NCN: [2021] UKFTT 239 (TC)

TC08188

INCOME TAX – PAYE - application of the Income Tax (PAYE) Regulations 2003 - delivery of P45 / P46 to new employer - basic rate tax code incorrectly applied by employer on a change of employment – whether taxpayer is entitled to credit for tax treated as deducted - PAYE deductions that the employer should have made but did not– whether s.29 Taxes Management Act 1970 discovery assessments validly raised – carelessness in failing to declare employment or income from employment on tax returns –- whether FTT has jurisdiction to consider PAYE deductions an appeal against a discovery assessment - whether s.8(5) of the TMA and Regulation 188 of the PAYE Regulations applies to s.29 TMA – appeal dismissed

FIRST-TIER TRIBUNAL **Appeal number: TC/2018/06012**

TAX CHAMBER

BRUNO GIULIANI

Appellant

and

THE COMMISSIONERS FOR

HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE RUPERT JONES

ANN CHRISTIAN

The hearing took place on 29 and 30 March 2021. With the consent of the parties, the form of the hearing was Tribunal Video Platform, due to Covid 19 restrictions. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Further written submissions were received from both parties on 7 May 2021.

Mr Thomas Chacko, Counsel, appeared for the Appellant

Mr Lloyd Ellis and Ms Christine Cowan, HMRC litigators, appeared for the Respondents

DECISION

Introduction

1. This is a corrected decision pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 amending the earlier decision released on 7 June 2021. We made an order pursuant to Rule 14 of the Rules not to identify the Bank which is not a party to this decision for the reasons set out at paragraph 9 below. We decided it was neither just nor fair to identify a non-party in such circumstances and therefore not in accordance with the overriding objective to do so. The corrections to this decision are to remove a couple of references from the original decision which were included by accident or mistake and may have led to identification of the Bank.

2. Mr Bruno Giuliani, the Appellant, appeals against discovery assessments raised by HMRC against him in March 2016 for tax years 2009-10 and 2010-11 in the sums of £50,611.94 and £81,987.80 respectively.

The issues

3. The assessments were made to collect an income tax loss. This was the difference between a) the basic rate of income tax which was incorrectly deducted from the Appellant's by his employer and b) the higher rate of income tax due to be paid on his earnings in the two tax years which should have been deducted. There is no dispute that his employer failed to deduct income tax under the PAYE system at the higher rate. The Appellant submits that this was his employer's fault because he handed them a P45 or P46 on joining his employment. HMRC submit that he did not do so and the fault for the under deduction is the Appellant's. This is the first issue.

4. HMRC submit that the Appellant was deliberate or at least careless in his failure to declare any employment income on the tax returns he filed for the two tax years and they discovered an insufficiency of tax which they were entitled to assess under s.29 of the Taxes Management Act 1970 ('TMA'). The Appellant submits that he acted neither deliberately nor carelessly in filing inaccurate returns because he believed he did not need to include any employment income where his employer was making PAYE deductions which he believed at the time were being properly made. This is the second issue.

5. The Appellant submits the tax is not due from him as he is entitled to a credit for 'tax treated as deducted' under section 8(5) of the TMA and Regulation 188 of the Income Tax (PAYE) Regulations 2003 ("the PAYE Regulations"). The Appellant's case is that his employer was required to deduct income tax at the higher rate for the years in question but failed to do so because it failed to process his P45 or P46. He submits that as a matter of law he is entitled to credit for the PAYE deductions that the employer should have made but did not. HMRC submit that there is no jurisdiction in an appeal against a discovery assessment for the Tribunal to consider sums that should have been deducted under Regulation 188 of the PAYE Regulations. They submit Regulation

does not apply to section 29 of the TMA and the tax loss must be considered without reference to Regulation 188.

6. This appeal therefore concerns:

   (i) whether the Appellant delivered a P45 or P46 to his new employer, the correct application of the PAYE legislation, and in particular how the provisions relating to a tax code on change of employment should have been applied to the Appellant - whether the tax calculated as due by HMRC should be treated as paid by his employer under the PAYE regulations;
   (ii) the validity of a discovery assessment where the Appellant has failed to declare any employment income on his self-assessment tax returns, in the belief that all applicable income tax had been deducted at source by his employer;
   (iii) whether the Tribunal has jurisdiction in an appeal to consider PAYE sums that should have been deducted so that there is no tax loss and the discovery assessments are invalid or whether this issue can only be decided at the collection and enforcement stage.

Background

7. The following background was not in dispute.

8. The Appellant worked for Oliver Wyman Ltd (OW) until 10 January 2010, when he started new employment with an investment bank ('the Bank').

9. We are satisfied that there is no need to name the Bank in this decision when criticisms are made of it in circumstances where it is not a party to these proceedings and has not had an opportunity to be represented nor put its case.

10. As part of the "onboarding" process with the Bank, the Appellant provided it a variety of documents. The Bank also carried out extensive background checks on the Appellant prior to his commencing employment. One of the documents requested from the Appellant was a P45.

11. The Appellant's income from the Bank was subject to the PAYE system ie the employer deducted income tax and national insurance from his earnings and paid it to HMRC.

12. The Bank operated a basic rate tax code ('BR' code) for the Appellant until April 2011 despite the Appellant's income being in excess of six figures and subject to the higher rate and additional rates of income. This resulted in an underpayment of tax for both 2009-10 and 2010-11 as no higher nor additional rate tax was deducted.

13. The Appellant filed tax returns for tax years 2009-10 and 2010-11 that did not include any employment income.

14. The deadlines for HMRC to open an enquiry into the self-assessment tax returns were 31 January 2012 (for 2009-10) and 31 January 2013 (for 2010-2011) respectively.

15. On 10 March 2016 HMRC issued discovery assessments to the Appellant under section 29 of the TMA in relation to both tax years using the extended time limit provided in section 36 of the TMA. These assessments sought to collect the difference between the tax actually due on his employment income and the amount deducted and accounted for by the Bank.

16. The Appellant now appeals against the two discovery assessments.

The Law

17. The burden of proof is upon HMRC to establish that the discovery assessments were validly raised. Thereafter the burden of proof is upon the Appellant to demonstrate that the tax charged by the discovery assessments is not due. The standard of proof is the ordinary civil standard of the balance of probabilities.

18. The relevant statutory provisions are set out below.

The Taxes Management Act 1970

19. Section 8 (1) TMA 1970 provides for the notices that HMRC may give to taxpayers to file returns. Those returns will establish both the amount by which a person is chargeable to income tax and the amount payable by them. Section 8(1AA)(b) provides that the amount of income tax payable is to be calculated between the amount of tax chargeable and that tax deducted at source. Section 8(5) provides that income tax deducted at source includes income tax treated as deducted:

> (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, ……. a return containing such information as may reasonably be required in pursuance of the notice, …...
>
> ……
>
> (1AA) For the purposes of subsection (1) above—
>
> ……
>
> (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 397(1) of ITTOIA 2005 applies.....
>
> …..

(5) In this section and sections 8A, 9 and 12AA of this Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.

[Emphasis Added]

20. Section 9(1) TMA 1970 provides that a return under s.8 TMA 1970 should include a self-assessment of the amount of tax that is chargeable (9(1)(a)) and the amount that is payable (9(1)(b)):

> (a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and
> (b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax due deducted at source and any tax credits to which section 397(1) or 397A(1) of ITTOIA 2005 applies.

21. Section 29 TMA 1970 empowers HMRC to make discovery assessments when the following conditions are satisfied (29(1)(a):

29 Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment -

> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> ….
>
> The officer, or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax..."
>
> ……..

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

> (a)in respect of the year of assessment mentioned in that subsection; and
>
> (b)... in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

22. Section 36(1) TMA 1970 provides for an extended time limit of six years from the end of the tax year in question for which an assessment may be raised where a loss of income tax is brought about carelessly by the taxpayer:

36 Loss of tax brought about carelessly or deliberately etc

(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

…….

23. The requirement to make payment of tax is addressed by s.59B TMA 1970, which provides:

59B(1) Subject to subsection (2) below, the difference between -

(a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and

(b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act of otherwise) and any income tax which in respect of that year has been deducted at source,

shall be payable by him....

The PAYE Regulations

24. Regulation 36(1)&(2) of the Income Tax (PAYE) Regulations 2003 provide that a former employer should provide part 1 of a P45 to HMRC and the remaining parts to an employee on their leaving employment:

Cessation of employment: Form P45

36.—(1) On ceasing to employ an employee in respect of whom a code has been issued, the employer must complete Form P45.

(2) The employer must then—

(a)send Part 1 of that form to the Inland Revenue, and

(b)provide Parts 1A, 2 and 3 to the employee,

on the day on which the employment ceases or, if that is not practicable, without unreasonable delay.

…….

25. Regulations 42(1)-(3) provide that if an employee moves employment within a current tax year they should provide their new employer with parts 2 and 3 of the P45 and the employer must thereafter comply with regulation 43:

Procedure if employer receives Form P45

42.—(1) This regulation applies—

(a)if an employee gives Parts 2 and 3 of Form P45 to the employer on commencing employment, and

(b)in the circumstances mentioned in regulation 51(2) (late presentation of Form P45: before employer required to send Form P46).

(2) The new employer must prepare a deductions working sheet and record on it the following information shown in Parts 2 and 3 of Form P45—

(a)the employee's name,

(b)the employee's national insurance number.

(3) If Parts 2 and 3 of Form P45 show that the earlier employment ended in the current tax year, the new employer must comply with regulation 43.

……

26. Regulation 43(1) &(8) provide that the new employer should deduct tax in accordance with the code provided within the P45:

Form P45 for current tax year

43.—(1) The new employer must record in the deductions working sheet the code shown in Parts 2 and 3 of Form P45 as the employee's code.

……..

(8) On making any relevant payment to the employee, the employer must deduct or repay tax by reference to the employee's code on the cumulative basis.

27. Regulation 46(1)-(3) provides for completion and provision of a Form P46 by the employee to the new employer where the employer does not receive a Form P45 from an employee and the appropriate tax code is not known. The employee must state which of Conditions A-C is satisfied:

46(1) This regulation applies if—

(a) an employee commences employment without giving the employer Parts 2 and 3 of Form P45, and

(b) a code in respect of the employee has not otherwise been issued to the employer.

[1A) The employee must provide the following information in Form P46.

(1B) The information is—

(a) the employee's national insurance number (if known),

(b) the employee's full name,

(c) the employee's sex,

(d) the employee's date of birth, and

(e) the employee's full address including postcode.

…….

(2) The employee must indicate in Form P46 which . . . of the following statements [applies]—

Statement A: that the employment referred to in paragraph (1)(a) is the employee's first employment since the preceding 6th April, and the employee has not since that date received—

(a) jobseeker's allowance[, incapacity benefit or employment and support allowance] which is subject to income tax, or

(b) a retirement pension or an occupational pension;

Statement B: that the employee is not receiving a retirement pension or an occupational pension and since the preceding 6th April—

(a) has had another employment, but is not now in receipt of employment income from it, or

(b) has received jobseeker's allowance[, incapacity benefit or employment and support allowance] which is subject to income tax, but payment of that allowance or benefit has ceased;

Statement C: that the employee either has another employment (which is continuing) or is in receipt of a retirement pension or an occupational pension

. . ..

(2A) A Form P46 must be—

(a) signed by the employee; or

(b) delivered by the employer by an approved method of electronic communications after he has complied with paragraph (2B).

(2B) To the extent that the information contained in it relates to the employee, the employer must verify the content of a Form P46 before it is delivered.

(2C) If, despite the requirements of paragraphs (2) to (2B), a Form P46 is sent or delivered to an officer of Revenue and Customs without the requirements of those paragraphs being satisfied, the employer must deduct tax [on the non-cumulative basis using code 0T] from the employee's earnings.]

(3) The employer must provide the following information in the Form P46—

(a) the date on which the employment started;

(b) the employee's works payroll number and the department or branch (if any) in which the employee is employed;

(c) the title of the job;

(d) the employer's PAYE reference;

(e) the employer's name;

(f) the employer's full address, including the postcode; and

(g) the tax code used in relation to the employee's earnings.

……

28. Regulations 47 and 48 provide that tax should be deducted using the *emergency* code on a cumulative or non-cumulative basis on first making a payment to the employee if Statement A or B applies (as defined in Regulation 46). Regulation 49(2)(c) provides that the employer must deduct tax on the cumulative basis using the *basic rate* code if Statement C applies (as defined in Regulation 46).

29. Regulation 72 provides that HMRC can recover tax not deducted by the employer from an employee in certain circumstances:

72 Recovery from employee of tax not deducted by employer

(1) This regulation applies if—

(a) it appears to the Inland Revenue that the deductible amount exceeds the amount actually deducted, and

(b) condition A or B is met.

(2) In this regulation and regulations 72A and 72B

"the deductible amount" is the amount which an employer was liable to deduct from relevant payments made to an employee in a tax period;

"the amount actually deducted" is the amount actually deducted by the employer from relevant payments made to that employee during that tax period;

"the excess" means the amount by which the deductible amount exceeds the amount actually deducted.

(3) Condition A is that the employer satisfies the Inland Revenue—

(a) that the employer took reasonable care to comply with these Regulations, and

(b) that the failure to deduct the excess was due to an error made in good faith.

(4) Condition B is that the Inland Revenue are of the opinion that the employee has received relevant payments knowing that the employer willfully failed to deduct the amount of tax which should have been deducted from those payments.

(5) The Inland Revenue may direct that the employer is not liable to pay the excess to the Inland Revenue.

(5A) Any direction under paragraph (5) must be made by notice ("the direction notice"), stating the date the notice was issued, to—

(a) the employer and the employee if condition A is met;

(b) the employee if condition B is met.

(5B) A notice need not be issued to the employee under paragraph (5A)(a) if neither the Inland Revenue nor the employer are aware of the employee's address or last known address.

(6) If a direction is made, the excess must not be added under regulation 185(5) or 188(3)(a) (adjustments to total net tax deducted for self-assessments and other assessments) in relation to the employee.

(7) If condition B is met, tax payable by an employee as a result of a direction carries interest, as if it were unpaid tax due from an employer, in accordance with section 101 of the Finance Act 2009.

30. An employee has a right of appeal against a Regulation 72 direction, under Regulation 72B:

72B Employee's appeal against a direction notice where condition A is met

(1) An employee may appeal against a direction notice under regulation 72(5A)(a)—

(a) by notice to the Inland Revenue,

(b) within 30 days of the issue of the direction notice,

(c) specifying the grounds of the appeal

(2) For the purpose of paragraph (1) the grounds of appeal are that—

(a) the employer did not act in good faith,

(b) the employer did not take reasonable care, or

(c) the excess is incorrect.

(3) On an appeal under paragraph (1) that is notified to the tribunal, the tribunal may—

(a) if it appears that the direction notice should not have been made, set aside the direction notice; or

(b) if it appears that the excess specified in the direction notice is incorrect, increase or reduce the excess specified in the notice accordingly.

72C Employee's appeal against a direction notice where condition B is met

(1) An employee may appeal against a direction notice under regulation 72(5A)(b)—

(a) by notice to the Inland Revenue,

(b) within 30 days of the issue of the direction notice,

(c) specifying the grounds of the appeal.

(2) For the purpose of paragraph (1) the grounds of appeal are that—

(a) the employee did not receive the payments knowing that the employer willfully failed to deduct the amount of tax which should have been deducted from those payments, or

(b) the excess is incorrect.

(3) On an appeal under paragraph (1) that is notified to the tribunal, the tribunal may—

(a) if it appears that the direction notice should not have been made, set aside the direction notice; or

(b) if it appears that the excess specified in the direction notice is incorrect, increase or reduce the excess specified in the notice accordingly.

31. Regulation 80 provides that HMRC can recover tax not deducted by the employer from the employer in certain circumstances by making a direction.

32. Regulation 185 provides for the adjustments to total net tax deducted for the purposes of s.59B TMA 1970. It provides that tax treated as deducted is to be treated as the amount of income deducted for the purposes of collecting tax and this includes deductions that the employer should have made but did not. It states:

185—(1) This regulation applies for the purpose of determining—

(a) the excess mentioned in section 59A(1) of TMA (payments on account of income tax: income tax assessed exceeds amount deducted at source), and

(b) the difference mentioned in section 59B(1) of TMA (payments of income tax and capital gains tax: difference between tax contained in self-assessment and aggregate of payments on account or deducted at source).

(2) For those purposes, the amount of income tax deducted at source under these Regulations is the total net tax deducted during the relevant tax year ("A") after making any additions or subtractions required by paragraphs (3) to (5).

(3) Subtract from A any repayments of A which are made before the taxpayer's return and self-assessment is made under section 8 or 8A of TMA (personal return and trustee's return).

(4) Add to A any overpayment of tax from a previous tax year, to the extent that it was taken into account in determining the taxpayer's code for the relevant tax year.

(5) Add to A any tax treated as deducted, other than any direction tax, but

(a) only if there would be an amount payable by the taxpayer under section 59B(1) of TMA on the assumption that there are no payments on account and no addition to A under this paragraph, and then

(b) only to a maximum of that amount.

(6) In this regulation—

"direction tax" means any amount of tax which is the subject of a direction made under regulation 72(5), regulation 72F or regulation 81(4) in relation to the taxpayer in respect of one or more tax periods falling within the relevant tax year;

"relevant tax year" means—

(a) in relation to section 59A(1) of TMA, the immediately preceding year referred to in that subsection;

(b) in relation to section 59B(1) of TMA, the tax year for which the self-assessment referred to in that subsection is made;

"tax treated as deducted" means any tax which in relation to relevant payments made by an employer to the taxpayer in the relevant tax year

(a) the employer was liable to deduct from payments but failed to do so, or

(b) the employer was liable to account for in accordance with regulation 62(5) (notional payments) but failed to do so;

"the taxpayer" means the person referred to in section 59A(1) of TMA or the person whose self-assessment is referred to in section 59B(1) of TMA (as the case may be).

[Emphasis Added]

33. Regulation 188 Income Tax (PAYE) Regulations 2003 provide for how the tax payable is to be calculated for assessments other than self-assessments (section 9 TMA) and the treatment of the PAYE deductions. Again, deductions from the tax payable take account of any tax which the employer was liable to deduct but failed to do so:

188. (1) In this regulation, "assessment" means an assessment other than one under section 9 of TMA (self assessment).

(2) The tax payable by the employee is -

A-(B-C) where

A is the tax payable under the assessment;

B is the total net tax deducted in relation to the employee's relevant payments during the tax year for which the assessment is made, adjusted as required by paragraph (3); and

C is so much, if any, of B as is subsequently repaid.

(3) For the purpose of determining the tax payable by the employee, and subject to paragraphs (4) and (5) -

(a) add to B any tax which -

(i) the employer was liable to deduct from relevant payments but failed to do so, or

(ii) the employer was liable to account for in accordance with regulation 62(5) (notional payments) but failed to do so;

(b) make any necessary adjustment to B in respect of any tax overpaid or remaining unpaid for any tax year; and

(c) make any necessary adjustment to B in respect of any amount to be recovered as if it were unpaid tax under section 30(1) of TMA (recovery of overpayment of tax etc) to the extent that—

(i) HMRC took that amount into account in determining the employee's code, and

(ii) the total net tax deducted was in consequence greater than it would otherwise have been.

(4) No direction tax is to be included in calculating the amount of tax referred to in paragraph (3)(a).

(5) If a direction is made after the making of the assessment, the amount (if any) shown in the notice of assessment as a deduction from, or a credit against, the tax payable under the assessment is to be taken as reduced by so much of the direction tax as was included in calculating the amount of tax referred to in paragraph (3)(a).

(6) Instead of requiring payment by the employee, [HMRC]1 may take the tax payable by the employee into account in determining the employee's code for a subsequent tax year.

(7) In this regulation—

"direction" means a direction made under regulation 72(5), regulation 72F or 81(4) in relation to the employee in respect of one or more tax periods falling within the tax year in question;

"direction tax" means any amount of tax which is the subject of a direction;

"tax payable under the assessment" means the amount of tax shown in the assessment as payable without regard to any amount shown in the notice of assessment as a deduction from, or a credit against, the amount of tax payable.

[Emphasis Added]

The Facts

34. We received written and oral evidence from HMRC Officer Mark McGee and the Appellant. We find the following facts on the balance of probabilities indicating, where matters were in dispute, our reasons for making such findings.

35. In 2009 the Appellant was employed by Oliver Wyman ("OW") but accepted an offer of new employment at the Bank. As part of the pre-employment process, on 10 November 2009, the Bank's Onboarding Team e-mailed the Appellant requesting information to enable pre-employment background screening. This e-mail stated that P45s may be requested if not already provided.

36. On 16 November 2009, the Appellant provided information and documents to the Bank Onboarding Team. This included two payslips from his then employer, OW, showing the tax code in operation as 647L but it did not include P45s or any information

regarding the pension status of the Appellant. At this time the Appellant was still employed by OW and so could not provide a P45 in respect of that employment – it only being available to an employee on leaving employment.

37. On 4 January 2010, HMRC issued a coding notice to the Appellant for the tax year 2010-11. This explained that the Appellant would no longer be entitled to a tax-free personal allowance due to estimated income exceeding £112,950 and would pay tax at the higher rate of 40% on earnings over £37,400.

38. On 11 January 2010, the Appellant began his employment with the Bank.

39. On 27 January 2010, the Bank's Onboarding Team e-mailed the Appellant requiring information to complete the screening process be provided within three working days. Proof of employment at three previous employers (Bain & Company, AT Kearney and CSC Peat Marwick) was requested and P45s were suggested as supporting documents. No further proof or documents were requested from the Appellant regarding his OW employment.

40. On 29 January 2010, the Appellant received security screening approval. Documents accompanying the approval cover the Appellant's employment history. These documents confirm he was employed at OW from April 2007 to December 2009 and refer to e-mail exchanges with previous employers. There are no e-mails from OW or information regarding the pension status of the Appellant.

41. On 31 January 2010, the Appellant's former employer - OW - issued a P45 to the Appellant. This showed total pay to date of £103,024.19.

42. There is a dispute about what happened next – whether the Appellant thereafter provided the Bank with a P45 or completed P46.We set out our reasons and findings on this in the fact finding and discussions section on the first issue. Nonetheless, we set out a summary of our reasons immediately below.

43. We accept the Appellant's evidence and find that the Appellant did provide a P45 to the Bank at the relevant time shortly after 31 January 2010 but the bank failed to process the document and ensure that higher rate tax was deducted from his earning as a consequence.

44. In summary, we accept that the Appellant's evidence was meticulous about retaining and submitting paperwork in all regards and particularly in relation to the 'onboarding' process with the Bank. He had retained Part 1A of his P45 which means that it is reasonable to infer that it is likely that he had delivered Parts 2 and 3 to the Bank as part of the onboarding process some time after 31 January 2010.

45. We accept that in 2011 the Bank did not have a record of it being delivered by the Appellant through his personal assistant ('PA') at the relevant time in 2010 or subsequently. However, as is clear from the matters below, the Bank appears to accept in June 2017, that it had a much wider problem at that time in failing to make proper PAYE deductions from a number of employee's earnings. It appears that there may well have been problems in its internal processes and systems in operating the PAYE system.

46. The Appellant's more contemporaneous recollection in his email of 1 March 2011 was that he had provided a P46 to the Bank at the time of joining in 2010. The recollection of his PA, Karen Tidd, was that the Appellant had provided a P45 at the relevant time. Further, the Appellant was not chased by the Bank (through its Human Resources or otherwise) for any missing paperwork such as a P45 or P46. There is no suggestion that the Bank's HR or personnel teams chased the Appellant for any missing documents at the relevant times in January or February 2010.

47. We are satisfied that the Appellant meant to refer to a P45 in his email of March 2011 and in his witness statement rather than a P46 and both witnesses suggested he only provided one document (a P45 or P46).

48. Irrespective of the documents delivered by the Appellant, on 23 March 2010 the Bank's Payroll Department submitted a P46 to HMRC on behalf of the Appellant as required by reg.49(2)(a) of IT (PAYE) Regulations 2003. This had not been completed by the Appellant but by the Bank. The Bank would have no need to complete and provide its own P46 if a P45 or P46 had in fact been delivered to the Bank by the Appellant unless it failed to locate or process the Appellant's document. As a result of the P46 completed by the Bank, the Basic Rate code was incorrectly utilised. Therefore, insufficient tax was deducted from the payments of earnings made by the Bank to the Appellant. While the Appellant benefitted from receiving a greater net proportion of his earnings, HMRC suffered the corresponding loss of tax.

49. On 23 January 2011, the Appellant filed his Self-Assessment Income Tax return for the tax year ended 5 April 2010 electronically having received a notice to file from HMRC. No employment income for this tax year was declared on his return.

50. On 1 March 2011, Paul Honeysett, the Bank's Payroll Governance Manager, e-mailed the Appellant stating: "during our end of tax year review we identified that you are currently on the Basic Rate tax code…. You are on this code because we have not received a P45 or P46 from you. Depending on your personal circumstances you may owe more taxes than we have withheld". Mr Honeysett went on to suggest the Appellant speak to his tax advisor or an Ernst & Young ('EY') helpline established by the Bank to establish the implications of the Basic Rate ("BR") coding and appropriate course of action.

51. Minutes later the Appellant responded to Mr Honeysett by e-mail stating: "I am not aware of the tax technicalities based on PAYE…. I gave you a P46 when I joined and therefore this is obviously an issue" The Appellant further requested confirmation that the correct tax code would be applied from then on.

52. On 2 March 2011, Mr Honeysett e-mailed the Appellant asking if he could recall when and to whom he provided the P46 and states: "I would still suggest that you contact EY on the number below who will be able to assist in providing an assessment of the underpayment and guidance on providing an amended tax code."

53. On the same day the Appellant replied to Mr Honeysett by e-mail stating: "I gave that back in January/Feb 2010 shortly after joining to my PA." The Appellant then requested "confirmation via return e-mail that the tax code will be appropriately adjusted from now on".

54. On 3 March 2011, Vicky Ward of the Bank's Payroll Services e-mailed Samantha Braithwaite, another employee of the Bank, stating: "The payroll department have not been able to locate a form received so far. However, I can confirm that the Payroll department followed the standard procedure of completing a P46 on Bruno's behalf, submitting to HMRC and we notified HMRC on 23/03/2010 of his employment." Ms Ward explained that the Appellant would be required to complete a new P46 if the original could not be located and continued: "There may still be a liability between January 2010 and February 2011. If Bruno would like to find out more or have any calculations done, then the Ernst & Young helpline will be able to assist." The Appellant was copied into this e-mail.

55. Minutes later the Appellant emailed Ms Ward and requested the following: "Please therefore confirm as previously requested that moving forward, the proper tax code will be used by HR/GBS. Please eventually chase HMRC to get it code (sic) based on your submission back on 23/03/2010. For the record my PA at the time was Karen Tidd, she left the bank."

56. Ms Ward replied to the Appellant by e-mail as follows: "I've just traced incoming e-mails from Karen Tidd, unfortunately, I can't see any email submissions from her at the time, sending the form into us electronically. However, I do appreciate that she may have posted it etc, as you had completed it, but unfortunately we have no trace of receiving this."

57. Ms Ward explained she could not amend the code without a P46 and asked the Appellant to complete a P46 selecting statement A to ensure his future taxes will be correct. Statement A on the P46 reads: "This is my first job since last 6 April and I have

not been receiving taxable Jobseeker's Allowance, Employment and Support Allowance or taxable Incapacity Benefit or a state or occupational pension."

58. A short time later the Appellant replied to Ms Ward by e-mail stating: "I understood from your previous e-mail that you already asked the proper tax rate to HMRC last year."

59. Still on 3 March 2011, Ms Ward responded by e-mail stating: "We did send the data to them, but they didn't respond via our electronic interchange." She explained HMRC would not deal with her directly due to customer confidentiality and suggested a P46 may be the quickest option to correct the tax code.

60. On 5 March 2011, Ms Ward e-mailed the Appellant to confirm she still had not received a P46 and requested this again. On 7 March 2011, the Appellant e-mailed Ms Ward to explain that he could not select statement A on the P46 as this would indicate he had not yet started employment at the Bank and again asked Ms Ward to deal with HMRC directly. Ms Ward e-mailed the Appellant to explain statement A was now correct as the Bank was his only job since 6 April 2010 and that HMRC would not deal with her so he must complete a P46 or call HMRC directly.

61. The Appellant replied to Ms Ward by e-mail stating: "On my side since the proper documentation was transmitted when I joined in early 2010, I assumed since then that everything was fine" The Appellant also requested evidence of the the Bank's contact with HMRC on 23 March 2010.

62. Still on 7 March 2011, Ms Ward responded to the Appellant by e-mail. She explained she was unable to provide evidence of the contact with HMRC as this would not be in a readable format and would include other employees' data. Ms Ward again asked the Appellant to provide a fresh P46 or contact HMRC directly.

63. On 11 April 2011 the Appellant e-mailed Ms Ward a completed P46 with statement A selected and stated: "Does not seem the Tax Code has been changed appropriately".

64. Later, on 11 April 2011, Ms Ward e-mailed the Appellant stating: "I can now update the payroll for you. I wasn't able to change it because I had not yet received a form from you until now. This would normally be too late for April, but I will process as an exception for you."

65. On 29 January 2012, the Appellant filed his Self-Assessment Income Tax return for the tax year ended 5 April 2011 electronically having received a notice to file from HMRC. No employment income for this tax year was declared on the return.

The Appellant's evidence

66. The Appellant gave evidence. We found him to be an honest witness. He accepted he had submitted incorrect tax returns in January 2011 and January 2012 but explained that he thought his employment income was taxed at source and he therefore did not need to declare in on the tax returns. The guidance he had read was very general.

67. We accepted that his evidence that he had not submitted incorrect returns with a view to gaining a tax advantage and had not acted deliberately. The remaining question was whether he acted carelessly in filing his tax returns for 2009-10 in January 2011 and 2010-11 in January 2012. We will address this in more detail when considering the second issue below.

68. The Appellant had been working in the UK for four years by 2010 and was familiar with the PAYE system. It was his understanding that income tax was deducted by the employer, who paid it to HMRC.

69. Tax year 2009-10 was the first year for which he was asked to complete a self-assessment tax return having received a notice to file from HMRC. He looked at HMRC guidance which said that employment income usually has tax deducted. The introduction to the Self Assessment guidance states, "Tax is usually deducted automatically from wages, pensions and savings. People and businesses with other income must report it in a tax return…".

70. He had rung the HMRC helpline for guidance. Although he could not remember who he spoke to or what they told him, he understood he only needed to declare untaxed income. He had also obtained some advice from the Citizens Advice Bureau, which indicated that the tax return was concerned with non-PAYE income.

71. The Appellant believed HMRC had full details of his income and the tax deducted, and they had not raised any concerns.

72. He did not believe that he had acted carelessly. He was not trying to hide his employment or the income from it. HMRC knew he was employed by the Bank, the income he received and the tax deducted. The error in his tax code, and therefore the underpayment of tax that followed, was the Bank's error.

73. In answer to questions, the Appellant stated that he did not realise his net income was incorrect and the tax deducted was not correct. There were no hard copy payslips provided by his employer but these were available for him to access through the Bank's computer system. His initial remuneration package from the Bank was a combination of base salary, target bonus and group target. From February 2010, the split between the components changed but it was mostly still discretionary. Therefore, it was not a question of him looking at the net income received in his bank account and comparing it to the gross income included on any payslips and deducing that insufficient tax had

been deducted at source. He was unaware initially as to what gross income to expect so could not estimate what his net income should be after full tax had been deducted.

74. For the reasons set out in the discussion section on the second issue, we have concluded on the balance of probabilities that the Appellant did in fact act carelessly in failing to declare his employment income in each of his two tax returns.

75. On or around 7 March 2016, Officer Mark McGee of HMRC reviewed the Appellant's Income Tax returns for the tax years ended 5 April 2010 and 5 April 2011 against P14 and P11D information held for these years. Officer McGee concluded there was an insufficiency of tax declared in both years and that the Appellant had been at least careless in filing inaccurate returns.

76. On 10 March 2016, HMRC Officer Mark McGee issued the discovery assessments under appeal, employing the extended time limits at s.36 TMA70.

77. On 8 April 2016, the Appellant called Officer McGee regarding the Assessments. Mr McGee made a handwritten contemporaneous note of the call and later produced a typed transcript.

Mark McGee's evidence

78. Mark McGee gave evidence on behalf of HMRC. We found him to be an honest and truthful witness. We accept it on the balance of probabilities.

79. He explained that in March 2016, he was reviewing a number of individual taxpayers. He had recently had the opportunity to start using a filtering tool, that allowed him to identify taxpayers who earned more than £100,000 and who were paying tax at the basic rate. He was looking at a number of employers in turn.

80. He used this tool to look at the Bank's employees in 2010, and identified the Appellant as falling within this category. He then looked at the Appellant's self-assessment returns, which showed no income declared. He also checked the P14 and P11D information supplied by the Bank. He concluded that the self-assessment returns filed were incorrect, and there was a significant underpayment of tax.

81. Mr McGee concluded that the Appellant had been at least careless in not declaring his employment income and raised assessments on 10 March 2016. In cross examination, Mr McGee said he could not remember if the Bank had had problems before, but in general investment banks did sometimes have foreign employees that were put on basic rate tax.

82. He was not part of the Large Business Unit at HMRC, he was looking at individual taxpayers. He confirmed that it was possible that the Large Business Unit did have the details of the Appellant's income and the tax deducted, but they would not have had access to his self-assessment returns.

83. He could not access any coding notices from 2010 by the time he was reviewing the Appellant's case in 2016. It was accepted by HMRC that the original assessments raised on 10 March 2016 were incorrect, as they were based on estimated figures. The assessments were revised on 1 August 2018 but were later revised again to £50,611.94 (2009-10) and £81,987.80 (2010-11).

84. On 12 May 2016, Mrs Sally McGee of HMRC took over responsibility for this enquiry from Mr McGee.

85. On 16 May 2016, Mrs McGee wrote to the Appellant's then agent, Ernst & Young, to explain the basis of the Assessments. She explained the assessed amounts for both years had been rounded up to the nearest £5,000 to account for other income, such as employee benefits or investments, which may have affected the tax due.

86. On 15 June 2016, the Appellant e-mailed Mrs McGee with a late appeal to HMRC against the Assessments. The grounds given for the appeal can be summarised as follows:

a) The Bank was required to deduct tax at the higher rate but failed to do so. The Appellant was due a credit under regulation185 IT (PAYE) Regs 2003 as a result.
b) The Appellant's recollection was that a P45 was provided to the Bank in early 2010. He retained Part 1A of the P45 showing code 647L. The Appellant's tax code at OW was basic rate as confirmed by his P45.
c) The Bank informed the Appellant in February 2011 that they had not received a P45 but confirmed on 3 March 2011 they had submitted a P46 to HMRC on his behalf on 23 March 2010.
d) As statement B on the P46 applied to the Appellant, the Bank should have deducted tax using the emergency code as provided for by reg.48(2)(c) IT (PAYE) Regs 2003. Statement B on the P46 reads:
"This is now my only job, but since last 6 April I have had another job or have received taxable Jobseeker's Allowance, Employment and Support Allowance or taxable Incapacity Benefit. I do not receive a state or occupational pension."

87. On 4 July 2016, Mrs McGee wrote to the Appellant accepting the late appeal and addressing the points raised. She explained she did not accept a P45 had been provided to the Bank and considered the Bank was correct to deduct tax at the basic rate under reg.46 IT (PAYE) Regs 2003 as they could not assume statement B applied.

88. On 27 July 2016, the Appellant e-mailed Mrs McGee. He disputed her interpretation of reg.46 IT (PAYE) Regs 2003 and argued the Bank should have selected statement B as: "they had checked my entire employment history and knew I was not being paid a pension in respect of any of it as none of my previous employment was eligible for any sort of pension."

89. On 18 August 2016, Mrs McGee e-mailed the Appellant requesting, among other things, evidence of relevant communications between the Appellant and the Bank.

90. On 1 September 2016, Mrs McGee issued a notice to provide information and documents to the Appellant under Schedule 36 to the Finance Act 2008 (sch.36 FA08). The notice included a request for: "copies of all communications between yourself and your employer [] Bank in respect of the tax code operated by them in the two tax years ended 05/04/2011".

91. On 11 October 2016, the Appellant's former PA, Karen Elliott (nee Tidd), provided a signed statement by way of an email. In her statement she recalled collecting a P45 from the Appellant as part of the normal onboarding procedure in the first few weeks after he joined the Bank in 2010. While Ms Elliot was not made available for cross examination and the statement is made some six years later, we accept her evidence as reliable as it is consistent with other evidence that suggests it is more likely than not that the Appellant provided a P45 to the Bank on joining.

92. On 13 October 2016, the Appellant's new agents, Atcha & Associates, wrote to Mrs McGee making further points. They referred to a call made by the Appellant to an HMRC helpline before submitting his return and enclosed Mrs Elliott's statement and e-mails between the Appellant and Ms Ward. The letter included the following statements regarding submission of the P45:

"2) Our client has no emails or any correspondence during the several weeks following the start of his employment on the 10th of January 2010, chasing him for a missing P45 or P46. On 1 March 2011, his employer informed him that they had been deducting tax at the basic rate."
"4) Mr Giuliani did not provide a P45 to his new employer immediately following commencement on 10 January 2010, as he had not then received a P45 from Oliver Wyman Ltd, the P45 only being issued on 31 January 2010. Mr Giuliani still has part lA of his P45 from Oliver Wyman: if he had not given parts 2 & 3 to [] Bank, he would still have them, which he does not. Consequently, the only reasonable inference is that parts 2 & 3 were indeed provided to his new employer, albeit that this would have been after the January 2010 payroll would have been processed."

93. On 3 November 2016, HMRC's call retrieval team called Mrs McGee to advise they had been unable to trace any call from the Appellant to HMRC regarding his self-assessment return but had traced a single call to the National Insurance Contributions Team. Mrs McGee made a contemporaneous note of this call.

94. On 8 November 2016, Mrs McGee wrote to Atcha & Associates to respond to the points made in their letter of 13 October 2016 and concluded the Appellant had deliberately submitted an inaccurate return.

95. On 20 December 2016, Mrs McGee issued a further notice to provide information and documents to the Appellant under sch.36 FA08. In respect of the Bank's confirmation to the Appellant that they did not receive a P45, the notice included a request for the following:

"all communications whether by correspondence email or some other method between yourself and your employer [] Bank in the period from you commencing employment in January 2010 to the date 3/3/2011 (for which e-mails have already been provided.)"

96. On 24 January 2017, Atcha & Associates wrote to Mrs McGee with further information, including documentation provided to the Bank as part of the onboarding process. They stated that the Appellant disagreed he had deliberately submitted an inaccurate return because his understanding was that he only had to declare sources of income other than employment income. With regards to communications between the Appellant and the Bank, the letter stated:

"2. The results of this search are consistent with the previous letters sent to you during 2016, in particular:
2.1 There is no further correspondence or communications with HR about any missing P45, or any other missing previous employment documentation. The only additional email that Mr Giuliani managed to locate was dated 02 March 2011 in relation to the P46. This email was encrypted at the time and could not be retrieved due to technical issues linked to the email system change that occurred in [the] Bank (copy screenshot enclosed).
2.2 No emails or other communications have been identified with any other party in respect of provision of a P45 or P46 from January 2010 to February 2011 inclusive."

97. The additional e-mail regarding the P46 dated 2 March 2011 was not enclosed but a copy of the encrypted screenshot referred to above was reproduced.

98. On 23 February 2017, Mrs McGee wrote to Atcha & Associates in response to their letter of 24 January 2017. On 10 April 2017, the Appellant e-mailed Mrs McGee in response to her letter of 23 February 2017. He re-iterated he had not deliberately submitted an inaccurate return and did not consider the inaccuracy careless as he had contacted an HMRC helpline and followed published HMRC guidance as he

understood it. On 10 May 2017, Mrs McGee wrote to the Appellant in response to his e-mail of 23 February 2017.

99. On 1 June 2017, Matthew Williams of the Bank's Human Resources e-mailed the Appellant confirming a total population of 334 individuals were: "impacted by the application of the "BR" tax code when set up on UK Payroll."

100. On 14 June 2017, Mr Williams e-mailed Colin Middleton of HMRC Large Business regarding the HMRC's enquiry into the Appellant and stated: "Bruno [the Appellant] was one of the employees impacted by the "BR" issue in the 2009-10 / 2010-11 tax year. This issue is related to employees who joined the bank for whom payroll were not provided with a P45/46 and were placed on code BR. As a result, due to the levels of income received, those employees impacted suffered significant underpayments of tax having only incurred a 20% flat rate charge on taxable income. The outcome of this was that all impacted employees were offered support in liaising with HMRC regarding the underpayment and an interest free loan was offered to settle the underpayment of tax….".

101. Mr Williams continued:
"The case of Bruno is a little different to how the other cases panned out. Bruno did not take up our offer of advisory/financial support and has contacted us recently to say that HMRC are making demands for the underpayment of tax for 2010-11 only now (6 years later). I asked Bruno whether a self-assessment return was filed for the tax years in question and he confirmed they were, but he was a little vague when probed on why the returns didn't outturn an underpayment of tax at the time".

102. On 27 June 2017, the Appellant e-mailed Mrs McGee to state that hundreds of the Bank's employees had been affected by BR coding issues and the Bank had contacted HMRC to discuss.

103. On 20 September 2017, Mrs McGee wrote to the Appellant to explain she had not changed her position but was awaiting any further evidence from the Bank before issuing a letter detailing that position.

104. On 20 April 2018, Mrs McGee wrote to the Appellant laying out her position on all matters and requesting further e-mail evidence. Attached calculations showed Amended Assessment figures of £53,201.94 for the tax year ended 5 April 2010 and £81,987.80 for the year ended 5 April 2011. These figures were calculated by reversing the rounding up of Mr McGee but mistakenly removed the Appellant's personal allowance for the tax year ended 5 April 2010.

105. On 24 May 2018, Mrs McGee issued a further notice to provide information and documents to the Appellant under schedule 36 to the Finance Act 2008. The notice requested the following documents: "Please provide the following document either by post or email a) copies of the three Paul Honeysett emails dated 3/2/2011 which are referred to on page 3 of this letter and, b) any other linked emails from yourself or other parties." The date of the above e-mails is stated in US date format and refers to 2 March 2011.

106. On 2 July 2018, the Appellant responded to the notice and stated the following regarding communications between himself and the Bank:

"2.1 As stated in [my] letter dated 20 January 2017, the three emails from Paul Honeysett are all encrypted and could not be retrieved due to technical issues linked to the email system change that occurred in [] Bank (all three screenshot copies are enclosed). These three emails are all dated March 2nd 2011 (as the American date order is used)."
"2.2. No emails or other communications have been identified with any other party in respect of provision of a P45 or P46 from January 2010 to February 2011 inclusive. This includes the emails from the inbox of Karen Tidd that [I] managed to check, as also stated in his letter dated 20 January 2017."
The Appellant concluded:
"The impact of this investigation on [my] family and health during these two years unfortunately doesn't leave him any other choice but to proceed with the payment of the sum stated in your letter dated 20 of April 2018."

107. On 1 August 2018, Mrs McGee made amended assessments on the understanding that agreement had been reached under s.54 TMA70. HMRC accept that no agreement was in fact reached and these Amended Assessments are therefore invalid as s.54(1) TMA70 does not confer HMRC the power to unilaterally amend the Assessments. On 21 August 2018, Mrs McGee issued her 'view of the matter' letter as required by s.49C(2) TMA70.

108. On 19 September 2018, the Appellant submitted his Notice of Appeal to the Tribunal Service.

Issues in the appeal

The first issue

109. It is not in dispute that for the relevant years the Bank only deducted tax from the Appellant's income at the basic rate, applying the basic rate code ('BR code') resulting in an underpayment of tax. The first issue involves therefore determining whether the Bank was correct to use the basic rate code ('BR code') until April 2011.

110. This question is made up of a number of subsidiary issues such as whether the Appellant provided the Bank with a completed P45 or P46 on starting his employment, such that the Bank was obliged to deduct income tax at the emergency or higher rate under the PAYE regulations. Further, if the Appellant did not provide a completed P45 or P46, it is in dispute whether the Bank could have verified that statement B of form P46 applied to the Appellant and should therefore have deducted tax under the emergency code rather than the basic rate pursuant to the PAYE regulations.

111. The legal consequences of the issues are as follows. If the Appellant provided the Bank a P45 from OW or a completed P46 at the relevant time, it was obliged to deduct tax at the higher rate under regs.51(2), 42(3) and 43(8) IT (PAYE) Regs 2003. Further, in the absence of a P45 or completed P46, if the Bank could verify, as required by reg.46(2B) IT (PAYE) Regs 2003, that statement B of form P46 applied to the Appellant it would have been obliged to deduct tax on the non-cumulative basis using the emergency code under reg.48(2)(c) IT (PAYE) Regs 2003. In any of these circumstances the Appellant submits he would be entitled to a credit for 'tax treated as deducted' under reg.188 IT (PAYE) Regs 2003 because the Bank would have been liable to deduct the correct tax due from payments but failed to do so.

The second issue

112. The second issue is the validity of the discovery assessments: whether the conditions for issuing the assessments under s.29(1) & (4) TMA have been met; and whether the Appellant's behaviour leading to the inaccuracy in the returns and the loss of tax was careless or deliberate for the purposes of s.29(1)&(4) and s.36(1) TMA.

113. It is not in dispute that the Appellant failed to declare his employment income and therefore his liability to income tax in his self-assessment returns for 2009-10 and 2010-11. It is not in dispute there has been a loss of income tax to the revenue because his employer under deducted the tax at source. It is in dispute whether HMRC has proved that the conditions for issuing discovery assessments under section 29 TMA and extending time limits under section 36 TMA have been satisfied for tax years 2009-10 and 2010-11. However, the primary dispute is whether the Appellant was careless in failing to declare his employment income on his returns.

The third issue

114. Ultimately the second issue involves determining whether the Appellant is entitled to a credit for "tax treated as deducted" under Regulation 188 Income Tax (PAYE) Regulations 2003 because the Bank was liable to deduct the correct income tax due from payments for any of the reasons set out below but failed to do so. If so, the Appellant submitted that there has been no loss of tax caused by the Appellant for the purposes of making a discovery assessment. HMRC submit that Regulation 188 does not apply to discovery assessments under section 29 of the TMA and there is binding

authority that the FTT does not have jurisdiction to decide the issue. Therefore, when considering whether there has been a loss of tax, the Appellant is not entitled to any credits for PAYE deductions that should have been made but which the Bank did not make.

115. We must determine whether this Tribunal has jurisdiction to hear and decide disputes concerning credit for tax treated as deducted under Regulation 185 and 188 of the PAYE Regulations in an appeal against a discovery assessment. If not, then such disputes must be determined at the enforcement and collection stage under section 59B of the TMA but cannot form a valid ground of appeal in proceedings before the tribunal.

116. Logically, the third issue should be determined before the first issue but it is easier to understand the issues in the order we set out. Further, this was the order in which the arguments were presented by the parties. As will become clear, we have decided to determine the factual issues that make up the first issue in case we have erred in law in deciding the third issue.

The First Issue - Incorrect Tax Code and the missing P45/46

117. It was accepted by both parties that the insufficiency of tax had arisen because when the Appellant had started work at the Bank, he had been taxed at the basic rate (the "BR" code) rather than a higher rate code. The background to this is set out above.

118. The Bank, and HMRC, suggested that the application of the wrong tax code was the fault of the Appellant who had failed to deliver to the Bank a P45 or P46 in the period January or February 2010 when he first began work.

HMRC's submissions on the first issue

119. Mr Lloyd Ellis, for HMRC, submitted that it was for the Appellant to prove that he provided a P45 or completed P46 to the Bank.

120. HMRC accepted that the Bank submitted a P46 to them on 23 March 2010, but unfortunately it was no longer possible to see what was on the form. It is presumed that the Bank felt unable to verify that any of the possible statements A-C (as set out in Regulation 46) definitely applied to the Appellant, and therefore the BR code remained applicable to him under Regulation 49 Income Tax PAYE Regulations 2003.

121. HMRC did not accept that the Appellant delivered a P45 or P46 to the Bank and submitted there is insufficient evidence to demonstrate that he did. The Appellant agreed in cross examination that he could not remember if he had submitted a P45 – although he suggested he had delivered a completed P46.

122. Mrs Karen Elliott's (nee Miss Karen Tidd) statement confirming that she remembered collecting the Appellant's P45 as part of the onboarding process does not match the Appellant's submission that he delivered a P46.

123. HMRC's submission was that as the onboarding process was completed by 29 January 2010, the P45 could not have been submitted as it was not issued until 31 January 2010. Even if a P46 from the Appellant were submitted to the Bank in January/February 2010, it would need to have been completed correctly.

124. As the Appellant asked for clarification before signing the fresh P46 in April 2011 as to which statement applied to him, HMRC submitted that this showed that had he actually completed a P46 in January/February 2010 then he may have completed it incorrectly.

125. In the absence of a P45 or P46 from the Appellant, the Bank submitted a P46 to HMRC in March 2010. The Bank seemingly were unable to confirm that Statement B in Regulation 46 applied (that he had had previous employment in the same tax year), and therefore the BR code was the correct code for them to use, until a P45 or correctly completed P46 was provided by the Appellant in 2011.

126. HMRC submitted that there is insufficient evidence to show that there was a widespread BR problem at the Bank, nor that any such problems are the Bank's fault. Their view was that the problem arose where employees had not provided a P45 or P46. The PAYE regulations were clear that the Bank should therefore apply the BR code.

The facts found on the first issue

127. We have already set out a summary of our findings of fact above. We have concluded that the Appellant did deliver a P45 to the Bank through his PA shortly after receiving it from OW on 31 January 2010, and that it was the Bank who wrongly applied to the BR code because it went missing or there was some other fault in its PAYE processes. However, we expand upon some of our reasons below.

128. The Appellant started work at the Bank on 10 January 2010. As part of the "onboarding" process, his personal assistant (PA), Miss Karen Tidd, collected various documents from him, to pass to the HR department.

129. One of the documents requested as standard was the P45 document that is issued by an employer to an employee on termination of employment. The P45 document has several parts, one of which is to be handed to the new employer (parts 2 and 3) and the other part (1A) retained by the individual. This shows the employee's tax code.

130. If a new employee does not have a P45 when they start work, then under Regulation 46 Income Tax (PAYE) Regulations 2003, the new employer should ask them to

complete a P46 form. The employee must indicate which of several optional statements applies to their situation.

131. Depending on the statement made by the employee in this form, the employer should then deduct tax on either the emergency code, or the basic rate code, pending HMRC issuing a tax code to the employer in relation to that employee.

132. If the employer does not receive a P46 from the employee, then if the employer can verify the information needed then they can complete the P46, and thus the correct tax code can be issued.

133. If the employer cannot verify that any of the different statements in the P46 apply, they are obliged under regulation 49 to use the BR code.

134. Thus if either: the new employee submits a P45; or a correctly completed P46; or the employer can verify the information need for the P46, the employer should be able to, and is obliged to, apply the correct code. This may well not be the BR code.

135. If the employer applies the BR code incorrectly after receiving a P45 or P46 from the employee, or verifying the P46 themselves, then the employer is responsible for the under deduction of tax.

136. The Appellant stated in his witness statement and oral evidence that he did not have a P45 when he first started work at the Bank on 11 January 2010. It was issued by OW some three weeks later on 31 January 2010. However, he was clear that he provided all onboarding documents required by the Bank on joining and thereafter and gave them to his PA, Miss Tidd, as per the Bank procedure. We accept this evidence.

137. The Appellant accepted that his witness statement actually refers to receiving from OW a P46, rather than a P45 – as did his email of March 2011. He also accepted he did not remember giving the Bank a P45. However, we have found that, on balance, he did.

138. Karen Tidd (now Mrs Karen Elliott) sent a signed statement dated 11 October 2016 in which she confirmed that she had collected the Appellant's P45 when he joined in January 2010 and sent it to the HR department.

139. We accept all of the Appellant's evidence set out below as being reliable on the balance of probabilities.

140. Whilst giving oral evidence, the Appellant explained that there were two different parts to the background screening and onboarding process at the Bank. The security screening had been completed by 29 January 2010, as confirmed by the document at page 119 of the bundle, but that did not mean the onboarding process was complete.

For example, it can take longer for payroll to set up bank payments of the monthly salary.

141. Therefore, the fact that the P45 was not issued until 31 January 2010 did not mean it had not been passed to the Bank thereafter.

142. The Appellant had retained Part 1A of the P45 form, as he was required to do. This is document 19 in the Bundle. He did not have the other parts, and we have found that on the balance of probabilities he had passed them to the Bank as there was nothing else he would have done with them. We accept his evidence that he was meticulous about keeping and dealing with paperwork and it more likely than not that he did not lose Parts 2 and 3 of the P45 but handed them to his PA. In contrast, there is evidence that the Bank was having an issue operating its PAYE system and wrongly applying the BR code for a number of employees (see its email of June 2017 as set out above).

143. In March 2011, the Bank payroll contacted the Appellant to alert him to the fact that he was on the BR code, and this indicates the Bank believed it had not received a P45 or P46 from him in 2010. However, it is more likely than not that it had mislaid the P45 the Appellant delivered or failed to locate or process it.

144. The Appellant responded by email to Paul Honeysett in payroll on 1 March 2011 to say that he had submitted a P46 when he joined. After some discussions, the Appellant submitted a further P46 to the payroll team on 11 April 2011.

145. In cross examination, the Appellant accepted that his witness statement did not mention delivery of a P45 form, and with the passage of time he could not remember whether he had done so. He relied on the email he had sent in March 2011. We found this admission to be an honest concession.

146. The Appellant said that the email from Mr Honeysett in March 2011 was the first time that the Bank had alerted him to the fact that no P45 or P46 had been submitted. He accepted that he had sought clarification from the payroll team about completion of the form, but that was simply because he was submitting it after being at the Bank for 15 months and not as a new employee. The questions asked were phrased for a new starter, and by March 2011 he was not a new starter. If he had completed it when he first started, he would not have needed to ask for clarification. He believed that he had done everything he needed to on joining the Bank, and had not been alerted to any missing P45 or P46 form until March 2011.

147. The Appellant explained that it had come to light that a substantial number of the Bank employees had incorrectly been put on the BR code. He produced evidence in the form of an email from a member of the HR team in June 2017 which showed that 334 staff members had been affected.

Discussion on the first issue

148. On the balance of probabilities, we have accepted that the Appellant did deliver a P45 to the Bank, by giving it to his PA, Karen Tidd.

149. The Appellant's evidence showed some confusion between whether a P45 or P46 was submitted when he started work with the Bank. His witness statement suggested a P46, whereas Karen Tidd's letter referred to a P45.

150. There is no dispute that a P45 was issued by OW, as the Appellant retained his part of it – part 1A. Given that he no longer retained parts 2 and 3 of the P45, we are satisfied it is more likely than not that he did give them to the Bank. There was no other explanation that was likely – that he had lost the parts or had given them to someone who was not authorised to receive them on behalf of the Bank.

151. We accept that Karen Tidd's evidence would carry little weight in isolation. Even though it was contained in a signed statement six years after the event and she was not made available for cross examination. However, it is consistent with all the other evidence. We also accept that in a large employer like the Bank, there would have been somebody with the responsibility of collecting the relevant documents from a new starter, and an experienced PA would have known what was required. There is no evidence to suggest that the Appellant was reminded or chased by the Bank in 2010 that he had not provided a P45 or P46. This only occurred in March 2011.

152. Whilst the Appellant's evidence was unclear about whether it was a P45 or P46 that was submitted in 2010, in March 2011 he certainly believed that the appropriate paperwork had been completed at the start of his employment.

153. On the balance of probabilities, we find that the Appellant did submit his P45 to the Bank shortly after he started working there and had received it from OW (ie. Sometime in February 2010). He had received it, and as he did not keep it, the most likely explanation is that he passed it to Karen Tidd. He genuinely believed 14 months later that he had submitted the necessary paperwork at the right time, and Ms Tidd would have been the person responsible for collecting it. Even if we were wrong that it was a P45, we are satisfied that the Appellant had earlier delivered a P46 to the Bank in January 2010. It is further possible that the Appellant completed a P46 initially when he started at the Bank in January 2010, and then handed in his P45 in addition after receiving it in February 2010.

154. The Appellant could not remember with certainty which it was, but he was not chased for the missing P45 or P46 at the time, and only one needed to have been submitted in order for the tax code to be processed correctly by the Bank.

155. Given the number of other employees who were also affected by the "BR issue", we find it likely that there was a problem at the Bank in that P45s/P46s were not processed correctly for a period of time.

156. We have considered and rejected HMRC's further submission that if the Appellant had indeed completed a P46, it might well have been incorrect in view of his later request for clarification when completing the P46 in April 2011. We are satisfied that the doubt arose in the Appellant's mind in 2011 as to how to complete a P46 simply because he was completing the P46 some 15 months after starting employment with the Bank, and the statements did not quite match the facts as he was not a new employee. He asked for confirmation of the correct statement to use as he wanted to ensure he completed the form correctly. We are therefore satisfied that the Appellant would have been clear which box to tick had he been completing the P46 at the outset of his employment.

157. In addition, we also accept the Appellant's alternative evidence that even if no P45 or P46 were handed in by him in January / February 2010, the Bank had enough information about him at that time to complete and verify a P46 on his behalf.

158. The Appellant stated that the Bank had enough information about his background, following extensive pre employment checks, to verify that statement B of Reg 46(2) would apply (that he had had a previous job in the same tax year) and the Bank could therefore have also completed the P46 in 2010. the Bank would then have been required to use the emergency rate code under Reg 48(2)(c) rather than BR.

159. The Bank had carried out extensive background checks, and they knew this was his only job currently, and his second job in the tax year. The only aspect they may not have known for certain was that he was not in receipt of a pension – however the Bank knew he was 39 years old. We are satisfied that the Bank could have been sure that a 39 year old would not be drawing a pension, under the pension rules.

160. As the Appellant either handed in a P45 or P46, and in any event the Bank could verify the information and submit the P46 on his behalf, the Bank should have deducted tax at the higher rate and wrongly applied to the BR code to the Appellant's earnings and made insufficient deductions.

Second Issue – the validity of the Discovery Assessments

161. HMRC must prove that the discovery assessments were validly raised. In order to do so it must prove that there was income which ought to have been assessed to income tax in the Appellant's self assessment returns, he brought about this situation carelessly and that there was a loss of tax. HMRC must prove the Appellant acted carelessly in failing to declare any employment income and that this failure to declare income on his tax returns led to a loss of tax such that the conditions in section 29(1) &(4) are satisfied.

162. Further, the assessments were not raised within the ordinary time limits, which are four years after the end of the tax years to which they relate (s.34 TMA 1970). To extend the time limits to six years, HMRC must establish that the Appellant was careless in filing his tax returns - s.36(1) TMA 1970. Careless is defined as the failure to take reasonable care under section 118(5) TMA 1970.

The Appellant's submissions on the second issue

163. Mr Chacko, for the Appellant, submitted that is for HMRC to show that the officer who raised the assessments (Mr McGee) made a discovery, and that it was not stale when he raised the assessments.

164. He submitted that paragraph 5 of Mr McGee's statement does not state when he became aware of the contents of the P14 information for the Bank he refers to, which was submitted in 2010 and 2011. Further, it appears that HMRC were aware that this problem had arisen with a large number of the Bank's employees in 2010, and in the Appellant's case at least they were contacted about this by the Bank in 2011 when the Bank changed his code.

165. Mr Chacko submitted that because these assessments were raised more than four years after end of the tax years they relate to, HMRC must also prove that Mr Giuliani failed to take reasonable care in filing his tax return. This is to be looked at according to the standards of a reasonable and prudent taxpayer in the Appellant's particular circumstances: *Atherton v HMRC* [2019] UKUT 0041 at [37].

166. He submitted that the Appellant's understanding, until this dispute began, was that HMRC were well aware of his earnings from the Bank, because he knew that the Bank were making returns of his earnings to them (his statement at 20-22). His failure to mention his employment income in his tax returns should be seen in that context: it makes no sense for this to have been a deliberate attempt to avoid paying this tax. Further, that is a reasonable thing for him to have believed: most people who do not work in the tax system probably believe it.

167. On being given notice to file a tax return, the Appellant looked up the guidance on HMRC's website (his statement at 19). The introduction to the Self Assessment guidance stated "Tax is usually deducted automatically from wages, pensions and savings. People and businesses with other income must report it in a tax return…". This is in fact still the statement in the overview to that guidance.[1]

168. This was not an obviously unreasonable position, for someone unfamiliar with the self-assessment system: it is not naturally obvious that someone would be required to include the income that their employer is also returning to HMRC.

[1] https://www.gov.uk/self-assessment-tax-returns

The correction of the tax code in March/April 2011

169. On 1 March 2011, Mr Honeysett (of the Bank's Payroll Governance) had emailed the Appellant to tell him that he was on the BR Code because they had not received a P45 or P46, and that "depending on your circumstances you may owe more taxes than we have withheld". Mr Honeysett suggested that he speak to a tax advisor.

170. The Appellant pushed back, saying that he had given in a P46 when he joined, that he did not understand the technicalities of the PAYE system, and asking for confirmation that "this will be corrected appropriately from now on".

171. While Mr Honeysett suggested again that the Appellant contact Ernst & Young ('EY') to assess any underpayment and provide guidance on amending the tax code, the Appellant argued that this was something for the Bank Payroll to sort out, not for him, as he had given the form to his PA when he joined.

172. The Bank's Payroll wrote to the Appellant's PA (who had not been his PA at the time he started work at the Bank) to see if she had an electronic record of sending a P46. Two options were given "in order to resolve the issue now" if the original P46 could not be found, being either for the Appellant to contact HMRC or for him to send the Bank Payroll a new P46. In this email they also noted that "there may still be a liability between January 2010 and February 2011…"

173. A series of emails ensued between the Appellant and the payroll department, with the Appellant providing a new signed P46 on 11 April 2011.

174. Mr Chacko accepted that HMRC argue that this chain of correspondence would have informed the Appellant that he had underpaid tax.

175. A reader looking at the full chain of emails together, in the context of the current tax dispute, would see that they included a warning that there may have been an underpayment: at the beginning Mr Honeysett recommended that the Appellant approach EY to deal with this.

176. However, that is not the way they would have been understood by the Appellant at the time. It is clear from the sequence of emails that the Appellant saw this as a mistake by the Bank's Payroll that they were trying to get him to sort out himself, and that it was their job to sort it out. The Bank's Payroll accepted that (as an alternative to the Appellant contacting HMRC himself) they would file a new P46, saying to him that they needed him to sign it "to make the situation right" and that, this done, "your future taxes will be correct…".

177. Mr Chacko submitted that it was not unreasonable for the Appellant to believe that the PAYE issue (which he made clear he did not understand) had been sorted out and

HMRC had been informed: indeed, HMRC had been informed of the change in code, though it appears that they did not take any action following this. The Bank is a large professional organisation with a dedicated payroll team who were in contact with HMRC. The point of having such a dedicated team is so that the other employees do not need to deal with their own PAYE issues.

Discussion on the second issue

Carelessness

178. It is accepted by the Appellant that he completed his tax returns incorrectly and did not declare any of his employment income. It is also accepted that the Appellant was taxed through the PAYE system at basic rate tax, which resulted in less tax being deducted than should have been, as he was a higher rate taxpayer because of his level of income.

179. As is set out above, we are satisfied that the Appellant did not act deliberately or dishonestly but did act carelessly by failing to declare his income from employment in either of his tax returns for the two years. These are our reasons for finding that HMRC have proved that the Appellant acted carelessly in failing to declare his employment income in his tax returns.

180. To establish carelessness, HMRC need to prove that the Appellant failed to take reasonable care in filing his tax return. S.118(5) TMA 1970 states that: 'A loss of tax...is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss....'

181. In the case of *Atherton*, the Upper Tribunal held that: 'The reasonable care which should be taken by a taxpayer is assessed by reference to a prudent and reasonable taxpayer in the position of the taxpayer in question.'

182. We accept that the Appellant had a genuine belief that under the PAYE system, his payable income tax was deducted by the employer and paid to HMRC, so there was no further income tax due on his earnings from the Bank.

183. We also accept that he assumed that the Bank had done what they needed to when he started work and had applied the correct tax code. It is noted that it was some 15 months (March 2011) after he started at the Bank (January 2010) that the payroll team alerted him to the problem and asked him to complete a P46 (leaving aside the question of whether one had been submitted previously or not).

184. We further accept that the Appellant expected that the Bank would sort out the tax code issue, once it had come to light.

185. However, none of these matters absolve the Appellant of carelessness in completing his online tax returns given the questions he was asked and the inaccurate answers he gave. The Appellant filed inaccurate tax returns with HMRC that did not show any employment, any income, or any employment income. We are satisfied that he acted carelessly in doing this.

186. We therefore reject Mr Chacko submission that on the facts of this case it was not careless for the Appellant not to realise that employment income needed to be included in the return.

187. The Appellant's grounds of appeal and his evidence was that he has not acted deliberately or carelessly because he reviewed some HMRC guidance which led him to believe he only needed to return untaxed income.

188. The referred to guidance is the introduction to self-assessment returns and can be found online at www.gov.uk/self-assessment-tax-returns and it states:

"Tax is **usually** deducted automatically from wages, pensions and savings. People and businesses with other income must report it in a tax return..[Emphasis added]

189. This guidance does not state that the Appellant would only need to return untaxed income. The guidance refers to tax ***usually*** being deducted automatically, which clearly shows there are circumstances when it might not be. We are satisfied it was unreasonable in the circumstances of this case for the Appellant to rely only on the introduction to guidance about self-assessment returns to satisfy himself that his returns were accurate.

190. The Appellant's grounds of appeal also concede that he did not read the notes when completing his returns. This in itself demonstrates the Appellant has failed to take reasonable care when completing his returns.

191. The Appellant was not asked when filing his return if he was in receipt of any income which was not taxed. The guidance the Appellant seeks to rely on also makes no reference to say you are not employed if your income is untaxed.

192. We are satisfied that the Appellant has acted carelessly so that section 29(4) TMA 1970 is satisfied and the standard four-year time limit for raising an assessment section 34(1) TMA 1970 can also be extended.

193. When filing his returns online, the Appellant was asked to complete boxes with questions in them regarding his employment. The Appellant declared on his return that

he was not employed so was not asked to provide details of his employment income such as that from the Bank.

194. The returns either asked if the Appellant a) was employed or not; or b) needed to complete employment pages. It is not in dispute that he gave an inaccurate answer to either of those questions such that he did not complete any further pages of the return that provided for employment income.

195. HMRC could not prove the specific question within the returns that the Appellant would have been asked about his employment when the returns were being completed online in 2009-10 and 2010-11. They had not retained copies of the Appellant's returns – only the fact that they had been recorded as nil returns. HMRC could not even provide screenshots of the questions and boxes contained in all online returns for the relevant year. HMRC could only provide copies of specimen paper tax returns for tax years ending 2010 and 2011, the relevant years, and the Appellant submitted his returns online.

196. However, the paper copies of specimen returns for 2010 & 2011 which HMRC provided ask the following regarding employment:

Employment
If you were an employee, director, office holder or agency worker in the year to 5 April [2010] [2011], do you need to complete *Employment* pages? Please read page TRG 3 of the tax return guide before answering.
Fill in a separate *Employment* page for each employment, directorship etc., for which you need to complete an *Employment* page and say how many sets of pages you are completing.
Yes No Number

197. Page TRG3 of the 'tax return guide' (SA150), as also provided by HMRC, states:

1. Employment
Some types of employment income go on the ***Additional information*** pages, enclosed in the return pack, not the ***Employment*** page, so check those first before obtaining the ***Employment*** page and ***notes***.
Fill in the ***Employment*** page if you:
• were employed in part-time, full-time or casual employment
• were a company director
• were an agency worker
• were an office holder, such as chairperson, secretary or treasurer
• would have been treated as an employee of another person had you not used a company or partnership as an intermediary.

You will need one ***Employment*** page for each employment, directorship etc.
You will not need to complete an ***Employment*** page if you:
• held an office (but you were not a director) and only received reimbursed actual out of pocket expenses (no other payments were made to you at all)
• were a company director and received no payments of any kind or benefits from that directorship
• held an office or employment but no liability to UK Income Tax arises on those earnings because you were resident, ordinarily resident or domiciled outside the UK. (If you held two or more offices or employments with the same employer or associated employers and earnings from, say, one are chargeable to UK Income Tax but earnings from the other are not, you should complete an ***Employment*** page for both or all the associated employments. If you are unsure, contact us for advice.)
If any of the above applies to you, say why you are not completing an ***Employment*** page in the 'Any other information' box, box 19 on page TR 6.

198. Assuming that the online return filled in by the Appellant was identical to the paper versions we were shown by HMRC, then the Appellant should have answered yes to the question – do you need to fill out the employment pages? Thereafter he should have filled out employment pages for OW and the Bank (for the tax year ending 5 April 2010) and the Bank alone (for 2011). If, as directed by the question on the return, he had read the 'tax return guide' titled 'how to fill in a tax return' (SA 150) this much would have been obvious from the notes set out above.

199. Even without reading the tax return guide, the obvious answer to the question on the return would be that he would need to fill out employment pages. The question did not ask whether he was due to pay any income tax on employment income – the overwhelming inference was that it was asking whether he had been employed. However, the Appellant did not fill out any employment pages let alone declare any employment income.

200. Further, even if the questions on the online returns that the Appellant completed differed from the paper versions that HMRC served, and we do not find this likely, we are satisfied that questions would have been asked to similar effect – either, have you been employed (during the relevant tax year)? or, have you received income from employment (during the relevant tax year)? The accurate answer to either question would have been yes and the Appellant failed to state that he had been employed or received any employment income. We are satisfied that any online return that the Appellant completed and filed did not ask the question – are you liable to pay any income tax on employment income? - or any equivalent question, which would have required more research in order to answer accurately.

201. There was no ambiguity in the questions that the Appellant answered inaccurately in his returns. Therefore, even if the Appellant relied on HMRC's online general self-

assessment guidance that income tax is usually deducted from employment income, it was not reasonable to do so.

202. First, the Appellant had been given a notice to file a tax return by HMRC and should have relied on the questions within the tax return itself and not on any general guidance. Second, the specific guidance in TR3 of 'how to fill in a tax return' was that he should complete employment pages. Third, the general guidance on self-assessment was only couched by the word 'usually' not always – it was not of universal application. It did not provide a blanket exemption to filing a tax return in respect of employment income. Fourth, the Appellant accepts he did not go on to read all the self-assessment guidance but stopped at the general introductory question. Fifth, the question the Appellant was asked on his tax returns was whether he had been employed or received any employment income – he was not being asked whether he had any further income tax to pay on that income.

203. The Appellant accepted that he completed his tax returns without troubling to read the specific guidance notes – the tax return guide - first.

204. The Appellant stated that he called the HMRC helpline, but there is no record of the conversation nor do we know who he spoke to or what questions were asked. Even though we accept the Appellant's assertion that he rang HMRC's helpline asking for advice, it is unlikely he was told that he needed to return untaxed income only. Helpline staff have guidance to ensure correct advice is given. Even if the Appellant was given such advice, it would not be reasonable to rely on such incorrect advice based on all of the publicly available information and guidance from HMRC. The Appellant's reasonable obligation to answer accurately the questions on his returns based on the totality of the advice was available to him. We do not know what the Appellant asked the helpline, and if his question had simply been about whether employment income was taxed at source under PAYE, the answer may not have assisted with completing the tax return. A prudent taxpayer would have ensured that they asked the questions needed to enable them to complete a tax return.

205. In relation to the tax returns completed by the Appellant, we accept that HMRC have not shown the precise question that was asked about employment income. However, there was a section to complete about his employment income, and if the Appellant was unsure whether he needed to disclose his PAYE income guidance was readily available. We find it more likely than not that if he had asked the telephone helpline if he needed to declare his employment income, they would have advised him to declare it.

206. Deciding not to include any employment income at all, and not reading the guidance notes, is not how a prudent and reasonable taxpayer would proceed, even making specific allowances for the Appellant's individual circumstances and his belief that the Bank had made all the necessary PAYE deductions.

207. Furthermore, by the time the Appellant was completing his 2011 tax return, in January 2012, he was aware that there had been a problem with his tax code, and had had a series of communications by email with the Bank throughout March 2011. The Bank had specifically and repeatedly advised him there was a problem about the correct deduction of basic rate tax, the incorrect tax code had been used and he should seek advice and guidance – even offering that he contact Ernst and Young. Therefore, the fact that the Appellant simply omitted his employment income from the 2011 tax return filed in January 2012 is all the more striking.

208. We accept that the Appellant was not trying to obtain a tax advantage by deliberately completing the tax returns without his employment income, but we are satisfied he did act carelessly. We find that, whatever the Appellant believed about his tax liability, he completed his relevant tax returns on the basis that he had no employment nor employment income and that was careless, particularly when filing in January 2012 for 2010-11 when he had been made aware that an incorrect tax code had been used. Even believing that his income was taxed at source, it would have been unreasonable for the Appellant to have assumed that there is no need for HMRC to check whether any adjustment is needed, if a return is required.

Validity of the discovery assessments

209. Our findings above inform our conclusion that the discovery assessments were validly raised.

210. We are satisfied the Appellant made and delivered self-assessment tax returns for the two years that have been assessed, that he failed to declare his employment income therein and that insufficient income tax has been paid on in his income. HMRC have proved on the balance of probabilities that there was income which ought to have been assessed to income tax and the loss of income tax was 'brought about' carelessly by the Appellant in order to raise the assessments as required by sections 29(1)&(4) TMA 1970.

211. We are satisfied that the requirements of section 29(1)(a) have been met. The Appellant's income which ought to have been assessed to income tax had not been assessed by him in a self-assessment return and that there was a loss of tax which the Officer can make good by charging a further amount when making an assessment. When it comes to our finding that there was a loss of tax, we will return to this when considering the third issue. In short, we are satisfied that there was a loss of tax for the purposes of section 29 TMA because there an under payment and under deduction of PAYE. We are satisfied that the sums in PAYE that the Bank should have deducted but failed to do so cannot be taken into account when examining a discovery assessment – Regulation 188 of the PAYE Regulations cannot be applied to extinguish the loss of tax.

212. We are also satisfied that the discovery assessments were made within the statutory deadlines. HMRC, specifically Mr McGee, made the discovery of the insufficient payment of the Appellant's income tax relating to tax years 2010 and 2011 for the first time in March 2016. The assessments were issued on 10 March 2016. This is outside the normal time frame for making an assessment, but because we have found that the Appellant was careless in completing his tax returns, the time limit can be extended to 6 years returns. We are satisfied therefore that HMRC have proved the Appellant acted carelessly and that the ordinary 4-year time limit for making an assessment in section 34(1) TMA 1970 can be extended to the 6-year limit provided under section 36(1) TMA 1970. The assessments have been validly raised within the statutory time limit.

213. We are satisfied by Mr McGee's evidence that in March 2016 he first reviewed the Appellants self assessment returns which showed zero income against the P14/P11D data from the Bank which showed considerable amounts of employment income and concluded that there was income that ought to have been assessed to tax which had not so the condition at section 29 (1)(a) TMA 1970 had been met. We are satisfied that the Appellant brought about the situation carelessly whereby income which ought to have been assessed to income tax was not so assessed.

214. Although the causation of the tax loss was not put in issue by the Appellant we are satisfied that the Appellant's failure to declare his employment income was significant and most proximate cause of there being a loss of income tax such that section 29(1)(a) TMA is satisfied. The Appellant's income which ought to have been assessed to income tax under section 9 TMA was not assessed and HMRC is entitled make an assessment in the amount to make good the loss of tax.

215. To the extent that the loss of tax was caused initially by the Bank's failure to deduct sufficient tax by only applying the Basic Rate code, that does not undermine the validity of a discovery assessment. There is a still a loss of tax because Regulation 188 of the PAYE Regulations cannot be applied. Further, the Appellant's failure to declare and assess his income for the purposes of income tax in any tax return was the most proximate and significant cause of the tax not being recovered by HMRC. But for the Appellant's failure to declare his employment or other income on his return and the tax which had been deducted at source by the Bank, the income tax which had not been deducted by the Bank would have been identified by HMRC. But for the Appellant's failure to self-assess that he was chargeable to income tax which had not been paid and making payment of that sum, there would not have been a loss of tax to the Crown.

216. We are also satisfied that the discovery assessments were made in the same month as Mr McGee made the discovery, and there could be no issue of staleness. It was only when the Officer had sight of both a) the employer's return of salaries in the P14 with the level of the Appellant's income and tax deducted; and b) copies of the Appellant's self assessment returns, that he could have first made the discovery. Prior to Mr McGee's discovery of both documents, he did not have sufficient information –the Large Business Unit did not have a copy of the Appellant's personal tax return at any

time before, it only had the P14s. Therefore, assessments were raised the same month that Mr McGee became aware of the insufficiency to tax and were fresh or newly made.

217. Further and in any event, the Supreme Court has recently decided that the issue of 'staleness' does not apply to section 29 assessments see *Revenue and Customs v Tooth* [2021] UKSC 17 at 76:

> 76. In our judgment, contrary to the latter part of para 37 in the decision in *Charlton*, there is no place for the idea that a discovery which qualifies as such should cease to do so by the passage of time. That is unsustainable as a matter of ordinary language and, further, to import such a notion of staleness would conflict with the statutory scheme. That sets out a series of limitation periods for the making of assessments to tax, each of them expressed in positive terms that an assessment "may be made at any time" up to the stated time limit.

218. So long as the statutory requirements for a discovery are satisfied, including the statutory time limits, an assessment can be raised. HMRC made a discovery of an error relating to the Appellant's income. When the Appellant filed his returns for the years under assessment, he carelessly declared to HMRC that he had zero income. The Appellant had not read the guidance notes when completing his tax returns. An amount of income that ought to have been assessed to income tax was not assessed by the Appellant and so HMRC raised an assessment to make good the loss of tax.

219. We therefore find that the discovery assessments were validly raised. The conditions in sections 29 & 36 TMA 1970 have been satisfied and the assessments which have been issued are valid.

The Third issue

220. The third question is whether the Appellant is entitled to credit for the 'sums treated as deducted' - the PAYE deductions that the Bank should have made but failed to make, in an appeal against a discovery assessment.

221. We are invited by the Appellant to find that there has been no loss of income tax for the purposes of section 29 of the TMA once the sums treated as deducted under Regulation 188 of the PAYE Regulations are taken into account. Therefore, the Appellant submits his appeal should be allowed because there has been no loss of tax which can be discovered.

222. HMRC argue the FTT has no jurisdiction to make a decision about sums treated as deducted for the purposes of Regulations 185/188 on an appeal against a discovery assessment – because Regulations 185/188 only apply to the enforcement stage or collection of tax by HMRC pursuant to section 59B TMA.

223. Following the hearing of this appeal, we invited the parties address four specific questions in writing. Thereafter we invited them to file further written submissions following the Upper Tribunal decision in *Stephen Hoey v Revenue and Customs:* [2021] UKUT 82 (TCC), which was decided some two weeks later on 12 April 2021. Mr Chacko filed written submissions on 7 May 2021 which addressed all our questions and the arguments on which he relied in light of the decision in *Hoey*.

The Appellant's submission on the third issue

224. Mr Chacko, for the Appellant submitted that if a P45 or P46 were delivered by the Appellant, or the Bank should have selected statement B on the P46, the Appellant should receive a credit for the amount of tax that should have been deducted from him by the Bank. This would mean that there was no understatement of outstanding tax liability and there could be no loss of tax for the purposes of section 29 of the TMA.

225. He submitted that tax that an employer should have deducted under PAYE but did not so deduct is (for these purposes) treated as if it had been paid to HMRC when calculating an employee's tax liability, and it is removed from the "tax payable" under their self-assessment.

226. The Appellant's omission of his employment income from his tax return would have meant that the return understated his income and the tax chargeable for the year. However, if the Bank were required to deduct that tax but failed to do so, this would mean that he would not actually have understated his outstanding tax liability (the "tax payable") for the year. HMRC would have been required to collect any underpaid tax from his employer. This is the general way that errors in the application of the PAYE system are dealt with: a failure to deduct the right amount of tax leads to a liability against the employer, not the employee.

227. He submitted that this comes from the definition of a self-assessment in s 9 of the Taxes Management Act 1970 ("TMA"), as recently explained by Judge Morgan in the FTT in *Lancashire and ors v HMRC* [2020] UFTT 0407 (TC) ('*Lancashire*').

228. Mr Chacko's argument was made up of the following steps.

229. TMA s 8 provides relevantly as follows:

> 8(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…a return containing such information as may reasonably be required in pursuance of the notice…
>
> (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) of ITTOIA applies…..

(5) In this section and sections 8A, 9 and 12AA of this Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income. (emphasis added)

230. TMA s 9(1) requires the return to include:

"a self-assessment, that is to say –

(a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and
(b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source…"

231. Therefore, sums to be treated as deducted at source reduce the sum of payable tax on a self-assessment return.

232. The requirement to make payment following submission of a tax return is dealt with by s 59B TMA. Regulation 185 of the PAYE Regulations makes clear that the tax "treated as paid" for those purposes includes tax that the employer should have deducted but did not:

185—(1) This regulation applies for the purpose of determining—

(a) the excess mentioned in section 59A(1) of TMA (payments on account of income tax: income tax assessed exceeds amount deducted at source), and
(b) the difference mentioned in section 59B(1) of TMA (payments of income tax and capital gains tax: difference between tax contained in self-assessment and aggregate of payments on account or deducted at source).

(2) For those purposes, the amount of income tax deducted at source under these Regulations is the total net tax deducted during the relevant tax year ("A") after making any additions or subtractions required by paragraphs (3) to (5).
(3) Subtract from A any repayments of A which are made before the taxpayer's return and self-assessment is made under section 8 or 8A of TMA (personal return and trustee's return).
(4) Add to A any overpayment of tax from a previous tax year, to the extent that it was taken into account in determining the taxpayer's code for the relevant tax year.

(5) Add to A any tax treated as deducted, other than any direction tax, but—

(a) only if there would be an amount payable by the taxpayer under section 59B(1) of TMA on the assumption that there are no payments on account and no addition to A under this paragraph, and then

(b) only to a maximum of that amount.

(6) In this regulation—

"direction tax" means any amount of tax which is the subject of a direction made under regulation 72(5), regulation 72F or regulation 81(4) in relation to the taxpayer in respect of one or more tax periods falling within the relevant tax year;

"relevant tax year" means—

(a) in relation to section 59A(1) of TMA, the immediately preceding year referred to in that subsection;

(b) in relation to section 59B(1) of TMA, the tax year for which the self-assessment referred to in that subsection is made;

"tax treated as deducted" means any tax which in relation to relevant payments made by an employer to the taxpayer in the relevant tax year—

(a) the employer was liable to deduct from payments but failed to do so, or

(b) the employer was liable to account for in accordance with regulation 62(5) (notional payments) but failed to do so;

"the taxpayer" means the person referred to in section 59A(1) of TMA or the person whose self-assessment is referred to in section 59B(1) of TMA (as the case may be). (emphasis added)

233. Similarly, when an assessment other than a self-assessment (such as a discovery assessment) is raised against a taxpayer, tax that should have been deducted is assumed to have been deducted, under Regulation 188:

188—(1) In this regulation, "assessment" means an assessment other than one under section 9 of TMA (self-assessment).

(2) The tax payable by the employee is—

Where

A is the tax payable under the assessment;

B is the total net tax deducted in relation to the employee's relevant payments during the tax year for which the assessment is made, adjusted as required by paragraph (3); and

C is so much, if any, of B as is subsequently repaid.

(3) For the purpose of determining the tax payable by the employee, and subject to paragraphs (4) and (5)—

(a) add to B any tax which—

(i) the employer was liable to deduct from relevant payments but failed to do so, or

(ii) the employer was liable to account for in accordance with regulation 62(5) (notional payments) but failed to do so;

(b) make any necessary adjustment to B in respect of any tax overpaid or remaining unpaid for any tax year; and

(c) make any necessary adjustment to B in respect of any amount to be recovered as if it were unpaid tax under section 30(1) of TMA (recovery of overpayment of tax etc) to the extent that—

(i) HMRC took that amount into account in determining the employee's code, and

(ii) the total net tax deducted was in consequence greater than it would otherwise have been.

(4) No direction tax is to be included in calculating the amount of tax referred to in paragraph (3)(a).

(5) If a direction is made after the making of the assessment, the amount (if any) shown in the notice of assessment as a deduction from, or a credit against, the tax payable under the assessment

is to be taken as reduced by so much of the direction tax as was included in calculating the amount of tax referred to in paragraph (3)(a).

(6) Instead of requiring payment by the employee, [HMRC][1] may take the tax payable by the employee into account in determining the employee's code for a subsequent tax year.

(7) In this regulation—

"direction" means a direction made under regulation 72(5), regulation 72F or 81(4) in relation to the employee in respect of one or more tax periods falling within the tax year in question;

"direction tax" means any amount of tax which is the subject of a direction;

"tax payable under the assessment" means the amount of tax shown in the assessment as payable without regard to any amount shown in the notice of assessment as a deduction from, or a credit against, the amount of tax payable. (emphasis added)

234. Section 29 provides relevantly as follows:

29 Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment –

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer, or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax…"

235. Mr Chacko submitted that HMRC's position is that, whether or not the Bank was required to deduct higher rate PAYE, their assessment against the Appellant should be upheld because the amount of income should have been recorded in his self-assessment, which is therefore insufficient. Presumably they also maintain that the "loss of tax" is the amount of tax that should have been paid, whether to be paid by the Appellant or the Bank. The fact, in their view, that Regulation 188 means that (if the Bank were required to deduct higher rate) no tax could actually be collected from the Appellant (effectively he would be treated as already having paid it), makes no difference to the proper amount of the s 29 assessment.

236. Mr Chacko submitted that there are two reasons why the PAYE credit would, in principle, be relevant to s 29. The first is that, to the extent that the PAYE credit was available, the original self-assessment would not be "insufficient"; and the second would be that there would not be a "loss of tax".

237. HMRC are understood to argue that the question of whether the Bank should have deducted higher rate tax is irrelevant to the outcome of the appeal: this presumably entails both (1) the error in the Appellant's self-assessment, both as to tax chargeable and to tax payable for each relevant year; and (2) the quantum of the "loss of tax" in s 29(1), are the same whether or not the Bank failed to deduct the right amount (or, put

another way, whether or not the Appellant is entitled to credit for the tax that should have been, but was not, deducted).

238. Before going on to the relevant authorities, Mr Chacko addressed the issue of "loss of tax" in this situation. If the Appellant was not required to pay higher rate tax to HMRC under his self-assessment, because he had the PAYE credit (and was therefore treated as already having paid that amount when the s 59B calculation is carried out, whether or not the PAYE credit forms part of the self-assessment itself), then there was no "loss of tax" resulting from any errors or insufficiencies in his self-assessment: there could not be, because he had paid what he was required to pay.

239. The "loss of tax" was a deficiency in the Bank's PAYE returns to HMRC, which should have been accounted for under PAYE Regulation 68 and HMRC could have demanded under PAYE Regulation 80. The Appellant's carelessness, if established, did not cause that loss of tax in a relevant way: it may have contributed to HMRC failing to become aware of the loss of tax at an earlier stage, but it was not a loss of tax by reference to the Appellant's self-assessment obligation. Put another way: the s 29 assessment cannot be correcting a "loss of tax" if, even if that assessment is upheld, HMRC would still "lose" the same tax because the Appellant is deemed (by virtue of the PAYE Credit) already to have paid it.

The authorities

240. Mr Chacko addressed the question of whether the FTT has jurisdiction to consider the deductions under Regulations 185 and 188 in an appeal against a discovery assessment or whether they only applied to enforcement proceedings (in the County Court) pursuant to section 59B TMA.

241. In *Lancashire*, HMRC argued that the amount that should be "treated as paid" was not within the jurisdiction of the Tribunal – it was only an issue when Regulation 185 (or, for a discovery assessment, Regulation 188) was applied and HMRC sought to collect the tax. Judge Morgan rejected HMRC's argument that amounts that should be "treated as paid" were not within the jurisdiction of the Tribunal to consider in an appeal against an assessment.

242. Mr Chacko submitted that in *Lancashire*, HMRC argued that the amount that should be "treated as paid" was not within the jurisdiction of the Tribunal, only being an issue when Regulation 185 (or, for a discovery assessment, Regulation 188) was applied and HMRC sought to collect the tax: the credit for tax that should have been deducted but was not would be something the taxpayer could raise in collection proceedings but not before the Tribunal on appeal.

243. Judge Morgan rejected this at [172]-[173], holding that the reference to tax treated as deducted in s 8(5) TMA, and therefore in the definition of a self-assessment, included sums treated as deducted because (in that case) regulation 185 treated sums that an employer was required to deduct as having been deducted.

244. The Judge stated at paragraph 172:

> The fact that regulation 185 is stated to apply only for the purposes of s.59B and that s.9(1)(b) does not specifically cross refer to that provision is not of itself sufficient to indicate that a more restrictive interpretation is to be given to the terms "income tax treated as deducted" when used in s.9(1)(b) than that suggested by its natural and ordinary meaning:
>
> (1) it appears that the term as used for the purposes of s9(1)(b) is drawn deliberately widely and non-specifically. There is no cross-referral to any provision which applies to treat income tax as deducted (whether under the PAYE system or otherwise).
>
> (2) I can see nothing to indicate, whether in s9(1)(b) or s59B, that the legislature intended to make a significant distinction as regards the taxpayer's position in relation to
>
> (a) income tax chargeable on earnings which, in effect, s59B(1) itself, in combination with the PAYE rules, provides is to be treated as income tax which has been deducted, and
>
> (b) income tax which is treated as deducted from or treated as paid in respect of income which is otherwise chargeable to tax under other provisions.....
>
> (3) Moreover, it would be out of kilter with the overall scheme of the self-assessment, tax payment and appeal regime if, as is the result of HMRC's interpretation, the taxpayer is required to assess a sum which does not accord with the sum he will actually have to pay and cannot appeal to the tribunal against any conclusion by HMRC as regards the availability of a tax credit or the amount of any such tax credit.

245. Judge Morgan, having rejected HMRC's argument that the amount that should be "treated as paid" was not within the jurisdiction of the Tribunal, held that (para 173) the tribunal can, accordingly, reduce those assessments, as amended by HMRC, to take account of the tax credits.

246. Mr Chacko submitted that there is extensive previous case-law on the collection of underpaid PAYE from employees. This has typically come before the Tribunal in cases where HMRC has invoked Regulation 72 to remove the PAYE credit. It is important therefore to see what Regulation 72 actually does. Regulations 72-72B provide:

72 Recovery from employee of tax not deducted by employer

(1) This regulation applies if—

(a) it appears to the Inland Revenue that the deductible amount exceeds the amount actually deducted, and

(b) condition A or B is met.

(2) In this regulation and regulations 72A and 72B

"the deductible amount" is the amount which an employer was liable to deduct from relevant payments made to an employee in a tax period;

"the amount actually deducted" is the amount actually deducted by the employer from relevant payments made to that employee during that tax period;

"the excess" means the amount by which the deductible amount exceeds the amount actually deducted.

(3) Condition A is that the employer satisfies the Inland Revenue—

(a) that the employer took reasonable care to comply with these Regulations, and

(b) that the failure to deduct the excess was due to an error made in good faith.

(4) Condition B is that the Inland Revenue are of the opinion that the employee has received relevant payments knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments.
(5) The Inland Revenue may direct that the employer is not liable to pay the excess to the Inland Revenue.
(5A) Any direction under paragraph (5) must be made by notice ("the direction notice"), stating the date the notice was issued, to—
(a) the employer and the employee if condition A is met;
(b) the employee if condition B is met.
(5B) A notice need not be issued to the employee under paragraph (5A)(a) if neither the Inland Revenue nor the employer are aware of the employee's address or last known address.
(6) If a direction is made, the excess must not be added under regulation 185(5) or 188(3)(a) (adjustments to total net tax deducted for self-assessments and other assessments) in relation to the employee.
(7) If condition B is met, tax payable by an employee as a result of a direction carries interest, as if it were unpaid tax due from an employer, in accordance with section 101 of the Finance Act 2009.
10. The employee has a right of appeal against a Regulation 72 direction, under Regulations 72B and 72C:

72B Employee's appeal against a direction notice where condition A is met
(1) An employee may appeal against a direction notice under regulation 72(5A)(a)—
(a) by notice to the Inland Revenue,
(b) within 30 days of the issue of the direction notice,
(c) specifying the grounds of the appeal
(2) For the purpose of paragraph (1) the grounds of appeal are that—
(a) the employer did not act in good faith,
(b) the employer did not take reasonable care, or
(c) the excess is incorrect.
(3) On an appeal under paragraph (1) that is notified to the tribunal, the tribunal may—
(a) if it appears that the direction notice should not have been made, set aside the direction notice; or
(b) if it appears that the excess specified in the direction notice is incorrect, increase or reduce the excess specified in the notice accordingly.

72C Employee's appeal against a direction notice where condition B is met
(1) An employee may appeal against a direction notice under regulation 72(5A)(b)—
(a) by notice to the Inland Revenue,
(b) within 30 days of the issue of the direction notice,
(c) specifying the grounds of the appeal.
(2) For the purpose of paragraph (1) the grounds of appeal are that—
(a) the employee did not receive the payments knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments, or
(b) the excess is incorrect.
(3) On an appeal under paragraph (1) that is notified to the tribunal, the tribunal may—
(a) if it appears that the direction notice should not have been made, set aside the direction notice; or
(b) if it appears that the excess specified in the direction notice is incorrect, increase or reduce the excess specified in the notice accordingly.
11. It is important to note, in the context of this dispute, exactly what a Regulation 72 Direction does. It removes the employer's liability for PAYE that they should have (and didn't) deduct (Regulation 72(5)) and it removes that same amount from the PAYE credit (Regulation 72(6)). It does not, apart from that, make any difference to the amounts of tax chargeable or payable by the employee for the year.

247. Therefore, Mr Chacko submitted that, if an employee successfully overturns a Regulation 72 Direction, that does nothing to the underlying income tax position: it merely restores the PAYE credit. In such a case the employee is placed back in the same position as the Appellant is in this dispute, assuming he is entitled to the PAYE credit. The outcomes in terms of the FTT's jurisdiction and the disposal of any substantive appeal against a s 29 assessment should therefore be the same where HMRC has unsuccessfully invoked Regulation 72 as they are in this case.

248. In this case, for example, if HMRC had issued a Regulation 72 direction with their assessment, to protect themselves in case the Appellant did show he had submitted a P45, then the Appellant would have argued on appeal that the Regulation 72 was invalid because he was not aware, when he received the payments of earnings, that the wrong amount was being deducted. If he succeeded in that argument, all that would do was remove the Regulation 72 direction and restore his entitlement to the PAYE credit. If HMRC are correct that his appeal should be dismissed even if he is entitled to that credit, it would mean that if they had unsuccessfully invoked Regulation 72, and he had appealed, his appeal would still have had to be dismissed.

249. Mr Chacko submitted that this is not the historic understanding of the Tax Tribunals, nor (it appears) HMRC. Regulation 72 does not contain any provisions fixing a payment obligation on the employee. That is why HMRC will usually issue a Regulation 72 direction together with either a closure notice or a s 29 assessment. There is authority to the effect that, in PAYE cases, where an employee has been assessed to the sum that should have been (and was not) deducted by the employer, and Regulation 72 has been used by HMRC, the employee's appeal against the assessment (and not only the appeal, if any, against the Regulation 72 Direction under 72B or 72C) will be allowed unless HMRC can establish the conditions for a direction under Regulation 72 PAYE.

250. He submitted that there are three relevant Upper Tribunal or High Court authorities, being *HMRC v Imtiaz Ali* [2011] EWHC 880 (Ch), *West v HMRC* [2018] STC 1004 and *Hoey v HMRC* [2021] UKUT 82.

West

251. In the recent Upper Tribunal case of *West v HMRC* [2018] STC 1004 ("*West*"), the Chancellor (Sir Geoffrey Vos) and Judge Berner reviewed the operation of the PAYE system and how it allocates liabilities between the employer and employee. This was a case where the taxpayer, being owner and director of a company in financial difficulties, was awarded a sum sufficient to pay off his loan account with the company after deduction of tax. On his tax return, he included the full sum as income but recorded the tax as deducted (see that decision at [10]). In fact the company did not account for the tax, and HMRC issued a Regulation 72 Direction transferring liability to Mr West, against which he appealed.

252. The Upper Tribunal examined and explained the interaction of the taxpayer's liabilities with the PAYE Credit. The analysis of the legislative regime is clearly a core part of the reasoning of the Upper Tribunal. The Upper Tribunal explained the consequences, for the Tribunal appeals system, of a Regulation 72 direction at [22] – [24] as follows:

> 22. If a valid direction is given under regulation 72, under the self-assessment system the employee will not be entitled to credit for the amount which should have been, but was not, deducted by the employer. The employee will accordingly be liable for income tax on the taxable earnings without the benefit of that tax credit.
> 23. The employee has two rights of appeal in this respect. The first, by regulation 72C of the PAYE Regulations, is an appeal against a direction notice under regulation 72(5A), namely when condition B in regulation 72(4) is met…
> 24. The second, and corresponding, avenue of appeal is against an assessment or amendment to a self-assessment under section 31 TMA. The powers of the FTT on 20 such an appeal are set out in section 50 TMA as follows:
> "(6) If, on an appeal notified to the tribunal, the tribunal decides— (a) that the appellant is overcharged by a self-assessment; … (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 … (c) that the appellant is undercharged by an assessment other than a self-assessment, the assessment or amounts shall be increased accordingly."

253. Mr Chacko submitted that the Upper Tribunal did not hold that the only method of challenging a Regulation 72 Direction was the right of appeal against the direction itself in Regulation 72C: it was open to the taxpayer to challenge the effect of the direction, by appealing against an assessment that sought to establish his liability to the tax. It is clear from the quotation from section 50 of the TMA that the Upper Tribunal understood this to mean that the taxpayer could argue that, because the Direction was invalid, they had been overcharged by the assessment, and the Tribunal could reduce the quantum of the assessment accordingly.

254. The basis for this is that, absent a valid Regulation 72 Direction, the taxpayer would be entitled to credit for the tax that should have been deducted under PAYE (i.e. would be in the situation the Appellant is in if he can show that the Bank should have deducted higher rate PAYE). The same result must follow in this case: if HMRC have not even attempted to invoke Regulation 72 and the Tribunal is satisfied that the PAYE credit should be available, the assessment should be reduced under s 50, given that the Upper Tribunal held that that would be the outcome if HMRC invoke Regulation 72 ineffectively.

255. *West* was quoted as authoritative by the High Court in *Hall (Liquidator of Ethos Solutions Ltd) v Nasim* [2021] EWHC 142 (Ch) at [76]: "If a valid direction is given under regulation 72 , under the self-assessment system, the employee will not be entitled to credit for the amount which should have been, but was not, deducted by the

employer. The employee will accordingly be liable for income tax on the taxable earnings without the benefit of that tax credit. The employee has two rights of appeal in this respect. The first is by regulation 72C of the PAYE regulations and the second is under section 31 / 50 TMA …"

256. Mr Chacko submitted that consistently with *West*, the standard practice in appeals where Regulation 72 directions have been made is to allow appeals against discovery assessments if it is shown that the Regulation 72 direction was invalid and therefore that the taxpayer should be given credit for tax that should have been deducted. For example, in *Febrey v HMRC* [2018] UKFTT 764, HMRC raised s 29 assessments for 2005/6, 2006/7 and 2007/8, in each case because HMRC said that PAYE should have been applied and they had made Regulation 72 Directions. Appeals were allowed against all three assessments: the first two because there had been no employment income, but the third because the Regulation 72 Direction was invalid (see the FTT at [174] – [175]). The Tribunal allowed the third appeal: it did not (as HMRC's analysis would require) dismiss it and leave it for the County Court to apply the PAYE credit.

257. Mr Chacko submitted that where an employee has appealed against s 29 assessment on the grounds that the terms of a Regulation 72 Direction are not met, and the Tribunal agrees, that merely brings the employee back to the position of the Appellant (assuming he succeeds in showing that either his P45 or P46 arguments are good). If HMRC are correct to say the PAYE Credit is irrelevant to the quantum of the assessment, that would mean that in those appeals, the employee's appeal would be dismissed (despite their success on the Regulation 72 arguments). As set about above, this is not the case.

Imtiaz Ali

258. Mr Chacko submitted that the same provisions were considered, in a different context, by the High Court (Warren J) in *HMRC v Imtiaz Ali* [2012] STC 42 ("*Imtiaz Ali*"), a case where HMRC were applying for the continuation of a freezing order. Mr Ali had received various sums ("the Payments") from a company of which he was a director. He denied these were income. HMRC took the view that they were, and so issued both a Regulation 72 Direction and an assessment (see Warren J at [3]-[4]), applying for a freezing order on the same day. Mr Ali argued (when the matter came back to court for an inter partes hearing) that the order was improper as he had no liability under the assessment until 30 days after it was made.

259. Warren J was very clear that prior to the service of the Regulation 72 Direction, Mr Ali was not required to self-assess the Payments: at [8], "Clearly, in relation to the income which has been made subject of the direction… Mr Ali did not need to self-assess the payments, although if they were income they should have been shown on his return…" and at [57], "Until the direction was given it must have been doubtful that HMRC had a cause of action for the PAYE because Mr Ali himself was not liable…" It important that, as far as Warren J was concerned, the "cause of action" was the liability to tax under the self-assessment or discovery assessment system, and not the payment

obligation under s 59B TMA: he specifically rejected Mr Ali's argument to that effect, which was the basis for Mr Ali's claim that the freezing order was premature.

260. This was part of Warren J's reasoning. A major argument relied upon by Mr Ali was that, because s 59B only imposed an obligation to pay 30 days after the assessment, the freezing order was premature and so made wrongly (see [11]). Warren J accepted (following Bingham J, as he then was, in *Siporex*), that a freezing order (then, a Mareva injunction) "will not be granted to an applicant who has no cause of action against the defendant at the time of the application…" (see Warren J at [18]).

261. Mr Chacko submitted that if the making of the Regulation 72 Direction only affected s 59B, and not the assessment itself, then Warren J would have been wrong to state at [57] that "Until the direction was given it must have been doubtful that HMRC had a cause of action for the PAYE because Mr Ali himself was not liable…" This was important because Warren J was considering whether HMRC had delayed in making their application: he held that they could not have applied until they had made the Regulation 72 Direction but that they could perhaps be criticised for failing to issue "the direction and the assessment much earlier…"

262. Mr Chacko submitted that Warren J considered and rejected the possibility that, by analogy with *Director of Asset Recovery Agency v McCormack* [2008] STC 1097, Mr Ali might have been required to include the Payments in his self-assessment and that meant that there was a pre-existing cause of action, based on the obligation to account for tax: at [40], "... in our case there was no failure to submit a return and when the return was actually submitted there was no obligation to self-assess the payments. Therefore, one cannot argue, except in relation to capital gains tax, that there is, in accordance with Pitcher J's decision, a cause of action via the route of section 59…." The reason Mr Ali did not need to self-assess the payments was because the Regulation 72 Direction had not been made when he filed his self-assessment and so the liability was still that of his employer (i.e. under the PAYE credit) (see Warren J at [8] and [57]) and it was because of this point that Warren J did not need to decide whether or not McCormack was correct.

263. Warren J decided (see [44],[49]) that there was a sufficient cause of action (albeit one that only required payment 30 days later) when the Regulation 72 Direction and the assessment had both been made.

264. Warren J specifically considered the effect of the PAYE credit (that being the way liability shifts from the employee to the employer) on the self-assessment at [51], where he considered (as part of his weighing exercise) the degree to which Mr Ali had failed in his obligations: "the failure, on HMRC's case, of Mr Ali to comply with his statutory obligations to include his income on his return. This is not to say that his self-assessment was wrong because at that stage the tax liability was not his. It only became his as a result of the direction on 17 February…"

265. Mr Chacko submitted it was therefore part of the reasoning of Warren J that, absent a Regulation 72 Direction transferring liability to an employee, that employee would not be liable under an assessment to tax on income where PAYE should have been deducted. Such an assessment would not have given rise to a cause of action and no freezing order could have been made.

266. Mr Chacko submitted that the Appellant is in exactly the position of an employee who has not yet had a Regulation 72 Direction made (the situation considered in *Imtiaz Ali*) or one who, on appeal, has succeeded in showing that it should not have been made (the situation considered in *West*, and applied in *Febrey*).

Hoey

267. Mr Chacko submitted that the recent Upper Tribunal case of *Hoey* did not consider any of the authorities above. However, it took the view that the Tribunal had no jurisdiction to consider the availability of the PAYE credit, because the reference to tax "treated as deducted" in s 8 TMA did not include tax treated as deducted under either Regulation 185 or Regulation 188, and that therefore the PAYE credit did not affect either the amount of tax payable under sections 8 and 9 (self-assessment) or the amount of tax payable with which an assessment under s 29 is concerned (see *Hoey* at 107).

268. Mr Chacko submitted that unfortunately, the Upper Tribunal in *Hoey* was given the inaccurate impression that there was no consideration of these provisions above the level of the FTT, only being directed to *Burton* in the Upper Tribunal which does not analyse them: see *Hoey* at [64].

Conclusion

269. Mr Chacko submitted it is difficult to reconcile *Hoey* with *West* or *Imtiaz Ali*, or the various cases allowing appeals where a taxpayer shows that HMRC were wrong to make a Regulation 72 Direction.

270. Mr Chacko submitted that in the s 29 assessment context relevant to this appeal, it may be possible to reconcile the decisions as follows: while the "tax payable" under a self-assessment ignores the PAYE Credit (*Hoey*), and that means that the self-assessment is insufficient as a matter of tax chargeable and tax payable (triggering s 29(1)(a) or (1)(b)), there is no "loss of tax" for the reasons dealt with above, and therefore the appeal should be allowed.

271. If the problem with a s 29 assessment where the PAYE credit applies, but Regulation 72 has not been used (or has not been used successfully) is that the "loss of tax" is zero, that would explain why (as held in *West*) an employee can challenge a Regulation 72 Direction by appealing against the assessment, and why (as held in *Imtiaz Ali*) no cause of action arises until HMRC makes the Regulation 72 Direction. An assessment without a valid Regulation 72 Direction removing the PAYE Credit would be reduced on appeal

because it would be excessive, even if (strictly speaking) the PAYE Credit did not make a difference to the self-assessment figure for "tax payable" (as held in *Hoey*) and so there was still an "insufficiency" in the tax payable for s 29 purposes.

272. However, Mr Chacko accepted it may be that it is impossible to reconcile these three decisions. He submitted that it was unfortunate that HMRC did not refer the Upper Tribunal in *Hoey* to either *West* or *Imtiaz Ali*, both of which they were party to, both of which are recent decisions of the superior courts, and both of which are (at the least) highly relevant to how the PAYE credit interacts with obligations under self-assessment.

273. He submitted that by failing to draw the Upper Tribunal's attention to *West* and the general practice of how the Tribunals deal with the consequences of Regulation 72 Directions removing the PAYE credit, the Upper Tribunal in *Hoey* may have been left without fully appreciating quite how chaotic the implications are if the PAYE credit is not relevant to the quantum of an assessment or self-assessment. If assessments should be upheld even where the credit is available, this is not just a matter of saying the dispute should be in the county court (see *Hoey* at [101] and [108]) but rather it will frequently require the multiplication of proceedings. Any attempt by HMRC to invoke Regulation 72 is likely to result in two sets of proceedings. Moreover, difficult questions of legislative interpretation (such as what the P46 provisions actually require and mean) would routinely be held to be outside the jurisdiction of the Tribunal that has been set up to deal with them. However (as here) the taxpayer cannot simply go to the County Court, as there may also be issues in the assessments that are unequivocally matters for the Tribunal.

274. Mr Chacko submitted that if the three decisions cannot be reconciled, then there is no consistent authority on the question whether the PAYE Credit is relevant when deciding how much tax should have been declared, i.e. whether there is an under-assessment of tax for s 29 purposes.

275. He submitted that in the absence of consistent authority, the Tribunal encouraged to follow the FTT's analysis in *Lancashire*, which is consistent with *West* and *Imtiaz Ali*. Recognising that the wide and general words in s 8(5) to tax "treated as deducted" refer generally to all systems of deemed deduction (including the most common system of deductions and deemed deductions, the PAYE system) is both the most natural meaning of that provision and allows the Tribunal machinery to operate coherently.

276. In answer to the points raised by the Tribunal as to the meaning of section 29(1) TMA, Mr Chacko submitted that use of the word "charged" "the amount … to be charged in order to make good to the Crown the loss of tax" is not a specific reference to "chargeable" rather than "payable" tax. An assessment might be made if HMRC discover an insufficiency in either figure, but if there is no additional tax to pay then there is no "loss of tax" and the assessment should be reduced accordingly.

Discussion on the third issue

277. Despite Mr Chacko's valiant efforts, we reject the argument that the Appellant is entitled to receive a credit for the amount of PAYE income tax that should have been deducted from his earnings by the Bank but was not.

278. We are bound by the Upper Tribunal decision in *Hoey v HMRC [2021] UKUT 82 (TCC)* to find that sums treated as deducted under Regulation 188 of the PAYE Regulations do not apply to section 29 TMA and cannot be considered in this appeal against the discovery assessments. We are satisfied therefore that there has been a loss of tax which HMRC is entitled to recover by way of making a discovery assessment.

279. We are bound by the recent authority of *Hoey* to find that no credit should be given under section 8(5) of the TMA and Regulation 188 when taking into the amount of tax payable by the Appellant as assessed by the section 29 TMA assessments. We are bound to find that credit for PAYE deductions is a matter is only justiciable in collection or enforcement proceedings under section 59B of the TMA (in the County Court) and not in an appeal against a discovery assessment.

280. We are therefore satisfied that there was a loss of tax to the Crown for the purposes of section 29(1) TMA 1970 and no account can be taken of PAYE credits that should be treated as having been deducted. We are satisfied that Regulation 188 regulation only affects the amount to be paid by or collected from the Appellant through PAYE. Any sum of PAYE income tax which may be treated as deducted by virtue of Regulation 188 is not appealable or justiciable in appeal to the FTT against a discovery assessment.

281. In *Hoey*, the UT firstly dealt with the question of whether the amount of tax to be paid to HMRC at the collection stage is a separate and subsequent step to the assessment of tax. The UT held at paragraph 95 of its decision that:

> 95. In our view the better view however is that s59B is a further sequential step:
> (1) This is consistent with the structure of TMA, which works through the provisions on assessment, then what HMRC can do with the assessment, and then the FTT powers. Section 59B sits in a separate section on payments, which comes after the parts on assessment and appeals, but before the section on collection and recovery.
> (2) There is no cross reference to s59B in ss8 and 9 as one might expect if s59B were to be incorporated or rolled up into the s8/s9 adjustments. In contrast s59B refers back to s8/9 concepts which suggests the steps in s8/s9 have already taken place.
> (3) Section 59B takes the assessment as a starting point which assumes the assessment function has already taken place.
> (4) That s59A is a further step, showing an actual amount payable "bottom line figure", is not the same as what is in the assessment, is consistent with the view taken by the UT in *Walker* although this point should not be overstated as there was not any specific reasoning explaining that view (see [79] above).

(5) It is consistent with the reference to s59B(1) TMA in the explanatory notes to the Income Tax Act 2007 when describing what the calculation of income tax liability deals with. Those notes state under the heading "Chapter 3: calculation of income tax liability" that : "The calculation does not deal with amounts of tax suffered (eg under PAYE or by way of deduction at source) as these are set off against a person's liability rather than deducted in arriving at it. See section 59B(1) of TMA". This is supportive of our view, but its importance should not be overstated.

282. The UT decided that Regulation 185 only applied to deductions for PAYE credits in enforcement proceedings under s.59B TMA. At [98] it stated: 'We agree with HMRC that the specific reference to s59B in Regulation 185 means it does not have a reach outside of s59B'. At [99] it distinguished and disapproved the FTT's decision in *Lancashire* which is relied on by the Appellant.

283. The UT then considered Regulation 188 at [104]-[107]:

104.Regulation 188 is functionally similar to Regulation 185. It fulfils a similar adjustment function to the tax payable amount in a non-SA assessment. It similarly takes the act of assessment as a given. It appears in the same part as Regulation 185 in the PAYE regulations. We see no reason to make a distinction between Regulation 188 and Regulation 185, and to say that, despite Regulation 185 not affecting s9 self- assessments, that Regulation 188 has reach into the tax payable amount under a non-SA assessment.

105.As to the wide general wording of the deeming, regarding tax deducted at source, in sections 8 and 9, it might be argued why then does the reference to tax treated as deducted not exclude the tax treated as deducted under Reg 185? The answer is that it does not need to. Regulation 185 is restricted to the purpose of 59B. The adjustments in s59B take place at a later stage to s9(1)(b) /s8. So, as at the stage where s8/9 TMA is considered, there is no Regulation 185 deemed deduction that has at that point been established and therefore no need for it to be excluded at that stage.

106. As mentioned above, HMRC point out the reference in s8(5) to tax "treated as deducted" has a clear function without needing to encompass PAYE treated as deducted HMRC gave the example of two provisions in the Income Tax (Trading and Other Income) Act 2005: s414 in the chapter imposing a tax charge for stock dividend income, and s530 in the chapter imposing a tax charge to gains from contracts of life insurance, under which a person liable to tax was treated as having paid income.

107. We conclude the PAYE credits under Regulations 185 do not affect the amount of tax payable with which sections 8 and 9 are concerned. Similarly, we conclude Regulation 188 does not affect the amount of tax payable with which an assessment under s29 TMA is concerned. As those self-assessment and assessment provisions are the only relevant sources of the FTT's jurisdiction, the effect of the PAYE credit is not something which falls within the FTT's jurisdiction.

284. The decision in *Hoey* is consistent with other decisions such as *Higgs and Others v HMRC* [2020] UKFTT 117 (TC) where the FTT stated at [57]: "I have concluded that the PAYE Regulations are not justiciable in this Tribunal." In *Walker v HMRC* [2016] UKUT 32 (TCC) at para 39 the Upper Tribunal stated: "It is, of course, correct that

section 59B is not justiciable before the FTT, being concerned with matters of collection and enforcement."

285. The UT decision in *Hoey* is also consistent with the case of *Burton v HMRC* in the FTT - [2009] UKFTT 320 (TC) and the UT - [2010] UKUT 252 (TCC). In the FTT decision the Tribunal stated at [16]:

> "16. It is clear that an employer has a statutory duty to deduct tax in accordance with the relevant PAYE regulations. Failure to do so will render the employer liable to account for such tax whether or not it has in fact been deducted. But I do not accept Mr Yerbury's argument that, absent specific provision to this effect, a breach of statutory duty on the part of the employer, directly or through its agent, or by HMRC, can prevent an assessment on the employee for the amount of an under-deduction. My Yerbury's proposition was of a general nature and he did not direct me to anything in the PAYE Regulations that would have the effect of removing from the Appellant his liability to pay tax on his earnings otherwise than to the extent PAYE had been deducted at source."

286. This position was upheld by the UT where it stated at [20]:

> "20. It is not in dispute that the underlying aim of the legislation is to deduct the "correct" amount of tax from payments of emoluments – and indeed it appears to achieve this in the overwhelming majority of cases. However there will always be a minority of cases where this legislative aim cannot be achieved. There are specific provisions in the legislation to address circumstances where the "correct" amount of tax has not been (or cannot be) deducted from payments (for example the direct collection provisions in section 203(2)(c) Income and Corporation Taxes Act 1988 and the provisions of section 59B(1) TMA dealing with the interaction of self assessment and PAYE). The existence of these provisions means that the legislative purpose must include the collection of tax from taxpayers in circumstances where it was not deducted under PAYE. A purposive approach to the construction of the legislation must therefore include dealing with circumstances where – for whatever reason – the "correct" amount of tax had not been deducted from payments of emoluments. In our view, neither of Regulations 101 nor 101A [the predecessors to Regulations 185 and 188] – construed purposively – were intended to relieve Mr Burton of his liability to tax in excess of basic rate, viewing realistically the circumstances under which he received his emoluments."

287. Further, the UT's decision in *Hoey* is consistent with the proposition that the sums to be treated as deducted under section 8(5) of the TMA do not apply PAYE credits to section 29 discovery assessments. Further, sums treated as deducted under section 8(5) of the TMA are explicitly stated to apply to self-assessments under section 9 TMA and partnership returns under section 12AA but not expressed to apply to discovery assessments under section 29 of the TMA. This is consistent with not taking any account of sums treated as deducted under the PAYE Regulations when considering a tax loss for the purposes of section 29(1) of the TMA.

288. We are not satisfied that the decisions in *West* or *Imtiaz Ali* are directly on point nor binding authority on the facts of this case. Mr Chacko's arguments, while ingenious, require analogies and inferences to be made based on assumptions concerning

Regulation 72 directions made or not made. In contrast, we are bound by the ration in [107] of the Upper Tribunal's decision in *Hoey* which directly applies to the issues in this case. Furthermore, we respectfully agree with its reasoning – it has provided a logical analysis of the interplay between the relevant provisions of the TMA and those of the PAYE Regulations.

289. We are therefore satisfied that any credit for PAYE deductions that should have been treated made by the Bank for the purposes of Regulation 188 cannot assist the Appellant in his appeal against the discovery assessments. He is not relieved of his liability to pay tax in excess of the basic rate under the discovery assessments even though he did provide the Bank with a P45 or P46 and they failed to apply the Basic Rate code. We have made the factual findings in relation to the first issue that we did in the event that this decision is further reviewed and to assist any appellate tribunal or court. There may also be consequences of our findings for any collection or enforcement proceedings against the Appellant but we make no comment upon those.

290. We also made findings of fact in relation to the first issue in order to satisfy ourselves that our interpretation of Regulation 188 and section 29 of the TMA was just and fair in light of all the circumstances of the case. Therefore, we should explain that we are satisfied that there is no real injustice in this result. Notwithstanding the finding that the Appellant delivered the Bank a copy of his P45 or P46 at the relevant time in early 2010, that the Bank applied the BR code incorrectly and failed to deduct sufficient tax, the following points remain.

291. First, the Appellant is not precluded from raising the same arguments at the collection and enforcement stage of proceedings. We say nothing more about the applicability and merits of such arguments at that stage.

292. Second, the Appellant has had the benefit of large sums of income from the Bank which has been undertaxed for the two tax years. He has enjoyed the benefit of an excess of income and underpayment of income tax for a decade on the basis that neither he nor the Bank have repaid HMRC. There has been a significant actual loss of tax to the Revenue for over ten years. We wish to align ourselves with what was said by the UT in *Burton* at [20]:

> 'A purposive approach to the construction of the legislation must therefore include dealing with circumstances where – for whatever reason – the "correct" amount of tax had not been deducted from payments of emoluments. In our view, neither of Regulations 101 nor 101A [the predecessors to Regulations 185 and 188] – construed purposively – were intended to relieve Mr Burton of his liability to tax in excess of basic rate, viewing realistically the circumstances under which he received his emoluments.'

293. Third, the Appellant carelessly failed to declare his employment income in his self-assessment returns in January 2011 and 2012.

294. Fourth, had the Appellant filed accurate returns, he himself might have identified his chargeability to income tax, the under deduction of tax through the Bank's PAYE deductions, assessed the balance of tax remaining payable and made the relevant payment of tax at the time. Alternatively, the anomaly would likely to have been identified by HMRC at that time and the Appellant, or Bank, would have been required to repay the balance of tax owed. The Appellant's failure to declare his income from employment and under deduction of tax is a more proximate cause of HMRC continuing to suffer the loss of tax than the initial failure by the Bank to deduct sufficient tax.

295. Fifth, by failing to file accurate returns in January 2011 and January 2012 the Appellant restricted HMRC's opportunity or ability to issue directions under Regulation 72 or Regulation 80 at that time either requiring the Appellant or the Bank to repay the outstanding tax. By not filing accurate returns and not repaying the sums of tax owed, he reduced HMRC's opportunity to identify the tax loss at that stage and decide whether to pursue the Appellant or the Bank for the unpaid tax by making directions under Regulation 72 or Regulation 80. It is difficult for the Appellant to pray in aid the absence of Regulation 72 direction and its associated appeal rights when his actions have contributed to such an absence.

296. Our conclusion on the third issue is that the FTT has no jurisdiction to take account of PAYE deductions in an appeal against a discovery assessment. We are satisfied that there has been a loss of tax as a matter of law (as well as in fact) which can be made the subject of discovery assessments. This disposes of the final ground of appeal.

Further observations on the potential for injustice of the FTT not having jurisdiction

297. We have also considered further arguments as to the potential for injustice of the FTT not having jurisdiction to take account of PAYE deductions in an appeal against a discovery assessment.

298. Although it is not determinative of the outcome of this appeal, we have considered Mr Chacko's argument about the "loss of tax" in this appeal. We are satisfied that not taking account of PAYE credits which might be 'treated as deducted' for the purposes of Regulation 188 does not invalidate HMRC's discovery assessment. The Appellant argues that the amounts that the Bank should have deducted should be treated as deducted for the purposes of section 8(5) of the TMA and Regulation 188 and such that there has been no loss of tax for the purposes of section 29 TMA and the discovery assessments should be cancelled. We have rejected that argument for the reasons set out above. We have also considered whether this causes an unjust result for the Appellant.

299. We asked the following questions of the parties in an email dated 31 March 2021 prior to the UT's decision in *Hoey* being released on 12 April 2021:

'Irrespective of ….. Judge Morgan's analysis in *Lancashire*, even if the Tribunal has jurisdiction and even if the Tribunal were to find that the Appellant delivered a P45 or P46 to the Bank, such that the bank was responsible for the initial failure to apply the correct code and make higher rate deductions under PAYE, is that the end of the matter? Is it arguable that section 29(1) and (4) do not simply require an analysis of whether the bank is responsible for a loss of tax but whether the Appellant is also responsible for a loss of tax? If the Tribunal were to find that the Bank were initially responsible for the mistake and loss of tax in applying the wrong code but the Appellant were later also responsible for the same, because he filed inaccurate or mistaken returns, where would that take matters?

Assuming for the moment that the Tribunal were to find that the Bank were responsible for applying the wrong code and making insufficient deductions but following the Bank's mistake, the Appellant had then filed inaccurate returns, and the condition of carelessness in section 29(4) were met, would this not mean that there had been income which had not been assessed for the purposes of section 29(1)(a) (or an insufficiency of tax under section 29(1)(b)) and that there was a loss of tax and that this had been brought about as a result of the Appellant's carelessness, then would the conditions of section 29 not be satisfied? Ie. would any earlier responsibility of the Bank for the loss of tax become irrelevant to the section 29 analysis if the statutory conditions are fulfilled? Put another way, if the Appellant's carelessness has brought about a loss of tax through his inaccurate returns, is it sufficient that his behaviour is a cause of the tax loss and even if the Bank's actions were also a cause this becomes irrelevant for the purposes of section 29? Is it that so long as the Appellant's inaccurate returns are a cause of the tax loss (and assuming for a moment that he was careless) then they do not have to be the sole cause of the tax loss because section 29 does not require this? Further, on these factual assumptions, would it also be relevant if the Appellant's behaviour was the more proximate cause of the tax loss than the Bank's behaviour (because the Appellant's behaviour came later and was the final cause of the tax loss)?

300. In his written submissions dated 7 May 2021 Mr Chacko argued that if the Appellant was not required to pay higher rate tax to HMRC under his self-assessment, because he had the PAYE credit (and was therefore treated as already having paid that amount when the s 59B calculation is carried out, whether or not the PAYE credit forms part of the self-assessment itself), then there was no "loss of tax" resulting from any errors or insufficiencies in his self-assessment: there could not be, because he had paid what he was required to pay.

301. He submits that the "loss of tax" was a deficiency in the Bank's PAYE returns to HMRC, which should have been accounted for under PAYE Regulation 68 and HMRC could have demanded under PAYE Regulation 80. The Appellant's carelessness, if established, did not cause that loss of tax in a relevant way: it may have contributed to HMRC failing to become aware of the loss of tax at an earlier stage, but it was not a loss of tax by reference to the Appellant's self-assessment obligation. Put another way: the s 29 assessment cannot be correcting a "loss of tax" if, even if that assessment is upheld, HMRC would still "lose" the same tax because the Appellant is deemed (by virtue of the PAYE Credit) already to have paid it.

302. We reach no concluded view on this argument because it is no longer necessary in light of the UT's decision in *Hoey* and our decision on jurisdiction. The logic of Mr Chacko's argument is straightforward and attractive - there has been no tax loss which can be discovered if, contrary to our finding, Regulation 188 can apply to section 29 of the TMA and there is jurisdiction to take into account the PAYE deductions that the employer should have made but did not. However, it has been rejected in *Hoey* for reasons with which we agree.

303. However, we make the following observations as to why application of the UT's interpretation in *Hoey* causes the Appellant no injustice in this case.

304. It would be a surprising interpretation of the provision if section 29 of the TMA did not empower HMRC to raise a discovery assessment and make good the loss of tax to the Crown in circumstances where:

- income which ought to have been assessed to income tax has not been so assessed for the purposes of s.29(1)(a) TMA because the Appellant failed to declare in his tax returns any employment income, let alone the PAYE deductions and any tax payable;
- the Appellant brought about this situation carelessly for the purposes of s.29(4) TMA;
- there has been an actual tax loss to the Crown because the Bank failed to make the correct PAYE deductions but only applied the basic rate of income tax and neither the Appellant nor the Bank have assessed or repaid the balance.

305. To the extent that the Appellant argues that any loss of tax has not been brought about by him but rather by the Bank, we observe the following. As a matter of fact, the loss of tax was originally caused by the Bank but the continuing loss is substantially caused by the Appellant's failure to assess and pay the balance of income tax due which had not been deducted under PAYE and of which he has the benefit. Therefore, our decision accords both with a strict and purposive interpretation of the legislation as suggested in *Burton*. As we have decided above, neither the 'treated as deducted' provisions of section 8(5) of the TMA nor Regulation 188 of the PAYE Regulations apply PAYE deductions that should have been made but were not made to reduce or extinguish a tax loss which is to be recovered in a discovery assessment raised under section 29 of the TMA. The application of this interpretation causes no injustice to the Appellant.

306. It is not in dispute that the Revenue has and continues to suffer an actual tax loss in respect of the Appellant's earnings by the under deduction of PAYE which we have found to have been caused by the Bank. The continuing actual tax loss was caused by the Appellant's failure to declare his employment income or any income on his tax returns and failure to make payment. Even if the sums which were under deducted was the initial cause of the tax loss, the Appellant's actions in failing to make an accurate

self-assessment superseded the Bank's failings. He has subsequently and substantially caused a continuing loss of tax by failing to declare his income and the Bank's PAYE deductions in his tax returns – by failing to make a proper self-assessment and paying the further sums of tax due. Therefore it is arguable that the Appellant's actions are the supervening and most proximate cause of the actual tax loss because he should have made good the loss of tax after declaring the amounts chargeable and payable in his self-assessment returns pursuant to section 9(1)(a) and (b) of the TMA.

307. It is arguable that if a taxpayer acts carelessly and inaccurately and does not assess and pay the sums not deducted, including sums treated as deducted under the PAYE Regulations, then the tax loss is sustained and caused by the Appellant's failure to make proper assessment and payment rather than the under deduction and he can no longer benefit from the PAYE credit that the employer should have deducted. It is arguable that the language of section 29 is directed to the loss of tax caused by an inaccurate assessment rather than the loss of tax caused by the original under deduction.

308. Therefore, it is further arguable that our interpretation of the terms of section 29(1) causes no injustice even where the Tribunal has no jurisdiction to consider PAYE deductions. The Appellant has failed to declare his income which ought to have been assessed to income tax. He has brought about this situation carelessly for the purpose of section 29(4) of the TMA. It is arguable that section 29(4) does not require the Appellant to have caused the tax loss himself - only that he caused the situation in 29(1) that income which ought to have been assessed has not been assessed to income tax. Thereafter, the Officer has made discovery assessments to make good the loss of tax to the Crown. It is not in dispute that as a matter of fact there was an actual loss to the Crown and we have found that as a matter of law there is a tax loss because PAYE deductions cannot be treated as deducted. Even if section 29 also requires the loss of tax to have been brought about carelessly by the taxpayer, the Appellant has substantially caused the loss of tax by failing to make an assessment of his employment income or his income tax liability for the reasons set out above.

309. However, it is not necessary to come any conclusion on any of these arguments as our decision on jurisdiction disposes of the third issue. There has been a tax loss as a matter of fact and as a matter of law because the PAYE deductions that should have been made but were not cannot be taken into account on this appeal. The Appellant carelessly failed to declare his employment income which ought to have been assessed to income tax and he caused the loss of tax in fact and law because he failed to assess and pay the income tax which was due on his income (excluding any PAYE deductions).

310. Therefore, for all these reasons HMRC's discovery assessments were validly issued and the Tribunal has no jurisdiction on an appeal to consider whether the Appellant might be entitled to any credit for PAYE deductions that the Bank should have made.

CONCLUSION

311. The first issue: We are satisfied that the discovery assessments were validly raised. Income which ought to have been assessed to income tax was not self-assessed in the Appellant's two returns. There was an actual tax loss which continues to this day. This situation was brought about by the Appellant. He carelessly filed his tax returns for the two years in question (2010 and 2011) by failing to declare any employment or employment income within them. The correct amount of income tax has not been paid, which loss HMRC is entitled to make good by raising discovery assessments. Sections 29(1) & (4) TMA are satisfied and HMRC was entitled to make the discovery assessments in 2016 relying on the extended time limits under section 36(1) TMA. The discovery assessments were raised within a reasonable time of HMRC making the discovery in 2016 (even though the concept of staleness is no longer known to law).

312. The second issue: We find on the balance of probabilities that the Appellant did deliver a P45 to the Bank through his PA in or around February 2010 shortly after starting his employment with it in January 2010. In the alternative he delivered a properly completed P46 at around the same time as joining the Bank. Further and in any event, the Bank had sufficient information available properly to complete a P46 on his behalf at that time. The Bank incorrectly applied the BR code and under deducted income tax through PAYE.

313. The third issue: For the reasons explained above, we are bound by the Upper Tribunal's decision in *Hoey*. This authority requires us to find that we do not have jurisdiction in an appeal against a discovery assessment to give credit for tax that should be treated as deducted under the PAYE Regulations. We are satisfied that the statutory conditions for making valid discovery assessments under section 29 are fulfilled – there was a loss of tax because we should take no account of PAYE deductions which should have been made by the Bank.

314. Therefore, the appeal should be dismissed.

315. When the assessments were issued on 10 March 2016 the exact figures for the Appellant's employment income and any employment benefits he received were not known so rounded figures were used. HMRC have recalculated the amount of tax due We accept HMRC's invitation to vary the assessments to the following amounts:

a. Year ending 5 April 2010 - £50,611.94 b. Year ending 5 April 2011 - £81,987.80.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

316. 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.

JUDGE RUPERT JONES

Release date: 28 June 2021