UT Neutral citation number: **[2022] UKUT 00119 (TCC)**

UT (Tax & Chancery) Case Number: UT/2020/0039

Upper Tribunal
(Tax and Chancery Chamber)

Appeal determined on the papers

Judgment given on 4 May 2022

Before

UPPER TRIBUNAL JUDGE JONATHAN RICHARDS

Between

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

BASHIR AHMED JAFARI

Respondent

Representation:

For the Appellants: Thomas Chacko, Counsel, instructed by the General Counsel and Solicitor for Her Majesty's Revenue and Customs

The Respondent did not appear and was not represented

DECISION

1. By a decision (the "Decision") of the First-tier Tribunal (Tax Chamber) released on 13 November 2019, the FTT dismissed the appeals of Mr Jafari against various decisions that HMRC had made regarding his income tax liability for tax years from, and including, 2008-09 to, and including, 2013-14. However, the FTT allowed Mr Jafari's appeal in respect of a discovery assessment that HMRC had made in respect of the 2009-10 tax year (the "Discovery Assessment") on the basis that the "discovery" on which HMRC relied was "stale" (using the expression adopted by the Upper Tribunal in *Charlton v Revenue and Customs Commissioners* [2012] UKUT 770 (TCC)).

2. In its judgment in *Revenue & Customs Commissioners v Tooth* [2021] UKSC 17, the Supreme Court decided (at [76] of the judgment) that, if HMRC have made a "discovery" which qualifies as such, the discovery cannot cease to qualify by mere passage of time. The Supreme Court, therefore, has held that the concept of "staleness" on which the FTT relied in its reasoning cannot cause an otherwise valid discovery assessment to become invalid. HMRC appeal against the Decision on the sole ground that the discovery on which HMRC relied to justify the making of the Discovery Assessment was incapable as a matter of law of becoming "stale" and the FTT erred in concluding otherwise.

Procedural matters

3. These proceedings were initially stayed pending the resolution of the *Tooth* litigation. Following release of the Supreme Court's judgment in *Tooth*, the Tribunal wrote to Mr Jafari to ask him to explain the basis on which he was defending HMRC's appeal. In parallel, HMRC were engaging in similar correspondence with Mr Jafari since, on its face, the judgment in *Tooth* appeared to suggest that the FTT's conclusion on "staleness" involved a clear error of law.

4. Mr Jafari's response, given by his representative, was simply to confirm that he was contesting the appeal. By directions issued on 25 November 2021, the Upper Tribunal required Mr Jafari to set out his grounds for contesting HMRC's appeal. Mr Jafari failed to comply with that direction so on 11 January 2022, the Upper Tribunal made a direction in "unless" terms (the "Unless Direction") requiring Mr Jafari to provide his grounds, warning Mr Jafari that a failure to comply with this direction could lead to him being debarred from defending HMRC's appeal. The Unless Direction also required Mr Jafari to set out his views on a proposal, put forward by HMRC, that their appeal against the Decision could be disposed of on the papers and without a hearing.

5. Mr Jafari failed to provide any grounds for contesting HMRC's appeal within the deadline specified in the Unless Direction and indeed by 27 April 2022, when I prepared this decision, Mr Jafari had not provided any such grounds in even belated compliance with the Unless Direction. Nor did he provide any views on HMRC's application for the appeal to be decided on the papers.

6. Accordingly, on 2 February 2022, the Upper Tribunal made further directions (the "Debarring Directions") as follows:

> (1) It debarred Mr Jafari from taking any further part in proceedings (although it required HMRC to continue to copy Mr Jafari into any correspondence that they sent the Upper Tribunal since Mr Jafari remained a respondent to the appeal even though debarred from defending it).
>
> (2) Having given Mr Jafari an opportunity to express his views under Rule 34(2) of the Upper Tribunal Rules on HMRC's application for the appeal to be determined on the

papers, it concluded that the appeal could fairly be determined in that way and made case-management directions accordingly.

7. The appeal is being determined by a single Upper Tribunal judge in accordance with paragraph 13 of the Practice Statement issued by the Senior President of Tribunals on the Composition of Tribunals made on 10 March 2009.

Applicable legislation

8. HMRC's power to make the Discovery Assessment derives from s29 of the Taxes Management Act 1970 ("TMA") which provides, so far as material, as follows:

> **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,…
>
> 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.

9. It can be seen from this provision that in all cases there needs to be a "discovery" falling within s29(1) before an officer or the Board are entitled to make a discovery assessment. Only in cases where a taxpayer has "made and delivered a return under section 8 or 8A" is it necessary for HMRC to satisfy either condition set out in s29(4) or s29(5) as a precondition to making a discovery assessment. It is well-known that HMRC bear the burden of establishing that there has been a discovery. If the conditions set out in s29(4) and s29(5) are relevant, HMRC bear the burden of establishing that either of those conditions is met.

10. The TMA sets out time limits within which discovery assessments must be made. The normal position, set out in s34 of TMA was, at the applicable time, that a discovery assessment had to be made within 4 years of the end of the year of assessment to which it relates.

11. The Discovery Assessment was made over 8 years after the end of the 2009-10 tax year. Therefore, it would have been out of time under the general rule. However, s36 of TMA contains an extended time limit as follows:

> **36 Loss of tax brought about carelessly or deliberately etc**
>
> (1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).
>
> (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,
>
> (b) attributable to a failure by the person to comply with an obligation under section 7
>
> …
>
> may be made at any time not more than 20 years after the end of the year of assessment to which it relates…

12. Where HMRC wish to rely on the extended time limit set out in s36, they bear the burden of proving that the requisite conditions are satisfied.

The Decision

13. References to numbers in square brackets are to paragraphs of the Decision unless I specify otherwise.

14. After setting out a summary of the various discovery assessments and closure notices that were under appeal, the FTT disposed of all HMRC's decisions under appeal other than the Discovery Assessment as follows:

> **CLOSURE NOTICE AND DISCOVERY ASSESSMENTS OTHER THAN 2009/10**
>
> 4. Following preliminary exchanges between the Tribunal and the parties' representatives at the beginning of the hearing (including a short adjournment to allow Mr Salam to take the appellant's instructions), the appellant decided to offer no case in respect of the closure notice and discovery assessments. With the agreement of the Tribunal, the appellant withdrew his evidence and submissions. It is not necessary in this decision to review the appellant's motivations for doing so: they have no relevance to the outcome, which is that he must pay the tax due. Save as follows, I make no findings of fact in respect of the closure notice and the discovery assessments or the circumstances that led to them.
>
> 5. As a result of the above, I dismissed the appellant's appeal in respect of the 2010/11 closure notice and each of the discovery assessments except for the discovery assessment relating to the tax year 2009/10, which is dealt with separately below.

15. It would have been better if the FTT had spelled out precisely what was meant by Mr Jafari's decision to "offer no case in respect of the closure notice and discovery assessments" and to

"withdr[a]w his evidence and submissions". If Mr Jafari was withdrawing his appeals to the FTT against all of HMRC's decisions, then the FTT should have said as much and followed the procedure applicable to withdrawals set out in Rule 17 of the FTT's rules of procedure (the "FTT Rules"). The result of a complete withdrawal would have been that there was no longer any decision for the FTT to make because HMRC's decisions were no longer under challenge. If, by contrast, Mr Jafari was saying only that he was advancing no positive case of his own, but still put HMRC to proof on those issues on which they bore the burden, the FTT should have said as much and gone on to make findings on those issues rather than saying, at [4], that it would make no findings on factual issues (with some limited exceptions).

16. The effect of Mr Jafari's statement at the start of the hearing was therefore unclear. However, whatever he meant by it, it seemed to apply to the Discovery Assessment just as much as the other HMRC decisions under appeal. The FTT proceeded on the basis that it remained entitled to make some decisions on the Discovery Assessment (see [15]) and indeed that HMRC bore the positive burden of establishing that the requisite discovery had been made applying the principles of *Burgess and Brimheath* v *HMRC* [2015] UKUT 578 (TCC). The FTT did not, however, apply the full logic of this proposition to other discovery assessments that HMRC had made. For example, it did not consider it necessary to make findings whether HMRC had made "discoveries" in connection with those other discovery assessments, whether the requirements of s29(4) or s29(5) were met as necessary and whether the extended time limit in s36 of TMA was available to HMRC in relation to those discovery assessments made more than 4 years after the end of the tax year to which they related, for example that for the 2008-09 tax year.

17. Whether Mr Jafari had made a return under s8 or s8A of TMA as regards the 2009-10 tax year was an issue of some potential relevance. If he had made such a return, then HMRC would bear the burden of establishing that one of the conditions set out in s29(4) or s29(5) was met. By contrast, if he had not, HMRC would have no such burden. The FTT made no express finding as to whether Mr Jafari had submitted a return for 2009-10. It did, however, at [8] to [10], record submissions made by HMRC's presenting officer and quoted extracts from HMRC's skeleton argument that suggested that:

> (1) Mr Jafari had submitted some document, purporting to be a return for 2009-10, to HMRC on 16 July 2013.
>
> (2) HMRC rejected that document as "unsatisfactory" in October 2013. (The FTT did not mention paragraph 10.19 of HMRC's Statement of Case that indicated that Mr Jafari did submit an "acceptable" return for 2009-10 on 2 January 2014).
>
> (3) Before rejecting the 2009-10 return submitted on 16 July 2013 as "unsatisfactory", HMRC purported to open an enquiry into that return under s9A of TMA on 26 July 2013.
>
> (4) HMRC closed that "enquiry" by issuing a purported closure notice under s28A of TMA on 24 February 2016.
>
> (5) However, HMRC subsequently became concerned that, since they had not accepted the return originally submitted for 2009-10, they could not validly have enquired into that return and so could not validly have issued any closure notice. Therefore, to protect HMRC's position, they made the Discovery Assessment on 15 August 2018 for the same amount of tax as had been set out in the Closure Notice.

18. The FTT evidently accepted that something like this had happened because it based its conclusion that the Discovery Assessment was invalid on its finding that HMRC had "discovered" the insufficiency of tax by 24 February 2016 at the latest (when it issued its purported "closure notice") but that discovery had become "stale" by 15 August 2018 when HMRC made the Discovery

Assessment (see [11]). That conclusion led the FTT to allow Mr Jafari's appeal against the Discovery Assessment even though his appeal against other HMRC decisions failed.

19. Having reached that conclusion, the FTT did not make findings on whether either condition set out in s29(4) or s29(5) was established as regards the Discovery Assessment. That was understandable, since HMRC's position, set out in their Statement of Case, was that it was not necessary for findings to be made on s29(4) or s29(5) with HMRC pleading:

> HMRC believe that S29 (1) TMA 1970 is satisfied in relation to 2008/9, 2009/10 and 2011/12 as they have discovered that income that should have been assessed to tax has not so been assessed. As there is failure to notify in these years [i.e. a failure to deliver a notice under s7 of TMA] no further section of S29 needs to be considered.

20. HMRC now accept this pleading (which was not settled by Mr Chacko as he was not instructed before the FTT) was wrong in law. The relevance or otherwise of s29(4) or s29(5) does not depend on whether a taxpayer has given a notice under s7. It depends on whether the taxpayer has delivered a return under s8 or s8A.

The single ground of appeal considered

21. HMRC's single ground of appeal succeeds. Paragraphs 80 to 84 of the Supreme Court's judgment in *Tooth* demonstrate that the FTT was wrong in law to conclude that the "discovery" on which HMRC relied had become "stale".

Disposition

22. HMRC rightly recognised, in helpful and clear written submissions made by Mr Chacko of counsel, that simply identifying the above error of law did not make their task complete. They also needed to explain what should happen to the Decision in the light of that error of law. The Upper Tribunal's powers in that regard are set out in s12 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA"). By s12:

> (1) The Upper Tribunal has the power, but not the obligation, to set the Decision aside.
>
> (2) If it sets the Decision aside, the Upper Tribunal may either:
>
> (a) remit the case back to the FTT with directions for reconsideration; or
>
> (b) remake the Decision, by making any decision open to the FTT if it were remaking that decision (including by making such findings of fact as it considers appropriate).

23. The FTT's conclusions as to staleness were clearly material to the Decision since they underpinned the decision to allow the appeal against the Discovery Assessment. I will, therefore, set the Decision aside.

24. HMRC invite me to remake the Decision in such a way that Mr Jafari's appeal against the Discovery Assessment is dismissed, so that the Discovery Assessment stands good. They submit that the only difference that the FTT identified between the Discovery Assessment and HMRC's other decisions under appeal was that the Discovery Assessment was perceived to be "stale". Since that conclusion involved an error of law, they argue that it follows that the Discovery Assessment should now be treated in the same way as the other HMRC decisions under appeal.

25. Mr Chacko, however very fairly and consistently with his duties to the Upper Tribunal, himself pointed out in his written submissions that following such a course is not entirely straightforward. I

consider I need to determine the following issues before I would be in a position to remake the Decision as HMRC suggest:

> (1) I must decide the effect of Mr Jafari's decision to "offer no case" and "withdraw his evidence and submissions". If by doing this, Mr Jafari was withdrawing his entire case, under Rule 17 of the FTT Rules, then it seems unlikely that the FTT had any power to make a decision allowing an appeal against the Discovery Assessment and the Upper Tribunal's power to remake the Decision would be similarly circumscribed.
>
> (2) Assuming that Mr Jafari had not withdrawn his entire case, and was simply putting HMRC to proof on those matters on which they had the burden, I must decide as a factual matter:
>
> > (a) Whether Mr Jafari had submitted a return for 2009-10 since that will determine whether HMRC need to demonstrate that the condition in either s29(4) or s29(5) was met.
> >
> > (b) Whether, to the extent they need to demonstrate this, HMRC have discharged their burden of proving that the requirements of s29(4) or s29(5) are met.
> >
> > (c) Whether the extended time limit in s36 applies.

26. Rule 17 of the FTT Rules is relevant to the first issue, set out in paragraph 25(1) above. It provides, so far as material, as follows:

> **17 Withdrawal**
>
> (1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case--
>
> (a) by sending or delivering to the Tribunal a written notice of withdrawal; or
>
> (b) orally at a hearing.
>
> (2) The Tribunal must notify each party in writing of its receipt of a withdrawal under this rule.
>
> (3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.

27. There are competing indications from the FTT Decision as to what the FTT might have thought that Mr Jafari was doing. If the FTT had thought that he was withdrawing the entirety of his case, it is difficult to understand why it would have gone on to write a full decision that allowed an appeal against the Discovery Assessment. It would have been more natural, in that case, for the FTT to have released no decision and simply notified the parties under Rule 17(2) that the appeals were withdrawn orally at the hearing.

28. However, and by contrast, if the FTT thought that Mr Jafari was simply putting HMRC to proof on those matters on which they bore the burden, the FTT would not have limited its analysis of "discovery" to the Discovery Assessment. It would have needed to make findings as to why it was satisfied that there had been the requisite discovery as regards all other discovery assessments. It would have needed to decide whether s29(4) or s29(5) was satisfied as regards other discovery assessments since, while HMRC considered that those conditions were not relevant to the Discovery Assessment itself, they had specifically pleaded that the condition in s29(4) was satisfied in relation to discovery assessments for 2012-13 and 2013-14. The FTT would also have had to consider the availability of the extended time limit in s36 of TMA.

29. In my judgment, the FTT did not turn its mind sufficiently to the effect of Mr Jafari's statements at the beginning of the hearing. I considered whether it was appropriate to remit this matter back to the FTT. However, that is not a course that either party has urged me to take. If Mr Jafari had wished to argue that the Decision could be defended because, on the true construction of his statements at the beginning of the hearing, he was simply putting HMRC to proof, he could, and should, have made that point in a Response to HMRC's Notice of Appeal. He was given ample opportunity to do so. Moreover, it is difficult to see what would be gained by remitting back to the FTT a question as to the effect of Mr Jafari's statements. The difficulty is not in knowing what Mr Jafari said: that is recorded at the Decision itself. Rather, the difficulty is in understanding what Mr Jafari meant. Remitting that matter back for reconsideration would simply be to invite further analysis, no doubt tinged with knowledge given by hindsight, of what Mr Jafari was saying. Moreover, there could be no guarantee that Mr Jafari would participate in such a process given his lack of engagement with proceedings in this Tribunal.

30. Therefore, I consider that the more appropriate course is to form my own conclusion on the effect of what Mr Jafari said given that I do at least have the FTT's summary, set out at [4] and [5], of what was actually said. I consider that the following aspects of that are significant:

> (1) Mr Jafari has said that he "withdrew his evidence and submissions". The word "withdrew" is clearly significant as an identical word is used in Rule 17.
>
> (2) Mr Jafari was expressed to take this step "with the agreement of the [FTT]". Rule 17 does not require the FTT to consent to a withdrawal so it might be thought to be a neutral indication. However, in my judgment Mr Jafari could not have felt that he needed any "agreement" of the FTT if he was simply putting HMRC to proof. He had the right to require HMRC to prove their case simply by virtue of having brought his appeals to the FTT.
>
> (3) The FTT says, at [5], that it was as a result of Mr Jafari's statements at the beginning of the hearing that it was dismissing his appeals against all decisions other than the Discovery Assessment. If Mr Jafari had simply been putting HMRC to proof, the FTT might have been expected to say that it was as a result of HMRC discharging their burden of proof that the appeals were dismissed.
>
> (4) Mr Jafari was withdrawing his evidence and his submissions. Between them, evidence and submissions amount to the entirety of a party's case and therefore it is difficult to see what was left if Mr Jafari was not withdrawing the totality of his case before the FTT. More specifically, Mr Jafari had made it clear that he wished to make no submissions to the FTT and cannot, therefore, have been intending to make a submission to the effect that HMRC had failed to discharge their burden of proof on those matters on which they bore the burden.

31. In my judgment, these considerations support a conclusion that Mr Jafari was withdrawing the entirety of his appeals to the FTT. The FTT should have taken that withdrawal at face value and not gone on to make findings on matters that were no longer in dispute. In my judgment, the correct course for me, given the error of law in the Decision, is to set the Decision aside and remake it in a manner that gives proper effect to Mr Jafari's withdrawal of the entirety of his case. That consideration means that I will remake the Decision such that all the appeals against HMRC decisions that were before the FTT are to be dismissed.

32. For completeness, had I not reached the conclusion set out in paragraph 31 above, I would have reached the following conclusions on the issues summarised in paragraph 25:

(1) As regards the issue in paragraph 25(2)(a), I would have concluded that Mr Jafari had submitted a return for 2009-10. That was effectively accepted in paragraph 10.19 of HMRC's Statement of Case before the FTT and in HMRC's skeleton argument before the Upper Tribunal. It follows that HMRC would need to establish that the condition in either s29(4) or s29(5) was met.

(2) The position as regards the issue in paragraph 25(2)(b) is not entirely straightforward. As I have noted in paragraph 19 above, HMRC did not say in their Statement of Case before the FTT that they considered that the conditions of s29(4) or s29(5) were satisfied, but instead made the mistaken assertion that the Discovery Assessment was valid whether or not those conditions were met. However, paragraph 47 of the witness statement of Officer Andrew Curry that was in evidence before the FTT explained HMRC's view that the shortfalls of tax in all years of assessment up to 2009-10 were as a result of Mr Jafari's deliberate conduct. Moreover, reasons were given for that view and evidence was referred to in support of it. In my judgment, Officer Curry's witness statement set out a prima facie case that there was deliberate conduct of the kind that would satisfy the requirements of s29(4). Certainly, it would have been better if HMRC had set out their case in this regard in their Statement of Case, rather than just in Officer Curry's witness statement. However, Officer Curry's witness statement was served in November 2018, some 9 months before the hearing before the FTT. Mr Jafari can have been in no doubt about the assertions that Officer Curry was making, yet chose not to rebut them with evidence or submissions of his own. I am satisfied that, on the unchallenged evidence before the FTT, the requirement of s29(4) was met.

(3) As regards the issue in paragraph 25(2)(c) above, HMRC's Statement of Case advanced the positive case that Mr Jafari had not submitted any notice under s7 of TMA. Mr Jafari chose not to answer that in evidence or submissions. Moreover, my conclusions in paragraph 32(2) above demonstrate that HMRC have demonstrated that, looking at matters at the date HMRC made the Discovery Assessment, the loss of income tax in question was brought about by Mr Jafari's deliberate conduct. Either conclusion is sufficient for the extended time limit in s36(1A) of TMA to apply.

33. My conclusions in paragraphs 31 and 32 both lead me to the same conclusions. The Decision is set aside and remade in such a way that all appeals that the FTT addressed in the Decision are dismissed.

Signed On Original

JUDGE JONATHAN RICHARDS
RELEASE DATE: 05 May 2022