[2020] UKFTT 0134 (TC)

TC07623

Procedure – Permission to Appeal – s.29 TMA 1970 discovery assessment – Grounds of appeal: (1) "staleness" not part of law; (2) Tribunal's decision unexplained; (3) Finding of "staleness" not reasonably open to Tribunal – Application refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/03178

DECISION
ON AN APPLICATION FOR PERMISSION TO APPEAL
IN THE CASE OF

BASHIR AHMED JAFARI **Appellant**

-and-

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

1. On 13 November 2019, the Tribunal issued the decision in this appeal ('the Decision'). On 14 February 2020, HMRC made an in-time application to appeal the Decision (pursuant to an application for an extension of time dated 8 January 2020 under Rule 5(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (S.I. 2009/273 (L.1), as amended) (the **Rules**), which was approved by Judge Poole on 17 January 2020).

2. I considered in accordance with Rule 40 of the Rules whether to review the Decision but decided not to undertake a review as I was not satisfied that there was an error of law in the Decision.

BACKGROUND

3. The appellant's appeal related to closure notices and discovery assessments for the tax years 2008/9 to 2013/14 inclusive. In each case, the closure notices and discovery assessments related to the under-declaration of income from the appellant's property interests.

4. Following exchanges with the Tribunal at the beginning of the hearing, the appellant decided to offer no case and, with the Tribunal's agreement, withdrew his evidence and submissions.

5. That disposed of each of the closure notices and discovery assessments except for the discovery assessment relating to 2009/10, in respect of which HMRC had the initial burden of proof, and which I considered from my review of the papers to be "stale". Accordingly, following exchanges with Mrs O'Reilly (who appeared on behalf of HMRC), I allowed the appeal in respect of that year alone.

6. Having given my decision orally at the conclusion of the hearing on 2 August 2019, I gave a short written decision, without reasons (with the agreement of the parties) on 6 August 2019. HMRC subsequently requested full reasons for my decision, which resulted in the Decision released on 13 November 2019.

The "staleness" issue and HMRC's Rule 2 obligation

7. HMRC's skeleton argument included the following relevant paragraph (quoted in the Decision at [10]):

> The year 2009/10 was closed on 24 February 2016 by issuing of a closure notice under S28A (1) & (2) TMA 1970. When preparing the Statement of Case, it became apparent that this was incorrect. The reason being that although a return for 2009/10 was initially received on 16 July 2013 this was not captured and was returned as unsatisfactory on 28 October 2013. The S9A TMA 1970 enquiry notice was issued on 26 July 2013 however no return had been captured at that time. It follows that the enquiry notice and the resulting closure notice issued under S28A (1) & (2) TMA 1970 were invalid. To rectify that situation HMRC issued an assessment on 15 August 2018 under S29 Taxes Management Act 1970. As the taxpayer had already appealed the decision HMRC treated the assessment to have been issued and appealed on the same day. It is this assessment HMRC will be requesting the Tribunal to determine.

8. As recorded at [8]-[9] of the Decision:

> 8. Mrs O'Reilly told me that:
>
> (1) HMRC had erroneously issued a closure notice on 24 February 2016 in respect of the 2009/10 tax year, not at that time having identified that there was no enquiry open into that tax year; and
>
> (2) HMRC belatedly realised that the 24 February 2016 closure notice for 2009/10 was invalid and purported to cure the defect by issuing a s.29 discovery assessment on 15 August 2018.
>
> 9. I asked Mrs O'Reilly to explain the date and circumstances of the discovery for 2009/10. She told me that the discovery had been made on or around 24 February 2016 when the purported closure notice had been issued. I enquired whether there had been any subsequent fresh discovery, for example at or near the date on which the discovery assessment was issued on 15 August 2018. Mrs O'Reilly confirmed that there had not.

9. At [11], I made the following specific findings of fact pursuant to the position revealed by the papers and Mrs O'Reilly's answers to my questions:

> 11. …
>
> (1) HMRC discovered an insufficiency to tax in respect of the 2009/10 tax year no later than on 24 February 2016 (and in view of my decision predicated on that date, it is unnecessary to ascertain any earlier date on which the insufficiency was discovered);
>
> (2) There was no new discovery when HMRC issued the s.29 discovery assessment on 15 August 2018, or at any time between 24 February 2016 and then.

10. At the end of the Decision, I wrote the following:

FURTHER COMMENTS

23. Having reflected after the hearing, I am disappointed that HMRC's pleadings failed to deal with the "staleness" issue dealt with in this decision. I have no doubt that had I not raised the invalidity of the 2009/10 assessment at the hearing, it would have escaped scrutiny altogether and the appellant would have paid tax (and penalties) not properly due.

24. It is true that the paragraph from HMRC's skeleton argument quoted at [10] above was sufficient to alert the Tribunal to the possibility that the 2009/10 assessment was invalid – but only because I had carefully read the papers in preparation for the hearing and was already familiar with the relevant cases.

25. No attempt was made to bring to the Tribunal's attention the relevant jurisprudence on discovery assessments, which undoubtedly incorporates the concept of "staleness" as matters stand. HMRC must have been aware that the 30-month delay between the discovery being made and the assessment being issued would – most probably – have led the Tribunal to conclude that the 2009/10 discovery was "stale" (absent any subsequent new discovery), making that assessment invalid.

26. That HMRC has pending appeals which might give rise to a future change in the law is immaterial. The options open to HMRC in a case such as this are either: (1) to make an application to stay affected proceedings in this Tribunal pending the outcome of the relevant appeals; or, failing which, (2) candidly to acknowledge the position, accept the inevitable adverse decision, and apply for permission to appeal.

27. It is one thing for HMRC to take a principled stance that certain decisions of the Courts and Tribunals contain errors of law and to argue accordingly (but frankly) in affected cases. But it is quite another thing to gloss over decisions which HMRC knows but dislikes and to proceed as if they do not exist. Doing so obscures the true position and risks the Tribunal coming to a legally insupportable conclusion.

28. The latter course of action was not properly open to HMRC. In my view, in adopting it in this case, HMRC did not act with the necessary candour. In fact, regrettably, I would say that HMRC failed to meet its obligation to "help the Tribunal to further the overriding objective" of dealing with cases fairly and justly under Rule 2(4)(a) of the Rules.

GROUNDS OF APPEAL

11. HMRC seeks permission to appeal the Decision on three grounds, as follows:

> **Ground 1: The discovery assessment for 2009/10 was not "stale" as delay in acting on a discovery does not prevent the issuing of an assessment so long as the statutory time limits are complied with.**
>
> 7. This Ground is contrary to the current state of the law, but both *Beagles* and *Tooth v HMRC* ("*Tooth*") [2019] EWCA Civ 826 are under appeal (*Tooth* having been granted permission to appeal to the Supreme Court). In those cases HMRC will argue that the concept of staleness has no application to discovery assessments.
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> 8. If permission is granted on this ground, HMRC will seek to have the appeal stayed behind *Beagles* and *Tooth*. This is because if HMRC successfully establish in either of those cases that there is no concept of "staleness" that prevents a discovery assessment being raised within the statutory time limits, then this ground would succeed.

Ground 2: The Tribunal's decision on "staleness" is unexplained

9. The Tribunal's decision on staleness is unexplained: paragraph [20] simply states *"I have no difficulty in deciding that the s. 29 discovery assessment raised by HMRC in respect of the 2009/10 tax year was invalid due to "staleness"…"*

10. Lack of explanation for a decision is an error of law: *Flannery v Halifax* [2000] 1 WLR 377 at 381.

11. Permission is sought on this ground, though alternatively the Tribunal is asked, on review of its decision under Rule 41, to allow the parties to make representations and then give reasons, or, alternatively, simply to give reasons (as envisaged in *Flannery* at 383).

Ground 3: The finding that the discovery assessment was "stale" was not reasonably open to the Tribunal

12. It is clear from *Pattullo v HMRC* [2016] UKUT 270 at [53] that staleness is exceptional and will not take place where the discovery has been "kept fresh" by continuous action by HMRC or the parties. Moreover, staleness results from "inaction" on the part of HMRC.

13. Here, the parties were in extensive debate about the 2009/10 figure for additional tax from the issue of the erroneous closure notice on 24 February 2016 onwards, in the course of the first appeal to HMRC, the review stage and the preparation for the hearing. No criticism of inaction can be levelled at HMRC. It was always clear to the Appellant, from the time HMRC took the view he had under-declared tax, that the figures for 2009/10 were in issue.

14. It was therefore not within the ambit of the Tribunal's reasonable judgment to find that this assessment was "stale".

Outcome sought

15. If permission to appeal is granted, the Upper Tribunal will be asked either to find further facts or to remit to the FTT to find facts, as to (1) when the discovery was made (the finding at [11] being a latest possible date), and (2) whether HMRC are entitled to rely on the 20 year time limit on the basis that the Appellant filed no tax return and this caused the loss of tax.

DISCUSSION

12. I consider each of the grounds of appeal in turn below.

Ground 1

13. As quoted above, HMRC acknowledges that "[t]his Ground is contrary to the current state of the law." This is a major departure from the argument put to me during the hearing, when Mrs O'Reilly asserted (at [17] of the Decision) that in HMRC's view, "the doctrine of "staleness" was unsound and devoid of statutory authority."

14. As should be obvious, HMRC's acknowledgement that the current state of the law (as exemplified in *Beagles v HMRC* [2018] UKUT 380 (TCC)) includes the concept of s.29 Taxes Management Act 1970 (**TMA**) discovery assessments becoming "stale" – and thus void – is sufficient to refuse this ground.

15. S.11 Tribunals, Courts and Enforcement Act 2007 (**TCEA**) grants a right of appeal on "any point of law arising from the decision made by the First-tier Tribunal…".

16. In *HMRC v Procter & Gamble* [2009] EWCA Civ 407, the Court of Appeal held:

> 74. For… an appeal to succeed it must be established that the Tribunal's decision was wrong as a matter of law …I cannot emphasise too

> strongly that the issue on an appeal from the Tribunal is not whether the appellate body agrees with its conclusions. It is this: *as a matter of law, was the Tribunal entitled to reach its conclusions?* It is a misconception of the very nature [of] an appeal on a point of law to treat it, as too many appellants tend to do, as just another hearing of the self-same issue that was decided by the Tribunal.
>
> [Emphasis added by the Court of Appeal.]

17. It is axiomatic that for a decision of the Tribunal to be appealable under s.11 TCEA, the basis of the decision must be unsound by reason of a departure from the law as it stood as at the date of that decision. If there is no such error of law then the decision cannot be appealed under s.11 TCEA. Thus, HMRC cannot on the one hand concede that Ground 1 "is contrary to the current state of the law" whilst simultaneously arguing that the Decision is in error for proceeding on the basis of that law.

18. HMRC is correct that the decisions of the Court of Appeal and Upper Tribunal in *Tooth* and *Beagles* respectively have been granted leave to appeal. However, the existence of leave to appeal does nothing to change the law pending the hearing of those appeals. HMRC's hope or expectation of overturning *Tooth* or *Beagles* is immaterial.

19. It is for this reason that cases before the courts and tribunals are often stayed behind other, more advanced, appeals. The Tribunal has power to stay appeals at Rule 5(3)(j) of the Rules.

20. Had HMRC wanted to await the decision of *Tooth* or *Beagles* before the issue of "staleness" was dealt with in this case, then the proper course of action was to apply for a stay *before* the hearing on 2 August 2019. That possible course of action was mentioned at [26] of the Decision.

21. Seeking leave to appeal the Decision already arrived at with a view to staying the appeal behind other cases in the hope of a better outcome would be inappropriate.

22. Accordingly, I refuse permission to appeal on ground 1.

Ground 2

23. This ground refers to the Decision at [20], which disposed of the 2009/10 assessment:

> 20. On the basis of the law as it presently stands, I have no difficulty in deciding that the s.29 discovery assessment raised by HMRC in respect of the 2009/10 tax year was invalid due to "staleness". It is therefore of no effect and the appellant is discharged from any liability arising in respect of it.

24. HMRC criticises the Decision for failing to explain the reasons for the decision at [20]. HMRC correctly submits that lack of explanation for a decision can constitute an error of law (*Flannery*).

25. I do not understand this ground: the 14 paragraphs immediately preceding [20] (i.e. [6]-[19]) explain the reasons – both as to specific findings of fact and the application of the law – for the decision. In that context, the reason given for the ground of appeal (*"[t]he Tribunal's decision on staleness is unexplained: paragraph [20] simply states "I have no difficulty in deciding that the s. 29 discovery assessment raised by HMRC in respect of the 2009/10 tax year was invalid due to "staleness"…"*) is surely inaccurate.

26. As a result, I am minded to refuse permission to appeal on this ground. However, I have considered whether the reasons given were *sufficient* to explain the decision at [20] (even though the ground argues only that the decision is "unexplained", not that the explanation in fact given is insufficient).

27. The Decision is stated at [29] to contain "full findings of fact and reasons for the decision" (i.e. pursuant to Rule 35(3)(b) of the Rules). Those "full findings… and reasons" are relatively brief, which was a conscious choice.

28. A risk of providing 'concise' full reasons for a decision is that it might attract criticism for insufficiently explaining its reasons.

29. Nevertheless, there is no expectation that the Tribunal's written reasons for its decisions will be extensive in every case. Rule 2(2)(a) provides that the overriding objective of dealing with cases fairly and justly includes "dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, [and] the anticipated costs and the resources of the parties." In my view, the "fullness" of the written decision required by Rule 35(3)(b) will vary by reference to the various factors indicated in Rule 2(2) and the circumstances of the appeal in question. Written decisions may be as short or long as circumstances require, provided that the overriding objective of dealing with each case fairly and justly is met.

30. Judges of this Tribunal frequently deal with hearings in which one or other party (or both) presents its case imperfectly for a wide variety of reasons. This can affect the judges' ability to give reasons for their decisions to a greater or lesser extent. In this case, the brevity of the reasons given for the Decision at [20] results from the lack of submissions made by HMRC, which arose from a deliberate decision about the presentation of its case. In that context, it seems wrong for HMRC to claim to be prejudiced by the shortness of the reasons given in the Decision.

31. The Decision did not engage with the legal arguments raised for the first time in ground 3, as to whether HMRC had kept the discovery of 24 February 2016 "fresh" by its conduct. This was because of the exchanges between the Tribunal and Mrs O'Reilly at [8]-[9] of the Decision and the specific facts found at [10]. In light of those facts as found (and accepted by Mrs O'Reilly), it would have been for Mrs O'Reilly to make a case that the discovery was not stale because it had been kept "fresh". That submission was not made. The burden of proof was on HMRC to establish (on the balance of probabilities) that the 2009/10 discovery assessment was valid, which HMRC failed to do.

32. In the circumstances of this case, I consider that the reasons provided in the Decision were appropriate to the issues and the submissions made. I reject the submission that insufficient reasons were given for the Decision at [20]. There was no "lack of explanation", as explained at [25] above. HMRC would in my view have been well able to understand the reasons for the Decision. Whilst the reasons given were brief, I consider that they were sufficient to deal with the case fairly and justly.

Representations and further reasons: whether new arguments should be permitted

33. Paragraph 11 of the Grounds of Appeal requests (in the alternative to leave to appeal) that the Tribunal "*on review of its decision under Rule 41, …allow the parties to make representations and then give reasons, or, alternatively, simply …give reasons.*"

34. I have already decided at [2] above not to review the Decision under Rule 41 as I am not satisfied that it contains an error of law. The Rules do not require the Tribunal to set out specific reasons for its conclusion that a decision does not contain an error of law: it is sufficient that, having considered the question, and having taken into account the overriding objective in Rule 2, the Tribunal is not satisfied that there is an error of law. Having undertaken that enquiry, a simple statement such as that at [2] suffices.

35. I take into account that Rule 41 is phrased restrictively and should be narrowly construed: "The Tribunal may *only* undertake a review… if it is *satisfied* that there was an error of law"

(my emphasis). To be "satisfied" in these circumstances means, in my view, to conclude on the balance of probabilities having considered the Decision, the Rules and the Grounds of Appeal. The fact that the Tribunal refuses a review on the basis that is not satisfied that there was an error of law in the Decision does not pre-judge the question of whether the applicant should be given leave to appeal on the basis of an arguable error of law.

36. This ground of appeal specifically asks that the Tribunal gives additional reasons for the Decision (whether or not after further submissions) pursuant to Rule 41. Without prejudice to the generality of the statement at [2], or the discussion at [23]-[32], I believe it appropriate to give reasons for coming to the view that it should not. They are as follows.

37. As I commented at [25], [27]-[28] of the Decision, HMRC had the opportunity to acknowledge the possible issues with the s.29 assessment. For reasons of its own, it chose not to do so. I criticised HMRC for taking that approach because I considered it to be incompatible with its obligation to the Tribunal under Rule 2.

38. Had HMRC decided to deal openly with the appellant and the Tribunal on this point, it would have had the chance to adduce evidence and make legal submissions as to why the s.29 assessment was not "stale". If HMRC had done that, the Tribunal would have been put in a position whereby it could give fuller reasons for its decision (whatever that might have been) if necessary, including consideration of the points on which HMRC now seeks to rely. I allow the possibility that HMRC might have satisfied the Tribunal that the discovery was not "stale" by 15 August 2018.

39. Instead, it was the Tribunal that identified the issue with the 2009/10 assessment during the course of the hearing. Mrs O'Reilly was then given at least two opportunities to make submissions on the point (this is apparent from the exchanges between the Tribunal and Mrs O'Reilly recorded at [7]-[9], [12]-[13], and [16]-[17] of the Decision). Mrs O'Reilly's only substantive submission is recorded at [17]: "*Mrs O'Reilly confirmed HMRC's view that the doctrine of "staleness" was unsound and devoid of statutory authority.*" That statement came as a surprise in light of the recent decisions in *Beagles* and *Tooth*, as did the inference that HMRC decided not to address the issues with the 2009/10 assessment because (in its view) the Upper Tribunal and the Court of Appeal had made errors of law. Hence the "Further Comments" at the end of the Decision.

40. In the context of HMRC's decision about how to present its case and in the circumstances of the hearing – during which HMRC had the opportunity to make fuller submissions and to direct the Tribunal to relevant evidence – I consider that the request at paragraph 11 of the Grounds of Appeal for the chance to make further representations is, in reality, a request for a second bite of the cherry. This is especially so because HMRC could have made an application – even during the hearing – for an adjournment, the better to prepare its case. No such application was made.

41. There are no representations that HMRC could make now that could not have been made at the hearing (or following an adjournment). HMRC was given opportunities in the hearing to make representations on the issue of "staleness". HMRC is alone responsible for the submissions it chose to make, and those which it did not.

42. As a result, HMRC should not now be permitted to raise new points. My decision at [32] above that the reasons given were sufficient stands.

43. Accordingly, I refuse permission to appeal on ground 2.

Ground 3

44. Ground 3 is separate but related to ground 2. It is argued that in concluding that the 2009/10 discovery assessment was "stale", the Tribunal reached a decision which was not reasonably open to it. Legal arguments are made as to why this is so.

45. Neither TCEA 2007 nor the Rules deal directly with the grounds upon which permission should be given for an appeal. As a result, the discretion of the Tribunal is 'at large', and the Tribunal "…can consider any factor which appears relevant" (*Hamilton on Tax Appeals*, 2nd edn., §19.31, referring to *R (oao Browallia Cal Ltd.) v General Commissioners of Income Tax* [2003] EWHC 2779 (Admin); [2004] STC 296).

46. The legal arguments introduced in ground 3 were not made during the hearing (or in the papers). They are therefore "new".

47. The question which therefore arises on this application is whether it is fair and just to allow these new arguments to be heard for the first time on appeal.

48. Without descending into a detailed consideration of the merits of the new arguments, I have considered them sufficiently to form a general impression of their strengths and weaknesses. In have assumed for these purposes that they would have a real prospect of success.

49. As the Tribunal (Judge Christopher Staker) wrote in *Hurst v HMRC* [2019] UKFTT 0452 (TC) (a permission to appeal decision in this Tribunal):

> 4. It is accepted for present purposes that the proposed HMRC appeal would have a real prospect of success. Normally, that of itself would suffice for permission to be granted. However, the Tribunal has a discretion whether or not to grant permission, and countervailing considerations also need to be considered.

50. The Rules give no guidance on the circumstances in which new points, not argued at first instance, should be allowed on an appeal.

51. However, Rule 52.6 of the Civil Procedure Rules 1998 (S.I. 1998/3132, as amended) (the **CPRs**) – on which there are a number of decided authorities – does deal with this point. The CPRs do not apply in this Tribunal, but they should not be disregarded and may (except where the Rules expressly depart from them) be treated as relevant in guiding judges of this Tribunal in the exercise of their discretion (see, by analogy, *BPP Holdings v HMRC* [2016] EWCA Civ 121 per Sir Ernest Ryder, Senior President of Tribunals).

52. Two recent Tribunal decisions have also considered the issue: *Hurst*; and *Eynsham Cricket Club* [2019] UKUT 47 (TCC) (a substantive appeal in the Upper Tribunal).

53. The general rule (under the CPRs) is summarised in *The Civil Court Practice 2019* ("*The Green Book*") at §52.6[3] as follows:

> An application for permission to appeal on grounds which were not argued in the lower court is likely to be refused: *Australia and New Zealand Banking Group Ltd v Société Générale* [2000] 1 All ER (Comm) 682, CA. This is 'not merely a matter of efficiency, expediency and cost, but of substantial justice': *Jones v MBNA International Bank* (30 June 2000, unreported [[2000] EWCA Civ 514]), CA, May LJ.

54. The full passage from *Jones* (at [52]) cited in the *Green Book* is as follows:

> Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally each party should bring before the court the whole relevant case that he wishes to

> advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view this is not such a case.

55. However, the *Green Book*, again at §52.6[3], continued:

> A pure point of law which was not raised below may be taken on appeal although the appeal court has a discretion to exclude it: see Davis LJ in *Sinclair v Glatt* [2013] EWCA Civ 241, [2013] NLJR 18, (2013) Times, 08 May at 24, citing Nourse LJ in *Pittalis v Grant* [1989] QB 605, [1989] 2 All ER 622, CA

56. Snowden J (sitting as a judge of the Court of Appeal) in *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337 summarised (at [25]-[26]) the position as follows:

> 25. The principles were also recently restated by Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360 at [15]
>
> > 15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.
> >
> > 16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
> >
> > 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).
> >
> > 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24 at [29]).
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> 26. These authorities show that there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst

> an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken."

57. In *Eynsham Cricket Club*, the Upper Tribunal (Judge Timothy Herrington) wrote:

> 49. [Counsel for the taxpayer]… submitted that, where, as in this case the FTT has been deprived by the parties before it of the applicable law because neither party quoted the relevant authorities, the "new ground" point is not a good one. He relies on *ICS Car Srl v Secretary of State for the Home Department* [2016] EWCA Civ 394, a case involving the imposition of civil penalties on a carrier who was found to be transporting illegal immigrants and where neither party drew the relevant regulations to the attention of the Judge. In those circumstances, the Court of Appeal decided that the Court ought to proceed on the basis of the law as it is and not as it was wrongly supposed to be: see [36] of the judgment. However, in so proceeding the Court of Appeal referred to the fact that this decision did not affect the evidence that was relied on, did not form the basis of an unfavourable judgment and did not require any further evidence: see [35] of the judgment. It is therefore clear to me that even in circumstances where the relevant law was not brought to the attention of the judge, the question as to whether the point might require further evidence to be properly argued is still very much relevant.
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> 50. The Court of Appeal has also made it clear that a party who contends that he might wish to call further evidence in consequence of fresh grounds being raised cannot be expected to be very specific about the nature of that evidence: see *Swarovski-Optik KG v Leica Camera AG* [2014] EWCA Civ 637 at [35].
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> 51. Finally, in this regard the Court of Appeal held in *Crane v Sky In-Home Limited* [2008] EWCA Civ 978, per Arden LJ at [21] that in this context:
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> > "If there is any area of doubt, the benefit of it must be given to the party against whom [the new point is sought to be raised]. It is the party who should have raised the point at trial who should bear any risk of prejudice."
>
> 52. It is therefore clear from these authorities that the party wishing to argue a new point on an appeal has a heavy burden to bear and that if there is any possibility of the other party being prejudiced because he might have conducted his case differently or adduced different evidence then permission should be refused.
>
> 53. In deciding whether to exercise my power to allow the New Argument to be relied on, I must give effect to the overriding objective to deal with cases fairly and justly, as provided for in Rule 2 of The Tribunal Procedure (Upper Tribunal) Procedure Rules 2008. Whilst, as required by Rule 2 (2), I must avoid unnecessary formality and seek flexibility in the proceedings I must also ensure that the matter is dealt with in a way which is proportionate to the importance of the case and the resources of the parties.

58. The Upper Tribunal refused permission for the "New Argument" to be raised.

59. In *Hurst*, the Tribunal wrote:

> 15. The HMRC contention that [certain cases] were incorrectly decided, and the HMRC arguments in support of that contention, are now raised for the first time in the HMRC notice of appeal. If permission to appeal were granted, these arguments would be heard and determined for the first time by the Upper

> Tribunal in an appeal against this Tribunal's Decision. It is well established that normally a party will not be permitted to raise a new point for the first time on appeal. An exception to the general principle may be made where the new point is a pure point of law. However, even in those circumstances, permission will not be given where there is any possibility of an injustice occurring. See *Eynsham Cricket Club v Revenue and Customs* [2019] UKUT 47 (TCC) at [40]-[53]; *GDF Suez Teesside Ltd v Revenue and Customs* [2017] UKUT 68 (TCC) at [46]-[47].
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> 16. The HMRC notice of appeal simply presents arguments as to why [the cases in question] were incorrectly decided, and why the Decision was incorrectly decided. It does not engage with the reasoning in the Decision itself… It does not acknowledge that it is seeking to raise a point for the first time on appeal, and does not set out any justification for this. Importantly, it does not address the question whether there would be any prejudice to the Appellant if permission to do this were granted.
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> 17. There is one obvious potential prejudice to the Appellant if permission were granted. Under the First-tier Tribunal Rules, the normal rule is that no order for costs would be made against him if he is unsuccessful in his appeal. On the other hand, under rule 10(1)(a) of the Upper Tribunal rules, the Appellant would potentially face costs consequences if he were unsuccessful in an appeal to the Upper Tribunal. The Appellant's one opportunity to argue issues without facing costs consequences is therefore in an appeal before the First-tier Tribunal. The Appellant loses that opportunity if an issue is argued for the first time before the Upper Tribunal. Therefore, even in a case involving a pure issue of law, there is a possibility of an injustice occurring if the issue is raised for the first time on appeal to the Upper Tribunal.
>
> 18. It may well be that this prejudice would not actually arise in practice, but it may well also be that there would be other potential prejudice to the Appellant if permission to appeal were granted. The issue has simply not been addressed in the HMRC notice of appeal.

60. The Tribunal refused permission to appeal in that case.

61. The CPRs and the cases relevant to them are not binding on me in this decision and I have approached them with caution. The question for me is whether they are relevant by analogy to the application of the overriding objective in the Rules to the specific circumstances of this case. I conclude that they are relevant and that they represent a useful guide as to the exercise of my discretion in this case. Similarly, I find *Jones*, *Hurst* and *Eynsham Cricket Club* to be helpful.

62. The current state of the law was helpfully surveyed by this Tribunal in *Good and Ryan v HMRC* [2020] UKFTT 0025 (TC) (Judge Christopher McNall and Helen Myerscough) at [75]-[85] (with which I respectfully agree) and applied to the facts of those cases at [86]-[168]. Whilst arguable, I do not consider ground 3 to be of such weight that it would be enough to decide the point in HMRC's favour if an appeal was allowed: the appellant would have a number of potential counter-arguments, drawing especially on *Pattullo*, *Beagles*, and *Tooth*.

63. In *Tooth*, Floyd LJ approved (at [60]) the following statement from the Upper Tribunal (at [37]):

> The requirement for newness does not relate to the reason for the conclusion reached by the officer but to the conclusion itself.

64. Later (at [61]), Floyd LJ said the following:

> The requirement for the conclusion to have "newly appeared" is implicit in the statutory language "discover". The discovery must be of one of the matters set out in (a) to (c) of section 29(1). In the present case the officer must have newly discovered that an assessment to tax is insufficient. It is his or her new conclusion that the assessment is insufficient which can trigger a discovery assessment. A discovery assessment is not validly triggered because the officer has found a new reason for contending that an assessment is insufficient, *or because he or she has decided to invoke a different mechanism for addressing an insufficiency in an assessment which he or she has previously concluded is present.*
>
> (my emphasis)

65. In this case, the Tribunal found as fact that the insufficiency to tax was discovered no later than on 24 February 2016. A closure notice was (erroneously) issued to remedy that insufficiency. On 15 August 2018, a s.29 discovery assessment (a "different mechanism for addressing an insufficiency") was issued in respect of the insufficiency that was already concluded to be present. HMRC accepted during the hearing that there had been no new discovery.

66. HMRC's power to issue discovery assessments under s.29 TMA represents a significant – though necessary – departure from the principle of finality in the self-assessment tax regime. Nevertheless, the intended function of such assessments was surely not intended by Parliament to encompass HMRC making out of time assessments purportedly so as to cure its own administrative errors.

67. I note from paragraph 15 of the Grounds of Appeal that the Upper Tribunal would be asked to make further findings of fact – or to remit the matter to this Tribunal to make findings of fact – if HMRC's application was to be allowed. Such findings might well require the presentation of additional evidence. If so, it would offend against the general prohibition against new evidence expressed in *Notting Hill Finance Ltd v Sheikh* at [25], quoting *Singh v Dass* at [17], and in *Eynsham Cricket Club* at [49].

68. Furthermore, the potential prejudice caused to the appellant by allowing new arguments on appeal – including in respect of costs – was noted in *Notting Hill Finance Ltd v Sheikh* at [25], quoting *Singh v Dass* at [18], itself citing *R (on the application of Humphreys) v Parking and Traffic Appeals Service* at [29]. The same issue was expressed, specifically in the context of the Rules, in *Hurst* at [17]-[18]. As in *Hurst*, so here: the Grounds of Appeal do not acknowledge the potential prejudice to the appellant which might arise from the costs regime which applies in the Upper Tribunal. This Tribunal has no power to exempt a party from the Upper Tribunal's costs regime. Nor does HMRC commit itself in the Grounds of Appeal to seek a departure from the general rule on costs. It follows that this Tribunal must assume that the appellant would be at risk on costs if this application is allowed. Given the circumstances of this application, that would cause material prejudice to the appellant.

69. Having considered all these issues, I have concluded that it would be inappropriate to allow HMRC to raise new legal arguments, whether or not supported by new evidence, in circumstances in which it had the opportunity to make them in the hearing before me. The legal arguments raised by ground 3 are not in my view of such weight that they should override the prejudice that would arise to the appellant should the appeal be allowed.

70. Accordingly, I refuse permission to appeal on ground 3.

DISPOSAL

71. Having weighed all the considerations set out above, the Tribunal decides that permission to appeal is refused on each of the grounds sought.

72. If the applicant is dissatisfied with the outcome of the application for permission to appeal the decision in this appeal, the applicant has a right to apply to the Upper Tribunal for permission to appeal the decision in this appeal. Such an application must be made in writing to the Upper Tribunal at 5th Floor, Rolls Building, 7 Rolls Building, Fetter Lane, London EC4A 1NL no later than one month after the date of this notice. Such an application must include the information as explained in the enclosed guidance booklet Appealing to the Upper Tribunal (Tax and Chancery Chamber).

JAMES AUSTEN
TRIBUNAL JUDGE
RELEASE DATE: 5 MARCH 2020

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 5 March 2020. Amendments were made to add the italicised summary ("*Procedure – Permission to Appeal… Application refused"*) at the head of the document.