[2019] UKFTT 600 (TC)

TC07383

Appeal number: TC/2017/05459

Income tax - ss 29 & 36 TMA 1970 - discovery assessment – Capital Allowances Act 2001 - expenditure on 'plant and machinery' whether deductible from income derived from HMO lettings - appellant asserted that expenditure claimed was restricted to communal areas - whether such areas formed part of 'dwelling-house' and therefore not 'qualifying expenditure' - competency issues - whether HMRC correctly raised discovery assessment under ss 29 TMA 1970 - yes - s 29(5) considered - whether assessments appropriate and correct - yes - appeal dismissed and assessments confirmed

FIRST-TIER TRIBUNAL
TAX CHAMBER

HORA TEVFIK **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER JULIAN STAFFORD

Sitting in public at Immigration Appellate Authority, Kings Court, Royal Quays, Earl Grey Way, North Shields on 28 September 2018

The Appellant did not attend and was not represented

Mr Richard Jones, Officer of HMRC, for the Respondents

DECISION

The appeal

1. This is an appeal by Mr Hora Tevfik ('the appellant') against a discovery assessment issued on 8 March 2016 made under ss 29 and 36 TMA 1970 for the tax year ended April 2011-12 in the sum of £11,849.80.

2. The issues which arise in this appeal are:

(i) whether expenditure by the appellant on plant and machinery in 'communal areas' of properties acquired and used in his UK property business qualifies for capital allowances, and

(ii) whether HMRC correctly raised the discovery assessment under s 29 TMA 1970.

3. There is no dispute that the expenditure was incurred by the appellant on plant and machinery in the properties, nor that the properties in question were acquired and used in his UK property business.

4. HMRC say that the expenditure was incurred on a 'dwelling-house' and therefore does not qualify for plant and machinery capital allowances by specific statutory exclusion [s 35 Capital Allowances Act 2001].

5. The appellant says that the expenditure was incurred on plant and machinery in the communal areas of the properties, which were not part of the 'dwelling-houses' and therefore capital allowances are due.

6. The appellant did not attend the hearing. The tribunal was satisfied that the appellant had been given notice of the time, date and venue of the appeal hearing and that it was in the interests of justice to proceed.

Background

7. The appellant's Self-Assessment Return for 2011-12 was received by HMRC on 22 January 2013. The Return claimed a deduction of £50,000 for capital allowances (Annual Investment Allowance ['AIA']) and also a 10% 'wear and tear allowance'.

8. The appellant's 2011-12 return showed the following entries in respect of income from land and property:

	£
Rents from Property	99,289
Less: Property Expenses (itemised)	48,840
Annual Investment Allowance	50,000
10% Wear and Tear Allowance	8,604

Adjusted loss for the year	(8,155)

9. The Return stated that one property had been rented out, which appears to have been a mistake (there were in fact three). The AIA of £50,000 was claimed on page 14 of the appellant's Return, and on the same page the 10% wear and tear allowance of £8,604 was also claimed. The 'wear and tear' allowance can be claimed for rented out furnished residential accommodation. In the appellant's return for 2011-12, s 308 A(1) ITTOIA 2005 provides that a wear and tear allowance election can only be made by a person carrying on a property business which consists of or includes a furnished letting of a dwelling-house.

10. The AIA cannot be claimed for providing plant and machinery for use in a dwelling-house and only applies to expenditure incurred on or after 6 April 2008. This raised the question whether the claim for 'wear and tear' allowance should have alerted the HMRC officer to the fact that the AIA claim (or any alternative claim for plant and machinery expenditure) would fail. There were no comments/additional entries in the white space of the Return. HMRC accepted the Return without enquiry.

11. In April 2015, during the course of an enquiry into the appellant's Return for the following year 2012-13, HMRC discovered that his £50,000 AIA claim, for 2011-12, related to expenditure on residential properties that he owned and were used in his property business which were let by him as houses of multiple occupancy ('HMO's') at:

- 162 London Road, Wokingham – purchased for £204,000 on 15 March 2001. The amount claimed for qualifying expenditure was £21,158. This included plant and machinery of £17,965 expended by the appellant's seller prior to the purchase of the property and £3,193 post purchase expenditure by the appellant.

- 23 Mylne Square, Wokingham - purchased for £245,000 on 25 February 2005. The amount claimed for qualifying expenditure was £17,185, all of which related to pre-purchase expenditure by the appellant's seller.

- 1 School Terrace, Reading - purchased for £263,000 on 21 December 2006. The amount claimed for qualifying expenditure was £15,094 and was made up of £13,584 expended by the seller prior to the appellant's purchase of the property and £1,510 post-purchase expenditure by the appellant.

The total expenditure was £53,437. The main type of plant and machinery claimed was as follows:

Heating and air conditioning installations
General power installations
Lighting installations
Security installations.
Telephone installations
Gas and electrical connections

Fire alarms and smoke detectors
Fixed furniture
Carpeting
Incoming mains connections
Mechanical ironmongery

12. The appellant had purchased the three properties from sellers who had not claimed any or all the capital allowances that might have been available, which therefore passed to the purchaser, that is, the appellant.

13. The appellant's agent Portal Tax Claims, when preparing the appellant's capital allowances claim, did so by undertaking a survey of the properties and then identifying pre and post-purchase expenditure. They then apportioned the purchase price for the property as between plant and machinery and non-qualifying expenditure, having identified the communal parts and limited the claim to those parts. They did so on the assumption that such communal parts would not form part of a 'dwelling-house' and therefore would qualify as plant and machinery. No copy of the survey or specific identification of the communal parts was provided by the appellant or his agent.

14. HMRC contend that on 31 January 2014, when the officer ceased to be entitled to enquire into the Return, he could not have been reasonably expected, on the basis of the information made available to him at that time, to be aware of the insufficiency in the appellant's 2011-12 Return. There was nothing in the appellant's 2011-12 Return or supporting documents to alert the officer to the insufficiency and therefore the condition at s 29 (5) TMA 1970 was met.

15. On 17 August 2015, following an exchange of correspondence with the appellant's agent, HMRC said that the AIA claim failed because AIA only applies to expenditure incurred on or after the 'relevant date' i.e. 6 April 2008 (s 38A CAA 2001). As set out above, all of the appellant's expenditure was incurred before that date. This was accepted by the appellant.

16. HMRC added that whilst the appellant might alternatively have been able to claim plant and machinery allowances, the expenditure was not 'qualifying expenditure' as it was incurred in providing plant or machinery for use in a dwelling-house (s 35 CAA 2001).

17. The appellant's agent, in a letter dated 2 November 2015, said that:

> "s (3) CAA 2001, states that if plant or machinery is provided partly for the use in a dwelling-house and partly for other purposes, such apportionment of the expenditure incurred in providing that plant or machinery is to be made for the purposes of subsection (2) as is just and reasonable."

[It is assumed that the agent was referring to s 35(3) CAA 2001.]

He added:

> "The claims submitted only include plant and machinery within the common/commercial areas of the property and have been calculated using the section 562 apportionment formula. All items within the 'residential' aspect of the property have been omitted in line with the above legislation.
>
> To add, Brief 45/10 looks to distinguish a key feature of a dwelling-house with the following quote – 'ability to afford those who use it the facilities required for day-to-day private domestic existence'. The private element would indeed refer to parts of the property we have not included within our claims and as stated only the common/commercial aspects of the properties have been itemised."

18. On 13 January 2016, HMRC rejected the agent's arguments and asked that the appellant withdraw his claim for relief. The officer dealing with the matter commented that where s 35 CAA 2001 refers to "part of a building" it was in his view in the context of the whole of that part providing the facilities for day to day private domestic existence. A dwelling-house or flat is not just the bedroom, bathroom and kitchen but rather it is the whole of the self-contained unit. This includes in his view all rooms, storage cupboards, loft space, eaves space and so on. [It is noted that the officer referred to "part of a building" whereas s 35 does not use that expression and simply distinguishes between plant and machinery used partly for a dwelling-house and partly for other purposes where such apportionment may be made as is "just and reasonable".]

19. There was no response from the appellant's agent and on 8 March 2016 HMRC issued a discovery assessment under s 29(1)(b) TMA 1970 disallowing the AIA claim. This reduced the loss of £8,155 to a profit of £41,845 and as a result additional tax of £11,849.80 fell due.

20. On 29 March 2016, the appellant appealed HMRC's discovery assessment decision via his agent. In the appeal the appellant did not specifically challenge the discovery assessment [as he perhaps could have done on the basis that the conditions of s 29(5) TMA 1970 may not have been satisfied]. The only basis of his appeal was that the expenditure related to communal areas of the HMO's, which he argued do not form part of 'a dwelling'.

21. On 14 April 2016 HMRC responded that in their view, where a house has a number of separate bedrooms with or without en-suite facilities occupied by a number of unconnected individuals who share other facilities such as kitchen, bathroom and lounge, then the whole of the house is a dwelling-house. He further commented that (conversely) for a dwelling-house that has been converted into a number of individual flats, each flat with its own entrance, cooking, washing and sleeping facilities, then each separate flat is a dwelling-house and that all areas within each flat comprise the dwelling-house. The officer added that common areas between the flats such as hallways and stairways are not part of the dwelling-houses.

22. After a further exchange of correspondence, the HMRC officer said that he would not accept a capital allowances claim for plant and machinery relating to any parts (communal or otherwise) of HMOs or similar properties. He did not distinguish communal parts from common parts or provide any further explanation for his view,

save to say that the initial purchase or construction expenditure was simply 'capital expenditure' that could not be written off for income tax purposes.

23. There was no further response from the appellant or his agent and HMRC summarised their view of the matter on 2 March 2017, rejecting the appeal but offering a review, which the appellant accepted on 13 March 2017.

24. On 30 May 2017, HMRC's reviewing officer, Louise Meynell, issued a review conclusion, upholding HMRC's position. She added that the appellant would only be able to claim a writing down allowance at the appropriate rate, if it was decided that the claim for capital allowances on plant and machinery in the *communal* areas was allowable. The claim would need to be reduced to recognise that only 20% or 10% writing down allowances could be claimed and adjustments may also be required to reflect the fact that the appellant only owned 50% of two of the properties.

25. On 28 July 2017, the appellant notified his appeal to the tribunal (on the same grounds as those set out in his appeal to HMRC).

26. At the hearing, the appellant did not attend and was not represented. The tribunal therefore only heard substantive argument from HMRC on the issue of whether the expenditure claimed by the appellant was 'qualifying expenditure'. However as a preliminary matter the tribunal noted that the question of whether the conditions in s 29(5) were satisfied (see paragraphs 9 and 10 above) had not been addressed by the parties in their submissions.

27. The tribunal therefore issued directions requiring the parties to submit written representations on the point. The tribunal directed that it would determine the appeal on the basis of those further written representations without a further hearing.

28. The parties have now lodged their written representations with the tribunal.

Legislation case law and guidance

29. The relevant legislation is contained in:

Capital Allowances Act 2001

1 Capital allowances

(1) This Act provides for allowances in respect of capital expenditure (and for charges in connection with those allowances).
(2) The allowances for which this Act provides are those under-
(a) Part 2 (plant and machinery allowances);

3 Claims for capital allowances

(1) No allowance is to be made under this Act, ..unless a claim for it is made.
(2) The claim must be included in a tax return.

(2A) Any claim for an allowance under Part 3A (business premises renovation allowances) must be separately identified as such in the return.

11 General conditions as to availability of plant and machinery allowances

(1) Allowances are available under this Part if a person carries on a qualifying activity and incurs qualifying expenditure.
(2) "Qualifying activity" has the meaning given by Chapter 2.
(3) Allowances under this Part must be calculated separately for each qualifying activity which a person carries on.
(4) The general rule is that expenditure is qualifying expenditure if-

(a) it is capital expenditure on the provision of plant or machinery wholly or partly for the purposes of the qualifying activity carried on by the person incurring the expenditure, and

(b) the person incurring the expenditure owns the plant or machinery as a result of incurring it.

(5) But the general rule is affected by other provisions of this Act, and in particular by Chapter 3.

15 Qualifying activities

(1) Each of the following is a qualifying activity for the purposes of this Part-
(a) a trade,
(b) an ordinary property business,
(2) Subsection (1) is subject to the following provisions of this Part.
(3) This section, in so far as it provides for-
(a) an ordinary property business,
to be a qualifying activity, needs to be read with section 35 (expenditure on plant or machinery for use in a dwelling-house not qualifying expenditure in certain cases).

33A Expenditure on provision or replacement of integral features

(1) This section applies where a person carrying on a qualifying activity incurs expenditure on the provision or replacement of an integral feature of a building or structure used by the person for the purposes of the qualifying activity.
(2) This Part (including in particular section 11(4)) applies as if-

(a) the expenditure were capital expenditure on the provision of plant or machinery for the purposes of the qualifying activity, and

(b) the person who incurred the expenditure owned plant or machinery as a result of incurring it.

(5) For the purposes of this section each of the following is an integral feature-

(a) an electrical system (including a lighting system),

(b) a cold water system,

(c) a space or water heating system, a powered system of ventilation, air cooling or air purification, and any floor or ceiling comprised in such a system,

(d) a lift, an escalator or a moving walkway,

(e) external solar shading.

(6) The items listed in subsection (5) do not include any asset whose principal purpose is to insulate or enclose the interior of a building or to provide an interior wall, floor or ceiling which (in each case) is intended to remain permanently in place.

[Section 33A was inserted by FA 2008 s73(2) with effect in relation to expenditure incurred on or after 1 April 2008 for corporation tax purposes and 6 April 2008 for income tax purposes.]

35 Expenditure on plant or machinery for use in dwelling-house not qualifying expenditure in certain cases

(1) This section applies if a person is carrying on a qualifying activity consisting of—

(a) an ordinary property business,

(2) The person's expenditure is not qualifying expenditure if it is incurred in providing plant or machinery for use in a dwelling-house.

(3) If plant or machinery is provided partly for use in a dwelling-house and partly for other purposes, such apportionment of the expenditure incurred in providing that plant or machinery is to be made for the purposes of subsection (2) as is just and reasonable.

38A AIA qualifying expenditure

(1) An annual investment allowance is not available unless the qualifying expenditure is AIA qualifying expenditure.

(2) Expenditure is AIA qualifying expenditure if-

(a) it is incurred by a qualifying person on or after the relevant date, …

(5) "The relevant date" means-

(b) for income tax purposes, 6 April 2008.

531 Meaning of "dwelling-house", "lease" etc.

(1) In this Part "dwelling-house" has the same meaning as in the Rent Act 1977 (c. 42).

562 Apportionment where property sold together

(1) Any reference in this Act to the sale of property includes the sale of that property together with any other property.

(2) For the purposes of subsection (1), all property sold as a result of one bargain is to be treated as sold together even though-

(a) separate prices are, or purport to be, agreed for separate items of that property, or

(b) there are, or purport to be, separate sales of separate items of that property.

(3) If an item of property is sold together with other property, then, for the purposes of this Act-

(a) the net proceeds of the sale of that item are to be treated as being so much of the net proceeds of sale of all the property as, on a just and reasonable apportionment, is attributable to that item, and

(b) the expenditure incurred on the provision or purchase of that item is to be treated as being so much of the consideration given for all the property as, on a just and reasonable apportionment, is attributable to that item.

Taxes Management Act 1970 ('TMA 1970')

Section 29 - Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment-

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or 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) [not applicable]

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above-

(a) in respect of the year of assessment mentioned in that subsection; and

(b) ... in the same capacity as that in which he made and delivered the return, unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf

(5) The second condition is that at the time when an officer of the Board-

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer …; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or
(ii) are notified in writing by the taxpayer to an officer of the Board

Section 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 more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).
(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax-
(a) brought about deliberately by the person,
……..
may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

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;
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

HMRC Guidance on the meaning of "dwelling-house" and qualifying plant and machinery expenditure

30. There is no definition of 'dwelling-house' in CAA 2001, but initial guidance in HMRC's manual CA11520 set out HMRC's view on its meaning. It stated that, amongst other types of accommodation, university halls of residence were not dwelling-houses.

31. HMRC have twice revised their view on the question of what constitutes a 'dwelling-house', particularly in the context of student residences. Until December 2008, HMRC accepted that a university hall of residence was not a dwelling-house. However updated guidance was issued at the end of 2008 and then further revised issued in October 2010. (There has however been no change to the underlying legislation.)

HMRC's Brief 66/08, 29 December 2008

32. HMRC's Brief 66/08 provided clarification of HMRC's view on the application of s 35 CAA 2001 to university halls of residence and similar facilities. Up until then HMRC's view was that communal areas such as shared kitchens were not dwelling-houses. These views were set out in CA11520 which was updated with the revised view being that the provision of student accommodation had evolved since they expressed their view in the original CA11520 and the updated guidance was intended to reflect this. Only "communal" areas and areas to which tenants do not have access are not 'dwelling-houses'. All other areas are 'dwelling-houses'.

> Example
>
> A student accommodation block has three floors, each with ten en-suite "study bedrooms" that are individually lockable. Each floor also has a kitchen and TV room which are for the use of the ten occupants. The building has air-conditioning equipment located in the attic and a boiler located in the basement – only maintenance personnel have access to these areas.
>
> In this example the kitchen and TV room are communal areas and not dwelling- houses. The stairs and corridors which give access to other areas are also communal and are not dwelling-houses. Tenants do not have access to the roof and attic and so they are not dwelling-houses. However, the individual study bedrooms are dwelling-houses.

HMRC said that this view extended to other types of multiple occupancy accommodation, such as those provided to key workers. HMRC explained that there are several references to dwelling-houses in CAA 2001. The term appears in Part 2 (plant and machinery allowances), Part 3 (industrial buildings allowance) and Part 10 (assured tenancy allowances). Their view of dwelling-houses should apply universally throughout the Capital Allowances Act.

HMRC Brief 45/10 - 22 October 2010

33. This Brief provided a revised guide on the meaning of "dwelling-house" for the purposes of s 35 CAA 2001.

34. Specifically for Part 10 of CAA 2001 (Assured Tenancy Allowances) the term "dwelling-house" is given the same meaning as in the Rent Act 1977. Because of this legislative reference, HMRC said that they originally assumed the term would have the same meaning in other Parts of CAA 2001, and went on from that assumption to conclude that the individual study bedrooms (in the student accommodation example above) would comprise separate "dwelling-houses" (because each allowed for exclusive occupation and access), but that the communal kitchen/diner and lounge/TV rooms were not part of the dwelling-house(s) [the view expressed in Brief 66/08].

35. HMRC's revised view in 45/10 was that the meaning of "dwelling-house" for Part 10 (which is the Rent Act/Housing Act meaning) is specific to that Part, and that the term when used in other Parts of CAA 2001 should take its ordinary, everyday meaning. Applying the Rent Act/Housing Act meaning to those other Parts of the Act would be inappropriate.

36. In *Uratemp Ventures Ltd. v Collins* [2001] UKHL 43, which was a decision under the Housing Act 1988, and which found that a hotel room could be a dwelling-house, despite the absence of cooking facilities, it was pointed out that the purpose of that Act was to give a measure of security to those who make their homes in rented accommodation at the lower end of the housing market and, in that particular context, a hotel room containing a shower and basin but no cooking facilities was found to constitute a separate dwelling.

37. In *Gravesham Borough Council v Secretary of State for the Environment* (1982) 47 P&CR 142 it was held that the distinctive feature of a dwelling-house for the purposes of the Town and Country Planning General Development Order, since replaced by the Use Classes Order, was its ability to afford to those who use it the facilities required for day-to-day private domestic existence. The Use Classes Order distinguishes between dwelling-houses, whether used by a single household or as a house in multiple occupation (classes C3 and C4), and various categories of residential institution such as hospitals, nursing homes, etc., (C2), prisons and military barracks (C2A), and hotels and hostels (C1).

38. Following these decisions HMRC concluded that a definition of "dwelling-house" based on the presence of "facilities required for day-to-day private domestic existence" is a better everyday description, bearing in mind that the question remains essentially one of fact, so that unusual or controversial cases may still need to be considered in the light of their individual facts and circumstances.

39. HMRC's revised view is that each flat in multiple occupation comprises a dwelling-house, given that the individual study bedrooms alone would not afford the occupants "the facilities required for day-to-day private domestic existence". In other words, the communal kitchen and lounge are also part of the dwelling-house. The common parts of the building block (such as the common entrance lobby, stairs or lifts) would not, however, comprise a "dwelling-house".

40. HMRC's updated view, was incorporated in the revised CA11520 which they said applied in all circumstances in relation to capital expenditure incurred on or after 22 October 2010.

41. In relation to capital expenditure incurred on or after 29 December 2008 but before 22 October 2010, HMRC said they would either accept capital allowances claims in returns made in respect of communal areas on the basis of the view as set out in Brief 66/08 or on the basis of the view as previously set out in CA11520.

HMRC's contentions

Discovery

42. HMRC assert that they were correct to issue a discovery assessment in respect of the appellant's return for the year ending 5 April 2012, because during the course of the enquiry into the year ending 5 April 2013 they discovered that expenditure claimed in the 2012 tax return was excessive.

43. The existence of the wear and tear allowance claim in the appellant's return was not of itself sufficient to make HMRC aware that the AIA claim would fail.

44. It is entirely possible for a person carrying a property letting business to be eligible for both the AIA and a wear and tear allowance against the rental income from that business; they are not mutually exclusive:

- The business income could consist of rentals from property that is not a dwelling-house, and also

- Rentals from property that does amount to a dwelling-house.

Expenditure on plant or machinery for the former would potentially attract AIA; whilst the latter would potentially be eligible for the wear and tear allowance.

- An AIA claim could relate to expenditure on Plant and Machinery for use in the property business, such as tools or a van, that could qualify for AIA and not be appropriate for a wear and tear allowance claim, as not relating to a dwelling-house.

- At the same time there could be expenditure on Plant and Machinery for use in a let dwelling-house that could attract a wear and tear allowance, but not qualify for AIA.

45. Section 308C ITTOIA 05 makes it clear that:

i. The amount of the wear and tear allowance is 10% of the relevant rental amount (s 308C(3));

ii. 'The relevant rental amount' includes only receipts within ss 6 (s 308C(4)(a)); and

iii. Receipts within ss 6 are those attributable to a dwelling-house that is subject to a furnished letting comprised in the property business (s 308C(6)).

46. It is clear from the figures returned by the appellant that not all of his property rental income qualified for a wear and tear allowance, as the amount claimed is less than 10% of the total rental receipts. It was therefore entirely possible that he was in receipt of rentals both from properties that were and were not dwelling-houses.

i. Therefore it was not clear from the return that the AIA claim must fail, and

ii. To establish the true position, in the absence of any other information from the appellant, HMRC would have had to make further enquiries.

47. The Courts have established that for a discovery assessment to be defeated:

i. The HMRC officer had to be aware of an actual insufficiency, rather than to be aware that there might be a possible insufficiency. He is under no obligation to undertake an enquiry into the return - *Langham v Veltema* (2004) BTC 156.

ii. The rules of s 29 TMA 70 are designed to ensure that a taxpayer who has made a full disclosure in his tax return has absolute finality once the time allowed for enquiry has passed. But in any case, where there was incomplete disclosure HMRC have the power to remedy any loss of tax - *Corbally-Stourton v HMRC* (2008) Sp C 692.

48. HMRC submit that the appellant's return for 2011-12 did not make a full disclosure of the position with regard to his let properties sufficient to determine the validity of his AIA and wear and tear allowance claims, without the need for further enquiries.

49. Consequently, when HMRC ceased to be entitled to enquire into the appellant's return for 2011-12, they could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the insufficiency in the appellant's self-assessment. The condition in s 29(5) TMA 70 is therefore fulfilled.

Whether the expenditure is qualifying expenditure

50. Plant and machinery allowances are given under Part 2 CAA 2001, by virtue of s 1 of the Act. There are a number of conditions in the legislation that have to be met before allowances can be claimed.

51. The general conditions as to the availability of plant and machinery allowances are found in s 11 CAA 2001; they include the conditions that there must be a qualifying activity and qualifying expenditure. The general rule is that expenditure is qualifying expenditure if it is capital expenditure on the provision of plant or machinery that is wholly or partly for the purposes of the qualifying activity carried on by the person incurring the expenditure and the person incurring the expenditure owns the plant or machinery as a result of incurring the expenditure. Therefore, the starting point in making a claim to plant and machinery allowances is to identify qualifying expenditure.

52. There is no dispute that the appellant conducts a qualifying activity, his UK property (s 15 CAA 2001).

53. Section 38A CAA 2001 provides that an AIA is only available in respect of AIA qualifying expenditure. Expenditure is AIA qualifying expenditure if it is incurred by a qualifying person on or after 'the relevant date', 6 April 2008 for income tax purposes (s 38A (5)). As the appellant's expenditure was all incurred before 6 April 2008, it was not AIA qualifying expenditure and therefore his AIA claim fails.

54. Section 33A CAA 2001, providing relief for expenditure on the provision or replacement of integral features of a building, took effect in relation to expenditure incurred on or after 6 April 2008 for income tax purposes. It is not entirely clear however whether the appellant's claim is partly in respect of expenditure on the

provision or replacement of integral features of a building, but to the extent that it may be, it fails because it was all incurred before 6 April 2008.

55. Section 35 CAA 2001 applies if a person is carrying on a qualifying activity consisting of an ordinary UK property business, and provides that the person's expenditure is not qualifying expenditure if it is incurred in providing plant or machinery for use in a dwelling-house.

56. 'Dwelling-house' has no specific statutory definition for the purposes of Part 2 CAA 2001, so it must take its ordinary every day meaning. In *Gravesham* it was held that the distinctive feature of a dwelling-house is its ability to afford to those who use it the facilities required for day-to-day private domestic existence.

57. Applying this definition to HMO's, HMRC say they provide the facilities for day-to-day private domestic existence via bedrooms (with or without en-suite facilities) and shared or communal kitchen/diner, bathroom and lounge; and therefore they are 'dwelling-houses' for the purposes of s 35 CAA 2001. Such a house would be a dwelling-house if occupied by a family.

58. HMRC say that in an HMO, it is the totality of the property that forms the dwelling-house. It is the house as a whole that provides the facilities for day-to-day private domestic existence and hence the house as a whole that is the dwelling-house. The bedroom on its own; the kitchen on its own; the bathroom or hallways on their own do not provide the facilities, but together they are the dwelling-house.

59. HMRC acknowledge that its interpretation of the meaning of 'dwelling-house' with regard to an HMO has developed over time. As set out in 66/08 and 45/10.

60. The appellant seeks support for his interpretation from RCB 66/08, but that was replaced by RCB 45/10 on 22 October 2010.

61. HMRC will accept capital allowance claims based on their interpretation set down in RCB 66/08:

- For capital expenditure incurred between 29 December 2008 and 22 October 2010, or
- For capital expenditure incurred before 29 December 2008 where the claim was filed before 22 October 2010.

62. The appellant's expenditure was incurred before 29 December 2008 (in March 2001, February 2005 and December 2006) but the claim was filed after 22 October 2010, with his 2011-12 Return on 22 January 2013.

63. The appellant's expenditure was incurred in providing plant or machinery for use in a dwelling-house notwithstanding that it related to communal or shared areas of the properties. Consequently the expenditure is disallowed by s 35 CAA 2001.

Appellant's Contentions

Discovery

64. The appellant asserts that the conditions in s 29 TMA 1970 have not been met, and that therefore the discovery assessment issued for 2011-12 cannot stand.

65. HMRC had from submission of the 2011-12 return to 31 January 2014 to enquire into the return. The taxpayer should have a reasonable expectation that HMRC would conclude any review of a tax return within the statutory deadline.

66. A wear and tear allowance claim of £8,604 should have led HMRC to realise that this must have related to at least £86,040 of rental income, whereas the rental income was £99,289 (leaving a balance of only £13,249). The size of the AIA claim being more than 50% of the value of the total rents should have raised the issue as to whether both claims could have been validly made and led HMRC to open an Enquiry into the return within the time limit - without having to resort to a discovery assessment.

67. HMRC contend that incomplete disclosure was made on the return. This cannot be correct - the AIA was properly disclosed - it is for HMRC to enquire as to the validity of that claim.

68. The appellant used a professional advisor to file his returns and he would have the expectation that the advisor would disclose a correct claim.

Conclusions

Discovery

69. The first issue to consider in this appeal concerns the discovery assessment provisions of s 29 TMA 1970, which permit an officer of HMRC to make an assessment where he discovers that an assessment is or has become insufficient. The HMRC officer may raise an assessment under s 29 only if he newly came to the conclusion that it was probable that there was an insufficiency. Section 29(5) prohibits the making of a discovery assessment after the close of the 'self-assessment enquiry window', if at that time an officer could on the basis of information then available to him, taking into account the general knowledge and skill that might reasonably be attributed to him, reasonably have been expected to be aware of an actual insufficiency.

70. Under common law the burden of proof rests with the person making the assertion. HMRC therefore have the burden of proof to show that the conditions of s 29 TMA 1970 for making a discovery assessment were met.

71. If HMRC discharge that burden, under s 50(6) TMA 1970, the burden then reverts to the appellant to show that he is overcharged by the discovery assessment. If the appellant cannot prove that, the assessment must stand good.

72. The standard of proof is the normal civil standard of the balance of probabilities.

73. We must consider whether the disclosure in the appellant's 2011-12 Return was sufficient to alert a reasonably competent HMRC officer that any relief claimed was

excessive or that income which ought to be assessed to income tax had not been assessed.

74. The appellant did not initially challenge the validity of the discovery assessments insofar as they may not have satisfied the conditions of s 29(5). Competency issues were not pleaded. The focus of his appeal was the substantive issue as to whether he had incurred and could claim 'qualifying expenditure'. HMRC did not initially address the issue as to whether the discovery assessments were validly made.

75. In the case of *Burgess and Brimheath Developments Ltd v HMRC* [2015]UKUT 578 (TCC) the Upper Tribunal confirmed that in appeals against discovery assessments (issued pursuant to TMA 1970 s 29) HMRC bears the burden of demonstrating that the assessments are valid irrespective of whether the appellant has raised the issue. It is incumbent upon HMRC to prove on the balance of probabilities that the necessary circumstances existed to permit a discovery assessment to be made.

76. The question therefore arises as to whether HMRC were specifically required to plead on this point (they have the burden of proof). However, given that the point was not raised by the appellant, this was, initially at least, clearly not an issue between the parties. In *Allpay Limited* v *HMRC* [2018] UKFTT 0273 (TC) Judge Barbara Mosedale said that HMRC did not have to plead matters which are not in issue and we agree with that principle.

77. The appellant's return at box 20 stated that "rents and other income from property" were £99,289. At box 36 the return stated that £8,604, being a "10% wear and tear allowance" was claimed, which meant that rental received from residential furnished property must at a minimum have been £86,040.

78. However, on the same page at box 32, the return claims the AIA of £50,000, which is not applicable to a dwelling-house.

79. The claim for wear and tear would have had to be restricted to furnished rooms and communal areas and not relate to any common areas which would raise the question whether a claimed allowance against rent of £86,040 could be reconciled with total rents of £99,289.

80. HMRC argue that Returns can include a mixture of properties that do or do not qualify. However, in box 1 on page 12, the appellant inserted that only one property was rented out during the year and therefore HMRC's argument in that regard is weakened. There were of course three properties.

81. *The question is what the legislation means by 'could not have been reasonably expected … to be aware of the [insufficiency]'. Was it enough that the officer had grounds to be suspicious? Or did the officer actually have to know the return was incorrect?*

82. In *Langham v Valtema* it was made clear that the only information which should be treated as being available to the HMRC officer for the purposes of s 29(5) was that listed in s 29(6). Section 29(6) refers to what it would have been reasonable to expect

the officer objectively to have been aware of on the basis of that information. However it is not necessary to take into account what further enquiries the officer could reasonably have been expected to undertake from the information supplied to him under s29(6).

83. In *HMRC v Charlton* [2013] STC 866 at [37] the Upper Tribunal said:

> "All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight."

84. In determining what is reasonable to expect of an officer, in addition to the rules of elementary arithmetic, he must be attributed as having some awareness of the tax laws, and the interaction of those tax laws insofar as they are relevant to the tax return which he is considering.

85. It is not required that the officer was aware that there was an actual insufficiency or that he be aware it was beyond all reasonable doubt that there was an insufficiency, but merely that the information available to him should have enabled him to conclude on balance that there was an insufficiency. If he could reasonably have been expected to have come to such conclusion before the closure of the enquiry window, HMRC are precluded from making a discovery assessment.

86. For the reasons argued by HMRC and set out at paragraphs 43-49 above, we cannot conclude that it was an obvious inference that he appellant's 2011-12 return was wrong or more likely than not to be wrong.

87. The AIA and wear and tear allowance, claimed together without further explanation could have been regarded as odd, but was it inevitably wrong? There was no further comment in the white space of the return which might have explained or qualified matters, so HMRC would have been speculating as to what background facts could have generated the information in the return. As HMRC argue, there were a variety of possible explanations and it was quite plausible that the return was correct.

88. We find, on the basis of the appellants 2011-12 return that HMRC could not have been reasonably expected, on the basis of the information made available to them, to be aware of the insufficiency. The return perhaps ought to have made HMRC suspicious of an insufficiency, but it was not enough to make them aware of the insufficiency.

89. We find HMRC were not precluded from making a valid discovery assessment because the condition in paragraph 29(5) was met.

Whether the expenditure is qualifying expenditure

90. The claim for AIA failed because AIA only applies to expenditure incurred on or after the relevant date of 6 April 2008. The appellant's expenditure was incurred before 6 April 2008.

91. HMRC considered, as an alternative to a claim for AIA, whether the appellant may be able to claim plant and machinery allowances.

92. HMRC's Brief 45/10 replaced 66/08 in order to remove the uncertainty around the definition of 'dwelling-house'. We concur with HMRC's updated view that the definition of a dwelling-house in s 531 Part 10 CAA was specific to that Part only. For other Parts of CAA 2001, 'dwelling-house' should take its everyday meaning. A definition based on the presence of the facilities required for day-to-day private domestic existence is a better everyday description. Each flat in multiple occupation comprises a dwelling-house. The individual bedrooms alone would not afford the occupants 'the facilities required for day to day private existence' (*Gravesham*). A communal kitchen and lounge are also part of a dwelling-house.

93. The 'common parts' of the building such as the common entrance lobby, corridors, stairs or lifts and those parts of the building which do not provide any living facilities would not, however, comprise a "dwelling-house". Neither are installations to the building such as mains, gas or electrical services, nor security and communication systems.

94. From the information provided by the appellant's agent, the expenditure was incurred in providing plant or machinery for use in a dwelling-house and related to common parts, communal or shared areas or installations in the properties. Such expenditure is allowed by s 35(3) CAA 2001 insofar as it is an asset provided partly for use in a dwelling-house and partly for other purposes but only so far as is just and reasonable.

95. We were not addressed by either party on the provisions of s 35(3) and 562(3) CAA 2001. The appellant has not identified the 'common areas' (as opposed to 'communal areas' which form part of a dwelling house) to which the claim for plant and machinery relates.

96. Although in an exchange of correspondence between HMRC and the appellant's agent there was discussion as to whether the appellant's claim for plant and machinery related to a dwelling-house or common areas and that the appellant's claim would need to be revised insofar as may be allowed by s 35(3), the appellant did not pursue that invitation or provide any further information as he perhaps could have done. Nor for example did he adjust his claim to reflect the fact that he only owned 50% of two of the three properties. The appellant's claim therefore was not further particularised and without that information and to the extent that the claim includes communal areas (as is possibly the case, given the appellant's agent's belief that a plant and machinery claim may relate to such areas) we have to conclude that the plant and machinery claim fails.

97. The burden of proof is on the appellant to establish that the expenditure on his properties was qualifying expenditure and clearly, he has not discharged that burden. Therefore, the discovery assessment raised in March 2016 was validly raised.

Decision

98. For the reasons set out above the appeal is dismissed and we confirm the assessment.

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

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 24 SEPTEMBER 2019