14 May 2021

PRESS SUMMARY

Commissioners for Her Majesty's Revenue and Customs (Appellant) v Tooth (Respondent) [2021] UKSC 17
On appeal from [2019] EWCA Civ 826

JUSTICES: Lord Reed (President), Lord Briggs, Lord Sales, Lord Leggatt, Lord Burrows

BACKGROUND TO THE APPEAL

If Her Majesty's Revenue and Customs (the "**Revenue**") find out that a taxpayer's assessment of tax has become insufficient, they have the power to make a fresh assessment (a "**discovery assessment**") if one of two conditions is met. This appeal concerns whether the discovery assessment the Revenue issued to Mr Tooth was valid. The appeal raises several issues of general importance about the Revenue's powers to make discovery assessments.

In January 2009, Mr Tooth filed a tax return using IRIS software approved by the Revenue, which contained his self-assessment of income tax for the 2007-08 tax year. Mr Tooth had taken part in a tax avoidance scheme and wanted to use the losses from the scheme to reduce his income tax liability. Due to a technical software issue with the form, Mr Tooth was unable to enter the losses from the scheme as an employment-related loss. On enquiry, the IRIS software engineers advised him to enter the loss in some other box and then explain what he had done in one of the spaces included in the form for written explanations from the taxpayer ('white spaces'). Mr Tooth entered the loss from the scheme in boxes for partnership income and explained in the adjacent white space that rather than a partnership loss, it was in fact an employment-related loss. The form automatically totalled the tax due with the result that Mr Tooth declared that he was entitled to a repayment of income tax for 2007-08.

The Revenue disagreed because, from the outset, they considered that the tax avoidance scheme was ineffective. But they did not open an appropriate enquiry into his return. Following retrospective legislation which confirmed that the scheme was ineffective, the Revenue issued a discovery assessment under section 29 of the Taxes Management Act 1970 (the "**TMA**") in October 2014. Mr Tooth appealed the discovery assessment to the First-tier Tribunal: he challenged the Revenue on whether they had made the requisite discovery (the *discovery issue*) and he denied that his return contained a deliberate inaccuracy which was the condition on which the Revenue relied (the *deliberate inaccuracy issue*). The First-tier Tribunal allowed Mr Tooth's appeal on the basis that there was no deliberate inaccuracy in Mr Tooth's return and therefore the condition was not satisfied, but it accepted the Revenue's argument that the discovery had been made by one of its officers in October 2014. The Upper Tribunal agreed with the First-tier Tribunal on the deliberate inaccuracy issue. It also agreed with Mr Tooth on the discovery issue. The Court of Appeal agreed with the Upper Tribunal on the discovery issue and so dismissed the Revenue's appeal, although the majority of the Court of Appeal accepted the Revenue's argument on the deliberate inaccuracy issue.

JUDGMENT

The Supreme Court unanimously dismisses the Revenue's appeal on the basis that there was no deliberate inaccuracy in Mr Tooth's tax return. Lord Briggs and Lord Sales give a joint judgment with which the other members of the Court agree.

REASONS FOR THE JUDGMENT

The deliberate inaccuracy issue

Whether Mr Tooth brought about the insufficiency to tax deliberately depends on construing sections 29(4) and 118(7) of the TMA [**24**]. Section 29(4) requires that the insufficiency of tax "*was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf*". However, section 118(7) of the TMA states that "*references to a loss of tax or a situation brought about deliberately by a person include a loss of tax or a situation that arises as a result of a deliberate inaccuracy in a document […]*". The effect of the clear and unambiguous language in section 118(7) is that where the insufficiency in tax is brought about due to an inaccuracy in a document given to the Revenue, section 29(4) is fulfilled if the inaccuracy was deliberate, even if the taxpayer did not deliberately under-declare tax [**37-40**].

Was the alleged inaccuracy deliberate? "*[D]eliberate inaccuracy in a document"* in section 118(7) of the TMA means a statement which, when made, was deliberately inaccurate (i.e. the taxpayer intended to mislead the Revenue), rather than a deliberate statement which is inaccurate [**42-43, 47**]. This is for several reasons. First, it is the natural meaning of the phrase "*deliberate inaccuracy*" [**43**]. Second, it accords with the differing statutory time periods within which the Revenue can make a discovery assessment. Third, it is consistent with the concept of deliberate inaccuracy in the penalty scheme [**45**]. Fourth, it is consistent with Parliamentary intent [**46**].

Finally, was there an inaccuracy? This depends on what "*in a document*" means [**48**]. The majority of the Court of Appeal held that it was enough if the deliberate inaccuracy could be found somewhere in the document, interpreted on its own without regard to the rest of the document. The Supreme Court disagrees. There is no reason to depart from the usual approach to interpreting a document as a whole. The fact that the Revenue chooses to use a computer to read online tax returns in the first instance does not alter the meaning of the document and anyway, the Revenue invites the taxpayer to add information in the white spaces [**49-52**].

Therefore, there was no inaccuracy in the document [**53-57**] and even if there had been, it was not deliberate as Mr Tooth did his best with an intractable online form [**58**]. Given the conclusion on the *deliberate inaccuracy issue*, the Revenue's appeal fails. However, the *discovery issue* raises additional important points [**59**].

The discovery issue

Section 29(1) states that "*if an officer of the Board or the Board discover […] that an assessment to tax is or has become insufficient*", the officer or the Board may make an assessment in the amount "*which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax*" [**24**]. The time limits for the Revenue to make a discovery run from the end of the year to which the relevant assessment relates, rather than from the date of discovery, and therefore serve as a trigger for the Revenue's powers rather than to determine the period beyond which the taxpayer is safe from further assessment [**66, 76, 80**]. Did the Revenue make a discovery under section 29(1)? The Court of Appeal agreed with the Upper Tribunal that there was no discovery in 2014 as the Revenue had formed its view in 2009 and that, even if pleaded, a discovery in 2009 would have been 'stale' by 2014 [**62**]. The Supreme Court disagrees.

First, there is no principle of 'collective knowledge': section 29(1) focuses on the state of mind of the individual officer of the Revenue who makes the assessment; if an officer had already made a discovery, that must not be regarded as a discovery 'once and for all' by the Revenue such that other officers cannot

make the same discovery in future [**64-65**]. This is because of the language and structure of section 29(1) [**68**], the similar language in section 29(5) [**68**], the history of section 29 [**69**], and the ordinary principle of the exercise of powers in public law [**70**].

Second, there is no concept of 'staleness': any idea that a discovery might lose its quality over time is contrary to the ordinary use of language, the leading authorities, and the statutory scheme [**73-77**]. The question is whether the officer of the Board who is deciding whether to make a discovery assessment has subjectively made a discovery that there has been an under-assessment of tax. It is perfectly possible for someone to make a discovery even if it is something already known to others [**78-82**]. There are several protections for the taxpayer: the Revenue must satisfy one of the two conditions in section 29 of the TMA, the statutory time limits depend on different levels of culpability, and the Revenue's discretion to issue an assessment can be challenged in judicial review proceedings on public law grounds [**83-84**].

The First-tier Tribunal applied the law correctly: the Revenue did make a qualifying discovery [**85-86**].

References in square brackets are to paragraphs in the judgment