[2016] UKFTT 285 (TC)

TC05059

Appeal number: TC/2013/06524

INCOME TAX – self-assessment – barrister – move from cash to true and fair basis – overpayment tax year between two underpayment tax years – tax paid twice on same profits – application of European Convention on Human Rights and Human Rights Act 1998 – held Section 29 of the Taxes Management Act 1970 to be construed in accordance with rights – appeal allowed to the extent of the double payment

FIRST-TIER TRIBUNAL
TAX CHAMBER

IGNATIUS FESSAL **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE
MRS JANET WILKINS

Sitting in public at Fox Court, 14 Gray's Inn Road, London on 11 April, 2016

Ms Lovejoy and the Appellant in person for the Appellant

Mr. Stone, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This is an appeal by Mr Ignatius Fessal ("Mr Fessal") against discovery assessments made by HMRC in respect of the 2005/06 and 2007/08 tax years and penalties related to those assessments.

The facts

2. In connection with this appeal, the parties have agreed the following facts:-

(a) Mr Fessal is a barrister and was in the "transitional regime" applicable to barristers moving from the cash to the true and fair basis of recognising profits for tax purposes under section 42 Finance Act 1998 for the three tax years 2005/06, 2006/07 and 2007/08. HMRC opened an enquiry into Mr Fessal's self-assessment for the 2008/09 tax year on 10 January 2011, as a result of which Mr Fessal's representatives submitted further information on 19 February 2011. HMRC responded with their final analysis of how the true and fair basis should have been applied for the 2006/07, 2007/08 and 2008/09 tax years on 14 April 2011. Mr Fessal struggled to obtain the relevant information for the earlier tax years because his former accountant, Mr Jitu Patel, had died in 2008. Further details were not provided to HMRC until 11 August 2011;

(b) revised returns were submitted for the four tax years 2005/06, 2006/07, 2007/08 and 2008/09. Further tax was payable for two of those tax years but, for 2006/07 and 2008/09, tax had been overpaid. The correct application of the true and fair basis resulted in profits being decreased for the 2006/07 tax year and increased for the 2005/06 and 2007/08 tax years. HMRC informed Mr Fessal on 14 December 2011 that any claim for overpayment relief for the 2006/07 year was out of time;

(c) Mr Fessal agreed HMRC's revised computations for each of these tax years on 25 January 2012, but subject to a claim that the overpayment for 2006/07 should be offset against the payments due for 2005/06 and 2007/08;

(d) HMRC wrote to Mr Fessal on 27 March 2012 raising discovery assessments under section 29 Taxes Management Act 1970 ("TMA") for the 2005/06 and 2007/08 years going back six years on the basis that Mr Fessal had been "careless" and without taking account of the overpayment claim. HMRC confirmed to Mr Fessal on 16 July 2012 that "there were no reasons to admit a late overpayment claim in this case". Mr Fessal's representatives wrote to HMRC on 20 September 2012 appealing against the assessments for 2005/06 and 2007/08. HMRC confirmed to Mr Fessal on 1 March 2013 that the time limit for any overpayment claim expired on 5 April 2011 and that Mr Fessal had no right of appeal; and

(e) Mr Fessal applied to the First Tier Tribunal on 16 September 2013 in respect of the assessments made for the 2005/06 and 2007/08 tax years.

He said that the assessments should take account of the overpayment of tax for the 2006/07 tax year, which should be offset against the tax due in those assessments.

3. We should mention at the outset that the relevant tax legislation in respect of the tax years in question refers to "negligence" rather than "carelessness" but it is common ground that, in this context, the two words should be equated and therefore, for the purposes of this decision, we will follow the language adopted by the parties and refer only to "carelessness".

4. Some further relevant additional facts are set out in the paragraphs which follow.

5. HMRC applied to have Mr Fessal's claim for the recovery of overpaid tax made in respect of the 2006/07 tax year or for the offset of that overpaid tax against the tax payments due from Mr Fessal for the 2005/06 and 2007/08 tax years struck out under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") on the basis that the claim for recovery of the overpayment was out of time, that the First-Tier Tribunal had no jurisdiction to consider either the claim for recovery of the overpayment or the claim to offset the overpayment against the tax payments due for the 2005/06 and 2007/08 tax years and that the claims had no reasonable prospect of success for the purposes of Rule 8(3)(c) of the Tribunal Rules.

6. In its decision dated 17 February 2015 ([2015] UK FTT 0080 (TC)), the First Tier Tribunal:-

(a) allowed HMRC's strike out application in respect of Mr Fessal's claim to extend the time limit for making a repayment claim in respect of the 2006/07 tax year; but

(b) refused HMRC's strike out application in respect of the appeals against the 2005/06 and 2007/08 tax assessments on the basis that Mr Fessal had a reasonable prospect of succeeding in his argument that the overpayment in respect of the 2006/07 tax year should be set off against the tax payable under those assessments to the extent that it would otherwise give rise to a charge to tax twice in respect of the same profits.

7. So this appeal primarily concerns whether or not Mr Fessal is right to claim that the assessments for the tax years 2005/06 and 2007/08 should be reduced by reference to the tax which he has paid in respect of the tax year 2006/07 to the extent that there would otherwise be a double charge to tax in respect of the same profits.

8. We should also mention at this stage the penalty position in relation to the assessments in question. In relation to the tax years to which the relevant assessments related, the maximum level of penalty under section 95 TMA was 100% of the underpaid tax in question. However, HMRC was empowered to abate the penalties in respect of each tax year and it applied its usual practice in doing so. The three headings under which HMRC's abatement procedure operated were disclosure of errors (maximum abatement 20%), co-operation (maximum abatement 40%) and seriousness of the offence (maximum abatement 40%). HMRC applied the maximum

abatement in relation to the disclosure and co-operation headings but only 35% of the maximum 40% abatement in relation to the seriousness heading. Its stated reason for reaching the latter conclusion was that, although the tax underpaid in the tax years 2005/06 and 2007/08 was significant, "consideration has been given that you overpaid tax in 2006/07 but that it is out of time for overpayment relief claim". So, in the calculation of penalties in respect of the relevant tax years, HMRC expressly took into account and acknowledged Mr Fessal's predicament in being unable to claim the benefit of any relief for his overpayment in respect of the tax year 2006/07.

Preliminary point

9. Before dealing with the issues raised by this appeal, we need to mention a further point which was raised before us by Ms Lovejoy at the hearing. This relates to Mr Fessal's claim for repayment of the overpayment in respect of the 2006/07 tax year. As noted above, that claim was the subject of a successful striking out application by HMRC in the previous hearing on this matter. Ms Lovejoy asked us to set aside the prior decision to strike out the action using our powers under Rule 38 of the Tribunal Rules. The basis for her application was the decision of the Upper Tribunal in *Raftopoulou v Revenue and Customs Commissioners* ([2015] UK UT 579 (TCC)) ("*Raftopoulou*") where it was held that a claim for repayment of tax was something "required to be done" for the purposes of sub-section 118(2) TMA and therefore that that provision could apply to give rise to an extension of the four year time limit for claiming an overpayment in respect of tax.

10. We agree that the above decision would be of great assistance to Mr Fessal if the Tribunal Rules could be construed in such a way as to enable us, at this juncture, to set aside the prior decision and re-make the decision. But we do not see how the Tribunal Rules do allow us to do that. This is because our powers to do so are limited by the constraints set out in Rule 38, including the requirement that one or more of the conditions in Rule 38(2) is or are satisfied and the requirement that a party applying for a decision to be set aside must make a written application to the First Tier Tribunal no later than 28 days after the date on which the First Tier Tribunal sent notice of the relevant decision to that party. By Ms Lovejoy's own admission, none of the conditions set out in Rule 38(2) is satisfied in relation to the prior decision in respect of the claim for repayment and the 28 day time limit in Rule 38(3) in relation to that decision expired some time ago.

11. Ms Lovejoy asked us to consider whether there was anything in Rules 5 or 2 of the Tribunal Rules which would allow us to disregard the above requirements.

12. We consider that Rule 5 of the Tribunal Rules is of no assistance to Mr Fessal in this context. Rule 5(2) enables us to give a direction in relation to the conduct or disposal of proceedings, including a direction amending, suspending or setting aside an earlier direction. However, those powers do not extend to setting aside a decision which has already disposed of proceedings – which is the exclusive preserve of Rule 38 – and the reference to "setting aside an earlier <u>direction</u>" is not apt to include setting aside an earlier <u>decision</u>.

13. We also consider that Rule 2 of the Tribunal Rules is of no assistance to Mr Fessal in this context. That paragraph states that the overriding objective of the Tribunal Rules is "to enable the Tribunal to deal with cases fairly and justly" and that the First Tier Tribunal must seek to give effect to the overriding objective when it exercises any power under the Tribunal Rules or interprets any rule or practice direction. Whilst the manner in which the overriding objective can be applied is expressed in the broadest possible terms, we do not think that the overriding objective can be used to disregard the requirements which are expressed so clearly in Rule 38 and which limit the power of a tribunal to set aside a previous decision and re-make that decision. Moreover, it is not clear that it would be fair or just to disregard the requirements set out in Rule 38. It is in the interests of fairness and justice that the circumstances in which a decision made by an earlier tribunal should be allowed to be set aside be definitively circumscribed. Otherwise, there would be no certainty in the process. And, as is apparent from the various provisions of Rule 38(2), those circumstances are where there has been an irregularity of some sort in the earlier proceedings of which none has been alleged in this case. In addition, the interests of fairness and justice dictate that the ability to apply for an earlier decision to be set aside needs to be constrained in terms of time – hence the time limit in Rule 38(3). It would not be fair or just for a party who has succeeded in proceedings to be exposed for an indefinite period to an application for the decision in those proceedings to be set aside. We would add that the fact that the conditions in Rule 38(2) and the time limit in Rule 38(3) should not be subject to an override under Rule 2 is recognised implicitly in the fact that the conditions and time limit are additional requirements for an applicant to meet, over and above the requirement in Rule 38(1)(a) that the tribunal considers that it is in the interests of justice to set aside the earlier decision.

14. In conclusion, we consider that it is not open to Mr Fessal at this stage to ask, on the basis of the *Raftopoulou* case, for an extension to the four year time limit for claiming the repayment of the tax which he has overpaid in respect of the tax year 2006/07 because his claim for an extended time limit has already been struck out and we do not have the power under the Tribunal Rules to set aside that prior decision and re-make it. This is a pity because it would seem from the relevant facts that, had the *Raftopoulou* case been decided before the earlier decision, that decision might well have been very different.

The appeal

15. We now turn to the main substance of this appeal, which is Mr Fessal's claim that he should not have to pay tax twice in respect of the same profits and that therefore his assessments in respect of the 2005/06 and 2007/08 tax years should be reduced in such a manner as to avoid that double charge to tax. Mr Fessal bases his claim on his rights under Article 1 Protocol 1(the "A1P1") of the European Convention on Human Rights (the "Convention") as applied by section 3 of the Human Rights Act 1998 (the "HRA").

16. Mr Fessal's position in this appeal may be summarised as follows:-

(a) he has at all times sought to pay tax on all of his profits and co-operated with HMRC in the process of the enquiry leading to his present predicament;

(b) he accepts that he was careless in filing his original returns for the tax years falling within the relevant period on an incorrect basis;

(c) he also accepts that the calculations made by HMRC in respect of each relevant tax year are correct and that the result of this is that profits which he thought belonged in the tax year 2006/07 in fact belonged in another tax year, with the result that he has overpaid tax in respect of the tax year 2006/07 and made corresponding underpayments of tax in respect of the tax years 2005/06 and 2007/08;

(d) he also accepts that, before taking into account any arguments under the A1P1, the legislation entitles HMRC to make a discovery assessment within six years of a tax year (where the taxpayer has been careless) and that the time limit for claiming an overpayment in respect of a tax year is four years and he does not seek generally to challenge that timing mismatch on A1P1 grounds;

(e) but, he says, that, in the specific circumstances of his case, where the overpayment in question is a direct result of a shift in profits between tax years – leading to an overpayment tax year straddled by two underpayment tax years - it amounts to a breach of his rights under the A1P1 if he is unable to take account of his overpayment in determining the extent of his underpayments;

(f) he adds that, if he had failed to file returns in respect of the relevant tax years at all, he would potentially be entitled to the extended time limit for claiming the repayment of overpaid tax under paragraph 3A Schedule 1AB TMA (the former "equitable liability"), and that it is illogical for him potentially to be in a worse position by virtue of filing his returns for the relevant tax years carelessly than if he had failed to file his returns for those tax years at all; and

(g) therefore, the operation of the domestic tax legislation in the specific circumstances of this case needs to be amended to the extent necessary to enable the legislation to be applied in a manner consistent with his rights under the A1P1. Mr Fessal did not elaborate on the manner in which the legislation should be so amended to achieve this outcome.

17. HMRC's response in this appeal may be summarised as follows:-

(a) if Mr Fessal's allegation is simply that the domestic legislation is producing an unfair result, it is not open to this Tribunal to examine the fairness or otherwise of the result. That is properly a question for judicial review and is beyond the powers of this Tribunal;

(b) but, if Mr Fessal's allegation is that the tax legislation needs to be read and construed in the light of Mr Fessal's rights under the A1P1, then

HMRC agrees that this Tribunal has the jurisdiction to consider that question;

(c) in doing so, however, this Tribunal needs to bear in mind that a taxpayer has to surmount a high hurdle before he can succeed in arguing that domestic legislation should be adapted to reflect his A1P1 rights. This is because a State has a "wide margin of appreciation" in framing its tax legislation and that a court or tribunal should respect the legislature's assessment in such matters unless that assessment is "devoid of reasonable foundation";

(d) although it is true that, in all cases, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the width of the "margin of appreciation" is highlighted by Simler J in her decision in *Rowe v HMRC* ([2015] EWHC 2293 (Admin)) when she said at paragraph 140 that "a public authority is better placed than the courts to determine how the individual and community interests should be balanced so that weight should be given to the decisions of public authorities within the discretionary area of judgement accorded to them when addressing whether the individual concerned has had to bear "an individual and excessive burden"";

(e) moreover, it is not possible to introduce A1P1 rights into the construction of domestic legislation in a manner which goes "against the grain" of that legislation as a whole. In this case, Parliament has deliberately chosen to insert a four year time limit for claiming overpayments of tax and a six year time limit for assessing underpayments of tax caused by carelessness and this is a decision which is not "devoid of reasonable foundation" given the need for certainty in tax matters for both taxpayer and HMRC. It would therefore go against the "grain of the legislation" if Mr Fessal's claim in this case were to succeed;

(f) it is also the case that the income tax legislation operates on an annual basis and makes no provision for set-off between different tax years. So, as long as the amount of income which is assessed to tax in respect of a tax year is correct - and Mr Fessal accepts that the amount of income which is assessed to tax in respect of each of the tax years 2005/06 and 2007/08 is correct - it goes against the "grain of the legislation" to allow an overpayment in respect of one tax year to be set-off against an underpayment in respect of another; and

(g) above all, HMRC stresses that Mr Fessal is in this position as a result of his own carelessness – had he not been careless and thereby exposed himself to the extended time limit allowed by section 29 TMA and section 36 TMA, he would not have been in this position.

The relevant law

18. The relevant legislative provisions are set out in an Appendix to this decision. Apart from section 95 TMA, which has now been repealed and appears in the form

that it took prior to its repeal, the provisions are set out in their present forms, which do not differ in any way which is material to this appeal from the forms in which they applied to the tax years in question. A brief summary of the pertinent provisions is as follows:-

5 (a) the A1P1 states that a person is not to be deprived of his "possessions" except in the public interest and subject to the conditions provided for by law and by the general principles of international law;

(b) section 3 HRA provides that, so far as it is possible to do so, primary legislation and subordinate legislation of the UK must be read and given effect in a way which is compatible with rights under (inter alia) the A1P1; 10

(c) section 29 TMA provides that, subject to certain pre-conditions which are set out therein, one of which is carelessness by the taxpayer in question, if HMRC discovers that there has been an underpayment of tax by a person in respect of any tax year, it may make an assessment to make good to the Crown the loss of that tax; 15

(d) section 36 TMA provides that, where a loss of tax has been brought about carelessly, the time limit for making an assessment in respect of the relevant underpayment of tax is six years after the end of the relevant tax year;

(e) sub-section 50(6) TMA empowers the First Tier Tribunal to reduce an assessment if it decides, on an appeal to it, that the appellant is over-charged by the assessment; 20

(f) Schedule 1AB TMA deals with the recovery of overpaid tax and the provisions in that schedule which are relevant in the present context are paragraph 3 (which generally precludes a claim for a repayment in respect of overpaid tax being made more than four years after the relevant tax year) and paragraph 3A (which provides for an extended time limit for claiming a repayment of overpaid tax in certain circumstances where the taxpayer has not delivered a tax return in respect of the relevant tax year); 25

(g) section 95 TMA provides that, where a taxpayer has carelessly filed an incorrect return, he is liable to a penalty of an amount which does not exceed the difference between the amount of income tax payable and the amount which would have been so payable if the return had been correct; and 30

(h) section 100B TMA empowers the First Tier Tribunal to increase or reduce a penalty if it decides, on an appeal to it, that the appellant is over-charged by the penalty. 35

Analysis

19. The appeal against the assessments in respect of the tax years 2005/06 and 2007/08 raises four distinct questions, as follows:-

40 (a) does this Tribunal have the jurisdiction to take into account Mr Fessal's rights under the A1P1 in determining this appeal and, if so, on what basis can it do so?

(b) if this Tribunal does have the jurisdiction to take into account Mr Fessal's rights under the A1P1 in determining this appeal, what are the tests that need to be applied in order to determine whether the assessments in this case have been issued in breach of Mr Fessal's rights under the A1P1?

5 (c) if this Tribunal does have the jurisdiction to take into account Mr Fessal's rights under the A1P1 in determining this appeal, and taking into account the tests referred to in Question (b) above, should Mr Fessal's appeal against the relevant assessments succeed? and

(d) if Mr Fessal's appeal should succeed, what is the appropriate remedy?

10 **Question (a): Jurisdiction**

20. In relation to Question (a), it is well-established that the powers of this Tribunal do not include the right to supervise the actions of HMRC and, in particular, the manner in which HMRC has exercised a discretion under the tax legislation – see *HMRC v Hok* ([2012] UKUT 363 (TCC)). So it is beyond argument that whether or
15 not HMRC's conduct in making the relevant assessments was in breach of Mr Fessal's rights under the A1P1 is not a matter for this Tribunal to consider. If Mr Fessal wishes to challenge HMRC's conduct on those grounds, the appropriate basis for him to do so is by way of judicial review in the High Court.

21. However, the fact that this Tribunal has no general supervisory jurisdiction in
20 relation to the conduct of HMRC does not mean that this Tribunal is precluded from taking into account Mr Fessal's rights under the A1P1 in determining this appeal. This is because section 3 HRA requires that all UK domestic legislation must be read and given effect in a way which is compatible with Convention rights "so far as it is possible to do so". This is the intention of Parliament, as expressed in section 3 HRA
25 and this Tribunal must give effect to that intention. In this regard, it is worth noting that, unlike section 4 HRA, section 3 HRA is not limited in its application to a court of the level of the High Court or above. Instead, it is of general application and therefore applies to this Tribunal, amongst others – see Lord Rodger in *Ghaidan v Godin-Mendoza* ([2004] UKHL 30) ("*Ghaidan*") at paragraph [106].

30 22. So, although this Tribunal has no jurisdiction to supervise the conduct of HMRC by reference to Mr Fessal's rights under the A1P1, this Tribunal is bound to consider whether the relevant legislation in this case, when properly construed in a way which is compatible with Mr Fessal's rights under the A1P1, empowered HMRC to issue the assessments which are the subject of this appeal in the amounts which it did.

35 23. It is worth referring at this point to the decision of the First Tier Tribunal in *Barrett v HMRC* ([2015] UKFTT 0329 (TC)) ("*Barrett*"). That contains, at paragraphs 77 to 96, a thorough analysis of the case law which is pertinent to the jurisdiction of the First Tier Tribunal. The decision makes it clear that the First Tier Tribunal's jurisdiction in any case is to be determined by reference to the specific
40 legislation which is in issue in the relevant case. There is no general supervisory jurisdiction but there is no doubt that the application of the provisions of relevant legislation falls within the First Tier Tribunal's jurisdiction and the reason that that is the case is that the application of those provisions is not a matter that involves

questions of public law but is simply a matter of determining whether the necessary conditions for the establishment of a taxpayer's liability under the legislation have been met. If they have not, then "any purported charge to tax would be an overcharge and thus squarely within the scope of s 50(6) TMA".

24. We believe that, during the course of the hearing, Mr Stone accepted that this was a correct description of this Tribunal's jurisdiction. However, there was some disagreement as to the identity of the relevant provision which would potentially be the subject of the A1P1 override in this case. We mention this at this stage because we think that it demonstrates quite neatly the differing ways in which each party is approaching this appeal. Mr Stone contended that, if any provision were to be the subject of the A1P1 override in this case, it should be section 36 TMA – the provision which extends the time limit within which HMRC can make an assessment from four years to six years in the case of carelessness. This is consistent with HMRC's approach to this appeal, which is to see it as a challenge to the mismatch between the four year time limit for reclaiming overpaid tax and the six year time limit for a discovery assessment in the case of carelessness. In contrast, Mr Fessal's approach to this appeal is to see it not as a general challenge to the mismatch in time limits but rather as a challenge to the ability of HMRC to tax the same profits twice. This is consistent with our view of this appeal. We do not think that Mr Fessal has any issue with the mismatch in time limits in general. He is simply arguing that, in the specific circumstances of this case, those time limits have operated in a manner which would breach his A1P1 rights if the assessments were to be upheld. On that view of the appeal, the provision which is potentially subject to the A1P1 override is more naturally section 29 TMA, which enables HMRC to raise a discovery assessment in certain cases where income which ought to have been assessed to income tax has not been so assessed.

25. We will return to this distinction when we address Question (c) below.

26. The manner in which section 29 TMA should be read and given effect to in a way which is compatible with Mr Fessal's rights under the A1P1 is not entirely straightforward. Lord Nicholls considered a similar issue at paragraphs [25] and following in the *Ghaidan* case. He noted that:

> "...the interpretive obligation decreed by s3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, s3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting s3.
>
> [31] On this the first point to be considered is how far, when enacting s3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since s3 relates to the "interpretation" of legislation, it is natural to focus attention initially on the language used in the

> legislative provision being considered. But once it is accepted that s3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of s3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of s3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, s3 would be available to achieve Convention-compliance. If he chose a different form of words, s3 would be impotent.
>
> [32] From this the conclusion which seems inescapable is that the mere fact that the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under s3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But s3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting s3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.
>
> [33] Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary s3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of s3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that s3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.
>
> [34] Both these features were present in *In re S (Minors) (Care Order: "Implementation of Care Plan)* [2002] 2 AC 291, [2002] 2 AII ER 192, [2002] 1 FCR 577. There the proposed "starring system" was inconsistent in an important respect with the scheme of the Children Act 1989, and the proposed system had far-reaching practical ramifications for local authorities. Again, in *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, [2002] 4 AII ER 1089, s29 of the Crime (Sentences) Act 1997 could not be read in a Convention-compliant way without giving the section a meaning inconsistent with an important feature expressed clearly in the legislation. In *Bellinger v Bellinger* [2003] 2 AC 467, [2003] 2 AII ER 593, [2003] 2 FCR 1, recognition of Mrs Bellinger as female for the purposes of s11(c) of the Matrimonial Causes Act 1973 would have had exceedingly wide ramifications, raising issues ill-suited for determination by the courts or court procedures."

27. Similar views to those set out above were adopted by Lords Steyn, Millett and Rodger and Baroness Hale in that case.

28. In some cases, it may be difficult to identify an interpretation that is both consistent with Convention rights and "[goes] with the grain of the legislation" in the words of Lord Rodger of Earlsferry cited above. However, in this case, we think it appropriate to follow a similar approach to the one adopted by the Supreme Court in

R v Waya ([2012] UK SC 51) in applying section 6 of the Proceeds of Crime Act 2002 (POCA") in the context of a post-conviction confiscation. The provision in question (sub-section 6(5)(b) POCA) was expressed in absolute terms and stipulated that, if the court decides that the defendant has benefited from the conduct referred to in earlier provisions of the Act "it must...make an order (a confiscation order) requiring him to pay that amount". The majority in the Supreme Court, in a passage which the minority endorsed, held that the above words should be read as being subject to the qualification "except insofar as such an order would be disproportionate and thus a breach of [the A1P1]".

29. It seems to us that a similar interpretive approach would be appropriate in the context of section 29 TMA. In other words, the power of the relevant representative of HMRC to issue an assessment pursuant to that section should be read as being to make an assessment of the amount of tax which is the amount required, in his or her opinion, to make good the loss of tax but only where assessing that amount does not breach the taxpayer's rights under the A1P1 to the extent that giving effect to those rights does not go against the "grain of the legislation".

30. We have considered whether the conclusion set out above could be said to be inconsistent with the decision of the Upper Tribunal in *Revenue and Customs Commissioners v Bosher* ([2013] UK UT 0579 (TCC)) ("*Bosher*"). That case involved an appeal by HMRC against a decision by the First Tier Tribunal to cancel 193 fixed penalties of £100 on the grounds that the penalties were disproportionate. In doing so, the First Tier Tribunal applied section 3 HRA to read the word "incorrect" in sub-section 100B(2)(iii) TMA in such a way as to include penalties which were disproportionate and therefore contrary to the taxpayer's rights under the A1P1. In allowing HMRC's appeal, the Upper Tribunal held that the First Tier Tribunal was not permitted to do this. Instead, the correct approach was to wait for HMRC to exercise its statutory right to mitigate the relevant penalty and then to apply the taxpayer's A1P1 rights at the stage of judicially reviewing the exercise of that power.

31. We consider that the provision which is at issue in the present proceedings (section 29 TMA) is different in a crucial respect from the legislation which was at issue in the *Bosher* case. The latter contained provisions giving HMRC specific power to mitigate the penalty (whereas the First Tier Tribunal was simply entitled to determine whether the relevant penalty, before any HMRC mitigation, was "incorrect") and therefore the "grain of the legislation" (in the words of Lord Rodger of Earlsferry) was that the First Tier Tribunal should not have the right to determine that a penalty, before any HMRC mitigation, was "incorrect" by reference to the A1P1 concept of proportionality – see paragraphs 59 and following of the decision in *Bosher*. In contrast, no such "second-stage" mitigation power features in section 29 TMA. It is therefore entirely consistent with the "grain of the legislation" to interpret section 29 TMA in the light of the taxpayer's rights under the A1P1 pursuant to section 3 HRA.

32. We consider that the fact that the making of an assessment under section 29 TMA is at the discretion of HMRC once the pre-conditions to the application of the section

have been met does not invalidate the distinction made above. There is a distinction between a power of mitigation which is expressly set out in the legislative provision that is under consideration, such as the one in the *Bosher* case – which meant that the provision could not be said to be non-compliant with the A1P1 until the mitigation process had been completed – and circumstances such as the present one, where HMRC has a discretion to make an assessment of an amount which is specified by the legislation and, in specifying the amount which is so assessable and to which HMRC's discretion is to be applied, the relevant provision fails to take into account the taxpayer's A1P1 rights. It cannot be said that reading Mr Fessal's A1P1 rights into the provision which determines the amount that HMRC is entitled to assess goes against the "grain of the legislation" in the same way as in the *Bosher* case. We believe that Mr Stone accepted this distinction at the hearing.

33. For these reasons, we consider that there is nothing in the *Bosher* case which suggests that the approach we have adopted is incorrect.

34. So, to summarise our conclusion in relation to Question (a), we consider that, whilst this Tribunal has no supervisory jurisdiction over the conduct of HMRC (and, in particular, the manner in which HMRC exercises its discretions), it does have jurisdiction (and is indeed obliged) to consider whether the assessments in this case have been properly issued pursuant to section 29 TMA and, in determining that question, it is obliged to read the power conferred on the relevant representative of HMRC by section 29 TMA as being to issue an assessment which makes good the loss of tax but only where assessing that amount does not breach the relevant taxpayer's rights under the A1P1 to the extent that giving effect to those rights does not go against the "grain of the legislation".

Question (b): The tests to be applied in determining whether there has been a breach of Mr Fessal's rights under the A1P1

35. Given our conclusions in relation to Question (a), it is necessary for us to determine how (if at all) Mr Fessal's rights under the A1P1 should affect the application of section 29 TMA pursuant to the principle of construction laid down by section 3 HRA. It is Mr Fessal's contention that, by assessing him to tax in respect of the underpayment tax years without taking into account the tax which he has paid in respect of the overpayment tax year on the profits which are included in the assessments for the underpayment tax years, his A1P1 rights have been infringed and therefore that, although the assessments are in accordance with the provisions of section 29 TMA before the A1P1 is taken into account, they are not in accordance with section 29 TMA once that section is construed in accordance with his rights under the A1P1.

36. In effect, Mr Fessal's contention is that, pursuant to section 3 HRA, section 29 TMA should be construed as enabling the relevant representative of HMRC to issue an assessment which makes good the loss of tax but only after taking into account in the assessment a related overpayment which arises as a result of the circumstances giving rise to the underpayment.

37. The A1P1 reads as follows:

"(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of
5 international law.

(2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

10 38. In the course of its decision in *SA Dangeville v France (Application No 36677/97)* ([2003] STC 771), the European Court of Human Rights explained the above provisions as

> "comprising three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful
15 enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the contracting states are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of
20 interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule (see, among other authorities : *Sporrong and Lönnroth v Sweden (Applications 7151/75 and 7152/75)* (1982) 5 EHRR 35 at paragraph 69; *Gasus Dosier-und Fördertechnik v Netherlands (Application No 15375/89)* (1995) 20 EHRR 403, paras 55 and 62; *Pressos Compania Naviera SA v*
25 *Belgium* (1995) 21 EHRR 301, para 33; and *Phocas v France (Applications 17869/91)* Reports of Judgments and Decisions 1996-II 541, para 51)."

39. It can be seen from the above that, in order successfully to challenge the assessments in this appeal, Mr Fessal needs to show that:-

(a) he will be deprived of a "possession" if he is required to pay the taxes which are
30 the subject of the assessments; and

(b) by failing to provide for his overpaid tax to be taken into account in calculating the extent of his underpayments in the particular circumstances of this case, section 29 TMA offends against the second and third rules set out above and it would not go against the "grain of the legislation" (in the words of Lord Rodger of
35 Earlsferry) for section 29 TMA to be construed as if it did provide for that to occur.

40. In applying the first limb of the test set out in sub-paragraph 39(b) above, it is clear from the extensive case law in this area that, in the field of taxation, the State has a "wide margin of appreciation". Domestic tax laws will be overturned only if
40 they are "devoid of reasonable foundation".

41. By way of example, although it was only obiter – as she had already found for the taxpayer on another ground – Mrs Justice Proudman DBE in *Lobler v Revenue and*

Customs Commissioners ([2015] UKUT 152 (TCC)) ("*Lobler*") outlined the issues to be borne in mind in considering the "wide margin of appreciation" enjoyed by the States which are party to the Convention and the circumstances in which, in the absence of a Convention override, legislation could be regarded as being "devoid of reasonable foundation". Citing the decision of the European Court of Human Rights in *NKM v Hungary* ([2013] STC 1104) ("*NKM*"), she noted that a State could justify depriving a person of his possessions as long as the following three tests were satisfied:-

(a) the legislation must be sufficiently accessible, precise and foreseeable in its application;

(b) the legislation must pursue a legitimate aim in the public interest; and

(c) the interference with the right to peaceful enjoyment must be proportionate in the sense that it strikes a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

42. Mrs Justice Proudman DBE went on to say that, as noted in paragraph [60] of the *NKM* case, the third of these tests is the most significant.

43. In applying the second limb of the test set out in sub-paragraph 39(b) above, the extract from the G*haidan* case set out above outlines the circumstances in which an interpretation of a particular provision could be so inconsistent with a fundamental feature of the legislation as to "cross the constitutional boundary s3 [HRA] seeks to demarcate and preserve". This, then, is a necessary limitation on the extent to which the A1P1 override can apply to any provision of domestic law.

44. So, to summarise our conclusion in relation to Question (b), we consider that, if Mr Fessal is to succeed in his appeal, he needs to establish that the tax which is the subject of the assessments is a "possession", that the failure of section 29 TMA to provide for his overpaid tax to be taken into account in calculating the extent of his underpayments in the particular circumstance of this case would cause one or more of the tests described in the *Lobler* case to be failed and that reading section 29 TMA in such a way as to allow the overpaid tax to be taken into account in that way in the particular circumstances of this case is not so inconsistent with the "grain of the legislation" that it would "cross the constitutional boundary" to read the section in that way.

Question (c): Should Mr Fessal's appeal succeed?

45. This leads naturally to Question (c), which is whether Mr Fessal has satisfied each of the hurdles mentioned above.

46. Since it had already conceded the point earlier in the process of this appeal, HMRC has said that, solely for the purposes of this appeal (but not generally), it accepts that the money of which Mr. Fessal will be deprived in the event that the

assessments are upheld is a “possession”. Accordingly, it is not a question which we need to resolve in the context of the present proceedings.

47. But we would add that, even if HMRC had not accepted that, we would have held that upholding the assessments would deprive Mr Fessal of a “possession”. We note that there have been a number of recent decisions which might at first glance appear to cast doubt on that conclusion – for example, the decision of the Court of Appeal in *R (on the application of St. Matthew's (West) Ltd and others) v Her Majesty's Treasury and another; sub nom R (on the application of APVCO 19 Ltd and others v Her Majesty's Treasury and another)* ([2015] STC 2272); (“*St Matthews*”) and the decision of Green J in *Walapu v Revenue and Customs Commissioners* ([2016] EWHC 658 (Admin)) (“*Walapu*”).

48. In the former case, there had been a retrospective legislative change which put beyond doubt the fact that SDLT was payable in relation to a transaction which the taxpayers had implemented whereas, prior to the legislative change, it was arguable that no such SDLT was payable. It was held that the effect of the legislative change was not to deprive the taxpayers of a “possession” because whether or not the SDLT was payable was in dispute prior to the change. But that is very different from the facts in the present case, where the legislation in respect of which the A1P1 override is being considered is the very legislation which enables HMRC to claim the tax, as opposed to legislation which post-dates HMRC's claim to the tax. Putting this another way, the legislation which was at issue in the *St Matthews* case was the retrospective legislative change that removed from the taxpayer an argument that no SDLT was payable but did no more than that. A secondary consequence of that was that the SDLT became payable but the SDLT was already arguably payable before the legislative change. As Vos LJ put it in paragraph [49] of the decision:

> “It would be different if the appellants had been challenging the imposition of SDLT itself”.

49. A similar distinction arises in relation to the *Walapu* case. The facts in that case were that the taxpayer challenged, on (inter alia) the grounds of the A1P1, an obligation to pay a disputed amount of tax under an “accelerated payment notice”. In relation to the A1P1 argument, Green J held that, even if the tax that was the subject of the “accelerated payment notice” was a “possession”, the taxpayer was not deprived of that tax because he would get it back with interest if he was successful in the substantive appeal. However, he also stated (at paragraph 120) that the tax in question was not a “possession” because it was the subject of a dispute. Again, this decision can be explained by distinguishing between the legislation in respect of which the A1P1 override was being claimed by the taxpayer in the *Walapu* case - the requirement to pay tax in advance – and the legislation which gave rise to the taxpayer's alleged obligation to pay the tax in the first place. Where the legislation in respect of which the A1P1 override is being claimed is not the legislation giving rise to the taxpayer's alleged obligation to pay tax in the first place, the fact that there is a dispute between the taxpayer and HMRC as to whether or not the tax is payable will mean that the taxpayer has no “possession” for the purposes of applying the A1P1 to the subject legislation. However, where, as in the present case, the legislation at issue

is the legislation which determines whether HMRC is entitled to assess Mr. Fessal to tax in the first place, the tax which is the subject of the assessment must be capable of being a "possession" if the A1P1 is to have any application in the field of tax law.

50. In short, to conclude that no part of the sum which is claimed by HMRC in this case amounts to a "possession" for Mr. Fessal would be to prevent the A1P1 from having any application in the context of tax legislation. Moreover, if that were to be the conclusion to be derived from the above line of cases, then it would be inconsistent with other decisions in relation to the application of the A1P1 in a tax context, such as *Burden v United Kingdom (Application No 13378/05)* ([2008] STC 1305).

51. Finally in relation to the question of whether upholding the assessments would involve depriving Mr Fessal of a "possession", we should mention a point which arises out of Lord Dunedin's well-known "three stages of tax" as set out in his judgment in *Whitney v CIR* ([1926] AC 37). Those three stages are, first, the determination of the liability to tax, secondly, the assessment of the tax and, thirdly, the recovery or collection of the tax. It is true that Mr Fessal is not seeking to apply the A1P1 to the legislation which determines his liability to tax. On the contrary, he has accepted HMRC's computations for the relevant tax years. Instead, Mr Fessal is seeking to challenge the legislation which relates to the second stage of the process – the assessment of the tax so determined. So, it might be said that the facts in this case fall squarely within the same category as the facts in the *St Matthews* case and the *Walapu* case – ie that the legislation in respect of which the A1P1 override is being claimed is not the legislation giving rise to the taxpayer's alleged obligation to pay tax in the first place but some other legislation. We do not think that this would be correct. Accepting this parity would involve giving too much significance to the process of determining the liability without taking into account the fact that a liability that cannot be assessed cannot be recovered and therefore remains a "possession". If HMRC is not permitted to make an assessment of a liability, then that liability does not give rise to any claim by HMRC against any of the assets of the relevant taxpayer. So the "possessions" of the taxpayer are not depleted by the liability in any sense. It is only when HMRC is entitled to assess the taxpayer in respect of the liability that the claim against the assets of the taxpayer arises and, in this case, the A1P1 override is being considered in the context of the legislation that entitles HMRC to make that assessment.

52. Thus, even if HMRC had not conceded that upholding the assessments in this case would deprive Mr Fessal of a "possession", we would have held that it would do so.

53. The more difficult question in this case is whether:-

(a) section 29 TMA in its current form, without any A1P1 override, is within the "wide margin of appreciation" which is given to a State under the Convention or is instead "devoid of reasonable foundation" because it fails one or more of the tests described in the *Lobler* and *NKM* cases; and

(b) limiting section 29 TMA in such a way as to require the overpaid tax in respect of 2006/07 to be taken into account in reducing the assessments in respect of the tax years 2005/06 and 2007/08 would or would not go against the "grain of the legislation".

5 54. The arguments which suggest that Mr Fessal has failed to justify his position under these tests are as follows:-

(a) given that the income tax legislation is based on the assessment of income from tax year to tax year, and makes no provision for the setting-off of an overpayment in respect of one tax year against an underpayment in
10 respect of another, it goes against the "grain of the legislation" to read any such limitation into section 29 TMA;

(b) Mr Fessal is not challenging the calculation of income in respect of any of the tax years in question – he accepts that HMRC has correctly allocated the income to each relevant tax year;

15 (c) given that the will of Parliament, as clearly expressed in sections 29 and 36 TMA and Schedule 1AB TMA, is to impose a time limit of four years for claims for the repayment of overpaid tax and a time limit of six years for the assessment of underpaid tax where the taxpayer has been careless, it goes against the "grain of the legislation" to allow Mr Fessal effectively
20 to extend the time limit for claiming the repayment of overpaid tax by obtaining at this stage a reduction in the assessments for the underpayment tax years;

(d) the UK is entitled to include in its legislation an extended time limit for assessing underpaid tax in circumstances of careless behaviour such that it
25 has a longer period to assess such tax than the period within which a taxpayer can make a claim for a repayment for overpaid tax. This is within the "wide margin of appreciation" enjoyed by the UK and not "devoid of reasonable foundation" so that the domestic legislation is A1P1-compliant; and

30 (e) Mr Fessal would not be in his current position had he not been careless in filing his tax returns in the first place.

55. These are all forceful reasons as to why this Tribunal should not disturb the assessments which are the subject of this appeal despite the unfair result to which they give rise.

35 56. But there are also arguments which point in the opposite direction. These are as follows:-

(a) it is true that the income tax legislation provides for income to be assessed on an annual basis and by reference to tax years. However, that is in no way inconsistent with the proposition that income should be taxed once
40 and only once;

(b) In contrast, there are numerous examples of judicial statements to the effect that avoiding double taxation on the same profits is a presumption in applying our tax legislation. For example, Lord Wilberforce, in *Inland Revenue Commissioners v Garvin* ([1981] 1WLR 793), stated that:-

> "The interaction of these two taxes seems to require consideration with a view to avoiding double taxation, which should be a right and not merely a privilege"

and Lord Keith of Kinkel, in *Bird v Inland Revenue Commissioners (H.L.(E.))* ([1989] 1 AC 300), stated that:-

> "In general, I am of opinion that it is not open to the revenue to subject a taxpayer to two different charges to tax in respect of the same receipts".

Similarly, in *R v Inland Revenue Commissioners, ex parte Woolwich Equitable Building Society* ([1990] WLR 1400), Lord Oliver of Aylmerton referred to

> "certain well-established presumptions or principles – [such as] a presumption against double taxation".

Lord Oliver went on to say that the presumption against double taxation is clearly rebuttable if sufficiently clear express words are used or if the circumstances surrounding the enactment of the particular legislation leads to an inevitable inference that Parliament intended, in using the words that it did, that the presumption should not apply. In this case, there is certainly nothing in the express language of section 29 TMA and paragraph 3 Schedule 1AB TMA – the provisions which create the mismatch between the time limit for claiming a repayment of overpaid tax and the time limit for HMRC to make a discovery assessment – to suggest that double taxation is intended. Nor is that an "inevitable inference" of the legislation in its current form. So there is nothing to rebut the presumption against double taxation to which Lord Oliver referred. In short, upholding an assessment by virtue of which the same income is taxed twice would be contrary to the "grain of the legislation" in a much more fundamental way than reducing an assessment in respect of the profits of a particular tax year by reference to tax that has already been paid on those same profits, albeit in respect of another tax year;

(c) it is true that Mr Fessal does not challenge the computation of the income in respect of the tax years which are under consideration. But his point is simply that it would be against the "grain of the legislation" to subject to tax income falling within the tax years 2005/06 and 2007/08 which has already been subject to tax in respect of the tax year 2006/07;

(d) Mr Fessal is not in any way seeking to challenge the general proposition that it is permissible for there to be a mismatch between the time limit for claiming a repayment of overpaid tax and the time limit for making a

discovery assessment where the taxpayer has been careless. For instance, he is not saying that simply because HMRC has made a discovery assessment in respect of an earlier tax year, the time limit for claiming a repayment of unrelated overpaid tax in respect of another, adjacent, tax year should be extended. As Ms Lovejoy put it at the hearing, if HMRC were to make a discovery assessment in respect of a tax year ending six years prior to the date of the relevant assessment and there happened to be an unrelated overpayment of tax in respect of the following tax year, Mr Fessal would not be claiming that the overpayment should be set off against the underpayment in those circumstances. Instead, his argument is confined to a situation where income is shifted between tax years as a result of a discovery assessment, thereby throwing up an overpayment in respect of one tax year which is inextricably related to, and referable to, an underpayment in respect of another tax year and saying that, in those circumstances, it would be "devoid of reasonable foundation" for the assessment in respect of the underpayment tax year not to take account of the tax paid in respect of the overpayment tax year on the profits which are attributable to the underpayment tax year. This is a very much more limited intrusion on the expressed scope of the domestic legislation than a wholesale disruption of the respective time limits for, on the one hand, claiming a repayment of overpaid tax and, on the other hand, suffering a discovery assessment where the taxpayer has been careless. It is quite possible that, whereas the latter would go against the "grain of the legislation", the former would not. It is also quite possible that, whereas the latter would fall within the "wide margin of appreciation" enjoyed by a State which is party to the Convention, the former would be "devoid of reasonable foundation";

(e) it does not strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights for a taxpayer to be required to pay tax twice in respect of the same profits. As was outlined by Mrs Justice Proudman DBE in the *Lobler* case, the European Court of Human Rights in the *NKM* case stated that a State could justify depriving a person of his possessions as long as the three tests set out in the *NKM* case were satisfied, of which the third test is the most significant. When viewed in relation to these particular facts, the legislation which is under consideration in the present case satisfies only the first of these tests. Subjecting the same profits to tax twice cannot reasonably be said to be pursuing a legitimate aim in the public interest or to be striking a fair balance between the demands of the general interest of the community and the protection of the individual's rights; and

(f) it is true that Mr Fessal would not have found himself in his present predicament had he not been careless in filing his tax returns for the relevant tax years. But is it proportional for the consequence of that carelessness to result in what is effectively a 100% penalty in respect of the tax payable on the doubly-assessed profits? Proportionality, as

described in *AXA General Insurance Ltd and others v Lord Advocate and others* ([2011] UKSC 46), entails "a reasonable relationship between the means employed and the aims pursued and a fair balance between general interests and individual fundamental rights". It is hard to see how assessments which include profits in respect of which tax has already been paid reflects a reasonable relationship between the means employed and the aims pursued or involves a fair balance between the general interest – that each taxpayer should pay his or her fair share of tax – and Mr Fessal's rights under the A1P1 not to be deprived of his possessions.

57. We observe that there are some similarities between the double taxation imposed on Mr Fessal in this case and the penalty suffered by the taxpayer in the *Barrett* case. In the latter case, the First Tier Tribunal declined to hold that the construction industry scheme ("CIS") legislation operated disproportionately by failing to provide a credit to the taxpayer against tax that should have been withheld and accounted for under the CIS for tax paid by the sub-contractor to whom the payment was made. So that was also a case of double payment, albeit that two persons were involved. In refusing to intervene, the First Tier Tribunal noted that the aim of the relevant legislation in that case was to secure compliance with the withholding regime that is the essence of the CIS. A failure to provide credit under the scheme was consistent with that aim and so the legislation fell within the wide margin of appreciation accorded to a State in framing its tax legislation.

58. In contrast to the legislation which was at issue in the *Barrett* case, the legislation in this case has the aim of ensuring that a taxpayer can be assessed to tax in certain circumstances even though the time limit for doing so would otherwise have expired. Mr Fessal is not challenging the right of the UK to do so. But imposing tax twice on the same profits is not a necessary consequence of that aim. And, even if it might be argued that the aim of the legislation is to ensure that taxpayers are not careless in filing their tax returns, which would be a somewhat oblique way of interpreting its aim, we think that subjecting the same profits to tax twice is not proportionate with that aim. We therefore think that the position of Mr Fessal is very different from that of the taxpayer in the *Barrett* case in this respect.

59. We have noted that the penalties legislation in the form which applied to the underpayment tax years in question (section 95 TMA) did allow for a 100% penalty in the case of carelessness. (The maximum penalty in the case of carelessness has subsequently been reduced to 30%). We have also noted that, in reducing Mr Fessal's penalty in respect of the underpayment tax years to 5%, HMRC took account of the fact that Mr Fessal was unable to claim the benefit of his overpaid tax in respect of the tax year 2006/07. We have considered whether either of these points should be taken into account in reaching a conclusion to this Question (c) and have decided that they should not. This is for two reasons.

60. First, we do not think that the form (or the application in the present circumstances) of the penalties regime should have any bearing on the manner in which section 29 TMA should be interpreted. The penalties regime is there to punish carelessness whereas section 29 TMA, the provision governing the ability to make a

discovery assessment, should make sense in A1P1 terms in and of itself without regard to the penalties regime. It applies at a logically prior point in time to the time at which penalties fall to be determined and its compatibility with the A1P1 should be tested without regard to how the penalties regime then applies in relation to the return for the tax year to which the assessment relates.

61. Another way of putting the above point is that the maximum penalty which could have been imposed on Mr Fessal was 100% of the additional taxes assessed by HMRC. If it is correct that the taxes which were assessed should have been reduced by the overpaid tax, then the maximum penalty which could have been imposed would have been reduced commensurately. So our decision in relation to whether or not section 29 TMA has applied in an A1P1-compliant manner in this case should logically precede, and be unaffected by, the penalty position.

62. Secondly, even if one were to look at the penalties regime and section 29 TMA as an integrated whole in this context, the highest penalty to which Mr Fessal could have been subjected based on the law, HMRC practice and his behaviour in this matter is 40% - i.e. no abatement at all under the seriousness heading. He justifiably obtained the maximum abatement under the other two headings and those were awarded without regard to the fact that he was being denied the benefit of a credit for his overpaid tax. So the overpaid tax was taken into account only in abating the penalties by 35%. The result is that, taking the position in aggregate, Mr Fessal has suffered a penalty of 105% in respect of the tax on the profits which have been taken into account twice in circumstances where the most which he could have expected to suffer under the existing legislation and HMRC practice was 40% in respect of that tax. That is a significant difference.

63. We recognise that Mr Fessal would not be in this position were it not for his carelessness. But we do not think that his carelessness is sufficient to justify a penalty of that size. The appropriate measure in the case of carelessness in filing returns is the imposition of a penalty. It is not the imposition of tax twice on the same profits. The fact that, were the assessments not to be reduced to avoid double taxation, Mr Fessal would potentially be in a worse position than if he had not filed tax returns at all simply reinforces that conclusion.

64. Taking all of this into account, and recognising the high hurdles that Mr Fessal has to surmount, we think that, on balance, he has satisfied us that the provisions of section 29 TMA prior to any A1P1 override are not consistent with his rights under the A1P1 and that the aggregate amount of tax which is payable under the two assessments which are the subject of this appeal should be reduced to reflect that.

Question (d): What is the appropriate remedy?

65. The starting point in answering this question is to consider whether a failure to recognise Mr Fessal's A1P1 rights in making an assessment under section 29 TMA invalidates the relevant assessment as a whole or simply engages the power of this Tribunal to reduce the relevant assessment under sub-section 50(6) TMA. The answer to this question turns on the form which the A1P1 override takes.

66. For instance, if section 29 TMA were required to be construed on the basis that the A1P1 override takes the form of a qualification or pre-condition to assessment along the lines of that set out in sub-section 29(3) TMA, then a finding that Mr Fessal's A1P1 rights have been breached by the making of an assessment would invalidate the relevant assessment as a whole – see, for example, the decision of the Court of Appeal in *Hankinson v HMRC* ([2012] STC 485 and the more recent decision of the First Tier Tribunal in *Bubb v HMRC* ([2016] UKFTT 0216).

67. But there is no reason why the A1P1 override needs to be quite so draconian in its effect. Section 29 TMA could just as easily be construed on the basis that the A1P1 override is not a pre-condition to assessment but instead simply amends the quantum of the assessment that HMRC is empowered to make. In other words, the A1P1 override means that the powers of the relevant representative of HMRC are to make an assessment in an amount which the relevant representative considers to be necessary to make good the loss of tax but only to the extent that the assessment does not lead to a breach of the taxpayer's A1P1 rights by disregarding, in the assessment, any tax which has already been paid on the same profits, albeit in respect of a different tax year. That would be the more natural way of construing section 29 TMA in the light of the injunction in section 3 HRA and we therefore adopt it. It means that this situation is distinguishable from a case where neither of the pre-conditions set out in sub-sections 29(4) or 29(5) TMA is satisfied. So the relevant assessment remains valid but is to be reduced pursuant to our power under sub-section 50(6) TMA.

68. In effect, the position is no different from any other case where a discovery assessment is valid but is held to be excessive.

69. As for the quantum of the relevant reduction, this should be such as to ensure that Mr Fessal pays tax only once on his profits for each of the three tax years that are involved. This means that the assessments need to be amended in such a way as to ensure that Mr Fessal is effectively able to credit against the aggregate amount of tax which is payable in respect of the two underpayment tax years the tax that he has paid in respect of the overpayment tax year on profits that have been included in the assessments for the two underpayment tax years.

70. There are two points which we would make in this context.

71. The first is that, given the differences which existed over the three tax years in question in Mr Fessal's personal allowances and the applicable band limits, this is not simply a case of removing from the scope of the assessments for the underpayment tax years those profits which have been subject to tax already in respect of the overpayment tax year. Instead, the aggregate profits which are included in the assessments for the underpayment tax years should be reduced so that the aggregate amount of tax which is payable in respect of the two underpayment tax years, taking into account, in respect of each underpayment tax year, the tax rates, personal allowance and band limits applicable to profits assessable in respect of the relevant tax year, is reduced by the overpaid tax. In this way, Mr Fessal effectively obtains a credit for the tax which he has already paid but neither gains nor loses from the fact that he paid his tax on the profits in question in respect of the wrong tax year.

72. The second point concerns how the adjustment described above should be allocated as between the tax year 2005/06 and the tax year 2007/08. Should the effective credit which is obtained by reducing the taxable profits in the manner described above be allocated to one underpayment tax year in advance of the other or pro-rated between them? In answering this question, we note the following points:

(a) first, it would seem from the figures that are set out in the papers that the understatement of profits in respect of the tax year 2005/06 was £55,808, the understatement of profits in respect of the tax year 2007/08 was £19,800 and the overstatement of profits in respect of the tax year 2006/07 was £52,999. There was also an overstatement of profits in respect of the tax year 2008/09 of £15,657. (The tax overpaid in respect of the tax year 2008/09 has not formed any part of the arguments between the parties in connection with this appeal, presumably because Mr Fessal was still in time to claim the repayment of the overpaid tax in respect of that tax year at the time when the assessments which are the subject of this appeal were issued.) The above figures indicate strongly that the overpaid tax in respect of the tax year 2006/07 was wholly referable to the underpayment in respect of the tax year 2005/06 and not in any way referable to the underpayment in respect of the tax year 2007/08. Instead, the overpaid tax which was referable to the underpayment in respect of the tax year 2007/08 was the overpaid tax in respect of the tax year 2008/09;

(b) allocating the effective tax credit in respect of the tax year 2006/07 to the tax year 2007/08 would disadvantage Mr Fessal in that he would effectively be regarded as having paid his tax in respect of the tax year 2007/08 on an earlier date than would have been required if he had filed correct returns in the first place; and

(c) on the other hand, Mr Fessal could have avoided all of these considerations if he had not been careless in the first place and therefore he should not be able to benefit from a reduction in interest costs simply because we decide that the whole of the effective tax credit which is attributable to the overpayment in respect of the tax year 2006/07 should be applied in reducing the assessment for the tax year 2005/06.

73. Taking these considerations into account, we believe that the appropriate outcome to this appeal is as follows:

(a) all of the tax overpaid in respect of the tax year 2006/07 should be applied in reducing the tax which is payable in respect of the tax year 2005/06;

(b) as noted in paragraph 71 above, this should be achieved by reducing the profits which are included in the assessment in respect of the tax year 2005/06 such that, taking into account the income tax rates, personal allowance and band limits applicable to the profits assessable in respect

of that tax year, the tax payable under the revised assessment in respect of that tax year is reduced by the tax overpaid in respect of the tax year 2006/07. For the purposes of the rest of this decision, we will refer to the tax that would remain payable under the revised assessment in respect of the tax year 2005/06 following the reduction described above as the "Base Tax Amount";

(c) if we were to stop at sub-paragraphs 73(a) and (b) above, the result of our reducing the assessment in respect of the tax year 2005/06 to the Base Tax Amount would mean that no interest would be payable by Mr Fessal in respect of the amount of tax which has effectively been carried back from the tax year 2006/07 to the tax year 2005/06, even though that tax was payable at a later point than would otherwise have been the case if it had been payable in respect of the tax year 2005/06. Accordingly, we consider that a further adjustment needs to be made to the assessment in respect of the tax year 2005/06, this time an upward adjustment, in order to compensate HMRC for the fact that Mr Fessal would otherwise effectively be obtaining the benefit of the credit for the overpaid tax in respect of the later tax year at a point which is earlier than the point when he actually paid the tax that gives rise to that credit;

(d) that upward adjustment to the profits which are included in the assessment in respect of the tax year 2005/06 should be such that, after taking into account the income tax rates, personal allowance and band limits applicable to the profits assessable in respect of that tax year, the tax payable under the revised assessment in respect of that tax year is increased above the Base Tax Amount by such amount (the "Additional Amount") as will serve to compensate HMRC for the fact that Mr Fessal would otherwise effectively be obtaining the benefit of the credit for the overpaid tax at a point which is earlier than the point when he actually paid the tax that gives rise to that credit. We will leave it to the parties to agree the quantum of the Additional Amount but with liberty to apply to this Tribunal to determine the amount in the event that they are unable to reach agreement; and

(e) finally, because the entire effective tax credit in respect of the tax year 2006/07 will have been used in reducing the tax overpaid in respect of the tax year 2005/06, no adjustment should be made to the assessment for the tax year 2007/08.

74. For the reasons set out above, we consider that Mr Fessal's appeal in relation to the assessment in respect of the tax year 2005/06 should be allowed to the extent described above but that the assessment in respect of the tax year 2007/08 should be upheld.

Penalties

75. Mr Fessal's appeal also extended to the 5% penalties in respect of the relevant assessments. As noted above, the penalty in respect of each underpayment tax year was set at 5% of the tax assessed in the relevant assessment and this was on the basis that Mr Fessal should be entitled to the full abatement of 20% in respect of his disclosure, the full abatement of 40% in respect of his co-operation but an abatement of only 35% in respect of seriousness. We are entitled to increase or reduce the penalties under sub-section 100B(2)(b) TMA.

76. Neither party made any submission to us in the course of the hearing in relation to the penalties.

77. Subject to the point which is discussed below, logic would suggest that the penalty in respect of the tax year 2005/06 should be reduced in accordance with our conclusion in relation to the assessment in respect of that year such that it amounts to 5% of the tax which is payable under the revised assessment in respect of that tax year after the adjustments described in paragraph 73 have been made – ie 5% of the aggregate of the Base Tax Amount and the Additional Amount – and that the penalty in respect of the tax year 2007/08 should remain unaltered on the basis that the assessment in respect of that tax year has been upheld.

78. We recognise that the 5% figure was reached only after allowing for an abatement of 35% because HMRC recognised that Mr Fessal was going to pay tax twice on the same profits. Now that that is not the case, it is arguable that the percentage by reference to which each penalty is calculated should be increased by some amount (not exceeding 35%) and then applied to the tax which is payable in respect of each assessment following the reduction in the assessment in respect of the tax year 2005/06 described above. However, in looking at the correspondence that passed between the parties when the penalties were imposed, it would seem that HMRC's reluctance to allow the full 40% abatement for seriousness (before taking into account the overpaid tax) was based on the significance of the quantum of tax which was underpaid in respect of the tax years to which the assessments related. Now that that quantum has been considerably reduced by the process described above, we see no reason to increase the percentage by reference to which the penalties were applied. We therefore hold that the penalty in respect of the tax year 2005/06 should be reduced to 5% of the tax which remains subject to assessment in respect of that tax year following the adjustments to the assessment for that tax year described above – ie 5% of the aggregate of the Base Tax Amount and the Additional Amount – and that the penalty in respect of the tax year 2007/08 should not be changed given that the assessment in respect of that tax year has been upheld.

Application for permission to appeal

79. We allow Mr Fessal's appeal against the discovery assessment for 2005/06 and his appeal against the related penalty, in each case to the extent we have determined by this decision.

80. We do not allow Mr Fessal's appeal against the discovery assessment for 2007/08 or his appeal against the related penalty in respect of that tax year.

81. We will leave it to the parties to agree on the relevant figures which give effect to this decision but with liberty to apply to this Tribunal for final determination in the event that they are unable to reach agreement.

82. 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 Rules. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 26 APRIL 2016

APPENDIX

The A1P1

5 (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

10 (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

15 **Section 3 HRA**

3 Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation
20 must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

25 (a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

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(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

35 **Section 29 TMA**

29 Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the
40 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

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(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

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.

(2) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(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—

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(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;

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(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

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(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

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(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

25
(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 years of assessment;

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(ia) a reference to any NRCGT return made and delivered by the taxpayer which contains an advance self-assessment relating to the relevant year of assessment or either of the two immediately preceding chargeable periods; and

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(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

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

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(7A) The requirement to fulfil one of the two conditions mentioned above does not apply so far as regards any income or chargeable gains of the taxpayer in relation to which the taxpayer has been given, after any enquiries have been

completed into the taxpayer's return, a notice under section 81(2) of TIOPA 2010 (notice to counteract scheme or arrangement designed to increase double taxation relief).

5 (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.

(9) Any reference in this section to the relevant year of assessment is a reference
10 to—

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

15 (b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made.

Section 36 TMA

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36 Loss of tax brought about carelessly or deliberately etc

(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not
25 more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

(1A) An assessment on a person in a case involving a loss of income tax or capital
30 gains tax —

(a) brought about deliberately by the person,

(b) attributable to a failure by the person to comply with an obligation under
35 section 7,

(c) attributable to arrangements in respect of which the person has failed to comply with an obligation under section 309, 310 or 313 of the Finance Act 2004 (obligation of parties to tax avoidance schemes to provide
40 information to Her Majesty's Revenue and Customs), or

(d) attributable to arrangements which were expected to give rise to a tax advantage in respect of which the person was under an obligation to notify the Commissioners for Her Majesty's Revenue and Customs under section
45 253 of the Finance Act 2014 (duty to notify Commissioners of promoter reference number) but failed to do so,

may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

(1B) In subsections (1) and (1A), references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.

(2) Where the person mentioned in subsection (1) or (1A) ("the person in default") carried on a trade, profession or business with one or more other persons at any time in the period for which the assessment is made, an assessment in respect of the profits or gains of the trade, profession or business in a case mentioned in subsection (1A) or (1B) may be made not only on the person in default but also on his partner or any of his partners.

(3) If the person on whom the assessment is made so requires, in determining the amount of the tax to be charged for any chargeable period in any assessment made in a case mentioned in subsection (1) or (1A) above, effect shall be given to any relief or allowance to which he would have been entitled for that chargeable period on a claim or application made within the time allowed by the Taxes Acts.

(3A) In subsection (3) above, "claim or application" does not include an election under any of sections 47 to 49 of ITA 2007 (tax reductions for married couples and civil partners: elections to transfer relief).

(4) Any act or omission such as is mentioned in section 98B below on the part of a grouping (as defined in that section) or member of a grouping shall be deemed for the purposes of subsections (1) and (1A) above to be the act or omission of each member of the grouping.

Sub-section 50(6) TMA

50 Procedure

(6) If, on an appeal notified to the tribunal, the tribunal decides—

(a) that, the appellant is overcharged by a self-assessment;

(b) that, any amounts contained in a partnership statement are excessive; or

(c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

Schedule 1AB TMA

Making a claim

5 3(1) A claim under this Schedule may not be made more than 4 years after the end of the relevant tax year.

(2) In relation to a claim made in reliance on paragraph 1(1)(a), the relevant tax year is—

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(a) where the amount paid, or liable to be paid, is excessive by reason of a mistake in a return or returns under section 8, 8A or 12AA of this Act, the tax year to which the return (or, if more than one, the first return) relates, and

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(b) otherwise, the tax year in respect of which the payment was made.

(3) In relation to a claim made in reliance on paragraph 1(1)(b), the relevant tax year is —

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(a) where the amount liable to be paid is excessive by reason of a mistake in a return or returns under section 8, 8A or 12AA, the tax year to which the return (or, if more than one, the first return) relates, and

25 (b) otherwise, the tax year to which the assessment, determination or direction relates.

(4) A claim under this Schedule may not be made by being included in a return under section 8, 8A or 12AA of this Act.

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(5) Sub-paragraph (1) is subject to paragraph 3A.

Determinations under section 28C: special rules

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3A(1) This paragraph applies where—

(a) a determination has been made under section 28C of an amount that a person is liable to pay by way of income tax or capital gains tax, but the
40 person believes the tax is not due or, if it has been paid, was not due,

(b) relief would be available under this Schedule but for the fact that—

(i) the claim falls within Case C (see paragraph 2(4)),

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(ii) the claim falls within Case F(a) (see paragraph 2(7)(a)), or

(iii) more than 4 years have elapsed since the end of the relevant tax year (see paragraph 3(1)), and

(c) if the claim falls within Case F(a), the person was neither present nor legally represented during the enforcement proceedings in question.

(2) A claim under this Schedule for repayment or discharge of the amount may be made, and effect given to it, despite paragraph 2(4), paragraph 2(7)(a) or paragraph 3(1), as the case may be.

(3) But the Commissioners are not liable to give effect to a claim made in reliance on this paragraph unless conditions A, B and C are met.

(4) Condition A is that in the opinion of the Commissioners it would be unconscionable for the Commissioners to seek to recover the amount (or to withhold repayment of it, if it has already been paid).

(5) Condition B is that the person's affairs (as respects matters concerning the Commissioners) are otherwise up to date or arrangements have been put in place, to the satisfaction of the Commissioners, to bring them up to date so far as possible.

(6) Condition C is that either—

(a) the person has not relied on this paragraph on a previous occasion (whether in respect of the same or a different determination or tax), or

(b) the person has done so, but in the exceptional circumstances of the case should be allowed to do so again on the present occasion.

(7) For the purposes of sub-paragraph (6)—

(a) a person has relied on this paragraph on a previous occasion if the person has made a claim (or a composite set of claims involving one or more determinations, taxes and tax years) in reliance on this paragraph on a previous occasion, and

(b) it does not matter whether that claim (or set of claims) succeeded.

(8) A claim made in reliance on this paragraph must include (in addition to anything required by Schedule 1A) such information and documentation as is reasonably required for the purpose of determining whether conditions A, B and C are met.

Section 95 TMA

95 Incorrect return or accounts for income tax or capital gains tax

(1) Where a person fraudulently or negligently—

(a) delivers any incorrect return of a kind mentioned in section 8 or 9 of this Act (or either of those sections as extended by section 12 of this Act), or

(b) makes any incorrect return, statement or declaration in connection with any claim for any allowance, deduction or relief in respect of income tax or capital gains tax, or

(c) submits to an inspector or the Board or any Commissioners any incorrect accounts in connection with the ascertainment of his liability to income tax or capital gains tax,

he shall be liable to a penalty not exceeding the amount of the difference specified in subsection (2) below.

(2) The difference is that between—

(a) the amount of income tax and capital gains tax payable for the relevant years of assessment by the said person (including any amount of income tax deducted at source and not repayable), and

(b) the amount which would have been the amount so payable if the return, statement, declaration or accounts as made or submitted by him had been correct.

(3) The relevant years of assessment for the purposes of this section are, in relation to anything delivered, made or submitted in any year of assessment, that, the next following, and any preceding year of assessment.

Section 100B TMA

100B Appeals against penalty determinations

(1) An appeal may be brought against the determination of a penalty under section 100 above and, subject to the following provisions of this section, the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax, except that references to the tribunal shall be taken to be references to the First-tier Tribunal.

(2) On an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but—

(a) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may—

(i) if it appears that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears to be correct, confirm the determination, or

(iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount.

(b) in the case of any other penalty, the First-tier Tribunal may—

(i) if it appears that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears to be appropriate, confirm the determination,

(iii) if the amount determined appears to be excessive, reduce it to such other amount (including nil) as it considers appropriate, or

(iv) if the amount determined appears to be insufficient, increase it to such amount not exceeding the permitted maximum as it considers appropriate.

(3) In addition to any right of appeal on a point of law under section 11(2) of the TCEA 2007, the person liable to the penalty may appeal to the Upper Tribunal against the amount of the penalty which has been determined under subsection (2), but not against any decision which falls under section 11(5)(d) and (e) of the TCEA 2007 and was made in connection with the determination of the amount of the penalty.

(3A) Section 11(3) and (4) of the TCEA 2007 applies to the right of appeal under subsection (3) as it applies to the right of appeal under section 11(2) of the TCEA 2007.

(3B) On an appeal under this section the Upper Tribunal has the same powers as are conferred on the First-tier Tribunal by virtue of this section.

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