Case No: A3/2014/3823

Neutral Citation Number: [2016] EWCA Civ 174
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX & CHANCERY CHAMBER)
Mr Justice Nugee
FTC1122013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2016

Before :

LADY JUSTICE ARDEN
LORD JUSTICE UNDERHILL
and
LORD JUSTICE SALES

- -

Between:

Hargreaves	**Appellant**
- and -	
The Commissioners for Her Majesty's Revenue and Customs	**Respondents**

- -
- -

David Goldberg QC, Clare Montgomery QC, Michael Furness QC and Conrad McDonnell (instructed by **KPMG LLP**) for the **Appellants**
Akash Nawbatt and Christopher Stone (instructed by **HMRC Solicitors Office**) for the **Respondent**

Hearing dates: 15-16 December 2015

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Judgment

LADY JUSTICE ARDEN :

Issue for decision

1. The issue here is whether the appellant taxpayer, Mr Hargreaves, has the right to require the respondent ("HMRC") to establish, at a separate preliminary hearing prior to the hearing of his appeal against a "discovery" assessment ("DA") made pursuant to section 29 of the Taxes Management Act 1970 ("TMA"), the matters which under that section HMRC must establish to show that the DA was validly made.

2. The Upper Tribunal (Nugee J) on 8 September 2014 rejected Mr Hargreaves' application for this purpose, dismissing an appeal against the First-tier Tribunal ("FTT") (Judge Gort). Having held there was no right, the FTT held that, while it had a discretion to order a separate preliminary trial, it would not do so. The Upper Tribunal upheld the FTT's decision on this. It held that it was possible to have a single hearing even though there were different burdens of proof in this case and also that it would need to hear evidence on the issues together. The trial of separate issues would probably lead to separate appeals and delay and that would be contrary to the overriding objective set out in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Mr Hargreaves does not in this appeal challenge the exercise by the FTT of its discretion if he fails to establish his right.

3. Mr Hargreaves' wish is to stay silent as to the details of his own case as long as he can. He wants to be able to elect not to give evidence until HMRC have proved their case on the relevant conditions. He contends that HMRC will not be able to prove that the conditions are satisfied, and is prepared to abandon his challenge to an in time assessment for 2001/2 if a separate trial is ordered.

4. The DA was issued on the basis that in the events that happened Mr Hargreaves was not entitled to be treated as neither resident nor ordinarily resident in the UK for tax purposes in his 2000/1 self-assessment tax return ("SATR"). He had stated, on his case in accordance with HMRC's IR20 guidance on residence, that he was to be regarded as "provisionally non-resident and not ordinarily resident with effect from 12 March 2000." He says this was a "red flag" which ought to have put HMRC on enquiry. The point is important because in that year Mr Hargreaves made capital gains of some £84m respectively on the sale of a shareholding in Matalan plc, which he had founded. Until 2000/1, he was ordinarily resident in the UK. HMRC contend that Mr Hargreaves did not take sufficient steps to become non-resident. Following the subsequent decision of the Supreme Court in *R (Gaines-Cooper) v HMRC* [2011] STC 2249, he has to show that he had effected a distinct break in his pattern of life in the UK and that would involve a multi-factorial inquiry. I need not go further into Mr Hargreaves' grounds for contending that section 29(2) applies.

5. In my judgment, for the detailed reasons given below, the question is one of statutory construction in the light of what Parliament may be taken to have known about the trial process in the FTT. The proper meaning of section 29 TMA in that context is in my judgment that the tribunals should have a discretion to determine whether there should be a separate trial of the issue on which the onus of proof rests on HMRC. In my judgment, Mr Hargreaves cannot establish the right to require a separate trial or any related right under the relevant statutory provisions.

6. I shall start with the statutory scheme for DAs, the FTT's rules of procedure and the judgment of the Upper Tribunal. I then turn to the parties' submissions and set out the reasons for my conclusions.

WHEN DAS MAY BE MADE AND WHAT HAS TO BE SHOWN

7. A DA is to be contrasted with an in time assessment. A taxpayer must file a SATR each year disclosing his income and chargeable gains (section 8 of the Taxes Management Act 1970 ("TMA 1970")) and (save where he files his SATR before 30 September in each year) calculating his liability to tax. HMRC has in general one year within which it can then start an inquiry into whether any item in the return was not correctly charged to tax. The inquiry must be brought to a close within a prescribed time, but within that time HMRC can make an assessment, which will be an "in time" assessment.

8. If the applicable time limits expire and HMRC subsequently discover that any assessment to tax was insufficient, section 29(1) of the TMA 1970 provides that HMRC may issue a DA. I am only concerned with the provisions applying to individuals, and so my description of the statutory scheme will be confined to the material provisions which apply to them.

9. In this case, HMRC issued a DA against Mr Hargreaves for 2000/1 and an in time assessment for 2001/2.

10. Section 29(1) provides:

> (1) If an officer of the Board or the Board discovers, as regards any person (the taxpayer) and a year of assessment—
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> (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.

11. The statutory provisions for DAs contain protections for the taxpayer. In particular, section 29(3) provides that one of two further conditions must be fulfilled:

> (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.

12. The first condition ("the conduct condition") relates to the taxpayer's conduct and is set out in section 29(4), which, as in force at the relevant time, provides:

> (4) The first condition is that the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.

13. The second condition ("the officer condition") relates to whether HMRC could reasonably be expected to know of the tax loss at the time when the time limits expired. This condition is set out in section 29(5), supplemented by section 29(6):

> (5) The second condition is that at the time when an officer of the Board—
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
>
> (b) informed the taxpayer that he had completed his enquiries into that return,
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.
>
> (6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—
>
> (a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;
>
> (b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;
>
> (c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer, whether in pursuance of a notice under s 19A of this Act or otherwise; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board …

14. HMRC must show that either the conduct condition or the officer condition is fulfilled. The Tribunals called this "the competence issue," and I will do the same and will refer to the conditions together as the conduct/officer condition. In this case, HMRC contends that both conditions were fulfilled. There are time limits applying to each condition, but nothing turns on these on this appeal.

15. The DA's validity depends on satisfaction of the conduct/officer condition. When section 29(3) states that a taxpayer "shall not be assessed" unless the conduct/officer condition is satisfied, this means: "shall not be validly assessed." In *Hankinson v HMRC* [2011] EWCA Civ 1566; 81 TC 424, the issue arose whether the HMRC conditions had to be satisfied *before* HMRC could issue a valid DA. As the Upper Tribunal pointed out, this Court held (at [21] to [28]) that, unlike section 29(1), the conduct/officer condition is objective. The officer did not have to consider whether those conditions were fulfilled before a discovery assessment was issued. At that stage, he only had to consider whether there was an insufficiency of tax (a "tax loss") (section 29(1)). In May 2012, the Supreme Court refused permission to appeal against this decision, stating that the decision of this Court was plainly right (https://www.supremecourt.uk/docs/PTA-1205.pdf). I record that information for completeness. The ratio of the decision in *Hankinson* is binding on us in any event.

16. If HMRC discharge the onus on them under section 29(3), the taxpayer may want to rely on section 29(2), which prevents a DA from being made where he computed his tax liability in accordance with the then generally prevailing practice. Section 29(2) provides:

(2) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made

> on the basis or in accordance with the practice generally prevailing at the time when it was made.

17. Mr Hargreaves at this stage relies on this provision. This Court held in *Hankinson v HMRC* at [19] that under this subsection the taxpayer bears the onus of proof.

18. Section 29(8) deals with objections to the making of an assessment. The taxpayer must in general (and certainly in this case) make these by appeal to the FTT and not by way of judicial review. HMRC accept that there are some situations where a taxpayer might still be able to seek judicial review, for example where he relies on a legitimate expectation. Section 29(8) states how an objection under section 29 must be made:

> (8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment …

19. In *Hankinson*, this Court considered section 29(8) to be inconsistent with the submission that the officer/conduct condition had to be satisfied before issue of a DA because s 29(8) presupposes the existence of a valid assessment.

20. Section 31(1)(d) TMA 1970 enables a taxpayer to appeal against "any assessment to tax which is not a self-assessment." So the taxpayer can appeal against an assessment under section 29(1). As explained, Mr Hargreaves made his objections under section 29 as part of his appeal to the FTT. Before his appeal was heard he made his application for a separate trial of the competence of the DA which both Tribunals rejected.

21. On a taxpayer's appeal under section 31(1)(d), the relevant power of the FTT is to reduce the assessment and it has no power in terms to quash an assessment: section 50(6). As now in force, this provides

> (6) If, on an appeal notified to the tribunal, the tribunal decides—
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> (a) that. . .the appellant is overcharged by a self-assessment;
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> (b) that. . .any amounts contained in a partnership statement are excessive; or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

22. Under this provision, the onus of justifying the assessment is on HMRC: see generally *IRC v Transport Economy Ltd* [1955] 35 TC 601 at 607 per Upjohn J. Mr

Hargreaves submits that it is an important principle that HMRC should bear the onus of proof in tax appeals: see *IRC v Garvin Rose* [1976] STC 98, 126.

FTT'S RULES OF PROCEDURE

23. The FTT's rules of procedure are to be found in Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273). In common with the Civil Procedure Rules, the overriding objective of the Rules is to enable the FTT to deal with cases fairly and justly (Rule 2). The FTT has wide powers of case management, including the power to direct the hearing of a preliminary issue (Rule 5). It can direct how evidence is to be given and exclude evidence where it would be unfair (Rule 15). It can order the trial of a preliminary issue (Rule 15).

24. Although the FTT and these Rules did not exist when section 29 TMA was first enacted, a court or tribunal would normally enjoy such powers. This is confirmed, for example, in relation to one particular procedural power in issue on this appeal, namely the power to direct which party shall begin, by one of the appellant's authorities. In *Dixon & Gaunt Ltd v IRC* (1947) 29 TC 289 at 298, Atkinson J held that the plaintiff (now called a claimant) was not always the party with the duty or right to begin.

25. This Court can therefore approach the issue to be decided on this appeal on the basis that Parliament would have been aware that the tribunal hearing any objection under section 29(8) TMA would have these powers.

JUDGMENT OF THE UPPER TRIBUNAL

26. The Upper Tribunal rejected the rights claimed by Mr Hargreaves on this appeal. It examined the effect of a separate trial on Mr Hargreaves. It was satisfied that, if there was a single hearing, Mr Hargreaves would lose an advantage. If the competence issue was a preliminary issue, Mr Hargreaves could insist on HMRC opening the case. Mr Hargreaves would then have had the option of electing to call no evidence and requiring HMRC to prove its case. If there was a single trial of all the issues, Mr Hargreaves lost his advantage unless he was prepared to abandon his case under section 29(2) (which I will call "the section 29(2) substantive issue").

27. The Upper Tribunal concluded that Mr Hargreaves did not have any relevant right. The disadvantage to him of separate hearings stemmed from the fact that a party took a risk if it did not call evidence on any issue on which he had the onus of proof (at [28]) or the conventional position if the burden of proof on some issues lay on one party and the burden of proving other issues lay on the other party ([29]). So the question whether there should be a separate issue was one of case management discretion and not of right ([30]). The Upper Tribunal rejected a number of other submissions made on behalf of Mr Hargreaves. A number of those submissions have been repeated on this appeal. The Upper Tribunal concluded by dismissing Mr Hargreaves' appeal.

28. The Upper Tribunal held that the evidence on the section 29(2) substantive issue was plainly relevant to the competence issue ([41]). Mr Hargreaves argued that it was wrong to put him in a position where HMRC would seek to rely on his evidence when the burden of proof lay on HMRC. The Upper Tribunal rejected this argument and

held that this position was simply the consequence of his reliance on section 29(2). The competence issue could not be decided on an assumption that Mr Hargreaves was ordinarily resident in the UK.

29. The judge rejected Mr Hargreaves' challenge to the exercise by the FTT of its discretion not to order a separate trial. The Upper Tribunal gave permission to appeal but only on the issue whether the taxpayer has the right to a separate hearing of the competence issue.

SUBMISSIONS

30. Mr David Goldberg QC appears with Ms Clare Montgomery QC, Mr Michael Furness QC and Mr Conrad McDonnell, for Mr Hargreaves on this appeal. Mr Akash Nawbatt appears with Mr Christopher Stone for HMRC.

31. A number of submissions made by Mr Goldberg were repeated by Ms Montgomery and Mr Furness, so I will not refer to those submissions as repeated.

Taxpayer protection

32. Mr Goldberg's fundamental point is that section 29(3) TMA 1970 provides a highly important protection for taxpayers. He submits that this protection would not be fulfilled unless there was a right to a separate hearing. A separate hearing is "an essential bulwark of the presumption of innocence". He submits that the process whereby HMRC can reopen a year outside the normal enquiry time limits by the issue of a discovery assessment meant to be difficult. Moreover, he submits, the purpose of the legislation is to give the taxpayer a benefit by protecting him against the need to prepare any other issues until it is known whether the assessment is valid. It creates a threshold over which HMRC must pass before the taxpayer has to defend his position.

33. This point is close to, but not exactly, the point decided in *Hankinson*. In *Hankinson* this Court held that the conduct/officer condition was not a pre-condition to a valid assessment. Lewison LJ, with whom Mummery LJ and Sir Mark Waller agreed, held that the FTT could order the trial of a preliminary issue (see [26]) but that observation was not part of the *ratio* and the appellant did not argue that there was a right to a separate hearing as in this case. Whether the protection for which Mr Goldberg contends exists must of course depend on the relevant statutory scheme read as a whole.

34. Mr Goldberg emphasises the point that section 29 forms part of a group of sections intended to provide finality in the new era of self-assessment. As Moses LJ held in *Tower MCashback LLP 1 v HMRC* (2011) 80 TC 641 at [24] (reversed on another point [2011] 2 AC 457):

> [24] As I have already observed, apart from a closure notice, and the power to correct obvious errors or omissions, the only other method by which the Revenue can impose additional tax liabilities or recover excessive reliefs is under the new s 29. That confers a far more restricted power than that contained in the previous s 29. The power to make an assessment if an inspector discovers that tax which ought to have been assessed has not been assessed or an assessment to tax is insufficient or relief is excessive is now

> subject to the limitations contained in s 29(2) and (3) (s 29(1)). Section 29(2) prevents the Revenue making an assessment to remedy an error or mistake if the taxpayer has submitted a return in accordance with s 8 or s 8A and the error or mistake is in accordance with the practice generally prevailing when that return was made. Section 29(3) prevents the Revenue making a discovery assessment under s 29(1) unless at least one of two conditions is satisfied (s 29(3)). The prohibition applies unless the undercharge or excessive relief is attributable to fraudulent or negligent conduct (s 29(4)) or having regard to the information made available to him the inspector could not have been reasonably expected to be aware that the taxpayer was being undercharged or given excessive relief (s 29(5)). There are statutory limitations as to the time at which the sufficiency or otherwise of the information must be judged. These provisions underline the finality of the self-assessment, a finality which is underlined by strict statutory control of the circumstances in which the Revenue may impose additional tax liabilities by way of amendment to the taxpayer's return and assessment.

The right to a separate hearing belongs to a group of rights

35. Mr Goldberg submits that the taxpayer's right to require a separate hearing on the competence issue ("the separate hearing right") forms part of a group of rights. The components of this group are: (1) the right to a separate hearing of the competence issue; (2) the right to require HMRC to begin and to force HMRC to lead evidence proving their ability to make the assessment without any aid from the taxpayer and (3) the right to challenge the correctness of an assessment on the hearing of the substantive appeal. Again, whether this submission is correct must of course depend on the relevant statutory scheme read as a whole.

Interpretation of section 29 and related TMA provisions

36. Mr Goldberg relies on a number of matters to support his submission as to the three components of the separate hearing right. He submits that it is to be inferred from section 50(6) TMA 1970 (para 21 above) that meeting the conduct/officer condition is to be dealt with as a threshold matter, i.e. at a separate hearing. Section 50(6) provides that, on an appeal, the tribunal's power is merely to reduce an assessment, and not to quash it. Therefore section 29(8) (para 18 above) must by implication confer the power to quash a DA if the conduct/officer condition is not met.

37. In other words, the process is, on Mr Goldberg's submission, a two-stage process. HMRC must first show that the conduct/officer condition is met. The appeal and the objection to the making of the DA have not been elided and they lead to different remedies. The situation is analogous to the statutory requirement for a person wishing to bring proceedings in respect of an act done under the Mental Health Act 1959 to obtain leave before starting proceedings. In *Pountney v Griffiths* [1976] AC 314, the House of Lords held that proceedings begun without such leave were a nullity.

38. I would reject these submissions. First, section 29(8) is dealing with the procedure the taxpayer must adopt, not with any powers of the FTT. Second, the FTT's power to reduce an assessment under section 50(6) clearly includes a power to reduce it to nil.

There is no reason why Parliament should provide for the remedy that might be given in judicial review proceedings in proceedings that were to be used in place of judicial review proceedings. Third, as to the point on nullity, this Court in *Hankinson* decided that the conduct/officer condition is not a precondition to the validity of a DA. Fourth, the procedure in section 29 is not a two-stage process because section 29(8) requires any objection to a DA on the basis of the conduct/officer condition to be dealt with on an appeal.

39. Mr Nawbatt submits that the fourth point is supported by the statutory history. Prior to the enactment of the Finance Act 1989, section 41 TMA required HMRC to obtain the leave of the General or Special Commissioners before making a DA. The taxpayer had no right to make representations at this stage: *Pearlberg v Varty* (1972) 48 TC 14. So prior to that date there was a two-stage procedure in force. The fact that it was abandoned shows on his submission that the new procedure is not a two-stage procedure. That is interesting background but does not necessarily prove the case as Parliament might have re-enacted the two stage procedure in a different way. However, I am confident that it has not done so for the reasons given. It is helpful to note that where leave was given for a DA, competence and substantive liability issues were not considered at a separate hearing: see, for example, *Hurley v Taylor* (1998) 71 TC 268. For an example of a similar case post 1989, see *Daniels v HMRC* [2014] UKFTT 173 (TC).

40. As to the right to compel HMRC to start, Mr Goldberg relies on *Dixon* & *Gaunt Ltd v IRC*. In that case, there was no evidence of the avoidance of tax on the basis of which the taxpayer had been assessed. The taxpayer opened its appeal, elected to call no evidence and made a submission of no case to answer. The Special Commissioners dismissed the appeal. On appeal to the High Court, Atkinson J set aside the order of the Special Commissioners and remitted the case back to them to determine on the basis that the onus of proof lay on the revenue. This authority does not, therefore, support Mr Goldberg's proposition that in appeals against DAs, HMRC must always begin.

41. Mr Goldberg submits that, even if HMRC begin, there is a risk that Mr Hargreaves will be required to open his case on all matters which he has to prove or adduce evidence, including the substantive issues, at one and the same time because his appeal challenges the assessment not only on compliance with the conduct/officer condition but also on a substantive basis. Again he submits that the purpose of the legislation is to give the taxpayer the right not to have to present his case under section 29(2) until HMRC has proved that the conduct/officer condition is met.

42. I do not accept either of these submissions. Even though the appeal raises other issues, Mr Hargreaves could at the end of HMRC's case, if HMRC open, submit that there was no case to answer on the conduct/officer condition. If he won on that, there would be no valid DA. If he lost on that, he could then call his evidence on the substantive issues in his appeal, including section 29(2). Of course he would have to plead his case and comply with any directions as to the service of witness statements and disclosure of documents but there is no suggestion that Mr Hargreaves could have some evidence or documents that he could hold back from HMRC in the course of its inquiry or otherwise. As to the purpose of the legislation, that depends on its true interpretation and Mr Goldberg cannot point to any provision which establishes a rule as to which party is to begin in every case.

43. Mr Goldberg then submits that Mr Hargreaves might be directed to open in which case he might have to give evidence on the issues in the substantive appeal first, and the burden on HMRC might have been subverted by the order in which the case had been taken. It is more than a matter of case management. I do not accept this submission. Mr Hargreaves would only be directed to begin where the FTT considered that this was the just way of proceeding, and, while this is a matter for the FTT, my provisional view is that it is difficult to see how it would reach that conclusion in the present case.

44. Before I come to my final conclusion, there are some submissions with which I must deal.

Overlap of issues

45. Mr Goldberg does not accept that there is any overlap between HMRC's case under the conduct/officer condition and Mr Hargreaves' case under section 29(2). This submission is not open to the appellant. The tribunals found otherwise and their findings on this point are not before this Court.

Draconian effect of tiny error?

46. Mr Goldberg submits that the power to make a DA is penal in its effect. He submits that, if the taxpayer makes a small mistake, the door is open to HMRC to reopen the computation of all tax for the relevant period. This is because "the situation mentioned in subsection (1) above" (used in subsections (2) and (5)) is that "*any* income which ought to have been assessed to income tax" has not been assessed. Thus, if the taxpayer had treated income of £100 as not liable to tax, and HMRC assesses the full £100 to tax but HMRC can show that the conduct condition is met only in respect of £50, then on a literal reading of section 29 it would appear to follow that the whole of the assessment meets the conduct/officer condition and is validly made. This is a startling conclusion.

47. I do not consider that this difficulty exists. I accept the submission of Mr Nawbatt that, once HMRC have shown that the conduct/officer condition is met, the taxpayer can show that the amount assessed is excessive. The position under section 29 is analogous to that where an assessment is made under section 36 TMA on the grounds of the taxpayer's fraudulent or negligent conduct: see per Aldous LJ in *Hurley v Taylor* at page 302F:

> The burden does not rest on the Revenue to any greater extent that the s36 burden [fraudulent or negligent conduct]. If they establish some fraudulent and negligent conduct and some loss of tax attributable to it they have finished section 36. From then on section 50(6) takes over and applies as it does for in-date assessments: that is to say, thereafter the burden rests on the taxpayer to establish that the assessment is wrong (see eg *Johnson v Scott (Inspector of Taxes)* [1978] STC 48 at 53).

Civil and criminal analogies

48. Before the Upper Tribunal, Mr Hargreaves argued that the position in this case was analogous to that arising in ordinary civil litigation where the burden is divided between different parties. On this appeal, he contends that this is wrong (to quote his skeleton argument, "it is like comparing an orange to a Tuesday afternoon"). His preferred civil analogy on this appeal is with an objection to jurisdiction under CPR Part 11, which must be resolved before the proceedings continue further.

49. I prefer Mr Nawbatt's submission that, in dealing with the statutory code, this Court should not be distracted by any analogies. The Court can have regard to what Parliament must have known would happen procedurally in the FTT as part of the context for enacting section 29 TMA, but not, as I see it, analogies of this kind.

50. In addition, Mr Nawbatt rightly points out that the objection that the conduct/officer condition is not met is not relevant to the FTT's jurisdiction because the objection is one that must be by appeal.

51. Mr Hargreaves also submits that the situation is analogous to that arising in criminal proceedings in at least three respects.

52. First, Ms Montgomery QC submits that the proceedings following the making of a DA are penal. She cites *Government of India v Taylor* [1955] AC 91 where foreign tax was treated as penal for private international law purposes. Her submission is that this point is an aid to interpretation. The present proceedings will expose Mr Hargreaves to proceedings for a penalty under section 95 TMA of an amount up to the amount of the tax loss. On her submission he would be bound in those proceedings by findings in the present proceedings. She does not assert that the proceedings on appeal to the FTT involve a civil or criminal charge for purposes of Article 6 of the European Convention on Human Rights ("the Convention"): that point is not open to Mr Hargreaves as it was not argued below and specific assurances were given by Mr Hargreaves' representatives to HMRC that it was not to be argued on this appeal. Her submissions, therefore, are simply directed to bolstering those of Mr Goldberg on interpretation.

53. I do not accept that section 29 is penal. As a taxing provision, section 29 TMA must not be given a strained interpretation so as to extend it in a way to cover matters not fairly within it (see generally per Hoffmann J in *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd* [1984] 1 BCC 99, 544). But I do not consider that the interpretation which I have placed on section 29 TMA above strains its language in any way.

54. Second, it is Mr Hargreaves' case that it is unusual for the onus in tax appeals to be on HMRC, and that that underlines the point that the conduct/officer condition is for the taxpayer's benefit and puts HMRC into a position which is analogous to that of the prosecution in criminal proceedings. This leads on to the third point.

55. Third, Ms Montgomery submits that there is occasionally an analogous division of onus in criminal offences, for example a defendant has the burden of showing "lawful excuse" if he is charged with the offence of carrying an offensive weapon in public contrary to section 1 of the Prevention of Crime Act 1953. She submits that, even in those cases, the defendant can still make a submission of no case to answer if the

prosecution does not produce sufficient evidence to show the matters which it has to prove.

56. I do not accept that this criminal analogy assists the Court in determining whether Mr Hargreaves has a right to a separate hearing in these proceedings. Again I consider that Mr Nawbatt is correct to argue that these analogies are distracting when the ultimate issue is one of statutory interpretation. In any event, the criminal analogy does not get Mr Hargreaves home. Even if there were a single issue in a criminal trial and that was an issue on which the burden fell on the defendant (e.g. diminished responsibility), the defendant would not necessarily be required to begin. Nor would a defendant in criminal proceedings be prevented from making a submission of no case to answer on any issue for which the prosecution had the burden.

57. Section 29 does not impose criminal liability. On the appeal under section 29 TMA Mr Hargreaves will have the privilege against self-incrimination but a wider right to silence does not arise as he is not subject to any criminal charge.

58. The question whether Article 6 applies to proceedings under section 95 TMA does not arise on this appeal. If proceedings are taken under section 95, Mr Hargreaves may then be entitled to protection under Article 6 of the Convention on the basis that the proceedings are criminal proceedings, but this is not certain. Even though the word "penal" is used in connection with stringent taxing provisions for domestic and private law purposes (see, for example, per Lord Simon LC in *Thomas Fattorini (Lancashire) Ltd v IRC* 24 TC 328 and see *IRC v Garvin Rose*), the extent of the criminal-head protection conferred by the Convention available in tax penalty proceedings depends on an evaluation of these proceedings because the European Court of Human Rights ("the Strasbourg Court") has made it clear that the application of Article 6 in these circumstances depends on the facts: see *King v UK*, App No 13881/02, [2004] STC 911, *Jussila v Finland,* App No 73053/01, [2009] STC 29. Moreover, Mr Nawbatt informed the court that HMRC does not rely on findings made in an appeal pursuant to section 31TMA in any proceedings under section 95 TMA. Proceedings for the assessment of tax or for a tax penalty are not proceedings to determine a "civil right or obligation" for the purpose of Article 6: see *Ferrazzini v Italy* App No 44759/98, (2002) 34 EHLR 45.

Statutory scheme v case management

59. Mr Furness submits that this is really a case about the boundaries of case management where rights of the taxpayer are engaged. The courts have to stop the coercive power of the state. He submits that this is not ordinary civil litigation. This is a particular statutory scheme with safeguards written into it. There may be a risk of inconsistent findings but, if Mr Hargreaves is correct about his right to a separate hearing and the three components, that risk is trumped by that right.

60. I do not doubt any of these points but in my judgment there is nothing in the statutory scheme to show that there was a right to a separate hearing for the reasons given above. If the state acts arbitrarily in deciding to bring proceedings, there are other remedies.

CONCLUSION

61. I would dismiss this appeal. In my judgment, on the true interpretation of section 29 TMA, a taxpayer has no right to a separate hearing to determine whether the conduct/officer condition is satisfied. He receives the protection to which he is entitled on the hearing of the appeal through the exercise by the FTT of its powers of case management.

Lord Justice Underhill

62. I agree.

Lord Justice Sales

63. I can detect no error of approach on the part of the FTT and the Upper Tribunal. The decision whether to order a trial of a preliminary issue regarding the competence of the DA is a case management decision for the FTT, and is not governed by any right on the part of the taxpayer as asserted by Mr Goldberg. I agree that this appeal should be dismissed for the reasons given by Arden LJ.