IN THE UPPER TRIBUNAL **Appeal No: CTC/1974/2019 (V)**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Jones

Attendances:

The Appellant appeared in person

For the Respondent: Ms Julia Smyth of Counsel, instructed by the General Counsel and Solicitor to Her Majesty's Revenue and Customs

DECISION

The Upper Tribunal dismisses the appeal of the Appellant.

The decision of the First-tier Tribunal sitting at Fox Court, London on 21 January 2019 under reference SC242/17/17034 did not involve any material error on a point of law and is confirmed.

This decision is made under sections 11 and 12(1) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Remote Hearing

1. I heard this appeal remotely on 12 June 2020. The parties had previously consented to a remote hearing but requested a video rather than telephone hearing. The appeal was conducted using Skype for Business with the parties participating through video-camera. Such a form of hearing had been directed pursuant to the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended by the Procedure (Coronavirus) (Amendment) Rules 2020.

2. Pursuant to s.29ZA of the Tribunals, Courts and Enforcement Act 2007 (inserted by the Coronavirus Act 2020) the Upper Tribunal used its reasonable endeavours to make a recording of these proceedings using the Skype for Business recording facility and preserve it for a reasonable time in case any person applies to view or listen to the proceedings.

3. Notice of the remote hearing was published in advance on the HM Courts and Tribunal Service's public website under the cause list for the Administrative Appeals Chamber ('AAC'). The online notice contained a form of words that invited any media representative or any other member of the public who wished to witness the hearing to contact the AAC email address so as to enable themselves to be joined to the hearing. No media representative or member of the public in fact joined the hearing. Nonetheless, I am satisfied that reasonable notice was given to the public as to how to attend the hearing such that it did constitute a public hearing for the purposes of Rule 37 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

4. In any event, even if the hearing had been conducted in private, I am satisfied that it would have been in the interests of justice to proceed in light of the exceptional public health considerations during the Covid-19 pandemic. A remote hearing without public attendance would be a reasonable and proportionate response of the Upper Tribunal to the resource demands on HM Courts & Tribunal Service, the availability of administrative support and current obstacles in providing a physical hearing. I am therefore satisfied that the hearing could have proceeded as a private hearing. It would have been in the interests of justice, particularly where the public has the opportunity apply to access a copy of the recording and this decision can be issued publicly and to the parties.

5. This decision therefore follows a remote hearing which has been consented to by the parties. As required, I record formally that:

(a) the form of remote hearing was V (Skype for Business). A face to face hearing was not held because it was not practicable in the light of Government guidance on urgent matters of public health and the case was suitable for remote hearing, with both parties consenting and involving short matters of law and evidence. Further delay would be inexpedient as this is an appeal in relation to determinations of the Respondent ('HMRC') and FTT that were historic (from November 2017 and January 2019 respectively);

(b) the documents that I was referred to were contained in a small hard copy Upper Tribunal bundle and full First-tier bundle to which all had access. We were all working off the paper files which had been served on all parties well in advance of the hearing;

(c) the order and decision made are as set out above.

Summary of the decision under appeal

6. The Appellant appeals the decision of the First-tier Tribunal ("FTT") dated 21 January 2019 to the Upper Tribunal**.** The FTT had granted the Appellant permission to appeal. The scope of that permission is examined in the submissions on behalf of HMRC set out below.

7. The FTT's decision dismissed the Appellant's appeal and confirmed HMRC's decision dated 20 November 2017 that the Appellant was not entitled to tax credits for the year ended 5 April 2017 (tax year 2016-2017).

8. The Appellant's case before the FTT was that a reduction should have been made from his income when his entitlement to tax credits was assessed. His case was that he had spent £46,080.35 on a property in Ghana (approximately £30,000 of which was spent in the 2016-2017 tax year)[1] and that this ought to be deducted from his income when determining his claim.

9. In dismissing his appeal, the FTT stated in its decision notice dated 21 January 2019 that the money invested in the property in Ghana could not form part of the Appellant's Capital Allowance and he had not included any such claim in his tax return.

10. The FTT made further findings, recorded at paragraphs 23 and 24 of its Statement of Reasons ("SOR") dated 30 May 2019, that the sums were not allowable deductions from his income, because while the Appellant hoped that the property would become a rental business in future, there was no current income from it and it was not currently a business.

[1] Recorded on the first page of the decision notice and para. 26 of the statement of reasons.

11. At the time the Appellant's appeal was determined by the FTT, on 21 January 2019, it is accepted that there was no claim in the Appellant's self-assessment tax return as filed to the sums claimed whether claimed as expenses, trading losses nor capital allowances (nor was there any such claim within any other return for the relevant years).

12. In this appeal before the Upper Tribunal, the Appellant suggests he included such a claim to the sum of £30,411 in capital allowances on an amended tax return. He states he filed a copy of this amended return electronically on 29 January 2019, and has provided copies of a print out from the Gov.Uk Self-Assessment report for his unique taxpayer reference. This states an amendment was submitted on 29 January 2019. A draft copy of his amended return was sent to the Upper Tribunal on 8 February 2020.

13. The Appellant submitted that he filed the amended return within the one-year deadline for corrections to returns to be made (one year from the 31 January 2018 initial deadline, being 31 January 2019). He accepts his amended return of 29 January 2019 was filed subsequent to the First-tier's decision of 21 January 2019 dismissing his appeal (some eight days later). On his case, it would have been filed with HMRC's self-assessment team prior to the FTT's Statement of Reasons being issued on 30 May 2019 (but it is not suggested that a copy was ever sent to the FTT at any time).

Overview of the arguments and the issue in this appeal

14. In short, the Appellant submits that the FTT erred in law in dismissing his appeal in that it failed to address his central argument that he was entitled to relief of the sum of around £30,000 claimed as expenditure on the property in Ghana. He submits that the expenses should have been treated as part of his capital allowance, in respect of which he was entitled to relief, and the FTT failed to consider this argument and apply the correct law. He submits the FTT erred by only addressing whether the sums claimed were deductible business expenditure as trading losses or losses generated from investment rather than part of his capital allowance.

15. HMRC maintains that the FTT's made no error and its decision was manifestly correct. They submit that the FTT addressed the relevant questions of law and the relevant tests in deciding that the sums claimed were not deductible as part of any capital allowance nor any type of business

expenditure. Second, HMRC submit that even if the FTT's decision was inadequately reasoned or it failed to apply the proper test in law, it was inevitable it would have come to the same conclusion as the sums claimed were not deductible as a matter of law. Any errors of the FTT would not therefore be material.

Tax Credits: Background

16. There are two types of tax credit: child tax credit and working tax credit. Entitlement to tax credits is contingent on the making of a claim: see s.3(1) of the Tax Credits Act 2002 ("the Act").

17. There is a distinction in the Act between an award of, and entitlement to, tax credits. In short: (a) an award is made during the relevant tax year (s.14); (b) entitlement is checked and then determined at the end of the tax year (ss.17 and 18). A declaration is completed at the end of the tax year, which: (a) enables HMRC to determine entitlement for that year; (b) enables a claimant to be treated as having made a new claim for the next tax year.

18. Unless the claim is a new claim, the award is based on the circumstances at the end of the previous tax year, assessed by reference to the information in the declaration.

19. Section 7 of the Act provides for an income test to apply.

The decision of the First-tier Tribunal (FTT)

20. In its decision notice dated 21 January 2019 the FTT stated as follows:

> '[The Appellant] argues that a reduction of £46,080.35 should be made from his relevant income when assessing his entitlement to Working Tax Credit and Child Tax Credit. This represents money that he says he invested in a property in Ghana which he hopes will provide a return of £300-£400 per month. He states that this is a Capital Allowance. He also asserts that the entire amount should deducted as Allowance from previous tax years. He estimates that he spent £30,000 in the 2016-2017 tax year. The Self-Assessment tax return does not reflect these expenditures.
>
> The Tribunal did not accept [the Appellant's] arguments that this is Capital Allowance and therefore it is irrelevant as to which year these expenses

occurred for the reasons articulated by HMRC, particularly in the supplementary submission dated 3/12/2018.'

21. The FTT's decision notice records that the Appellant's tax return (as then filed on 29 April 2017) did not reflect the expenditure claimed of approximately £30,000. As set out above, the Appellant submits he filed an amended tax return some eight days later on 29 January 2019 in which the sum was claimed. In the copy provided to the Upper Tribunal, boxes 49 and 57 of the amended return claim the sum of £30,411 as an Annual Investment Allowance and as the total of all capital allowances.

22. The FTT's Statement of Reasons ("SOR") was provided on 30 May 2019. The Appellant did not suggest that he had ever sent a copy of the amended return to the FTT. The FTT did not revisit the question of capital allowances explicitly. The relevant parts state as follows:

'23. [The Appellant] has spent large sums of his 2016/2017 income and previous years income on a property in Ghana.
24. He hopes that this will become a commercial business in the future where he will achieve a rental income.
25. The property in Ghana may or may not be a business in the future. It is currently not a business and received no income from this property for the tax year 2016/2017.
26. He estimates that in the 2016/2017 tax years his expenses were £30,000. I make no findings as to whether he has in fact spent this money on the property in Ghana because I do not believe there is an adequate breakdown of what he states were the costs contained in his schedule at pp.101 onwards. It is, in any event, irrelevant, because the rules of calculation of income and allowable deductions for WTC and CTC are clear. Any money he has spent either purchasing or renovating an additional property is not deductible as a trading loss nor loss generated from investment. The trade is not being carried on upon a commercial basis.
27.[The Appellant] has simply transferred his income to an asset which is his choice. I don't consider that at this point there is any relevance what may or may not become of the property in the future whether residential or commercial.
28. Even if I were to accept that [the Appellant's] investment could be deducted in calculation of his relevant income, this would be restricted to the 2016/2017 tax year (of approximately £30,000 on his oral evidence) and he

would still have a relevant income above £16,000 which would make no difference to the decision that he is entitled to a nil payment of WTC and CTC. I do not accept that he can roll over losses for previous years or provide different calculations with regards to his losses over the years when it suits him (having previously failed to declare despite his occupation as an accountant).
29. The Decision Notice explains that I accepted the arguments articulated by HMRC, particularly in the supplementary submission dated 3/12/2018 which I agree with and adopt as reasons for my decision.'

23. Both the Decision Notice and SOR refer to HMRC's supplementary submission dated 3/12/2018. This document set out and relied upon Regulation 3 of the Tax Credits (Definition and Calculation of Income) Regulations 2002 and Section 120 of the Income Taxes Act 2007 ("ITA"). It stated as follows:

'10. Tribunal are respectfully asked to note the following:

There are fundamental differences between the rules for trading losses and property losses.

……

b) Secondly and more importantly in this case, it is not the loss that may be deducted but rather the "relief" for such losses provided under Section 120 of the ITA which is in itself, restricted to losses attributable to those that relate to capital allowances, or that have an agricultural connection.

11. In this particular case, from the evidence provide by [the Appellant], the loss/expenses claimed appear to be broadly attributable to repairs and maintenance (as noted in paragraph 18 of the original response and reiterated below for Tribunal) which are generally treated as a business expense. The loss does not appear to be attributable to a Capital Allowance, and no Agricultural Connection is implied.

……

12. On that basis there would not be any relief available under section 120 [of the ITA], and accordingly [the Appellant] could not deduct those from his other income for the purposes of calculation of tax credits entitlement for that particular tax year 2016-2017.'

24. It is apparent from the FTT adopting the reasons set out in HMRC's supplementary submission that it rejected the deduction of any capital allowance in part because the expenses appeared to be attributable to repairs and maintenance and as such were considered a business expense. Its other reason for rejecting the Appellant's entitlement to any capital allowance was set out in its decision notice - that he had made no such claim in his tax return.

The Law

25. Regulation 3(8) of the Tax Credits (Definition and Calculation of Income) Regulations 2002 provides:

> '3(8) If—
>
> (a) a claimant has sustained a loss in relation to a [UK property business] or an overseas property business; and
>
> (b) the relief to which he is entitled in accordance with [section 120 of ITA (deduction of property losses from general income)] exceeds the amount of his property income or foreign income for tax credits purposes, for the year in question;
>
> the amount of his total income for tax credit purposes, computed in accordance with the preceding provisions of this regulation, shall be reduced by the amount of the excess.
>
> [In this paragraph "UK property business" and "overseas property business" have the same meanings as they have in Chapter 2 of Part 3 of ITTOIA.'

26. Sections 263 and 265 of the Income Tax Trading and Other Income Act 2005 ('ITTOIA') provide in so far as relevant:

> '263(1) This Chapter explains for the purposes of this Act what is meant by—
>
> (a) a person's UK property business (see section 264), and
>
> (b) a person's overseas property business (see section 265).
>
> …..
>
> (4) References in this Act to an overseas property business are to an overseas property business so far as any profits of the business are chargeable to tax under Chapter 3 (as to which see, in particular, section 269).

(5) Accordingly, nothing in Chapter 4 or 5 is to be read as treating an amount as a receipt of an overseas property business if the profits concerned would not be chargeable to tax under Chapter 3.

(6) In this Act "property business" means a UK property business or an overseas property business.

265 Overseas property business
A person's overseas property business consists of—

(a) every business which the person carries on for generating income from land outside the United Kingdom, and

(b) every transaction which the person enters into for that purpose otherwise than in the course of such a business.'

27. Sections 120(1)-(3) and 123(1)-(3) of the Income Tax Act 1007 ("ITA") provide:

120 Deduction of property losses from general income
(1) A person may make a claim for property loss relief against general income if—

(a) in a tax year ("the loss-making year") the person makes a loss in a UK property business or overseas property business (whether carried on alone or in partnership), and

(b) the loss has a capital allowances connection or the business has a relevant agricultural connection.

(2) The claim is for the applicable amount of the loss to be deducted in calculating the person's net income—

(a) for the loss-making year, or

(b) for the next tax year.

(See Step 2 of the calculation in section 23.)

(3) The claim must specify the tax year for which the deduction is to be made.

……

123 Meaning of "the loss has a capital allowances connection" and "the business has a relevant agricultural connection"
(1) This section applies for the purposes of sections 120 and 122.

(2) The loss has a capital allowances connection if, in calculating the loss—

(a) the amount of the capital allowances treated as expenses of the business, exceeds

(b) the amount of any charges under CAA 2001 treated as receipts of the business.

[(2A) But any allowance under Part 2A of CAA 2001 (structures and buildings allowances) is to be ignored for the purposes of subsection (2).]

(3) The business has a relevant agricultural connection if—

(a) the business is carried on in relation to land that consists of or includes an agricultural estate, and

(b) allowable agricultural expenses deducted in calculating the loss are attributable to the estate.

…….'

28. Sections 1, 3, 15, 21, 51A and 270AA of the Capital Allowances Act 2001, in so far as relevant, provide:

'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);

(aa)Part 2A (structures and buildings allowances);

(ba)Part 3A (business premises renovation 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.

[(2ZA) Any claim for an allowance under Part 2A (structures and buildings allowances) must be separately identified as such in the return.]

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

[(2B) . . .]

(3) In this Act "tax return" means—

(a) for income tax purposes, a return required to be made under TMA 1970,

……

15 Qualifying activities

(1) Each of the following is a qualifying activity for the purposes of this Part—

…….

(d) an [ordinary overseas] property business,

…….

but to the extent only that the profits or gains from the activity are, or (if there were any) would be, chargeable to tax.

……..

21 Buildings

(1) For the purposes of this Act, expenditure on the provision of plant or machinery does not include expenditure on the provision of a building.

(2) The provision of a building includes its construction or acquisition.

(3) In this section, "building" includes an asset which—

(a) is incorporated in the building,

(b) although not incorporated in the building (whether because the asset is moveable or for any other reason), is in the building and is of a kind normally incorporated in a building, or

(c) is in, or connected with, the building and is in list A.

LIST A
ASSETS TREATED AS BUILDINGS

1 Walls, floors, ceilings, doors, gates, shutters, windows and stairs.

2 Mains services, and systems, for water, electricity and gas.

3 Waste disposal systems.

4 Sewerage and drainage systems.

5 Shafts or other structures in which lifts, hoists, escalators and moving walkways are installed.

6 Fire safety systems.

…….

51AEntitlement to annual investment allowance

(1)A person is entitled to an allowance (an "annual investment allowance") in respect of AIA qualifying expenditure if—

(a)the expenditure is incurred in a chargeable period to which this Act applies, and

(b)the person owns the plant and machinery at some time during that chargeable period.

(2)Any annual investment allowance is made for the chargeable period in which the AIA qualifying expenditure is incurred.

……..

270AA Structures and buildings allowances

(1)This Part applies if—

(a)the construction of a building or structure begins on or after 29 October 2018,

(b)qualifying expenditure is incurred, on or after that date, on its construction or acquisition, and

(c)the first use of the building or structure, after the qualifying expenditure is incurred, is non-residential use.

……'

The Appellant's submissions

29. The Appellant first submitted that the FTT erred in law in that it failed to identify and address his argument that he was entitled to deduct his expenditure as a capital allowance. He submitted that the Judge wrongly

focussed upon whether there had been any trading losses. The argument as to his entitlement to deduct his capital allowance was not considered in the FTT's SOR and insufficient reasons were given for rejecting his case. The FTT wrongly focussed on repairs and maintenance and failed to consider the construction costs of the building as forming part of his capital allowance.

30. Second, the Appellant submitted that if the FTT had properly considered his argument as to the capital allowance claimed, it would have been bound to decide that he was entitled to such. The entitlement to deduct the capital allowance as claimed would have reduced his income for the purposes of claiming tax credits. Therefore, the FTT's error was material. He submitted that the original decision by the FTT was in error and *Wednesbury* unreasonable. Therefore, he submitted 'in consonance to the principle of fairness and equity, the decision by the earlier tribunal should not be allowed to stand'.

31. The Appellant submitted that he was a United Kingdom resident and taxpayer as well as a rational investor who wanted a more than meagre private pension. He therefore decided to invest in property business because this offered more returns than investment in his private pension. He thus continuously invested in a property year on year albeit in an overseas country, namely Ghana.

32. He submitted that his investment was a capital expenditure and therefore qualified for Annual Investment Allowance and thus he claimed Annual Investment Allowance of £30,411.00 (Box 49) in his Tax return for 2017. This £30,411.00 annual investment allowance was within the threshold of £200,000.00 for that year.

33. The Appellant relied on Section 120(1) of the Income Tax Act 2007 as part of his argument that the property expenditure formed part of his deductible capital allowance:

'120 Deduction of property losses from general income
(1) a person may make a claim for property loss relief against general income if:
(a) In a tax year ("the loss-making year, the person makes a loss in a UK property business or overseas property business (whether carried on alone or in partnership) and

(b)The loss has capital allowances connection or the business has relevant agricultural connection.'

34. The Appellant submitted that in order for HMRC to be able to consider his capital investment as a capital allowance, he needed to have met the provisions of Capital Allowances Act 2001. This Act defines the qualifying activities applicable in section 15(1) as:

'Each of the following is a qualifying activity for the purpose of this part
(a) a trade. 2
(b) An ordinary UK property lettings business.
(c) An ordinary overseas property business.
(d)An EEA furnished holiday lettings business.
(e) A profession or vocation.
(f) A concern listed in section 12(40 of ITTOIA 2005 or section 39(4) of CTA 2009 (mines, transport undertakings etc).
(g) Managing the investments of a company with investment business.
(h) Special leasing of plant or machinery, and
(i) An employment or office,
But to the extent only that the profits or gains from activity are, or (if there were any) would be chargeable to tax.'

35. In addition to the above, for capital allowances to be considered, section 3 of the capital Allowance Act 2001 requires that:

'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.'

36. The Appellant's Tax return for 2017 at box (49) demonstrated that a claim for £30,411.00 for Annual Investment Allowance had been submitted to HMRC. HMRC's response suggested that a claim had not been made and that the Appellant did not include the alleged capital allowances in his tax return for the applicable tax year 2016/2017. This statement was false.

37. The Appellant's tax return for 2016/2017 shows at box [49] £30,411.00 that a Capital Allowance-Annual Investment allowance was claimed. HMRC stated that any such claim would need to have been made by 31 January 2019. The Appellant had made his claim in his amended return on 29 January 2019.

38. Therefore, having met the statutory provisions of Capital Allowances Act 2001, his general income as worked out and noted in paragraph 36 on page K was £50,983.00. Thus £30,411.00 was therefore deductible from £50,983.00 to arrive at net income for tax credits purposes bearing in mind that £30,411.00 was within the allowable allowance of £200,000.00 for that year.

39. HMRC's submission dated 15 May 2020, stated that the Appellant was not in business. Having withdrawn his private pension and invested the same together with other income in a business-property, the Appellant submitted he was in business. Thus, HMRC's claim that he was not in business was false, inaccurate, misleading and manifestly flawed. There was an overseas business because he had begun spending money on the building. The fact that there was no income or receipts from the building did not prevent it being a business. The fact was there was no income simply meant that the expenditure constituted the losses of the business. The FTT erred in finding there was no business.

40. The Appellant's original claim was for £46,080.35. This £46,080.35 was made up of direct qualifying expenditure for 2015/2016 and 2016/2017. Where he failed to make a claim of over £15,000.00 in his 2015/2016 tax return, this could be claimed in other years.

41. HMRC had stated that a valid claim for capital allowances had not been made. This was false, inaccurate and misleading as it was made in his amended tax return of 29 January 2019. Furthermore, HMRC stated the Appellant's income was too high to be entitled to tax credits. Had HMRC deducted £30,411.00 from his general income, the balance would fall within the threshold to entitle him to Tax credits.

42. The Appellant further relied upon section 21 of the Capital Allowances Act 2001:

'21Buildings

(1) For purposes of this Act, expenditure on the provision of plant or machinery does not include expenditure on the provision of building.

(2) The provision of a building includes its construction or acquisition.

(3) In this section, "building" includes an asset which-

(a) Is incorporated in the building,

(b) Although not incorporated in the building (whether because the asset is movable or for any other reason), is in the building and is of a kind normally incorporated in a building, or (c) Is in, or connected with, the building and is in LIST A ASSETS TREATED AS BUILDINGS

1. Walls, floors, ceilings, doors, gates, shutters, windows and stairs.

2. Main services, and systems, for water, electricity and gas.

3. Waste disposal systems.

4. Sewerage and drainage systems

5. Shafts or other structures in which lifts, hoists, escalators and moving walkways are installed.

6. Fire safety systems.'

43. He submitted that, as noted above, a property business can be acquired, constructed, received as a gift or by inheritance. The Appellant submitted he was building from scratch funded by his income and therefore, all the costs were direct costs of construction. The Appellant submitted that interestingly the HMRC Tax returns did not explicitly require this information to be submitted to HMRC. His tax return for the year 2016/2017 did not require that he submitted evidence in a statement.

44. In as far as United Kingdom Tax is concerned, the Appellant submitted he was a resident and a registered tax payer. As he was developing his property business in an overseas country Ghana, he was a non- resident landlord in Ghana and as such all rental income for UK tax purposes would be repatriated to UK and included in his annual (Self-Assessment) tax return. Property developers in the United Kingdom and overseas, such as Knight Frank and many others (both individuals and corporate bodies) are allowed Capital Allowances Tax relief.

45. In conclusion, he submitted that the FTT's premise for refusing his allowable claim was based on false and inaccurate interpretation of the law and was

manifestly flawed. He therefore submitted the Upper Tribunal should overturn the decision of the First Tier Tribunal (FTT) and re-make it in his favour.

HMRC's submissions

46. On behalf of HMRC, Ms Smyth made the following submissions, many of which I adopt in the discussion section below. In summary, HMRC's position was that:

a. The FTT did not make any error of law. Even if the amended tax return now adduced and relied upon by the Appellant is valid, such amended tax return did not exist at the time of the decision under appeal dated 21 January 2019. Therefore, the First-Tier Tribunal ('FTT') cannot have erred in law, and

b. In any case, the claim for capital allowances made in the amended tax return could not succeed as a matter of law.

47. Ms Smyth expanded upon these two arguments in her oral submissions opposing the appeal. These are addressed below in the discussion section.

48. HMRC relied upon a further argument in writing which was not developed orally when opposing the appeal. This was that the Appellant had changed his grounds of appeal and was seeking to rely upon a ground of appeal for which permission not been granted.

Change in the Appellant's grounds of appeal

49. It was submitted that the Appellant's appeal had, until recently, always proceeded as an appeal on the basis that the First-Tier Tribunal ('FTT') erred in law and not as an appeal based on submitting an amended tax return after the original FTT decision.

50. By way of example:

a. The Appellant's letter dated 15 June 2019 stated that the basis of the appeal was that there were *'deficiencies or irregularities in the manner or factor that were considered when the decision was made… There were mistakes in law, the decision is contrary to the legislation and it is 'Wednesbury unreasonable'.* This letter did not mention that he had filed an amended tax return on 29 January 2019.

b. Permission to appeal was granted on the grounds that *'the grounds may be arguable and the position could be clarified by the Upper Tribunal'*. Permission to appeal was not granted on the basis that an amended tax return had been filed. c. The application for permission and Notice of Appeal states that the FTT Judge *'erred in law'* and that *'there were absolutely mistakes in law'*. No mention of an amended tax return was made.

51. HMRC submitted that the Appellant's appeal now appeared to be based on the amended tax return, filed after the decision under appeal had been made.

52. If the appeal had always been based on the Appellant having filed an amended tax return, then permission to appeal may not have been granted because the amended tax return was filed after the decision under appeal and therefore the Appellant would have been unable to demonstrate that the FTT erred in law.

53. HMRC submitted that the foregoing was important. The Appellant was informed in the Application for permission and Notice of Appeal dated 22 August 2019 on the application form that *'What you have said on this form will be treated as your main submission on the appeal (even if you are only applying for permission to appeal). You should therefore make sure that you say everything you wish to at this stage'*. Despite such invitation, the Appellant declined to inform the Upper Tribunal at that time about the amended tax return and instead presented the appeal as being on the basis that the *'First Tier Tribunal Judge did not apply the correct law or wrongly interpreted the law. Also, it had no evidence or not enough evidence to support its decision or did not give adequate reasons.'*

54. The new amended tax return, on the Appellant's own case, was submitted eight days after the decision under appeal. Accordingly, HMRC submitted that the FTT cannot have erred in law based on the amended tax return because it did not exist at the time that the FTT decision was made.

55. HMRC therefore invited the Upper Tribunal to dismiss the appeal. Ms Smyth submitted that the appropriate course of action would be for the Appellant to engage with whichever HMRC team that he is currently engaging with regarding his amended tax return and self-assessment tax payable. The original FTT decision was properly made in relation to his entitlement to tax credits.

Discussion and Decision

The FTT's decision

56. I am satisfied that the FTT made no material error in dismissing the Appellant's appeal. This is largely for the reasons relied upon by Ms Smyth for HMRC which I adopt below.

57. When the FTT's decision notice is read together with paragraph 29 of its SOR, it is apparent that it considered and rejected the Appellant's argument that he was entitled to the deduction of around £30,000 in expenditure as a capital allowance. It gave sufficient reasons for doing so. The FTT relied upon on HMRC's supplementary submissions dated 3/12/2018 in coming to its conclusion. It further relied upon the absence of any claim being made in any self-assessment tax return by the Appellant (no claim having been filed by the time HMRC made its decision in November 2017 nor by the time the FTT made its decision on 21 January 2019).

58. In its SOR the FTT made further findings that the Appellant was not engaged in any overseas property business as he was not currently receiving any income from his property development and while it might become a commercial business in the future it was not at that time. Therefore, in addition to finding that the expenditure was not a capital allowance, the Appellant's expenditure could not be treated as a trading loss nor a loss generated from investment. The latter findings are not challenged in this appeal and the FTT was entitled to make them on the evidence before it. The Appellant accepted that the business had not received any income, although he submitted that all the expenditure was claimable as a capital allowance.

59. Even if the FTT did not express its reasons for rejecting the capital allowance argument as expansively as it might, I am satisfied that there was no material error in coming to the conclusions that it did.

No Material error in the FTT's decision

60. I am satisfied that the FTT was correct to find that the Appellant was not entitled to deduct the capital allowance he claimed because:

(i) the Appellant had not made a valid claim for capital allowance (by the time HMRC made its decision on his entitlement to tax credits in

November 2017 or at least by the time his appeal was decided on 21 January 2019).

(ii) Even if the Appellant had made such a claim, it could not have succeeded as a matter of law as he was not operating or carrying on any overseas property business at the time of the decision and expenditure on a property could not constitute a permissible capital allowance. Therefore, the Appellant's income was too high to be entitled to tax credits during the relevant period.

61. Regulation 3 of the Tax Credits (Definition and Calculation of Income) Regulations 2002 sets out the manner in which the income of a claimant is to be calculated for the purposes of the Tax Credits Act 2002. Pursuant to regulation 3(8), if a claimant has sustained a loss in relation to an overseas property business, and the relief to which the claimant is entitled under s.120 of the Income Tax Act 2007 ("ITA 2007") exceeds the amount of his property income or foreign income for tax credits purposes, the amount of his total income for tax credits purposes is reduced by the amount of the excess.

62. "Overseas property business" is defined in the Income Tax (Trading and Other Income) Act 2005, as follows:

(i) Section 263(4) and (5) provides that: (a) references to an overseas property business are to an overseas property business so far as any profits of the business are chargeable to tax; and (b) an amount is not to be treated as a receipt if not chargeable to tax.

(ii) Section 265(a) provides that an overseas property business consists of: (a) every business which the person carries on for generating income from land outside the UK; and (b) every transaction which the person enters into for that purpose otherwise than in the course of a business.

63. The fundamental issue for present purposes is whether the Appellant had sustained a loss in relation to an overseas property business and was entitled to relief under s.120 of ITA 2007. I am satisfied that the Appellant had sustained no such loss and was not entitled to such relief because he was not engaged in any overseas property business at the relevant time because he was not receiving any income nor trading (entering into any transactions).

Further I am satisfied that any expenditure on his overseas property in the year 2016-2017 could not constitute a deductible capital allowance.

Lack of claim within any return filed by the time of the FTT decision

64. First, pursuant to s.3 of the Capital Allowances Act 2001 ("CAA 2001") no allowance can be made unless a claim is made, and the claim must be included in a tax return.

65. As HMRC set out in its submissions dated 25 November 2019 (para. 26,), the Appellant did not include the amount of alleged capital allowances in his tax return for the applicable tax year, 2016/2017. The Appellant's original tax return of 29 April 2017 was the only one in existence at the time his appeal was determined before the FTT on 21 January 2019.

66. As HMRC's Capital Allowances Manual, published online, explains at 11130, any such claim would need to have been made by 31 January 2019 (and see s.9ZA of the Taxes Management Act 1970):

> "In Income Tax cases capital allowance claims are made in the return (apart from the few exceptional cases - CA11120). The time limit for making a claim or amending a claim is the normal time limit for making or amending a tax return. That time limit is the first anniversary of 31 January following the year of assessment. For example, the capital allowance claim for 2017/2018 can be amended at any time up until 31 January 2020 because 31 January following the year of assessment 2017/2018 is 31 January 2019 and the first anniversary of that is 31 January 2020" the time limit for making such a claim needs to be made within two years of the accounting year end."

The Appellant's amended tax return

67. The Appellant has provided an undated, unsigned claim with his February 2020 submissions, which is stamped "Copy only Do not send to HMRC." This does not show that a capital allowances claim was made in time. HMRC also observes that no reference to this version of the form appears to have been made to the FTT at any time (and, in particular before it provided its SOR on 30 May 2019). Despite the Appellant providing a print-out from a Gov.Uk website stating that he filed an amended self-assessment return on 29 January

2019, after the FTT made its decision, HMRC has been unable to verify this. The part of HMRC that is instructed upon the Appellant's appeal is a different part of HMRC to the part that deals with amended tax returns and so such information could not be gained easily.

68. The amended tax return that the Appellant relied upon is both undated and unsigned and marked 'Copy only Do not send to HMRC'. The Appellant has also filed what appears to be the same document with his written submissions 22 May 2020 which appears to show that an amendment to his tax return was filed on 29 January 2019. The amended tax return was also sent to the Upper Tribunal under cover of a letter dated 8 February 2020 i.e. over one year after the amendment was made and around 6 months after the Application for permission and Notice of Appeal.

69. The Appellant sought to rely on this undated amended tax return from 8 February 2020 and has in his 22 May 2020 submissions clarified that this document was filed on 29 January 2019. The Appellant submits that the amended tax return was filed on 29 January 2019. HMRC had reviewed its records to ascertain what amendment was made on 29 January 2019. The part of HMRC which deals with tax credits had not been able to confirm from the part which deals with self-assessment that such an amended return had been filed. Although the amended tax return appears to have been made in time, this tax return did not exist at the time of the decision under appeal which was made on 21 January 2019. Had this amendment been made days later, in February 2019, the amendment would have been out of time.

70. It is worth noting that the amended tax return records an Annual Investment Allowance of £30,411 being claimed in the 2016/2017 tax year. This figure is different to the figure that the Appellant claims in Application for permission to appeal (in which he claims £31,277.14 for the 2016/2017 tax year) and does not include the £15,000 in unused Annual Investment Allowance ('AIA') that the appellant seeks to carry forward.

71. In any event, unused AIA cannot be carried forward as the Appellant asserts. AIA can only be claimed in the chargeable period in which the qualifying expenditure occurs (Capital Allowances Act 2001, Section 51A(2)), however, a business could claim the AIA in full, thereby increasing a 'loss' and carry forward this 'loss' to the next tax year. The box at 80 of the amended tax return marked 'total loss to carry forward after all other set-offs – including

unused losses brought forward' is not completed in the amended tax return and therefore the alleged £15,000 unused 'loss' has not been claimed.

72. While I am prepared to accept that the Appellant did make such a claim on 29 January 2019, based upon the printout suggesting it had been filed electronically on that date, no return had been filed by the time the Appellant's appeal had been decided by the FTT. It therefore demonstrates no error of law on the part of the FTT in making its decision. It is merely fresh evidence relating to events subsequent to its decision which could not form part of its decision.

73. I do not need therefore to consider HMRC's argument that the Appellant should be prevented from raising a ground of appeal for which he was not granted permission, namely that he made a claim for capital allowance in an amended tax return dated 29 January 2019. The existence or issue of the amended tax return was not before the FTT and it was right to conclude that no such claim had been made (at the time of HMRC's original decision of November 2017 and at the time it considered the appeal).

74. I do not need to decide therefore whether to admit the amended tax return as fresh evidence in this appeal to the Upper Tribunal as it did not relate to events that had taken place before the FTT made its decision but only to subsequent events. I asked the Appellant why he only made such a claim and filed an amended return only eight days after his appeal had been dismissed by the FTT (partly on the basis he had made no claim to capital allowances in his tax return as then filed). While making no finding, the filing of an amended return might appear to have been a response to the FTT's finding that he was not entitled to the deduction of any capital allowances. The Appellant stated that the reason he had then filed an amended return was because it had taken time to compile the evidence in support of the claim. Whatever the reason, the FTT was not asked to adjudicate upon events that occurred after it made its decision.

75. I did not ask the parties therefore to address me on the consequences of *Ladd v Marshall* [1954] 1 WLR 1489 and whether the admission of the amended tax return constituted fresh evidence on an appeal or simply evidence arising after the appeal was decided. I am satisfied that I can admit and consider the evidence nonetheless. I do so with reservations.

76. I am sceptical whether there is sufficient evidence to establish on the balance of probabilities that an amended tax return was filed on 29 January 2019 or at all, for all the reasons that HMRC rely upon to suggest the evidence is unreliable. Further, I am doubtful whether the Appellant has provided a good reason why he did not make the claim to the capital allowances before he did, such as in his original tax return or at least before his appeal was heard by the FTT. The timing of the claim appears to be directly in response to the decision of the FTT on 21 January 2019. Yet the Appellant, if he did file an amended return some eight days later, did not seek to bring it to the attention of the FTT before it prepared its SOR on 30 May 2019 nor present it to HMRC's tax credits department before appealing to the Upper Tribunal. Nonetheless I am content to admit this fresh evidence and accept it at face value because I am satisfied I can do so without doing any injustice to HMRC.

77. This is because, even accepting it as reliable evidence, the amended return does not constitute a claim made by the relevant time that HMRC made its decision on entitlement to tax credits and the FTT decided its appeal in respect thereof. The evidence regarding the amended tax return could not have possibly been before the FTT as it only arose after the FTT made its decision. To the extent that any subsequent claim within the amended return is accepted to be valid by HMRC's self-assessment department, then the Appellant is at liberty to pursue the consequences of this with HMRC's tax credits department.

Any claim to relief or deduction of a capital allowance could not have succeeded – there was no overseas property business because it received no income nor receipts and expenditure on an overseas property at that time could not constitute a capital allowance. Therefore, no deductions could be made from the Appellant's income for the purposes of tax credit entitlement

78. Any error of law in the FTT's approach to deciding the questions of capital allowances or trading losses could not be material. Further, even if the Appellant's amended tax return had been filed before the FTT made its decision and evidence of such had been before it to consider, the Appellant's claim that the expenditure of £30,000 approximately should be deducted from his income as capital allowance relief could not have succeeded as a matter of law.

79. Pursuant to s.120(1) of ITA 2007, a person may make a claim[2] for property loss relief against general income if: (a) the person makes a loss in a UK or overseas property business; and (b) the loss has a "capital allowances connection." Section 123 sets out when a loss has a "capital allowances connection."

80. By virtue of s.123(2), a loss has such a connection if, in calculating the loss, the amount of the capital allowances treated as expenses of the business exceed the amount of any charges under the Capital Allowances Act 2001 ("CAA 2001") treated as receipts of the business.

81. As the FTT decided, the Appellant could not have made a capital allowances claim, because he was not in fact operating an overseas property business. He was not receiving any income or receipts from the property. Even on his own case, he had only invested in a property, with a mere possibility that he might operate such a business in future.

82. The requirement that a person actually be operating a business is made clear by the statutory provisions already set out, and also by the CAA 2001. Part 2 of that Act makes provision for plant and machinery allowances, and section 15(1) again provides that an ordinary overseas property business is a "qualifying activity" only to the extent that the profits or gains from the activity or would be chargeable to tax. There was no income, trading or receipt from the property, let alone any profit. There was no property income against which capital could be offset. For those reasons, I reject the Appellant's argument that expenditure alone, without the receipt of any income from the property was sufficient to support it being a business.

83. The short point, as the FTT found, is that the property in Ghana may or may not be the source of a business in future, but was not a business at the time of the relevant decision. Therefore, even if the Appellant had made a capital allowance claim prior to the FTT making its decision, it would have failed.

84. Further even if there had been such a business despite there being no income, there was is, in fact, nothing to indicate that money was spent on plant and machinery for the purposes of Part 2 of the CAA 2001. Only plant and

[2] This reflects the fact that a claim must be made.

machinery qualifies under section 21 of the CAA 2001 and not expenditure on a property. Expenditure on the provision of plant or machinery does not include expenditure on the provision of a building: s.21. Expenditure on the property could not qualify as a capital allowanced under Part 2A of the CAA 2001 as the property had started being constructed at least within the 2016-2017 tax year. Section 270AA makes clear that in order for expenditure to qualify as a capital allowance, the construction of the building must begin after 29 October 2018.

85. Finally, the FTT found that even if it were to accept that the Appellant's investment of around £30,000 could be deducted in calculation of his relevant income, he would still have a relevant income above £16,000 which would make no difference to the decision that he was entitled to a nil payment of tax credits. This factual finding of the FTT has not been challenged as being perverse or unreasonable. It is another reason why the Appellant's appeal should fail.

86. For all these reasons, the Upper Tribunal must dismiss the appeal.

87. This decision is only binding in so far as it relates to the Appellant's appeal against the FTT's decision of 21 January 2019 that he was not entitled to Working Tax Credit or Child Tax Credit for the tax year 2016-2017 at that time due to the level of his income as then claimed or assessed.

88. The claim within the Appellant's amended tax return to relief or deduction for his expenditure of £30, 411 as a capital allowance appears yet to be decided by HMRC as part of any self-assessment process. If, as a result of the Appellant's claim in any amended self-assessment return dated 29 January 2019, HMRC (or the First-tier Tribunal (Tax Chamber) on any appeal thereto) decide to revise the Appellant's deductible expenditure and grant relief for capital allowance, the Appellant may be entitled to ask for HMRC to revise his entitlement to tax credits (section 20 of the Tax Credits Act 2002 which was in force until 1 February 2019 previously provided for this to take place).

Conclusion

89. For the reasons given above I am not satisfied that there was any material error in law in the decision of the FTT dated 21 January 2019. The First-tier's decision is confirmed and the Appellant's appeal is dismissed.

Signed (on the original) Rupert Jones

Judge of the Upper Tribunal

Dated 18 June 2020