TC04992

Appeal number: TC/2014/01601
TC/2014/02391

Income tax– discovery assessments under s 29 TMA- whether the appellant was careless within s 29(4) – whether errors attributable to online submission difficulties

FIRST-TIER TRIBUNAL
TAX CHAMBER

THOMAS BUBB **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH FALK
ELIZABETH BRIDGE

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 22 January 2016

The Appellant in person

Rosalind Oliver, Officer of HM Revenue and Customs, for the Respondents

DECISION

Background and preliminary points

1. The appeals relate to (a) surcharges of £164 and £159 imposed under s 59C(2) and (3) Taxes Management Act 1970 ("TMA") for late payment of income tax in respect of the tax year 2008-09 (case reference TC/2014/01601), and (b) discovery assessments under s 29 TMA in respect of the tax years 2009-10 and 2010-11 in the amounts of £4,702.80 and £1,981.07 respectively (case reference TC/2014/02391). HMRC also submitted that the Tribunal should increase the assessment for 2009-10 by a further £1902.40 under s 50(7) TMA, resulting in total tax due for that year of £6605.20. The appeals were brought separately but subsequently consolidated. At the date of the hearing the tax due for 2008-09, £5046.80, also remained unpaid although there is no valid appeal in respect of that liability.

2. Both appeals were lodged a few weeks late. This appears to have been caused by failures to submit the correct information with the notices of appeal and some confusion between the subject matter of the two appeals. HMRC did not objection to the appeals being heard and we gave permission.

3. At the hearing we asked HMRC about the use of the s 29 TMA assessment procedure in this case. It was agreed in discussion that, contrary to what might have been assumed at the time, HMRC had in fact been in time to open an enquiry under s 9A TMA when they first wrote to the appellant on 22 April 2013 about the check they were making of his 2009-10 and 2010-11 returns. The reason they were in time was that both returns has been filed late. The 2009-10 return had been filed online on 26 October 2012 following a notice to file dated 10 October 2011 (which the appellant had not become aware of for some months). It should have been filed within three months of the notice to file, under s 8(1G) TMA. Notice to file the 2010-11 return was given promptly on 6 April 2011. The return should have been filed online by 31 January 2012 but was filed a little late on 27 February 2012. The effect of s 9A(2)(b) TMA is that in each case an enquiry could be opened up to the quarter day following the first anniversary of the return being delivered, being 31 October 2013 for 2009-10 and 30 April 2013 for 2010-11.

4. Based on the reasoning in *Raftopoulou v HMRC* [2015] UKUT 579 (TCC), which emphasises that neither notices of enquiry nor closure notices need to be in a particular form (and can even be contained in the same document), we can see an argument that the letters sent to the appellant on 22 April 2013 could be viewed as notice of intention to enquire into the returns within s 9A, if not as closure notices as well. However, it is clear from those letters that what HMRC were planning to do was to issue assessments, which they proceeded to do under s 29 TMA on 31 May 2013. Mrs Oliver was also very clear when we queried the point at the hearing that HMRC were proceeding only under s 29 TMA and were not seeking to argue that enquiries had been opened or that closure notices had been issued. Given HMRC's position, and having heard no argument on what would in effect be an extension of the reasoning in *Raftopoulou*, we have also proceeded on the basis that s 29 TMA is the relevant provision to consider, and further that (as HMRC accepted) s 29(5) was not applicable. As discussed further below the effect of this is that, in order for the assessments to be upheld, HMRC need to show that the loss of tax the subject of the assessments was brought about carelessly by the appellant under s 29(4). (There was no allegation of deliberate behaviour.)

5. A final preliminary point is that it quickly became apparent that the appellant had not received HMRC's bundle prior to the hearing. He had previously declined delivery of an unknown package with unpaid or underpaid post, which was possibly the bundle. The appellant had no objection to proceeding but we required a short adjournment for Mrs Oliver to take the appellant through the contents of the bundle, following which they confirmed that apart from legal and tax authorities there was nothing in the bundle with which the appellant was unfamiliar.

Evidence and submissions

6. The appellant gave oral evidence and both the appellant and Mrs Oliver made oral submissions. Additional written submissions were also made by both parties following the hearing. Documentary evidence included correspondence between the parties, copies of tax returns and calculations and the discovery assessments. Some additional documentary evidence was also included in the additional submissions. We should say at the outset that we have no doubt that the appellant was a truthful witness and we accept his evidence.

Findings of facts

Relevant employment history

7. The appellant served over 28 years in the navy followed by 15 years in the civil service. He has been in receipt of both naval and civil service pensions since 1989 and 2003 respectively, and as from mid-2009 a State pension. After leaving the civil service the appellant was engaged from time to time as a consultant, working for the Ministry of Defence. Since he was keen to avoid difficulties he had seen other consultants fall into with unexpected tax bills, he wished to continue to be paid under PAYE. He arranged this himself via a firm of accountants, Orange and Gold, but by the periods we are concerned with they had ceased to provide this service and had recommended another firm called Parasol, who would employ the appellant and charge him for the service provided.

8. The appellant commenced work via Parasol in July 2007 and provided them with details of the two pensions then in payment and permission to access records held by Orange and Gold. He also notified them of his State pension when that became payable. Unfortunately Parasol operated the standard emergency tax code which allocated full personal allowances to the appellant. Since full allowances had already been allocated to the civil service pension the code they should have operated for a secondary source of income was the "BR" code, which was the code used for the naval pension. The BR code would have allocated no allowances and would therefore eliminate underpayment of tax on that account, although it would not have assisted in ensuring that the correct amount of higher rate tax was collected.

9. Parasol operated the emergency code as from July 2007. This was justified by them to the appellant when he approached them during the enquiry on the basis of an email exchange which they claimed the appellant had had with them in January 2008 confirming that he had no pension income. The questions asked by Parasol in the exchange were questions asked by HMRC in a P46 form (the form required for new employees without a P45), and in their explanation to the appellant in 2013 Parasol said that this was a "P46 statement by email". The appellant had no recollection of or access to the original email exchange (any emails would have been on the MoD

system) and his reaction was that he must have assumed that Parasol were asking him about other pensions of which they were not already aware. He believed that he would not have appreciated that the answers were intended for HMRC's use, and given that there is no evidence that it was apparent to him that he was actually completing a P46 or other official form, or otherwise giving information to HMRC, this appears justified. Parasol also appear to have wrongly notified HMRC of a January 2008 start date for the employment with Parasol. However, it seems that Parasol had also notified HMRC at some point that the appellant's earnings from them were a secondary source of income since this also appears on HMRC's records. This should have been an indication to HMRC that the BR code was the appropriate one. For whatever reason, however, no actual tax code was issued and Parasol continued to use the emergency code, with the standard uplifts to it each tax year.

10. During the period that the appellant was employed by Parasol he was working in the UK during the week but his home was in France. The appellant left employment with Parasol in October 2010 when his role at the MoD ceased. At that he point he moved back to the UK temporarily, before returning to France in July 2011. According to HMRC's records, his address was updated to reflect this, showing his French address from 1 August 2011. The appellant then remained resident in France until 2015.

Tax returns

11. The appellant received a notice to file a return for 2010-11 but did not initially receive the notices to file returns for 2008-09 and 2009-10 that were issued in October 2011, only becoming aware of them during 2012 and filing the returns in respect of those earlier years on 26 October 2012. The appellant also did not receive the P800 form that HMRC's system indicates was issued to him in February 2011. If he had received the P800 it would have indicated to him that, based on HMRC's calculations, a total of slightly under £10,000 of tax was unpaid for 2009-10 and prior years. To confuse matters further, the appellant did receive a tax repayment of nearly £3000 in March 2012. HMRC could give no explanation at the hearing of this repayment of tax, which seems to be unrelated to any of the years in question.

12. The appellant correctly completed his 2008-09 return, showing an underpayment of tax. Although the appellant later indicated that he wished to amend the return and was subsequently given information by HMRC about the possibility of claiming relief under Schedule 1AB TMA, no amendment or claim was made and the assessment stands.

13. Both the 2009-10 and 2010-11 returns contained errors. These were as follows:

> (1) Both returns omitted the appellant's State pension. The appellant accepted that this was a mistake: the pension was paid into his wife's account and he had forgotten to include it. For 2010-11 HMRC's system picked this up and corrected the return, but the system in place for 2009-10 did not do this.
>
> (2) The 2009-10 return significantly understated the total for occupational pensions in box 10, at £8320 rather than £20,076. Tax deducted from occupational pensions was correctly stated as £5096. However, the appellant had included the correct amounts for each of his two

occupational pensions and the tax deducted from each in box 19, the additional information or "white space" box. This information was not picked up by HMRC's system when processing the return, even though the instructions for the return specifically asked for a breakdown of non State pensions in box 19.

(3) The 2010-11 return understated earnings from Parasol and overstated tax deducted at £31,843 and £7,570 rather than £33,513 and £6,690 respectively. Occupational pension income was correctly stated in box 10 at £20,106 but tax deducted was slightly overstated at £6,727 rather than £6,293. Box 19 included a disclosure that the appellant had taken his pay and tax details from his last payslip as he had not received a P60, and again included an accurate breakdown of the income (but not in this case the tax deducted) from his two occupational pensions.

14. The errors in the returns, combined with the fact that HMRC's system did not pick up the significance of the entries in box 19, meant that instead of the underpayments for each year being identified and addressed HMRC's system generated repayments for each year. This was the case even though another part of HMRC's system had clearly picked up the underpaid tax.

15. We accept the appellant's evidence that he had difficulties in putting information together for the returns. Having sold his house in England, many of his records were in storage in England or packed up in France, and most of the Parasol related information was within the MoD computer system to which the appellant no longer had access. He also had no P60 in respect of his Parasol earnings for 2010-11.

Submission problems

16. The appellant explained that he had also had real difficulties in submitting his tax returns online from France. The system repeatedly failed to accept his French address, generating error messages. When he managed to get it to accept the address after a number of attempts to re-enter it, the system deleted some figures and changed others. He experienced many failed attempts, in each case having to re-complete the whole form. He thought there were around eight failed attempts. The error in the 2009-10 return which stated the total for occupational pensions at £8320 rather than £20,076 was an example of the kind of random changes the system made. The appellant also found that he was unable to get through to HMRC by phone on the international number available, and was unable to access the returns after he had filed them.

17. The appellant's submission difficulties were explained for the first time at the hearing. We should point out that the appellant should certainly not be criticised for not raising them earlier given that, as explained at [24] below, the entire correspondence with HMRC had focused on the wrong question. Mrs Oliver's approach at the hearing was to say that she had never heard of submission problems of that nature, but asked for time to check internally and make further submissions, which we allowed. We accordingly made directions inviting submissions from HMRC in relation to (a) the repeated error messages and failures the appellant said he had experienced in attempting to submit returns online from France and (b) the random alteration of figures he claimed had also occurred as part of the same process.

18. The further submissions received from HMRC do not in our view properly address the points raised, and in one respect corroborate what the appellant said. The

submissions attach a series of internal email exchanges between Mrs Oliver and a member of the Digital Customer Support team. Although Mrs Oliver initially asked the right questions the only response to those was that the tracking tool only showed successful submissions and the appellant had not contacted the helpdesk, so it was not possible to comment on his problems. This simply does not address whether HMRC had any experience of submission problems of the nature described by the appellant.

19. The email exchanges did however go on to say that in the 2008-09 return filed on the same day as the 2009-10 return (26 October 2012) the appellant ticked a box to indicate that he had amended his address. This prompted the addition of a note to his self assessment record that his address changed on that date, even though in fact that address had been on his record from 1 August 2011. This is in our view supportive of the appellant's evidence that he was having problems with the address and attempted to deal with the difficulties by re-entering it. The email exchanges also state that amending an address should not change figures already entered.

20. HMRC's further submissions make it clear that they do not accept the appellant's contentions that the inaccuracies in the returns arose from problems with the self assessment system, and reiterate that changing an address would not affect figures already entered.

21. We found the appellant's evidence to be entirely credible. We do not think that HMRC has produced any evidence that establishes that we should not accept the appellant's description of the difficulties he had. We think this is supported both by the indication on HMRC's system that an attempt had been taken to alter the address on 26 October 2012, and more significantly by the random nature of the errors.

HMRC correspondence and the s 29 assessments

22. The appellant contacted HMRC by letter in January 2013. The principal focus of the letter related to the tax due as a result of his 2008-09 self assessment, but he also detailed some of the problems he had had with making tax returns, including failure to receive notifications that returns were due.

23. It was quite probably the ensuing correspondence with the appellant that led to the problems with the two later years finally being picked up, and in April 2013 HMRC wrote to the appellant with the details and indicated that they were proposing to raise assessments. The s 29 TMA assessments issued the following month sought both to recover the repayments and to assess the difference between the tax originally deducted and the correct amount of tax. However, the assessment for 2009-10 was itself incorrect because it omitted tax on the appellant's State pension. HMRC's submission that the assessment for that year should be increased by the Tribunal under s 50(7) TMA is intended to rectify that omission.

24. Throughout the correspondence, including the independent review process that HMRC undertook in respect of the two assessments, significant errors were made by HMRC in relation to determining whether the appellant had been careless and also in their purported explanations to him. In particular, rather than focus on the correct question, namely whether the loss of tax for 2009-10 and 2010-11 was attributable to carelessness in making the returns, the correspondence concentrated entirely on whether the appellant had been careless in relation to the Parasol tax code, by carelessly completing a P46 form. Since the appellant considered that he had taken

great care in engaging Parasol and giving then details of his pensions, had no recollection of a P46 form (which is not surprising since he had not actually completed one and had only answered some questions from Parasol by email) and also assumed that he would not have had to give his pension details to Parasol again, he disagreed with HMRC and brought his appeal on that basis. HMRC rightly accepted at the hearing that the appellant deserved better service from HMRC than he had received.

Discussion

Surcharges for 2008-09

25. We were informed that the surcharges imposed under s 59C(2) and (3) TMA had been charged without any mitigation by HMRC under s 59C(11) TMA. On the basis of Mrs Oliver's confirmation at the hearing that she would recommend that HMRC should mitigate them in full (ie entirely remit them) it is unnecessary to reach a finding about whether the appellant had a reasonable excuse for not paying the tax due in respect of that year, and we have not considered them further.

Discovery assessments for 2009-10 and 2010-11: the s 29 conditions

26. Section 29 TMA provides so far as relevant:

> "(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> …
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) 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.
>
> (6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—
>
> (a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;
>
> (b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;
>
> (c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or
>
> (d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—
>
> (i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or
>
> (ii) are notified in writing by the taxpayer to an officer of the Board.
>
> …
>
> (8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.
>
> …"

27. Section 29(4) was modified by paragraph 3 Schedule 39 FA 2008. It previously referred to the situation mentioned in subsection (1) being "attributable to fraudulent or negligent conduct" rather than to it being brought about carelessly or deliberately. Under SI 2009/403 the change to the wording came into effect on 1 April 2010, but subject to a transitional rule in regulation 10. This rule applies where notice to file a return has not been given within one year of the end of the year of assessment, and is potentially relevant in this case to 2009-10 because the notice to file was only given in October 2011. However, the effect of regulation 10(4) is to disapply the transitional rule where:

> "…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…"

28. This wording tracks part of the wording in s 29(1) and in our view applies in this case. Accordingly we do not think it necessary to consider the version of s 29(4) previously in force.

29. In our view the requirements of section 29(1) were met in relation to both 2009-10 and 2010-11, such that subject to one of the conditions in s 29(4) or (5) being satisfied assessments could be made. HMRC clearly "discovered" that there was income that had not been assessed for both years in or shortly before April 2013. As made clear in a number of cases, and in particular *Hankinson v HMRC* [2012] STC 485 (CA) and *Charlton v HMRC* [2013] STC 866, this is concerned with the inspector's subjective view and does not require any new facts to emerge. It is enough that the inspector satisfies himself or comes to a conclusion.

30. It is however worth being clear about what the inspector actually concluded. The conclusions reached, as demonstrated by the assessments that followed, related to the errors described at sub-paragraphs (2) and (3) of [13] above. Neither those conclusions nor the assessments addressed the omission of the appellant's State pension from the returns. For 2010-11 this was unnecessary because the return had already been corrected, but this was not the case for 2009-10 and the effect was to leave the appellant's State pension for that year untaxed.

31. Turning to the conditions in s 29(4) and (5), s 29(5) was not relied on by HMRC and we have therefore not determined whether it was satisfied. We would note that s 29(5) is predicated on the basis that the condition is being tested at a time when HMRC is no longer able to open an enquiry into the return. That was not the case here, as discussed at [3] above, and that would seem to make reliance on s 29(5) less than straightforward. We would also note that the most significant contributor to the under assessments was the understatement of occupational pension income for 2009-10. Since a correct breakdown of this income was included in the additional information box it is clear that information was made available within s 29(6)(a) on the basis of which the hypothetical inspector could reasonably have been expected to be aware of the deficiency: compare *Charlton*.

32. This leaves s 29(4). In order for HMRC to succeed under s 29(4) the "situation mentioned in subsection (1)" must have been "brought about carelessly" by the appellant. The test for carelessness is considered further below. It is clear that the burden of proof is on HMRC to establish carelessness (see *Hankinson* at [22], citing *HMRC v Household Estate Agents* [2008] STC 2045). It is also clear that the "situation mentioned in subsection (1)" refers to the fact of the underassessment referred to in s 29(1) (in this case s 29(1)(a))- see *Hargreaves v HMRC* [2015] STC 905 at [21(6)].

33. Under s 29(4) HMRC must therefore demonstrate that the appellant's careless behaviour brought about the underassessment. If they can establish that then there is power under the closing words of s 29(1) to make an assessment in the amount or further amount which in the officer's opinion ought to be charged "to make good to the Crown the loss of tax". The reference to "loss of tax" can only be a reference to the underassessment referred to in the preceding part of s 29(1), namely the underassessment brought about by careless behaviour. There is no power to raise a valid assessment to make good a loss of tax that is not attributable to careless behaviour.

The test for carelessness

34. As explained above, in order to succeed in their argument that the assessments were validly made under s 29 TMA HMRC must establish that the appellant was

careless within s 29(4). Whether the appellant was careless is a question of fact, to be determined having regard to all the circumstances.

35. The previous version of s 29(4), referring to fraudulent or negligent conduct, was considered by the Upper Tribunal in *Colin Moore v HMRC* [2011] STC 1784. It was noted without disapproval that the First-tier Tribunal in that case had applied the following formulation of the test of negligence set out in *Anderson v HMRC* [2009] UKFTT 206 at [22]:

> "The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done."

36. This is an objective test. Some other more recent First-tier Tribunal cases have concluded that, in the context of Schedule 24 FA 2007, "carelessness" requires that the attributes and experience of the particular taxpayer should be taken into account, rather than simply considering a hypothetical reasonable taxpayer. This reflects the test applied in determining whether a reasonable excuse exists, and has been justified by the absence of any defence of reasonable excuse from Schedule 24, in contrast to the predecessor provisions: see *Martin v HMRC* [2014] UKFTT 1021 (TC).

37. In our view there is no similar justification to apply this approach to s 29(4), and no indication that there was any intention that the amendment to s 29(4) was intended to make any significant change.

38. However, we do think that it is correct to take account of all the circumstances. These include the fact that the taxpayer was not acting through an agent who might be more familiar with the system, the fact that returns with as few, simple entries as the appellant's ought to be straightforward for an inexperienced taxpayer to file, and in this case the existence of the difficulties we accept that the taxpayer had in submitting the returns.

Findings on carelessness

39. We find that the appellant was careless in not including his State pension in either the 2009-10 or 2010-11 return. The appellant simply overlooked it on the basis that it was paid into his wife's account, and this was clearly careless. The income was not immaterial and should obviously have been included, as the appellant accepted at the hearing.

40. However, we do not consider that HMRC has established that the appellant was careless in relation to the other errors in those returns. In the case of 2009-10 the discrepancies have no rational explanation other than a software or system related submission error. The appellant included an accurate breakdown of pension income in the additional information box, and we cannot see how a quite different and much lower figure, which also bears no sensible relationship to the tax deducted from pension income, would have been entered by the appellant in box 10. And whilst it should ordinarily be possible to check the entries again before submission, and this might be a reasonable thing to do, there are limits to this. Any such check should be one that ensures that the taxpayer has made the correct entries. It is not reasonable to expect that a taxpayer should also repeatedly check that the system has not randomly altered numbers that the taxpayer entered. Given the continued failures in submission and errors that the appellant was experiencing we also accept that there comes a point

when the level of checking that might reasonably be expected- whether for taxpayer errors or, having spotted problems with the system, for system errors- would reduce. It is also not clear to us that the appellant was in fact able to check all the entries, at least in a straightforward way, before making the eventual successful submissions.

41. It is less clear to what extent the errors in the 2010-11 return were all due to system problems. The errors in respect of the Parasol income might be attributable either to a system error or to the appellant's use of his last payslip rather than a more accurate P60. However, a clear disclosure was made that no P60 was available and that payslip information had been used, and we do not think that this was careless in the circumstances. This is particularly so as the appellant would have no reason to be aware that HMRC's normal processing systems do not pick up details included in the additional information box, and he would also reasonably have assumed that HMRC had P60 information from Parasol. In respect of pension income for 2010-11 we think it more likely than not that there was a system error, bearing in mind that accurate occupational pension income details were included both in box 10 and in a breakdown in the additional information box.

Application of s 29(4) in this case

42. The assessments were made to make good the under assessments resulting from the errors described in (2) and (3) of [13] above. We do not consider that HMRC has established that these errors were caused by careless behaviour on the part of the appellant. In contrast there was careless behaviour in omitting State pension income. This would have allowed HMRC to issue an assessment under s 29(1) to correct the loss of tax caused by that behaviour, namely the absence of tax on that income. It does not permit HMRC to raise an assessment to recover a loss of tax that HMRC has not established was attributable to careless behaviour.

43. This point is not addressed by the Tribunal's power to increase an assessment under s 50(7) TMA. Section 29 goes to the validity of the assessment: *Hankinson* at [27] and [28]. If no assessment is validly raised then there is nothing that can be increased. If a valid assessment is made then s 50(7) is potentially in point, but only in that case.

44. Accordingly, we do not consider that discovery assessments were validly made under s 29 TMA.

45. This conclusion is in our view entirely in line with the policy of s 29. Section 29 in its current form is much more restricted than the version in force before the introduction of self assessment, underlining the finality of self assessment by imposing strict controls on the circumstances in which a discovery assessment can be made: see the explanation given by Moses LJ in *Tower MCashback LLP v HMRC* [2010] STC 809 at [24]. There is no general power to raise assessments under s 29 and, in the case of s 29(4), the power that exists is limited to making good a loss of tax that is brought about by careless behaviour.

ESC A19

46. We should briefly mention Extra Statutory Concession A19, under which HMRC may give up arrears of income tax in certain circumstances if they result from failure to make proper and timely use of information supplied. Whilst we have no jurisdiction

to consider its application (see *Prince and others v HMRC* [2012] UKFTT 157 (TC)) we note that HMRC had formed the view that it did not apply, but that Mrs Oliver assured the Tribunal that it would be reconsidered in the light of anything arising at the hearing. Given our decision this should not be necessary but we mention it for completeness and in case there is an appeal.

Decision

47. On the understanding that HMRC will remit the surcharges for 2008-09 we make no finding in respect of them. We allow the appeals against the discovery assessments for 2009-10 and 2010-11 on the basis that they were not validly made under s 29 TMA.

48. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

SARAH FALK
TRIBUNAL JUDGE

RELEASE DATE: 29 MARCH 2016