[2017] UKFTT 462 (TC)

TC05925

Appeal number: TC/2014/05749

Income Tax – Failed avoidance scheme – No in-time enquiry made by HMRC – Discovery assessment – Whether discovery 'stale' – No – Whether the condition in s 29(5) TMA fulfilled – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CLIVE BEAGLES **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at the Royal Courts of Justice, Strand, London WC2 on 16 and 17 May 2017

Michael Firth, Counsel, instructed by KPMG LLP, for the Appellant

James Henderson, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. Mr Clive Beagles appeals against a "discovery assessment", in the sum of £437,389.60, to disallow a loss claimed on the sale of a relevant discounted security ("RDS") in his 2001-02 self-assessment tax return. The assessment was issued by HM Revenue and Customs ("HMRC"), under s 29 of the Taxes Management Act 1970 ("TMA"), on 15 January 2008 and was upheld on 26 September 2014 following a review.

2. Mr Michael Firth, who appears for Mr Beagles, contends that the discovery was stale when the assessment was made and, as Mr Beagles had made a full disclosure on his return, from which a HMRC officer could be reasonably expected to have been aware of an insufficiency to tax, the condition in s 29(5) TMA has not been fulfilled. Accordingly, he says, the assessment cannot be valid.

3. For HMRC, Mr James Henderson contends that there is no basis for introducing a test of staleness into s 29(1) TMA and, even if there was, such a test would have no application on the facts of the present case. He also submits that the s 29(5) TMA condition has been satisfied and therefore the officer was entitled to make the assessment.

4. There are therefore, three issues before the Tribunal:

(1) Whether a discovery can become stale;

(2) If so, whether the discovery in the present case was stale at the time the assessment was made; and

(3) Whether the condition in s 29(5) TMA has been satisfied.

5. Before addressing these issues it is first convenient to set out the factual background to the case and the relevant legislative provisions, s 29 TMA and paragraph 3 of schedule 13 to the Finance Act 1996. Also, although throughout this decision I have referred to HMRC, this should be read where appropriate as a reference to the Inland Revenue.

Evidence and Facts

6. In addition to several bundles of documentary evidence, which included correspondence between the parties and a copy of the 2001-02 self-assessment tax return filed by Mr Beagles, I heard from Mr Brian Manning, the HMRC officer on whose instruction the discovery assessment was issued.

7. Although I found Mr Manning to be a credible witness there were times during his cross-examination by Mr Firth when he was reluctant to answer a question directly. He also appeared to be generally defensive in his answers. However, to be fair to Mr Manning, the events on which he gave evidence occurred more than ten years ago and it is perhaps not surprising that his recollection was not as clear as might have been the case had they been more recent.

8. With that in mind, and on the basis if this evidence, I make the following findings of fact.

9. In 2001-02 Mr Beagles utilised a tax avoidance scheme designed to produce a tax deduction with no corresponding taxable amount. The scheme, which had been promoted by KPMG, was the same as that considered by the Special Commissioner (Dr John Avery-Jones CBE) in *Astall and Edwards v HMRC* [2008] STC (SCD) 142 ("*Astall*").

10. At [2] of his decision the Special Commissioner outlined the scheme as consisting:

> "… of the appellants settling a small sum in a trust under which he has a life interest. The settlor lends money to the trust in return for a security issued by one of the trustees, a company. The terms of the security are that it is redeemable in 15 years at 118% of the issue price but the appellant can redeem the security at 100.1% of the issue price between one and two months after issue. If a condition relating to the dollar-pound exchange rate, which is designed to have an 85% chance of being satisfied, is satisfied within one month and a notice to transfer the security is given, the term of the security becomes 65 years (with the same redemption price) but the purchaser can redeem it at 5% of the redemption price (about 6% of the issue price) on seven days' notice. The redemption terms are designed to satisfy the definition of a relevant discounted security within Sch 13 to the Finance Act 1996. The object is that the appellant claims the difference between the issue price and 6% of the issue price (less a turn for the purchasing bank) as a loss on a relevant discounted security, while the difference remains in the trust for the benefit of the appellant. The same scheme was entered into by 64 people having an income of at least £1m, with total losses claimed of about £156m."

11. In essence, the issue in *Astall* was whether the security was an RDS as defined by paragraph 3 of schedule 13 to the Finance Act 1996. In his decision, which was upheld by the High Court (reported at [2008] STC 2920) and the Court of Appeal (reported at [2010] STC 137), the Special Commissioner held that the scheme did not achieve its aim as the security was not an RDS. In particular, a 'market change' condition that had been inserted into the arrangement as an "anti-Ramsey" device served no commercial purposes and should be ignored as should the possibility of a purchaser not being found. It was also clear that the early redemption option would be exercised given that, as the Special Commissioner observed (at [21(3)], "no purchaser would have considered holding the securities for 65 years".

12. On 29 January 2003 Mr Beagles filed his self-assessment tax return. The figure entered in box 15.8 of the return, *Post-cessation expenses, pre-incorporation losses brought forward and losses on relevant discounted securities, etc.*, was £1,093,474. In box 23.5, *Additional information*, it was stated:

> "Please see the attached Appendix detailing the transaction which resulted in the income tax loss shown in box 15.8"

13. The following information was provided in that Appendix:

"**Appendix One – Information provided in the 2002 Return as referenced at box 23.5 on page 9 of the 2002 Return.**

Clive Beagles (UTR … [number provided]
Tax return for the year ended 5 April 2002
Box 23.5 Additional Information

Clive Beagles (the "Settlor") is the settlor and life tenant of the Clive Beagles 2001 Life Interest Trust established on 19 December 2001 (the "Trust"). The other beneficiaries are members of the Settlor's family. Form 41 G was submitted on 10 January 2003 to Nottingham Trusts and the trustees' tax reference is [reference number provided]. The Trust is UK resident. As a settlor interested trust taxable income and capital gains arising in the Trust have been included in the Settlor's return.

On 21 December 2001 ("the Issue Date") the Settlor subscribed for a security (the "Security") from Office Contracts Limited (the "Issuer") acting on behalf of and as trustee for the Trust for the sum of £1,159,573 (the "Issue Price"). The other trustees are Clive Beagles and [his wife]. The trustees were required to issue the Security under clause 15 of the Trust Deed. The terms of the Security were as follows:

1. The Security was redeemable on the 15th anniversary of the Issue Date at £1,368,296 (the "Principal Amount"). It qualifies as a Relevant Discounted Security under the terms of Schedule 13 Finance Act 1996.

2. The Security could be redeemed at the Settlor's option between one and two months after the Issue Date at a figure equal to 100.1/118 of the Principal Amount.

3. In the event that the US dollar/sterling rate remained within a band specified by the terms of the Security at the end of a period of one month following the Issue Date and a notice was delivered to the Issuer that the Settlor intended to transfer the Security to a third party, the redemption date of the Security became the date 65 years after the Issue Date. (A third party is identified in the Security as a person who is not an associate of the holder of the Security within the meaning of s 435 of the Insolvency Act). In the event that such a transfer took place the new holder of the Security could elect for the note to be redeemed at an amount equal to the greater of the open market value of the Security and 5% of the Principal Amount on a date not more than 28 days after acquiring the Security.

On 25 February 2002 the Settlor delivered the notice referred to in 3 above to the Issuer and subsequently sold the Security to S G Hambros Bank & Trust (Jersey) Limited, an unconnected purchaser for £66,466. SG Hambros Bank & Trust (Jersey) Limited was first approached on 4 February 2002 regarding the possible acquisition of the Security. Legal

> costs of £367 were incurred in arranging the sale of the Security which are relevant costs under Para 1(4) Schedule 13 Finance Act 1996.
>
> On 12 March 2002 the Issuer redeemed the Security for £68,415 in accordance with the terms referred to in 3 above.
>
> As a result of the sale mentioned above the Settlor incurred a loss as defined in Para 2 Schedule 13 Finance Act 1996 of £1,093,474 being the sale proceeds received of £66,466 less the issue price of £1,159,573 and less the legal costs of £367. This loss is eligible for offset against income of the Settlor in accordance with Para 2 Schedule 13 Finance Act 1996."

14. It is common ground that HMRC did not open an enquiry under s 9A TMA into the return but issued a discovery assessment, on 15 January 2008, after the time limit for opening an enquiry under s 9A had expired.

15. Mr Brian Manning, in his evidence, explained that in September 2003, when he started working at HMRC's Special Investigations Section ("SIS"), he had assumed responsibility, from another Inspector, for a number of schemes which sought to claim RDS losses. These included the KPMG promoted RDS scheme utilised by Mr Beagles and others. Mr Manning continued the investigations into the KPMG RDS scheme on a sample basis of five cases. These included the cases of Mr Astall and Mr Edwards, the appellants in the *Astall* litigation. In addition to these five cases, which were subject to detailed enquires, enquires under s 9A TMA were opened into the returns of all those, other than Mr Beagles, who had used that scheme.

16. Mr Manning explained that prior to the implementation of the Disclosure of Tax Avoidance Schemes ("DOTAS") provisions in the Finance Act 2004 HMRC had identified users of schemes through analysis and examinations of tax returns. The offices most likely to identify schemes aimed at high net worth individuals were briefed on recent commonly sold schemes and how they could be identified. It would then be necessary for staff in those offices, comprising Complex Personal [Tax] Return ("CPR") teams, to consider the returns filed to ascertain if a scheme had been utilised, something Mr Manning described as being "not quite a needle in a haystack but not far off".

17. On 8 July 2004, Mr Manning received the following email from a CPR team colleague:

> "Brian,
>
> Bad news I'm afraid, in that a case has just been received on CPR (following a repayment claim in respect of 2001-02), with a 2001-02 Return containing a KPMG RDS loss of £1,093,474. The Return was received in January 2003 and so we've missed the boat for a Section 9A enquiry. This is a bit galling as the service office were obviously aware of the risk having printed off your RDS avoidance page from your SIS website in July 2003! I'm going to follow up with RIAT [Risk and Assessment Team] how the case was missed from their profile.

> Anyway, in order that you can update your database, the case details are as follows:
>
> Taxpayer: C Beagles
> UTR: [number]
> Loss: £1,093,474
>
> The Return contains the usual one page schedule sent with the KPMG cases and so any discovery would prima facie appear doomed. Let me know if you'd like a copy of the relevant Return pages."

18. Mr Manning responded later that day requesting a full copy of Mr Beagles' return, correspondence by which the return was submitted and asked why it had not been "taken up". Mr Manning suggested that his colleague should write to Mr Beagles to advise that HMRC was looking into losses on RDS and that a discovery assessment under s 29 TMA may be made if appropriate to recover any tax lost. Mr Manning's email concluded by stating:

> "When it comes to issuing the assessment we will take advice from the discovery expert."

19. A copy of Mr Beagles' return was sent to Mr Manning with a covering letter, dated 14 July 2004. The letter, after confirming that there was no covering correspondence with the return continued:

> "Having spoken to RIAT here, it appears the case was captured in March 2003, and made its way to the SA data warehouse in June 2003 (it can take 3 months for data to transfer across). RIAT ran their profile on [box] 15.8 in May 2003, and thus the case was not picked up. I have no explanation as to why [the] Service [office] did not refer the case up to us here in CPR earlier, other than that they are under severe work pressure and a short staffed.
>
> Having discussed your selected letter to the taxpayer with [a colleague], we both felt uneasy as to the wording therein. We could not see the benefit of a potential discovery letter, and would rather leave matters until we can be sure we have grounds for discovery. Can you let me have your further thoughts?"

20. In an email of 22 July 2004, in response to the letter of 14 July he wrote:

> "If you are not comfortable issuing a pre-emptive letter on discovery don't issue it. I have issued one in another case but that is style rather than substance.
>
> Can you put this aspect on a (very) long BF so that if we do get anywhere with RDS cases we don't overlook to reconsider discovery."

21. Mr Manning explained that by BF he meant "Bring Forward" and that BF was used by HMRC as an abbreviation to diarise a matter to be reconsidered at some future specified date. However, he was unable to shed any light on why Mr Beagles' return, which contained identical disclosure to that contained in the returns of the other taxpayer's who had utilised the KPMG RDS scheme, had not been selected for an enquiry.

22. In addition to the KPMG RDS scheme, Mr Manning was also responsible for an RDS appeal listed before the Special Commissioners, *D L Campbell v Inland Revenue Commissioners* [2004] STC (SCD) 396 ("*Campbell*"), in which, in a decision released on 6 July 2004, the appellant successfully appealed against a decision of HMRC, applying a Ramsay approach (after the decision of the House of Lords in *W T Ramsay Ltd v Inland Revenue Commissioners* [1981] STC 174), to disallow a loss on the transfer of an RDS. Although HMRC appealed to the High Court against the decision of the Special Commissioners that appeal was subsequently withdrawn.

23. On 25 November 2004 the House of Lords gave judgment in *Barclays Mercantile Bank Finance plc v Mawson (Inspector of Taxes)* [2005] STC 1 ("*BMBF*") and *Scottish Provident Institution v Inland Revenue Commissioners* [2005] STC 15 ("*STI*"). Both cases concerned the Ramsay approach and the decision of the Special Commissioners in *Campbell* was described by Lord Nicholls, at [38] in *BMBF* as "perceptive". Mr Manning confirmed in evidence that he considered that the application of the judgment in *SPI* would reinforce HMRC's challenge to the KPMG RDS scheme.

24. As Mr Manning considered that there were differences between *Campbell* and the KPMG RDS scheme, he continued with the five sample enquiries into the KPMG scheme. On 1 August 2005 he wrote to KPMG as follows:

> "We [HMRC] have seen leading counsel on this [KPMG RDS] scheme with reference to one of the individuals in the sample (Mr G Edwards). Leading counsel strongly supports HMRC's view that the scheme does not activate the tax loss. I shall refer to the grounds for Counsel's opinion as being the "*Ramsay* approach", although this is essentially the same purposive approach to statutory construction as found in cases such as *Carreras* and *SPI* where the facts of the case were quite different from *Ramsay*. In this light it is not appropriate even with the risks which any litigation involves to offer your clients any relief by way of compromise. It is our intention to use Mr G Edwards as the sample case, although we shall [be] happy to include Mr Astall as well.
>
> It seems to us that Mr G Edwards is a suitable case to bring to the Commissioners and that your client's time to devote to that is not unreasonable in the light of the tax relief he claims. If Mr Edwards RDS claim succeeds in the courts by reason that a Ramsay approach does not apply subject to your confirmation below it seems to me that all such KPMG cases for 2001-02 and 2002-03 will succeed even with those facts identical to Mr Astall's scheme."

In evidence, Mr Manning confirmed that it was his view, in addition to HMRC's as stated in the letter, that the KPMG RDS scheme did not activate the loss and therefore did not work. After referring to the question of a litigation timetable, evidence required and listing arrangements, the letter continues:

> "… I have compared the [KPMG] lists of clients for each year with my own data which though not complete for 2002-03 indicates that for 2001-02 Mr [named taxpayer] should be added as should Mr C Beagles (an enquiry was not raised on Mr Beagles within the enquiry

> window but if the whole or part of the scheme is found not to succeed my colleague will consider a discovery assessment).

The letter then considered the decision in *Campbell* before turning to the KPMG RDS scheme. It refers to a letter of 11 March 2005 in which Mr Manning:

> "… pointed out that in *SPI* their Lordships did apply Ramsay to the 'mechanistic' provisions of Ch II Pt IV FA 1994".

Although the letter of 11 March 2005 was not available, Mr Manning confirmed that he did not think that he would have changed his opinion or view as to the application of *STI* or the KPMG RDS scheme between 11 March and 1 August 2005.

25. Following a meeting on 5 October 2005 between KPMG and HMRC at which technical issues associated with the claim for losses under the KPMG RDS scheme was discussed, KPMG replied to Mr Manning's 1 August 2005 letter on 7 October 2005. Insofar as it concerned Mr Beagles, the letter stated:

> "I struggle to see how a discovery assessment can be in point. The provisions of s 29 TMA deal with the matter of discovery. The Revenue can only issue discovery assessments if:
>
> (i) There has been negligent or fraudulent conduct on behalf of the taxpayer or;
>
> (ii) Based on the information provided the Inspector could not have reasonably expected to be aware of the underpayment of tax.
>
> Mr Beagles tax return was prepared on the same basis as all the other taxpayers. There is no question of fraud or neglect on Mr Beagles behalf. It is clearly impossible for the Revenue to raise a discovery assessment."

26. In his response, dated 6 December 2005, Mr Manning wrote, in regard to Mr Beagles:

> "… the question of discovery does not need negligence but I suggest that we return to Mr Beagles claim when KPMG's RDS scheme has been resolved."

27. On 3 April 2006 Mr Manning received the following email from a member of the CPR team:

> "Good morning Brian,
>
> I understand from our Team Leader [name] that you want a discovery assessment made for 2001-02 on one of our taxpayers – MR C BEAGLES.
>
> Would you please let me have details of the assessment you need (amount, description, etc) and I will undertake the necessary administrative work on your behalf. I assume that if any appeal and/or correspondence is received after the assessment has been made that it will need to be referred to you to deal with."

28. On 6 June 2006 a further email was sent to Mr Manning as he had not responded to the 3 April 2006 email. It was assumed that this was because:

> "… you are not yet in a position to let me have details of the assessment you need."

Confirmation of this was requested as was an indication of when provision of the information could be expected.

29. In the absence of any response letters were sent to Mr Manning on 8 August 2006 and again on 1 February 2007 which requested details of the assessment "as a matter of urgency." Mr Manning, who in evidence said that he was "embarrassed" by his treatment of his colleagues, explained that he had not replied because of pressure of work saying he was, "in a sense drowning in stuff". He said that although HMRC was challenging the KPMG RDS scheme, he had not been "ready", at the time the emails and letters had been sent to him, to make a discovery assessment. This was because the KPMG RDS scheme was to be challenged before the Special Commissioners and he wanted the that tribunal's endorsement of his view that the scheme did not work.

30. Mr Manning explained that having taken over the *Campbell* case on which HMRC had applied the Ramsay approach to the closely articulated RDS legislation and lost, he was not confident that such an approach would succeed in relation to the KPMG RDS scheme which, in his view, unlike many other RDS schemes was very sophisticated. Also, as the House of Lords in *BMBF* had described the Special Commissioners decision in *Campbell* as "perceptive", and an appeal against that decision had been withdrawn by HMRC, Mr Manning felt he was on the back foot and that although he had taken a view that the scheme did not work he was not confident enough to issue a discovery assessment until the outcome of the *Astall* litigation was known. He said that if the taxpayers had succeeded in *Astall* he "would not have troubled Mr Beagles."

31. Closure notices, under s 28A TMA were issued to Mr Astall and Mr Edwards by Mr Manning on 16 January 2007. They both appealed against the amendments to their respective self-assessment tax returns made by these closure notices.

32. However, before *Astall* was heard by the Special Commissioners, Mr Manning had, on 17 May 2007, sent an email to his colleagues in the CPR team noting that the enquiry window for Mr Beagles for 2001-02 "was missed" and:

> "Whilst detailed the particulars given on Mr Beagles' disclosure sheet with his return would not enable in our view HMRC to arrive at the conclusion that Ramsay, which is a difficult concept to apply, would be competent here. We cannot deny knowing about the scheme when the enquiry window for Mr Beagles was closing and it is something of a mystery as to why this case escaped the net."

The email continues by seeking advice:

> "… as to whether a discovery assessment is competent, and whether it should be issued now or whether we should see if a tribunal found in favour of HMRC which would be grounds for positively stating that the scheme as disclosed on the return does not work. …
>
> I apologise for the extreme delay. Had a settlement been reached with KPMG this case could have been included with the appropriate discount to reflect "uncertainty in the discovery issue." Largely for that reason it was not pushed but we are in litigation with KPMG and I do not see that it would be wise to delay much further in deciding whether we do or do not have a discovery position to pursue. 2001-02 will go out of date for normal time in a matter of months."

33. The appeals of Mr Astall and Mr Edwards were heard between 16 and 18 July 2007 and the decision of the Special Commissioner (in *Astall*) released on 14 August 2007.

34. On 22 August 2007 Mr Manning again contacted the CPR team by email to inform them of the outcome in the case and that:

> "We can now say with some force that the scheme does not work. I expect that KPMG will appeal the decision but by the time that is heard in the courts we may be beyond the six year time limit.
>
> If you have not yet had advice from TAA please pass this in and let me know the outcome ie whether we can make a discovery assessment. I will write to KPMG who still appear to be acting for Mr Beagles in this respect."

35. Having received advice that a discovery assessment could be made Mr Manning delegated its issue to the office that dealt with Mr Beagles' affairs and wrote to KPMG on 28 December 2007 to advise them of this. The assessment was issued on 15 January 2008 and an appeal to HMRC against the assessment made on 8 February 2008. It was agreed, at a meeting on 7 October 2008 between Mr Manning and KPMG that Mr Beagles' position would "be placed on hold" until the final determination of the litigation in *Astall*.

36. As noted above the decision of the Special Commissioner in *Astall* was upheld by High Court and Court of Appeal and, on 3 February 2010, permission to appeal was refused by the Supreme Court.

37. Following further correspondence between the parties a review was requested on 20 May 2014. HMRC notified Mr Beagles of the outcome of the review, which upheld the discovery assessment, by letter dated 26 September 2014.

38. On 24 October 2014 Mr Beagles notified his appeal to the Tribunal.

Relevant Legislation

39. Insofar as applicable s 29 TMA (as in force at the material time) provided:

> **29 Assessment where loss of tax is 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.

(2) …

(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 is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.

(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 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 section 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.

(7) – (9) …

40. It is common ground that, as held by the Upper Tribunal in *Burgess & Brimheath Developments Ltd v HMRC* [2016] STC 579, it is for HMRC to establish the relevant conditions for the issue of a discovery assessment under s 29 TMA have been met.

41. Paragraph 3 of schedule 13 to the Finance Act 1996, 'Meaning of relevant discounted security', insofar as material to the present case provides:

> (1) Subject to the following provisions of this paragraph and paragraph 14(1) below, in this Schedule 'relevant discounted security' means any security which (whenever issued) is such that, taking the security as at the time of its issue, the amount payable on redemption—
>
> (a) on maturity, or
>
> (b) in the case of a security of which there may be a redemption before maturity, on at least one of the occasions on which it may be redeemed,
>
> is or would be an amount involving a deep gain, or might be an amount which would involve a deep gain.
>
> …
>
> (3) For the purposes of this Schedule the amount payable on redemption of a security involves a deep gain if—
>
> (a) the issue price is less than the amount so payable; and
>
> (b) the amount by which it is less represents more than the relevant percentage of the amount so payable.
>
> (4) In this paragraph 'the relevant percentage', in relation to the amount payable on redemption of a security, means—
>
> (a) the percentage figure equal, in a case where the period between the date of issue and the date of redemption is less than thirty years, to one half of the number of years between those dates; and
>
> (b) in any other case, 15 per cent.;

> and for the purposes of this paragraph the fraction of a year to be used for the purposes of paragraph (a) in a case where the period mention in that paragraph is not a number of complete years shall be calculated by treating each complete month, and any remaining part of a month, in that period as one twelfth of a year.

42. Having set out the factual background and relevant legislation I now turn to the issues identified in paragraph 4, above. In doing so, although carefully considered, it has not been necessary to refer to every argument advanced on behalf of the parties in arriving at my conclusions.

Whether a discovery can become stale

43. The Upper Tribunal (Norris J and Judge Berner) summarised the test for a discovery in *HMRC v Charlton Corfield & Corfield* [2013] STC 866 ("*Charlton*") at [37] as follows:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment. But that would not, in our view, include a case, such as this, where the delay was merely to accommodate the final determination of another appeal which was material to the liability question. Such a delay did not deprive [the Inspector's] conclusions of their essential newness for s 29(1) purposes."

The Upper Tribunal went to say at [42]:

> "… on the basis of our finding that nothing new is required except the conclusion, the question in a case such as that put by [counsel for the taxpayer] would, we suggest, not be on the collective corporate knowledge of HMRC, but on the newness of that conclusion. Without deciding the matter, we can certainly envisage an argument that the passing of a file from one HMRC officer to another could not have the effect of refreshing a conclusion that was no longer new. But that does not depend on something new being discovered by reference to HMRC's collective knowledge. It is solely concerned with the newness of the conclusion."

44. After referring to these passages from *Charlton*, the Upper Tribunal (Lord Glennie) in *Pattullo v HMRC* [2016] STC 2043 ("*Pattullo*") said, at [52]:

> "So far as concerns the question of law, namely whether any discovery under s 29(1) has to be acted upon while it remains fresh (or before it becomes stale), I prefer the submissions for the taxpayer. Quite apart from the support given to this submission by the passages in *Charlton* and *Corbally-Stourton* to which I have referred, which are highly persuasive, the requirement for the discovery to be acted upon while it remains fresh appears to me to arise on the natural meaning of s 29(1) itself. That subsection provides that 'if' HMRC discover certain matters then they may, subject to what follows later in the section, make an assessment in the amount needed to make good the loss of tax. The word 'if', like many words in the English language, has a variety of shades of meaning. It may be purely conditional. But it may equally have a temporal aspect, as in the expression 'if and when' (eg if the sun comes out we shall go to the beach). I do not regard this as stretching the meaning of 'if'. The context makes it clear that an assessment may be made if and when it is discovered that the assessment to tax is insufficient. It would, to my mind, be absurd to contemplate that, having made a discovery of the sort specified in s 29(1), HMRC could in effect just sit on it and do nothing for a number of years before making an assessment just before the end of the limitation period specified in s 34(1)."

45. As the First-tier Tribunal ("FTT") in *Pattullo* had not considered the issue of staleness, as opposed to the time limit (in s 34 TMA), or had elided the two "quite separate issues" the Upper Tribunal held, at [55], that it had erred in law. It continued, at [56]:

> "However, that is by no means the end of the matter. For the FTT have found as a matter of fact that the discovery was made between June and November 2009: see [38], [39], [53] and [56]. The assessment was made in January 2010. Those are findings of fact which, if allowed to stand, are destructive of the contention that the discovery was stale by the time that the assessment was made. I did not understand Mr Gordon [counsel for the taxpayer] seriously to contend otherwise; but if he did, I reject that contention."

46. Mr Firth contends that I am bound by the decision of the Upper Tribunal in *Pattullo* whereas Mr Henderson contends that Lord Glennie's comments in that case were obiter.

47. Mr Henderson took me to [13] to [19] of the decision of Park J in *Langham (Inspector of Taxes) v Veltema* [2002] STC 1557, in which he described the 'working of the self-assessment system' to illustrate his argument that if there was a 'staleness' test Park J would have mentioned it. Although the decision of Park J in *Langham v Veltema* was reversed by the Court of Appeal, as Henderson J, as he then was, noted in *HMRC v Household Estate Agents Ltd* [2008] STC 2045 at [24], it nevertheless approved his description of workings the self-assessment system. While it is true, as Mr Henderson says, that Park J did not mention any staleness test or requirement of newness in *Langham v Veltema*, as Mr Firth submits, that case cannot be authority for a proposition of law that it did not even consider.

48. The issue of staleness was raised before the Tribunal (Judge Mosedale and Mr Barrett) in the recent case of *Atherton v HMRC* [2017] UKFTT 831 (TC) in which it observed that:

> "215. …The Upper Tribunal in *Charlton* also said, obiter or in passing, that the assessment must follow on the heels of the discovery with some alacrity:
>
> > [37] ...all that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment.... The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment. But that would not, in our view, include a case, such as this, where the delay was merely to accommodate the final determination of another appeal which was material to the liability question. Such a delay did not deprive [the discovery] of their essential newness for s 29(1) purposes.
>
> 216. While it is inherent in the word 'discovery' that the discovery must be of something new, there is nothing overt in s 29 which requires the assessment to be proximate to the discovery: this obiter comment in *Charlton* was therefore criticised in three FTT decisions: *Pepper* [2015] UKFTT 615 (TC), *Gakhal* [2016] UKFTT 356 (TC) and *Miesegaes* [2016] UKFTT 375 (TC).
>
> 217. Nevertheless, it was followed by the Upper Tribunal in *Pattullo* [2016] UKUT 270 (TC) at [52], released on 14 June 2016 and what was said in *Pattullo* is binding on this Tribunal as it formed a part of the operative decision. So while in the May 2016 hearings of this appeal, Ms Balmer [counsel for HMRC] sought to persuade us *Charlton* was wrong on this point, by the July and September hearings she accepted we were bound by *Pattullo*. We understand that HMRC reserve the right to challenge this interpretation of s 29 if this decision is appealed."

49. I respectfully agree with the Tribunal in *Atherton* that *Pattullo* is binding on this Tribunal and that it is therefore possible for an assessment to loss its "newness" or become "stale".

Whether discovery is stale

50. As the Upper Tribunal in both *Charlton* and *Pattullo* recognised, whether an assessment has become stale is a fact-sensitive matter. However, in *Pattullo* other than agree with counsel for the taxpayer, at [53] that:

> "… it would only be in the most exceptional of cases that inaction on behalf of HMRC would result in the discovery losing its required newness by the time that an assessment was made."

Lord Glennie did not think that:

> "… it would be helpful to try and define the possible circumstances in which a discovery would lose its freshness and be incapable of being used to justify making an assessment made in January 2010."

51. That said, although Lord Glennie rejected, at [56], the appellant's argument as the FTT had found that there had been a discovery in that case between June and November 2009 and the assessment made in January 2010, he said that if there had been a discovery in July 2008, when the High Court issued its decision in *Drummond v HMRC* [2008] STC 2707 ("*Drummond*") dismissing an appeal by the taxpayer in relation to the same scheme as that utilised by the taxpayer in *Pattullo*:

> "… that on any view … the passage of some 18 months or more would, in the circumstances of this case, have made the discovery stale and incapable of justifying the assessment …"

52. It is therefore necessary to consider when the discovery was made in the present case to ascertain whether it was still "fresh" at the time the assessment. As the Upper Tribunal noted in in *Charlton*, to make a discovery, all that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. As Lord Glennie observed in *Pattullo*, at [62]:

> "…it is the state of mind of the individual HMRC inspector which is relevant, not that of some reasonable HMRC inspector."

Accordingly, in the present case, it is necessary to determine when it newly appeared to Mr Manning that the KPMG RDS scheme as utilised by Mr Beagles did not work.

53. Mr Firth contends that it is clear that Mr Manning expressed such a view in August 2005, as evidenced by the letter, dated 1 August 2005, he wrote to KPMG, which he confirmed reflected his own view (see paragraph 24, above). Mr Manning also confirmed that his view had not changed since 11 March 2005, as confirmed by the letter of that date (see paragraph 24, above). However, Mr Firth contends that it was late November 2004, after the House of Lords had given its decision in *SPI*, that it newly appeared to Mr Manning that the KPMG RDS scheme did not achieve its purpose (see paragraph 23, above).

54. Mr Firth also relies on the emails and letters from Mr Manning's CPR colleagues sent in 2006 and 2007 (see paragraphs 27 to 29, above), to say that Mr Manning had decided, prior to April 2006, to raise a discovery assessment. Additionally, Mr Firth dismisses Mr Manning's claim that he could not issue the assessment without the Tribunal's imprimatur as an example of the dangers of a witness attempting to reconstruct his thinking over a decade after the event and that in the circumstances the contemporaneous documentary evidence should be preferred over Mr Manning's recollection.

55. Given that the assessment was issued on 15 January 2008 Mr Firth submits that this is a "most exceptional case" as envisaged by Lord Glennie in *Pattullo*. He points out that, notwithstanding that the Upper Tribunal in *Pattullo* would have known that *Drummond* was appealed to the Court of Appeal, which handed down its decision on 25 June 2009 (reported at [2009] STC 2206), Lord Glennie still considered that a discovery would have been stale after 18 months "on any view" and that waiting for a decision on, or related to, the effectiveness of a scheme does not stop the discovery from becoming stale. Accordingly, he invites me to find that the discovery was incapable of justifying the assessment in the present case as it had lost its essential newness.

56. Mr Henderson however, contends that the assessment was not stale. He refers to Mr Manning's evidence that Mr Beagles' return "slipped through the net" and that in his communications with KPMG, who were acting for Beagles, it is made perfectly clear, eg the letter of 6 December 2005 (see paragraph 26, above) that Mr Manning had decided to wait for the decision of the Special Commissioners in *Astall* to ascertain whether the KPMG RDS scheme worked before coming to any conclusion.

57. This, Mr Henderson says, is consistent with the email of 17 May 2007 (see paragraph 32, above) in which Mr Manning apologises to his CPR colleagues for the "extreme delay" and refers to the "uncertainty on the discovery issue" that was not "pushed" because of the litigation with KPMG (the *Astall* case) but that as the normal time limit to issue a 2001-02 was due to expire in "a matter of months" he did not consider it "would be wise to delay much further" in deciding whether or not there was a "discovery position to pursue." Mr Henderson compared Mr Manning's position with that of the Inspector in *Pattullo* whose suspicion was converted into a positive view that there had been a discovery only after the emphatic and final decision of the Court of Appeal in *Drummond* and the refusal of the Supreme Court to grant permission to take it further.

58. I agree with Mr Henderson that there are similarities between *Pattullo* and the present case. In *Pattullo* Lord Glennie, after referring, at [62], to Dr Branigan, the Inspector who gave evidence before the FTT in that case, said:

> "… The FTT heard evidence from Dr Branigan, evidence which was subjected to detailed cross-examination. Some inspectors might be cautious in coming to a conclusion that the tax return underestimated the amount of tax due. Others might be more ready to reach such a conclusion. The tribunal were concerned with Dr Branigan's state of mind, not with that of anyone else. They heard the evidence and for the reasons given in those paragraphs they formed the view that although at an earlier time he had suspicions, until the Court of Appeal gave its decision in *Drummond* in June 2009 those suspicions were not yet sufficient in his mind to lead him to form the view that there was an insufficiency in the tax declared in the assessment. His view that there was such an insufficiency 'newly appeared' to him between June and November 2009 (FTT at [53]). It may be that he was slower and more cautious about forming this view than some other HMRC officers might have been, but it is his characteristics which matter for this

> purpose, not those of other officers. I see no reason to question the FTT's judgment on this point."

59. Like Dr Branigan in *Pattullo*, it may be the Mr Manning was slower and more cautious about forming a view that the KPMG RDS scheme did not work than some other HMRC officers might have been. In my judgment, it is clear, not only from his oral evidence but also the contemporaneous documentary evidence, that Mr Manning did not reach his conclusion that the KPMG RDS scheme did not work until it was confirmed by the decision of the Special Commissioner in *Astall*.

60. In particular:

(1) in his email of 8 July 2004 Mr Manning raised the possibility of a discovery assessment "if appropriate" and that it would be necessary to obtain advice from a "discovery expert" when "it comes to issuing the assessment" (see paragraph 18, above);

(2) the letter, dated 14 July 2004, to Mr Manning from the CPR team did not see the benefit of a "discovery letter" until "we can be sure we have grounds for discovery" (see paragraph 19, above);

(3) Mr Manning, in his letter of 1 August 2005 to KPMG says that his colleague "will consider" a discovery assessment (see paragraph 24, above);

(4) his letter, of 6 December 2005, to KPMG suggests that the issue of a discovery assessment should be delayed until the outcome of the *Astall* litigation is known (see paragraph 26, above); and

(5) the email dated 17 May 2007 from Mr Manning to his colleagues refers to whether the issue of a discovery is "competent", and whether it should be issued then or wait until the outcome of *Astall* (see paragraph 32, above).

All of which suggest that, at the time each was written, Mr Manning had not come to any firm conclusion, notwithstanding his reservations about the KPMG RDS scheme and his strong suspicion that it did not work and confirms his evidence that the decision of the House of Lords in *STI* could reinforce HMRC's challenge to the KPMG RDS scheme (see paragraphs 23 and 30, above).

61. It is only after the decision of the Special Commissioner in *Astall* had been released that Mr Manning, on 18 August 2007, contacted his colleagues in the CPR team by email to say that it could be said "with some force" that the KPMG RDS scheme "does not work" (see paragraph 34, above). It is also clear from that email that it was only then that Mr Manning wanted the advice in relation to a discovery assessment. It must follow, therefore, that it was at that point that it "newly appeared" to Mr Manning that there was an insufficiency of tax.

62. Accordingly, as the assessment was issued in January 2008, it cannot have become stale.

63. However, even if Mr Firth is right and the insufficiency had "newly appeared" to Mr Manning sometime earlier, as in *Charlton*, where the Inspector had waited for the decision of the Court of Appeal in *Drummond* before making the discovery

assessment, the assessment would still not have become stale. As the Upper Tribunal in *Charlton* observed, at [37], an assessment would not lose its "essential newness":

> "… in a case, such as this, where the delay was merely to accommodate the final determination of another appeal which was material to the liability question."

64. Having concluded that the discovery assessment was not stale, I now turn to the condition in s 29(5) TMA and consider whether it has been fulfilled.

Whether s 29(5) TMA condition fulfilled

65. Patten LJ (with whom Briggs and Simon LJJ agreed) provided the following helpful summary of principles relevant to the application of s 29(5) TMA in *Sanderson v HMRC* [2016] STC 638 ("*Sanderson*"), at [17]:

> "The power of HMRC to make an assessment under s.29(1) following the discovery of what, for convenience, I shall refer to as an insufficiency in the self-assessment depends upon whether an 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 insufficiency". It is clear as a matter of authority:
>
> (1) that the officer is not the actual officer who made the assessment (for example Mr Thackeray in this case) but a hypothetical officer;
>
> (2) that the officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law: see *HMRC v Lansdowne Partners LLP* [2012] STC 544;
>
> (3) that where the law is complex even adequate disclosure by the taxpayer may not make it reasonable for the officer to have discovered the insufficiency on the basis of the information disclosed at the time: see *Lansdowne* at [69];
>
> (4) that what the hypothetical officer must have been reasonably expected to be aware of is an actual insufficiency: see *Langham v Veltema* [2004] STC 544 per Auld LJ at [33]- [34]:
>
> > "33. More particularly, it is plain from the wording of the statutory test in section 29(5) that it is concerned, not with what an Inspector could reasonably have been expected to do, but with what he could have been reasonably expected to be aware of. It speaks of an Inspector's objective awareness, from the information made available to him by the taxpayer, of "the situation" mentioned in section 29(1), namely an actual insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an insufficiency, as suggested by Park J. If he is uneasy about the sufficiency of the assessment, he can exercise his power of enquiry under section 9A and is given plenty of time in which to

> complete it before the discovery provisions of section 29 take effect.
>
> 34. In my view, that plain construction of the provision is not overcome by Mr. Sherry's argument that it is implicit in the words in section 29(5) "*on the basis of* the information made available to him" (my emphasis) and also in the provision in section 29(6)(d) for information, the existence and relevance of which could reasonably be inferred from information falling within section 29(6) (a) to (c), that the information itself may fall short of information as to actual insufficiency. Such provision for awareness of insufficiency "on the basis" of the specified information or from information that could reasonably be expected to be inferred therefrom does not, in my view, denote an objective awareness of something less than insufficiency. It is a mark of the way in which the subsection provides an objective test of awareness of insufficiency, expressed as a negative condition in the form that an officer "could not have been reasonably expected … to be aware of the" insufficiency. It also allows, as section 29(6) expressly does, for constructive awareness of insufficiency, that is, for something less than an awareness of an insufficiency, in the form of an inference of insufficiency."

(5) that the assessment of whether the officer could reasonably have been expected to be aware of the insufficiency falls to be determined on the basis of the types of available information specified in s.29(6). These are the only sources of information to be taken into account for that purpose: see *Langham v Veltema* at [36]:

> "The answer to the second issue– as to the source of the information for the purpose of section 29(5) - though distinct from, may throw some light on, the answer to the first issue. It seems to me that the key to the scheme is that the Inspector is to be shut out from making a discovery assessment under the section only when the taxpayer or his representatives, in making an honest and accurate return or in responding to a section 9A enquiry, have clearly alerted him to the insufficiency of the assessment, not where the Inspector may have some other information, not normally part of his checks, that may put the sufficiency of the assessment in question. If that other information when seen by the Inspector does cause him to question the assessment, he has the option of making a section 9A enquiry before the discovery provisions of section 29(5) come into play. That scheme is clearly supported by the express identification in section 29(6) only of categories of information emanating from the taxpayer. It does not help, it seems to me, to consider how else the draftsman might have dealt with the matter. It is true, as Mr. Sherry suggested, he might have expressed

> the relevant passage in section 29(5) as "on the basis *only* of information made available to him", and the passage in section 29(6) as "For the purposes of subsection (5) above, information is made available to an officer of the Board if, *but only if,*" it fell within the specified categories. However, if he had intended that the categories of information specified in section 29(6) should not be an exhaustive list, he could have expressed its opening words in an inclusive form, for example, "For the purposes of subsection (5) above, information … made available to an officer of the Board … *includes any of the following*"."

He continued:

> "18. Where there is more scope for argument is in relation to the level of awareness that the relevant information needs to create in order for the condition to bar the right to raise a s.29(1) assessment. In the present context, for example, is it necessary for the information disclosed to lead the notional officer to conclude on the balance of probabilities that there is an insufficiency or must he be satisfied beyond reasonable doubt? Alternatively is some quite different test to be applied? The balance of probabilities test had found support in *Corbally-Stourton* and has been adopted in the Scottish case of *R (on the application of Pattullo) v Revenue and Customs Commissioners* [2010] STC 107.
>
> 19. But in *Lansdowne* at first instance Lewison J (at [48]) preferred to take a different and more general approach:
>
> > "Mr Coleman said that this was the wrong test. HMRC had to know with reasonable certainty of the insufficiency in question otherwise the office could not have been 'aware' of it. There is, no doubt, an epistemological debate to be had about whether you can discover or be aware of something that does not in fact exist. In the present case, for example, the commissioners decided that there was no insufficiency. Had HMRC discovered or been aware of an insufficiency before their decision that there was in fact no insufficiency? Or had they been aware of it, but then ceased to be aware of it? And now that I have disagreed with the commissioners on one of the points, are HMRC aware of it again? Or have they been aware of it throughout? But I do not consider that I need to enter into this debate. In the present case the commissioners asked whether HMRC had sufficient information to make a decision whether to raise an additional assessment. That seems to me to be the right test."
>
> 20. A not dissimilar test was applied in the Court of Appeal. The Chancellor said (at [56]):
>
> > "I do not suggest that the hypothetical inspector is required to resolve points of law. Nor need he forecast and discount what the response of the taxpayer may be. It is

> enough that the information made available to him justifies the amendment to the tax return he then seeks to make. Any disputes of fact or law can then be resolved by the usual processes. For these reasons I would dismiss the appeal of HMRC."

> 21. To the same effect, Moses LJ said (at [69]-[70]):

> "… As the Chancellor points out (at [56]), awareness of an insufficiency does not require resolution of any potential dispute. After all, once an amendment is made, it may turn out after complex debate in a succession of appeals as to the facts or law, that the profits stated were not insufficient. I have dwelt on this point because I wish to leave open the possibility that, even where the taxpayer has disclosed enough factual information, there may be circumstances in which an officer could not reasonably be expected to be aware of an insufficiency by reason of the complexity of the relevant law.

> [70] I also wish to express polite disapproval of any judicial paraphrase of the wording of the condition at s 30B(6) or s 29(5). I think there is a danger in substituting wording appropriate to standards of proof for the statutory condition. The statutory condition turns on the situation of which the officer could reasonably have been expected to be aware. Awareness is a matter of perception and of understanding, not of conclusion. I wish, therefore, to express doubt as to the approach of the Special Commissioner in *Corbally-Stourton v Revenue and Customs Comrs* [2008] STC (SCD) 907 and of the Outer House in *R (on the application of Pattullo) v Revenue and Customs Comrs* [2009] CSOH 137, [2010] STC 107, namely that to be aware of a situation is the same as concluding that it is more probable than not. The statutory context of the condition is the grant of a power to raise an assessment. In that context, the question is whether the taxpayer has provided sufficient information to an officer, with such understanding as he might reasonably be expected to have, to justify the exercise of the power to raise the assessment to make good the insufficiency."

> 22. It is important to emphasise that the decision in *Lansdowne* did not involve any qualification of what Auld LJ in *Langham v Veltema* identified as the question posed by the second s.29(5) condition. The hypothetical officer must, on an objective analysis, be made aware of an actual insufficiency in the assessment by the matters disclosed in the s.29(6) information. This is made clear by the Chancellor at [55] of his judgment in *Lansdowne*. The sole dispute in that case was whether the disclosures made by the taxpayer's accountants were sufficient to cause the hypothetical officer to conclude that there was an insufficiency."

66. At [32], in *Sanderson*, after out setting passages of the "most recent guidance" from the House of Lords on the *Ramsay* approach, which was then the decision in

MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] STC 237, Patten LJ said:

> "Even if the notional officer can be supposed to have read these passages in deciding whether to challenge Mr Sanderson's self-assessment, he is likely to have concluded that a *Ramsay*-based challenge would require a careful analysis of all the component parts of the Scheme and that no one aspect of it was likely to be determinative. The tax return failed to disclose the simultaneous entry into the counter-option; the termination of the in the money contract on 4 April 1997 which created the gain that largely funded the liabilities on the out of the money contract and the change from Guernsey to UK trustees on 7 April 1997."

67. Mr Firth contends that the correct approach to be adopted is, through the mindset of the hypothetical officer, to first identify the information available from the disclosure in Mr Beagles' tax return under s 29(6) TMA and then determine whether that information would have resulted in awareness of the insufficiency. He emphasises that the test is not concerned with disclosure of all material or relevant facts and contrasts this with s 138(5) of the Taxation of Chargeable Gains Act 1992 which provides that to obtain clearance in advance of a share for share exchange the particulars furnished to HMRC are required to "fully and accurately disclose all facts and considerations material for the decision" and if not any clearance given "shall be void."

68. From the information contained in Mr Beagles' tax return, in particular its appendix (which is set out at paragraph 13, above) the hypothetical officer would be aware:

(1) that Mr Beagles is the settlor and life tenant of the Clive Beagles 2001 Life Interest Trust established on 19 December 2001;

(2) that the Trust is UK resident

(3) of the terms of the security;

(4) that it qualified as an RDS;

(5) of the four possibilities for redemption—

(a) on the 15th anniversary of the issue date at £1,368,296 (the Principal Amount),

(b) at the option of Mr Beagles between one and two months after the Issue Date at a figure equal to 100.1/118 of the Principal Amount, ie £1,160,732.45,

(c) after 65 years at the Principal Amount if the 'market change condition' was satisfied and Mr Beagles gave notice that he intended to transfer the Security to a third party,

(d) alternatively, if the 'market change condition' was satisfied the third party transferee of could, within 28 days of acquiring the Security, elect to

redeem it at the greater of its open market value and 5% of the Principal Amount;

(6) what actually happened, namely the sale of the security to an unconnected purchaser for £66,466 following the delivery of the notice to the Issuer who redeemed the security for £68,415 on 12 March 2002; and

(7) that Mr Beagles claimed a loss, as defined in paragraph 2 of schedule 13 to the Finance Act 1996, in the sum of £1,093,474.

The hypothetical officer would also have been aware of the RDS legislation, schedule 13 to the Finance Act 1996, and that for a security to meet the definition of an RDS a "deep gain" would be involved.

69. Mr Firth contends that such an officer, who is required to check a return and not just read and accept it, would need to consider the terms of the Security and the possibilities for its redemption and ask, in relation to each, whether it did or might involve a deep gain. In doing so, Mr Firth says, the hypothetical officer would be aware from the RDS legislation that it was concerned with actual, ie genuine commercial, as opposed to legal possibilities and, from his awareness of *Ramsay*, would appreciate the gain refers to a real gain.

70. Having undertaken a similar exercise the Special Commissioner in *Astall* (which concerned the same scheme as that utilised by Mr Beagles) said, at [21]:

> "… (2) The terms of the Security were, in the words of the KPMG memorandum given to clients interested in the scheme, "structured so that it falls within the definition of a relevant discounted security for tax purposes." The premiums of 0.1% under the early redemption option, and 18% on final redemption after either 15 or 65 years, and in particular the same premium for both periods, do not reflect a market return for a zero-coupon security being the last two being about 1.1% and 0.25% respectively compounded annually. The three alternatives given to the Appellants after the Market Change condition had been satisfied that is set out in paragraph 4(29) above amounted to a choice between (a) redeeming the Security at 100.1 of the issue price (the 0.1 necessarily being paid out of the initial capital of the trust) and accordingly losing the benefit of the fee of 1% plus VAT that had been paid; (b) selling the Security with the hope of a tax loss of 94; and (c) holding the zero-coupon Security for 15 years with an effective annual yield of about 1.1%. Apart from Mr Astall's particular circumstances which I consider below, it was a practical certainty that nobody was going to choose (a) or (c). (This choice reminded me of what in the 1970s became known as the "X sham option." Mr X was a highly respected member of the tax bar who had very reasonably advised the promoter of a tax scheme that it would stand a better chance of success if the taxpayer had a choice of action so that it was not clear that one result was preordained. The promoter took the advice somewhat too literally and wrote an option into the scheme that when one analysed the figures nobody would choose, the name being coined by counsel for the Revenue to pull Mr X's leg about it.)

(3) The choice offered to the purchaser of the Securities was between redeeming them on 7 days notice and realising the discount as a profit, or holding the zero-coupon Securities for 65 years with an effective annual yield of about 4.76% (assuming annual compounding) which Mr Patterson said (and I accept) was about the market rate. It was also a practical certainty that any purchaser would immediately redeem them at 5% of their redemption price, and this was known to KPMG. No purchaser would have considered holding the Securities for 65 years."

71. The Special Commissioner went on to say:

> "25. The capital of the trust was fixed in Mr Astall's case at £2,700 so that it could meet either the premium on early redemption on default of £2,638 or the early redemption at the holder's option of £2,110. The trust had no other use for the capital, which could otherwise have been nominal. Although I agree with Mr Prosser that the trustees could actually use income, assuming that they had received any, to pay the premium, they would then have to reimburse Mr Astall as life tenant for the whole of the income. Since following redemption the trust will have no funds other than the trust capital with which to pay the income to the life tenant, this is the same as saying that the capital of the trust must meet the early redemption premium and Mr Astall must receive all the income, regardless of whether the income is temporarily spent on the premium. One can discount the possibility of the trust being invested to make a capital gain within the first two months of the life of the Security because the Confidential Information Memorandum to the banks states that "These funds remain invested in readily accessible bank accounts with Kleinwort Benson or Lloyds."
>
> 26. A realistic view of the facts is as set out above, that the scheme has been designed to fix the capital of the trust so as to meet the premium on early redemption and this is the only possible source of funds. The parties intended that this should be used for the purpose and objectively this is the only possibility when considering the matter at the date of issue of the Security. Early redemption would always require a circular transaction using the capital of the trust. Does the possibility of such a transaction mean that the Security is within the statutory definition of a relevant discounted security? I do not think it does. The terms of the early redemption option have been structured so as to create what is a deep gain according to the formula but one which can be paid only by means of a circular transaction involving the payment by Mr Astall of the capital that he put into the trust for no other purpose (apart from funding the premium on redemption on default). That is very different from Mr Prosser's example of a company happening to pay interest out of capital. The only way in which the early redemption premium can be paid is by using the trust capital. Asking myself whether the relevant statutory provisions, construed purposively, were intended to apply to such a transaction, the answer is no."

72. Clearly, the Special Commissioner considered it a "practical certainty" that the first option, redemption at 15 years at an effective annual yield of 1.1%, which he said did "not reflect a market return for a zero-coupon security", would be rejected.

73. Mr Firth contends that such a calculation, being nothing more than simple mathematics, is not only within the hypothetical officer's remit but that no further disclosure is necessary for him to conclude that this option would not be chosen. However, I accept Mr Henderson's argument that that the hypothetical officer would not necessarily have the commercial awareness to dismiss the first option as not reflecting a market return.

74. The second option was dismissed as it involved the circular transaction of a payment from the trust to the settlor out of the capital he put in for no other purpose apart from funding the premium on redemption, something the Special Commissioner considered not to be within the relevant statutory provision purposively construed. The Special Commissioners also considered this improbable as any benefit "of the fee of 1% plus VAT" for participating in the scheme would be lost.

75. Mr Firth contends that in the present case that the hypothetical officer would come to the same conclusion as he would be aware, from the information disclosed on the return, that Mr Beagles was the Settlor of the Trust and that any funds used for the redemption would be his own. As such there was sufficient information on which the hypothetical officer to conclude that this option did not involve a deep gain.

76. However, in relation to any redemption payment being made out of the Trust, and therefore Mr Beagles' own funds, it is clear from [26] of the Special Commissioner's decision that he discounts the possibility of the trust being invested to make capital gains because the Confidential Information Memorandum to the bank, something which was not available to the hypothetical officer, provides that the funds are to remain invested in "readily accessible bank accounts". Accordingly, and as Mr Henderson submits, there is insufficient information provided on the appendix to the return, for the hypothetical officer to have arrived at the same conclusion as the Special Commissioner.

77. As previously noted, the Special Commissioner dismissed the notion that any purchase would have considered holding the Security for 65 years. Mr Firth contends that the hypothetical officer would have been able to come to the same conclusion without any further information than that disclosed by Mr Beagles. Although Mr Henderson contends that the Special Commissioner reached his conclusion on the basis of the evidence before him, there is, as Mr Firth says, nothing to suggest that this was the case.

78. However, I do not consider that it necessarily follows that a hypothetical officer would reach the same conclusion as a highly respected and experienced Special Commissioner. For the same reason, I do not accept Mr Firth's submission that it would be clear to the hypothetical officer that only the fourth option, option (d) in paragraph 68(5), above, is applicable with the result that because this does not involve a deep gain the hypothetical officer would have been aware of an insufficiency.

79. I agree with Mr Henderson who submits that, in essence, Mr Beagles' case is that the hypothetical officer should, by conducting a fact-sensitive and highly subtle Ramsay analysis on the basis of the limited information provided in the appendix to Mr Beagles' return, have reached the same conclusion as the Special Commissioner in *Astall*.

80. Although Mr Beagles did set out the basic details of the transactions in that appendix, he did not provide the material which would have allowed the facts to be viewed realistically and legislation purposively applied, eg, it was not stated that the terms of the Security had been artificially constructed to give the avoidance scheme the best chance of success or, indeed, even highlight that it was an avoidance scheme which served no commercial purpose. These factual matters are relevant because if the market change condition was not satisfied Mr Beagles would have had to redeem the Security within one or two months or on the 15 year anniversary of its issue, both of which would, prima facie, give rise to a deep for the purposes of schedule 13 to the Finance Act 1996.

81. Additionally, the information before the hypothetical officer in this case, the single page appendix to Mr Beagles' return, can be contrasted with that provided to the Special Commissioner. This consisted of eight ring binders of documents which were reduced to a core bundle of two binders and an agreed statement of facts containing 57 paragraphs and running to several pages in addition to further findings of fact made following the oral evidence of nine witness, including expert witnesses although, as is clear from his [6(13)] of the Special Commissioner's decision the expert evidence did not assist him (see at [4] to [7] in *Astall*).

82. Notwithstanding the difference in volume of evidence before the Special Commissioner and hypothetical officer, Mr Firth contends that the information contained in the appendix to Mr Beagles' return was sufficient for the hypothetical officer to come to a conclusion that there was an insufficiency in this case. However, a comparable argument, in relation to the terms of the security, was rejected in *Astall* where the Special Commissioner observed, at [22]:

> "Mr Prosser [counsel for the taxpayers] contends that the only relevant facts are the terms of the Security. However, that presupposes that the possibilities of redemption written into the Security are within the facts when viewed realistically. In my view, the *Ramsay* approach as explained in *Barclays Mercantile* entitles and requires me to construe legislation aimed at considering all possibilities in such a way as to limit those possibilities to real ones. A purposive construction of the definition of relevant discounted security must have regard to real possibilities of redemption, not ones written into the document creating the Security that the parties know, and any reasonable person having the knowledge available to the parties knows, will never occur. Mr Prosser's argument that a purchaser of a security must be able to determine from its terms whether it is a relevant discounted security carries no weight in these circumstances. There will only ever be one purchaser of it who is fully aware of the scheme, who will redeem it within seven days so that the Security will be outstanding for a

> maximum of two months. The purpose of the legislation is to tax gains on securities that are issued at a deep discount and conversely to relieve losses on such securities. The difference between the issue price and the redemption price must give rise to a possibility of making a gain that can be objectively seen to exist. This Security never had this possibility; it is a practical certainty that there will be a loss of 94. To decide otherwise would be to return "tax law [to] being 'some island of literal interpretation'."

83. Similarly, in the present case, I am unable to conclude that the information contained in the appendix to Mr Beagles' return in itself provided sufficient information to enable a hypothetical officer to be aware of any insufficiency to tax. It is therefore necessary to consider whether there is information the existence and/or relevance of which could be reasonably expected to have inferred by the officer in accordance with s 29(6)(d)(i) TMA.

84. The Court of Appeal in *Sanderson* endorsed, at [41], the following observation of the Upper Tribunal in [78] – [79] of its decision in *Charlton*:

> "78. The correct construction of s 29(6)(d)(i) is that it is not necessary that the hypothetical officer should be able to infer the information; an inference of the existence and relevance of the information is all that is necessary. However, the apparent breadth of the provision is cut down by the need, firstly, for any inference to be reasonably drawn; secondly that the inference of relevance has to be related to the insufficiency of tax, and cannot be a general inference of something that might, or might not, shed light upon the taxpayer's affairs; and thirdly, the inference can be drawn only from the return etc provided by the taxpayer.
>
> 79. As we have described, the balance provided by s 29 depends on protection being provided only to those taxpayers who make honest, complete and timely disclosure. That balance would be upset by construing s 29(6)(d)(i) too widely. Inference is not a substitute for disclosure, and courts and tribunals will have regard to that fundamental purpose of s29 when applying the test of reasonableness."

85. It is clear from the words used in s 20(6)(d) TMA that any inference drawn must be to the existence and relevance of the information and not its content. As the Upper Tribunal observed in *Charlton*, at [76]:

> "On the other hand, we do not accept Mr Tidmarsh's [counsel for HMRC] submission that the hypothetical officer must be able to infer the actual content of the information. If that had been the case, s 29(6)(d)(i) would not have referred expressly to the need to infer the existence and relevance of the information. Examples given by Mr Tidmarsh, in answer to questions from the tribunal, to illustrate information which would be regarded as having been made available on this basis served only to illustrate that this interpretation would deprive the provision of practical meaning."

86. It is also apparent from the decision of the Court of Appeal in *Langham v Veltema* at [34], to which Patten LJ referred in *Sanderson* (see paragraph 65, above),

that s 29(6) allows for a constructive awareness of the insufficiency in the form of an inference of it. I agree with Mr Firth, who contends that this is important, as it illustrates that the hypothetical officer is allowed to think about what he is shown, not only in relation to the information on the tax return but also in terms of inferring the relevance and existence, but not the content, of such information.

87. In *HMRC v Lansdowne Partners Ltd Partnership* [2012] STC 544 ("*Lansdowne*") the Court of Appeal considered the question of a discovery assessment in relation to a fund manager in a partnership whose partners included individuals who were also investors in the fund who sought rebates of the management fees by the fund. These rebates were deducted and the issue of whether there was an entitlement to do so was still a live issue when the matter came before the Court of Appeal, in particular, whether the case could be distinguished from *Mackinlay (Inspector of Taxes) v Arthur Young McClelland Moores & Co* [1989] STC 898 ("*Arthur Young*").

88. The Court of Appeal in *Lansdowne* also considered whether HMRC were precluded from raising a discovery assessment because of s 30B(6) TMA, the partnership equivalent of s 29(5)TMA. The Chancellor (Sir Andrew Morritt with whom Moses and Patten LJJ agreed) said, at [50]:

> "In these circumstances the question is whether on this information an officer of the Board could have been reasonably expected to be aware that the amount of the profits included in the partnership return was insufficient. Plainly it is necessary to assume an officer of reasonable knowledge and understanding. He would have been aware of the decision of the House of Lords in *Arthur Young*. He would see from the partnership return and statement that the income included management and performance fees and that some of them had been deducted from the income because they had been 'rebated'. He would know from the letter from Mr Tai that at least some of those rebates had been made to limited partners in LPLP [Lansdowne]. And he would know from his general knowledge of *Arthur Young* and s.74(1)(a) ICTA that payments to partners are not usually deductible for tax purposes. But is that enough?"

After referring to submissions from counsel for HMRC that it was not enough, the Chancellor, after referring to passages from *Langham v Veltema* (including that cited by Patten LJ in *Sanderson*, see paragraph 65, above) continued at [56]:

> "In the end, this part of the appeal boils down to a very short point. The question, to adopt the formulation used by Auld LJ, is whether the hypothetical inspector having before him those three documents and the note of the meeting held on 22nd February 2006 would have been aware of "an actual insufficiency" in the declared profit. I would answer that question in the affirmative. He could see from those documents:
>
> (1) The income of LPLP consisted of management and performance fees.

> (2) There had been deducted from that income what was described as 'rebates'.
>
> (3) 'Rebates' had been paid to limited partners.
>
> (4) Arthur Young had established that all payments to partners should be included in gross income and were not, generally, deductible for tax purposes.
>
> (5) There was no indication on the face of the accounts or in Mr Tai's letter to suggest any special treatment of 'rebates' paid to limited partners either by omission from the gross income or in their deduction therefrom.
>
> I do not suggest that the hypothetical inspector is required to resolve points of law. Nor need he forecast and discount what the response of the taxpayer may be. It is enough that the information made available to him justifies the amendment to the tax return he then seeks to make. Any disputes of fact or law can then be resolved by the usual processes."

89. Patten LJ at [21] in *Sanderson* (in the passage I have cited at paragraph 65, above) referred to the comments of Moses LJ, who agreed with the Chancellor, in *Lansdowne*.

90. Mr Firth submits that it is clear from *Lansdowne* that the hypothetical officer is not required to resolve points of law but can deduce or infer from the information provided whether there is an insufficiency. His primary case in relation to the possibilities for the redemption of the Security, which I have rejected, was that the appendix to the return contained sufficient information to discount all but the fourth option. However, in relation to the second option, as an alternative or fall back position Mr Firth submits that the hypothetical officer would be aware from the return of the existence of the market change condition and, while the return does not explain why it exists, as it must be there for some reason the hypothetical officer (who would have been aware of *Ramsay* as the officer in *Lansdowne* was aware of *Arthur Young*), with even a basic understanding of *Ramsay*, would be able to reasonably infer that it had been inserted as an anti-Ramsay device and therefore its existence and relevance was to support an insufficiency.

91. Mr Henderson relies on the passage in [78] – [79] in *Charlton* endorsed by the Court of appeal at [41] in *Sanderson* that I have cited at paragraph 84, above, for the proposition that s 29(6)(d) should be construed restrictively and the attempt by Mr Beagles to bring in reasons for the market change condition under s 29(6)(d)(i) TMA falls foul of the qualifications in that passage. In any event, he submits, that even if the hypothetical officer did know that the market change condition had been inserted as part of a tax avoidance scheme it would not identify the insufficiency as it would not provide any information on the likelihood of the condition being satisfied or whether a purchaser would be found and notwithstanding the market change condition the option of Mr Beagles redeeming early could not be discounted.

92. Although there was an element of disagreement between Chadwick LJ and Arden LJ in relation to the construction of s 29(6)(d) in *Langham v Veltema*,

Henderson J (as he then was) said, at [33], in *HMRC v Household Estate Agents Ltd* [2008] STC 2045:

> "I respectfully prefer the approach of Arden LJ, which seems to me to be more in accord with the wording of the subsection and the restrictive approach to its interpretation favoured by all three members of the Court of Appeal."

93. As in the present case, counsel for the taxpayer before the Upper Tribunal (Newey J) in *Sanderson* (reported at [2014] STC 915) relied on s 29(6)(d) TMA as a fall back position. In *Sanderson* this was that the hypothetical officer would have known from Mr Sanderson's return that he had participated in the 'Castle Trust [avoidance] Scheme' and could reasonably be expected to infer that HMRC would have other information about the scheme which would be of relevance.

94. After citing [78] – [79] of *Charlton*, Newey J continued, at [57]:

> "On balance, I do not consider that s 29(6)(d)(i) of the TMA applies in the present case. My reasons include these:
>
> (i) Section 29(6) is principally concerned with information supplied by the taxpayer. The idea is evidently that (in the absence of negligence on the part of the taxpayer or a person acting on his behalf) HMRC should not be able to go behind a return after the enquiry window has closed if the taxpayer himself provided HMRC with information from which the existence of an insufficiency could reasonably be deduced. In the present case, however, Mr Sanderson disclosed nothing about the Castle Trust Scheme beyond what was contained in his 1998–99 return;
>
> (ii) While s 29(6)(d)(i) is not confined to information supplied by the taxpayer, the authorities establish that the provision is to be construed restrictively (see *Langham v Veltema, Household Estate Agents* and *Charlton*);
>
> (iii) Mr Gordon's [counsel for taxpayer] approach to s 29(6)(d)(i) could involve the hypothetical officer having attributed to him information that it would be difficult or impossible for an officer processing a tax return to discover within an organisation as large as HMRC (for example, as to the affairs of other taxpayers and from returns dating back a number of years). It would also appear to imply that the hypothetical officer could be deemed to have available to him information in the hands of the taxpayer that the taxpayer had himself chosen not to supply to HMRC. Parliament is unlikely to have intended such consequences;
>
> (iv) It seems to me that, for s 29(6)(d)(i) to apply, the hypothetical officer must be able to infer (and not just guess at) the existence of specific information (albeit not its actual content) of definite relevance to the existence of an insufficiency. That was the case in *Charlton*: the fact that there was an SRN inevitably meant that a form AAG1 had been lodged, and that form was bound to contain information about the scheme in question. In contrast, an officer considering Mr Sanderson's 1998–99 return could, I think, have

> done no more than surmise that HMRC would somewhere have other information about the Castle Trust and that, if it did, it could cast light on Mr Sanderson's loss claim. In my view, that is not good enough for the purposes of s 29(6)(d)(i)."

95. On balance, like Newey J in *Sanderson* and for the same reasons, I do not consider that s 29(6)(d)(i) TMA applies in the present case. In particular, the hypothetical officer must be able to infer (and not just guess at) the existence of specific information (albeit not its actual content) of definite relevance to the existence of an insufficiency and, in my judgment, cannot do so in relation to the reasons for the market change condition.

96. In *Blumenthal v HMRC* [2012] SFTD 1264, after considering a submission by counsel for the taxpayer that the hypothetical officer should be expected to be aware that it was unlikely that the value of a well-known company had crashed because of market conditions, interest rates or discounts, from the value on redemption from £265,960 to £9,866 but should have realised that there was something in a Deed of Variation that triggered this fall in value, the Tribunal (Judge Brannan and Ms Redston) said, at [201]:

> "In our view, this sort of inference goes beyond what is expected of the hypothetical officer. The difference between the issue price and the market value on conversion might have alerted the officer to make enquiries as to whether there was any factor, such as a stock market warning, or the threat of an impending administration, which would have cut the value so significantly. But this is not "constructive awareness of the insufficiency" (see the summary of *Veltema* at paragraph 167 above), although it might reasonably have been the trigger for further enquiries. That, however, is not enough to protect the Appellant from a discovery assessment."

97. Similarly, in the present case although the market change condition might have alerted the hypothetical officer to make enquiries it cannot, in itself, amount to constructive awareness of any insufficiency. As in *Blumenthal*, it is not enough to protect Mr Beagles from a discovery assessment.

Summary of conclusions

98. In summary, for the above reasons I find that:

(1) although it is possible for a "discovery" to lose its newness or become stale, the discovery in the present case was made subsequent to the decision of the Special Commissioner in *Astall*. Accordingly, it had not lost its newness or become stale; and

(2) the condition in s 29(5) TMA, that the hypothetical officer could not have been reasonably expected, on the basis of the information made available to him, to have been aware of the insufficiency has been fulfilled allowing HMRC to make a discovery assessment under s 29 TMA in the circumstances of this case.

99. The appeal is therefore dismissed.

Appeal rights

100. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

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