[2016] UKFTT 752 (TC)

TC05479

Appeal number: TC/2016/00260

Income tax - Closure Notice and Discovery Assessments – Sections 28B and 30B Taxes Management Act 1970 - Capital Allowances Act 2001 Sections 83 and 84 - whether cost of cars purchased by Appellant and provided to mini cab drivers for hire should be treated as fixed assets giving rise to capital allowances and not revenue items treated as stock - yes - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

WATERLOO CAR HIRE (a partnership) **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER SHEILA CHEESMAN

Sitting in public at Fox Court, Brooke Street, London on 5 September 2016

Mr Albert Fox and Mr Daniel Gance for the Appellant

Mr John Corbett, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. This is an appeal by Melvyn Sheath and Denise McConkey, trading in partnership as Waterloo Car Hire ("the Appellant") against HMRC's decision of 5 August 2015, to issue Discovery Amendments for years 2009-10 and 2010-11 under Regulation 30B Taxes Management Act 1970 ("TMA") and Closure Notice Revenue Assessments for years 2011-12 and 2012-13 under s 28B (1) and (2) TMA 1970.

2. The sole issue or determination by the Tribunal is the treatment of second hand cars bought by the Appellant partnership and made available for use by its self employed mini cab drivers. The Appellant disputes HMRC's decision to refuse its claim for the cost of the cars to be included in 'cost of sales' in its accounts as revenue expenditure and to treat the cars as fixed assets where relief for the expenditure is by way of the capital allowances legislation.

Preliminary application

3. On behalf of the Appellant, Mr Gance applied for an adjournment. He said that, unfortunately, the Appellant had not been able to produce a bundle of documentation in time for the hearing, as had been directed by the Tribunal. Although HMRC had prepared an improvised bundle, despite not being obliged to do so, other issues had arisen in respect of which he intended to take specialist advice.

4. Mr Gance said that there may have been procedural errors with regard to the discovery assessments, potentially rendering them invalid. He submitted that the discovery assessments, according to HMRC's statement of case and skeleton argument, had been issued under s 29 TMA 1970, but this could not be right as s 29 TMA 1970 provides for a discovery assessment to be made only in relation to a tax return made and delivered under s 8 TMA 1970 (personal return) or s 8A TMA 1970 (trustee's return), not a partnership tax return. As no such personal or trustee's returns were in issue, s 29 TMA 1970 could not provide the basis for amending the partnership statement.

5. Mr Corbett for HMRC did not take issue with this and had no objection to the adjournment application. He said however that the reference to s 29 only appeared in HMRC's statement of case and skeleton. The actual assessments had been raised without reference to the appropriate section under TMA 1970 (s 30B), but that did not affect their validity.

6. Mr Gance said that he nonetheless required at least a month to take specialist advice and prepare submissions, but for religious reasons his availability to attend a Tribunal hearing in October would be severely restricted, (the month of October coincides with the Jewish High Holy days), and asked for the hearing to be adjourned generally so that the parties could agree a mutually convenient date in November 2016.

7. Today's hearing date had been set by the Tribunals Service on 20 July 2016. A previous application for an adjournment had been made to the Tribunal on 8 August 2016 but refused, subject the Appellant's right to reapply at the hearing.

8. Having considered:

- the substantive issues in the appeal;
- that all necessary evidence appeared to be included in the bundle prepared by HMRC;
- that both parties had been afforded sufficient time to prepare their submissions;
- that all parties and their representatives had attended (Mr Corbett from HMRC having travelled from Belfast);
- that there was no clear reason why either party would be prejudiced by the Tribunal proceeding with the hearing;

the application for an adjournment was refused.

Background

9. The Appellant is a mini cab, car hire and courier business based in south east London that has been trading since 1979. The business normally has around 45 self-employed drivers who accept taxi jobs via the Appellant's switchboard control. The Appellant uses a digital computer radio system which identifies addresses using GPS technology and recognises previous telephone numbers. These are then fed through to the drivers. The Appellant advertises itself a taxi business.

10. The Appellant has for the last four or five years had a fleet of 'spare cars' which they allow drivers to use when their own car is off the road or otherwise unavailable. Older cars were charged at £80 a week and newer ones at £100 a week. The Appellant operates this system to promote driver loyalty.

11. The drivers operate individually, charging customers a fare in the normal way. Most payments to drivers would be in cash. They pay £125 a week to the Appellant for the rent of a taxi radio and, it is asserted by HMRC, for the use of the loaned vehicle.

12. Customers would often be tourists or business people needing a taxi to the airport or to a hotel. Those customers paid the driver who accounted part of the fare to the Appellant. There are also account customers who pay the Appellant direct. The account customers were mostly local businesses.

13. The individual driver's share is 60% of any account fare and the amount is netted off against the radio rent (and HMRC assert the minicab rent.) The debit or credit balance is paid either to or by the driver as appropriate. Usually, the driver owes the Appellant.

14. The Appellant maintains ledgers showing how the 'radio rental' and 'account' payments are netted off and cash and cheque payments made. They also maintained books showing car 'rentals' and any expenses claimed.

15. The Appellant includes in its 'cost of sales' the 60% of accounts income paid to the drivers. Repair and motor expenditure (petrol and insurance costs) in respect of the owned vehicles are also included. These are accepted by HMRC.

16. The Appellant includes in its 'cost of sales' the cars purchased during the year. The cars are in most cases transferred to the driver once they have 'ceased to have any economic value'.

17. In their witness statements, Mr Sheath and Mrs McConkey said that the vehicles used by the drivers fall into three main categories:

- New vehicles are purchased by the partnership, which are then hired to the drivers on a weekly charge. Ownership of the vehicles remains with the partnership.
- Some drivers utilise their own vehicles.
- The vehicles purchased by the partnership which are second hand are sold on to the drivers for their own use.

18. The methodology of the 'sale on' was described as follows:

- The partnership purchases a second hand vehicle at auction.
- The vehicle is then offered to the driver, with relevant terms of sale.
- On acceptance an agreement on price and payment schedule is then arranged.
- A document relating to the sale is signed and completed.
- In respect of payment under the sale agreement, this is paid by the driver on a weekly basis, in addition to the payments for use of the radio.
- In the event of a driver failing to make his weekly payment, under the terms of the agreement the vehicle may be repossessed.

19. On 29 November 2013, on receipt of the Appellant's 2012 return, HMRC advised that they would be opening an enquiry under s 12AC TMA

20. A meeting was arranged and held on 25 March 2014. The main queries related to the treatment of cars purchased given that the cost of vehicle had been included as a revenue expense under 'cost of sales'. HMRC say that the purchase cost of the vehicles are costs of a capital nature and should not be included in 'cost of sales'.

21. Following the meeting, an examination of the Appellant's accounts for the year under enquiry showed that the cost of second hand cars, to the value of £57,324, had been included in the cost of sales figure.

22. HMRC pointed out to the Appellant that as the cars were essentially plant and machinery they were not revenue items and should have been treated in the accounts as capital items and any allowances claimed under the Capital Allowances legislation.

23. HMRC raised further enquiries as to whether the bought cars were indeed written off or whether this was an accounting treatment, as whereas mini cab licences normally lasted for only 12 months, some of the cars purchased in 2012 were still licensed by 'Transport for London' until dates in 2015. HMRC pointed out by way of example that vehicle registration AJ57JBO, a Vauxhall Zafira, disposed of on 31 March 2012, was licensed until 9 January 2015 and vehicle registration FG57MWM, a Vauxhall Astra Estate, disposed of on 17 May 2012 was licensed until 20 May 2015.

24. HMRC requested details of any cars purchased in years 2010, 2011 and 2013.

25. The Appellant's accountants replied that the accounting treatment of cars purchased was in accordance with HMRC's guidance saying:

> "*The economic life of the cars rented to the drivers is no more than one year. As the asset has a life of no more than one year and does not provide an enduring advantage it is entirely appropriate to treat the cost of the car as revenue expenditure. As an alternative if the cars were indeed treated as Fixed Assets subject to capital allowances, due to the modus operandi of the company there were regular disposals of the vehicles, thereby giving rise to balancing allowances on each of the vehicles....*
>
> *All cars are disposed of after one year for nil consideration as (the Appellants) are of the opinion that the cars have no value by virtue of the trade that they have been used for."*

26. HMRC responded, explaining that BIM CA23620 provided specific guidance on short-life assets, including those assets which are excluded from treatment in that manner. Cars are excluded, under the Capital Allowances Act 2001 s 83 and s 84, with one minor exception which did not apply.

27. BIM CA23620 states:

> "An asset is a short life asset (SLA) if the person who incurs qualifying expenditure on it elects to treat it as a SLA and it is not excluded from SLA treatment. The actual or expected life of the asset is irrelevant in deciding whether or not it qualifies for SLA treatment. All that matters is that an election is made and that it is not specifically excluded. Cars apart from cars hired out to people in receipt of certain disability allowances, are excluded."

28. In a subsequent exchange of correspondence the Appellant's accountants said that (in view of HMRC's clarification of the status of cars under capital allowances legislation) they may have to review the accounting treatment of the cars purchased by the Appellant, but nonetheless maintained that they were justified in including the second hand cars in cost of sales. They explained (so far as relevant) that:

i. "The drivers who provided their own vehicles paid for the 'hire of the radio' and nothing else, whereas those drivers that did not own their own vehicle paid for 'the hire of radio' and 'a further payment' for a fixed period, after which the ownership of the vehicle was passed to them for nil consideration.

ii. Drivers who do not own their own vehicle have sole and exclusive use of the car for a fixed period during which the driver is responsible for all of the insurance and maintenance costs of the car. During the period of payment, no other driver has access to the car.

iii. Whilst in the hands of Waterloo Care Hire it is clearly a revenue item. At the end of a fixed period the car is passed on without further payment to the driver; this outcome being known to both parties at the time the payments are commenced. The nearest accurate description of these payments is that of an 'Instalment Plan' leading to the eventual transfer of ownership of the car.

iv. We have further concluded that after taking into consideration all the relative circumstances, the cars should more correctly be treated as Trading Stock and should be shown in the Accounts as such. Treatment of the cars as Fixed Assets is incorrect. We are therefore, re-drafting the Accounts to reflect the above and these will be with you shortly."

29. HMRC replied that:

i. The treatment of the Appellant's business vehicles as short-life assets was incorrect. Such treatment is not in accordance with recognised accounting principles. Statement of Standard Accounting Practice 9(2), defines stock as:

- Goods or other assets purchased for resale
- Consumable stores
- Raw materials and, components purchased for incorporation into products for sale
- Products and services in intermediate stages of completion
- Long-term contract balances
- Finished goods

ii. The cars are bought for use in the Appellant's car hire business. The Appellant is not selling the cars to the drivers for profit. That is not their business. It is the Appellant's choice whether they engage drivers who do not own a car.

iii. The Appellant provides the vehicles for a fee (a rental to all intents and purposes), so that they can carry out their business. The drivers do not work for the Appellant for the dual purpose of making money from fares and simultaneously buying a car which they are obliged to use for the Appellant's business. If the Appellant choses to give the car to the driver when they deem the car to no longer be cost effective, that is a matter for them. The accountancy treatment of it and then the tax treatment of it are different matters.

iv. HMRC said that the exclusivity of the vehicle use contradicted what was said at the meeting in March 2014 and asked for evidence to corroborate the accountant's statement that each vehicle would only be used by one driver throughout its period of ownership by the business, although in any event, it would make no difference to how the vehicles should be treated in the accounts.

v. The Appellant's nominal ledger describes the drivers payments as 'Car Rental'. Why would they be called this, if that was not what was taking place?

vi. HMRC were advised at the March 2014 meeting that 'Repairs costs' were for repairs to owned vehicles and 'motor expenditure' was petrol and insurance for owned vehicles.

vii. HMRC asked to be provided with written evidence of the agreements between the drivers and the Appellant supporting the claim that payments made by drivers were not rental payments but payments on account of their eventual purchase of the vehicles.

viii. HMRC also requested details of the drivers connected with a list of 10 cars which the accountants had previously identified as vehicles sold on to drivers.

30. HMRC also advised that they were issuing an opening notice of a check into the partnership's 2013 tax return.

31. The Appellant's accountants replied that they could appreciate that some confusion had arisen as to the exact nature of the business and that this had become apparent from the points raised by HMRC. They said that what they had "sought to do was to go behind the misconceptions held and look and present to HMRC the reality of the manner the business was administered". What they were presenting to HMRC were the "actual facts" of what took place and not what they previously understood. They appreciated and were well aware of the accounting and VAT entries that would be required to reflect the reality of the nature of trade. They added:

i. The petrol and repairs refer to those vehicles that are not subject to the nature of this correspondence. They explained that with regard to such apparent anomalies, the business had a number of new leased vehicles which were not subject to subject to sale on arrangements.

ii. The business paperwork does not reflect the facts of what took place. The agreement with the drivers was that 60 payments were to be made on a "long term hire" basis and if any payments were missed the agreement could be cancelled, though this rarely, if ever, occurred.

iii. The key point to be considered is that it was agreed with the drivers at commencement that at the end of the fixed period the legal ownership of the vehicle would be transferred to the driver and the payments they had made represented the purchase price.

iv. A copy 'Drivers Car Hire Agreement' was provided, (although did not in any way on its face, reflect the agreement described by the accountants).

v. A copy list of drivers who had purchased vehicles was also provided.

32. HMRC replied that they were firmly of the view that the figure relating to vehicles shown in the accounts to 31 March 2012 as purchases - £57,324 and written-off were not treated correctly for taxation purposes. The vehicles were capital in nature and their value at the date of disposal did not have any bearing on this. The vehicles should have been dealt with under the Capital Allowance legislation and

reflect the changes to it from 6 April 2009 (Schedule 11 Para 26-29-Finance Act 2009).

33. HMRC commented that the accountants latest representations describing the treatment within the business of the second hand vehicles, was entirely different to what had been described at HMRC's visit in March 2014 and the copy records provided. The newly introduced 'facts' were not supported with any written evidence. It was also odd that the situation had existed over such a long period without the apparent incorrect accounting treatment of the cars coming to light.

34. HMRC said that they intended to make additions to the net profit shown in the Partnership tax returns from 2010 to 2013 based on vehicle purchase details previously provided and having factored in all of the carried forward figures from 2010.

35. In the 2012 year, the cost of vehicles acquired in that year (£57,325) was claimed in full, as 'Cost of Sales' expenditure. Capital allowances would have been allowable at £13,613 on the vehicles purchased that year and on the written down values carried forward from 2011. HMRC therefore proposed to make additions to Partnership net profit for 2012 of £43,712.

36. For other years, HMRC assumed the treatment was the same for vehicles purchased in those years and proposed additions as follows:

Year	Car cost (£)	Capital Allowance (£)	Additional (£)
2010	5,766	1,153	4,613
2011	39,067	6,269	32,798
2013	43,855	14,648	29,207

The capital allowance figures shown included those given on the written down value from the previous year, with the exception of 2010. The new rules did not apply for 2009.

37. On 5 August 2015 HMRC issued amendments to the Appellant's partnership assessments for the years 2010, 2011, 2012 and 2013.

38. On 25 August 2015 the Appellant's accountants appealed the amendments. HMRC treated this as a request for a statutory review.

39. HMRC's review, upholding the decision of 5 August 2015, was issued on 21 December 2015.

40. The Appellant lodged a Notice of Appeal of the decision with the Tribunal on 12 January 2016.

Evidence

41. The bundle of documents prepared by HMRC consisted of:

(1) Copy Partnership statement and Tax returns of the Appellant for the relevant years
(2) Copy sample car hire agreement
(3) Copy notes of the meeting between the parties on 25 March 2014
(4) Correspondence between HMRC and the Appellant's agent.
(5) Closure notices, Discovery notices and Notices of Appeal.
(6) Witness statements by the two partners in Waterloo Car Hire, Mr Melvyn Sheath and Miss Denise McConkey
(7) Skeleton arguments by both parties
(8) Miss Denise McConkey also gave oral evidence to the Tribunal

Relevant legislation

42. The relevant legislation is contained in:

Capital Allowances Act 2001

Capital expenditure

Section 33
In calculating the profits of a trade, no deduction is allowed for items of a capital nature.

Short life assets

Section 83 - Meaning of "short-life asset"

Plant or machinery in respect of which qualifying expenditure has been incurred is a short-life asset if -

(a) its treatment as a short-life asset is not ruled out by section 84, and
(b) the person incurring the expenditure elects for the plant or machinery to be treated as a short-life asset.

Section 84 - Cases in which short-life asset treatment is ruled out

Treatment of plant or machinery as a short-life asset is ruled out in any of the cases listed in column 1 of the Table, unless an exception listed in column 2 applies.

Table

Short-life asset treatment ruled out	Exception if any
3. The plant or machinery is a car (as Defined by s268A)	The car is within s82(4) cars hired out to persons

Taxes Management Act 1970

Assessment where loss of tax discovered

29(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.

29(3) Where the taxpayer has made and delivered a return undersection 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.

29(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.

29(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 or section 8 or 8A of this Act in respect of the relevant year of assessment;

(b) or 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.

30B Amendment of partnership statement where loss of tax discovered

(1) Where an officer of the Board or the Board discover, as regards a partnership statement made by any person (the representative partner) in respect of any period-

(a) that any profits which ought to have been included in the statement have not been so included, or

(b) that an amount of profits so included is or has become insufficient, or

(c) that any relief or allowance claimed by the representative partner is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (3) and (4) below, by notice to that partner so amend the partnership return as to make good the omission or deficiency or eliminate the excess.

(2) Where a partnership return is amended under subsection (1) above, the officer shall by notice to each of the relevant partners amend-

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

(b) the partner's company tax return,

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

(3) Where the situation mentioned in subsection (1) above is attributable to an error or mistake as to the basis on which the partnership statement ought to have been made, no amendment shall be made under that subsection if that statement was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(4) No amendment shall be made under subsection (1) above unless one of the two conditions mentioned below is fulfilled.

(5) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by-

(a) the representative partner or a person acting on his behalf, or

(b) a relevant partner or a person acting on behalf of such a partner.

(6) 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 representative partner's partnership return; or

(b) informed that partner 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.

(7) Subsections (6) and (7) of section 29 of this Act apply for the purposes of subsection (6) above as they apply for the purposes of subsection (5) of that section; and those subsections as so applied shall have effect as if-

(a) any reference to the taxpayer were a reference to the representative partner;

(b) any reference to the taxpayer's return under section 8 or 8A were a reference to the representative partner's partnership return; and

(c) sub-paragraph (ii) of paragraph (a) of subsection (7) were omitted.

(8) An objection to the making of an amendment under subsection (1) above on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the amendment.

(9) In this section-

"profits"—

(a) in relation to income tax, means income,

(b) in relation to capital gains tax, means chargeable gains, and

(c) in relation to corporation tax, means profits as computed for the purposes of that tax;

"relevant partner" means a person who was a partner at any time during the period in respect of which the partnership statement was made.

(10) Any reference in this section to the representative partner includes, unless the context otherwise requires, a reference to any successor of his.

36(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).

36(1B) In subsections (1) and (1A), references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.

The Appellant's case

43. The grounds for appeal as stated in the Notice of Appeal to the Tribunal are:

> "The partnership contends that part of the trade is the buying and selling of motor vehicles. The profit or loss on said transactions are of a revenue nature. HMRC contends that income received in respect of the above are payments for hire, and motor vehicles are treated as capital (items). The dispute is in relation to the correct accounting treatment of the vehicles in the partnership's accounts."

44. The Appellant's skeleton argument prepared by Mr Gance summarised the grounds of appeal in more detail:

i. The Partnership has been described as a 'taxi operation'. This description of the trade is incorrect to such an extent that it could have had a significant bearing on the outcome of HMRC's enquiry. The partnership operates a mini cab hire business.

ii. HMRC refer to the meeting on 25 March 2014, in which information is alleged to have been provided that would have a distinct bearing on how the assessments are dealt with. HMRC's minutes of the meeting are not agreed.

iii. HMRC say that they are relying on internal advice in asserting that the purchase of cars should not be included in cost of sales. No copy of that advice had been provided.

iv. With reference to the discovery assessment, nowhere in any of the communications from HMRC was s 30B TMA referred to.

v. The issuing of a Notice under s 12AC TMA 1970 would have to be in writing. Nowhere in the representations made by HMRC does it state that a 'Notice' was ever issued for 2012-13.

vi. Expenditure on the purchase of cars is purely an expense ultimately for the benefit of drivers as part of their self-employed income. Because this benefit is bestowed by way of vehicles should not be prejudicial. By way of analogy, a builder can buy a building and have it treated as a purchase whereas in the 'main', any such acquisitions would be treated a 'capital' item that would

appear in a balance sheet. In other words, just because the cars are purchased does not mean it should be treated as a capital asset.

45. At the hearing, Mr Fox for the Appellant reiterated the points made by Mr Gance in his skeleton argument.

46. Mr Fox said that an enquiry by HMRC cannot be conducted without the taxpayer being informed of the authority by which it undertakes the enquiry and the relevant law being applied. During the enquiry no explanation was offered to the Appellant as to the discovery process.

47. To compound matters, in their statement of case and skeleton argument, HMRC erroneously referred to s 29 TMA with regard to the discovery assessment when they should have referred to s 30B TMA. Section 29 TMA is not relevant. The principles established under Article 6 of the European Convention on Human Rights, in terms of the Appellant having the right to a fair hearing, have clearly been infringed.

48. The notes of the meeting which took place on 25 March 2014 had not been signed by the Appellant and are not agreed.

49. The Appellant's witness statements clearly stated that the second-hand cars were sold to the drivers over a period of time, and part of the monies paid by the drivers represented payment for the vehicles. The drivers paid £125 a week plus £10 per week for the PDI's. The cars were transferred to the drivers when they were no longer cost-effective. The drivers were responsible for their own insurance and maintenance of vehicles, which would not have been the case were they simply hiring vehicles. HMRC assert that the vehicles remained the property of the Appellant during the period they were used by the drivers. This is simply not true and not borne out by the evidence.

50. Unfortunately the sample agreement provided to HMRC related to one of the newer vehicles which had been hired to a driver. That car had actually been purchased new by the Appellant on finance. The agreement is not representative of the agreements reached with drivers relating to the second-hand vehicles which evidenced the agreement as to price and a payment schedule. Regrettably the Appellant's proprietors had not retained a copy sample of those agreements

51. Mr Fox referred to the case of *Michael Mabutt and The Commissioners for HMRC* [2016] UKFTT 306, TC05075. He could not during the course of the hearing recollect the name of the case or its reference, which he provided with additional representations following the hearing. In that case the sole issue under consideration was whether a valid enquiry notice was served under Section 9A, TMA 1970. The Tribunal heard that Mr Mabutt submitted his tax return for the year ended 5 April 2009. HMRC wrote to him and his agent acknowledging receipt of the return "for the year ended 6 April 2009. We are writing to tell you that we intend to enquiry into this return". Mr Mabutt's representative argued that HMRC were attempting to open an enquiry into a non-existent return because there was no such tax year as one ended on 6 April 2009. HMRC argued that the error was minor and did not affect the validity

of the notice and in any event it would have been apparent which year HMRC were referring to from the surrounding correspondence. HMRC relied on Section 114(1), TMA 1970 to correct the error. The Tribunal found that where a date is fundamental to a document, that date must be correct. HMRC's letter advised the tax payer of its intention to open of an enquiry in to a return for a year that did not exist. As a result the Tribunal held that the notice did not constitute a valid notice of enquiry under Section 9A, TMA 1970 and that as no valid enquiry had been opened HMRC were out of time to raise assessment.

HMRC's submissions

52. Mr Corbett for HMRC said that with regard to the revenue assessments for the years 2012 and 2013, the onus of proof rests at common law with the Appellant to show that the assessments are incorrect. Section 50(6) TMA 1970 recognises this:

> Section 50(6)
> If, on an appeal notified to the tribunal, the tribunal decides-
> (a) that, the appellant is overcharged by a self-assessment;
> (b) that, any amounts contained in a partnership statement are excessive; or
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

53. With regard to the discovery amendments for 2009/10 and 2010/11, the onus sits with HMRC to show that they have discovered a loss of tax that can be assessed under section 30B within the time limits in section 36.

54. During the enquiry into the 2011-12 return, the officer discovered that due to the treatment of the cars, the assessment to tax for 2009-10 and 2010-11 had become insufficient. Under s 30B(4) an assessment could only be made if the one of two conditions are fulfilled.

> (1) The first condition contained in s 30B(4) was met as the officer believed that as an accountant, the agent acting on behalf of the Appellant should have been aware that cars were excluded from being treated as short life assets. If he was not aware of this, it was careless of him not to check in what circumstances HMRC would accept a claim that a car had an economic life of less than one year.
>
> (2) The second condition contained in s 30B(6) was met as the car purchases were included in the cost of sales with no analysis of what was included and no officer could have been expected to know that it included the purchase of cars to be used as taxis in the business.

55. The time limit in s 36(1) applies (20 years) as the loss was brought about by the negligence of the agent acting on the Appellant's behalf.

56. The evidence supplied clearly shows that the motor vehicles are hired to the drivers on a weekly basis. The hire agreement provides for payment in advance and gives the partnership the right to cancel if there are arrears of rent of more than seven

days. There is nothing in the agreement to prevent the driver from terminating the agreement at any time.

57. The vehicles are said to be disposed of for no charge when they are deemed to be no longer cost effective for use by the partnership. How exactly the vehicles are disposed of and the use of them following disposal is not relevant.

58. The vehicles remain the property of the Appellant throughout the period of use by the partnership. They are hired to drivers for use as mini cabs in the business and therefore should be treated as fixed assets in the balance sheet and cannot be treated as stock in trade.

59. No argument or any associated evidence has been supplied relating to the sale of any of the cars.

60. Cars are excluded from being treated as short life assets under Capital Allowances Act 2001 s 83 and s 84.

61. The cars should be treated as fixed assets and be dealt with under the capital allowances legislation contained in the Finance Act 2009 Schedule 11 Paras 26-29 and the Capital Allowances Act 2001 section 83, section 84, section 104A, 104AA, 104D, 104F and 268C.

Conclusion

62. With regard to the revenue assessments for the years 2012 and 2013, the onus of proof rests, with the Appellant to show that the assessments are incorrect. Therefore unless the Appellant can produce evidence to show that on the balance of probabilities it has been overcharged by the assessments the 2012 and 2013 assessments must stand.

63. With regard to the discovery amendments for 2010 and 2011, the onus rests with HMRC to show that they have discovered a loss of tax that can be assessed under Section 30B. These amendments are based on the documents and information supplied for each of the years and do not rely on any presumption of continuity.

64. As far as deductions for tax purposes are concerned, items of a capital nature are not allowed. This is set out in s 33 Income Tax Act (Trading and Other Income) Act 2005. This is one of the instances where tax rules or principles take precedence over generally accepted accounting practice.

65. What constitutes a capital item is not defined by statute. Whether expenditure is capital is a question of law. In this case HMRC were reliant on whether the facts as presented were sufficient to demonstrate that the cars in question are revenue rather than capital items.

66. At the outset, when the Appellant's business operations were discussed and the records made available, it was never suggested that the approach which was later stated, was the actuality of what was taking place. The notes show that nominated

partner was at this meeting and made no comment as to the alternative treatment later suggested.

67. HMRC asked whether the accountants were able to provide any written evidence, such as a contract, that drivers entered into an instalment plan at the outset. None had been offered at the meeting.

68. If part of the business was selling cars, contractually, the sale would occur at the outset. Instalment payments would essentially be repayment of a loan with the driver being a debtor. The payments would not be shown as an income receipt when each instalment was paid. If the cars were indeed rented to the drivers each instalment would be treated as an income receipt. Further as HMRC say given that the Appellant is a VAT registered business if the payments were treated as income this would have further implications.

69. The only written evidence of an arrangement between the Appellant and a driver was a copy of a 'Driver Car Hire Agreement', in which neither the transfer of ownership in the form of a sale, nor the terms of such an arrangement were mentioned.

70. The available evidence shows that the second hand vehicles were being hired to the drivers. There is no evidence that the cars were, during the period of use by the drivers, being purchased under some form of instalment plan.

71. For an agreement for sale (of the cars) to exist and for title to pass either at the outset or on payment of a final instalment some form of written contract incorporating appropriate terms and conditions would have to exist. No such evidence has been supplied by the Appellant.

72. The only evidence provided, which the Appellant now say relates to one of the new vehicles which were not sold off to drivers is a hirer agreement which clearly shows that title to the cars remained with the Appellant throughout and was terminable by the Appellant on non-payment of the hire fee.

73. Items of a capital nature cannot be treated as stock. The cars were purchased for use in the Appellant's business to generate profit and promote driver loyalty. The cars were, in our view, fixed assets subject to capital allowance legislation and not items that could properly be included in "cost of sales"

74. In our view the case of *Michael Mabutt* has no relevance to this appeal. The erroneously reference to Section 29, TMA 1970 by HMRC in their statement of case and skeleton argument was after the assessment and in any event remedied before the hearing. The actual notices issued by HMRC correctly stated that the enquiries were being opened under Section 12AC, TMC 1970 and the subsequent notices of assessment clearly stated that HMRC were issuing a closure notice and revenue assessment in respect of 2011/12 and 2012/13 and discovery assessments in respect of years 2009/10 and 2010/11 in respect of the discovery amendments.

75. The cost of purchase of the vehicles represented revenue expenditure and not capital expenditure.

76. We do not accept that any omission by HMRC to mention the specific legislation, under which either the revenue assessments or discovery assessments were made, invalidated them. The tax payers and their agent were plainly aware that notices had been issued under Section 12A TMA 1970, and the reasons why the enquiries had been opened. The error in HMRC's statement of case and skeleton argument in referring to section 29 TMA 1970, as opposed to section 30B TMA 1970 was remedied prior to the hearing and did not operate retrospectively to invalidate the early assessments.

77. For the above reasons we dismiss the appeal. We confirm the Revenue assessments for 2011/12 and 2012/13, the discovery assessments for 2009/10 and 2010/11 are confirmed.

78. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 9 NOVEMBER 2016