TC01416

Appeal number TC/2010/09182

INCOME TAX – Appellant last working as a doctor in 1998 – Appellant claiming trade loss relief in tax years 2006/07, 2007/08 and 2008/09 in respect of legal expenses to challenge decisions of the General Medical Council regarding his registration as a medical practitioner and continuing medical education expenses –Whether Appellant "carried on a trade" in the tax years in question (Income Tax Act 2005 s.64(1)(a)) – no – Discovery assessments issued in respect of tax years 2006/07 and 2007/08 (Taxes Management Act s.29) – Whether there had been a "discovery" given that the Appellant disclosed his circumstances in his tax returns – No – Closure notice issued in respect of the 2008/09 tax return – Whether Appellant had a legitimate expectation that the trade loss relief would be allowed – No – Appeal allowed in part

FIRST-TIER TRIBUNAL

TAX

ADMIRALS LOCUMS & MR TUSHAR BHADRA **Appellant**

- and -

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

TRIBUNAL: DR CHRISTOPHER STAKER (Tribunal Judge)
MRS SUSAN LOUSADA (Tribunal Member)

Sitting in public in Colchester on 31 May 2011

The Appellant in person

Ms Helen Thorn for the Respondents

DECISION

Introduction

1. Mr Tushar Bhadra ("the Appellant") appeals against three decisions of HMRC, all dated 24 August 2010. The first is a closure notice in respect of his 2008/09 income tax return. The other two are discovery assessments under s.29 of the Taxes Management Act 1970 (the "TMA") in relation to the 2006/07 and 2007/08 tax years respectively.

2. The effect of all three decisions is to deny the Appellant's claims for trade loss relief for the years in question. The amount of the trade losses claimed were £2444 in 2006/07, £5566 in 2007/08, and £8785 in 2008/09. In each of those years, the turnover of the trade was returned as nil.

3. The consequence of the claimed trade losses being disallowed is that the Appellant is liable to additional amounts of income tax of £537.68 for 2006/07, £1,378.52 for 2007/08, and £2,356 for 2008/09.

4. The evidence and submissions presented to the Tribunal were detailed, but the facts and issues can be summarised briefly as follows. In 1987, when practising as a medical practitioner, the Appellant established an employment agency for locum doctors called Admirals Locums. However, the Appellant's registration as a medical practitioner was suspended by the General Medical Council ("GMC") in July 1998, and he has not worked as a medical practitioner, and Admirals Locums has not had any turnover, since 1998. His registration as a medical practitioner was subsequently restored in 2000, but he was unable to obtain work. His registration was then erased with effect from 1 September 2006. The Appellant brought various challenges against the decisions of the GMC, which continued through the tax years in question.

5. The Appellant's position is that even if since 1998 he has not worked as a doctor, and Admirals Locum has had no turnover, he has nonetheless been continuously hopeful of working again as a medical practitioner, and of actively operating his locum agency, and has been taking active steps towards that goal by bringing various legal challenges against the GMC. He maintains that he has therefore continued since 1998 to have a trade (albeit a trade with no turnover), and that he was accordingly entitled to claim trade loss relief from that trade against general income. The claimed trade losses are said to consist of legal expenses incurred in seeking to have his registration as a medical practitioner restored, expenses for educational courses that are required for maintenance of his registration as a medical practitioner, and office expenses such as stationary for Admirals Locums. The Appellant also argues that HMRC have at all material times known of his circumstances when previously allowing his claims for trade loss relief, and that he has a legitimate expectation that HMRC will not now suddenly change its position.

6. The HMRC position, in short, is that in the years to which this appeal relates, the Appellant had no trade, and can therefore have had no trade losses.

The hearing

7. The Appellant appeared in person at the hearing. HMRC was represented by Ms Helen Thorn. The Appellant attended and gave evidence, and was also asked questions by the Tribunal. By agreement between the parties, Ms Thorn presented the HMRC case first. The Tribunal heard submissions and arguments from the Appellant and Ms Thorn. The material before the Tribunal included an appellant's document bundle, an appellant's authorities bundle, a further document bundle, a further legislation and authorities bundle, a skeleton argument for HMRC, as well as the notice of appeal and statements of case of each party, and various other documents, including documents that were handed to the Tribunal at the hearing.

The relevant legislation

8. Section 64 of the Income Tax Act 2007 ("ITA") relevantly provides:

> (1) A person may make a claim for trade loss relief against general income if the person—
>
> (a) carries on a trade in a tax year, and
>
> (b) makes a loss in the trade in the tax year ("the loss-making year").
>
> ...
>
> (7) This section applies to professions and vocations as it applies to trades.

9. Section 66 of the ITA provides:

> (1) Trade loss relief against general income for a loss made in a trade in a tax year is not available unless the trade is commercial.
>
> (2) The trade is commercial if it is carried on throughout the basis period for the tax year—
>
> (a) on a commercial basis, and
>
> (b) with a view to the realisation of profits of the trade.
>
> (3) If at any time a trade is carried on so as to afford a reasonable expectation of profit, it is treated as carried on at that time with a view to the realisation of profits.
>
> (4) If the trade forms part of a larger undertaking, references to profits of the trade are to be read as references to profits of the undertaking as a whole.
>
> (5) If there is a change in the basis period in the way in which the trade is carried on, the trade is treated as carried on throughout the

basis period in the way in which it is carried on by the end of the basis period.

(6) The restriction imposed by this section does not apply to a loss made in the exercise of functions conferred by or under an Act.

(7) This section applies to professions and vocations as it applies to trades.

10. Section 34 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOI") relevantly provides:

(1) In calculating the profits of a trade, no deduction is allowed for—

(a) expenses not incurred wholly and exclusively for the purposes of the trade, or

(b) losses not connected with or arising out of the trade.

11. Section 9A of the TMA relevantly provides:

(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry")—

(a) to the person whose return it is ("the taxpayer"),

(b) within the time allowed.

(2) The time allowed is—

(a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered;

...

12. Section 28A of the TMA relevantly provides:

(1) An enquiry under section 9A(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.

In this section "the taxpayer" means the person to whom notice of enquiry was given.

(2) A closure notice must either—

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions.

(3) A closure notice takes effect when it is issued.

...

13. Section 29 of the TMA relevantly provides:

(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 is attributable to fraudulent or negligent conduct on the part of 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.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; and

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (*b*) to (*d*) to the taxpayer includes a reference to a person acting on his behalf.

...

The evidence and arguments of the parties

14. The Appellant's evidence included amongst other matters the following.

15. Prior to the establishment of Admirals Locums in 1987, the then Inland Revenue had taken the position that the Appellant's earnings as a locum doctor were employment income assessable under then Schedule E, and that he did not qualify for relief in respect of his wife's wages for secretarial services, travelling, meals and telephone calls. The Appellant was unsuccessful in challenging that position of the Inland Revenue: *Bhadra v Ellam (Inspector of Taxes)* [1987] STC 239, 60 TC 466.

16. In 1987, the Appellant then founded Admirals Locums, an employment agency for locum doctors. Admirals Locums was contacted by hospitals and GPs requiring the services of locum doctors. He was able to undertake about half of this locum work himself. He found other doctors to undertake the other half of the work. When he sent another doctor, he would pay the other doctor some 70% of what the contracting hospital or GP paid the agency in respect of the services. The remaining 30% covered the Admirals Locums' expenses and profit.

17. In the period to 1998, when Admirals Locums had an active turnover, the Inland Revenue accepted that the Appellant was entitled to trade loss relief in respect of Admirals Locums. The Appellant referred to various exchanges of correspondence that he had with the Inland Revenue in the period 1987-1994, which were in evidence before the Tribunal. The Appellant placed particular reliance on a letter from the Inland Revenue dated 19 January 1994, in which the Inland Revenue sets out "the revised figures for Schedule D losses in respect of Admirals Locums" for the years 1987/87 to 1992/93 inclusive.

18. However, on 22 July 1998, the Appellant ceased to be able to work because the GMC suspended his registration as a medical practitioner. Although he was subsequently restored to the register on 31 January 2000, he was unable to obtain any work. The General Medical Council then erased his registration on 1 September 2006, restored it on 1 November 2006, and then on 18 May 2007 again erased it with retrospective effect to 1 September 2006. The Appellant has undertaken no work as a medical practitioner since 1998, nor has Admirals Locums provided the services of any doctors since 1998.

19. The Appellant's position is that the erasure of his registration by the GMC was unlawful, and he has taken various legal steps to challenge this, albeit so far always unsuccessfully. The Appellant put into evidence copies of all or portions of a number of judicial decisions relating to these unsuccessful challenges.

20. Since July 1994, the Appellant has incurred legal expenses in seeking to have his registration as a medical practitioner restored, and has also incurred expenses for educational courses that are required for maintenance of his registration as a medical practitioner, and office expenses such as stationary for Admirals Locums. He claimed

trade loss relief in respect of these expenses in the many years after 1998. The claimed trade loss relief was allowed by HMRC for all of these years, but HMRC is now trying to claw it back for the three years to which this appeal relates.

21. The Appellant kept the tax authorities fully informed at all material times of what his position was. The Appellant referred to information contained in a letter from him to the Inspector of Taxes dated 31 January 2002, and to information contained in his tax returns for 2001/02, 2003/04, 2004/05, 2005/06, 2007/08 and 2008/09. The Appellant also referred to related correspondence that he had had with the tax authorities.

22. The oral and written submissions of the Appellant included the following.

23. There was throughout a venture for the purpose and in the nature of a trade, as a result of which the Appellant suffered losses. Just because the Appellant was unable to earn does not mean that he was not committed to a venture for pursuing the essential steps to remove the obstruction to his trade, namely the sanctions on his registration. The purpose of the expenses was for the trade. Lack of success is a risk in any business. The losses were wholly and exclusively for the purposes of the trade, as there is no other reason why the Appellant would want to retrieve his registration.

24. The Appellant has always disclosed all material facts to HMRC. He has acted honestly without fraud or negligence. Having allowed his claims in the past, he now has a legitimate expectation based on fairness that HMRC will not seek suddenly to change its view retrospectively in relation to the past, even if it can change its view in relation to the future.

25. HMRC have made no "discovery" for purposes of s.29 TMA as he always kept the tax authorities fully informed of his position.

26. The oral and written submissions of HMRC included the following.

27. The Appellant has not practised medicine since being struck off the medical register in 1998, and therefore there is no trade. As there was no trade, the losses were not wholly and exclusively for purposes of a trade. That the Appellant was not trading in the tax years to which this appeal relates is supported by the fact that no turnover has been reported in his tax returns for the last 10 years. Loss relief has not arisen from activities from a business operating on a commercial basis in accordance with the test in s.66 ITA. Even if the Appellant was trading, the costs were incurred for the enduring benefit of the business and were therefore of a capital nature. As the Appellant has not practised as a doctor since 1998, it was an act of negligence for him to claim the losses in the tax returns to which this appeal relates, for purposes of s.29 TMA. The Appellant as an educated man would not expect to claim expenditure when he could not trade. The onus of proof is on the Appellant, on a balance of probabilities, to show that the amendment to the assessment in the closure notice and the discovery assessments were excessive. The expenditure incurred to retrieve the registration could not be seen to be connected to a commercial trade. The closure notice and discovery assessments were therefore correctly issued.

The Tribunal's views

28. The Tribunal has considered all of the evidence before it as a whole. Omission of any detail in this decision does not mean that it has not been considered.

29. The Tribunal finds it unnecessary to consider the detailed history of the Appellant's registration status as a medical practitioner and his disputes with the GMC, or the merits of that dispute.

30. The Tribunal accepts that the Appellant has taken steps to seek to challenge decisions of the GMC. The material before the Tribunal included copies of proceedings before the GMC Professional Conduct Committee from June 2004 and July 2005. It also included a decision of the Employment Appeal Tribunal of 12 March 2008 in appeal no UKEAT/0523/07/CEA, *Bhadra v General Medical Council and others*, dismissing an appeal by the Appellant. At paragraph 12 of that decision it is stated that:

> The evidentiary material on the Claimant's account includes a series of litigation in which he has been engaged against the GMC which includes four applications to employment tribunals, two applications to the Privy Council, an application to the High Court which was withdrawn, and further judicial review proceedings which I am told are on foot.

31. The Appellant put into evidence a page from the decision of Stanley Burnton LJ of the Court of Appeal in *Bhadra v General Medical Council* [2009] EWCA Civ 317, refusing the Appellant's application for permission to appeal against a decision of the Administrative Court (Blake J). The Appellant also provided a page from the original decision of Blake J. These are presumably the judicial review proceedings referred to in the Employment Appeals Tribunal as at that time still being "on foot". Although the Tribunal was not provided with copies of them, other proceedings referred to in the quoted passage of the Employment Appeal Tribunal decision would appear to include *Bhadra v General Medical Council* [2002] UKPC 55, [2003] 1 WLR 162 (Privy Council) and *Bhadra v General Medical Council* [2005] All ER (D) 15 (Employment Appeal Tribunal).

32. In *Bhadra v General Medical Council* [2009] EWCA Civ 317, Stanley Burnton LJ refused the Appellant's application for permission to appeal against the decision of Blake J to refuse the Appellant's application for permission for judicial review of the GMC's actions on grounds of the Appellant's delay in bringing the proceedings. Stanley Burnton LJ gave the following history of the matter, at paragraphs 2-5 of that decision:

> 2. The case relates to the suspension of Doctor Bhadra from the medical register, originally in 1998, following a finding of serious professional misconduct by what was then the Professional Conduct Committee of the GMC. Twelve months' suspension was imposed. It was reviewed in January 2000 and he was re-registered but subject to conditions. The registration then became subject to regular reviews by what had become the Fitness to Practise Panel. In fact, the conditions

attached to the registration were such that Doctor Bhadra was unable to work as a doctor and to earn his living from his profession. As a result of that, he was not required to pay the annual fee to remain on the register pursuant to a GMC policy to that effect.

3. During the course of the period of his registration he also turned 65, and that was an additional reason why a fee should not be payable. In 2006 Doctor Bhadra's conditional registration was continued for a further twelve months until 15 June 2007. However, unfortunately and for no apparent good reason, on 1 September 2006 a decision was taken by the GMC to remove him from the register for non-payment. That decision should not have been made for reasons which I have already indicated, namely that he had not been required to pay the fee on account of his inability to work and on account of his age.

4. Doctor Bhadra contacted the GMC and brought to their attention the fact that there had been a practice of waiving payment of his registration fee and that he was over 65 and therefore, in any event, entitled to have his annual registration fee waived. On 2 November 2006 the GMC contacted him, indicating that he should not have been removed and he was restored to the register. Doctor Bhadra then alleged that, because there had been a period of two months during which he was not on the registered when he was re-registered on 2 November, he should have been re-registered without conditions. As a result of that, the Fitness to Practise Panel was reconvened on 18 May 2007 to determine whether the conditions should be imposed. It was their decision which gave rise to these proceedings.

5. The Panel took the view that the decision to remove Doctor Bhadra from the register had not been an unlawful error of no validity but had been the result of a conscious decision that had not been quashed and therefore continued to have effect. It decided that in those circumstances the decision to restore Doctor Bhadra to the register on 2 November was unlawful and ineffective. It therefore concluded there was no registration and that it did not have jurisdiction to consider the continued conditions.

33. In refusing permission to appeal, Stanley Burnton LJ said at paragraphs 8-10 as follows:

8. ... In my judgment, although, like the judge, I have sympathy with Doctor Bhadra's situation, having been the subject of incorrect decisions, or certainly arguably incorrect decisions, which he finds himself unable to challenge in a court, I see no basis on which the judge's decision can be challenged.

9. The case is now difficult for Doctor Bhadra because there are legal complexities involved as to the difference between unlawful decisions, void decisions and voidable decisions, and his focus before me has not been on the reasons for the judge's ultimate decision, given reluctantly, that time could not be extended. But, having carefully

> considered the judge's judgment, I, similarly reluctantly, conclude that there are no grounds for interfering with it. Doctor Bhadra's course must be to apply under the regulations for restoration, and one hopes that the application will be sympathetically, but correctly, considered.
>
> 10. There are also allegations concerning the GMC's position, alleging perpetration of a fraud and the like, but there is not basis for those allegations. One feels sympathy for Doctor Bhadra because he had been the victim of decisions which were clearly wrong or at least arguably wrong, but there are prescribed time limits which were not complied with. Were the decision mine from the beginning it may be that the decision would have been different, but it is not mine. I am reviewing the judge's decision and I can see no defect in it. Accordingly, the application must be dismissed.

34. The decision of Stanley Burnton LJ was given on 25 March 2009. It is suggested by the Appellant that the paragraphs 8-10 of his decision indicate that the Appellant had by that date not yet reached the end of the road in terms of possible steps he could take in his efforts to seek to have his registration as a medical practitioner restored.

35. The Tribunal accepts, for the purposes of this appeal, that throughout the tax years to which the present appeal relates at least, the Appellant was still pursuing active steps with a view to having his registration as a medical practitioner restored, and that during this period, his prospects of ultimately achieving that aim could not be considered unrealistic.

36. However, that of itself does not answer the question whether, for purposes of s.64 ITA, the Appellant was engaged in a trade, and the claimed losses were "a loss in the trade".

37. The Tribunal notes that in order to be able to claim trade loss relief under s.64 ITA, it is a requirement that the taxpayer "carries on a trade in a tax year" (s.64(1)(a)). At the time of the tax years to which this appeal relates, the Appellant had not worked as a doctor for some 8-10 years, and Admiral Locums had not provided locum services in that period. While the Appellant may have been hopeful of working again as a doctor in the future, and of Admirals Locums becoming an active locum agency in the future, the Tribunal does not consider that this means that the Appellant can be considered in the meantime for an indefinite period to be continuing to carry on his former trade. It is uncertain whether he will ever realise his aim of having his registration restored. If he does, it may be that he will resume his activities in the future. However, at the time of the tax years in question, the Tribunal considers it clear that he was not carrying on any trade, and that he had not done so for a very considerable period.

38. The Appellant sought to rely on the principle in *Morgan (HMIT) v Tate & Lyle Ltd* [1955] AC 21, in which it was held that expenditure could be for the purposes of a trade where the object of the expenditure was to preserve the assets of the company from seizure and so to enable it to carry on and earn profits. The Tribunal notes that that case was subsequently applied in *McKnight (Inspector of Taxes) v Sheppard*

[1999] STC 699 (to which the Tribunal was not referred by the parties), in which the House of Lords considered that legal expenses incurred by a stockbroker in challenging disciplinary proceedings could on the facts of a particular case be expenditure exclusively for the purposes of a trade. Lord Hoffmann said in that case that "The well-known case of *Morgan* (*Inspector of Taxes*) *v Tate & Lyle Ltd* [1955] AC 21, 35 TC 367 is authority for the proposition that money spent for the purpose of preserving the trade from destruction can properly be treated as wholly and exclusively expended for the purposes of the trade within the meaning of s 130(a) [of the Income and Corporation Taxes Act 1970]". However, in both *Tate & Lyle* and *Sheppard*, the taxpayer was trading in the year in question. In the tax years to which the present appeal relates, the Tribunal considers that the Appellant was not trading. The claimed expenditure was not "for the purpose of preserving the trade from destruction", but would be more correctly characterised as expenditure for the purpose of steps towards the aim of re-establishing a trade that had ceased to exist.

39. In relation to tax years 2006/07 and 2007/08, HMRC has made discovery assessments under s.29 TMA. The Appellant delivered tax returns for those two years, and therefore HMRC is only able to make these discovery assessments if either of the conditions in s.29(4) and (5) of the TMA is satisfied.

40. The condition in s.29(4) is that HMRC's discovery that the Appellant was not entitled to the claimed loss relief was "attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf". The condition in s.29(5) is that HMRC could not have been reasonably aware, on the basis of the information made available to it before the end of the enquiry period into the tax return, that the Appellant was not entitled to the claimed trade loss relief. It is sufficient for either of these conditions to be satisfied. For purposes of the condition in s.29(5), by virtue of s.29(6) and (7), information is available to HMRC if it is contained in the relevant tax return or in tax returns for the previous two years, or in documents accompanying these returns, or in a claim made in respect of the tax year in question, or could reasonably be inferred from such information.

41. Various of the Appellant's tax returns were in evidence before the Tribunal. At item 3.116 of the tax return for the year 2001/02 ("Additional information"), the following was stated by the Appellant:

> My GMC registration was suspended on July 1998. To relieve that I have been making efforts so as to enable my self-employment earning to resume as in the past. For that CME (continuing medical education) & other legal process had to be taken. CME is currently needed for all doctors—often born by their employers. In my case, I have born it—as a self-employed, having no employer.

42. An almost identical statement is contained at item 3.116 of the tax return for the year 2003/04, and a slightly modified formulation was contained at item 3.116 of the tax return for the year 2004/05. At item 3.116 of the tax return for the year 2005/06, the following was stated:

> My GMC registration was suspended since 22 July 1998 most unfairly and deceptively. Without registration I cannot practice. I have been making efforts to retrieve my registration to enable me to earn my self-employment income as in the past before 22 July 1998. For that I have to have educational expenses & also to take legal action which is continuing—for which there are legal expenses in various ways. I bear those expenses—as an expenditure to retrieving my registration with a view to enable me to use [?] for profit by self-employment.

43. The Appellant's tax return for the year 2006/07, the first of the years to which the present appeal relates, was put in evidence only in the form of a printout from the HMRC database. It is unclear from this printout whether the Appellant stated anything similar in this tax return. However, by virtue of s.29(7) TMA, the information given in the two previous tax returns is to be treated as having been given in relation to this tax year also.

44. The Appellant's tax return for the year 2007/08, the second of the years to which the present appeal relates, states at item 101 ("Any other information") that "I refer to my letters of 8.9.2008 & 2.12.2008—containing details of my incomes, losses & reasons of my claims". In evidence was a letter dated 8 September 2008 from the Appellant to HMRC, paragraph 4 of which states "I claim relief for losses in respect of the costs to retrieve my Registration—in my various self-employments, including for Admirals locums". There is also in evidence a letter from the Appellant to HMRC dated 2 December 2008. This letter sets out the Appellant's view of the history of his case. It states at paragraph 10 that:

> The GMC sanctioned my registration on 22.7.98. Without registration I cannot do the GP job, Consultant job or any other kind of Medical Practitioner's Job. I have to and have been trying to retrieve my Registration—which involves substantial expenses, "wholly and exclusively" for purpose of my trade—ie, GP, ADMIRALS LOCUMS, Agency works as Consultant and below.

45. It is further noted that by virtue of s.29(7) TMA, the information given in the 2005/06 tax return is to be treated as having been given in relation to this tax year also.

46. The Tribunal is satisfied that on the information provided, HMRC should at the material time have been aware that the Appellant had not worked as a medical practitioner since 1998, that the reasons for this related to problems with the GMC and his registration as a medical practitioner, and that he was continuing to claim trade loss relief in respect of this purported trade, even though he had not worked since 1998.

47. In order to issue the discovery assessments in respect of these two years, it was necessary for HMRC to "discover" something, within the meaning of s.29(1) TMA.

48. In *Corbally-Stourton v HMRC* [2008] UKSPC SPC00692, [2008] STC (SCD) 907 at [44] it was said that a discovery is something "newly arising, not stale and old". In *Cenlon Finance Ltd v Ellwood* [1962] AC 782 at 794, Viscount Simonds said: "I can

see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged ..." In *Langham v Veltema* [2004] STC 544, Auld LJ said at [5]: "The discovery procedure in s 29 has its origin in earlier tax statutes and may apply where, after normal finality of an assessment, some new fact comes to light or incorrect application of the law ... or where, for any reason, it newly appears that the taxpayer has been undercharged ..."

49. The Tribunal is not persuaded that since the end of the enquiry period into those two tax returns there has been anything "newly arising", or that anything has "newly appeared". The main fact relied upon by HMRC in requesting dismissal of the appeal is that the Appellant had no trade in the years in question. However, this is something that the Appellant made clear in information provided to HMRC in accordance with s.29 TMA.

50. The Tribunal therefore finds that there was no "discovery" by HMRC, within the meaning of s.29(1) TMA, in relation to 2006/07 and 2007/08 tax years. That being the case, it is unnecessary to consider whether the conditions in s.29(5) or (6) were satisfied. However, for completeness, for similar reasons for finding that there was no "discovery", the Tribunal finds that the relevant officer could have been reasonably expected, on the basis of the information made available at the relevant time, to be aware of the situation. It follows that there was also no fraud or negligence on the part of the Appellant.

51. The appeal in relation to the discovery assessments for the 2006/07 and 2007/08 tax years is accordingly allowed.

52. The situation in relation to the year 2008/09, the third of the years to which the present appeal relates, is different, in that the challenged decision is not a discovery assessment under s.29 TMA, but a closure notice under s.28A TMA. A closure notice, unlike a discovery assessment, is not subject to the limitations in s.29(4)-(6) TMA. To issue a closure notice, the relevant officer does not need to "discover" anything new. Section 28A gives a general power to the relevant officer to "make the amendments of the return required to give effect to his conclusions". The fact that a taxpayer in a tax return gives full disclosure of his or her circumstances when claiming trade loss relief cannot prevent the relevant officer from concluding that the taxpayer is not entitled to that trade loss relief, and from issuing a closure notice accordingly.

53. However, the Appellant invokes the principle of legitimate expectation, arguing that it would be unfair for HMRC to deny his claims for trade loss relief in circumstances where he has always been open about his situation, where HMRC has nonetheless allowed his claims for many years, and where he has accordingly continued to incur the expenses in question on the understanding that trade loss relief would be claimable.

54. Although there are some recent cases to the effect that the Tribunal has jurisdiction to deal with claims based on the doctrine of legitimate expectation (*Noor*

v Revenue & Customs [2011] UKFTT 349 (TC) at [21]; *Hanover Company Services Ltd v Revenue & Customs* [2010] UKFTT 256 (TC) at [42]), the existence and scope of that jurisdiction cannot be regarded as settled law (see for instance *Reed Employment Plc & Ors v Revenue & Customs (Rev 1)* [2010] UKFTT 596 (TC) at [8]-[9]; *Matthews & Anor v Revenue & Customs* [2011] UKFTT 24 (TC) at [18]; *Van-Lauren G Welds Ltd v Revenue & Customs* [2011] UKFTT 146 (TC) at [33]). In the circumstances, it is unfortunate that the Tribunal did not have the benefit of more detailed argument on the issue.

55. In relation to the application of the principle of legitimate expectation in the context of taxation, the Tribunal has had regard to *R (Huntingwood Trading Ltd) v HM Revenue & Customs* [2009] EWHC 290 (Admin) at [19]-[26], where some of the relevant case law is identified. One of the cases there quoted is *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agencies Ltd* [1989] STC 873, in which Bingham LJ said at 892-893:

> I am, however, of opinion that in assessing the meaning, weight and effect reasonably to be given to statements of the Revenue the factual context, including the position of the Revenue itself, is all important. Every ordinarily sophisticated taxpayer knows that the Revenue is a tax-collecting agency, not a tax-imposing authority. The taxpayer's only legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law (see *R v A-G, ex p Imperial Chemical Industries plc* (1986) 60 TC 1 at 64 per Lord Oliver). Such taxpayers would appreciate, if they could not so pithily express, the truth of Walton J's aphorism 'One should be taxed by law, and not be untaxed by concession' (see *Vestey* [1977] STC 414 at 439, [1979] 1 Ch 177 at 197). No doubt a statement formally published by the Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them. But where the approach to the Revenue is of a less formal nature a more detailed inquiry is, in my view, necessary. If it is to be successfully said that as a result of such an approach the Revenue has agreed to forego, or has represented that it will forego, tax which might arguably be payable on a proper construction of the relevant legislation it would, in my judgment, be ordinarily necessary for the taxpayer to show that certain conditions had been fulfilled. I say 'ordinarily' to allow for the exceptional case where different rules might be appropriate, but the necessity in my view exists here. First, it is necessary that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the Revenue's ruling, unless it is the same as an earlier transaction on which a ruling has already been given. It means that he must indicate to the Revenue the ruling sought. It is one thing to ask an official of the Revenue whether he shares the taxpayer's view of a legislative provision, quite another to ask whether the Revenue will forego any claim to tax on any other basis. It means that the taxpayer must make plain that a fully considered ruling is sought. It means, I think, that the taxpayer should indicate the use he intends to make of any ruling given. This is not because the Revenue would wish to favour one class of taxpayers at the expense of another

> but because knowledge that a ruling is to be publicised in a large and important market could affect the person by whom and the level at which a problem is considered and, indeed, whether it is appropriate to give a ruling at all. Secondly, it is necessary that the ruling or statement relied on should be clear, unambiguous and devoid of relevant qualification.
>
> In so stating these requirements I do not, I hope, diminish or emasculate the valuable developing doctrine of legitimate expectation. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen. The Revenue's discretion, while it exists, is limited. Fairness requires that its exercise should be on a basis of full disclosure. Counsel for the applicants accepted that it would not be reasonable for a representee to rely on an unclear or equivocal representation. Nor, I think, on facts such as the present, would it be fair to hold the Revenue bound by anything less than a clear, unambiguous and unqualified representation.

56. In the present case, it is true that the Appellant had for several years after he ceased to work nonetheless continued to claim trade loss relief, and that he had disclosed his circumstances to HMRC, and that HMRC had not disallowed his claims. However, in the Tribunal's view, the fact that such claims had been made by the Appellant in the past, and had not been disallowed by HMRC, falls well short of a "clear, unambiguous and unqualified representation" by HMRC that the Appellant was entitled to continue to claim that trade loss relief years after he last worked in 1998, much less a "clear, unambiguous and unqualified representation" that he would continue to be entitled to claim trade loss relief for any particular period of time in the future.

57. In the Appellant's 2 December 2008 letter referred to above, which related to his tax return for 2007/08, the Appellant stated at paragraph 2 that "I am writing this for some difficulty I have encountered from the tax office in Wales in respect of my completed Tax Return Form for the year 6.5.2007-5.4.2008", and at paragraph 12 that "The technical adviser in Wales told me that it is not a necessary expense". An almost identical letter dated 1 December 2009 was sent by the Appellant to HMRC in respect of his tax return for 2008/09, making similar comments in paragraphs 2 and 14. This latter letter indicates in the first paragraph that the Appellant's concern was that his claim for trade loss relief in his 2008/09 return had not been allowed by HMRC in the assessment issued on that return.

58. Apparently in response to that letter, HMRC sent a letter to the Appellant dated 21 January 2010, stating:

> Thank you for your letter of 1 December 2009. ...
>
> I enclose copies of your 2008-2009 tax return and accompanying charts and letters as requested.
>
> You will see from the copy return that you did not complete box 32 of the supplementary self-employment page asking for any losses to be offset against other income from the year. This is why no losses have appeared on the tax calculation. I have treated your recent letter as an amendment to your return and entered the losses of £8785.97 in this box an amended tax calculation and payable order will follow under separate cover.

59. This letter clearly does not amount to a clear, unambiguous and unqualified representation that the Appellant was entitled to claim trade loss relief in the year in question. It merely indicates that his return was not treated as having claimed trade loss relief because the Appellant had not ticked the correct box, and that that the return would now be treated as claiming trade loss relief. The letter expresses no view on the merits of that claim to trade loss relief.

60. The extensive correspondence between the Appellant and HMRC that was put in evidence is almost entirely from the period prior to 1998 (when the Appellant last worked) or from the period commencing from the opening of the enquiry into his 2008/09 tax return in 2010. The Tribunal finds nothing in the evidence to suggest that after the Appellant last worked in 1998, HMRC made a clear, unambiguous and unqualified representation to him that he would be entitled to continue to claim the trade loss relief in future, and more particularly, in the tax years to which this appeal relates.

61. In the circumstances, it is unnecessary for the Tribunal to consider the extent of its jurisdiction in relation to issues of legitimate expectation. Even if the Tribunal could consider the Appellant's ground of appeal based on legitimate expectation, it would find that the ground of appeal fails on its merits.

62. The appeal in relation to the closure notice for the 2008/09 tax year is accordingly dismissed.

Conclusion

63. For the reasons given above, the Tribunal:

(1) allows the appeal in relation to the discovery assessments for the 2006/07 and 2007/08 tax years;

(2) dismisses the appeal in relation to the closure notice for the 2008/09 tax year.

64. 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.

Christopher Staker

TRIBUNAL JUDGE
RELEASE DATE: 26 AUGUST 2011