[2020] UKUT 229 (TCC)

Appeal number: UT/2019/0147

Income Tax - employer made deductions from redundancy payment without providing details of breakdown – employee arguing deduction was for tax - whether FTT erred in law, in holding employee failed to overcome burden to displace discovery assessment given further evidence relating to deduction and in making an unsupported finding of fact – yes - appeal allowed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

HEATHER JONES **Appellant**

-and-

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

TRIBUNAL **JUDGE SWAMI RAGHAVAN**
JUDGE ASHLEY GREENBANK

Sitting in public by way of remote video skype for business hearing treated as taking place in, London, on 10 June 2020

The Appellant appeared in person

Hannah Wilce, lawyer, of the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

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DECISION

1. The Appellant ("Miss Jones") appeals against a decision (the "FTT Decision") of the First-tier Tribunal (the "FTT") released on 17 December 2017 and published as *Heather Jones v Commissioners of Inland Revenue* [2017] UKFTT 872 (TC).

2. The appeal concerned deductions Miss Jones's former employer made from a severance payment made to her in 2010-11. Under the relevant PAYE Regulations (as defined below), the employer was liable to deduct tax at the basic rate of 20% from the taxable proportion of that payment, leaving any additional tax to be reported and accounted for under self-assessment. A deduction of 39.7% was made but Miss Jones did not receive any details of the reasons for that deduction. The employer subsequently reported and accounted for a basic rate tax deduction of 20% to HMRC. HMRC raised a discovery assessment on her for the balance she owed in respect of the higher rate tax (40%) chargeable on the severance payment. The issue put to the FTT was whether Miss Jones had discharged the burden on her, to show that the figures contained in HMRC's assessment should be reduced or the assessment should be set aside. The FTT dismissed her appeal concluding she had not discharged that burden. Miss Jones now appeals, with the permission of the FTT, against that decision.

Background and the FTT's decisions

3. The FTT hearing took place on 14 April 2016. Following the hearing Miss Jones was given the opportunity to obtain further evidence in support of her case. The FTT then issued its decision dismissing her appeal on 17 December 2017.

4. Miss Jones subsequently applied to set aside the FTT Decision but that was refused in a decision the FTT issued on 20 July 2018 ("FTT set-aside refusal decision"). Miss Jones then applied for permission to appeal against the FTT Decision. The application was granted by the FTT. In view of the broad scope of the permission granted, HMRC accept the reasoning referred to in the FTT's refusal to set aside is within the scope of the appeal before us.

5. The following background is taken from the FTT Decision and the FTT set-aside refusal decision. Where appropriate we have added in details from the documents before the FTT which are not in dispute.

6. Miss Jones left her employer at the time, Doubletake Studios Limited ("DTS"), on 31 October 2010. She entered into a compromise agreement with DTS on 10 November 2010 under which she would receive a redundancy payment of £36,700 from the company. It was agreed that the sum would be paid in four equal instalments of £9,175, the first payment to be made within 14 days of receipt of the letter and the remaining three payments at monthly intervals thereafter (FTT [4]).

7. Miss Jones received the amounts into her bank account as follows:

(1) 24 November 2010 - £9,175.00

(2) 21 December 2010 - £9,175.00

(3) 24 January 2011 - £9,175.00

(4) 22 February 2011 - £6,515.04

8. As we explain below, one of the grounds of appeal relates to errors, which are not disputed, in the FTT's findings of fact (at FTT [7]). In short, the FTT mistook what was in fact a transfer *out* of Miss Jones's account of £9,175 on 3 December 2010 as a payment *into* her account on that date. It also omitted from its findings the instalment payment of £9,175 made to her on 24 January 2011.

9. No documentation was received from Miss Jones's employer to show how the £6,515.04 was made up (FTT [8]). (We understand the reference to lack of documentation to mean that Miss Jones did not receive a payslip at the time of the payment or later. The only documentation relating to the deduction that Miss Jones received was in the form of e-mail correspondence to which we refer below.)

10. Miss Jones e-mailed DTS to query why sums had been deducted as she was expecting to receive the last instalment of £9,145. The significance of that e-mail correspondence, which was not discovered and forwarded to the FTT by Miss Jones until after the FTT made its decision on 17 December 2017, is a matter of dispute and forms the basis for Miss Jones's first ground of appeal. We deal with this issue in more detail at [20] to [22] below.

11. Miss Jones's P45 did not include the taxable element of the severance payment in excess of £30,000 (the £6,700) or any tax thereon. The final instalment was made after the P45 was issued and the P45 could not therefore have included (at least) that payment (FTT [14]). The end of year details supplied to HMRC by DTS (on form P14) showed that tax was deducted from taxable element of the final payment of £9,175 using code "BR M1". The P14 therefore showed tax at 20%, which was the basic rate of tax in force for that year, was deducted from the taxable proportion of that payment (i.e. £6,700) in the amount of £1,340 (FTT [6]). DTS accounted to HMRC for that sum.

12. DTS subsequently went into liquidation. HMRC approached the liquidators of DTS but were unable to determine how the £6,515.04 was made up or what deductions had been made to arrive at the amount paid (FTT [13]).

13. Miss Jones did not declare the redundancy payment in excess of the £30,000 allowed under s 401 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") (the £6,700) in her tax return for the tax year 2010-11. HMRC raised a discovery assessment on 2 April 2015 in which the final calculation, taking account of the consequent reduction of personal allowance, of the tax due was £1,650.40. The amount of the assessment was later amended to £1,351.20 to take account of a late agreed claim for unclaimed expenses (FTT [19] and [20]).

14. The FTT started its discussion by noting HMRC's acceptance that HMRC bore the burden to show that there was a discovery, leading to a loss of tax and that this was brought about by the carelessness or deliberate action of the appellant under ss 29 and 36(1)/36(1A)(a) Taxes Management Act 1970, but that once this was satisfied the

burden reverted to Miss Jones to provide evidence to either reduce or set aside HMRC's figures (FTT [24] [25]).

15. The FTT agreed with the parties' view that the evidence was not conclusive because the amount that had been deducted did not amount to 20%. However, it allowed Miss Jones the further opportunity to provide evidence that tax at 40% had been deducted (FTT [26]).

16. Miss Jones's enquiries shortly afterwards, on 15 April 2016, to DTS's liquidators to explain the basis of the deduction, were unsuccessful. She was told the company's records (which HMRC had earlier been informed were contained in 740 boxes) had been archived. The liquidator said it had no information as to the contents of the unmarked boxes and did not propose to spend the time needed to review the records in order to answer Miss Jones's query.

17. Miss Jones then asked the FTT to relist a hearing and applied to the FTT to issue a witness summons to the liquidator to explain the deduction. The FTT refused the witness summons application for reasons, which it set out in the FTT Decision issued on 17 December 2017. In that decision, before dealing with the witness summons application, the FTT noted from its own re-examination of the bank statements that an additional payment of £9,175 had been made on 24 January 2011 that neither party had referred to at the hearing (FTT [31]). In its view, this inevitably led to the conclusion that four payments of £9,175 had been made to Miss Jones and tax deducted from none of them (FTT [31]) and "could possibly mean that the payment of £6,515.04 on 22 February 2011 was an entirely separate payment to the Appellant, possibly relating to non-taxable expenses due to [Miss Jones] or something similar" (FTT [32]).

18. Regarding the application for summons, after summarising the FTT's practice in relation to such applications, the FTT declined to exercise its discretion to issue the summons. Even if the information could successfully be produced, the costs incurred, which would either fall on the company creditors or Miss Jones, would be disproportionate to the amount at issue in the appeal. It was also possible the information produced might support HMRC's position. The FTT went on to determine the matter. It concluded that HMRC had shown prima facie that there was a "discovery" leading to a loss of tax and that Miss Jones had failed to discharge the burden of proof on her to reduce or set aside HMRC's figures and accordingly dismissed her appeal and confirmed the discovery assessment for the tax year 2010-11 (FTT [37]).

19. Miss Jones applied on 29 January 2018 to set aside the FTT Decision. The basis for that set-aside application was an e-mail chain Miss Jones subsequently discovered some time afterwards when clearing out her inbox.

20. In the e-mail chain, headed "Doubletake: signed compromise agreement" James Gordon, DTS's lawyer, e-mailed Miss Jones and others on 10 November 2010 setting out the payment schedule for the four £9,175 monthly settlement instalments from 24 November through to 24 February 2011. Shortly after that last payment Miss Jones wrote to DTS (Ray Gilbert) on 28 February 2011 to query why the final payment had come through as £6,515 rather than £9,175.

21. Mr Gilbert replied on 1 March 2011 stating: "As expected the answer lies with the tax. Lee's explanation is attached.". That explanation referred to an internal chain of e-mails: Mr Gilbert had forwarded Miss Jones's query to Julian Jenkins (DTS's Managing Director) and Lee Price (DTS's Financial Controller) at 10.55am. Mr Jenkins replied at 10.59am "Wasn't there some tax due on a small part of the deal?".

22. Mr Price replied at 11.32am as follows:

> "James *[this referred to James Gordon, DLS's lawyer]* stated £30,000 was tax free and £6,700 was taxable and to deduct the tax from the last payment, so the last payment of £9,175 was partially taxed reducing it to £6,515."

23. The FTT refused Miss Jones's application to set aside its earlier decision. It agreed with HMRC that the evidence supplied by Miss Jones did not advance her case. It was not sufficient to justify confirmation of the amount of the tax deducted: 40% of £6,700 was £2,680 whereas the deduction arising from the figures mentioned in the email of 1 March 2011 was £2,660.

24. On 14 October 2019, the FTT granted Miss Jones permission to appeal to the UT.

Law

25. As mentioned above, under section 401 ITEPA 2003, the first £30,000 of the severance payment was exempt from tax, leaving the remaining balance of £6,700 liable to tax.

26. Regulation 37(2) Income Tax (Pay As you Earn) Regulations 2003/2682 ("PAYE Regulations") which sets out how a payment made after a P45 has been issued should be taxed, states:

> "(2) The person making the payment must deduct tax at the basic rate in force for the tax year in which the payment is made."

27. The above regulation is reflected in HMRC's guidance to employers. The 2010/11 guide for employers stated that if a payment is made to an employee after they have already received a form P45, including those employees who have received a redundancy payment in excess of £30,000, they should use code "BR".

Grounds of appeal against the Decision

28. Miss Jones's grounds of appeal argue the FTT erred in law as follows:

A. The FTT failed to consider the e-mail chain evidence giving DTS's explanation for the deduction. The FTT was wrong to reach the view the evidence did not add anything and it failed to give reasons.

B. The FTT based its original finding in part by making a speculative assumption, unsupported by the evidence, that an amount shown in her bank statements of £9,175 was a payment to her by her former

employers. The entry was not a payment <u>in</u> but in fact a transfer <u>out</u> by her to her deposit account.

C. The FTT based its decision in part on the assumption that her contention "was that a 40% tax rate had been applied to the sum of £6,700, being the taxable element of the £36,700." This was not her case, which was that her employer had deducted £2,660 PAYE tax from her. That amounted to an error of procedure.

D. The FTT's refusal of her application for a witness summons to the liquidator unjustly denied her access to crucial evidence in support of her case.

Discussion

Ground A: **FTT's treatment of e-mail chain evidence**

29. There is nothing in the argument that the FTT did not consider the evidence or that it rejected it without reasons. The FTT's refusal to set aside decision shows the FTT did consider the e-mail chain and it did give reasons (at [6] to [8] of that decision) for rejecting it. The essence of Miss Jones's ground is that the FTT was wrong to reject the evidence as not surmounting the burden on her to displace the assessment.

30. Although it appears that, before the FTT at least, HMRC argued it was significant that Miss Jones had not adduced the e-mail chain sooner, they do not pursue that point before us. HMRC's position before the UT is that the FTT were right to refuse to set aside the FTT's earlier decision. Although HMRC accept the e-mail chain is at least relevant they say it is insufficient to surmount the burden of proof which lay on Miss Jones.

31. Whether evidence is adjudged sufficient to displace a burden is a matter of evaluation and of degree. (We were not referred by the parties to any particular authority it is uncontroversial that the UT will be slow to interfere with FTT's assessment of such matters - see Jacob LJ's discussion of the relevant authorities at [9] and [10] of *Proctor and Gamble UK v Revenue & Customs Commissioners* [2009] EWCA Civ 407). That deference would naturally also apply to evaluation of the sufficiency of evidence. We preface our analysis on Miss Jones's first ground however by noting that at least part of the rationale for an appellate tribunal's caution appears to arise because such evaluation is not made in a vacuum but taking account all the circumstances of the case and the impression formed by the tribunal hearing primary evidence which the appellate tribunal did not see. Taking account the narrow compass of the issue and available documentation before the FTT, that the e-mail chain was not considered in the context of live evidence but against the backdrop of the findings the FTT had already expressed in is earlier decision, we consider the justification for deference is perhaps not as strong as it might otherwise be. We are in no significantly worse position than the FTT to evaluate the sufficiency of the e-mail chain.

32. Ms Wilce, for HMRC, submits that the email chain provides no evidence as to the rate at which tax was deducted. She argues the use of the words "partially taxed" in the email provides nothing beyond that which is not disputed, namely that the £6,700 was

taxed at some rate. She suggests the e-mail may have been indicating that the amount deducted was partially due to tax and partially due to other deductions, alternatively, that it may have been referring to the fact that tax had only been deducted from the £6,700 above the £30,000 allowance.

33. We consider those arguments unsustainable. On any ordinary reading of the e-mails, it is clear DTS's explanation for the deduction was that the deduction was for tax and not for anything else. The reference to "partially taxed" cannot in our view mean anything other than that it was only the £6,700 element above the £30,000 comprised within the £9,175 instalment, which was taxed, and not the whole of the £9,175 payment. Given that it was not suggested that the deduction was for any reason other than tax it is not possible sensibly to interpret "partially taxed" as meaning the employer considered that some lesser sum, than that which was in fact deducted, was subtracted by way of tax from the £6,700 element.

34. Accordingly, it is difficult to see that the e-mail chain could be anything other than highly relevant.

35. It was not in dispute that a deduction had been made by Miss Jones's employer. The FTT was faced with weighing up the following: on the one hand the documents filed with HMRC (P14) showing deduction at basic rate, together with an actual deduction which had been made at a rate which did not appear to equate to any applicable rate of tax as well as the possibility the deduction could be for something else; and, on the other hand, the bank statement entries and the terms of the settlement agreement which showed that the instalment payments were made outside of the usual payroll processes and the e-mail chain, which contained a near contemporaneous explanation confirming the deduction was, from the employer's view, in respect of tax and not anything else.

36. As a report of what the employer considered the deduction was for, it would not necessarily be conclusive, in the same way that it was accepted by the parties at the FTT hearing that the P14 documents were not conclusive as to the nature of what was in fact deducted from the instalment. Nevertheless, it must be accepted that the employer had provided a straightforward response to a straightforward query as to what the deduction was for and that it did this within a matter of days after the payment was made. It unambiguously confirmed the employer's view that the deduction was for tax and nothing else. No challenge was made to the e-mail chain's authenticity.

37. Although the earlier terms on which the FTT allowed Miss Jones to revert to the FTT with further evidence were tied to her showing the deduction was of tax at 40%, that was an impossible task given the undisputed facts meant that the amount of deduction from £9,175 was 39.7%. This was because of the findings made on the amount of settlement instalment (£9,175), the amount in excess of £30,000 upon which tax was due (£6,700) and the final payment in respect of the settlement made of £6,515.04: the difference between £6,515.04 and £9,175 of approximately £2660 amounted to 39.7% of £6,700 and could never be 40% of that amount. That arithmetic certainty would never change as a result of any further evidence Miss Jones could

adduce. The real relevance of the percentage was that because it was not 40% then that tended to suggest, in the FTT's view, that the deduction was not for tax.

38. In order for the opportunity the FTT gave to Miss Jones to make sense, the real issue which the FTT must have thought it was engaging with was whether Miss Jones could show that the deduction that had been made was in respect of tax and not something else despite the deduction amounting to 39.7%.

39. Regarding that particular question, the e-mail chain, as evidence tending to show the deduction was of tax and nothing else, should, in our view, have been regarded as highly relevant and should have been an important item which the FTT weighed in the balance in deciding whether or not the deduction was made for or on account of tax. In our view, it should have been sufficient, given the findings already made and the other evidence available, to outweigh the FTT's reservations that the deduction was not for 40%, in particular, given the context of the payment being an atypical one made outside of the normal payroll cycle and so consistent with Miss Jones's suggestion that the calculation of the payment was therefore more prone to error. In any case, it is also not clear, why it should necessarily have been assumed that the deduction, if it was thought to be in respect of tax, had to be precisely 40%, given that a deduction in accordance with another PAYE code may have taken account of Miss Jones's particular tax circumstances, including for instance a proportion of her personal allowance.

40. By dismissing evidence which so clearly went to the essence of the issue the parties had raised before it – namely whether the deduction was made for tax and not something else - we consider the FTT erred in law.

41. The effect of that conclusion was that the FTT failed to go on to consider the next main issue that then arose. This issue was whether Miss Jones was entitled to take into account the amount deducted in excess of basic rate in calculating her own liability to income tax given that, in accordance with Regulation 37 of the PAYE Regulations, her employer was only entitled to deduct tax at basic rate. The alternative, to the extent the deduction exceeded that which the employer was legally liable to deduct by way of PAYE, might be that Miss Jones was left with a claim against the employer rather than a credit for tax deducted at source on her self-assessment. We raised this point in the hearing. As the point had not been raised before in the proceedings, the parties were understandably not able to respond in any detail with their arguments on the point. We indicated that we would, if it was required for our determination, seek written submissions on it, but for the reasons that we have set out below, that has not proved necessary.

Ground B: speculative assumption unsupported by evidence

42. There is no dispute between the parties that the FTT incorrectly made a finding that a payment was made to Miss Jones on 3 December 2010 (see [7] above). The entry on that date for £9175 in Miss Jones's bank statements actually reflected a payment out. This was reflected by i) the minus symbol next to the figure ii) the payment reference to another account number rather than "Doubletake." as was the case for the other instalments iii) because the balance remaining in the account went down rather

than up. The FTT was accordingly right to note later on in its decision that a payment of £9,175 on 24 January 2011 was an instalment payment. However, its earlier errors in treating the 3 December 2010 payment as payment in, and its omission of the 24 January 2011 payment, meant it was then wrong to conclude (at FTT [32]) that that meant four payments of £9,175 had been made with no tax deducted and that therefore the payment of £6,515.04 on 22 February 2011 was an entirely separate payment to Miss Jones possibly relating to non-taxable expenses or something similar.

43. HMRC submit that the error was not material to the FTT's reasons for dismissing Miss Jones's appeal. That, it was said, was reflected in the tentative language of possibility which the FTT used. Also, the point did not go to whether tax was deducted at 40% rather than 20% but suggested that no tax was deducted at all.

44. We disagree with HMRC. The FTT's view that it was possible that four payments had been made, without any deduction lent support, albeit on a different basis to that HMRC had argued for, upon which to reject Miss Jones's case that the deduction she had suffered was attributable to tax. It thus added to the picture that there was insufficient evidence to displace the discovery assessment HMRC had made and was, we consider material to the FTT's decision.

45. In any case, the findings as to when the settlement payments were made were clearly relevant to the issue put before the FTT. It is clear the FTT erred in law by making a finding of fact on a relevant matter, that a payment had been made to Miss Jones when that was completely contrary to the bank statement evidence, and which then led it to positing a wrong assumption, about the nature of the subsequent £6,515.04 payment in issue.

Ground C – misunderstanding of appellant's argument

46. Under this ground, Miss Jones argues that the FTT misunderstood her argument. She refers to the FTT's reason for dismissing the relevance of the e-mail evidence (see [23] above) which concluded the e-mail did not "support or further advance the Appellant's contention that a 40% tax rate had been applied to the sum of £6,700, being the taxable element of the £36,700 redundancy payment". That was wrong, as in Miss Jones submission, she had never argued that 40% had been deducted from the final instalment and accepted that the deduction was equivalent to 39.7% and not 40%.

47. As we have set out above at [37] in our discussion of Ground A, the FTT cannot sensibly have expected, given the findings made, that Miss Jones could ever show a deduction of 40% had been made. Read in context, the reasons it expressed at [8] (of its decision refusing to set its earlier decision aside) reveal that it was not persuaded the e-mail chain overcame the significance of the deduction being for an amount that was not 40%.

48. For the reasons we have explained in relation to Ground A, in our view, the FTT was wrong not to give the e-mails the significance they deserved. We see this Ground as an extension of Miss Jones's argument under Ground A. Her essential point is the FTT gave too much weight to the fact that the deduction was not made at 40% in

deciding whether the deduction was made on account of tax. For the reasons that we gave in relation to Ground A, we agree with that point, although we would not express it in the terms in which Miss Jones has expressed it in Ground C.

Ground D: **FTT unjust to find against appellant after refusing her witness summons application**

49. Miss Jones argues the FTT's refusal of her application for a witness summons denied her access to crucial evidence and that the FTT erred in law in then finding against her. HMRC, on the other hand, support the FTT's reasons for refusing the application which concerned the proportionality of requiring the liquidator to attend.

50. The FTT set out (at FTT [33]) the relevant rule, Rule 16 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 which provides that, on the application of a party or on its own initiative, the Tribunal may by summons require any person to attend as a witness at the hearing at the time and place specified in the summons and order any person to answer any questions or produce any document in that person's possession or control which relate to any issue in the proceedings.

51. While the FTT did not refer in terms to the FTT's Practice Statement – (Witness Summonses and Orders to Produce Documents of 25 February 2015) - it set out (at FTT [34] and [35]) the substance of what is said in that Practice Statement regarding the need to contact the witness in advance and the need for the tribunal to be satisfied of the relevance of the evidence sought. That Practice Statement also set out that the application (which was required to set out a number of matters (a) to (k)) should normally be served on the proposed witness. It does not appear that such a formal application was served, however both HMRC and Miss Jones wrote to the liquidator to explain the issue arose in the context of ongoing FTT proceedings and what was sought. HMRC's letter of 15 April 2016 indicated to the liquidator that HMRC had been requested by the FTT to contact the liquidator again to obtain a definitive breakdown of the relevant payment. The liquidator responded on 29 April 2016 explaining that, following the liquidator's release in January 2016, the records had been archived. The liquidator did not consider it cost-effective to review the significant amount of boxes to confirm whether any relevant information was held.

52. The FTT effectively exercised its discretion to consider the witness summons application without a hearing. Although no formal application had been served on the liquidator, given 1) the substance of the letters HMRC and Miss Jones wrote to it, and the reasons given in the liquidator's negative response 2) the delay that had already occurred to determination of the proceedings following the initial substantive hearing 3) that, if a summons was granted under the Rules, the witness would arguably have the opportunity to vary it or set aside, we consider it was open to the FTT to take that course. The FTT went on to refuse the application because there was no "proportionate merit". Their point, in essence, was that given the likelihood of the search turning up something that advanced Miss Jones's case, and the amount of tax at issue, it did not consider the costs to be incurred to be proportionate.

53. As correctly identified by the FTT (at FTT [36]), its decision on the application was a matter of discretion, and one which we would add arises to be determined as a matter of case management. It is well established that such case management discretion can only amount to an error of law in the limited circumstances (set out by Lawrence Collins LJ in *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427 (at [33]):

> "…an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge".

54. Miss Jones's ground does not identify in what respect the FTT erred in law in exercising its discretion. We consider the decision it reached was one that was at least open to it to make in view of the particular circumstances before it. Miss Jones's ground in fact argues that it was contrary to justice to find against her having refused her application for summons. But once such application was lawfully refused, as we consider it was, it had to be accepted any relevant evidence the liquidator might have uncovered would not be before the tribunal. We see no injustice in the FTT making a decision on the evidence that was before it and without regard to evidence that might have been uncovered but which was not because the relevant witness summon relevant to that evidence had been turned down.

55. Accordingly, the FTT did not err in law under this Ground.

Set aside of FTT Decision by UT and remaking of FTT Decision

56. Where, an FTT decision contains an error or errors of law (as we have found the FTT Decision and FTT refusal to set aside decision has in relation to Grounds A and B above), s12 of the Tribunals, Courts and Enforcement Act 2007 provides that the UT may (but need not) set aside the FTT's decision. If the UT does set aside the FTT's decision, it may either (i) remit the case back to the FTT with directions for its reconsideration, or (ii) re-make the FTT's decision.

57. It follows from our analysis on Grounds A and B that we consider the errors of law identified there to be material to the FTT Decision and the FTT's refusal to set aside decision and accordingly we set those decisions aside.

58. Subject to HMRC's reservations regarding questions of the validity of the discovery assessment, which we will come on to, both parties supported the UT remaking the decision rather than remitting it to the FTT.

59. At the hearing we invited submissions on the question of the discovery assessment's validity under s29 TMA in view of the principles applied by the UT in *Burgess and Brimheath Developments Ltd v HMRC* [2015] UKUT 578 (TCC), regarding the elements relevant to discovery assessments where HMRC bore the burden of proof.

60. Section 29 TMA provides so far as relevant:

> **29 Assessment where loss of tax discovered**
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> …
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> …
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was
>
> brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board—
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment;
>
> Or (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.

61. *Burgess and Brimheath* was included in the authorities bundle by HMRC but neither party had referred to it in their written arguments. In *Burgess and Brimheath*, the UT held regarding validity (which it described in terms of competence and time limits issues):

> [53] …in the absence of a positive case put by HMRC in relation to the competence and time limit issues, the FTT erred in law in not finding that HMRC had failed to discharge the burden of proof in those respects

> such that the assessments could not be regarded as having been validly made and the appeals must accordingly be allowed.

62. Earlier it set out that the competence (and also time limit) issues:

> [45]…were issues with respect to which HMRC had the burden of proof, and which, for HMRC to succeed, had to form part of HMRC's own case. They were not issues that the appellants had to raise or argue…"
>
> and
>
> [49] …formed an essential element of HMRC's case, on which HMRC bore the burden of proof, and which if not proved would fail to displace the general rule that the assessments could not validly have been made.

63. The UT acknowledged (at [44] and [49]) that HMRC could succeed if the competence and time limit issue had been conceded by the appellants in that case, but that silence did not imply such concession.

64. Accordingly, unless HMRC has advanced a positive case on the matters pre-conditioning the validity of the discovery assessment upon which it bears the burden of proof, or the appellant has conceded those issues, a tribunal will be unable to find that HMRC has discharged its burden of proof on those matters with the result the assessments could not be regarded as having been validly made.

65. Before us, Ms Wilce, sought to argue on behalf of HMRC, that the relevant pre-condition in s29 TMA was the second condition (s29(5)) above. However, as she fairly acknowledged, there was nothing in HMRC's Statement of Case before the FTT to suggest that that provision was the basis put forward for the assessment's validity.

66. Nor, did the Statement of Case, or the terms of the FTT Decision, when read as a whole, suggest that any positive case was made on behalf of HMRC regarding the first condition contained in s29(4) (that the insufficiency of tax was brought about carelessly or deliberately). Both the Statement of Case, and the FTT Decision (at FTT [24]) recounted HMRC's acceptance "that the onus was upon them to show that there is a discovery, leading to a loss of tax, and that this was brought about by the carelessness or deliberate action of the Appellant under ss29 & 36(1)/36(1A)(a) TMA". However, there was nothing in the Statement of Case which then set out what HMRC's case was on the conduct considered to constitute Miss Jones acting carelessly or deliberately. While it was mentioned that Miss Jones had not included the payment on her self-assessment, the description in the Statement of Case of the "point at issue" was confined to the tax rate on the compromise payment. The absence, in the FTT Decision, of any discussion of why it was considered that the situation giving rise to the insufficiency of tax had been brought about carelessly or deliberately by Miss Jones does not suggest any positive case on such validity issues was raised subsequently. While the FTT repeated (at FTT [37]) what it had noted earlier about the onus lying on HMRC in relation to validity matters, it said nothing explaining why it was satisfied HMRC had met such burden. Nor could we see, or was it suggested, that Miss Jones had made any concession that the discovery assessment was valid.

67. Ms Wilce suggested that should any question arise to validity then we should remit the matter to the FTT so a decision could be made with the benefit of the full evidence and argument relevant to that issue. However, we decline to remit the case for much the same reason as the UT did in *Burgess and Brimheath* (see [58] of that decision). Where, in the absence of HMRC having put a positive case to the FTT on the relevant validity issues, the only course open to the FTT was to allow the appellants' appeals, it would not be in the interests of justice to allow HMRC to make a case which it ought to have made the first time round.

68. We remake the decision allowing the appeal on the basis HMRC have not discharged the burden on it to show the discovery assessments were valid.

Disposition

69. The appellant's appeal is allowed. The FTT Decision is set aside and remade so as to allow Miss Jones's appeal on the basis that HMRC were unable to meet the burden on them to show the discovery assessment was valid.

JUDGE SWAMI RAGHAVAN

JUDGE ASHLEY GREENBANK

RELEASE DATE: 21 July 2020