INCOME TAX-appeal against discovery assessments-whether the requirements in s 29 Taxes Management Act 1970 were met- whether the assessments were made outside the time limits in ss 34 and 36 Taxes Management Act 1970

UT Neutral citation number: **[2023] UKUT 00086 (TCC)**

UT (Tax and Chancery) Case Number: UT-2022-000105

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building
Fetter Lane
London
EC4A 1NL

Heard on: 13 March 2023
Judgment given on 03 April 2023

Before

UPPER TRIBUNAL JUDGE TIMOTHY HERRINGTON
DEPUTY UPPER TRIBUNAL JUDGE TRACEY BOWLER

Between

RAMASAMY DANAPAL

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Quinlan Windle, Counsel, instructed by Amirthan & Suresh Solicitors

For the Respondents: Rebecca Sheldon, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

Introduction

1. This is an appeal of the appellant (“ Dr Danapal”) against parts of the decision (“the Decision”) of the First-tier Tribunal (“FTT”) (Judge Charles Hellier and Member Julian Stafford) released on 8 December 2021. That part of the Decision which is the subject of this appeal is the FTT’s dismissal of Dr Danapal’s appeal against discovery assessments (the “Assessments”) for the years 2006/7, 2007/8 and 2009/10 (the “Assessed Years”).

2. The Assessments were as follows:

> (1) On 11 March 2016, for the tax year ending 5 April 2010, a discovery assessment issued in the amount of £40,439.42. This Assessment was made under the power contained in s 29 Taxes Management Act 1970 (“TMA”) on the basis that HMRC had discovered that there was an insufficiency of tax assessed for that year and that situation arose as a result of careless behaviour on the part of Dr Danapal or a person acting on his behalf.
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> (2) On 2 August 2016, for the tax year ending 5 April 2007, a discovery assessment issued in the amount of £13,345.36. This Assessment was made under the power contained in s 29 TMA on the basis that HMRC had discovered that there was an insufficiency of tax assessed for that year and that situation arose as a result of deliberate behaviour on the part of Dr Danapal or a person acting on his behalf.
>
> (3) On 2 August 2016, for the tax year ended 5 April 2008, a discovery assessment issued in the amount of £23,253.47. This Assessment was also made on the basis that there was an insufficiency of tax assessed which arose as a result of deliberate behaviour on the part of Dr Danapal or a person acting on his behalf.

3. The FTT found that the Assessments were made in accordance with s 29(1) TMA and that the condition in s 29(4) TMA, as set out below, was satisfied . The FTT also found that the extended time limit for the making of the Assessments in s 36 TMA, as set out below, applied and that the Assessments were made within the time limits prescribed by that section. The amount of the Assessments was also confirmed.

4. Dr Danapal now appeals to this Tribunal with the permission of Judge Cannan, sitting in the FTT. We set out at [37] below the four grounds of appeal for which permission has been given.

The Law

5. The Assessments were made under the power contained in s 29 TMA. Section 29 TMA at the time relevantly provided:

> "(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment —
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> (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
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> (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,
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> 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—
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> (a) in respect of the year of assessment mentioned in that subsection; and
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> (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 …"

6. For the years covered by the Assessments, Dr Danapal had made and delivered self-assessment returns under s 8 TMA. Therefore, one of the conditions in s 29(4) or 29(5) TMA needed to be met for the Assessments to be valid. The FTT held that the condition in s 29(5) had not been met and accordingly we are concerned only with the condition set out in s 29 (4).

7. The Assessment for tax year 2009/10 was made more than four but less than six years after the end of that tax year. The Assessments for tax years 2006/07 and 2007/08 were made more than six but not more than 20 years after the end of those tax years.

8. Section 34 TMA provides that, subject to other provisions in the TMA, an assessment to income tax may not be made more than four years after the end of the tax year to which it relates.

9. Section 36 TMA permits assessments to be made more than four years after the end of the tax year to which they relate if specified conditions are met. It relevantly provided at the time:

> "(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,

> …
>
> 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 of the Taxes Acts allowing a longer period).
>
> (1B) In subsections (1) and (1A) references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person."

10. Section 118(5) TMA provides:

> "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.

11. Section 118 (7) TMA provides:

> "In this Act references to a loss of tax or a situation brought about deliberately by a person includes 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."

12. It was common ground that in relation to the question as to the validity of the Assessments, that is in this case whether the condition in s 29 (4) TMA had been satisfied and whether the Assessments have been made within the relevant time limits, the burden of proof rests with HMRC: see *Burgess v HMRC*; *Brimheath Developments Ltd v HMRC* [2016] STC 579 at [43] .

13. As held by the Supreme Court in *Tooth v HMRC* [2021] STC 1049 ("*Tooth*") at [47], for there to be a deliberate inaccuracy in a document within the meaning of s 118(7) TMA there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps, (although it was not necessary to decide it in that appeal or in this case) recklessness as to whether it would do so. The Supreme Court observed at [83] that deliberate behaviour generally describes conduct that "amounts to fraud or is akin to fraud".

The Facts

14. The FTT set out limited findings of fact at [10] to [19] of the Decision, as summarised below.

15. Until the end of October 2012, Dr Danapal worked for the NHS as a full time A&E consultant. He also ran a private clinic in Harley Street. In November 2012, Dr Danapal's work at the clinic was taken over by a company.

16. On 3 January 2013, HMRC opened an enquiry into Dr Danapal's self-assessment tax return for 2010/11. On 6 December 2013, HMRC opened an enquiry into Dr Danapal's self-assessment tax return for 2011/12. During these enquiries, Dr Danapal was represented by a firm of accountants ("Firm A") who were also engaged to prepare and submit his tax returns. HMRC sought and were provided with various documents. Following correspondence with Firm A, it was agreed that there were some inaccuracies in the 2010/2011 return.

17. In October 2014 Firm A agreed that the profits should be increased by disallowing various expenses in relation to legal and professional fees, the costs of home office use, motoring costs and advertising costs claimed.

15. Mr Robinson of HMRC also (i) enquired into capital allowances claimed in relation to an asset for which the first claim was made in 2007/8 in respect of expenditure of £171,000, and (ii)

contended that amounts had been omitted in the calculation of turnover and therefore in the calculation of net profit.

18. On 3 September 2015 Mr Robinson wrote to Dr Danapal, copying his accountants, saying that various additions to his taxable profits had been agreed with them by disallowing various expenses. He expressed the view that similar additions were due in respect of later and earlier years in respect of a number of those categories of expenses.

19. Mr Robinson also continued to query a deduction of £70,000 commission, the turnover of the business, overdraft and interest charges and capital allowances on the 2007/8 purchase.

20. There were further exchanges and on 11 March 2016 Mr Robinson issued a notice of assessment under section 29 for the year 2009/10, and on 2 August 2016 the remaining Assessments.

21. On 11 March 2016, HMRC made an assessment for the tax year 2009/10 increasing Dr Danapal's tax liability for that tax year by £40,439.42.

22. On 2 August 2016, HMRC made assessments for the tax years 2006/07 and 2007/08 increasing Dr Danapal's tax liability for those tax years by £13,345.36 and £23,253.47 respectively. On the same date, HMRC issued closure notices in respect of the two enquiries for the years 2010/11 and 2011/12. For the sake of completeness, we should mention that appeals were made against those closure notices which the FTT determined in HMRC's favour. There is no appeal against that finding in this appeal.

The Decision

23. References to numbered paragraphs in parentheses, [xx] unless stated otherwise, are references to paragraphs in the Decision.

24. At [75] to [81] the FTT set out its conclusions as to whether the conditions set out in s 29 TMA was satisfied. In fact in this part of the Decision it dealt only with the question of carelessness and not the question of deliberate behaviour. The FTT in this part of the Decision made only limited findings as to the facts which the FTT said established that either Dr Danapal or a person acting on his behalf, namely Firm A, had been careless. Neither in this part of the Decision did it make reference to any particular Assessed Year. It simply said this at [76] to [81]:

> " 76. [Dr Danapal's representative] says that there was no "suggestion of fraudulent or negligent conduct on the part of the appellant during the process of investigation". He says that Dr Danapal relied wholly upon his accountants to prepare and submit his returns; they were qualified to do so and such reliance was not negligent (or careless) let alone a fraudulent (or deliberate) act by Dr Danapal intending to mis-state his taxable income.
>
> 77. Dr Danapal's evidence to us was that he had at the time of these returns a full-time job as an A&E consultant which, with his private practice, gave him no time to scrutinise his tax returns or to learn anything about tax. He knew nothing about tax other than that he had paid on his income; he left everything to his accountants and followed their advice. His private practice manager handled the maintenance of the accounting records.
>
> 78. Overall we believed Dr Danapal. We think it unlikely that he knew how the figures in his returns were calculated. We accept that he felt justified in leaving everything to his accountants, but that leaves the question as to whether so doing was careless.

> 79. The accountants used were qualified and their letters indicate an understanding of the issues. Whilst there was no evidence that there was some obvious inaccuracy or inconsistency in his returns, giving them no real scrutiny before signing them could be regarded as carelessness.
>
> 80. But section 29 (4) speaks not only of careless or deliberate behaviour on the part of the taxpayer, it also speaks of such behaviour on the part of the person acting on his behalf. It seems to us that the errors in the returns were redolent of at least careless behaviour on the part of Mr Danapal's accountants.
>
> 81. On that basis the condition in section 29(4) was satisfied."

25. Therefore, it is clear from these conclusions that although the FTT canvassed the possibility that Dr Danapal had himself been careless in the preparation of his returns, it appeared to have concluded that he was not. The basis for that finding appears to be (i) its finding at [77] that the practice manager handled the maintenance of accounting records and (ii) the findings at [78] that it was unlikely that Dr Danapal knew how the figures in the returns were calculated and that he felt justified in leaving everything to his accountants. In the light of those findings the FTT concluded that the accountants, Firm A, had been careless.

26. At [87] to [111] the FTT dealt with the application of the time limits in s 34 and s 36 TMA.

27. At [87] the FTT found that the Assessment for 2009/10 was made more than 4 years but less than 6 years after the end of 2009/10 tax year and thus it was out of time unless s 36 applied. It then said that the insufficiency of tax for this year was brought about by the carelessness of Dr Danapal's accountants, as it had found at [80]. This therefore confirms that the FTT's findings as regards carelessness only related to the 2009/10 tax year and only related to carelessness on the part of Firm A and not on the part of Dr Danapal. On the basis of this finding, it found that the Assessment for 2009/10 been made in time.

28. At [89] the FTT recognised that the Assessments for 2006/7 and 2007/8 were made more than 6 years, but less than 20 years, after the end of the relevant tax year and could only be lawful if the loss of tax was brought about deliberately by Dr Danapal or a person acting on his behalf. In that regard, the FTT then considered four elements of the Assessments for those years separately.

29. First, in relation to the capital allowance claim referred to [15] above, the FTT made the following findings at [91] to [97]:

> "91. We find that from 2007/8 onwards capital allowances were claimed in respect of equipment which was treated in Dr Danapal's returns as having been bought by him for £171,000. We find that Mr Robinson sought evidence of this purchase but the only evidence tendered to him was a loan agreement relating to a purchase of the equipment and made between a bank and Harley Street Healthcare Ltd (the company which in 2012 took over Dr Danapal's business).
>
> 92. Mr Robinson concluded from this that the asset in question was not owned by Dr Danapal but by that company, and accordingly that capital allowances were not available to Dr Danapal in respect of it.
>
> 93. We agree that if the assets did not belong to Dr Danapal then capital allowances should not have been claimed in the years from 2007/8 onwards…
>
> 94. We accept, although this was not argued by [Dr Danapal's representative], that it is possible that the loan to the company was part of an arrangement under which Dr Danapal acquired

> ownership of the assets and incurred the expense of acquiring it. That could have been the case, for example, if the company had acted as Dr Danapal's agent, if the company had lent the money to Dr Danapal who bought the assets, or if Dr Danapal had acquired the asset from the company after the company had purchased it. However none of the evidence before us provided any suggestion that such possibility was likely. We therefore find that Dr Danapal did not own the asset and did not pay for it.
>
> 95. If the purchase of the equipment was made by the company it would not have been reflected in the business bank account or Dr Danapal's personal bank account. Thus whoever prepared the tax return must have recorded the acquisition knowing that the cost was not incurred by Dr Danapal. On this basis the capital allowance claim made in the 2007/8 tax return is likely to have been made in the knowledge that such relief was not due and therefore with the intention of representing falsely that it was due. On this basis it was made deliberately by Dr Danapal's then accountants.
>
> 96. We are not able to reach a similar conclusion in relation to later years. That is because it seems to us perfectly reasonable that whoever was preparing the tax return for those years made the capital allowance claim by reference to the brought forward pool of expenditure and would not necessarily have known how that brought forward balance arose.
>
> 97. Thus we find that there was an insufficiency brought about deliberately by reason of excessive capital allowance relief in 2007/8 but do not so find in relation to later years."

30. Secondly, in relation to the overclaimed expenses which related to the 2010/11 return, as referred to [16] and [17] above, the FTT found at [99] that those amounts were included erroneously due to a lack of care but did not find the misstatement to be deliberate. At [100] the FTT concluded that although it was likely that similar errors occurred in earlier years, it could not conclude that the loss of tax was brought about deliberately. The result of this finding was that this element could not be assessed for the years 2006/7 and 2007/8 as it was out of time, subject to the findings of the FTT on the interpretation of s 36 TMA referred to at [34] below.

31. However, although not referred to explicitly, the FTT must have concluded that these amounts had been claimed carelessly in the return for 2009/10 and those were the items that supported the FTT's finding at [87] that there was insufficiency of tax for that year brought about by the carelessness of Firm A.

32. Thirdly, in relation to the understated turnover, referred to at [15] above, at [101] the FTT referred to Mr Robinson's conclusion that various deposits made into Dr Danapal's business and business bank accounts represented turnover that had not been included in the return for 2010/11. It was agreed after discussion with Firm A that the sum of £24,755 represented taxable fee income. The FTT concluded that these amounts had been omitted deliberately. It said this at [102] to [104]:

> "102. No evidence was provided to us that this sum was not fee income of the year. We have found that it was agreed by Dr Danapal's advisors. The omission of such income in 2010/11 indicates that it was likely that further such omissions had occurred in earlier years. The fact that at least part of this income was represented by deposits to Dr Danapal's personal business bank account indicated that the income had intentionally been kept out of the business of the books of the business and that therefore the insufficiency of assessed tax by reason of its omission had been deliberate.
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> 103. That there was a deliberate under-recording of a number of fee receipts in 2010/11 indicates to us that it is likely that this was a pattern of behaviour and so likely in the absence of evidence to the contrary that it had been pursued in earlier years. Evidence to the contrary could have consisted of the presentation of Dr Danapal's bank statements for earlier years and a

> reconciliation of the receipts with his declared turnover, but none such was produced to us. We conclude that the omissions of equivalent income in earlier years was also deliberate.
>
> 104. We find that this deliberate omission was the result of the action of either Dr Danapal or his then accountants or both. These were not insubstantial sums; there were several of them; their omission cannot have been simply an oversight or careless. If Dr Danapal gave access to his personal bank accounts to his accountants or declared the fees to them then the insufficiency must have been brought about by them deliberately; if Dr Danapal did not give his accountants access to his personal bank accounts he must have known that he should declare these fees to them. If he did not declare the deposits to his accountants then the insufficiency was brought about deliberately by him. In either case this insufficiency was brought about by Dr Danapal or a person acting on his behalf."

33. Fourthly, in relation to the payment of £70,000 commission referred to at [19] above, the FTT found at [105] that Mr Robinson had treated the sum as a non-allowable expense of 2010/11 but did not assume that it had occurred in earlier years. Accordingly, no issue arose as to whether or not any error was deliberate in relation to that sum. The sum was therefore not to be taken into account in respect of any of the Assessed Years.

34. Finally, in its conclusions on s 34 and s 36 TMA the FTT considered whether the fact that s 36 provides that the loss of tax brought about deliberately extends the time limit for assessing all other insufficiencies in the same tax year, even if not brought about deliberately. The FTT accepted that position. It said at [106] and [107]:

> "106. Section 36 extends the time limit for making an assessment to 20 years where there is a case "involving a loss of tax brought about deliberately". The word "involving" to our minds does not mean "consists of"; rather the statutory phrase encompasses an assessment which includes a particular loss of tax brought about deliberately together with other elements which were not so brought about.
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> 107. We have concluded that the omission of turnover was deliberate in each of the section 29 years. As a result the assessments for the earlier years are permitted by section 36 even though they may also consist of some errors which we have found were not shown to have been brought about deliberately by the actions of Dr Danapal or his advisers."

35. At [113] the FTT concluded that because the condition in s 29(4) TMA had been satisfied and the extended time limit for the making of the Assessments in s 36 TMA applied, the discovery assessments were made within the time limits prescribed by that section and the amount of those assessments was confirmed.

Grounds of Appeal and issues to be determined

36. Dr Danapal was granted permission to appeal on the following four grounds:

(1) The FTT erred in law by providing insufficient reasons to support its conclusion that the loss of tax was brought about carelessly by a person acting on Dr Danapal's behalf.

(2) The FTT erred in law in concluding that a loss of tax was brought about deliberately when making the capital allowances claim in 2007/08.

(3) The FTT erred in law in concluding that a loss of tax was brought about deliberately by the understated turnover in 2010-11 and earlier years.

(4) The FTT erred in law in concluding that s. 36 TMA provides that a loss of tax brought about deliberately extents the time limit for assessing all other insufficiencies in the same tax year, even if not brought about deliberately.

37. The position of the parties in relation to each Ground is as follows.

Ground 1: Dr Danapal contends that failure to give adequate reasons is a self-standing ground of appeal and that the FTT's conclusion on carelessness was explained in a single sentence at [81] which simply states that there was carelessness. It does not explain what this carelessness was or how it brought about the insufficiencies identified by HMRC.

In response, HMRC contend that what was set out at [76] to [80] amounted to a finding that the behaviour of Firm A was careless, because despite being qualified and displaying an understanding of the issues they failed to identify the errors discussed later in the Decision in the returns. HMRC submit that these are sufficient reasons for the finding of "carelessness".

Ground 2: Dr Danapal contends that the FTT's finding that Firm A acted deliberately in relation to the claim for capital allowances was in essence a finding of dishonesty on Firm A's part and the FTT did not have the evidence to justify such a finding. Alternatively, given the state of the pleadings that dishonesty on the part of Firm A had not been pleaded the FTT could not or should not have made such a finding.

HMRC contend that in the light of the FTT's finding that Dr Danapal merely paid for the assets but did not own them there was sufficient evidence to justify the FTT's conclusion. An allegation of dishonesty in relation to the capital allowances and underdeclared turnover was made in HMRC's skeleton argument and was also included in the Statement of Case. Furthermore, questions were put to Dr Danapal regarding the behaviour of Firm A in relation to the capital allowance claim during cross examination by Mr Stafford, the FTT panel member and that was sufficient to meet the requirement that the allegation of dishonesty was put to Dr Danapal fairly and squarely in cross examination.

Ground 3: Dr Danapal contends that the documents before the FTT show that work identifying the source of the payments into the bank accounts had not been undertaken by HMRC. Bank statements for the previous years were not adduced by HMRC to prove that the underreporting of turnover occurred in those years. The FTT's conclusion that it was for Dr Danapal to rebut the FTT's inference of a pattern of behaviour (based on one year of limited evidence) was an improper approach the burden of proof which was compounded by the FTT suggesting that Dr Danapal could have rebutted the allegation by providing bank statements. Furthermore, the FTT does not record that any of its inferences of deliberate behaviour were put to Dr Danapal in cross examination.

HMRC contend that it was open to the FTT to conclude that the amount of undeclared turnover and deliberate underreporting indicate a pattern of behaviour that was likely in the Assessed Years applying the presumption of continuity. In the circumstances, where the FTT found that the underreporting of income was deliberate, it was open to it to determine, in the absence of contrary evidence from Dr Danapal, that there had been a similar pattern of underreporting in previous years. Additionally, questions surrounding the understated turnover and associated deliberate behaviour were put to Dr Danapal in cross examination.

Ground 4: Dr Danapal contends that the FTT's construction that the statutory phrase "involving a loss of tax brought about deliberately" encompasses an assessment which includes a particular loss of tax brought about deliberately together with other elements which were not so brought about runs contrary to the language of s 29 and s 36 TMA.

HMRC contend that s 36 TMA provides that a loss of tax brought about deliberately extends the time limit for assessing all other insufficiencies. The FTT was correct to conclude that "involving" did not mean "consist of" but rather an assessment which includes a particular loss of tax brought about deliberately, together with other elements which were not so brought about.

38. If we were to conclude that any of the Grounds establishes an error of law on the part of the FTT we will need to consider whether any such error is sufficiently material for us to consider exercising our power under s 12 of the Tribunals, Courts & Enforcement Act 2007 ("TCEA") to set aside all or any part of the Decision and, if so, whether or not to remake the decision or remit the matter to the FTT for further consideration.

Discussion

Ground 1: Did the FTT give adequate reasons for its finding of carelessness on the part of Firm A?

39. It was common ground that the FTT had a duty to give reasons for its finding that Firm A had acted carelessly in completing the tax return year in question and that a failure to do so would amount to an error of law on the part of the FTT. The well-known Court of Appeal judgment in *Flannery v. Halifax Estate Agencies Ltd* [2000] 1 WLR 377 sets out the relevant principles at page 381G to page 382 C as follows:

> "(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex parte Dave) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.
>
> (2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.
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> (3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, " the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.
>
> (4) This is not to suggest that there is one rule for cases concerning the witnesses truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with

> experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."

40. We have no doubt in this case that the FTT failed in its duty to give adequate reasons for its finding that Firm A acted carelessly in completing the return in question. Aside from the point that HMRC's Statement of Case made no allegation of carelessness on the part of Firm A as opposed to Dr Danapal himself, it was the duty of the FTT to explain what evidence it relied on in making its finding of carelessness and why that evidence demonstrated that Firm A had been careless. In order to do so, the FTT would have had to have considered what material was before Firm A when it completed the return, what it was told by Dr Danapal or his practice manager about that evidence and how it was that Firm A came to complete the return inaccurately. None of those matters are addressed by the FTT in the Decision. That is not surprising, because Firm A gave no evidence itself and was therefore not cross examined as to how it carried out its work in relation to Dr Danapal's tax returns.

41. None of the matters relied on by HMRC demonstrate that adequate reasons were given. The only findings made by the FTT at [76] to [79] were that (i) Dr Danapal's practice manager handled the maintenance of the accounting records (ii) Dr Danapal relied entirely on his accountants to complete the returns correctly (iii) Dr Danapal himself was believed in that regard so the FTT impliedly rejected any allegation of carelessness on his part and (iv) the accountants were qualified and their letters indicated an understanding of the issues. None of those findings explains why Firm A was careless in completing the returns. No explanation is given as to why a failure to complete the returns accurately could be attributed to a lack of care on the part of Firm A. The FTT gave no explanation as to why it had reached the conclusion that it did, in particular, why Firm A had failed to identify what was agreed were errors in the returns.

42. Nothing in the FTT's later discussion on the question of carelessness improves the position. Although at [87] the FTT made a finding that the lack of care was in respect of the over claimed expenses for 2009/2010 no further explanation is given for that finding. Whilst at [99] the FTT found that there was a lack of care in relation to the 2010/2011 return, there was no further analysis of carelessness in respect of any the years covered by the Assessments.

43. We therefore find that Dr Danapal has made out his case on Ground 1 and that the FTT made an error of law in not giving adequate reasons for its decision on the carelessness issue.

Ground 2 : Did the FTT err in law in concluding that a loss of tax was brought about deliberately when making the capital allowances in 2007/08?

44. We have no doubt that the FTT was not entitled to find that Firm A acted deliberately in completing the relevant return inaccurately in this regard.

45. Ms Sheldon accepted that the finding in this case that Firm A acted deliberately in causing an inaccurate entry to be made in the 2007/08 tax return could be characterised as a finding of dishonesty. She also accepted that it was not open to the FTT to make a finding of dishonesty where such an allegation had not been pleaded or put to the witness in cross examination.

46. As Henderson J said in *Ingenious Games LLP v HMRC* [2015] UKUT 1659 at [62] to [63]:

> "[62] ….it is not open to HMRC to put allegations of dishonesty (or other serious forms of misconduct) to their witnesses, or to invite the FTT to make adverse findings of fact on such a

> basis, unless the relevant allegations have been pleaded with full particularity and the Appellants have been given a proper opportunity to respond to them.
>
> [63] In cases where the burden of proof lies on HMRC to establish fraud or dishonesty, these principles undoubtedly apply in the same way as they would in ordinary civil litigation. Examples include cases where HMRC wished to make assessments to income tax outside normal time limits on the ground (before 1989) of fraud or wilful default under s 36 of the Taxes Management
>
> Act 1970…"

47. The requirement under s 36 TMA to demonstrate fraud or wilful default has now been replaced with the concept of deliberate behaviour, but as was said in *Tooth*, deliberate behaviour in this context is conduct that amounts to fraud or is akin to fraud and HMRC have accepted that the behaviour alleged in this case can be characterised as dishonest. HMRC also accepted that the burden of proof is on them to prove the deliberate behaviour in question.

48. It is also clear in this case that HMRC, in its Statement of Case, made no allegation of deliberate behaviour against Firm A. That document pleaded that a loss of tax had arisen because Dr Danapal himself had acted deliberately or carelessly in completing the returns. Likewise, in its skeleton argument before the FTT, HMRC's submissions on deliberate behaviour were confined to making submissions of deliberate behaviour on the part of Dr Danapal, making reference to his defence that he acted on the advice of Firm A. However, no direct allegations were made against Firm A and it is therefore to be assumed that HMRC rejected Dr Danapal's contentions that he acted in accordance with advice given to him by Firm A.

49. In those circumstances, it was clearly wrong for the FTT to have made the findings they did of dishonesty on the part of Firm A. Such a finding could have had serious implications for Firm A as a professional firm of chartered accountants and it was given no opportunity to refute them.

50. In *MRH Solicitors v Apex Hire Ltd and others* [2015] EWHC 1795 a court found that in a claim for personal injury the underlying motor accident was staged and the claim was fraudulent. The Judge found the solicitors for the claimant were a party to the fraud. The solicitors had not been given any warning that the findings might be made. The solicitors took the matter to the Administrative Court which observed at [34] and [35]:

> "34. We well understand how the Recorder's suspicions were aroused. However, in the absence of good reason a Judge ought to be extremely cautious before making conclusive findings of fraud unless the person concerned has at least had the opportunity to give evidence to rebut the allegations. This is a matter of elementary fairness. In *Vogon International Ltd v the Serious Fraud Office* [2004] EWCA Civ 104 at [29] May LJ (with whom Lord Phillips MR and Jonathan Parker LJ agreed) said,
>
> > "It is, I regret to say, elementary common fairness that neither parties to the litigation, their counsel nor judges should make serious imputations or findings in any litigation when the person concerned against whom such imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves."
>
> 35. This is not only required because of fairness to the party affected but also to avoid the Court falling into error – see for instance Co-operative Group (CWS) Ltd v International Computers [2003] EWCA Civ 1955 at [38]. As Megarry J memorably said in John v Rees [1970] CH 345, 402,

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were answered; of inexplicable conduct , which was fully explained…Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events"

51. Accordingly, we reject Ms Sheldon's submissions that the fact that an allegation of dishonesty in relation to the capital allowances and underdeclared turnover as made in HMRC's skeleton argument and in the Statement of Case was sufficient. As we have observed, those allegations were made only against Dr Danapal and not against Firm A. Neither does the fact that questions were put to Dr Danapal regarding the behaviour of Firm A by a member of the FTT's panel make any difference to the position. Questions from the Tribunal did not amount to a cross examination and in any event the questions were only put to Dr Danapal, not to Firm A.

52. We therefore find that Dr Danapal has made out his case on Ground 2 and the FTT made an error of law in concluding that Firm A had acted deliberately in relation to the inaccuracy contained in Dr Danapal's tax return for 2007/2008 regarding the capital allowance claim for that year.

Ground 3: did the FTT err in law in concluding that a loss of tax was brought about deliberately by the understated turnover in 2010 – 11 and earlier years?

53. As set out at [32] above, the FTT found at [104] there was a deliberate omission of fee income which was the result of the action of either Dr Danapal or Firm A or both. No allegation of deliberate behaviour against Firm A was pleaded by HMRC and accordingly, for the reasons set out above, this finding cannot stand.

54. Ms Sheldon submitted that, as found by the FTT, Dr Danapal disputed the legality of the Assessments, but save in relation to an argument that some or all of them could only be for nil amounts, made no argument as to their amounts. In the absence of evidence from Dr Danapal, who had the burden of proof regarding whether turnover had been understated, it was open to the FTT to accept the amount of £24,755 as understated turnover.

55. Furthermore, Ms Sheldon submitted, it was open to the FTT, as it did at [102] to [104], to conclude that such a substantial amount could not have been omitted through carelessness and that a deliberate underreporting indicates a pattern of behaviour that was likely in the Assessment Years. This follows from the presumption of continuity: see *Jonas v Bamford* [1973] STC 519 at [540].

56. In circumstances where the FTT had found that the underreporting of income was deliberate, Ms Sheldon submitted that it was open to it to determine, in the absence of contrary evidence from Dr Danapal, that there had been a similar pattern of underreporting in previous years. Additionally, questions surrounding the understated turnover and associated deliberate behaviour were put to Dr Danapal in cross-examination.

57. We reject those submissions. In our view it was not open to the FTT on the basis of the evidence before it to make a finding that Dr Danapal had deliberately omitted fee income from his tax returns for the following reasons.

58. First, as recorded at [101] the FTT found that the figure included in the 2010/11 tax return was reduced following discussions between Mr Robinson and Firm A. That in itself casts doubt on whether the figures on which HMRC relied, namely review of the deposits into Dr Danapal's

personal and business bank accounts represented turnover. The FTT undertook no analysis as to why HMRC had agreed that the figure could be reduced.

59. As Mr Windle submitted, the evidence before the FTT showed that Firm A wrote to HMRC explaining that Dr Danapal took loans from family and friends while always inserting fee income into the fee book maintained by his staff. At a meeting with HMRC, Firm A repeated the contention that some of the deposits were transfers from family. It was conceded, however, that without documentary evidence of this, the deposits should be treated as sales.

60. As Mr Windle submitted, HMRC's inability to identify the correct understatement of turnover at the first attempt demonstrates that calculating the turnover was not simply a matter of adding up the deposits into the bank accounts: further analysis of the source of the payments was required. The documents before the FTT show that identifying the source of the payments was non-trivial and that this work had not been undertaken by HMRC. Bank statements for the previous years were not adduced by HMRC to prove that the underreporting of turnover occurred in those years.

61. Secondly, as Mr Windle submitted, the FTT's conclusion that it was for Dr Danapal to rebut the FTT's inference of a pattern of behaviour (based on one year of limited evidence) was an improper approach to the burden of proof. The FTT was wrong to say that it was for Dr Danapal to adduce evidence to rebut the allegation that he had acted deliberately. As Mr Windle submitted, the FTT made a double inference (that there was an underreporting of turnover and that this inferred underreporting was deliberate) thereby effectively removing the requirement that HMRC prove the serious allegation of deliberate behaviour made against Dr Danapal.

62. Finally, the FTT does not record that any of its inferences of deliberate behaviour were put to Dr Danapal in cross examination and we can therefore infer that they were not. It was therefore clearly inappropriate for the FTT to have made that finding without the issue having been put squarely to Dr Danapal in cross-examination.

63. We therefore find that Dr Danapal has made out his case on Ground 3.

Ground 4: construction of s 36 TMA

64. This ground is only relevant if any of the allegations of deliberate behaviour on the part of Dr Danapal are ultimately found to be made out. For the reasons set out at [65] to [78] below we have remade the Decision as a result of the errors of law made by the FTT regarding its conclusions on deliberate behaviour and have found that none of the allegations have been made out. In those circumstances, there is no need to address Ground 4 and in our view consideration of the point should be left to a case where it is relevant.

Remaking the Decision

65. We have found that the Decision discloses a number of errors of law. That fact does not necessarily mean that we should allow the appeal and set aside the Decision. Section 12 TCEA provides that if the Upper Tribunal finds that the making of the relevant decision involved the making of an error on a point of law it "may (but need not) set aside" the decision, and that if it does it must either remit the case to the FTT with directions for reconsideration, or remake the decision. That language clearly indicates that we have a discretion in that respect. It is well established that we should not exercise our discretion to set aside the Decision if we are satisfied, notwithstanding errors of law in the Decision, that there was a sufficient basis in the findings of the

FTT which were fully reasoned and not subject to challenge to justify its conclusions on the relevant issue.

66. We cannot be so satisfied in this case. In our view, the errors of law made by the FTT are material and we should set aside the Decision in its entirety.

67. Ms Sheldon submitted that if we were to set aside the Decision, we should remit it to the FTT for a fresh hearing. However, we are satisfied that we can remake the decision on the basis of the evidence that was before the FTT for the reasons set out below. We do so by reference to each of the Assessments in turn.

2006/07

68. The amount of the Assessment for this year was comprised of items representing (i) overclaimed expenses, which the FTT found to have occurred as a result of the carelessness of Firm A and (ii) understated turnover which the FTT found to have occurred as a result of deliberate behaviour on the part of either Firm A or Dr Danapal.

69. As regards the overclaimed expenses, in our view the Assessment in relation to those sums cannot stand. The only finding of carelessness was in relation to Firm A and, as we have found, inadequate reasons were provided for that finding. Having considered the evidence before the FTT, we can find nothing that will support a finding of carelessness against Firm A, particularly as there was no evidence from the Firm itself. There can be no finding of carelessness against Dr Danapal. The FTT found that he had not been careless in relation to the claims in question and HMRC have not challenged that finding.

70. As regards the understated turnover, for the reasons set out above there is no proper basis on which a finding of deliberate behaviour on the part of Firm A can stand. The question therefore is whether there is sufficient evidence to support a finding of deliberate behaviour against Dr Danapal.

71. We have considered whether it would be appropriate to remit the matter to the FTT for that to be determined, bearing in mind the credibility of Dr Danapal as a witness is relevant in that regard and the opportunity would arise for the allegations of deliberate behaviour to be put to him fairly and squarely. However, in the circumstances we are satisfied that we can remake this part of the Decision on the basis of the evidence put to the FTT and its own findings on Dr Danapal's credibility.

72. In his witness statement filed with the FTT Dr Danapal said that his accountants dealt with HMRC and provided all the replies on whatever evidence was required by HMRC on his behalf. He said that his accountants only know the answers to the questions raised by them and the evidence required by them. He said it was his practice to provide all the information and evidence to his accountants of all his financial transactions and they selected the relevant information to file tax returns. He said that he was fully dependent on his accountants for their services.

73. It is clear that the FTT accepted that evidence. As we have previously mentioned, at [78] the FTT said that it believed Dr Danapal when he said he left everything to his accountants and followed their advice and that his private practice manager handled the maintenance of the accounting records. The FTT also found that it was unlikely that Dr Danapal knew how the figures in his returns were calculated.

74. On the basis of those findings, in our view there was no basis on which it could be found that Dr Danapal knowingly provided inaccurate information to Firm A. All that was relied on by HMRC was the bank statements provided in relation to the enquiry for the year 2010/2011 and in relation to that year Dr Danapal's accountants accepted that that a number of the items represented fee income in the absence of a detailed analysis of what the relevant entries represented. No analysis of relevant items was undertaken in relation to the previous years and, as we have said the burden is on HMRC to show that items had been omitted deliberately by Dr Danapal rather than for Dr Danapal to have refuted the allegation by producing the bank statements in question. That evidence could clearly have been requested by HMRC and they never did so. On that basis, in our view there was no evidence before the FTT that could found a finding of deliberate behaviour on Dr Danapal's part, having taken into account the FTT's own assessment of his credibility as a witness.

75. Consequently, the allegation of deliberate behaviour on the part of Dr Danapal in relation to understated turnover in respect of this year of assessment cannot stand and the Assessment in relation to the amounts in question was therefore out of time.

2007/08

76. For the reasons given in relation to 2006/07, the Assessment in relation to both the overclaimed expenses and understated turnover cannot stand.

77. In relation to the claim for capital allowances, for the reasons that we have given, the finding that there was deliberate behaviour on the part of a person acting on behalf of Dr Danapal, namely Firm A, cannot stand. There was no finding of deliberate behaviour on the part of Dr Danapal himself and HMRC have not challenged that conclusion. In any event, the Decision does not record any questions having been put to Dr Danapal about his knowledge or understanding of the capital allowance claims and therefore whether he was responsible for any deliberate inaccuracy in his tax return in that regard. Accordingly, there is no basis on which we should seek to alter that finding on appeal and the assessment in relation to the capital allowance claim was therefore out of time.

2009/10

78. For the reasons given in relation to 2006/07 the Assessment in relation to both the over claimed expenses and the understated turnover cannot stand.

Conclusion

79. It follows from our conclusions in remaking the Decision in relation to each of the Assessed Years that all of the Assessments were made out of time. That follows from the fact that we have decided that HMRC have not satisfied the burden which rests with them to prove that either Dr Danapal or Firm A acted carelessly or deliberately in relation to the insufficiency of tax which was discovered by HMRC. Accordingly, the Assessments must be discharged.

Disposition

80. The appeal is allowed.

JUDGE TIMOTHY HERRINGTON JUDGE TRACEY BOWLER
UPPER TRIBUNAL JUDGES

RELEASE DATE: 03 April 2023