[2016] UKFTT 0409 (TC)

TC05163

Appeal numbers: TC/2015/02629
TC/2015/02889
TC/2015/02884
TC/2015/02685
TC/2015/02755
TC/2015/02707
TC/2015/02921
TC/2015/03246
TC/2015/03008

INCOME TAX – Limited Liability Partnership – Whether Members of a Limited Liability Partnership entitled to declare a profit share on individual self-assessment tax returns that differ from an "incorrect" amount declared on the partnership self-assessment tax return – Yes – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) ROBERT KING
(2) JOHN HODGSON
(3) RAY ABERCROMBY
(4) PAUL WOODCOCK
(5) PETER FAIRCHILD
(6) LEO COYLE
(7) KAREN CROWE
(8) LAURENCE BARD
(9) GEOFFREY HILL **Appellants**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at the Royal Courts of Justice, London on 1 and 2 June 2016

Jonathan Bremner, Counsel, instructed by Robert King, for the First to Eighth Appellants

The Ninth Appellant did not appear and was not represented

Aparna Nathan, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellants were all members of a limited liability partnership ("LLP") accountancy firm, BTG Tax LLP ("BTG") during its accounting period ending 30 April 2011. On 26 November 2011 the business of BTG was acquired by accountants Smith & Williamson LLP ("Smith & Williamson"). As a result each appellant ceased to be a member of BTG and, in each case, became a member either of Smith & Williamson or another firm of accountants. Under the terms of the BTG Members Agreement the Designated Members, two corporate bodies over which none of the appellants had any control, were responsible for the preparation of BTG's accounts and tax computations. The accounts for the period ending 30 April 2011, which showed a loss of £1,628,797, were audited by Deloitte LLP who confirmed that they gave a "true and fair" view of the state of BTG's affairs and of its loss and had "been properly prepared in accordance with United Kingdom Generally Accepted Accounting Practice" ("GAAP"). However, as a result of an "add back" by the Designated Members in their tax computation, the 2011-12 partnership tax return included an amount of £1,449,862 as profits of BTG.

2. As they did not consider there to be any legal basis for the add back the appellants filed their personal tax returns to reflect their view of the computation of their share of BTG's profits for tax purposes providing an explanation in the "white space" in their respective tax returns. HM Revenue and Customs ("HMRC") opened enquiries into the appellants' and BTG's 2011-12 tax returns under ss 9A and 12AC of the Taxes Management Act 1970 ("TMA") respectively. Closure notices were subsequently issued, under s 28A TMA, to the appellants and, under s 28B(1) TMA to BTG. The closure notice issued to BTG did not result in an amendment to its return and it did not appeal. However, the closure notices issued to the appellants, which were upheld following a review, concluded that there had been an understatement of their respective share of BTG's profit and their returns amended accordingly.

3. This appeal, against those closure notices, raises the issue of whether members of a LLP are entitled to declare different profit share figures on their individual tax returns to that declared on the partnership tax return if they believe the figure declared on the partnership return to be incorrect.

4. Mr Jonathan Bremner appeared for the first to eighth appellants and Ms Aparna Nathan for HMRC. The ninth appellant, Mr Geoffrey Hill, did not appear and was not represented. However, as the notice of hearing was sent to him on 18 March 2016 at the same address as stated on his Notice of Appeal and from which he wrote to the Tribunal on 7 January 2016 and as stated in his witness statement of 4 February 2016, I was satisfied that he had been notified of the hearing. Also, as I considered it was in the interests of justice to do so, I proceeded with the hearing of Mr Hill's appeal in his absence in accordance with rule 33 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009.

Evidence and Facts

5. In addition to several bundles of documents which included the appellants' individual tax returns for 2011-12, BTG's 2011-12 tax return and its accounts for the year ended 30 April 2011 together with correspondence between the parties, I was provided with witness statements from each of the appellants none of whose evidence was challenged.

6. Although there was no statement of agreed facts there was no real dispute as to the following material facts giving rise to this appeal.

Overview

7. As stated above, all of the appellants were members of BTG during its accounting period ending 30 April 2011. On 26 November 2011 BTG's business was acquired by Smith and Williamson and on that date each of the appellants ceased to be members of BTG becoming members of Smith and Williamson or other accountancy practices.

8. BTG's accounts for the accounting period ended 30 April 2011 (the "Accounts") showed a loss of £1,628,797. These were audited by Deloitte LLP. In their opinion the Accounts:

- gave a true and fair view of the state of BTG's affairs as at 30 April 2011 and of its loss for the year then ended,
- had been properly prepared in accordance with United Kingdom Generally Accepted Accounting Practice, and
- had been prepared in accordance with the requirements of the Companies Act 2006, as applied to LLPs.

9. BTG's revenue recognition policy as set out in Note 1 to the Accounts states:

> **Revenue Recognition**
>
> Revenue relating to professional services rendered is recognised when the following conditions have been met
>
> - the amount of revenue can be measured reliably,
> - it is probable that economic benefits will flow to the entity,
> - the stage of completion of the engagement at the balance sheet date can be measured reliably, and
> - the costs incurred for the transaction and the costs to complete can be measure reliably.
>
> Revenue is recognised on a case by case basis, based on the stage of completion, the fee structure and the partner's estimate of likelihood of completion. When a minimum fixed fee is agreed, it is fully recognised when the necessary elements of the case are completed.

Note 4 to the Accounts records:

> During the year, the LLP incurred exceptional costs as detailed below

	2011	2010
	£	£
Restructuring costs	955,645	
Provision against unbilled income	1,131,836	
	1,087,481	

10. With regard to the £1,131,836 "Provision against unbilled income", Mr Robert King, whose unchallenged evidence was to the same effect as that of the other appellants, explained:

> "In common with all partners in BTG I was responsible for assessing the recoverability of the unbilled work in progress on my clients. This had to be done periodically throughout the year but with a particular emphasis on the year end figure.
>
> Great stress was place on getting this figure correct as BTG, and Begbies Traynor Group plc as a whole, recognised the value of unbilled work in progress in turnover but only where it could be reliably measured and where the recovery of that work in progress was probable. This was in accordance with the accounting policy relating to revenue recognition as disclosed in the accounts of the LLP and the group as a whole. There was, therefore, great focus on the recoverability of the unbilled WIP in order to ensure that income was not recognised in the accounts improperly or at too early a stage."

After noting that he was a tax practitioner of more than 30 years experience, Mr King continued:

> "It is my position that the assessment of the unbilled WIP determined the revenue to be recognised in the accounts (it is not a provision or an anticipation of an expense) and that this was done in a robust and thorough manner, overseen by senior members of the finance team of Begbies Traynor Group plc, in accordance with the LLPs accounting policy, which, it is agreed by all parties, complied with generally accepted accounting practice."

11. Therefore the £1,131,836 was not (at that stage) to be recognised in determining the profit of the LLP.

12. With regard to the restructuring costs of £955,645, it is clear from HMRC's letter of 17 February 2015 to Mr King that only £318,026 of the total sum remains in issue. This is comprised of:

(1) Partner garden leave of £105,000;

(2) Employee garden leave of £157,000; and

(3) General debtor provisions of £56,000.

13. In the 2011-12 partnership tax return submitted by the Designated Members, the deductions identified in the Accounts were reversed and an additional amount of £1,449,862 was included as profits of BTG for tax purposes.

14. Turning to the position of each of the individuals concerned:

Robert King

15. Mr Robert King was a member of BTG. When its business was acquired by Smith & Williamson, on 26 November 2011, he ceased to be a member of BTG and became a partner in another firm of accountants.

16. His share of the BTG's profit/loss as stated in the 2011-12 partnership statement was £85,000. In his 2011-12 tax return Mr King recorded his share of the firm's profit as £27,433. The "white space" declaration in his return stated:

> The income shown in this return as a share of the profits from BTG Tax LLP does not accord with the allocation of profits as shown in the partnership tax return. The partnership return shows a disallowance of £1,449,862 in respect of general provisions. It is considered that this is incorrect and that the provisions are fully deductible for tax purposes. This return has been made on that basis. Therefore I have calculated the income as shown as follows. The profit is as shown in the statutory accounts of BTG Tax LLP is £440,675. Tax adjustments, other than the disputed provisions number referred to above, total £277,485 additions. Therefore the taxable profit for the partnership as a whole is £668.160. The total amount of members' remuneration charged as an expense in the accounts (ie fixed profit shares) is £2,069,472. Therefore the taxable profit is 32.2865 per cent of the total fixed profit shares. My fixed profit share for the period is 32.2865 per cent of this number, being £27,443. If it were to be calculated in accordance with the partnership return, my taxable profit share would equal my fixed profit share of £85,000. Please note that this return has been prepared on the premise that the basis period for partnership income is the tax year to 30th April 2011. On 26th November 2011 the business of BTG Tax LLP was acquired by Smith and Williamson Tax LLP. The business continued to operate in the same way following the acquisition and, with one exception, all the individual members of BTG Tax LLP became members of Smith and Williamson Tax LLP. Hence this has been treated as a continuation rather than a cessation and commencement of a new business. For this reason no income has been shown as having been derived from Smith and Williamson Tax LLP as this will fall into the next basis period. UK pension and state benefits 2 – details of the payers, the amounts paid and tax deducted from each PricewaterhouseCoopers nil tax deducted

17. HMRC opened an enquiry into the 2011-12 tax return under s 9A TMA by letter dated 19 September 2013 on the basis that Mr King had understated his share of the BTG profit. After much correspondence a closure notice under s 28A TMA was eventually issued by HMRC. Mr King appealed to HMRC against the conclusions of the closure notice by letter dated 4 November 2014 and also asked for a statutory review. The Reviewing Officer notified his conclusion, by letter dated 1 April 2015, that the closure notice should be upheld. On 4 April 2015 Mr King appealed to the Tribunal.

John Hodgson

18. Mr John Hodgson was a member BTG until its business was acquired on 26 November 2011 by Smith & Williamson at which date he ceased to be a member of BTG and became a partner in another firm of accountants.

19. Mr Hodgson's share of BTG's profit was stated in BTG's return as being £92,308. In his personal tax return for 2011-12, Mr Hodgson recorded his share of BTG's profit as £29,539. The "white space" declaration in the return stated:

> The amount declared as a share of partnership profits is an estimate. It is based on the statutory accounts to 30 April 2011. This figure is adjusted for tax purposes. The net tax adjustments in the partnership return for the year ended 30 April 2010 were £220,540. Pending determination of the precise figure for tax adjustments for the year ended 30 April 2011 this prior year number has been used to give a taxable profit of £661,215. The member's remuneration was £2,069,473 and therefore the taxable percentage is 32. My fixed share was £92,308 and therefore my estimated taxable profit is £29,539. The taxable profit for the period to 26 November 2011 was £ nil. Please note that on 26 November 2011 the business of BTG Tax LLP was acquired by Smith and Williamson Tax LLP. The business continued to operate in the same way following the acquisition and all bar one of the individual partners became members of Smith and Williamson Tax LLP. The business has therefore been treated as a continuation rather than a cessation and commencement of a new business.

20. On 23 January 2013, Mr Hodgson wrote to HMRC setting out a "more accurate assessment" of his taxable profit for the year in the sum of £26,500. By letter dated 19 September 2013, HMRC opened an enquiry into Mr Hodgson's return under s 9A TMA. By letter dated 27 October 2014, HMRC issued a closure notice under s 28A TMA on the basis that Mr Hodgson had understated his share of BTG's profit.

21. Mr Hodgson appealed against the closure notice and requested a statutory review in a letter dated 10 November 2014. However, the closure notice was upheld following the review and on 26 April 2015 Mr Hodgson appealed to the Tribunal.

Ray Abercromby

22. Mr Ray Abercromby was also a member of BTG until 26 November 2011 when its business was acquired by Smith & Williamson and he became a partner in another firm of accountants.

23. His share of BTG's profit was stated in BTG's 2011-12 return as being £90,000. However, in his personal tax return for 2011-12 Mr Abercromby recorded his share of BTG's profit as £28,800. The "white space" declaration stated:

> The amount declared as a share of partnership profits of BTG Tax LLP is an estimate. The members have not yet been provided with a statement of their individual partnership profit shares based on the partnership return for the year to 30 April 2011.The estimate is based

> on the statutory accounts for the year to 30 April 2011. These accounts show a profit before members fixed profit shares of £440,675. This needs to be adjusted for tax purposes. The net tax adjustments in the partnership return for the year ended 30 April 2010 were £220,540. Pending determination of the precise figure for adjustments for year ended 30 April 2011, this prior year number has been used for the purposes of arriving at an estimated taxable profit. This gives a taxable profit of £661,215. The total amount of member's remuneration charged as an expense in the accounts (i.e. fixed profit shares) is £2,069,472. Therefore, the estimated taxable profit is 31.95 percent of the total fixed profit shares, rounded to 32 percent. My fixed profit share for the period was £90,000 and therefore my estimated taxable profit share as shown in this return is 32 percent of this number, being £28,800.

24. On 19 September 2013 HMRC opened an enquiry into Mr Abercromby's return under s 9A TMA. By letter, dated 24 October 2014, HMRC issued a closure notice under s 28A TMA on the grounds that Mr Abercromby had understated his share of BTG's profit. Mr Abercromby appealed against the closure notice and requested a statutory review on 12 November 2014. He was notified by a letter of 1 April 2015 that the closure notice had been upheld and he appealed to the Tribunal on 23 April 2015.

Paul Woodcock

25. Mr Paul Woodcock was, until 26 November 2011 when its business was acquired by Smith & Williamson, a member of BTG. On ceasing to be a member of BTG Mr Woodcock became a partner in another firm of accountants.

26. Mr Woodcock's share of BTG's profit was stated in BTG's 2011-12 return as being £80,417. In his personal tax return for 2011-12, Mr Woodcock recorded his share of BTG's profit as £26,800. The "white space" declaration stated:

> AMENDMENT - the profit shown on the partnership pages for BTG Tax LLP does not accord with the allocation of profits as shown in the partnership return. The partnership return shows a disallowance of £1,449,862 in respect of general provisions. It is considered that this is incorrect and that the provisions are fully deductible for tax purposes. My tax return has been completed on that basis. END of AMENDMENT. The amount declared in this return as share of partnership profits of BTG Tax LLP is an estimated figure. The members have not yet been provided with a statement of their individual partnership profit shares based on the partnership tax return for the year to 30 April 2011. The estimate is based on the statutory accounts for the year to 30 April 2011. These accounts show a profit before members' fixed profit shares of £440,675. This needs to be adjusted for tax purposes. The net tax adjustments in the partnership tax return for year ended 30 April 2010 were £220,540, pending determination of the precise figure for tax adjustments for year ended 30 April 2011, this prior year number has been used for the purposes of arriving at an estimated taxable profit. This gives a taxable profit of

> £661,215. The total amount of members' remuneration charged as an expense in the accounts (ie fixed profit shares) is £2,069,472. Therefore the estimated taxable profit is 31.95 percent of the total fixed profit shares, rounded to 32 percent. My fixed profit share for the period was £83,750 and therefore my estimated taxable profit share as shown in this return is 32 percent of this number, being £26,800. On 25 November 2011 BTG Tax LLP was acquired by Smith & Williamson Tax LLP. As the members of Smith & Williamson Tax LLP were identical to the members of BTG Tax LLP the acquisition has been treated as a continuation of an existing LLP.

27. By letter dated 19 September 2013, HMRC opened an enquiry into Mr Woodcock's return under s 9A TMA. A closure notice, under s 28A TMA was subsequently issued by HMRC on 24 October 2014 on the basis that Mr Woodcock had understated his share of BTG's profit. Mr Woodcock appealed against the closure notice and requested a statutory review on 12 November 2014. However, the closure notice was upheld and Mr Woodcock appealed to the Tribunal on 8 April 2015.

Peter Fairchild

28. Mr Peter Fairchild was a member of BTG until 26 November 2011 when its business was acquired by Smith & Williamson. He resigned from BTG on that date and joined Smith and Williamson some weeks later. Accordingly, Mr Fairchild's basis period ended on 25 November 2011 (as recorded in his tax return) and a new basis period then began, running from 28 December 2011 to 5 April 2012.

29. Mr Fairchild's share of BTG's profit was stated in BTG's 2011-12 return as being £110,493. In his personal 2011-12 tax return, Mr Fairchild recorded his share of BTG's profit as £0. The "white space" declaration stated:

> The profit share reported is provisional at this stage. It is thought that final confirmation of the profit share will be available by 31 August 2013.

30. By letter dated 23 February 2015, HMRC issued a Closure Notice under s 28A TMA (following an enquiry into Mr Fairchild's return opened under s 9A TMA). HMRC's conclusion was that Mr Fairchild had understated his share of BTG's profit. On 2 March 2015 Mr Fairchild appealed against the closure notice and requested a review. The review upheld the closure notice conclusions and Mr Fairchild was notified of this on 1 April 2015.

31. Also, on 23 February 2015 HMRC issued a discovery assessment, under s 29 TMA upon Mr Fairchild for "additional tax" not shown on his 2010-11 return. Mr Fairchild appealed, to HMRC, against the discovery assessment by letter of 4 March 2015.

32. On 13 April 2015 Mr Fairchild appealed to the Tribunal against the closure notice conclusions and the discovery assessment.

33. Finally with regard to Mr Fairchild I should note that HMRC, in calculating the amendment made to his 2011-12 tax return, had incorrectly used the same basis period employed for the other appellants. However, Ms Nathan said that HMRC recognised this and accepted that the correct basis should be applied and that the amendment would, if necessary, be recalculated accordingly.

Leo Coyle

34. Mr Leo Coyle was a member of BTG until 26 November 2011 when Smith & Williamson acquired its business and he became a partner in another firm of accountants.

35. Mr Coyle's share of the BTG's profit was stated in BTG's return as being £130,007. In his personal tax return for 2011-12 Mr Coyle recorded his share of BTG's profit as £41,600. The "white space" declaration of his return stated:

> The amount declared in this Return as share of partnership profits of BTG Tax LLP is an estimated figure. The members have not yet been provided with a statement of their individual partnership profit shares based on the partnership tax return for the year to 30 April 2011. The estimate is based on the statutory accounts for the year to 30 April 2011. These accounts show a profit before members fixed profit shares of GBP 440,675. This needs to be adjusted for tax purposes. The net tax adjustments in the partnership return for the year ended 30 April 2010 were GBP 220,540. Pending determination of the precise figure for adjustments for year ended 30 April 2011, this prior year number has been used for the purposes of arriving at an estimated taxable profit. This gives a taxable profit of GBP 661,215. The total amount of member's remuneration charged as an expense in the accounts (i.e. fixed profit shares) is GBP 2,069,472. Therefore, the estimated taxable profit is 31.95 percent of the total fixed profit shares, rounded to 32 percent. My fixed profit share for the period was GBP 130,000 and therefore my estimated taxable profit share as shown in this return is 32 percent of this number being GBP 41,600…

36. HMRC opened an enquiry into the return under s 9A TMA on 19 September 2013 and issued a closure notice under s 28A TMA s 28A on 24 October 2014 having concluded that Mr Coyle had understated his share of BTG's profit. Mr Coyle appealed against the closure notice on 4 November 2014 and requested a statutory review. On 13 April 2015, following the closure notice being upheld by the review, Mr Coyle appealed to the Tribunal.

Karen Crowe

37. On 26 November 2011, following the acquisition of its business by Smith & Williamson, Ms Karen Crowe ceased to be a member of BTG and became a partner in another firm of accountants.

38. Ms Crowe's share of the BTG's profit was stated in BTG's 2011-12 return as being £36,667. In her personal tax return for 2011-12, Ms Crowe recorded her share

of BTG's profit as £36,667 (the same figure contained in BTG's return). In the "white space" declaration, however, Ms Crowe stated that:

> The amount declared as a share of partnership profits of BTG Tax LLP is an estimated figure. The members have not yet been provided with a statement of their individual partnership profit shares based on the partnership return for the year to 30 April 2011.The estimate is based on the statutory accounts for the year to 30 April 2011. These accounts show a profit before members fixed profit shares of £440,675. This needs to be adjusted for tax purposes. The net tax adjustments in the partnership return for the year ended 30 April 2010 were £220,540 - pending determination of the precise figure for adjustments for year ended 30 April 2011, this prior year number has been used for the purposes of arriving at an estimated taxable profit. This gives a taxable profit of £661,215. The total amount of member's remuneration charged as an expense in the accounts (i.e. fixed profit shares) is £2,069,472. Therefore, the estimated taxable profit is 31.95 percent of the total fixed profit shares, rounded to 32 percent. My fixed profit share for the period was £36,667 and therefore my estimated taxable profit share as shown in this return is 32 percent of this number, being £11,733...

39. By letter dated 19 September 2013, HMRC opened an enquiry into Ms Crowe's return under s 9A TMA and on 24 November 2014 issued a s 28A TMA closure notice on the basis that Ms Crowe had understated her share of BTG's profit. On 25 November 2014 HMRC issued a discovery assessment, under s 29 TMA, in relation to her 2010-11 return.

40. By letter dated 17 December 2014, Ms Crowe appealed against the closure notice and requested a statutory review. Subsequently (following a review by HMRC), Mr Crowe appealed to the Tribunal on 27 April 2015. Ms Crowe also appealed against the discovery assessment by a letter of 17 December 2014 to HMRC and to the Tribunal on 27 April 2015.

Laurence Bard

41. Mr Laurence Bard was also a member of BTG until 26 November 2011 when, following the acquisition of its business by Smith & Williamson, he became a partner in another firm of accountants.

42. Mr Bard's share of BTG's profit was stated in BTG's 2011-12 return as being £168,056. On 20 March 2013, HMRC received two Partnership (short) forms from Mr Bard in relation to his 2010-11 and 2011-12 tax returns together with a letter dated 17 March 2013. The "white space" in each of the forms referred to the letter "for any other information".

43. In the 17 March 2013 letter Mr Bard stated that:

> … the adjustment of £1,449,862 which was made in arriving at taxable profits for the year to 30 April 2011 in the partnership return for BTG Tax LLP is incorrect and not justified by tax law.

44. A closure notice was issued on 23 February 2015 (following an enquiry opened under s 9A TMA) in respect of Mr Bard's 2011-12 return as HMRC had concluded that he had understated his share of BTG's profits. In addition a discovery assessment, under s 29 TMA, was issued for 2010-11. Mr Bard appealed against the closure notice and discovery assessment on 17 March 2015 requesting a statutory review of both. The closure notice and discovery assessment were upheld on review. On 3 May 2015 Mr Bard appealed to the Tribunal against the closure notice.

Geoffrey Hill

45. Like the other appellants Mr Geoffrey Hill was a member of BTG until its business was acquired by Smith & Williamson on 26 November 2011 when he became a partner in another firm of accountants.

46. Mr Hills share of the BTG's profit as stated in the 2011-12 partnership return was £28,014.90. In his personal 2011-12 tax return Mr Hill recorded his share of the firm's profit as £8,964. The "white space" declaration in the return stated:

> "The amount declared in this return as share of partnership profits of BTG Tax LLP is an estimated figure. The members have not yet been provided with a statement of their individual partnership profit shares based on the partnership tax return for the year to 30th April 2011. The estimate is based on the statutory accounts for the year to 30th April 2011. These accounts show a profit before members' fixed profit shares of GBP 440,675. This needs to be adjusted for tax purposes. The net tax adjustments in the partnership tax return for year ended 30th April 2010 were £220,540, pending determination of the precise figure for tax adjustments for year ended 30th April 2011, this prior year number has been used for the purposes of arriving at an estimated taxable profit. This gives a taxable profit of GBP 661,215. The total amount of members' remuneration charged as an expense in the accounts (i.e. fixed profit shares) is £2,069,472. Therefore the estimated taxable profit is 31.95 of the total fixed profit shares, rounded to 32. My fixed profit share for the period was GBP 15,000 and therefore my estimated taxable profit as shown in this return is 32 of this number, being GBP 4,800. The additional GBP 13,014.90 relates to disallowable motor expenses. Please note that this return has been prepared on the premise that the basis period for partnership income is the year to 30th April 2011. On 26th November 2011 the business of BTG Tax LLP was acquired by Smith and Williamson Tax LLP. The business continued to operate in the same way following the acquisition and, with one exception, all the individual members of BTG Tax LLP became members of Smith and Williamson Tax LLP. Hence this has been treated as a continuation rather than a cessation and commencement of a new business."

47. HMRC opened an enquiry into the 2011-12 tax return under s 9A TMA by letter dated 19 September 2013 on the basis that Mr Hill had understated his share of BTG's profit. Long running correspondence ensued concluding on 27 April 2015 with an appeal to the Tribunal.

48. I should also note that in a letter of 20 November 2013, TFO Tax LLP, Mr Hill's agents, confirmed to HMRC that he wished to be bound by the decision reached with Mr King on the conclusion of their enquiries. HMRC replied on 24 April 2014 notifying Mr Hill that they were in a position to conclude the aspects of the enquiry in regard to the BTG 2011-12 partnership return and that in their view the amounts returned by the designated partner were correct. The letter stated that, accordingly, Mr Hill's share of partnership income was £28,015 allocated on the partnership return rather than £8,964 shown on his return.

Law

49. Section 6(1) of the Limited Liability Partnership Act 2000 ("LLPA") provides that every member of an LLP is the agent of the LLP. However, an LLP it is not bound by anything done by a member in dealing with a person if the member has no authority to act for the LLP and the person knows that he has no authority or does not know or believe him to be a member of the LLP (s 6(2) LLPA).

50. Although an LLP is a "body corporate" (s 1(2) LLPA) s 863 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") provides that, for income tax purposes, an LLP carrying on a trade or business with a view to profit is treated as if it was a partnership. A partnership does not have separate legal personality (s 848 ITTOIA). For partnerships that are comprised of UK resident individual partners, s 849 ITTOIA provides that the partnership profits are calculated as if the firm were a UK resident individual with the partnership's profits allocated to the partners in accordance with the partnership's profit sharing arrangements (s 850 ITTOIA). Partnership trading (including professions) profits must be computed in accordance with generally accepted accounting practice (s 25 ITTOIA).

51. Insofar as it is relevant to the present case s 8 TMA provides:

> **8 Personal return**
>
> (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—
>
> (a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is—

(a) the 31st January next following the year of assessment, or

(b) where the notice under this section is given after the 31st October next following the year, the last day of the period of three months beginning with the day on which the notice is given.

(1AA) For the purposes of subsection (1) above—

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

(b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which section 397(1) or 397A(1) of ITTOIA 2005 applies.

(1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under this section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, loss, tax, credit or charge for the period in respect of which the statement is made.

(1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of this Act for a period which includes, or includes any part of, the year of assessment or its basis period.

…

(2) Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

…

52. Section 9 TMA provides, that returns submitted under s 8 TMA must contain a self-assessment of the amounts in respect of which an individual is chargeable to income tax and capital gains tax.

53. HMRC have the power to enquire into a tax return under s 9A TMA. Such an enquiry (under s 9A TMA) is completed by the issue of a closure notice under s 28A TMA which provides, so far as relevant:

28A Completion of enquiry into personal or trustee return

(1) An enquiry under section 9A(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.

In this section "the taxpayer" means the person to whom notice of enquiry was given.

(2) A closure notice must either—

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions.

(3) A closure notice takes effect when it is issued.

54. Under s 12AA TMA an officer of HMRC may issue a notice to a partner (the recipient being one identified in accordance with the rules accompanying the notice) requiring the submission of a partnership return. The partnership return must contain a partnership statement setting out the profits of the partnership as well as the amount of profits allocated to each partner (s 12AB TMA).

55. HMRC may enquire into the partnership return under s12AC TMA. Such an enquiry may be closed under s 28B TMA which provides:

28B Completion of enquiry into partnership return

(1) An enquiry under section 12AC(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.

In this section "the taxpayer" means the person to whom notice of enquiry was given or his successor.

(2) A closure notice must either—

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions.

(3) A closure notice takes effect when it is issued.

(4) Where a partnership return is amended under subsection (2) above, the officer shall by notice to each of the partners amend—

(a) the partner's return under section 8 or 8A of this Act, or

(b) the partner's company tax return,

so as to give effect to the amendments of the partnership return.

56. Insofar as it applies to the present case s 31 TMA provides:

31 Appeals: right of appeal

(1) An appeal may be brought against—

(a) any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax),

(b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return),

(c) any amendment of a partnership return under section 30B(1) of this Act (amendment by Revenue where loss of tax discovered), or

(d) any assessment to tax which is not a self-assessment.

…

57. Section s 50 TMA provides:

> **50 Procedure**
>
> (1) – (5) …
>
> (6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that the appellant is overcharged to tax by a self-assessment.
>
> (b) that any amounts contained in a partnership statement are excessive; or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides
>
> (a) that the appellant is undercharged to tax by a self-assessment
>
> (b) that any amounts contained in a partnership statement are insufficient; or
>
> (c) that the appellant is undercharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be increased accordingly.

58. The comments of Henderson J in *Tower MCashback LLP1 and another v HMRC* [2008] STC 3366 were approved by Lord Walker in the decision of the Supreme Court in that case (reported at [2011] 2 AC 457) who said, at [15]:

> "… He [Henderson J] also observed (again, in my view, entirely correctly), at paras 115-116:
>
> > "115. There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the Commissioners in exercise of their statutory functions to have regard to that public interest.

59. Judge Bishopp in the Tax and Chancery Chamber of Upper Tribunal observed in *Colin Moore v HMRC* [2011] UKUT 239, at [15]:

> "There can, I think, be no doubt that any taxpayer completing a self-assessment return has a duty to take care when doing so: the obligation upon him is plainly to submit an accurate return."

60. In *R (oao De Silva) v HMRC* [2016] EWCA Civ 40, Gloster LJ included an explanation of the relevant provisions in the Appendix to the Judgment in which she set out "certain of the relevant statutory provisions and an analysis of their effect" (see at [25]). Paragraph 4 of the Appendix deals with "Returns":

> "[4] Returns
>
> a. Administratively both the partnership itself and the individual partners are obliged to make tax returns to the Revenue in relation to each tax year. At the relevant times a partnership was required to complete a partnership return pursuant to s 12AA of the TMA. Section 12AB(1) of the TMA provided that every tax return made by a partnership "shall include a statement (a partnership statement)" showing, among other things:
>
> > i the amount of income or loss sustained by the partnership for the period covered by that re-turn (i.e. on a composite basis); s 12AB(1)(a); and
> >
> > ii the amount of such income or loss attributable to each partner; s 12AB(1)(b).
>
> b. Section 12AB(2) and (3) allowed for amendments to be made to a partnership statement, and where they were made s 12AB(4) provided for corresponding amendments to be made to the self-assessment returns of the partners made under s 9 of the TMA.
>
> c. The partnership statement was logically followed by the submission of each individual partner's tax return pursuant to s 8 of the TMA. The individual partner was required to include the relevant share of the partnership profits or losses allocated to him as shown in the partnership statement in his own tax return: s 8(1B) of the TMA…"

61. In *HMRC v Vaines* [2016] UKUT 2 (TCC), the Upper Tribunal (Judge Gammie QC and Judge Powell) observed that:

> "23. At the same time new sections 8 and 9 TMA provided for returns to include a self-assessment and a new section 12AA TMA made provision for a partnership return to facilitate the establishment of the amounts that individual partners should include in their self-assessment.
>
> 24. Although section 111 ICTA has been rewritten to a number of sections in Part 9 of ITTOIA, the basic approach adopted by section 111 is still evident from those provisions of Part 9: in particular, the actual trade is the trade carried on by the partners collectively (s.111(2)), the profits of the actual trade are then shared among the partners according to their interest for the period (s.111(3)) and the concept of a "deemed trade or profession" (now the "notional trade or profession") is then introduced for the purposes of assessing each partner to tax in respect of his share by reference to the correct basis period (s.111(4)).
>
> 25. Prior to self-assessment, the basis periods for the assessment of partnership profits depended upon whether the entry or departure of any partner was treated as a cessation of the partnership trade or its dis-continuance. The determination of the basis period for the assessment of the partnership's profits on partners generally depended upon that determination. Following the introduction of self-assessment, however, each partner is assessed to tax on their share of the profits by reference to the basis period determined according to their notional trade. It is,

> however, as the language of the Act recognises, a notional trade only for the purposes of assessment. The actual trade remains that of the partners collectively and it is the profits of that collective trade that must be computed before being allocated or shared among partners to provide each partner's share of the profit that is the profit of their notional trades for the purposes of their self-assessment.
>
> …
>
> It is the profits of the trade carried on collectively that has always been recognised as the subject matter of computation and charge. That has not changed with the introduction of self-assessment. It is in the context of the partnership trade conducted collectively that Mr Vaines must justify the deduction of his payment."

62. In *Morgan and Self v HMRC* [2009] SFTD 160 ("*Morgan and Self*") the Tribunal (Dr Nuala Brice) was concerned with the tax treatment of certain payments, by a firm of chartered accountants to partners who were asked to withdraw from the firm made in addition to their share of the profits.

63. Summarising HMRC's arguments Dr Brice said, at [6]:

> "… The Revenue's primary argument was that the further payments were payments of profits and so were chargeable to income tax and were not deductible by the firm. Alternatively they argued that, because the firm had made a partnership return under the 1970 Act, which included a partnership statement showing the amounts of the further payments as being income accruing to each partner, it followed that each partner was obliged to include the same amount as income in his or her personal return and that was the amount upon which each partner was chargeable to tax."

64. Having dismissed the appeal on the basis of HMRC's primary argument and because it had been argued before her, although it was not necessary for her to do so, Dr Brice nevertheless briefly expressed her views in relation to the alternative argument. She said:

> "[69] Section 8(1) of the 1970 Act provides that, if so required, an individual must deliver a return together with such statements as relate to the information in the return. In my view a partnership statement will relate to the information contained in the return of an individual who carries on a profession in partnership. Section 8(1B) provides that the return of a partner must include any amount shown in the partnership statement as equal to his share of income. There is therefore a statutory obligation for a partner to include in his return whatever amount is shown in the partnership statement as equal to his share of the income of the partnership. This accords with the scheme of the legislation and enables the Revenue to ensure that the amounts in the partnership return are consistent with the amounts returned by the individual partners.
>
> [70] However, the question then arises as to what happens if the partnership and the partner do not agree about the nature of payments made. In these appeals the firm was of the view that the payments were

profits and therefore income but the appellants disagreed. A case could arise where a firm was of the view that payments were not income but the individual partner thought that they were. How are such matters to be resolved? If a disagreement were to arise outside the context of the tax legislation then no doubt it could be resolved by the dispute resolution machinery in the partnership agreement. However, if the disagreement fundamentally affects a tax liability then the Revenue will also have a view and it seems that the appropriate forum for resolving the dispute should be the tax appeal procedure. The statutory provisions in the 1970 Act assume that the partnership return is right unless corrected by the Revenue (in which case the Revenue can also correct the individual partner's return). However, there is no provision which deals with the case where an individual partner takes the view that the partnership return and partnership statement is wrong. If, in such a case, the partner does complete his return including as his income the amount shown in the partnership statement he cannot also declare that the return is correct and complete to the best of his knowledge as he would be of the view that the amount returned was too high or too low.

[71] A somewhat similar problem arose in *Sutherland* [*Re Sutherland & Partner's Appeal* [1994] STC 387] where a partnership of six general practitioners appealed against a partnership assessment. Before the appeal was heard the partnership divided between five doctors on the one hand and a single doctor on the other. The General Commissioners determined the assessment and the single doctor required them to state a case for the opinion of the High Court. The question then arose as to whether one partner had the right of appeal against the determination of the General Commissioners under section 31 of the 1970 Act and also having regard to section 56 of the same Act which provided that only an appellant could ask for a stated case. The Court of Appeal held that legislation should be interpreted so as to give effect to Parliament's presumed intention. Having regard to the procedural code in the 1970 Act it was clear that it was the intention of Parliament that one jointly assessed taxpayer should have a right of appeal. At 391f Sir Donald Nicholls VC said that the statutory provisions did not slot neatly into place.

> "On the one hand, the statutory scheme for appeals is not geared to cases where a single assessment is made on more than one person and the taxpayers disagree about what should be done. On the other hand, Parliament cannot be taken to have intended that in such a case one of the persons assessed should have no right of appeal …
>
> (At 391) Legislation is to be interpreted so as to give effect to Parliament's presumed intention, so long as this is clear, provided always the language of the statute fairly admits of the interpretation in question. Here, having carefully considered the procedural code for tax appeals set out in Part IV of the [1970 Act] we are of the clear view that Parliament must have intended that one jointly assessed taxpayer shall have a right of appeal even if the

> other person or persons named in the assessment do not wish to appeal. Accordingly, section 31 is to be construed as enabling any person assessed to tax to bring an appeal in respect of the assessment, whether he has been assessed alone or jointly with others."

[72] The statutory provisions relevant to this appeal do not slot easily into place either. At first sight they do not appear to deal with the case where a partnership and an individual partner disagree about the nature of payments made to the individual partner, which nature affects the tax liability of the individual partner. At the relevant time in *Sutherland* section 31 provided that an appeal might be brought against an assessment to tax and so the language of the statute fairly admitted of the interpretation given by the Court of Appeal. It is not so easy to identify how the language of the current version of section 31 could fairly be interpreted so as to give a partner a right of appeal where he disagrees with the partnership statement as, if the Revenue are right, there will be no assessment or amendment of a self-assessment to appeal.

[73] I have therefore re-examined the provisions of section 8 and 9 of the 1970 Act in the light of these difficulties. Section 8(1) begins by stating the purpose of the whole section which is to establish the amount to which the individual is chargeable to tax and the amount payable by him by way of tax. It seems to me to be implicit in these provisions that what must be established is the right amount upon which the individual is chargeable to tax and the right amount of tax payable by him, no less but also no more. If that is right then the whole section must be interpreted in the light of that purpose. Section 8(1)(a) then goes on to provide that the return must contain 'such information as may reasonably be required in pursuance of the notice'; the notice of course is the notice requiring the return. Section 8(1)(b) finally contains the provision which, with s 8(1B), requires the production of the partnership statement and the inclusion in the return of the amount shown in it as equal to the individual's share of the income of the partnership.

[74] Although the provisions of s 8(1)(b) and 8(1B) impose a clear statutory obligation to provide the partnership statement with the return, and to include the amounts in it in the return, those subsections have to be read within the context of the whole of s 8 which includes s 8(1)(a). It seems to me that the language of s 8(1)(a) fairly admits of the interpretation that the totality of the information referred to must ensure that the return is complete and so must include any additional information needed to supplement the partnership statement in order to comply with the purposes of the section which is to establish the right amount of tax. This would be the case both if the individual thought that the amount in the partnership statement was too high (as in this appeal) or too low, that is, if it under-stated what the individual thought was the right amount. This interpretation is also consistent with s 8(2) because the provision of the additional information would then enable the individual to declare that the return was correct and complete. The same interpretation would then carry through into s 9. Under s 9(1) the

> self-assessment of the individual would be on the basis of the complete information in the return including both the partnership statement and any supplementary information.
>
> [75] It seems to me that this interpretation would also be consistent with the whole scheme of the legislation as the Revenue would be provided with the partnership statement but would also be provided with any supplementary information needed to support a claim that the partnership statement either overstated or understated the profits paid to the individual partner. If the Revenue were not satisfied that the partnership statement was wrong they could amend the self-assessment of the individual partner this giving the individual partner a right of appeal.
>
> [74] I have reached these views with some hesitation and it is with some relief that I recall that I do not have to decide this issue. However, if the appellants had succeeded on the first issue, and if they were not chargeable to tax on the amount shown in the partnership statement, it does not seem right that they should become chargeable just because of the contents of a partnership statement which had been shown to be wrong."

65. In *Phillips v HMRC* [2009] UKFTT 335 (TC) the Tribunal (Judge Mosedale) referring to *Morgan and Self* held, at [112], that:

> "… any partner has the right to appeal assessments against him in relation to his liability to tax on his partnership share is, I think, consistent with the views expressed in *Morgan & Self*"

66. However, in *Gibbs v HMRC* [2013] UKFTT 236 (TC) Judge Mosedale subsequently considered, contrary to the view that she had expressed in *Phillips*, that:

> "[55] … there is no right of appeal for a partner to appeal a consequential amendment under s 28B(4) or s 30B(2). While this might superficially appear surprising, it would be consistent with the scheme of the TMA. Section 111 taxes each partner in accordance with his share of the partnership profits. Each partner must declare his share of the profits as disclosed on the partnership return. The partners' liability is driven entirely by the partnership return. Amendments to that return automatically are carried on to the partners' returns (s28B(4) and s 30B(2)). If a partner were allowed an individual appeal against his own return, this might lead to a situation of over or under taxation of the partnership profits as a whole as there is a risk that a different partnership profit figure would be used for different partners' tax returns.
>
> 56. It seems to me that a proper interpretation of s 31 and one that is consistent with logic is that only the partnership returns can be appealed. But as I said in *Phillips*, any partner can bring the appeal. The effect of succeeding in the appeal would be a reduction in the partnerships' taxable profits and this would flow through to benefit all partners under s 50(9)."

67. In *MCashback Software 6 LLP v HMRC* [2013] UKFTT 679 the Tribunal (Judge Cannan), whose focus was on the issue of appeal rights in the case of a

consequential amendment to an individual's tax return under s 28B(4) TMA (finding that there were none), characterised the second issue in *Morgan and Self* (at [56]) as:

> "…whether individual partners could challenge on appeal the contents of a partnership return and in particular the partnership statement. HMRC contended they could not. The remedy of an individual partner was to raise the matter in the partnership."

68. He continued, at [57]:

> "The Tribunal Judge expressed the view that section 31 TMA 1970 would not naturally be construed so as to give an individual partner a right of appeal against a partnership return which had not been amended by HMRC. However she said that the individual partner could make an individual return under section 8 effectively adjusting the partnership statement so that the income or gains returned by the individual were seen by that individual to be correct. HMRC could then open an enquiry into the individual return of the partner and the partner could appeal any amendment, even if it were an amendment so as to ensure consistency with the partnership statement."

69. Following *Morgan and Self*, HMRC published guidance on the inclusion of partnership profit allocations in partners' tax returns in their Enquiry Manual at EM7025. This stated:

> Following the Morgan and Self cases, we take the view that partners should normally resolve between themselves any dispute about the allocation of profits. But, in exceptional cases, where there is a genuine disagreement that cannot be resolved between the partners, individual partners should
>
> • enter, as their share of partnership profits, the amount they consider to be correct and advise us that they have done so by making an entry in the white space notes section of the return to show
>
> • advise us that they have done so by making an entry in the white space notes section of the return to show
>
> • the profits as allocated in the partnership statement,
>
> • a deduction (or addition) of the disputed amount, and
>
> • an explanation about why they think the profit allocated to them in the partnership statement is wrong.
>
> If the individual partner does this, then we would not automatically regard the personal return as incorrect if profits, as declared by the individual, were a "net" amount after deducting the disputed amount.
>
> But each case will turn on its facts. If there is a discrepancy between profits as allocated by the partnership and profits as returned by the partner, you may need to open enquiries into the returns in order to establish the correct position in respect of both partnership and partner's returns. Normal culpability considerations will apply.

Discussion and Conclusion

70. For the appellants, Mr Bremner contends that the tax adjustment, the add back to the accounts by the Designated Members, was incorrect as a matter of tax law and that as a result the self-assessments in the individual tax returns were correct and therefore complied with the requirements of s 8 TMA. He relies on the *obiter* observations of the Special Commissioner in *Morgan and Self* at [69] to [74] (see, paragraph 64, above) and notes that this accords with the guidance contained in HMRC's Enquiry Manual, EM 7025.

71. Ms Nathan, for HMRC who does not accept that the appellants' individual returns comply with s 8 TMA, submits that the issue of whether BTG's returns were GAAP compliant is not justiciable in this appeal as it is by the members of the LLP rather than the LLP itself. She says that their proper course for challenging the correctness or otherwise of the LLP adjustment is by way of an appeal by BTG against the s 28B(1) TMA partnership closure notice, or if the members cannot agree whether to appeal by way of civil proceedings against the LLP.

72. Turning first to s 8 TMA (which is set out at paragraph 51, above), as Dr Brice observed, at [73] of *Morgan & Self*:

> "It seems to me to be implicit in these provisions that what must be established is the right amount upon which the individual is chargeable to tax and the right amount of tax payable by him, no less but also no more. If that is right then the whole section must be interpreted in the light of that purpose."

73. However, save for one exception, s 8 TMA does not provide any guidance on what information may "reasonably be required" by HMRC for this purpose. That exception is contained in s 8(1B) TMA which requires a person who carries on a trade in partnership to include in his or her return "each amount which, in any relevant statement, is stated to be equal to his share of any income, loss, tax, credit or charge for the period in respect of which the statement is made" with the "relevant statement" being the partnership statement made in accordance with s 12AB TMA setting out the partnership profits and the amount allocated to each partner (s 8(1C) TMA).

74. Relying on *Colin Moore* Ms Nathan submits that not only is a partner obliged to include the figure of the share of the partnership profit allocated on his or her return as stated in the partnership statement but that it has to be recorded in the correct box on that return and that a failure to do so would amount to non-compliance with the strict statutory requirements of s 8(1B) TMA. However, although the Upper Tribunal in *Colin Moore* did refer to the "correct" figure being included in a taxpayer's return it did not address the question that arises here which is what is the correct figure? Is it that provided by the appellants in their individual returns or BTG in the partnership return and, as such *Colin Moore* is of little, if any, assistance in the present case.

75. Ms Nathan, who contends that the "correct" figure is that declared in the partnership statement says that provided an individual enters this figure in the correct box of his or her individual tax return it will be "correct and complete" and the individual would therefore be able to make the declaration required by s 8(2) TMA.

She submits that such an interpretation is to be preferred to that in *Morgan & Self* as it recognises that Parliament could not have intended there to be tension between the two obligations it imposes at s 8(1B) TMA and s 8(2) TMA. This is because s 8(2) TMA applies to everyone required to deliver a tax return and must be consistent to all individuals. Moreover, she says, it would be contrary to the intention of Parliament if s 8(2) TMA were to take precedence over s 8(1B) TMA as it was clearly intended that tax assessments on the partners must flow directly from the partnership return and (as was the situation prior to the introduction of self-assessment) that 100% of reported profits would be assessed (see *Vaines*, at paragraph 61, above).

76. With regard to the *obiter* observations in *Morgan & Self*, which as a decision of this Tribunal is not binding, Ms Nathan submits that because Dr Brice gave precedence to s 8(2) TMA over 8(1B) TMA it was wrongly decided and in any event should not be followed as it was concerned with the nature of particular payments and not the computation of partnership profits or allocation between the partners.

77. Mr Bremner, however, questions the interpretation of s 8(2) TMA advanced by Ms Nathan which he says cannot be correct. He illustrated his submission by way of an example where an individual knew that a partnership statement was incorrect because it contained a negligent or careless understatement of a liability to tax. In such circumstances not only is the person who gave the partnership return to HMRC, the designated partner, liable to a penalty under paragraph 1 of schedule 24 to the Finance Act 2007 calculated by reference to the potential lost revenue but, as a result of the application of paragraph 20 of that schedule, where the inaccuracy affects the amount of tax payable by a partner, the partner is also liable to a penalty. The only way that such a partner could protect himself from a penalty, Mr Bremner says, would be to include a higher figure in his personal return – something that HMRC's construction of s 8 TMA does not permit. Mr Bremner contends that similar difficulties would also arise if, as in this case, the partnership statement overstates a liability.

78. In response Ms Nathan suggests that a partner who believed the partnership profit to have been understated first course of action should be to seek, through the partnership, to amend the partnership return or arrange for a successor to be appointed as the nominated partner if he or she is not acting in the interests of the partnership. However, as this would take time the partner could either:

(1) put the s 8(1B) TMA figure in box 7 (share of partnership's profits) in his return;

(2) put the s 8(1B) TMA figure in the correct box of his return (box 7) and notes in the "white box" his belief that the profits are understated;

(3) put the s 8(1B) TMA figure in the correct box of his return (box 7) and notes in the "white box" his belief that the profits are understated. Additionally, the partner includes the additional income he believes to be missing from the partnership account in the "other income" box of his return;

(4) put the higher figure he believes to be correct in box 7 of his return and puts the partnership figure and explanation in the "white box" and includes the additional income as "other income" in the box in his return; or

(5) put the higher figure he believes to be correct in box 7 of his return and omit the s 8(1B) TMA figure entirely.

79. In the first three of the above options, Ms Nathan says, HMRC would regard the partner's return as correct in law at the time of filing enabling him to make the s 8(2) TMA declaration. However, he could be liable to a penalty if he opted for (1) or (2) above in respect of an error in the partnership statement that affected the amount of tax payable him. Although he could also be liable to a penalty in (3) because of the incorrect partnership return as any amendment should not lead to additional tax being due there would be no potential lost revenue on which it could be calculated and accordingly no penalty would be due. With regard to options (4) and (5), HMRC would regard the return as incorrect as the s 8(1B) TMA has not been included in box 7 and as such a s 8(2) TMA declaration could not be made. The partner would be protected from potential penalties, however, in option (4) because of the entry in the "other income" box but not option (5) where the additional amount has not been included in the return.

80. However, as Mr Bremner submits, such an approach would lead to a partner, who seeks to avoid a liability to a penalty (as in option (3), above) including part of his share of the partnership profit in the "other income" box of his return. This would appear to be inconsistent with Ms Nathan's submission that the correct figure must be included in the correct box in a tax return and it is difficult to reconcile, if I were to accept Ms Nathan's argument, how an individual, in circumstances described in option (3) knowing that his individual return is incorrect, could make the declaration required by s 8(2) TMA.

81. Clearly, as Dr Brice observed at [72] in *Morgan and Self*, the statutory provisions "do not slot easily into place" and do not appear to deal with the case where a partnership and individual partner disagree. However, albeit *obiter* and "with some hesitation", Dr Brice did consider the issue arising in this appeal, ie whether partners are entitled to declare different profit share figures on their individual tax returns to those declared on the partnership tax return where they believe that shown on the partnership return is incorrect.

82. Although a first instance decision of the First-tier Tribunal is not binding in the way that a decision of the Upper Tribunal or Court of Appeal would be it would, nevertheless, be expected to be followed by the First-tier Tribunal in another similar case unless considered clearly wrong. In *HMRC v Abdul Noor* [2013] UKUT 71 (TCC) the Tax and Chancery Chamber of the Upper Tribunal, in relation to the effect of a decision of one High Court Judge on another (but equally applicable in the case of any persuasive authority or court of tribunal of first instance), said, at [82]:

> "… although the decisions were not binding on him in the way that a decision of the Court of Appeal would be binding, the decision of a

> High Court Judge ought to be followed by another [High Court] judge unless that judge thinks that the earlier decision was clearly wrong"

As Lord Goddard CJ put it in *Huddersfield Police Authority v Watson* [1947] KB 842, at 848:

> "I can only say for myself that I think the modern practice, and the modern view of the subject, is that a judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity."

83. Therefore, despite clearly being *obiter*, the observations of Dr Brice on s 8 TMA in *Morgan and Self* were made after hearing argument on the issue from experienced leading counsel on both sides and, as such, should not be dismissed lightly. Rather, having carefully considered what she said, particularly at [74], I would adopt her reasoning and agree that the purpose of s 8 TMA is to establish the right amount of tax.

84. It is therefore necessary to ascertain what the right amount of tax is in this case.

85. Section 25 ITTOIA provides that a profits of a trade (which by virtue of s 24 ITTOIA includes a profession) must comply with the Companies Act 2006 and be GAAP compliant which, in the opinion of the auditors Deloitte LLP, the Accounts in this case did (see paragraph 8, above). Therefore, given the weight of evidence before me that there was no basis for the adjustment to the Accounts made by BTG, it must follow that the "correct" figure from which to establish the right amount of tax is as recorded in each appellant's return.

86. Although Mr King, Mr Hodgson, Mr Abercromby, Mr Coyle and Ms Crowe did include the figure shown in the partnership statement on their individual returns in addition to the "right" figure derived from the accounts, the individual returns filed by the other appellants did not and therefore cannot be regarded as correct and complete. However, given the duty on the Tribunal on an appeal against an amendment to a return made by a closure notice under s 28A TMA is to determine the correct amount of tax due (see *Tower MCashback LLP1* at paragraph 58, above), in the absence of any other reason, this should not restrict their right of appeal.

87. However, Ms Nathan says that such another reason exists. She contends that the amendments to the appellants' 2011-12 tax returns, because they implement an adjustment to a partnership return, are essentially "consequential amendments" with the same effect as an amendment under s 28B(4) TMA and any right of appeal should be construed accordingly.

88. It is clear from *Gibbs* and *MCashback Software LLP 6* that there is no right of appeal under s 31 TMA against consequential amendments under s 28B(4) TMA. However, I do not accept Ms Nathan's argument that s 31 TMA should be interpreted in such a way so as to impose a limitation on a partners right of appeal following an amendment to his or her return made by a s 28A TMA closure notice. Despite any apparent similarity to a consequential amendment made under s 28B(4) TMA, an

amendment made by a closure notice under s 28A TMA is clearly and obviously within s 31(1)(b) TMA. As such I agree with Mr Bremner who submits that as the amendments against which the appellants have appealed were made by closure notices issued under s 28A TMA the appellants have an unlimited right of appeal under s 31(1)(b) TMA

89. As the Vice-Chancellor observed in the passage in *Sutherland* to which Dr Brice referred at [71] in *Morgan and Self*, albeit in relation to a period before the advent of self-assessment and closure notices, Parliament cannot be taken to have intended that in such a case the persons assessed, such as the appellants in the present case, should have no right of appeal. Given that legislation is to be interpreted so as to give effect to Parliament's presumed intention and the language of the statute "fairly admits" such an interpretation it is not necessary to consider arguments based on Article 1 Protocol 1 to the European Convention on Human Rights.

90. Accordingly, for the reasons above, the appeals against the amendments to the appellants' returns made by the closure notices under s 28A TMA are allowed.

Discovery Assessments

91. In relation to the discovery assessments issued by HMRC, under s 29 TMA, on Ms Crowe, Mr Fairchild and Mr Bard in respect of their 2010-11 returns, to the extent that it is necessary to do so, in order to determine this issue Ms Crowe's appeal against the discovery assessment is allowed. However, as the other appeals against the discovery assessments remain open the parties may, if they are unable to resolve the issues between them, make an application to the Tribunal to do so provided that any such application is made within 60 days of the release of this decision.

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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 14 June 2016