



UT Neutral citation number: [2022] UKUT 128 (TCC)

UT (Tax & Chancery) Case Number: UT/2018/000003

**Upper Tribunal
(Tax and Chancery Chamber)**

Appeal determined on the papers

Judgment given on 11 May 2022

Before

**UPPER TRIBUNAL JUDGE JONATHAN RICHARDS
UPPER TRIBUNAL JUDGE THOMAS SCOTT**

Between

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

Appellants

and

NICOLA MARTINO

Respondent

Representation:

For the Appellants: Sarabjit Singh QC, Counsel, instructed by the General Counsel and Solicitor for Her Majesty's Revenue and Customs

The Respondent did not appear and was not represented

DECISION

1. The Appellants (“HMRC”) appeal against a decision (the “Decision”) of the First-tier Tribunal (Tax Chamber) (the “FTT”) reported as *Gordon, Connell, Martino and Hills v HMRC* [2018] UKFTT 307 (TC). Mr Gordon, Mr Connell and Mr Hills have settled their disputes with HMRC and therefore we will deal only with the position of Mr Martino in this decision. References to numbers in square brackets are to paragraphs of the Decision unless we specify otherwise.

The Decision

2. HMRC formed the view that Mr Martino was, in January 2010, involved in “unauthorised payments” of £34,486 out of funds held by Scottish Equitable, a registered pension scheme of which Mr Martino was a beneficiary. Accordingly, HMRC decided that Mr Martino was liable to an “unauthorised payments charge” under s208 of the Finance Act 2004 (“FA 2004”) at 40% of the amount transferred and to an “unauthorised payments surcharge” under s209 of FA 2004 at 15% of the amount transferred. On 22 May 2014, HMRC made a discovery assessment (the “Assessment”) for tax of £18,967, being 55% of the amount transferred ([43] to [49]).

3. Mr Martino appealed to the FTT against the Assessment. He, and the other taxpayers whose appeals were heard with his, made a number of challenges to the Assessment summarised at [91] to [101]. One such challenge was that HMRC had not made a “discovery” sufficient to trigger the power to make a discovery assessment set out in s29(1) of the Taxes Management Act 1970 (“TMA”). Mr Martino also argued that the Assessment was made out of time ([98] and [99(2)]).

4. At [125] and [126], the FTT accepted the arguments of Mr Martino and the other taxpayers to the effect that HMRC had not made the requisite “discovery”. Although HMRC had discovered by mid-2011 that Mr Martino was concerned in the making of an unauthorised payment, they did not make the Assessment until May 2014 by which time, in the FTT’s judgment, any discovery had become “stale” and ceased to qualify.

5. That conclusion meant that Mr Martino, and the other taxpayers, all succeeded in their appeals to the FTT. However, the FTT went on to deal comprehensively with all other aspects of the appeals. At [128] to [129], the FTT rejected Mr Martino’s argument that the Assessment was out of time. More generally, it rejected all other challenges to the Assessment that Mr Martino had made, whether on his own behalf, or by adopting challenges made by the other taxpayers.

HMRC’s appeal against the Decision and procedural matters

6. HMRC appeal against the Decision on the single ground that the concept of “staleness” on which the FTT relied does not exist in the context of discovery assessments and so cannot operate to render invalid a discovery assessment that would otherwise be valid. HMRC’s appeal was stayed pending the judgment of the Supreme Court in *HMRC v Tooth* which was expected to provide an authoritative statement as to the existence or otherwise of a concept of “staleness” in the context of discovery assessments made under s29 of TMA.

7. On 14 May 2021, the Supreme Court gave judgment in *HMRC v Tooth* [2021] UKSC 17 (“*Tooth*”). At [76] of that judgment, the Supreme Court decided that, if HMRC have made a “discovery” which qualifies as such, the discovery cannot cease to qualify by mere passage of time.

8. On 10 June 2021, the Upper Tribunal made a direction lifting the stay of HMRC’s appeal. It required Mr Martino, and the other taxpayers, to confirm whether they continued to oppose HMRC’s appeal in the light of the Supreme Court’s judgment in *Tooth* and, if they did, to provide a Response or amended Response setting out their position in the light of that judgment.

9. Mr Martino did not comply with these directions, or a reminder and, on 7 September 2021, the Upper Tribunal made an order in “unless” terms requiring compliance. Mr Martino still failed to comply and by directions made on 1 October 2021 under Rule 8 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the “Rules”) Mr Martino was barred from taking any further part in proceedings. The making of that direction triggered Rule 8(8) of the Rules to the effect that the Upper Tribunal need not consider any response to HMRC’s appeal or other submission made by Mr Martino and may summarily determine any or all issues against him.

10. HMRC continued to progress their appeal and a hearing was listed for 3 May 2022. Before the hearing, all taxpayers other than Mr Martino had settled their disputes with HMRC and the Upper Tribunal had endorsed consent orders disposing of HMRC’s appeal as relating to those other taxpayers. With only HMRC’s appeal relating to Mr Martino still to be determined, and with Mr Martino being debarred from taking any further part in proceedings, the Upper Tribunal asked for HMRC’s views as to whether the appeal could appropriately be determined on the papers. HMRC agreed to this suggestion and we are, therefore, determining the appeal on the papers and without a hearing as permitted by Rule 34 of the Rules.

Discussion and disposition

11. The FTT could not have known, when making the Decision, that the concept of “staleness” could not operate to render invalid an otherwise valid discovery assessment since the judgment of the Supreme Court in *Tooth* post-dated the Decision. However, in the light of the Supreme Court’s judgment, HMRC’s appeal succeeds.

12. Given the error of law in the Decision, our powers set out in s12 of the Tribunals, Courts and Enforcement Act 2007 are engaged. By s12:

- (1) The Upper Tribunal has the power, but not the obligation, to set the Decision aside.
- (2) If it sets the Decision aside, the Upper Tribunal may either:
 - (a) remit the case back to the FTT with directions for reconsideration; or
 - (b) remake the Decision, by making any decision open to the FTT if it were remaking that decision.

13. The FTT’s conclusion on staleness was clearly material to the Decision. We therefore set aside the Decision insofar as it relates to Mr Martino.

14. It is clear from the Decision that, were it not for the FTT’s conclusions on staleness, the FTT would have dismissed Mr Martino’s appeal against the Assessment in its entirety. Mr Martino has chosen to make no challenge at all to the FTT’s rejection of his other arguments. In those circumstances, we see no reason to depart from the FTT’s conclusions on those other issues. We remake the Decision so that Mr Martino’s appeal against the Assessment is dismissed.

Signed on Original

**JUDGE JONATHAN RICHARDS
JUDGE THOMAS SCOTT**

RELEASE DATE: 11 May 2022