[2016] UKFTT 107 (TC)

TC04898

Appeal number: TC/2015/00099

INCOME TAX – whether appellant carrying on a single trade – discovery assessment – penalty – whether any inaccuracy deliberate – HMRC permitted to amend Statement of Case – decision on a preliminary issue

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANDREW ADELEKUN **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
JOHN AGBOOLA

Sitting in public at The Royal Courts of Justice, Strand, London on 5 January 2016 and having considered supplemental submissions from the Appellant dated 7 and 15 January 2016 and from the Respondents dated 3 February 2016

The Appellant in person

Karen Powell, Officer of HM Revenue & Customs, for the Respondents

DECISION

Introduction

1. The appellant is appealing against a penalty, assessments and closure notices relating to income tax and national insurance contributions summarised in the following table.

Tax year	Date of assessment	Type of assessment	Amount
2009-10	27 March 2014	Discovery assessment	£31,502.25
2010-11	27 March 2014	Closure notice	£31,323.90
2011-12	27 March 2014	Discovery assessment	£18,467.50
2012-13	11 November 2014	Closure notice	£15,769.24
2012-13	11 December 2014	Penalty	£6,899.04

2. All of the amounts set out in this table arise because HMRC consider that the appellant could not carry forward losses arising in consequence of capital allowances claimed on an "oil water separator" ("OWS") from profits that he made in subsequent tax years in his business of providing project advisory services. The essence of HMRC's argument is that the business of providing project advisory services is a different trade from that in which the losses on the OWS were incurred. The appellant argues that he is carrying on one single trade with the result that his entitlement to carry forward losses is not restricted.

Evidence and procedural matters

3. This appeal involves tax and penalties totalling more than £100,000. The central question at issue is whether the appellant carries on one single trade, or two separate trades. Determining that question therefore necessitates evidence as to the precise nature of the business that the appellant carries on and much of that would be contained in the appellant's own witness evidence.

4. While the Tribunal's directions relating to this appeal made provision for the exchange of documentary evidence in the form of lists of documents, they made no provision for witness statements to be exchanged in advance. Rather, they envisaged that witness evidence would be given orally at the hearing. We started the hearing by asking the parties whether, given the large sum of money involved, they were happy to proceed on that basis, or whether instead the hearing should be adjourned for witness statements to be prepared and exchanged. We set out the following concerns that we had with proceeding without witness statements:

(1) From the appellant's perspective, the hearing was likely to be his sole opportunity to give witness evidence. If he had not thought carefully about what he wanted to say in advance, there was the risk that he might miss out something highly relevant to his case. If the appellant prepared a witness statement, that risk would be reduced as the act of preparing it would involve him thinking in detail about his evidence.

(2) HMRC might be in the position of hearing evidence for the first time at the hearing. They would only have a limited period of time during the hearing to consider what questions they wished to ask in cross-examination or what submissions they wished to make on that evidence. Therefore, HMRC too, were running the risk of leaving out something relevant.

(3) Only half a day had been allocated to the appeal. If we could not deal with it in that time, we would all need to come back at a later date which would result in the parties (and the Tribunal) having to suffer all of the disadvantages arising from the absence of witness statements, without obtaining the advantage of a speedy resolution of the appeal.

5. The appellant said that he was well prepared for the hearing, was confident it could be dealt with in half a day and did not want it delayed any further. Officer Powell agreed that the provision of a witness statement would have made it easier for her to conduct the appeal but accepted that, if HMRC felt strongly about this point, they could have applied to the Tribunal for a direction that witness statements be prepared. We therefore decided to proceed with the hearing and not adjourn it.

6. The appellant himself gave oral evidence and Officer Powell cross-examined him. We have accepted his evidence although, on the "single trade" issue we have reached a different conclusion from him on the effect of that evidence. We also had evidence in the form of a bundle of documents that HMRC prepared. HMRC did not call any witness evidence.

7. During the course of her argument, Officer Powell made submissions to the effect that the appellant had underdeclared income of £10,000 for the 2010-11 tax year and also that he had miscalculated the amount of losses available for carry forward against his profits for tax years from, and including, 2010-11. Those points were not set out in Officer Powell's Statement of Case. We have exercised our discretion to permit HMRC to amend their Statement of Case for the following reasons:

(1) Section 50(7) of the Taxes Management Act 1970 provides that, if the Tribunal is satisfied that a taxpayer is undercharged by any assessment other than a self-assessment, the Tribunal must increase that assessment. Since s50(7) imposes a mandatory requirement and Officer Powell had put forward a good prima facie case that the appellant had made the errors she referred to, we considered that the appellant should be required to answer that case.

(2) If we refused HMRC permission to amend their Statement of Case, HMRC would be prevented altogether from making the arguments Officer

Powell wished to make. However, by giving the appellant time in which to respond to these arguments, we could reduce the prejudice to the appellant in being confronted with new points. In addition, if HMRC's failure to advance their new arguments before the date of the hearing itself was "unreasonable", any prejudice that the appellant suffered in having to deal with new points at a late stage in the proceedings could be potentially dealt with in an award of costs under Rule 10 of the Tribunal Rules.

8. However, we considered that it was not fair to require the appellant to deal with these new points during the hearing. We therefore said that our written decision would set out our conclusions, as a preliminary issue, on those matters that were raised in Officer Powell's Statement of Case. We will make separate directions to enable these other issues to be determined.

9. Officer Powell suggested to the appellant in cross-examination that the OWS did not exist. That was effectively an allegation of fraud since the appellant has been claiming capital allowances on the OWS. HMRC's pleaded Statement of Case contains no allegation of fraud against the appellant and we did not allow Officer Powell to make that allegation for the first time during the hearing. We have therefore approached our decision on the basis that the OWS does exist and we need to decide whether losses arising in consequence of capital allowances on the OWS can be carried forward and set off against the appellant's other business profits.

10. Finally, following conclusion of the hearing, the appellant sent two sets of further written submissions to the Tribunal. HMRC objected to the Tribunal considering these submissions since they argued that the appellant had adequate opportunity to present his case during the hearing. However, in case the Tribunal decided to hear the appellant's submissions, HMRC made their own submissions in response. Since the appellant was representing himself, we have given him some latitude in matters of procedure and have decided to consider the written submissions that both he and HMRC made following the hearing.

Facts

11. We found the facts set out at [11] to [22] below.

12. The appellant carries on business as a sole trader of providing project and business advisory services. That business involves him meeting with entrepreneurs and initiators of projects and helping them to secure debt or equity investments or to enter into partnership arrangements. It also involves him carrying on the activities of a "project advisor" which he describes as "the initiation, structuring, development and management of projects". He deals with senior people including the chief executive officers of his clients. He provides his services to a range of industries, including the transport, oil, gas, construction and education sectors.

13. The appellant is based in the UK. His clients are based around the world and often need expertise "on the ground" in countries outside the UK. The appellant has a network of contacts around the world that he is able to use to provide advice to his clients and that network of contacts, located in a variety of countries, is a key part of

the appellant's business offering. The appellant does not personally provide all of the services that his clients require: he draws extensively on his network of contacts who will often provide services directly to his clients.

14. The appellant's clients occasionally need help with administrative matters in the UK. While his business is not that of providing administrative support, he considers that it is important to be obliging to his international clients and therefore occasionally helps them out with administrative matters, such as helping them to find suitable "buy to let" properties when they are considering making investments in the UK.

15. One of the appellant's key clients is Lubbe Construction (Pty) Ltd ("Lubbe Construction"), a South African company that undertakes infrastructure projects and builds social housing in South Africa. The appellant did some work for Lubbe Construction for a period without any written terms and conditions of their agreement being in place. In December 2006, they formalised their arrangement and the appellant and Lubbe Construction entered into an agreement under which the appellant would provide Lubbe Construction with "development and management of Lubbe Projects" from 2 January 2007 to 31 December 2011. Lubbe Construction agreed to pay the appellant £175,000 per annum for those services. The appellant makes most of his business revenue from Lubbe Construction. Figures that he provided, which were not challenged and which we have accepted, show that in all years between 2007 and 2012, the appellant made in excess of 85% of his revenue from Lubbe Construction, except in 2010 when the figure was 70%.

16. The managing director, and main shareholder, of Lubbe Construction is Mr Samuel Lubbe, a South African citizen. Through his work with Lubbe Construction, the appellant has formed a strong business relationship with Mr Lubbe and they have also been personal friends since 1999.

17. In 2003, the appellant approached Mr Lubbe with a proposal for the purchase of the OWS, which is an item of heavy machinery that can be used to clear blocked pipes in oil extraction machinery and also to separate oil from water (which reduces the cost of oil spillages in offshore oil extraction projects). The OWS cost USD 895,000 to buy. Mr Lubbe agreed to lend 10% of the purchase price to the appellant. The appellant funded the remainder of the purchase price by borrowing from a bank in Nigeria and secured the loan on his late father's estate.

18. There was no partnership between the appellant and Mr Lubbe in relation to the exploitation of the OWS. Rather, the arrangement was that the appellant would repay the principal and interest on the loan by providing consultancy services to Lubbe Construction without charge (or, perhaps more accurately, by applying the amount of consultancy fees due to the appellant towards satisfaction of his outstanding obligations under the loan). It was not explained how this arrangement dealt with the fact that Mr Lubbe had advanced the loan, but Lubbe Construction had the obligation to pay consultancy fees, but nothing material turns on this point. This arrangement was not implemented immediately as Mr Lubbe gave the appellant some "breathing

space" but, from about 2006, the appellant started repaying the loan in this way[1]. The loan has now been repaid in full.

19. The appellant does not himself have any qualifications relevant to, or experience in, the oil industry. He makes the OWS available to oil companies carrying on activities in Nigeria. The OWS needs skilled people to operate it. Sometimes the appellant makes the OWS available together with the personnel necessary to operate it (and draws on his network of contacts in Nigeria to provide those personnel). Sometimes he simply leases the OWS alone in which case the lessee needs to find its own personnel to operate it. The appellant markets his activity of providing the OWS as "Hamilton Enterprise Developments". He uses different branding to describe his consultancy services and other business activities.

20. We were shown an example of a lease agreement dated 27 February 2012 under which the OWS was made available to a lessee company incorporated in Nigeria. That lease agreement was governed by Nigerian law and provided that the appellant would lease an oil water separator, generator and triplex pump to the lessee for a period of one year in return for payment of £7,500 per month. That agreement made no mention of any other services (such as consultancy services) to be provided: it dealt only with the lease of equipment and matters relating thereto. We were also shown an invoice made out to the same lessee company recording that the OWS had been provided and setting out the appellant's charges. That invoice made no mention of consultancy or project management services. We accepted the appellant's evidence (which was not challenged in cross-examination) that he lost a large amount of paperwork in a fire in 2012 and that this is the reason why more invoices relating to the OWS were not provided.

21. The appellant finds customers wishing to use the OWS from among clients who use him for consultancy advice. Lubbe Construction, the principal client to whom the appellant provides consultancy services, does not use the OWS as Lubbe Construction does not carry on an oil extraction business and so has no use for the OWS.

22. The appellant showed us a breakdown of sales that he made in his financial years that ended on 31 December 2012 and on 31 December 2013. That breakdown showed the customers to whom the appellant supplied services in those years, a description of the type of service provided to that customer and the revenue charged to that customer. The appellant used the description "Business & Project Advisory" or "Project Advisory" to describe the services provided to all customers in these years. However, for three customers he described his services as "Business & Project Advisory including using the OWS etc".

23. The appellant has claimed capital allowances under the Capital Allowances Act 2001 on the OWS in his tax returns for 2004-05 to 2006-07. Since the capital allowances claimed were in excess of the appellant's taxable income for those tax

[1] This statement was not challenged in cross-examination and we have, accordingly accepted it. However, we note that the written consultancy agreement entered into in December 2006 referred to at [15] makes no mention of this arrangement.

years, the appellant claimed to make a loss for income tax purposes in those tax years which was available to be carried forward against subsequent years' profits.

24. The appellant has been given a single Unique Taxpayer Reference ("UTR") by HMRC that he uses when making both direct and indirect tax returns. HMRC have not issued him with a separate UTR relating to the OWS business.

Statutory provisions

Section 83 of the Income Tax Act 2007 ("ITA 2007")

25. Section 83 of ITA 2007 permits losses incurred in a trade in a tax year to be carried forward and set against the profits of subsequent tax years. However, s83(3) of ITA 2007 provides:

> But a deduction for that purpose is to be made only from profits of the trade.

26. "The trade" referred to is that set out in s83(1) of ITA 2007 being the trade in which the loss was made. Therefore, when s83(1) and s83(3) are read together, the result is that losses incurred in a trade can be carried forward only against profits of the same trade.

Provisions relating to "discovery assessments"

27. Section 29 of the Taxes Management Act 1970 ("TMA 1970") provides, so far as relevant, as follows:

> **29 Assessment where loss of tax discovered**
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment--
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, 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) 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.

28. Section 34 of TMA 1970 sets out the usual time limit that applies to income tax assessments. With effect from 1 April 2010, subject to transitional provisions, an assessment such as a discovery assessment must be made no later than four years after the end of the year of assessment to which it relates. Both discovery assessments at issue in this appeal were made within this time limit.

Provisions relating to penalties

29. Schedule 24 of the Finance Act 2007 ("FA 2007") sets out the penalty regime applicable to this appeal. Paragraph 1 of Schedule 24 of FA 2007 provides for a penalty to be payable if, inter alia, an income tax return contains an "inaccuracy" and the "inaccuracy" is careless or deliberate on the taxpayer's part.

30. Paragraph 3(1) of Schedule 24 of FA 2007 provides as follows:

> **Degrees of culpability**
>
> 3—
>
> (1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—
>
> (a) "careless" if the inaccuracy is due to failure by P to take reasonable care,
>
> (b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
>
> (c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).
>
> (2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P—
>
> (a) discovered the inaccuracy at some later time, and
>
> (b) did not take reasonable steps to inform HMRC.

Case law on the question of whether a taxpayer is carrying on one trade or two

31. The question of whether the appellant is carrying on one trade or two is one of fact. That is made clear in *Scales v George Thompson & Company Limited* 13 TC 83 where Rowlatt J said, of a company that carried on the business of underwriting and operating a fleet of ships:

> I think this is a plain case. I am bound to say I do not think there is any question of law raised here and, whether question of law or question of fact, I certainly should not say the Commissioners were wrong. This company carried on the business of underwriting. It also had a fleet of steamers. I cannot conceive two businesses that could be more easily separated than those two. They both have something to do with ships; that is all that can be said about them. One does not depend upon the other; they are not interlaced; they do not dovetail into each other, except that the people who are in them know about ships; but the actual conduct of the business shows no dovetailing of the one into the other at all. They might stop the underwriting; it does not affect the ships. They might stop the ships and it does not affect the underwriting. They might carry on underwriting in a country where there were no ships, except that it would not be commercially convenient; but the two things have nothing whatever to do with one another.

> It is said that as a matter of law the Court must hold that they are one business, for these reasons, that the two businesses were bought together from a firm who had carried on both businesses; that the deposit at Lloyd's was bought by the same company that bought the ships and supplied the working capital to run the ships; that the company is one company. Of course it is, but the fact that the company is one company and declares one dividend and so on cannot affect this case. The company can carry on two businesses, although it may, for the purposes of convenience, if it wishes, amalgamate the proceeds before paying the shareholders.

32. That is not a conclusion of law, so Rowlatt J was not setting out a legal test that needs to be followed in considering questions of this kind. However, we have found his approach to the determination of the facts helpful and note that, in *HMRC Commissioners v. Brander (as executor of the Will of the late fourth Earl of Balfour)* 80 TC 163, the Upper Tribunal considered whether two business activities were "dovetailed" as part of their examination of whether the deceased had been carrying on a single business enterprise at the relevant times.

33. Officer Powell also referred us to two other cases *C Connelly & Co v Wilbey (HM Inspector of Taxes)* [1992] BTC 538 and *Cannon Industries Ltd v Edwards (HM Inspector of Taxes)* 42 TC 625 which also made it clear that the question of whether one trade or two is conducted is a question of fact.

Discussion

The single trade issue

34. The question of whether the appellant is carrying on one trade or two is a question of fact that we have to determine in the light of the evidence made available to the Tribunal.

35. We accept that the appellant pursues his consultancy activities, and his activities involving the OWS, for a commercial purpose. We also accept the appellant's evidence that a businessman in his position needs to be flexible and accommodating to his clients by helping them out with administrative tasks that are not part of his core business activity. We therefore accept that, from the appellant's perspective, all of his commercial activities amount to a business activity as he is seeking to make money by doing them. Accordingly, we can understand why the appellant considers that he has a single business which consists of making money in a variety of different ways. However, the question that we have to decide is not whether the appellant pursues the various aspects of his business with the common aim of making money but rather whether those different aspects of his business are, in fact, separate trades. As the *Scales* decision makes clear, it is possible for a single person to be carrying on more than one trade. For similar reasons, the fact that HMRC allocate the appellant a single UTR does not dispose of the issue. The UTR is allocated to enable HMRC to identify the appellant for all tax purposes. It does not determine whether he is carrying on one trade or two.

36. The provision of plant and machinery under a lease is conceptually a different kind of business activity from the provision of consultancy services. It gives rise to risks (for example the risk that the machinery breaks down or injures someone) which are not present in the activity of providing consultancy services. Hiring plant and machinery would ordinarily be regarded as a "trade", whereas providing consulting services would ordinarily be regarded as a "profession". A person hiring the OWS would be interested in the OWS performing a particular mechanical task (though that person may need to engage skilled operators to enable that mechanical task to be performed). By contrast, a person obtaining consulting services is paying for the professional skill and judgement of the person providing those services. While those differences do not themselves answer the question, they do suggest that a high degree of linkage would be needed between the OWS activities and the consulting activities before they could be regarded as being part of the same single trade.

37. During the hearing, we invited the appellant to explain what exactly were the links between his OWS activities and his consultancy activities. His answer was to the effect that, he was able to find people to operate the machine to serve the purpose which his clients wanted and that, if he was able to lease the machine to a particular client, that made him money. That answer did not satisfy us of any particular link between the OWS activities and the consulting activities other than the appellant's wish to make money.

38. We considered carefully the appellant's evidence to the effect that clients who used the OWS also tended to use him for consulting activities. However, we did not consider that demonstrated that the appellant was carrying on a single trade: it was equally consistent with the conclusion that the appellant was carrying on two separate trades which involved a similar customer base. We also noted that the major customer of the appellant's consulting activities, Lubbe Construction, makes no use of the OWS at all.

39. If we had evidence that the appellant's project management services involved him in advising offshore oil extraction companies on how best to manage their projects and advising that use of an OWS would enable them to increase their yield or maintain the condition of their equipment, and that, having given advice like this, the appellant would then offer to make the OWS available, we would have regarded that as evidence of "dovetailing". However, the appellant neither gave evidence to this effect, nor gave any detail as to how the OWS activities fitted with the consulting activities. The breakdown referred to at [22] shows only that the appellant prepared a document that describes the activity of providing the OWS as an example of "Business and Project Advisory" or "Project Advisory" services. It does not, however, explain what the links are between the appellant's consultancy activities and the provision of the OWS.

40. Moreover, there was evidence that suggested there was little dovetailing between the appellant's activities of providing the OWS and his consultancy activities. For example, neither the lease agreements nor the invoices referred to at [20] make any mention of consultancy activities being provided in connection with, or together with, the OWS. We accept that the appellant has lost documentation in a fire. However, he

still has the burden of proving his case. The Tribunal's response to the appellant's misfortune should not be to infer that the lost paperwork would have demonstrated that the OWS was provided as part of a "package" that included the provision of consultancy services particularly when such evidence as we have does not suggest this.

41. Finally, we have noted that we invited the appellant to explain the links between the OWS activities and the consulting activities. Officer Powell said in her submissions that HMRC had themselves sought, without success, to understand what if any links there were. The appellant struck us an intelligent man who dealt admirably with the task of presenting his case as a litigant in person. He cannot fail to have appreciated the significance of the questions that he was asked in this regard. The fact that he did not put forward any detailed explanation of any links between the OWS and the consulting activities, other than their common purpose of making money, has led us to conclude that there are not any significant links.

42. For all of those reasons, we do not consider that the appellant was carrying on a trade such that losses arising on his OWS activities could be set off against profits from his consulting activities.

43. In supplemental written submissions, the appellant argued that, were the Tribunal to decide that he was carrying on two separate trades, we would be making a decision that places small and medium sized enterprises ("SMEs") such as his at a disadvantage compared with multinational corporate groups. The Tribunal's duty is to apply the law. If the law did disadvantage SMEs in comparison with other businesses, that would be a matter for Parliament to correct if it chose to. Therefore, whether or not there is a difference between the treatment of SMEs and multinational groups is not relevant to our decision. In any event, we do not consider there is any such difference. Corporation tax principles prevent a company carrying forward a loss from one trade against profits of another in just the same way as income tax principles do. In addition, one company in a group cannot surrender a carried forward loss by way of group relief. Therefore, even if a corporate group chose to carry on different businesses in separate companies, it could not use group relief rules to achieve the result that the appellant wants to achieve.

44. Finally, the appellant suggested that HMRC were taking a hard line on the "single trade" issue because they have lingering suspicions about his business dating back to a decision they made to refuse to register him for VAT purposes, which led to the appellant making an appeal to the Tribunal. We did not consider that this argument could affect the outcome of this appeal, not least since we have concluded that HMRC were right to determine that the appellant did indeed carry on two separate trades.

Discovery assessment for 2009-10

45. HMRC have the burden of proving that the conditions necessary to make the discovery assessments were satisfied.

46. For the tax year 2009-10, HMRC relied on the requirements of s29(5) being satisfied. The appellant submitted his tax return for that tax year on 18 April 2010. By virtue of s9A(2) of TMA 1970, HMRC had until 18 April 2011 to open an enquiry into that tax return and it was common ground that they did not do so. Therefore, in order to consider whether the requirements of s29(5) are met in relation to the 2009-10 tax year, we need to consider whether, by 18 April 2011, a hypothetical officer of HMRC receiving information of the kind specified in s29(6) of TMA 1970 and being reasonably competent to deal with that information, could reasonably have been expected to be aware that the appellant was making a claim to carry forward losses incurred in one trade against profits of another.

47. The only document we were shown that falls within the categories set out in s29(6) of TMA 1970 was the appellant's tax return for 2009-10 itself. The appellant did not suggest that there was any other relevant documentation submitted to HMRC on or prior to 18 April 2011 that dealt with the claim to carry forward losses associated with the OWS trade. Having reviewed the appellant's tax return for 2009-10, we cannot see anything that would have alerted a reasonable HMRC officer that the profits against which the appellant was seeking to set off losses arose in a different trade from that in which the losses were incurred.

48. The next question is whether an officer of HMRC made a "discovery" falling within s29(1) of TMA 1970. In *Commissioners for Her Majesty's Revenue & Customs v Charlton and others* [2012] UKUT 770 (TCC), the Upper Tribunal considered what could amount to a "discovery" for the purposes of s29 TMA 1970. Their conclusion, set out at [37] was:

> All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment

49. Applying that test, we consider that an officer of HMRC did make such a "discovery". We were shown a letter dated 5 February 2013 written by an officer of HMRC to the appellant. That letter included the following sentence:

> At our meeting of 6 November 2012 you indicated that you acquired and established an oil/water separator in Nigeria in 2004 at a cost of £322,000.

The letter went on to ask a series of questions about the OWS.

50. The letter referred to above suggests that, prior to 6 November 2012, HMRC were not aware of the existence of the OWS. HMRC officers asked a number of questions about the appellant's business activities, including the OWS. By 27 March 2014, they were of the view that losses associated with the OWS could not be set off against the appellant's profits from his consultancy activities. That was a "discovery" within s29(1) of TMA 1970.

51. Therefore, the conditions necessary to make a discovery assessment for 2009-10 were satisfied. Since this discovery assessment was made on 27 March 2014, less than 4 years after the end of the tax year 2009-10, it was made within the applicable time limit set out in s34 of TMA 1970.

The discovery assessment for 2011-12

52. The position with the discovery assessment for 2011-12 is different. For that tax year, HMRC are relying, under s29(4) TMA 1970, on the appellant's alleged "carelessness" in failing to calculate his carried forward losses correctly. Officer Powell did not explain why HMRC wished to rely on s29(4) rather than s29(5) in relation to the discovery assessment for 2011-12. It may be this is because HMRC had opened an enquiry (and issued a closure notice) for the 2010-11 tax year. However, before we can determine whether the appellant was "careless" in failing to calculate his losses correctly, we need to determine whether those losses were indeed calculated incorrectly. Therefore, we will make our decision on the validity or otherwise of the 2011-12 discovery assessment when we deal with the additional issues summarised at [7].

The penalty for 2012-13

53. Officer Powell defended the penalty for 2012-13 on two grounds:

> (1) The appellant continued to claim to set losses associated with the OWS off against his consulting profits in this tax year even though, at the time he prepared his tax return for that year, he was aware that HMRC were disputing that the appellant had a single trade. He did not mention the existence of the dispute in his 2012-13 tax return or accompanying documents and did not amend his return within applicable time limits so as to revoke the claim that he had made to carry forward losses.
>
> (2) In any event, because of the errors in the calculation of losses that Officer Powell alleged, as referred to at [7], by 2012-13, the appellant had no losses available for carry forward and the appellant was therefore deliberately claiming relief for losses which, at that point, did not exist.

54. It is clear from our conclusion at [42] that there was an inaccuracy in the appellant's return for 2012-13 as losses from his OWS activities could not be set off against profits in the manner claimed.

55. We consider that there is a fundamental flaw with HMRC's argument set out at [53(1)]. HMRC only made their first assessment,, and issued their first closure notice, relating to the inability to carry forward losses on 27 March 2014 which was after 31 January 2014, the date on which the appellant submitted his tax return for 2012-13. Therefore, when the appellant submitted his tax return for 2012-13, while he would have known in general terms that HMRC were querying his ability to carry losses forward, he would not have known that they were sufficiently certain of their position to issue an assessment or closure notice. Officer Powell suggested that, once the appellant received the discovery assessment and closure notice on 27 March 2014, he should have amended his tax return for 2012-13. However, that argument does not support the imposition of a penalty based on a "deliberate" inaccuracy. On the contrary, unless HMRC can establish that the appellant deliberately made an error in his tax return when he submitted it on 31 January 2014, paragraph 3(2) of Schedule 24 of FA 2007 makes it clear that failure to amend the return could at most support a penalty based on a "careless" inaccuracy.

56. We have considered whether the appellant deliberately made a mistake in the calculation of his tax liability as set out in the tax return that he submitted on 31 January 2014. We are satisfied that the appellant and HMRC have a genuine difference of opinion on the question of whether the appellant has a single trade. The fact that the appellant did not agree with HMRC's point of view does not mean that he was deliberately seeking to calculate his tax liabilities wrongly, even though we have concluded that HMRC's point of view is correct.

57. We do not consider that paragraph 3(2) of Schedule 24 of FA 2007 applies to treat the inaccuracy as careless. In order for that paragraph to apply, the appellant would need to "discover" the inaccuracy and fail to take reasonable steps to inform HMRC of it. We do not consider that the appellant has, to date, "discovered" any inaccuracy since he has held a genuine belief that his view of his tax liability is correct and that HMRC's view is incorrect.

58. By virtue of paragraph 17(2)(b) of Schedule 24 of FA 2007, we have the power to substitute the penalty for one calculated by reference to scales chargeable for "careless" errors. However, HMRC have not put forward any evidence, or made any submissions, that suggest the appellant's behaviour referred to at [53(1)] was careless. In particular, Officer Powell did not suggest that the appellant's view that he had a single trade was one that he could not reasonably have held. Nor did she suggest that the appellant failed to take steps to check the validity of his view which a reasonable taxpayer would have taken. HMRC have the burden of proving that a penalty is due and they have not satisfied us that the behaviour referred to at [53(1)] suggests that the inaccuracy in his 2012-13 tax return was either careless or deliberate.

59. The argument set out at [53(2)] can only be resolved in the light of the question of whether the appellant did, as HMRC allege, calculate his losses available for carry forward wrongly.

Conclusion

60. Our conclusion on the preliminary issues is as follows:

(1) The appellant is not carrying on a single trade. Losses that the appellant makes in connection with his OWS activities cannot be carried forward and set off against future years' profits of his consulting business.

(2) The discovery assessment for 2009-10 was validly made within applicable time limits.

(3) We will consider the validity of the discovery assessment for 2011-12 at the same time as we make our decision on the issues set out at [7].

(4) We do not agree that a penalty for the tax year 2012-13 is chargeable on the basis of HMRC's argument set out at [53(1)]. We will consider HMRC's argument at [53(2)] at the same time as we make our decision on the issues set out at [7].

61. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 18 FEBRUARY 2016