[2017] UKFTT 552 (TC)

TC05997

Appeal numbers: TC/2015/06806
TC/2017/00005

PROCEDURE – several applications including, most significantly, an application that the validity of discovery assessments should be determined as a preliminary issue – application allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LANCE MILLIGAN **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Sitting in public in Bristol on 9 May 2017

George Rowell, instructed by Trenfield Williams Ltd for the Appellant

Alan Hall, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is a case management decision. It deals with four applications made by the appellant on 6 December 2016.

2. These applications are:

(1) That the appeal against the penalty assessments filed on 19 December 2016 be joined to the appeal against the substantive assessments.

(2) That the appellant be permitted to file an amended grounds of appeal in the form submitted to the Tribunal and to the respondents on 6 December 2016 (the "**amended grounds of appeal**").

(3) That there be a "split trial" or preliminary issue hearing in respect of the validity of the discovery assessments (the "**preliminary issue**").

(4) That the tribunal exclude the statements of four witnesses whom HMRC did not (at the time of the application) propose to call to give evidence (the "**witness statements**").

3. As things turned out on the day:

(1) The appeal against the penalty assessments had already be joined to the appeal against the substantive assessments. This is apparent from the appeal numbers set out on the face of this decision. So this application is allowed.

(2) Mr Hall agreed that HMRC would no longer oppose the application to file the amended grounds of appeal, and it was thus not a live issue for very long at the hearing.

(3) So the focus of the hearing was on the preliminary issue and the exclusion of the witness statements. HMRC opposed both applications.

(4) In light of the decision I have come to on the preliminary issue, (namely that the validity of the discovery assessments should be heard as a preliminary issue), I have decided that I should make no directions in respect of the witness statements. I give my reasons for this at [62- 64] below.

Relevant factual background

4. No evidence was formally tendered to me in relation to the factual background against which these applications were made. I take the following from HMRC's statement of case, but make no findings of fact in respect of them.

(1) The substantive appeal concerns discovery assessments visited on the appellant by HMRC on 20 May 2013. There are nine discovery assessments for the years ended 5 April 2001 – 5 April 2009 (inclusive) which together assess

the amount of tax and class 4 national insurance due from the appellant at £86,383.73.

(2) The appellant is a costume designer to the entertainment industry, who has worked for major TV and film production companies for many years. Self-assessment tax returns were sent to him for the periods in question, but were not completed and submitted to HMRC.

(3) On 29 February 2012 the appellant was arrested on the basis that he had committed an offence under section 106A TMA, namely the fraudulent evasion of income tax. He was interviewed under caution on that day. The HMRC Officer responsible for that arrest was the same HMRC Officer that was ostensibly responsible for issuing the discovery assessments, namely Officer Karen Bailey ("**Officer Bailey**").

(4) Following his arrest, the appellant's home was searched and HMRC uplifted various papers. HMRC then carried out further investigations and obtained further documents (for example, bank statements) and undertook a further recorded interview with the appellant on 14 May 2012.

(5) The appellant's trial at Bradford Crown Court on 8 April 2013 was adjourned when it was agreed that HMRC would not proceed with the criminal proceedings on the basis that the appellant would made a financial settlement for the relevant tax years.

(6) Discovery assessments were issued to the appellant on 28 May 2013 (the "**discovery assessments**").

(7) The amended grounds of appeal set out, broadly, three grounds of appeal:

> (a) Firstly, that HMRC did not make a discovery within a reasonable time prior to the date of the discovery assessments.
>
> (b) Further or alternatively the discovery assessments were raised out of time since they rely on the extended time limit of 20 years on the ground that the appellant's failure to declare and pay the assessed tax and national insurance contributions was deliberate.
>
> (c) The discovery assessments overstate the appellant's true taxable income for the years in question.

The discovery assessments

5. The discovery assessments are assessments raised pursuant to section 29 of the Taxes Management Act 1970 ("**TMA**").

6. Section 29(1) says as follows:

"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."

7. It was common ground that neither subsections (2) nor (3) are applicable to the appellant's circumstances since they apply only where a taxpayer has delivered a tax return, which of course the appellant, allegedly, has failed to do. And so, neither sections 29(5) and 29(6) are relevant either.

8. It is also worth pointing out at this stage that:

(1) HMRC have the burden of proving that an HMRC officer has made a requisite discovery for the purposes of section 29(1);

(2) This is a part subjective part objective test. It requires an examination of the state of mind and knowledge of a particular HMRC officer (in this case Officer Bailey and perhaps Officer Lee Griffiths) (see [15] below) ("**Officer Griffiths**"). There is no requirement in this case to consider what the relevant officer could have been reasonably expected to have been aware at the time of issuing the discovery assessments, as would be required by section 29(5) since that section is not engaged in this case.

(3) Although the test in section 29 appears to be purely subjective, it is clear from case law, including *Charlton v Revenue & Customs Commissioners* [2013] STC 866 UT ("**Charlton**") at [37] (see the extract at [22] below) that the officer must act honestly and reasonably. It is for the Tribunal to decide whether or not the officer has acted honestly and reasonably. This is the objective element of the test.

(4) The application on the preliminary issue is not that the discovery assessments are invalid on the basis that the appellant behaved honestly. It is solely on the basis of whether the relevant officer's conclusion that the appellant was liable for the tax set out in the discovery assessments had lost its "essential newness".

The preliminary issue

9. In the case of *Janet Addo v Revenue & Customs Commissioners* [2016] UKFTT 787, Judge Jonathan Richards, on an application similar to that in this case, (namely whether the validity of a discovery assessment should be heard as preliminary issue), set out his view of the law which relates to the determination of this issue. It is a view with which I agree and it is set out below:

> "**The law relating to the determination of issues as preliminary issues**
>
> 9. It is clear from the decision from the decision of the Court of Appeal in *Hargreaves v Revenue and Customs Commissioners* [2016] EWCA Civ 174 that an appellant does not have an automatic right to have the issue of the validity of the assessments tested as a preliminary issue. However, it is also clear that the Tribunal has a discretion, as a matter of case management, to direct that an issue be determined as a preliminary issue. The Upper Tribunal has, in *Wrottesley v Revenue and Customs Commissioners* [2016] STC 1123 given guidance as to how this Tribunal should exercise its case management discretion in paragraph [28] of the decision which reads as follows:
>
> > We think that the key principles to consider can be summarised as follows:
> >
> > (1) The matter should be approached on the basis that the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly.
> >
> > (2) The power should only be exercised where there is a 'succinct, knockout point' which will dispose of the case or an aspect of the case. In this context an aspect of the case would normally mean a separate issue rather than a point which is a step in the analysis in arriving at a conclusion on a single issue. In addition, if there is a risk that determination of the preliminary issue may prove to be irrelevant then the point is unlikely to be a 'knockout' one.
> >
> > (3) An aspect of the requirement that the point must be a succinct one is that it must be capable of being decided after a relatively short hearing (as compared to the rest of the case) and without significant delay. This is unlikely if (a) the issue cannot be entirely divorced from the evidence and submissions relevant to the rest of the case, or (b) if a substantial body of evidence will require to be considered. This point explains why preliminary questions will usually be points of law. The tribunal should be particularly cautious on matters of mixed fact and law.
> >
> > (4) Regard should be had to whether there is any risk that determination of the preliminary issue could hinder the tribunal in arriving at a just result at a subsequent hearing of the remainder of the case. This is clearly more likely if the issues overlap in some way—see (3)(a), above.

(5) Account should be taken of any potential for overall delay, making allowance for the possibility of a separate appeal on the 5 preliminary issue.

(6) The possibility that determination of the preliminary issue may result in there being no need for a further hearing should be considered.

(7) Consideration should be given to whether determination of the preliminary issue would significantly cut down the cost and time required for pre-trial preparation or for the trial itself, or whether it could in fact increase costs overall.

(8) The tribunal should at all times have in mind the overall objective of the tribunal rules, namely to enable the tribunal to deal with cases fairly and justly."

10. I shall refer to these eight foregoing principles as the "**Wrottesley criteria**" in the rest of this decision.

The appellant's submissions

11. On behalf of the appellant, Mr Rowell submitted as follows:

(1) The Tribunal has wide powers of case management, including the power to order the hearing of a preliminary issue:

(2) In the civil courts the leading case on the discretion to order a preliminary issue trial is *Steele v Steele* [2001] ALL ER (D) 227 (Apr) ("**Steele**"). Neuberger J summarised the relevant questions for the Court as follows:

(a) whether determination of the preliminary issue would dispose of the whole case or at least one aspect of the whole case;

(b) whether determination of the issue would reduce the time involved in pre-trial preparation;

(c) the amount of effort which would be involved in looking at the questions of law necessary to determine the issue;

(d) whether it would be safe to draw conclusions on matters of fact in the course of determining the issue and how far that would impinge on the usefulness of determining the preliminary issue;

(e) whether determination of the preliminary issue might unreasonably fetter the court in its pursuit of the just resolution of the proceedings;

(f) the extent of the risk that determination of the preliminary issue would increase costs and delay;

(g) the relevance of determining the preliminary issue in the context of the whole proceedings;

(h) whether the pleadings might be amended to avoid the consequences of determination of the preliminary issue and the extent of the risk of increased costs and delay thereby created; and

(i) whether, with regard to the foregoing, it was just to rule on the preliminary issue.

(3) This formulation of the relevant principles was applied in the context of a direct tax appeal in *Goldman Sachs International v RCC* [2010] STC 763. At first instance the tribunal judge applied the formulation so as to refuse an application for a preliminary issue hearing. On appeal there was no dispute that the *Steele* formulation was to be applied, but the Upper Tribunal held that the tribunal judge had done so in a flawed manner and hence the discretion would be exercised afresh so as to grant the preliminary issue application.

(4) The *Steele* formulation was also quoted with approval in Wrottesley (at para, 22), although the Upper Tribunal then proceeded to set out a slightly different formulation of its own (at para. 28). The case concerned whether the taxpayer's domicile ought to be tried as a preliminary issue. The FTT answered this question in the negative. The Upper Tribunal held that the FTT had exercised its discretion on a flawed basis, but that the appeal would be dismissed because the same result would be reached if the discretion was exercised on the correct basis. The principle reasons for this decision were that holding a preliminary hearing would not shorten the overall time or volume of evidence for the appeal, there would inevitably be some repetition of evidence, and it would not result in the effective determination of the appeal.

(5) In *Hargreaves* the Court of Appeal affirmed the orthodox understanding that ordering a preliminary hearing in relation to the s. 29 TMA conditions is a matter of case management discretion for the Tribunal rather than a decision as of right for the tax-payer. It said nothing about how that discretion was to be exercised.

(6) The question, in short, is did the assessing officer, Officer Bailey, make a 'discovery' for the purposes of s. 29(1) TMA within a reasonable time prior to the issuing of the assessments on 20 May 2013?

(7) He submitted that this question is suitable for trial as a preliminary issue in accordance with the *Steele* criteria:-

(a) The preliminary issue would dispose of the entire case if it were resolved in the Appellant's favour. If the requirements of s. 29(1) TMA are not met, the discovery assessments will be wholly invalid.

(b) Determining the preliminary issue would save a great deal of case preparation time. As para. 22-26 of the amended grounds of appeal

demonstrate, the "no discovery" argument can be made on the basis of documents which HMRC are in no position to dispute, namely their own interview transcripts, witness statements and exhibits.

(c) The "no discovery" argument will require examination of some recent case law, but the hearing required could comfortably fit within a single day.

(d) It would be safe to draw conclusions of fact from the relevant documentary evidence as HMRC are in no position to dispute its provenance and validity (see above).

(e) There is no question of the tribunal being unreasonably fettered in relation to the rest of the proceedings as the "no discovery" argument, if successful, would be determinative of the proceedings.

(f) The risk that the preliminary issue would increase cost and delay is not particularly great. At most it would bring forward a legal argument which would have to be canvassed during the main hearing in any event.

(g) The preliminary issue is of central relevance to the proceedings as a whole.

(h) There is no obvious scope for amendment of the pleadings to avoid the consequences of determination of the preliminary issue.

(i) As most of the relevant factors point strongly in favour of granting the preliminary issue application, it follows that this is what the interests of justice require.

The respondent's submissions

12. Mr Hall, on behalf of the respondents, submitted as follows:

(1) That the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly (the first of the Wrottesley criteria).

(2) Officer Bailey was involved in both the criminal investigation and the discovery assessments. The criminal investigation involved the collection and analysis of a large volume of information. There are many lever arch files of documents which reflect that investigation and it would be extremely difficult, given that volume, to separate Officer Bailey's evidence into that which relates to the discovery assessments (on the one hand) and that relating to the general criminal investigation, and the dishonesty point (on the other).

(3) Indeed, given that Officer Bailey will have to give evidence as regards the dishonesty and quantum points, it would be practically more satisfactory to deal with all her evidence in a single session; and this is better done at a substantive hearing when the evidence regarding the issue of the discovery assessments, too, can be dealt with.

(4) HMRC may need to provide an explanation of any procedural issues encountered by Officer Bailey in relation to the discovery assessments which might have arisen from an interaction between the criminal proceedings and the machinery of issuing the discovery assessments. He implied that the timing of the criminal trial might have had an impact on the timing of the issue of the discovery assessments and he indicated that HMRC might need to tender additional witnesses to speak to any differences between the criminal procedure and the tax assessment process.

(5) Officer Bailey might have consulted other individuals within HMRC between February 2012 and May 2013. He implied that this might require such individuals to attend any preliminary hearing, to give evidence of any such conversations.

(6) Finally, that whilst there was an attraction to having a preliminary hearing to deal with the validity of the discovery assessments, this was a fatal attraction. It was difficult, if not impossible, to separate the strand of evidence relating to the discovery assessments from those with which it was interwoven, namely the criminal investigation and the dishonest conduct points. It would be a great deal easier to have all of these issues dealt with at a single substantive hearing.

Officer Griffiths and Officer Bailey

13. At the hearing, Mr Hall dealt only about Officer Bailey.

14. In response to a written question that I raised with Mr Rowell and Mr Hall (whether it was agreed that it was Officer Bailey who was the assessing officer), Mr Rowell responded with paperwork showing that it was clearly Officer Bailey who was responsible for issuing the assessments.

15. Mr Hall responded in the following terms:

> "I can confirm that Karen Bailey was responsible for making the assessments clerically. This was done on the instructions of Mr Lee Griffiths, who was the decision maker. At this stage, HMRC intend to call both witnesses to address the "*staleness*" issue".

16. It was unfortunate that Mr Hall did not raise this at the hearing so I was not able to enquire as to the precise roles and responsibilities of each officer. I consider this in greater detail below.

Discussion

17. Before considering the competing submissions, and examining them against the Wrottesley criteria, it seems to me that I need to review whether there is some merit in the fundamental basis of the application (namely the "essential newness" point).

18. By this I mean whether "essential newness" is a substantive legal test, which will render a discovery assessment invalid if it cannot be satisfied by HMRC (rather

than whether, if there is such a test, the appellant is likely to succeed in any application that it applies to his circumstances).

19. Clearly if there is no such test, then it would hardly be consistent with the overall objective of enabling me to deal fairly and justly with this case, to permit the appellant to run an argument based on it as a preliminary issue. Furthermore, it might be said that such a point might be irrelevant, and is unlikely, therefore to be a knockout one.

20. Mr Rowell has given three examples of cases which have referred to the essential newness point. These are *Anderson v Revenue & Customs Commissioners* [2016] UKFTT 335 at paragraphs 69-72 ("**Anderson**"), Charlton at [37] and *Sanderson v Revenue & Customs Commissioners* [2016] STC 636 (CA) at paragraphs 20 – 24 ("**Sanderson**").

21. Having read each of these decisions, it is my view that *Sanderson* is largely irrelevant since it looks at the application of the provisions of sections 29(5) and (6) TMA 1970 which are not in point in the appellant's circumstances for the reasons given at [7] above.

22. However, the cases of *Charlton* and *Anderson* are in point. At [37] of *Charlton*, the Upper Tribunal said as follows:

> "In our judgment, no new information, or 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 correct 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 the question. Such a delay did not deprive Mr Cree's conclusions of their essential newness for s.29(1) purposes." .

23. So it is clear from *Charlton* that the Upper Tribunal thought that there might be circumstances where if an officer, having concluded that a discovery assessment should be issued, takes overlong to actually issue the assessment, the conclusion might have lost its essential newness and thus the discovery assessment would be invalid.

24. In *Anderson*, at the paragraphs to which I was referred by Mr Rowell, it was said (at [72]):

> "In any event, HMRC have to prove that a conclusion was reached and that it was reasonable and "new". In this case, there is no real evidence as to when

HMRC realised that in their view additional tax was due for the tax year 2007/08. It could have been some considerable time before the assessment was actually issued such that their conclusion had lost its newness by that point. There are indications that HMRC was considering the valuation position as early as July 2011…. but the discovery assessment was not made until 23 February 2013. "

25. In that case, the Tribunal concluded (see [113]) that:

"….. even if Miss Carson could be regarded as having made the discovery as early as July 2012, in these circumstances we do not regard the passage of time from then until the issue of the discovery assessment on 23 February 2013 as sufficient for the conclusion to have lost its "newness"."

26. So it is clear from *Anderson* too that there might be circumstances (which could include the passage of time, but might include other circumstances) where a conclusion reached by the assessing officer might have lost its newness and thus any discovery assessment based on that conclusion would be invalid.

27. There are, however, other cases which go both ways. In the First-tier Tribunal decision in *Gakhal* [2016] UKFTT 0356 (TC), the Tribunal indicated that:

"……. we would agree with the Respondents that the passage in *Charlton* is *obiter* and so not binding upon us…… We conclude that the concept of a discovery becoming stale has no relevance insofar as lack of staleness is proposed as an additional condition which must be met in order to raise a discovery assessment".

28. The sentiment in *Gakhal* was endorsed in *Miesegaes* [2016] UKFTT 0375 (TC).

"……. on this view of the law, it is irrelevant when the discovery was made as long there was a discovery".

29. However, there is contrary sentiment expressed in *Pattullo* [2016] UKUT 0270 (TCC)

"It would, to my mind, be absurd to contemplate that having made a discovery of the sort specified in section 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….".

30. And in *Corbally-Stourton* [2008] STC (SCD) 907

"The conclusion that it is probably that there is an insufficiency must be one which newly arises (from fresh facts or a new view of the law or otherwise)"

31. Two things are apparent from these extracts.

32. The first is that there is no settled law as to whether the essential newness point is a substantive legal point.

33. The second is that there is sufficient jurisprudence on the point that it is not unreasonable for the appellant to seek to test it as a preliminary issue. It is a relevant point. If there is such a test and the facts show that HMRC have failed it, there is a succinct knock out point. I consider this in more detail below.

The Wrottesley criteria

34. I remind myself of the first and last Wrottesley criteria, that I should deal with this case fairly and justly and use my power to order that the validity of the discovery assessments be dealt with as a preliminary issue, sparingly.

35. I shall return to these later. I now consider the other Wrottesley criteria against the submissions made by the parties.

Succinct knock-out point

36. If the discovery assessments are invalid under section 29(1) TMA then that is an end of the appeal. The appellant succeeds. Their validity under section 29(1) is a succinct knock-out point. It is a separate point from the dishonesty and quantum points. Its determination is highly relevant.

Length of hearing

37. In their letter of 14 November 2016 which relates to listing, HMRC state their view that the substantive hearing is likely to last three to four days. This was before the appellant's application to amend his grounds of appeal to include quantum. I do not know whether dealing with quantum would increase any time estimate that HMRC would now give, but I suspect it would. HMRC indicated at that stage they would call two witnesses. The two witnesses which HMRC were proposing to call as identified in that letter were Officer Bailey and T Dove. No mention was made of the four witnesses which are the subject of Mr Rowell's fourth application. No mention, either, was made about Officer Griffiths. The latter is surprising given that it had been made pretty clear in the appellant's original grounds of appeal that:

> "The appellant believes that the [assessments] should be dismissed for a number of reasons, including that they depend on "discovery" and "dishonesty" both of which are challenged and denied."

38. I would have thought, therefore, that if Officer Griffiths had played a significant part in issuing the discovery assessments, he would have been identified in HMRC's letter of 14 November 2016 as a witness who was planning to attend.

39. So, although there had been some ambiguity over HMRC's position regarding calling witnesses, their time estimate of three to four days was based on calling just two. It is now likely that if they wish to adduce evidence on the question of quantum,

four additional witnesses are required, as well as a fifth, Officer Griffiths, who will give evidence regarding the discovery.

40. So the three to four days on the basis of two witnesses is likely to be considerably longer on the basis of six. If the hearing of the two issues identified in the original grounds of appeal was likely to be three to four days, then it seems to me that adding quantum (and four more witnesses) to them is likely to extend the time of the hearing to five or six, at least. Mr Rowell submitted that a three to four day hearing would involve at least three or four days of preparation time. I think he is erring on the low side, but be that as it may, if you were to identify a day's preparation with a day's hearing, we are talking five or six days preparation for a hearing which will deal with all three issues. This is to be compared with a hearing of one day to deal with the validity point. Mr Hall did not challenge Mr Rowell's estimate of one day preparation for each day of the hearing.

41. The validity point is a succinct one. It requires the Tribunal to consider the state of mind and knowledge of the relevant officer, both before 29 February 2012 when the appellant was arrested and subsequently until, on 20 May 2013, the discovery assessments were issued. This will require the relevant officer to give evidence.

42. I appreciate, however, that there is now an issue as to the identity of the relevant officer. At the hearing, Mr Rowell had proceeded on the basis that the relevant officer was Officer Bailey, since she had been involved not just on the criminal side, but more pertinently, she was the officer who had signed the assessments, and as Mr Hall has confirmed, she was responsible for issuing the assessments. However, he has subsequently made the point that she was only responsible for issuing the assessments clerically. The person on whose instructions she acted was Officer Griffiths who was the decision maker. So one issue which will need to be resolved is which officers state of mind and knowledge is relevant. Is it either Officer Bailey or is it Officer Griffiths or is it both.

43. However, each relevant officer can tender a relatively short witness statement on which he/she will undoubtedly be cross examined. Submissions will be made by each party as to the existence and relevance of the essential newness test and its application to this case based on the relevant officer's evidence. I agree with Mr Rowell that a day is a realistic estimate for the length of this hearing. It would cut preparation time down very considerably. In my view the deliberate behaviour and quantum issues are likely to take up disproportionately more preparation and hearing time than the validity issue. This can be saved if the appellant succeeds on the preliminary issue.

44. Mr Hall submitted at the hearing that Officer Bailey's investigation and her evidence on the validity of the discovery assessments is inextricably entwined with her investigation and evidence on the dishonesty and quantum points. I can see some likelihood of linkage with dishonesty but less so with quantum. But there are two points to be made here. Firstly, if Officer Bailey is the relevant officer, then she should be able to identify her knowledge and state of mind in relation to the discovery assessments and deal with those as a distinct evidential issue. Indeed I suspect any

witness statement prepared by her for a hearing of all three points to deal with these issues in a compartmentalised manner, looking first at validity, then dishonesty, then quantum. All she is required to do for the preliminary issue is to provide a witness statement dealing with the first of these.

45. If, on the other hand, the relevant officer is Officer Griffiths, then there is no evidence that he will be burdened with the intertwining of the criminal and civil process. And so his witness statement can focus exclusively on his state of mind and knowledge.

46. Mr Hall also makes the point about a link between the civil and criminal investigations and how the latter might have had an impact on the former. I appreciate this point. It is one which the relevant officer can deal with in his/her evidence. There may be no need to call other HMRC witnesses. The relevant officer's evidence regarding any impact that the criminal investigation had on the assessment process might be conclusive albeit that it will be tested in cross-examination. However, if any additional witness is required from HMRC to speak to this point (and there is no indication that there will be) I believe it can be readily accommodated within the one day which Mr Rowell submits should be set aside for the hearing.

47. So evidentially, the validity issue can be dealt with separate from the dishonesty and quantum issues and requires modest evidence.

48. I am told that I should be "particularly cautious" on matters of mixed fact and law". The validity of the discovery assessment is just such a matter. But the existence and application of the legal test (essential newness) and the factual issues (the state of mind of the relevant officers) are relatively straightforward. I appreciate that there will need to be some debate as to whether or not the essential newness is a legal test. More on this below. But they are both capable of resolution without affecting the other issues under appeal (dishonesty and quantum) and the resolution of the preliminary issue in the appellant's favour would mean that the considerable time of preparing for the substantive hearing, and the time set aside for that substantive hearing itself would be saved for the benefit of the appellant, HMRC and the Tribunal.

Further hindrance

49. I can see no reason why determination of the validity issue in HMRC's favour would hinder the Tribunal in arriving at a just result on any subsequent hearing of the dishonesty and quantum points. If the discovery assessments are found to be section 29(1) compliant, then the appellant falls back on his two alternative grounds of appeal; namely that he has behaved honestly, and that the amount assessed is excessive. Since dishonesty is not being run as a ground for the invalidity of the discovery assessments as part of the preliminary issue, I think it is unlikely that there will be any findings of fact in the hearing of the preliminary issue, which would prejudice the hearing of the dishonesty issue at a subsequent hearing. Mr Rowell made no such point in his submissions, and I would have expected him to if he

thought there would be (given it is something which might be to the appellant's detriment). I can certainly see no prejudice to HMRC.

Overall delay

50. The hearing of the preliminary issue can be brought on relatively soon. That is my view. Neither party made substantive submissions on the point. It will of course delay the hearing of the dishonesty and quantum points (should the appellant fail on the validity point). But the possible saving in time and costs, to my mind, far outweighs the delay.

Need for a further hearing

51. As mentioned above, the determination of the preliminary issue in the appellant's favour will mean that the appeal succeeds. The preparation and hearing time for the dishonesty and quantum points is saved.

Time and costs

52. I have dealt with these above. The preliminary issue can be dealt with as a distinct and separate issue both legally and evidentially. Its determination in the appellant's favour will reduce the overall cost and time required for the appeal. If the appellant fails in his application then the costs of preparation and for the hearing which relate to the dishonesty and quantum points will then have to be incurred. But the overall costs of a one day hearing for the preliminary issue when added to the preparation and trial costs (in terms of time and money) of a subsequent hearing of the dishonesty and quantum points is unlikely to be materially more than the costs of an overall five to six day hearing on all the issues. The possibility of the time and costs being saved in relation in relation to the dishonesty and quantum issues if the appellant is successful on the validity point, in my view, is an upside that materially outweighs any additional cost downside.

53. I am conscious that a hearing brings with it considerable logistical hassle. And there is an attraction in reducing this, which would be the case if there were a single hearing rather than a split trial. However, I am sure that Officer Bailey would be present on each day of the hearing of the substantive appeal even though she might participate as a witness for part only of that hearing. It means, of course, that she will have to travel twice. Officer Griffiths might be in the same boat. This is also true for the appellant (and more importantly, from a costs perspective, Mr Rowell or whoever represents the appellant at the hearing of the preliminary issue). But that additional cost and hassle is, to my mind, a cost worth paying given the potential for savings that a decision, on the preliminary issue, in favour of the appellant, would engender.

Standing back

54. The hearing of the validity of the discovery assessments is a distinct and discrete point. There is no need, as was the case in *Addo*, to consider the hypothetical officer issues arising from sections 29(5) and (6) TMA, since neither of these sections are engaged in this case. The validity of the discovery assessments under section

29(1) is a short question of fact and law. In the light of the length of time between 29 February 2012 (when the appellant was arrested), and what was known to the relevant officer (before then and then between then and the date of the issue of the discovery assessment on 20 May 2013), had his/her conclusion lost its essential newness thus rendering the discovery assessments invalid? This can be dealt with as a distinct matter even though it is a mixed issue of law and fact. If decided in favour of the appellant it concludes the appeal which saves time and money for everyone.

55. The two issues which have given me food for thought are, firstly, the essential newness test and whether it is a legal test in the first place; and secondly the uncertainty as to whether it is Officer Bailey or Officer Griffiths whose state of mind and knowledge needs to be tested.

56. But these issues will have to be dealt with as part of the main hearing, in any event. There is a certain amount of case law on the essential newness point and submissions on it would not, in my view, take more than three or so hours.

57. As regards whether the point as to whether it is Officer Bailey or Officer Griffiths who is the relevant officer, then both can tender short witness statements, Officer Bailey disentangling her evidence about the civil process, from the broader investigation that she has undertaken, and Officer Griffiths explaining his role in the proceedings. Their witness statements will speak for themselves as regards the role that each has played. And it should be readily apparent from those statements of the state of mind and knowledge of each officer at the relevant times. I cannot see the time required for the adoption of these statement and subsequent cross examination taking more than two and a half hours.

Conclusion

58. I accept that, in *Tilling v Whiteman* [1980] AC1 Lord Scarman described preliminary issues as often being "treacherous shortcuts" which can lead to "delay, anxiety and expense".

59. This was recognised by Mr Justice Neuberger in *Steele.* However, the judge went on to say

> "On the other hand it is clear that determination of preliminary issues can be very beneficial as CPR Part 24 recognises. To my mind, as is so often the case, there are inevitably conflicting factors. The determination of a preliminary issue can be a very satisfactory way of cheaply and quickly disposing of a case or part of a case."

60. I am conscious of Mr Hall's view that whilst there is an attraction to having the validity of the discovery assessments heard a preliminary issue, it is a fatal attraction. I disagree. This case is one where, in my view, the determination of this preliminary issue would be a satisfactory way of comparatively cheaply and relatively quickly disposing of the appeal as a whole. The hearing of the validity of the discovery assessment as a preliminary issue is consistent with the overriding objective of dealing with cases fairly and justly

61. I therefore allow the appellant's application that the question of whether the discovery assessments are valid under section 29(1) TMA 1970 should be heard as a preliminary issue.

Witnesses

62. The appellant's application is that I direct that any witness statements tendered as evidence for David Threlkeld, Barry Ryan, Kay Mellor and Steven Taylor are excluded as evidence if HMRC do not call them to give live evidence and so make them available for cross examination.

63. My understanding is that the evidence of these witnesses is relevant to the question of dishonesty (and perhaps quantum) but none will give relevant evidence as to the validity of the discovery assessment.

64. I have decided, therefore not to give any directions on this point for the following reasons:

(1) Firstly, Mr Hall indicated at the hearing that HMRC may well, contrary to what might have been suggested hitherto, call as live witnesses any witnesses upon whose evidence HMRC intends to rely. It is just that, given HMRC's uncertainty about the appellant's case (now resolved given the amended grounds of appeal) HMRC was not certain which witnesses would need to be called. If therefore, HMRC do call these witnesses to give live evidence, then Mr Rowell's application is redundant. So we should adopt a wait and see policy. Should HMRC subsequently decide to tender written evidence alone, then the matter can be considered at the appropriate time, and indeed it might be the subject of a subsequent application along the lines made by Mr Rowell at the hearing.

(2) Secondly, and more importantly, if the appellant succeeds on the hearing of the preliminary issue that the discovery assessments are invalid, then the appeal succeeds. There is no need to determine dishonesty or quantum. So the evidence of the four witnesses is irrelevant. Again the position should be wait and see, and the issue addressed only if the appellant fails on the preliminary issue. Then, if as mentioned above, HMRC seek to tender written evidence alone, an appropriate application can be made and determined at that time.

Decision

65. For the foregoing reasons, my decision on each of these four applications is as follows:

(1) That the appeal against the penalty assessments filed on 19 December 2016 be joined to the appeal against the substantive assessments. This has already been done.

(2) That the appellant be permitted to file an amended grounds of appeal in the form submitted to the Tribunal and to the respondents on 6 December 2016.

(3) There be a split trial preliminary issue hearing in respect of the validity of the discovery assessments. The Tribunal will issue, separately, appropriate case management directions in due course.

(4) I give no directions regarding exclusion of the statements of the four witnesses (David Threlkeld, Barry Ryan, Kay Mellor and Steven Taylor) whom HMRC did not, at the time of the application propose to call to give evidence.

Appeal rights

66. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 10 JULY 2017