[2021] UKFTT 162 (TC)

TC08131

Income tax – discovery assessment under Section 29 TMA – HMRC withdrew from the appeal – HMRC issued a second discovery assessment but later recognised it was invalid – was the previous withdrawal effective?

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/00612

BETWEEN

SEAN KELLY **Appellant**

-and-

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

TRIBUNAL: JUDGE TRACEY BOWLER
DR CAROLINE SMALL

The hearing took place on 20 January 2021. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video platform. A face to face hearing was not held because of the circumstances of the pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

After the hearing HMRC provided written submissions following a request by the Tribunal.

Mr Kelly is a litigant in person.

Ms Siobhan Brown, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents.

DECISION

INTRODUCTION

1. This is an appeal against discovery assessments issued on the basis that Mr Kelly was provided with taxable benefits in kind in the form of a car and fuel benefits in the tax years 2010/2011, 2011/2012, 2012/2013 and 2013/2014. Mr Kelly disputes the assessments on various grounds including one which is that the car was a "pooled car" within Section 167 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). His case has been designated as a lead case under rule 11 of the First Tier Tribunal (Tax Chamber) Rules ("the Tribunal Procedure Rules") and the cases of several of his previous colleagues are stayed behind his appeal.

2. After the hearing (which had focussed on the issues raised in the pleadings as to whether the car provided for Mr Kelly's use was a pool car), the Tribunal identified a procedural issue with the assessments relied upon by HMRC. HMRC had made a "discovery" in 2015 and had issued discovery assessments in 2016 which had been appealed by Mr Kelly. Shortly before the expected hearing of that appeal, HMRC had written to Mr Kelly and the Tribunal to withdraw from the appeal. In 2017 new "discovery" assessments were issued by HMRC. Mr Kelly appealed those assessments and it was that appeal which had come before the Tribunal.

3. The Tribunal identified a concern with HMRC's claim to have issued a second, later set of assessments relying upon the same discovery made in 2015 and asked the parties for written submissions. HMRC conceded that there was no power to issue the 2017 assessments relying upon the same discovery as for the 2016 assessments, but maintained that the 2016 assessments were not in fact disposed of.

4. This decision sets out why we have decided that why HMRC cannot rely on the 2016 assessments, or the 2017 assessments, and therefore why the appeal must be allowed. As a result of that decision we have not addressed the underlying substantive issues concerning the taxability of a car and fuel which HMRC say were provided to Mr Kelly.

BACKGROUND AND FACTS

5. HMRC received information alleging that Mr Kelly's employer, Direct Assist Ltd ("DAL"), had been paying off-payroll cash bonuses to its employees and had been providing them with prestige company cars without declaring the provision of benefits for income tax and National Insurance purposes. As a result, two officers, including Officer Reilly, visited DAL's premises in September 2014. They were provided with information including a spreadsheet showing cars allocated to individual employees. The spreadsheet showed that a Range Rover Sport was allocated to Mr Kelly. This was the "discovery" relied upon by HMRC to issue assessments under Section 29 Taxes Management Act 1970 ("TMA").

6. Initially, HMRC expected that DAL would pay any unpaid tax due on provision of company cars (on a grossed up basis). Further information was requested from DAL by HMRC in a letter of 3 October 2014. However, in December 2014 HMRC were told that DAL was commencing proceedings for voluntary liquidation.

7. On 11 March 2015, Officer Reilly made an unannounced visit to DAL's premises. Again the expectation of DAL paying any tax liability for the employees on the provisions of company cars and fuel was discussed. DAL's director told Officer Reilly that it was hoped that the employees would not be left to pay the tax bill themselves, but later that month DAL was placed into compulsory liquidation.

8. As a result of DAL's liquidation, HMRC's attention turned to assessing the employees.

9. On 9 July 2015, P800 calculations were issued to Mr Kelly reflecting tax said to be payable on the provision of a company car and fuel by DAL as shown by the spreadsheet given to HMRC in September 2014. Those calculations were disputed by Mr Kelly and equivalent calculations were disputed by other DAL employees. Correspondence followed between the employees, including Mr Kelly, and HMRC. HMRC provided further explanations for the calculations.

10. In letters dated 17 August 2015 and 17 October 2015, Mr Kelly and some of his colleagues made clear that they were disputing the calculations, requested an independent review of them and said that they wished to appeal to the tribunal if necessary. In a letter dated 3 November 2015, a colleague of Officer Reilly responded and said that changes to the amount of tax payable could not be made and offered a meeting with Officer Reilly. In a letter dated 20 November 2015, Mr Kelly declined the offer of the meeting and again requested an independent review. Officer Reilly responded in a letter dated 15 December 2015, acknowledging the appeal against the assessments (although none had been issued at that point). Despite Mr Kelly's previous requests for an independent review, the letter then directed that if he disagreed with HMRC's decision he should ask for an independent review, or continue the appeals by taking them to the Tribunal.

11. Mr Kelly duly replied in a letter dated 18 December 2015 again requesting an independent review. This was acknowledged in a letter from Officer Reilly on 11 January 2016. It was only on 29 January 2016 that Officer Reilly wrote to Mr Kelly explaining that she had been advised that an independent review could only take place if an appealable decision had been issued and the tax calculations which had been issued did not give rise to a legally enforceable charge to tax, or an appeal right.

12. On 2 February 2016, HMRC issued assessments under section 29 Taxes Management Act 1970 ("TMA"). We refer to these as the "2016 assessments". They were as follows:

(1) an assessment for the year 2010/2011 in the amount of £5786;

(2) an assessment for the year 2011/2012 in the amount of £6566;

(3) an assessment for the year 2012/2013 in the amount of £6664;

(4) an assessment for the year 2013/2014 in the amount of £6727.

13. On 13 February 2016, the DAL employees, including Mr Kelly, requested an independent review of the assessments. They provided some further information in a letter dated 12 March 2016.

14. The independent review letter was issued on 5 April 2016. It maintained that Mr Kelly was taxable on the provision of a car and fuel benefit to him by DAL, but explained that the calculations required adjustment as an incorrect figure had been used for the list price of the car and it was recognised that the earliest date on which it could have been made available to Mr Kelly was later than the assessments had assumed.

15. Mr Kelly responded in a letter dated 27 September 2016 providing more details about the basis on which he disputed the assessment. HMRC wrote to Mr Kelly on 5 October 2016 asking a series of questions relating to the information provided by him. Those questions were answered by him in a letter dated 10 November 2016.

16. It is not disputed that at some point in this process Mr Kelly appealed the 2016 assessments, although the Notice of Appeal has not been provided to us.

17. The appeals were listed for a hearing on 2 and 3 March 2017, but on 24 February 2017 HMRC wrote to Mr Kelly to advise that the assessments issued on 2 February 2016 were

"technically flawed" and would be reduced to nil. They would be "vacated" and consequently there would no longer be an appealable decision for the Tribunal to adjudicate. HMRC said the evidence would be reviewed and further action considered; Mr Kelly would be able to appeal any further assessments which may be issued.

18. On the same day, HMRC also wrote to the Tribunal saying that it had been discovered that the assessments were technically flawed and would be vacated. HMRC went on to say that "As the appealable decisions are to be withdrawn HMRC observes that this obviates the need for any hearing to proceed". (The same error was identified as having arisen in the linked appeals.)

19. At the hearing, HMRC were unable to identify what the technical flaw referred to in their letters was. However, in their subsequent submissions HMRC have stated that, at that time, HMRC considered the assessments to be flawed because of a failure to refer to Section 29 TMA in the notification letters. It had also been realised that the assessments understated Mr Kelly's tax because there had been a failure to take into account the application of the higher rate of income tax.

20. On 27 February 2017 the Tribunal wrote to the parties. The letter to HMRC noted HMRC's notification and stated:

> "The Tribunal therefore allows the appeal and any hearing date is cancelled. If the Tribunal hears nothing to the contrary within 28 days from the date of this letter, the file will be closed."

21. That is standard wording used in letters where HMRC withdraws assessments or decisions which have been appealed.

22. The letter to Mr Kelly has not been provided and a copy has not been kept by the Tribunal, given the closure of the file after HMRC's withdrawal. However, given the wording of the letter to HMRC we are satisfied that the standard wording would have been used in the letter to Mr Kelly which was:

> "HM Revenue and Customs have informed the Tribunal (copy letter enclosed) that they are no longer defending the decision/assessment which was the subject of your appeal.
>
> The Tribunal therefore allows your appeal and any hearing date is cancelled. If you have any further application with regards to this appeal it should be made within 28 days from the date of this letter, in the absence of which the file will be closed."

23. On 13 March 2017, HMRC wrote to Mr Kelly and stated that although the Tribunal's file had been closed because of a "technical error" caused by an incorrect assessment having been issued, HMRC's view remained the same that a car and car fuel benefit arose and reserved the right to reissue assessments against which Mr Kelly would have a further right of appeal.

24. New assessments were issued on 15 June 2017. We refer to these as the "2017 assessments". They were as follows:

(1) an assessment for the year 2010/2011 in the amount of £548.40;

(2) an assessment for the year 2011/2012 in the amount of £6282.40;

(3) an assessment for the year 2012/2013 in the amount of £9621.80;

(4) an assessment for the year 2013/2014 in the amount of £10,189.60.

(5) an assessment for the year 2014/2015 in the amount of £8,507.80

25. All of the assessments except the one for the year 2014/2015 were the subject of the hearing before us. The 2014/15 assessment had been cancelled because Mr Kelly submitted a tax return for 2014/2015 and HMRC were out of time to open an enquiry into that return (as accepted by HMRC in its review letter of 22 November 2017 described below).

26. Under section 36(1) TMA, an assessment may be made at any time not more than six years after the end of the tax year of the assessment to which it relates if there is "careless" behaviour. HMRC contends that Mr Kelly was careless. If so, this enabled the assessments to be raised on 15 June 2017 up to, and including, for the tax year 2011/2012. At the hearing HMRC conceded that the assessment for the year 2010/11 was out of time and should be cancelled. However, this was on the basis of relying upon the 2017 assessments, upon which for the reasons stated later, HMRC no longer rely. If the 2016 assessments could be relied upon as HMRC now contend, the 2010/11 assessment would not be out of time if Mr Kelly was found to have been careless.

27. On 5 July 2017, Mr Kelly telephoned HMRC to express concern about the process involving the cancellation of the previous assessments and issue of the new assessments. He was told that he could ask for an independent review but that had already taken place, or he could proceed straight to the tribunal. He chose the latter option.

28. On 11 July 2017, Mr Kelly wrote to HMRC appealing the assessments. Following a further exchange of correspondence Mr Kelly's colleague, Ms Brooks, (whose case is stayed behind Mr Kelly's) asked for an independent review of the files on 27 September 2017.

29. On 22 November 2017, the officer of HMRC conducting the independent review wrote to confirm the assessments for the tax years 2010/2011 - 2013/2014 and confirmed that the assessment for 2014/2015 was invalid.

30. Mr Kelly signed his notice of appeal on 13 March 2018. It was acknowledged by the tribunal on 18 May 2018.

31. On 25 April 2019, Judge Brooks issued Directions in which it was directed that Mr Kelly's appeal should proceed as a lead appeal, with the appeals of his colleagues stayed until further directions.

HMRC'S CASE

32. After the hearing, Judge Bowler wrote to the parties requesting submissions on the point of law, concerning the application of section 29 TMA given that HMRC had sought to issue discovery assessments in both 2016 and 2017 as a result of one discovery in 2015, as explained further below.

33. HMRC responded to that request, apologising for the inconvenience, delay and confusion, with submissions as follows:

> (1) It was conceded that it was not possible for HMRC to issue the two sets of assessments in 2016 and then 2017 under Section 29 TMA in relation to the same discovery made in 2015;
>
> (2) The 2016 assessments had not been disposed of and therefore the 2017 assessments were invalid;
>
> (3) The 2016 assessments stand good unless there is a decision by the Tribunal or an agreement between HMRC and the taxpayer under section 54 TMA;
>
> (4) The withdrawal from the appeal in February 2017 by HMRC did not constitute an agreement under Section 54 TMA. It was mistakenly based on deciding that the technical fault in the notification should be rectified by re-issuing assessments;

(5) The letter of 27 February 2017 issued by the Tribunal in response to HMRC's withdrawal did not amount to a decision of the Tribunal as it did not indicate that the decision had been taken by a judge in chambers. The case of *Hegarty & Anor v HMRC* [2019] TC 06908 is relied upon. As a result it did not have any effect on the 2016 assessments under section 50 TMA;

(6) Any action said to have been taken by HMRC to nullify the 2016 assessments was invalid under Section 30A(4) TMA and those assessments stand good;

(7) Relying upon the case of *Hackett* [2016] TC 05508 HMRC's actions should not be considered to be an abuse of process. It was a misunderstanding on HMRC's part which led to the withdrawal of their case in 2017 and the purported withdrawal of the 2016 assessments;

(8) If the Tribunal finds in favour of HMRC on both the procedural and substantive matters, the 2016 assessments need to be amended to reflect the amounts set out in the 2017 assessments.

(9) If the Tribunal finds that there was a section 54 agreement or that the case was decided by the Tribunal in 2017, HMRC accepts the appeals must succeed.

MR KELLY'S CASE

34. Mr Kelly has not responded to Judge Bowler's request or HMRC's submissions. There was no requirement for him to do so. Moreover, we have had full regard to our duty to Mr Kelly as a litigant in person as set out in the Equal Treatment Benchbook and the importance of providing access to justice for litigants in person. That does not mean that we should apply lower standards for litigants in person, but it does mean that we recognise that Mr Kelly should not be expected to engage in the detailed and complex procedural analysis which is at the heart of the issues raised in his case. His grounds of appeal have only addressed the underlying substantive issues.

THE LAW

Discovery assessments

35. Section 29 TMA 1970 (at the applicable time and in so far as relevant) provided for discovery assessments in the following terms:

> 29 Assessment where loss of tax discovered
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount,
>
> which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

36. The first question is whether as a matter of law HMRC made one or more discoveries. In *HMRC v Charlton* [2012] UKUT 770 (TC), the Upper Tribunal described a "discovery" in the following way at paragraph 28:

> "the word "discovers" does connote change, in the sense of a threshold being crossed. At one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised and at another he is of that view."

37. The threshold for a discovery to arise is low.

38. The Officer of HMRC making the discovery must believe that the information points in the direction of their having been income which ought to have been assessed to tax and which has not ((*Anderson v HMRC* [2018] UKUT 0159 (TCC) at [28]), but that conclusion must be a reasonable one based on the evidence available to the Officer (*Charlton*).

39. If there has been a discovery, a more contentious concept of "staleness" was potentially in issue at the time of the hearing. However, since then the decision of the Supreme Court in *HMRC v Tooth* [2021] UKSC 17 has made clear that "there is no place for the idea that a discovery which qualifies as such should cease to do so by passage of time" (paragraph 76).

40. Time limits for the issue of assessments are set out in in sections 34 and 36 TMA. Section 34 provides that in general an assessment to income tax may be made at any time not more than four years after the end of the year of assessment to which it relates.

41. Section 36 provides that an assessment on a person involving a loss of income tax brought about carelessly by the person may be made at any time not more than six years after the end of the assessment to which it relates.

42. There are additional limits on HMRC's ability to issue assessments where a taxpayer has submitted a self-assessment tax return for the relevant tax year.

43. The burden of proof, applying the usual civil standard of the balance of probabilities, is on HMRC to show that the discovery assessments were validly issued under section 29 TMA.

Disposal of an assessment

44. Once an assessment has been validly served on the taxpayer, section 30A (4) TMA provides that it shall not be altered except in accordance with the express provisions of the Taxes Acts. The definition of "Taxes Acts" includes the TMA (section 118 TMA).

45. Section 50 TMA provides the power for the Tribunal to increase or decrease assessments or allow them to stand good.

46. Section 50(10) TMA provides that where an appeal is notified to the Tribunal, the decision of the Tribunal and the appeal is final and conclusive. By virtue of section 50(11) this is subject to sections 9 to 14 of the Tribunal's Courts and Enforcement Act 2007 (which deal with reviews and appeals of Tribunal decisions), the Tribunal Procedure Rules and the Taxes Acts.

47. Section 54(1) TMA deals with the situation where a taxpayer has appealed and before the appeal is determined by the Tribunal and HMRC officer and the appellant come to an agreement, whether in writing or otherwise, that the assessment decision under appeal should be treated as discharged or cancelled. In such a case the same consequences follow as if, at the time when the agreement was come to, the Tribunal had determined the appeal and had cancelled the assessment or decision.

48. Section 54(3) provides that if the agreement under section 54(1) is not in writing, section 54(1) will not apply unless the fact that an agreement was come to, and the terms which are agreed, are confirmed by notice in writing given by the HMRC officer to the appellant or by the appellant to the HMRC officer.

49. In contrast, if it is the taxpayer who gives notice that he desires not to proceed with the appeal, then section 54(4) provides that unless an officer of HMRC notifies the appellant in

writing within 30 days that he is unwilling that the appeal should be treated as withdrawn, Section 54 is applied as if the appellant and the officer had come to an agreement that the assessment or decision under appeal should be upheld without variation.

The Tribunal Procedure Rules

50. A copy of the relevant Tribunal Procedure Rules is provided in the Appendix to this decision.

DISCUSSION

The Discovery

51. HMRC have relied upon the provision of information to them in September 2014 in a spreadsheet showing cars allocated to employees as the discovery which gave rise to the ability to issue assessments.

52. We agree that there was a discovery made when the spreadsheet was provided which enabled HMRC to issue an assessment under Section 29 TMA. This discovery therefore enabled HMRC to issue the 2016 assessments.

The 2016 assessments

53. HMRC have not sought to claim that the 2016 assessments were invalid or void. However, given the issues which arise in this case we consider that it is incumbent on us to address the validity of the 2016 assessments. If they were void ab initio, the conclusions reached regarding the 2017 assessments' validity may be altered.

Validity

54. HMRC have said on various occasions that the 2016 assessments were "technically flawed". We asked for a further explanation of this at the hearing which HMRC was unable to provide. However, in the written submissions provided after the hearing HMRC say that in February 2017 they considered the assessments to be flawed because of a failure to refer to section 29 TMA in the notification letters. On further review HMRC realised that there was also a failure to include the salaries paid to Mr Kelly in the tax calculation leading to an understatement of tax as a result of the application of the higher rate of income tax. The 2017 assessments were considered to have corrected the "technical flaw".

55. The 2016 assessments did not just fail to refer to section 29 TMA or a discovery. They wrongly stated that the assessments were sent to Mr Kelly "because you have told us that you have additional tax to pay that you had not told us about."

56. Section 114(1) of TMA provides:

> "An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding."

57. In the stricter context of penalty notices, the statement of Henderson J in *Pipe v Revenue and Customs Commissioners* [2008] STC 1911, that a mistake may be too fundamental or gross to fall within the scope of the subsection, was recognised by the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761; but the judges considered, in essence, that the correct approach was to determine overall what information had been provided to the taxpayer.

58. We are satisfied that, in the context of the correspondence, the basis of the 2016 assessments was entirely clear to Mr Kelly. There was a mistake in the reference to information provided by Mr Kelly, but Mr Kelly understood why, and in respect of what, he was being assessed. We are therefore satisfied that Section 114(1) TMA would apply and the 2016 assessment should not be considered to be void ab initio or voidable.

59. Our conclusion that the 2016 assessments were not void ab initio is important in the context of the consideration of the validity of the 2017 assessments, as we explain below.

The 2017 assessments

60. Before the hearing took place, the parties had proceeded on the basis that the 2016 assessments had been effectively superseded by the 2017 assessments and that the dispute solely concerned the 2017 assessments. We address those first as the position regarding the 2017 assessments needs to be recognised in order to understand HMRC's current approach to the 2016 assessments.

61. Following the action taken by HMRC in February 2017 to withdraw from the appeal of the 2016 assessments on the basis that they were invalid or technically incorrect, the 2017 assessments were issued in June 2017.

62. The 2017 assessments state on their face that HMRC "have found that there is additional tax due" and that they were made under section 29 TMA.

63. However, there is no suggestion that there was any subsequent discovery after the issue of the 2016 assessments and prior to the 2017 assessments. Some of the 2017 assessments increased the amount subject to tax in the 2016 assessments, but that was as a result of the errors made in calculation in the 2016 assessments and not as a result of any new discovery. Instead, HMRC recognise that the 2017 assessments were also based upon the discovery made in September 2014.

64. Section 29 TMA refers to "an" assessment being issued after a discovery. Therefore on the words of the legislation HMRC are not able to use section 29 on two separate occasions to raise assessments on the basis of the one discovery. As explained above, the 2016 assessments were not void ab initio and therefore HMRC could not validly rely on the same discovery to issue the 2017 assessments.

65. We are fortified in this conclusion by the decision of the Upper Tribunal in *Tooth* where (at para 79) it was stated that:

> "… (4) the same officer (or officers) cannot make the same discovery twice. We see no reason, however, why the same officer cannot, for <u>different</u> reasons, discover that one of the situations set out in s 29(1)(a), (b) or (c) pertains a second time. Suppose an officer discovers that an assessment to tax has become insufficient for a certain reason, but HMRC decides not to issue an assessment because the point is controversial and the amount small. Suppose that officer then—for different reasons—discovers that the assessment has become insufficient. We consider that this, second, discovery could justify the making of an assessment.
>
> (5) The position is, obviously, a fortiori where two <u>different</u> officers are <u>independently</u> involved. Again, provided the basis for the discovery is different, there is a statutory basis under s 29(1) for issuing two assessments.
>
> (6) What, however, if two <u>different</u> officers independently make the <u>same</u> discovery? In our judgment, as a matter of ordinary English, a discovery can only be made once. We accept that s 29(1) TMA is framed by reference to the subjective state of mind of an officer or the board, but what is a 'discovery' is an objective term. It seems to us that in this case, the first officer makes the discovery;

> the second officer simply finds out something that is new to him. In particular if one officer is made aware of, and accepts, the conclusion of another officer it cannot be said that the first officer made a discovery."

66. Once this issue was identified, the parties were asked for written submissions. HMRC has conceded in its submissions that it is not possible to issue two assessments under section 29 TMA for the same discovery and the 2017 assessments were therefore not validly issued.

67. As a result, the appeal of the 2017 assessments must be allowed. However, that is not the end of the matters before us as HMRC have submitted that, in fact, the 2016 assessments should be applied instead of the 2017 assessments.

Can HMRC now rely once more on the 2016 assessments?

68. Section 30A(4) TMA prohibits amendment of the 2016 assessments except as provided by the Taxes Acts (which include the TMA). There is no basis to conclude that the 2016 assessments ceased to exist by virtue of HMRC's decision at the time that they were in some way invalid. As explained above, we have found that the 2016 assessments were not void ab initio.

69. The 2016 assessments stand good under the TMA unless there is either:

(1) An agreement between HMRC and Mr Kelly under section 54 TMA; or

(2) A decision made by the Tribunal as contemplated by section 50 TMA.

Was there a section 54 agreement?

70. The letter sent to the Tribunal by HMRC on 24 February 2017 stated that HMRC withdrew the 2016 assessments. At the same time HMRC wrote to Mr Kelly to tell him that the assessments would be "vacated" so that there was no longer an appealable decision for the Tribunal to adjudicate. These letters came out of the blue. There is no suggestion in the evidence that the parties had discussed, let alone agreed, HMRC's withdrawal of the assessments. There was no subsequent letter or phone call from Mr Kelly (or any of other employees whose cases have been stayed awaiting the outcome of this appeal) to indicate any agreement was reached between the parties.

71. In addition, any agreement under section 54 where the withdrawal is by HMRC requires either an agreement in writing or a notice in writing issued by the HMRC officer to confirm that an agreement, and its terms, had been reached. There is no such written agreement or notice in this case.

72. Consequently, we find that there was no agreement or notice satisfying the provisions of section 54 TMA.

Did the Tribunal make a decision under Section 50 TMA?

73. We start by addressing the application of the Tribunal Procedure Rules.

74. Rule 17 of those Rules allows either party to withdraw by way of a written notice of withdrawal. HMRC sent such a notice to the Tribunal on 24 February 2017. The Tribunal, in turn, duly notified Mr Kelly of the notification in the letter sent on 27 February 2017 and went on to say that the appeal was allowed.

75. HMRC rely on statements made by Judge Thomas in the case of *Hegarty* and submit that the letter was not a decision of the Tribunal and therefore it could not result in a disposal of the 2016 assessment under section 50 TMA.

76. The *Hegarty* case is not binding on us and we respectfully disagree with Judge Thomas' statements in that case. Judge Thomas said that the standard form letter as issued to Mr Kelly on 27 February 2017 is not from a judge of the Tribunal and does not say that it is written on

the instructions of a judge who has decided the matter. He asserts that only a judge in chambers is able to determine an appeal otherwise than after the hearing of an appeal. However, we disagree with the conclusion that the Tribunal's standard letter is ineffective for the following reasons.

77. We can see no basis under the Rules for the conclusion reached by Judge Thomas that the Tribunal's letters to HMRC and Mr Kelly should have been specifically issued by, or expressly in accordance with the direction of, a Tribunal judge considering the withdrawal in the case made by HMRC. We have considered whether Judge Thomas may have had rule 29 in mind which requires that there must be a hearing (other than in a default paper case) before the Tribunal makes a decision which disposes of proceedings, unless the parties consent to a decision being made without a hearing. However, we consider that the Tribunal did not make a decision disposing of the proceedings when the 27 February 2017 letters were issued. The proceedings ceased by virtue of HMRC's withdrawal and there was nothing left of which the Tribunal could dispose.

78. We have also considered the use of the word "Tribunal" in rule 17. Rule 1 defines "Tribunal" as the First-tier Tribunal. However, it is clear from a review of the Rules overall that there are occasions where reference is made to the Tribunal where it would naturally be assumed that the Tribunal means a tribunal judge or a panel consisting of a judge and member and there are occasions where it would naturally be assumed that the Tribunal means the administrative function of the Tribunal. For example, striking out under rule 8 and costs awards under rule 10 would be actions taken by a judge or panel. In contrast, the requirements to send notices of appeal and appointments of representatives to the Tribunal clearly do not require any more than for the information to be sent to the Tribunal administration. In other words, where there is a function of a judicial nature, Tribunal is taken to refer to a Tribunal judge or a panel, subject to the extension provided by rule 4 which provides for the possibility of delegation of the exercise of the judicial function to staff authorised by the Senior President of the Tribunals.

79. The withdrawal provisions in rule 17 do not, in themselves, require any exercise of judicial function. There is no requirement that the Tribunal should approve the withdrawal. It is simply a matter of notification of the withdrawal which we consider to fall within the administrative sense of the Tribunal. Indeed, we contrast rule 17 of the Tribunal Procedure Rules with rule 17 of the First-tier Tribunal (Immigration and Asylum Chamber) Rules, dealing with withdrawal in that Chamber, which states:

> "(2) The Tribunal must (save for good reason) treat an appeal as withdrawn if the respondent notifies the Tribunal".

80. In that situation, there is a requirement for consideration to be given to whether there is good reason to treat an appeal as not having been withdrawn. Accordingly, the Presidential Guidance Note No 1 of 2014 published by the President of the Immigration and Asylum Chamber makes clear that it is for a judge to decide whether to permit the withdrawal by the respondent; and, in particular, whether there is "good reason" why the appeal should not be treated as withdrawn.

81. No such limitation by reference to "good reason", or otherwise, is contained in the (tax) Tribunal Procedure Rules. Rule 17 of the Tribunal Procedure Rules, simply refers to the administrative function of notification.

82. We are therefore satisfied that the notification of withdrawal did not involve a function of judicial nature. The simple act of the withdrawal by HMRC was sufficient for withdrawal to take place.

83. However, the notification of the withdrawal by the Tribunal does not simply notify the action taken by HMRC. It goes one step further and states that the appeal is consequently allowed.

84. We are aware that the standard form letters sent out by the Tribunal in this case are amongst a set of standard form notices and direction which have been approved by a judge of the First-tier Tax Tribunal. In doing so, we are satisfied that the judge carried out a judicial function and decided that when specified circumstances arose, a particular action would follow. In this case the decision taken by that judge was that where a notice of withdrawal was received from HMRC the standard letters in the form sent to HMRC and Mr Kelly should be issued. That judicial decision is recognising that where HMRC withdraw, HMRC is saying that the appeal is no longer contested. As a consequence there is no longer any dispute for the Tribunal to decide and, necessarily, that results in the taxpayer's appeal succeeding.

85. As a result, we are satisfied that there was a decision of the Tribunal, validly made under the Tribunal Procedure Rules, which was reflected in the letters of 27 February 2017 issued by the Tribunal.

86. Section 50(10) TMA states that a decision of the Tribunal is final and conclusive, subject to, inter alia, the Tribunal Procedure Rules. Section 50(10) TMA is not restricted to particular types of decision. In particular, section 50(10) TMA is not restricted to decisions which dispose of the proceedings as referred to in rule 29. Any decision made by the Tribunal in accordance with the Tribunal Procedure Rules is treated as final and conclusive by section 50 TMA.

87. Accordingly, the decision described in the letters of 27 February 2017 to allow the appeal of the 2016 assessments should be treated as a decision for the purposes of section 50 TMA and Mr Kelly's appeal of the 2016 assessments should be recognised as having been allowed.

88. Importantly, we are satisfied, having regard to all of the circumstances in this case, that our conclusions regarding the effect of the Tribunal's letters of 27 February 2017 give effect to the overriding objective set out in rule 2 of the Tribunal Procedure Rules; namely to deal with cases fairly and justly.

89. Given our conclusions set out above, we have not considered it to be necessary to address whether HMRC's conduct should be treated as an abuse of process.

90. In order to undo the withdrawal, HMRC are required under rule 17 to apply for reinstatement. Rule 17 requires that a reinstatement application should be made within 28 days of the notice of withdrawal. HMRC did not do so as they proceeded instead to issue the 2017 assessments. However, permission to make a late application for reinstatement could have been made at some point thereafter. HMRC have not made any such application as HMRC maintain that the withdrawal had no effect, but HMRC has also conceded that if this is found to be incorrect, Mr Kelly's appeal should succeed. We therefore consider it would not be appropriate for us to treat HMRC's submissions as giving rise to a deemed application to make a late reinstatement application.

CONCLUSION

91. For all these reasons we therefore conclude that:

(1) Mr Kelly's appeal of the 2017 assessments is allowed as those assessments were not validly issued by HMRC;

(2) In February 2017, HMRC validly withdrew its case in the appeal by Mr Kelly of the 2016 assessments and his appeal of those assessments was duly allowed by the Tribunal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

92. 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.

TRACEY BOWLER
TRIBUNAL JUDGE

RELEASE DATE: 18 MAY 2021

Appendix

Relevant Extracts from the Tribunal Procedure Rules

Overriding objective and parties' obligation to co-operate with the tribunal
2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—
(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise of the Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—
(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) Parties must—
(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally.

Delegation to staff
4.—(1) Staff appointed under section 40(1) of the 2007 Act (tribunal staff and services) or section 2(1) of the Courts Act 2003 (court officers, staff and services) may, if authorised by the Senior President of Tribunals under paragraph 3(3) of Schedule 5 to the 2007 Act, carry out functions of a judicial nature permitted or required to be done by the Tribunal.

(3) Within 14 days after the date that the Tribunal sends notice of a decision made by a member of staff under paragraph (1) to a party, that party may make a written application to the Tribunal for that decision to be considered afresh by a judge.

Withdrawal
17.—(1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case—
(a) by sending or delivering to the Tribunal a written notice of withdrawal; or
(b) orally at a hearing.

(2) The Tribunal must notify each party in writing of its receipt of a withdrawal under this rule.

(3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.

(4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after—
(a) the date that the Tribunal received the notice under paragraph (1)(a); or
(b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b).

Determination with or without a hearing

29.—(1) Subject to rule 26(6) (determination of a Default Paper case without a hearing) and the following paragraphs in this rule, the Tribunal must hold a hearing before making a decision which disposes of proceedings, or a part of proceedings, unless—

(a) each party has consented to the matter being decided without a hearing; and

(b) the Tribunal considers that it is able to decide the matter without a hearing.

(2) This rule does not apply to decisions under Part 4 (correcting, setting aside, reviewing and appealing Tribunal decisions).

(3) The Tribunal may dispose of proceedings, or a part of proceedings, without a hearing under rule 8 (striking out a party's case).