[2016] UKUT 270 (TCC)

Ref: UT/2014/0084
(Previously Ref: FTC/145/2014)

CAPITAL GAINS TAX – Discovery assessment; tax avoidance scheme involving capital redemption policies; when HMRC officer discovered that assessment was insufficient; whether there can be a series of discoveries; whether the discovery became stale; TMA 1970 s 29(1); whether officer could not have been reasonably expected to be aware of the insufficiency at earlier date; attributes of the hypothetical officer; what constitutes such awareness; tests to be applied; TMA 1970 s 29(5); Appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

ON APPEAL FROM THE
FIRST-TIER TRIBUNAL (TAX CHAMBER)

NEIL PATTULLO

Appellant

– and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: LORD GLENNIE

Sitting in public at George House, 126 George Street, Edinburgh on 24 and 25 November 2015

Keith Gordon, barrister, instructed by AVN Venus Tax LLP, Leeds, for the Appellant (Neil Pattullo, "the taxpayer")

Ross Anderson, advocate, instructed by the Office of the Advocate General for Scotland, for the Respondents (HMRC)

DECISION

LORD GLENNIE

Introduction

[1] This case raises, once again, issues as to the construction and application of s 29 Taxes Management Act 1970 ("TMA"). In its present form, introduced by the Finance Act 1994 with effect from 1996-97, that section has been considered in a number of cases including *Langham* v *Veltema* [2004] STC 544 ([2004] EWCA Civ 193), *Corbally-Stourton* v *HMRC* [2008] STC (SCD) 907, *Tower MCashback LLP 1* v *HMRC* [2010] STC 809 ([2010] EWCA Civ 32), *HMRC* v *Lansdowne Partners Ltd* [2012] STC 544 ([2011] EWCA Civ 1578), *Charlton* v *HMRC* [2013] STC 866 ([2012] UKFTT 770 (TCC)), *Sanderson* v *HMRC* [2013] UKUT 0623 (TCC) and *Alistair Norman* v *HMRC* [2015] UKFTT 0303 (TC). The present appeal from the decision of the First-tier Tribunal ("FTT") ([2014] UKFTT 841 (TC)) raises questions in relation to s 29(1) – in broad terms, what amounts to a "discovery" and when does it cease to be "new" – as well as re-visiting the characteristics of the "hypothetical officer" contemplated by s 29(5).

[2] An appeal from the FTT to the UT lies, with the permission of the FTT or the UT, "on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision": s 11(1) Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). The decision of the FTT was not an excluded decision and permission has been granted by a judge of the UT. The grounds of appeal, consolidated in accordance with the directions of the judge who granted permission to appeal, identify in paras 1-3 three alleged errors of law in the decision of the FTT, the first two relating to s 29(1) and the third to s 29(5). I shall consider these alleged errors of law in due course.

[3] The Grounds of Appeal go on in paras 4-19 to identify a number of "errors of fact" in the FTT's decision. These alleged errors of fact re-iterate in a more condensed form the "challenges against findings of fact" articulated in paras 20-43 of the original Grounds of Appeal on which permission to appeal was sought and ultimately granted. There is no difficulty in this re-formulation of the alleged errors of fact, and during the course of the hearing I was in fact referred to the errors of fact as formulated in the original Grounds of Appeal. Mr Pattullo ["the taxpayer"] submits that such a challenge to findings of fact made by the FTT is permitted and justified on *Edwards* v *Bairstow* grounds, i.e. on the basis that the FTT acted "without any evidence or upon a view of the facts which could not reasonably be entertained" or "that the facts found [by the FTT] are such that no person acting judicially and properly instructed as to the appropriate law could have come to the determination under appeal": *Edwards* v *Bairstow* [1956] AC 14 per Viscount Simonds at p 29 and per Lord Radcliffe at p 35. HMRC for their part accept that, if it finds that the FTT made an error of law in coming to its decision, the UT has power under s 12(4)(b) of the 2007 Act to "make such findings of fact as it considers appropriate", and to that extent may re-visit findings of fact made by the FTT. On this there is a measure of agreement, under reference to *HMRC* v *Pendragon* [2015] 1 WLR 2838 ([2015] UKSC 37) per Lord Carnwath at paras 44-51. However, HMRC dispute the broader challenge to the FTT's findings of fact on *Edwards* v *Bairstow* grounds. It will be necessary to consider the extent to which the UT can and should enter into a reconsideration of the facts in this case.

The legal framework

[4] As Moses LJ explained in *Tower MCashback* at paras [1]-[3] and [12]-[24] – and nothing in the judgments in the Supreme Court in that case (reported at [2011] 2 AC 457) cast any doubt upon these passages – the introduction of self-assessment was a dramatic change in determining a taxpayer's liabilities. Under the new regime introduced in 1996-97, the taxpayer not only submits a return of his income and gains but makes a single self-assessment of the amount of income tax (on income from all sources) and capital gains tax chargeable on him on the basis of the information contained in his return: see ss 8 and 9 TMA. Subject to certain exceptions, that self-assessment is the final determination of his taxable income and chargeable gains for a particular year of assessment.

[5] One of those exceptions is where the taxpayer amends his return within twelve months of the filing date. Another is where the Revenue gives notice ("notice of enquiry") to the taxpayer of its intention to enquire into the return under s 9A TMA, in which case the taxpayer may amend his return, or the Revenue may amend it in accordance with a closure notice, or the Revenue may amend the self-assessment. The precise details do not matter for present purposes because, as is common ground between the parties, (a) the taxpayer did not amend his return within that period or at all and (b) the Revenue did not give the taxpayer a notice of enquiry within the time allowed under s 9A(2) for doing so (i.e. 31 January 2006) or at all.

[6] The third exception, and the only one relevant here, is the power conferred on the Revenue by s 29 TMA to make an assessment. Those powers are heavily circumscribed. As Moses LJ pointed out in *Tower MCashback* at para [24], s 29 in its current form "confers a much more restricted power than that contained in the previous s 29." After mentioning the various restrictions, he observed that those provisions "underline the finality of the self-assessment, a finality which is underlined by strict statutory control of the circumstances in which the Revenue may impose additional tax liabilities by way of amendment to the taxpayer's return and assessment."

[7] Section 29 provides, so far as material, as follows:

> **"29. — Assessment where loss of tax 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 ……. 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) … [Not relevant to the present case]
>
> (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).

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if –

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment the return, or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; 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. …"

[8] So far as concerns the present case, the key provisions are those in s 29 sub-ss (1)(b) and (c), (3)(a), (5)(a) and 6(a). This case concerns the taxpayer's return and self-assessment for the year of assessment 2003/04, which was submitted within the statutory filing period which ended on 31 January 2005. It is agreed that, for the purposes of s 9A, the Revenue were entitled to give a notice of enquiry into the return at any time up to and including 31 January 2006. Not having given a notice of enquiry by that date, the Revenue could thereafter only make an assessment on the taxpayer for that

year of assessment if: (i) they "discovered" that the assessment to tax in the taxpayer's return was insufficient (s 29(1)); and (ii) they could not have been reasonably expected at that time (31 January 2006) , on the basis of "the information" by then made available to them, to be aware that the assessment to tax was insufficient (s 29(5)(a)). I refer to the tax being insufficient as a shorthand for the various circumstances covered by paras (a), (b) and (c) within s 29(1). Reference to the information by then made available to them is a reference to information of the kinds and from the sources referred to in s 29(6), and no other information (see *Langham* v *Veltema* at para [36]

[9] It should also be noted, and this was not in dispute, that, quite apart from the provisions of s 29, the statutory time limit for making an assessment in the case of the taxpayer for the year of assessment in question was 31 January 2010.

The circumstances giving rise to this appeal

[10] The essential facts giving rise to the appeal are not in dispute. I take them from the fact findings made by the FTT, though not necessarily in the same order as set out in the FTT's decision. A number of those fact findings are challenged in the Note of Appeal, and I shall indicate as I go through which findings are subject to challenge.

The CRC tax avoidance scheme

[11] The taxpayer entered into a tax avoidance arrangement in relation to the 2003/04 year of assessment. The arrangement involved the use of Capital Redemption Contracts (CRCs) and sought to take advantage of the wording of s 37 Taxation and Chargeable Gains Act 1992 which is in the following terms:

> "37(1) — There shall be excluded from the consideration for a disposal of assets taken into account in the computation of the gain any money or money's worth charged to income tax as income of, or taken into account as a receipt in computing income or profits or gains or losses of, the person making the disposal for the purposes of the Income Tax Acts."

Capital redemption business carried on by insurance companies consists of effecting (on the basis of actuarial calculations) contracts in terms of which, in return for one or more fixed payments, a sum or a series of sums of a specified amount become payable on a specified date or over a period. The nature of the insurance business must not be life insurance. Because of the various complexities of regulatory issues relating to insurance law in the United Kingdom, UK insurance companies do not carry on capital redemption business. Accordingly, all CRCs used in tax avoidance schemes were issued by non-UK resident companies.

[12] The FTT describe in paras 27 and 28 how the scheme was designed to work:

> "27. The basis of the scheme was to take advantage of the fact that there might be both an income tax charge and a chargeable gain for capital gains tax purposes as CRCs were treated for tax purposes essentially as if they were life insurance policies. For income tax purposes, the chargeable gain is the surrender consideration less the amount paid for the contract by the trustees. …
>
> 28. For capital gains tax purposes, the chargeable gain equals the surrender consideration less the value on appointment out of trust. This would normally be a negligible gain. However, the scheme relies on an interpretation of s 37 of the Taxation of Chargeable Gains Act 1992 to the effect that the [surrender] consideration should be excluded from the calculation as it has already been included in the computation made for income tax purposes. This results in a capital loss equal to the value of the capital redemption contract on its appointment out of the trust to the [taxpayer]."

Schemes such as this were ultimately held not to achieve their purpose. As the FTT note in para 7, it was established in *Drummond* v *HMRC* (2007) Spc00617 that the purpose of s 37 was to avoid double taxation by deducting from disposals an amount already taken into account for income tax purposes. It was not, as the FTT somewhat colourfully put it, designed "to create a massive tax loss by some form of fiscal alchemy involving transactions with no other purpose than constituting the magic ingredients with which the fiscal alchemy is performed."

[13] *Drummond* was heard before the Special Commissioners in about October 2006. The decision was issued in July 2007. It was affirmed on appeal by Norris J (at [2008] STC 2707) on 23 July 2008 and by the Court of Appeal (at [2009] STC 2206) on 25 June 2009. Permission to appeal to the Supreme Court was refused in November 2009.

[14] *Drummond* concerned a scheme involving the surrender of second hand life insurance policies ("SHIPS"). However, it is now agreed that the ratio of the decision applies equally to CRCs. There is now no dispute as to the ineffectiveness of the scheme nor any dispute as to the correctness of the assessment (if validly made) which is the subject of these proceedings. This appeal is limited to the procedural issues arising under s 29 TMA.

Investigation of CRC schemes

[15] In their decision, the FTT describe the way in which CRC schemes came to be investigated. In 2004 there were already a number of investigations within HMRC Specialist Investigations ("SI") into the surrender of SHIPS which, put briefly, "relied upon a mismatch between chargeable events legislation and capital gains legislation" (para 19). Some of these schemes were initially investigated in Edinburgh but subsequently all SHIPS investigations were consolidated and dealt with by SI Bristol.

[16] The existence of tax arrangements involving CRCs was identified in late 2004. Schemes involving CRCs first appeared in returns submitted for the tax year 2003/04. The FTT make a finding that a CRC policy is (or was) an arcane and specialist product (para 21) and most officers of HMRC would not know (or would not have known) what it was. CRCs were not then (as they are now) covered by avoidance scheme disclosure regulations, a fact which made them difficult to identify.

[17] Responsibility for managing HMRC's response to these schemes was given to SI Edinburgh. Dr Branigan, an experienced official within SI, was appointed the project leader of a team of investigators based in Edinburgh (para 20). It was in late 2004 that he ascertained that CRCs were being used in an attempt to achieve the same tax advantages as were then thought to apply to SHIPS (para 21).

[18] By some point in 2005, Dr Branigan had a team of about four tax officials working on the identification and analysis of various tax avoidance schemes (para 22). The investigation project was registered on HMRC's internal case management system in May 2005. The team's first task was to set up systems to identify participants in the scheme. The scheme was given the code or project name CRC Mk II because of the existence of previous CRC schemes in the 1990s. Descriptions of the arrangements were published on the HMRC intranet, which gave details of the disclosures or entries likely to be made in a tax return and instructions to local officers to contact Edinburgh SI if anything aroused their suspicions. Patterns gradually came to be identified, e.g. the involvement of the same bank, insurance company, solicitors or accountants. Most participants were eventually identified by HMRC, frequently after the time for opening an enquiry under s 9A TMA.

[19] It should not be assumed, however, that it was immediately obvious to all HMRC officers, even within SI, that CRC schemes were not effective. The FTT find at para 29 that in 2006 there was considerable uncertainty within HMRC whether CRC schemes worked. HMRC's Manual at CG69004 (dated September 2003) stated that CRCs were not within the charge to Capital Gains Tax since under such a policy, on payment of a sum of money, the insurer guarantees to the insured a sum payable on a specified future date or dates independently of any contingency. However, as the FTT go on to say, whatever HMRC may have thought, many practitioners in the tax industry were proceeding on the basis that that view was wrong.

[20] To give an idea of the scale of the issue under investigation by the team, the FTT note (at para 23) that some 925 participants in the scheme were identified, a figure thought to represent about 97% of all participants. There had been, they say, 909 open enquiries and investigations in which the contents of the returns were examined to determine whether a discovery assessment should be issued. [This last finding about the 909 open enquiries and investigations is disputed by the taxpayer on the basis that, on Dr Branigan's unchallenged evidence, the figure of 909 referred to the number of cases where, after the enquiry window was closed, the contents of the return were critically examined on an individual basis in order to determine whether it was possible to make a "discovery assessment" under s 29. In so far as there is any difference between the two versions – and I am not persuaded that there is – nothing turns on it.] Some cases were investigated under Code of Practice 8, which applies to cases where serious fraud is not suspected. In a number of cases it was concluded that no discovery assessment was possible; no investigation took place; and the loss claimed under the scheme was, in effect, allowed. It is estimated that taxpayers' loss claims using such schemes have amounted to some £2,186,774,738, of which only about £317.2m has been recovered by HMRC.

[21] For what it is worth, the FTT note at para 26 that legislation brought into force in 2005 now prevents the operation of such schemes by clarifying that CRCs are not chargeable assets for capital gains tax purposes: Finance (No. 2) Act 2005 Schedule 7 para 14.

The taxpayer's return

[22] The taxpayer's tax return for the year 2003/04 was received by HMRC on time on 31 January 2005. The FTT set out in summary the content of that return, so far as material, at paras 12-17. I put the paragraph number of the FTT decision against each part of the summary.

[23] [FTT para 13]: That part of the return relating to the taxpayer's Capital Gains Tax liability contained the following entry:-

	Enter date of Acquisition	Enter Date of Disposal	Disposal proceeds	Losses arising
Capital Redemption Contracts	04/03/04	08/03/04	£ * [left blank]	£2,665,000.00

[24] [FTT para 14]: At Box 8.1, total gains were noted as £2,143,097. At Box 8.2, the total losses were stated to be £2,701,938. This sum was carried forward to Box

8.10. After setting out this information, the FTT make the following comment (still within para 14):

> "14. Neither the basic or economic loss of £60,000 (£2,665,000 less £2,600,000) or its calculation is set out anywhere in the return. While the figures from which that economic loss can be calculated are to be found within the return, this is not how the Appellant calculated the capital loss. In spite of the information contained within the tax return, there is no explanation within the return as to how the loss claimed arose."

[25] [FTT para 15]: At Box 8.22, under the heading Additional Information, the following is set out:-

> "1 On 24 February 2004 I settled an interest in possession trust with £6,000.
>
> 2 The trust is called "The Pattullo 2004 Life Interest Settlement".
>
> 3 I Borrowed on commercial terms a sum of £2,665,000 from Investec Bank UK Ltd and settled this amount into the trust.
>
> 4 The Trustees "Nexus Trustee Company Limited" used the funds to acquire a number of Capital Redemption Contracts on 1 March 2004 for £2,665,000 from Rockville International Corp.
>
> 5 The trustees appointed the Capital Redemption Contracts to me on 4 March 2004.
>
> 6 I surrendered the Capital Redemption contracts on 8 March 2004 and received redemption proceeds of £2,600,000.
>
> 7 This has given rise to a capital loss as a consequence of s37(1) TCGA 1992 amounting to £2,665,000."

[26] [FTT para 15]: There is also a sheet entitled CLIENT SCHEDULE TO CAPITAL GAINS PAGES. Below the heading are *inter alia* the following entries:-

Personal /Business assets	Date	Year	Gain; Loss
Capital Redemption Contracts			
Disposal	08/04/2004	* [left blank]	
Acquired	04/03/2004	(£2,665,000.00)	
Chargeable gains (allowable loss) after reliefs		£2,665,000	

[27] The FTT go on to make these comments at paras 16 and 17, after completing their summary of the information supplied in the return:

> "16. It can be seen that the disposal proceeds are not shown. There is also no reference to income tax charges on the return. How section 37 operates is not explained

in the return. It is neither clear nor obvious, on the basis of the information contained in the return that an insufficiency of tax is being declared.

17. There is no clear calculation explaining how the loss of £2,665,000 is reached."

These comments in paras 14, 16 and 17 of the FTT decision are criticised in this appeal by the taxpayer.

Investigation of the taxpayer's affairs in this case

[28] This chapter is dealt with in paras 10, 31, 32 and 33-40 of the FTT decision.

[29] The FTT point out that although the legislation appears to assume that a tax return, once submitted, will be examined by an officer of HMRC, practice is rather different. Unless the taxpayer leaves the calculation of tax to HMRC, the return will not normally be examined by an individual officer. The data from each return is inserted into a database by HMRC officers, a purely clerical exercise involving no consideration of the contents of a return. The initial examination of a taxpayer's return is carried out by a computer, which is programmed to carry out an initial risk assessment based on various algorithms and filters. Sometimes this is the only examination of a return.

[30] Disclosure of the CRC scheme was not at that time required by law (though it is now). Although some promoters did make disclosure, most participants, including the taxpayer in this case, did not. The FTT find that, even if full disclosure of a tax avoidance scheme is made, that will not guarantee the opening of an enquiry, because the first and possibly the only examination of the tax return is carried out by the computer. But they go on to find that there would be a greater risk of an enquiry being opened if full or greater disclosure were made.

[31] By about October 2006 Dr Branigan and his team had been investigating these schemes for over a year (see para 33). As the FTT go on to find in that paragraph, Dr Branigan's team had carried out some technical analysis of the arrangements but had not fully got to grips with all the arguments and the proper interpretation of the relevant legislation. What triggered their interest in the taxpayer at that stage is unknown. His return was obtained from store and received at the Edinburgh SI on 23 October 2006. Dr Branigan examined the return and noted the following: (i) that the taxpayer had an interest in the trust; (ii) that a CRC was acquired and almost immediately disposed of; (iii) the involvement of Rockville International Corporation and Investec Bank (UK) Ltd; (iv) the reference to section 37 of the 1992 Act; and (v) that a large loss was claimed. In October 2006, the taxpayer was identified as a possible participant in the CRC Mk II Scheme. Further investigation ensued.

> "*At that stage, Dr Branigan did not consider that there was a sufficient basis to raise an assessment, although he was of the view that there was sufficient to justify further investigation. We have no reason to doubt the soundness of that view by such an experienced and senior HMRC officer.*"

These last two sentences, which I have italicised, were the subject of intense criticism by Mr Gordon on behalf of the taxpayer.

[32] In para 34 the FTT make the following findings:

> "On 28 October 2006, [the taxpayer] was informed that his affairs were under investigation. *When the return was examined in October 2006, it was not clear to Dr Branigan and his team how the taxpayer claimed section 37 operated. While this no doubt raised suspicions, even strong suspicions, in the minds of Dr Branigan and his*

> *team, this did not make them aware that that return disclosed an insufficiency of tax or that there was a reasonable prospect of establishing that there were such an insufficiency.* Accordingly, Dr Branigan wrote to [the taxpayer] on 23 October 2006 stating that he had reason to believe that in 2003/04 [the taxpayer] had participated in arrangements whose sole or main purpose was the avoidance of tax and requested the production of certain specified documents. [The taxpayer] declined to produce any documentation and none has ever been produced. *At that stage Dr Branigan had not formed a view on whether the scheme was effective.*"

The italicised passages are challenged by the taxpayer in this case.

[33] In para 35, the FTT refer to the investigation into SHIPS and the *Drummond* litigation concerning such tax avoidance schemes (see above). They note that the taxpayer in *Drummond* appealed against an assessment in about January 2007. As is pointed out by the taxpayer in this case, that must be an error since *Drummond* was heard before the Special Commissioners in April 2007, so the appeal must have been brought early in 2006 if not before. Whatever the date on which the appeal in *Drummond* was brought, it was heard in April 2007 and the decision, favourable to HMRC, was issued in July 2007. The decision was appealed. The FTT record that no further steps were taken by Dr Branigan or his team to challenge the CRC policy schemes while the SHIPS (*Drummond*) litigation continued. He was not involved in the appeal proceedings relating to *Drummond* or any high level discussions on SHIPS within HMRC.

[34] In paras 36-38 the FTT find that in September 2007 Dr Branigan wrote to the taxpayer requiring him to produce specified documents (relating to the CRC policy and related trust and financial arrangements). After sundry correspondence a fresh notice under s 20(1) TMA was issued in August 2008. The purpose of the notice was to consider whether there was an insufficiency which would justify an assessment based on HMRC's state of knowledge at that time. The 2008 Notice stated that a marketed tax avoidance scheme involving capital redemption policies was being investigated, and that, in order to establish whether a discovery assessment could be made, it was necessary for HMRC to consider the basic transactional documentation and any related correspondence. The taxpayer did not comply with the notice. In mid-January 2009 he commenced proceedings in the Court of Session for judicial review, seeking reduction of the Notice. A Hearing took place in May 2009 before Lord Bannatyne. On 7 October 2009 he dismissed the petition (2010 SLT 993). The taxpayer reclaimed. However, this was overtaken by events. The Court of Appeal decision in *Drummond*, in favour of the Crown, was issued on 25 June 2009. Permission to appeal to the Supreme Court was refused in November 2009. In the light of these developments the discovery assessment now under challenge in these proceedings was raised. The reclaiming motion became pointless and was subsequently abandoned on terms agreed between the parties.

[35] The FTT describe Dr Branigan's thinking in this way at paras 39-40. After the Court of Appeal decision in *Drummond* in June 2009, he was satisfied that there was an insufficiency. The documents sought from the taxpayer were no longer necessary. The Court of Appeal had held that the scheme did not work. The decisions in *Drummond* at all levels had held, in effect, that the surrender proceeds of the policies were not to be excluded from the consideration for their disposal. The tax avoidance scheme, which created a large but entirely artificial capital loss by excluding those proceeds, therefore failed. That interpretation of s 37 applied equally to the taxpayer's scheme in this case.

There was therefore an insufficiency of tax. Accordingly, an assessment was issued on 13 January 2010 in the sum of £835,400.60.

[36] That assessment was appealed by the taxpayer on or about 5 February 2010. The matter was taken no further at that time. Following the UT's decision in *Charlton*, the taxpayer, through his advisers, requested an internal review in January 2013. This led to the assessment being confirmed in March 2013, when the taxpayer lodged the present appeal.

The first issue: HMRC's "discovery" of the insufficiency of tax (s 29(1))

[37] The first two grounds of appeal concern the findings and decision of the FTT on questions arising under TMA s 29(1).

The FTT's findings

[38] The FTT's findings on this issue are set out at paras 53-58. I set them out in full below:

> "53. Having regard to the facts as we have found them to be, it is clear that while *a series of discoveries* may have been made as a consequence of the decision of the Special Commissioner and the High Court [in *Drummond*], the critical decision was the emphatic judgment of the Court of Appeal issued in June 2009, endorsed by the refusal to give permission to appeal to the Supreme Court in November 2009. At that stage, either in June 2009 or November 2009, what may have been a suspicion even a strong suspicion was converted to the positive view that there was an insufficiency of tax. This view newly appeared between June and November 2009 and plainly, in our view, constitutes a discovery within the meaning of s 29(1).
>
> 54. In making the findings of fact narrated above, we have relied on the documents produced and, in particular, the evidence of Dr Branigan. We found him to be honest, straightforward, reliable and credible. He was the subject of extensive cross-examination and we were impressed by the care he took over his comprehensive answers. We reject the attack on his reliability in a skilful cross-examination by Mr Gordon which, among other matters, compared Dr Branigan's affidavit in the judicial review proceedings with his evidence before this Tribunal. It is true that there were differences; some aspects of his evidence were not covered in his affidavit. However, we are of the view that Dr Branigan was not attempting to depart from his basic views and recollection. Rather, he was at pains to ensure that we had the complete picture. The circumstances in which his affidavit came to be prepared for the purposes of the judicial review proceedings were not before us. However, it is within the experience of the Tribunal that these documents sometimes have to be produced at short notice, and may be directed to what may seem important at the time but which become less significant subsequently, where other matters not previously thought to be of significance, assume an importance not hitherto appreciated. Dr Branigan had ample opportunity to reflect before providing and giving evidence to this Tribunal. It seems to us that his evidence before us, insofar as it is different from his affidavit, is likely to have been more comprehensive and accurate.
>
> 55. In evidence, Dr Branigan modified the affidavit he produced before Lord Bannatyne in the judicial review proceedings. He accepted that full disclosure of a tax avoidance scheme will not guarantee the opening of an enquiry. This is because full disclosure of such a scheme in the white space on the return will not necessarily trigger action when the first (and possibly) only examination of the tax return is carried out electronically by a suitably programmed computer. Dr Branigan also said in evidence, and we accept, that there would be a greater risk of an enquiry being opened if full or greater disclosure is made. This seems to us to be only common sense. It is essentially part of the cat and mouse game played by promoters of tax avoidance schemes (some of

which work and others do not) to provide sufficient information to avoid the opening of an enquiry and to negate or reduce the prospect of a discovery assessment after the enquiry window has closed and before statutory time bar precludes the raising of an assessment. We refer to this below in paragraph 79.

56. We therefore conclude that for the purposes of s 29(1) of TMA an officer of HMRC discovered that relief which had been given was or had become excessive (this is how the Appellant put the issue in his Skeleton Argument - paragraph 27(a)). The discovery occurred in 2009 as we have described. The assessment was raised in January 2010. *The assessment was not time-barred or stale. The deadline for raising the assessment was 31 January 2010* (TMA s 34(1) - as it was enacted at that time). Even, if the discovery could be said to have been made at an earlier stage, for example when the Special Commissioner or the High Court issued their decisions in Drummond in 2007 and 2008 respectively, the discovery would still not have been time-barred. *If, on that hypothesis, it could be said that it was not acted on promptly, it nevertheless still met the statutory deadline*.

57. In reaching the foregoing conclusions in relation to s 29(1) we have, we think, followed the thrust of the Upper Tribunal's reasoning in Charlton in relation to s 29(1). After a lengthy review of the authorities, and relying in particular upon the opinion of Lord Normand in IRC v Mackinlay's Trs 1938 SC 765 and other cases in turn relying on Lord Normand's opinion, the Upper Tribunal concluded that 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 has been an insufficiency in an assessment. This can be for any reason including a change of view or opinion or the correction of an oversight. New information about the facts or the law is not required (paragraphs 37, 39, 44). The approach in this part of Charlton has been followed in Sanderson, at paragraphs 20-24).

58. In Charlton the tax return for the tax year 2006/07 was lodged before 31 January 2008. HMRC did not open an enquiry into it. In March 2009, HMRC became aware that the taxpayer was a participant in a scheme similar but not identical to the scheme in Drummond. The officer in charge (Mr Cree) who gave evidence before the First-tier Tribunal did not raise assessments immediately but waited until after it became clear that the Court of Appeal's judgment in Drummond would not be appealed to the Supreme Court (paragraph 11). Although this date is not identified in the Upper Tribunal's decision in Charlton, we know from the proceedings before us and an examination of the reports in Drummond that the Supreme Court refused permission to appeal on 29 November 2009. The Upper Tribunal in Charlton concluded (paragraph 37) that a delay in raising an assessment merely to accommodate the final determination of another appeal which was material to the liability question, did not result in the conclusion (that there was an insufficiency of tax) losing its essential newness for the purposes of section 29(1).

I have italicised the phrase "a series of discoveries" in para 53 of the FTT decision because this is focus of the first ground of appeal. The italicised passages at para 56 of the FTT decision are the subject of attack in the second ground of appeal.

The Note of Appeal

[39] In the Note of Appeal, it is submitted that the FTT made two errors of law in reaching its decision on the s 29(1) point. They are:

(a) that the FTT proceeded on the basis that a discovery could comprise a series of discoveries (see para 53 of its decision); and

(b) that the FTT proceeded on the basis that the staleness of a discovery is determined by the statutory time limits (see para 56)

Submissions and discussion

A series of discoveries?

[40] I deal first with the first of the grounds of appeal noted at (a) above. The criticism of the FTT's decision is that the FTT erred in law in proceeding on the basis that a discovery could comprise a "series of discoveries".

[41] There was little or no dispute between the parties as to what constituted a "discovery" for the purposes of s 29(1). It was common ground that the relevant discovery was a discovery by the particular officer or inspector at HMRC. It was his state of mind which was in issue, not that of some reasonable officer or inspector. The test was subjective. As to the required state of mind, Mr Gordon, for the taxpayer, submitted, under reference to *R* v *Kensington Income Tax Commissioners ex parte Aramayo* [1913] 3 KB 870, 879, 997, that the word "discovers" as used in that section did not require actual knowledge on the part of the particular inspector that the assessment to tax was insufficient. It was a much lower threshold than that; honest and reasonable belief rather than knowledge (*Charlton* v *HMRC* at para 54). It meant no more than that the inspector "comes to the conclusion" or "has reason to believe" that the assessment to tax was insufficient. Referring to the decisions of the FTT in *Alistair Norman* v *HMRC* and *Charlton* v *HMRC*, Mr Gordon submitted that the discovery that the assessment to tax was insufficient did not have to be based on any new information, or any new research, or any change in the law or change in understanding of the law. It could arise from an extended period of reflection or from a "eureka moment", in either case possibly based upon a fresh understanding of the material already under consideration. In *Charlton* the UT put the matter this way (at para 28):

> "… The word 'discovers' does connote change, in the sense of a threshold being crossed. At one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view. That is the only threshold that has to be crossed. We do not agree that the lawyer… would be regarded as having made a discovery any the less by waking up one morning with a different conclusion from the one he had earlier reached, than if he had changed his mind with the benefit of further research. It is, we think, evident that the relevant threshold for there to be a discovery may be crossed as a result of a 'eureka' moment just as much as by painstaking research."

That passage was applied by the FTT in *Norman* at para 54 in the following terms:

> "the threshold for a 'discovery' is now also well established as being a fairly low one. In *Charlton* it was stated that '[a]ll that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment."

Mr Gordon laid some emphasis on the metaphor of crossing a threshold as developed in *Charlton*.

[42] Subject to one point, I did not understand Mr Anderson to take issue with this. He too referred to *R* v *Kensington Income Tax Commissioners ex parte Aramayo*, citing an additional passage from the judgment of Lush J at p 898 ("finds" or "satisfies himself"). He also referred me to the remarks of Lord President Normand *IRC* v *Mackinlay's Trs* 1938 SC 765, 772 (a case where the discovery was based on a new interpretation of the law), remarks subsequently approved in *Cenlon Finance Co Ltd* v *Ellwood* [1962] AC 782, 794 and 799-800. He did, however, submit, and this was the one point on which he took issue with Mr Gordon on this part of the argument, that the metaphor of having to cross a threshold was not necessarily helpful. Under reference to

the observations of Lord Hoffmann in *Serco Ltd* v *Lawson* [2006] ICR 250 at para 19 and Moses LJ in *HMRC* v *Lansdowne* at para 70, he warned against the danger of analysis by metaphor. The metaphor of crossing the threshold might well have been apposite in the *Charlton* case, and might be in point in any case concerned with the sudden discovery of fact, a sudden new understanding of the law, or the like. But it did not necessarily answer the question of how or when a discovery occurs when it occurs in the course of a long and painstaking research into a taxpayer's affairs

[43] Mr Gordon argued that since, for the purpose of s 29(1), a discovery involved the crossing of a threshold, there could only be one moment at which this occurred. At any one time, either HMRC had reason to believe (to use one of the expressions from *Aramayo*) that there was an insufficiency in the assessment to tax or it did not have reason to believe that. To use the language in *Charlton*, the officer was either of that view or was not of that view. On that basis he submitted that the FTT was clearly wrong when it referred, in the italicised passage in paragraph 53 of its decision (quoted at para [38] above), to a "series of discoveries" which may have been made as a consequence of the decision of the Special Commissioner and the High Court in *Drummond* before the critical decision in the judgment of the Court of Appeal in that case in June 2009 and the refusal of permission to appeal to the Supreme Court in November 2009. There could not, he submitted, be a series of discoveries. Once a discovery was made it was made; and HMRC was thereupon entitled, subject to other subsections within s 29, to make an assessment in the amount or further amount to be charged.

[44] I am not persuaded that the FTT did err in dealing with the matter in this way. The process of discovery, or coming to a realisation, or forming a view, whichever expression one chooses, is not always as simple as is suggested by the metaphor of crossing a threshold. There may be moments when the discovery of new information causes an inspector briefly to form a view that more tax is owing than has been assessed. But then he may reflect that perhaps he has been overhasty in coming to that conclusion, perhaps he needs more information, one more piece of the jigsaw. This may happen a number of times. It may not always involve the acquisition of further information. It may involve legal research, or further reflection on the legal research already carried out. Or it may simply be a question of taking more time to think; of lights coming on one by one until eventually it becomes clear; of weighing the matter up, sometimes coming to one view and sometimes another, until eventually coming down on one side or another. There is, to my mind, some force in Mr Anderson's point about the danger of analysis by metaphor, but if the metaphor of crossing the threshold is to be used, then, while that moment may occur at the end of that process, there will be many points on the way to that threshold when discoveries are made, points become clearer and thoughts become more refined. There may even be hesitation on the doorstep, shifting forwards then back again before finally going in. Crossing the threshold is not like crossing the Rubicon.

[45] I do not understand the FTT to be saying any more than that when they refer, in para 53, to a "series of discoveries" having been made by HMRC as a consequence of the decisions at various levels in *Drummond*. This is clarified later in that same paragraph when they say that "at that stage", i.e. when the Court of Appeal gave its judgment in June 2009 and/or when the Supreme Court refused permission to appeal in November 2009,

> "what may have been a suspicion even a strong suspicion was converted to the positive view that there was an insufficiency of tax. This view newly appeared between June and November 2009 and plainly, in our view, constitutes a *discovery* within the meaning of s 29(1)."

If it is helpful to think in terms of crossing a threshold, the FTT make it clear that in their view that the threshold was crossed in the period June to November 2009 when the *Drummond* case was decided emphatically and finally by the judgment of the Court of Appeal and the refusal of leave to take it further. The reference to the "series of discoveries" at an earlier stage is plainly a reference to the earlier stages of the legal process in *Drummond* and the associated and developing thinking within HMRC about that case and this. I detect no error of law in this passage.

When a "discovery" becomes stale

[46] I turn now to the second ground of appeal noted at (b) in para [39] above. This is the criticism that the FTT proceeded on the basis that the staleness of a discovery is determined by the statutory time limits.

[47] In support of his submissions on this point, Mr Gordon referred to the decision of the Special Commissioner in *Corbally-Stourton* v *HMRC* at para [44] for the proposition that a discovery can go stale:

> "There is one other aspect of the word "discover" to which I should refer. … "a discovery" is something newly arising, not something stale and old. The conclusion that it is probable that there is an insufficiency must be one which newly arises (from fresh facts or a new view of the law or otherwise)."

On this basis there is a temporal element to s 29(1). Once the discovery is made or, as Mr Gordon would have it, the threshold is crossed, then HMRC must act with reasonable diligence if it is to make an assessment; otherwise the discovery becomes stale and the right to make an assessment is lost.

[48] Mr Gordon was at pains to emphasise that HMRC need not make an assessment immediately upon making a discovery in terms of s 29(1). It would be sufficient, he submitted, for HMRC to notify the taxpayer of its discovery in the expectation that matters could be resolved without the need for a formal assessment. In each case the question whether the discovery had been kept "fresh" would turn on its particular facts. It would only be in the most exceptional of cases, he said, that the conduct of HMRC, for example their inaction, would result in the discovery losing its required "newness" by the time that an assessment was made.

[49] Mr Gordon referred to the findings of the FTT on this point, in particular in para 56. The FTT had noted that the assessment was raised in January 2010 and commented that it "was not time-barred or stale". They explained that the statutory "deadline" for raising the assessment (in terms of TMA s 34(1) as it stood then) was 31 January 2010. They went on to say that even if the discovery could be said to be made at an earlier stage, for example when the Special Commissioner or the High Court issued their decisions in *Drummond* in 2007 and 2008 respectively, the "discovery" would still not have been time-barred. Even if the discovery could not be said to have been acted upon promptly, the making of the assessment as a result of that discovery still met the statutory deadline. Mr Gordon submitted that this addresses the wrong question. The question was not whether or not the assessment was made within the statutory period. The correct question was whether the assessment was made while the discovery which triggered the right to make it was still fresh; or, to put it another way, whether by the

time that assessment was made that discovery had gone stale. The FTT had not addressed this point. In focusing on the question of whether the assessment was made within the statutory period laid down by TMA s 34(1), the FTT had erred in law.

[50] At first Mr Anderson did not appear to dispute the basic proposition that a discovery, if it was to be acted upon by the making of an assessment, had to be acted upon before it lost its essential "newness", in other words before it became stale. But he emphasised that the question of newness or staleness related only to the conclusion reached by the officer, in other words his discovery, and not to the grounds giving rise to that conclusion. In support of this distinction he referred me to para 37 of the decision of the UT in *Charlton* dealing with the nature of newness:

> "All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in the 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 their 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 made 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 the essential newness for s 29(1) purposes."

Mr Anderson submitted that there was no merit in the taxpayer's argument that the FTT had misunderstood the concept of staleness by identifying it with the time bar period. Even on the basis that the discovery was made at the time of the Court of Appeal decision in *Drummond* towards the end of June 2009, waiting until the Supreme Court had refused an application for leave to appeal in November of that same year was perfectly sensible and could not deprive the discovery of its essential newness. The discovery assessment itself was raised at the beginning of January 2010. The passage of time between November 2009 and January 2010 could not make the discovery stale.

[51] After some opportunity overnight for reflection, Mr Anderson altered his position. He submitted that between discovery and assessment, the only time limit imposed was that imposed by statute (viz s 34(1) TMA). HMRC could make an assessment at any time after discovering the insufficiency. Insofar as the concept of staleness could be used to fetter the power to make an assessment, that was entering into the territory of *mora* (*mora*, taciturnity and acquiescence) and/or estoppel. Only some indication by HMRC that, notwithstanding the discovery, they did not propose to make an assessment, would act as a bar to them changing their minds and making one thereafter. The passage in *Charlton* at para 37 was tentative. It used expressions such as "it might" and "depending on the circumstances". It could not be regarded as authority for the proposition advanced by the taxpayer in this case. In any event, being a decision of the UT in another case, it was not binding and should not be followed. He emphasised, of course, that the point did not arise if I adhered to the fact findings made by the FTT that the discovery was made in the period between June and November 2009, though he recognised that it clearly did arise if I were to find that the discovery was made in 2007 or 2008.

[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 sub-section 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" (e.g. 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).

[53] However, the word "if", as used in this way in the sub-section, does not mean "immediately". Mr Gordon was right, in my view, to accept that the discovery could be kept fresh for the purposes of being acted upon later. As he accepted, each case would turn on its particular facts. He gave the example of notification being given to the taxpayer of the discovery in the expectation that matters could be resolved without the need for a formal assessment to be made. No doubt there are many other examples which could be given. The UT in *Charlton* at para 37 recognise that the decision in each case will be fact sensitive. I do not think it would be helpful to try to define the possible circumstances in which a discovery would lose its freshness and be incapable of being used to justify making an assessment. But I consider that Mr Gordon was right to accept that it would only be in the most exceptional of cases that inaction on the part of HMRC would result in the discovery losing its required newness by the time that an assessment was made.

[54] I accept Mr Gordon's criticism that the FTT did not direct itself properly to this question. It is tolerably clear from para 56 of its decision that the FTT was eliding the concept of staleness with that of time bar. The only explicit discussion of the question of staleness occurs in that paragraph, in the statement that the assessment "was not time-barred or stale", a juxtaposition of the two concepts which ends in the conclusion that even if the discovery could be said to have been made as early as 2007 or 2008, and could be said not to have been acted on promptly, "it nevertheless still met the statutory deadline."

[55] On this point, therefore, I conclude that the FTT have erred in law, whether by failing to deal with the question of staleness, as opposed to time bar, or by eliding those two quite separate issues.

[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 paras 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 of the assessment was made. I did not understand Mr Gordon seriously to contend otherwise; but if he did, I reject that contention.

Challenge to findings of fact

[57] Mr Gordon's real point involved a root and branch challenge to many of the fact findings in the FTT's decision and, in particular, their finding that the discovery was not made until sometime between July and November 2009. He contended that, at latest, the discovery took place in July 2008 when the High Court issued its decision in *Drummond*, after which some 18 months of silence followed, rendering the discovery stale long before the assessment was made. But his primary contention was that the discovery was made

(a) in October 2006, when Dr Branigan examined the tax return, did not understand from the return how the taxpayer claimed to have achieved the tax saving through s 37 TCGA, began to entertain strong suspicions that it disclosed or might disclose an insufficiency of tax, and wrote to the taxpayer stating that he had reason to believe that in the year in question he had participated in arrangements whose sole or main purpose was the avoidance of tax; or

(b) in July 2007, when the decision of the Special Commissioner was issued in *Drummond* (a decision subsequently upheld in the High Court and the Court of Appeal).

In support of the July 2008 date being the very latest date at which the discovery could be said to have been made, Mr Gordon relied particularly upon an answer given by Dr Branigan in evidence before the FTT, in the course of his re-examination, to the effect that he had "no doubt" that if he had needed to he "could have justified [making an assessment] following the High Court decision in *Drummond*". Although Mr Gordon offered these various alternatives, it is unnecessary to choose between them because on any view, if the discovery was made as early as July 2008, if not earlier, then 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 made in January 2010.

[58] In terms of s 12(2)(b) of the Tribunal, Courts and Enforcement Act 2007, where the UT finds that the making of the decision appealed against involved the making of an error of law, it may set aside the decision of the FTT and, if it does, it must either (i) remit the case to the FTT with directions for its reconsideration or (ii) re-make the decision. It was not suggested that I should remit this case to the FTT. Sub-s (4) goes on to say that where the UT re-makes the decision, it may make any decision which the FTT could have made and "(b) may make such findings of fact as it considers appropriate." As Lord Carnwath pointed out in *HMRC* v *Pendragon* at paras 47 and 48, that provision gave an extended jurisdiction to the UT as compared with that which had previously been enjoyed by the High Court on an appeal under the previous law. That extended jurisdiction recognised that under the new tribunal system the UT is itself a specialist Tribunal with the function of ensuring the adoption of a consistent approach to the determination of questions of principle arising under particular statutory schemes. In the course of his submissions, Mr Anderson accepted that this provision gave the UT power to revisit questions of fact in the event that it found that the FTT had made an error of law. Clearly if certain findings of fact have been influenced by a mistaken view of the law, or the questions of fact arising for determination have been focused in the wrong way because of a mistaken understanding of the law, it would be appropriate to revisit such findings. Clearly, too, if, because of a mistaken appreciation of the law, the FTT has failed to make findings on a particular issue, then it will be appropriate for the UT to make the necessary findings on the evidence before it. Lord Carnwath put it this way in *Pendragon* at para 50:

> "Having found errors of approach in the consideration by the First Tier Tribunal, it was appropriate for them [the UT] to exercise their power to remake the decision, making such factual and legal judgments as were necessary for the purpose, thereby giving full scope for detailed discussion of the principle and its practical application. Although no doubt paying respect to the factual findings of the First Tier Tribunal, they were not bound by them. They had all the documentation before the First Tier Tribunal, including witness statements, and transcripts of the evidence and submissions, and detailed written and oral submissions. It is clear that they undertook a thorough exercise involving a hearing lasting six days."

That case involved a consideration of the concept of "abuse of law" as developed by the European court. It involved issues of mixed fact and law or, to put it another way, the evaluation of facts in accordance with legal principle. As Lord Carnwath pointed out (at para 50), the case was one which was particularly well-suited to detailed consideration by the UT with a view to giving guidance for future cases. In those

circumstances it was open to the UT to remake the decision and make such factual and legal judgments as were necessary for the purpose, not being bound by the FTT's fact findings though paying due respect to them.

[59] I would just make two points about that. The first is that case involved an assessment of what was the "essential aim" of the transactions which produced the tax advantages: see per Lord Sumption at para 39. The details of the arrangements were clearly identified in the evidence. What was at issue was the characterisation of those arrangements. In one sense that is a question of fact. In another it is a mixed question of fact and law. What Lord Carnwath was getting at in the passage quoted above was that the UT should not feel itself constrained by what might, on one view, be thought to be fact findings by the FTT on this issue. That is quite different from the present case where the fact findings sought to be challenged are discrete findings of primary fact relating to when, as a matter of fact, the relevant inspector at HMRC, Dr Branigan, made the "discovery" (in the sense discussed above) that the assessment to tax was insufficient. The FTT's findings on this particular question proceeded on a correct appreciation of what constituted a discovery. I do not regard anything said by Lord Carnwarth in *Pendragon* as permitting the UT to interfere with finding of fact made by the FTT which are not tainted by some error of law as explained above. The second point is that many of the findings of the FTT which are now under attack were based upon hearing oral evidence. I have not had the advantage of seeing or hearing the witnesses and, unlike the UT in *Pendragon*, I have not been provided with transcripts of the evidence. What I have been given is a summary, taken from notes made at the hearing, of small parts of the evidence and a summary of the alleged inconsistencies between Dr Branigan's evidence before the FTT and the evidence which he gave in an affidavit in connection with judicial review proceedings in the Court of Session. I make no criticism of this. I mention it simply to show that in this case the UT is not in the same position as the UT in *Pendragon* and is not in as good a position as the UT in that case to determine whether the conclusions drawn by the FTT on the evidence it heard are sound.

[60] Finally, so far as the relevant principles are concerned, I accept that the UT can revisit findings of fact made by the FTT on *Edwards* v *Bairstow* principles whether or not any substantive error of law affecting the decision has been identified. Those principles are well-known and I need say no more about them. But save where those principles apply, and save where the findings are tainted by error of law (see above), the UT should treat findings of the FTT with the same respect and restraint expected of any appellate tribunal considering the decision of an inferior one: see *Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203 at paras 58-68.

The relevant findings under attack

[61] Mr Gordon's challenge to the FTT's findings of fact fell into two parts. He first submitted that on Dr Branigan's own evidence, substantially accepted by the FTT, it was clear that the discovery took place at latest in July 2008 and probably even earlier than that (see para 57 above). The evidence relied upon was broadly as follows:

(a) In re-examination, Dr Branigan said that he had no doubt that, if he had needed to, he "could have justified" an assessment following the High Court decision in *Drummond* issued in July 2008. If he "could have justified" making an assessment at that time, it could only be on the basis that he had made the discovery by then.

(b) Dr Branigan admitted to being aware of the progress of the *Drummond* case, and the decision to litigate it, before 2006. The transcript from the contemporaneous notes of those representing the taxpayer (the accuracy of which was not challenged) was that although he was not responsible for the *Drummond* file he was aware of it and knew that there was a "legitimate challenge to the arrangements". That was some time before 2006. HMRC were challenging SHIPS and taking a different view from the taxpayer.

(c) The FTT found (at para 34) that in October 2006, when he examined the taxpayer's return in the present case, Dr Branigan was not clear how the taxpayer claimed that s 37 operated so as to achieve a tax saving for him. That alone demonstrated that at that time he, as "an experienced and senior HMRC officer" (FTT para 33) had reason to believe that the taxpayer's tax liability had been understated in his return; and had satisfied himself (to use one of the expressions suggested by the case law) that the assessment was insufficient.

(d) Further, at that time he could see that the taxpayer had engaged in the same planning that he (Dr Branigan) had been investigating for nearly two years and which his Bristol colleagues had been investigating in the *Drummond* case; and he must therefore by then have formed the view (or come to the conclusion) that tax had been under-assessed.

Mr Gordon submitted that in light of these facts the FTT's conclusion in paras 33, 34, 39 and 53, to the effect that that Dr Branigan's concern about the correctness of the return was not sufficient to amount to a "discovery" that the tax return revealed an insufficiency, simply demonstrated a misunderstanding of the relevant level of knowledge needed for a discovery.

[62] I cannot accept that submission. It should be observed that the Note of Appeal does not include amongst the three alleged errors of law a contention that the FTT erred in the legal test of what was meant by the word "discovers" in s 29(1). But, that apart, it is clear from their decision that the FTT did indeed understand the level of knowledge required for the purpose of a discovery within the terms of that subsection. They were also aware that the test is subjective. In other words it is the state of mind of the individual HMRC inspector which is relevant, not that of some reasonable HMRC inspector. 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 para 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.

[63] However, Mr Gordon went on to submit that the FTT were wrong (in para 54) to find Dr Branigan to be "honest, straightforward, reliable and credible" in his evidence. He pointed out that Dr Branigan's oral evidence before the FTT contradicted parts of his affidavit evidence lodged in process in judicial review proceedings in the Court of Session. The FTT should, he argued, have treated Dr Branigan's evidence with far more suspicion.

[64] The difficulty with this argument is that the FTT heard and saw Dr Branigan give evidence. They heard him being cross-examined under reference, among other things, to what he had said in his affidavit. They formed a clear view as to his credibility and reliability. That view should not lightly be set aside on appeal to a tribunal which does not have those advantages. Whether or not the UT is entitled to interfere with findings of fact in the absence of legal error on the part of the FTT, I am satisfied that I should not do so in this case. No transcript of Dr Branigan's evidence was put before me. This is not an *Edwards* v *Bairstow* type of case, nor do the circumstances come anywhere near to meeting the test set out in cases such as *Henderson* v *Foxworth Investments Ltd*.

Conclusion on the first two grounds of appeal

[65] In the circumstances set out above, the appeal on the first two grounds of appeal, relating to TMA s 29(1), fails.

The second issue: reasonable awareness of the insufficiency (s 29(5))

[66] The third ground of appeal asserts an error of law in respect of TMA s 29(5). Again, I should first set out the relevant findings in the FTT's decision.

The FTT's findings

[67] The FTT's findings on this issue are set out at paras 59-81. Given the nature of the attack on those findings, it is appropriate to set them out below in some detail:

> "59. …
>
> 60. The essential ingredient of the condition [in s 29(5)] is that the officer could not have been reasonably expected to be aware of the insufficiency. The word reasonably requires the Tribunal to assess what the notional or hypothetical officer ought to have been aware of. The provisions of s 29(5), unlike s 29(1) thus set an objective test or standard which has to be met. A number of authorities have analysed this provision in great detail. However, we do not think Parliament could have intended that the issue should be as complex, sophisticated and nuanced as some of the more recent cases appear to indicate.
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> 61. Parliament has imposed a negative condition or test which must be met by HMRC. It is that an officer could not have been reasonably expected on the basis of the information then made available …to be aware of the insufficiency of tax. The reference to an officer indicates an objective test. What the actual officer (if any) was aware of is not relevant. It is what the Tribunal considers an officer could or could not have been reasonably expected to be aware of that is important.
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> 62. Section 29(6) expressly states what is meant by information made available to such an officer. For present purposes, such information is made available if it is contained in the taxpayer's return or is information the existence of which and the relevance of which as regards the question of insufficiency of tax could reasonably be expected to be inferred by such an officer. The source of all the information which is to be the basis of the Tribunal's decision on the question of the state of awareness of the

notional officer is therefore the taxpayer. This will include his agents. This is an exhaustive list (see Auld J in Langham v Veltema at paragraph 36).

63. Finally, whether the negative condition is met falls to be tested, in effect, on the date of closure of the statutory enquiry window (here, 31 January 2006).

64. The Tribunal's assessment of the notional officer's state of awareness is therefore based partly on objective facts and partly on its view of the conclusion which the notional officer ought reasonably to have reached; and therefore of what he ought reasonably to have been expected to be aware on the basis of that information found as fact to exist at the relevant date (and any information inferred therefrom). This point was noted by Lady Arden in Langham v Veltema at [2004] STC 544 at paragraph 51; and followed by Newey J in Sanderson at paragraph 41. The conclusion to be reached is either awareness of an insufficiency of tax, or something less than such an awareness, such as suspicion that there is an insufficiency, or the need for further investigation, or satisfaction that there is no such awareness. Put another way, would the notional officer's assessment of the situation make him aware that there was an insufficiency of tax?

65. Courts and tribunals are used to considering objectively and deciding questions of reasonableness such as what a reasonable person, the man on the Clapham omnibus, the officious bystander, a reasonably competent professional, or a reasonably careful driver should reasonably have been aware of and what he or she ought reasonably to have done or refrained from doing, or how a fair minded and informed observer would view a particular situation. There are no doubt many other inhabitants of this legal village in which everyone always acts in a fair, reasonable and balanced manner, only considers the relevant and always disregards the irrelevant. The courts are sometimes assisted in this exercise of objective assessment by evidence of standards set by institutions, professional bodies, codes of practice, or experts. However, the courts and tribunals are not bound by such evidence but generally take it into account. The only evidence of that nature came from Dr Branigan without objection as to its admissibility. Normally, the Court would make its own objective evaluation on a properly informed basis against the background circumstances. The Tribunal would not hear evidence from an individual offered as a candidate for the role of hypothetical officer. Dr Branigan's evidence did not fall into that category. He was and is a specialist investigating officer.

65A Since drafting the foregoing paragraph, we have noted the observations of Lord Reed in Healthcare at Home Ltd v CSA [2014] UKSC 49, at paragraphs 1-4. What we have said, we think, reflects his Lordship's views. We have endeavoured to evaluate what a hypothetical officer could or could not have been reasonably expected to be aware of on the basis of the information available at the material time.

66. We have to determine what knowledge and understanding the hypothetical or notional officer might reasonably be expected to have. We have to make such determination in the light of the particular facts and circumstances of the present appeal. Comparison with the facts of other cases is of limited assistance and possibly of no assistance. The Tribunal can apply its expertise in tax matters and take account of the relevant evidence led. The Appellant makes a number of assertions as to what the hypothetical officer ought to have been aware, and the knowledge and experience with which he ought reasonably to have been imbued. The use of the words *an officer* and *reasonably to have expected* import considerable flexibility into the test, and give the Tribunal a discretion over the factors they consider to be influential and the weight to be attached to them. Mr Gordon accepted that the matter was one of fact and degree (Charlton paragraph 93).

67. Here, we are concerned not with what an officer ought reasonably to have done but with what he could reasonably have been expected to be aware of. S 29(5) focusses exclusively on specific categories of information, here the Appellant's tax return, and any information which can reasonably be inferred therefrom. Thus, a detailed knowledge of the law is not such information. Nor is a detailed knowledge of HMRC practice, policy and procedure. While the hypothetical officer may have a working knowledge of these matters, our evaluation is that this would not lead him to the conclusion that there was an insufficiency of tax.

68. The Upper Tribunal in Charlton concluded that the form AAG1 submitted by the promoters of the scheme in question should be regarded as information made available for the purposes of s 29(5) (paragraph 82). This fell to be inferred from the inclusion in the return of the Scheme Reference number (SRN). The First-tier Tribunal determined that due to administrative slip ups an enquiry was not opened (2011SFTD 1160 at paragraph 18). That tribunal concluded that it was absolutely obvious from the information in the tax return that the appellants had participated in artificial tax avoidance schemes to generate capital losses; the disclosure of the SRN for the scheme reinforced that view (paragraph 119 and 121). The tribunal also noted that the taxpayer had disclosed with perfect accuracy the essential features of the scheme. In that tribunal's view, the notional officer ought to have been aware that it was instantly obvious that a tax avoidance scheme had been implemented. The background of fact and assessment disclosed in the First-tier tribunal's decision which formed the backcloth to the Upper Tribunal's decision was very different from the facts as we have found them to be in the proceedings before us.

69. Critical to the Upper Tribunal's decision in Charlton on the question whether the condition in section 29(5) was fulfilled was that

1. The notional officer would have been sufficiently aware of the law relating to second hand insurance policies to be able to appreciate the unusual nature of the entries in the return.

2. He would be aware of the High Court Judgment in Drummond (paragraph 90).

3. The information provided to the notional officer does not have to explain how the scheme works (paragraph 93).

4. The notional officer does not require to be given the characteristics of an officer of general competence, knowledge or skill only (paragraph 65).

5. The notional officer must be assumed to have such level of knowledge and understanding that would reasonably be expected in an officer considering the particular information provided by the taxpayer (paragraph 65).

6. It is not necessary that the notional officer should be able to comprehend all the workings of the scheme, or the legal and factual arguments that might arise or be able to form a reasoned view of those matters (paragraph 93).

70. The Upper Tribunal in Charlton observed that seeking some form of typical or average officer is futile (paragraph 55). That does not seem to us to be entirely consistent with the judicial approach to the imputed knowledge or awareness of a reasonable individual in various circumstances. The Upper Tribunal observed that the hypothetical officer must be assumed to have such level of knowledge and understanding that would reasonably be expected in an officer considering the particular information (paragraphs 58 and 65). However, that simply begs the questions, how is that level of knowledge to be determined and what is reasonable to expect of such an officer.

71. The Upper Tribunal noted that the test was one of awareness, a matter of perception and understanding, and not one of certainty or probability (paragraph 92); and not one of conclusion. However, a state of awareness, understanding or perception seems to be the result of the application of the test rather than the test itself (cf paragraph 58). Moreover, it is difficult to see why a conclusion is excluded from a state of awareness. One plus one equals two. Two is the result of adding one to one. It is a conclusion. Knowing that one plus one makes two is a state of awareness. We agree, however, that the awareness of a hypothetical officer is not to be measured by probabilities. Probability is normally deployed to determine facts. The deemed awareness of the hypothetical officer is determined by reference to the s 29(6) information available, the attributes he is deemed to have, and the thought processes with which he is imbued.

72. The basis of the Upper Tribunal's decision appears to be that the difference between the allowable loss claimed and the income declared was enough to justify an officer making an assessment. How they reached that view, beyond adopting the forthright views of the First-tier tribunal is not entirely clear. It seems ultimately they expressed an overall view, which they were no doubt entitled to do. For the First-tier tribunal, it was abundantly plain that the section 29(5) test was not met. The Upper Tribunal came to the same conclusion but for different reasons (as noted in Sanderson at paragraph 42).

73. Charlton does not constrain us to decide this appeal in favour of the Appellant. The facts were in reality quite different and we heard different evidence, of which only a limited amount is relevant to our objective evaluation. In Charlton there was a much fuller explanation in the tax return. There was also a Scheme Reference Number although the Upper Tribunal would have reached the same decision had there been no such reference.

74. However, an HMRC officer, in order, ever, to become aware of an insufficiency of tax must have some general knowledge of tax law and practice. We do not consider that it is reasonable to expect him to be aware of the arcane world of capital redemption contracts or that they are specifically mentioned in the HMRC Manual. Even if it is assumed that an officer was aware of the entire contents of the HMRC Manual, we do not consider that it necessarily follows that an officer could have been reasonably expected to be aware that there was an insufficiency of tax disclosed in the Appellant's tax return. While an officer might have been suspicious, that suspicion would not give him the necessary awareness. He might have taken certain steps such as consult colleagues. However, that is not relevant because the statutory test relates to what awareness is to be attributed to an officer by reference to specified information, and not to what he might reasonably have done or what further information he might have gleaned by taking such steps. That would not be the type of information specified in s 29(6).

75. Even if such an officer had taken such steps, we could not reach any conclusion on what the fruits of those enquiries might have been. At most he might have ascertained that there was an appeal on its way to or pending before the Special Commissioners dealing with what might at that time have appeared to be a similar scheme. That might have made an officer suspicious, but it is impossible to conclude that he could be reasonably expected to have become aware of an insufficiency of tax. He may well have reasoned that there might be an insufficiency of some unspecified amount of tax. But that is not enough. That does not constitute awareness of an actual insufficiency of tax whatever the amount might be.

76. Moreover, even if the hypothetical officer is taken to have been aware that the loss claimed in the tax return was attributable to a tax scheme, the hypothetical officer would also be aware that some tax schemes work and deliver the benefits claimed.

There is no rule that the existence of an obvious tax scheme means that a hypothetical officer would be entitled to make an assessment (see Sanderson at paragraphs 50 and 51).

77. In our view, a reasonable reading of the Appellant's return would not make a hypothetical officer aware that there was an insufficiency of tax. He could not reasonably have become aware of an insufficiency. The information was incomplete as several boxes were blank. The white space gave minimal details. CRCs and their use as part of tax avoidance arrangements would not be generally known to a hypothetical officer at the relevant date. It took several years and three rounds of appeals to determine the proper scope of s 37 of the 1992 Act. As at 31 January 2006, Drummond would at best have been at an embryonic stage. We doubt whether a hypothetical officer would have been aware of it at that time. It could not be said to have been far down the line as Mr Gordon contended. While it may be the case that a very close examination might enable further details to be deduced, and with hindsight the claim for such large tax relief might seem so suspicious as to infer that this was an illegitimate tax scheme as a result of which there was an insufficiency of tax declared, we do not consider it appropriate to approach the question of awareness in that way for the purposes of s 29(5).

78. This is our own assessment of what we consider an officer could or could not reasonably be expected to be aware of. However, it is plain that that was also the view of Dr Branigan. We do not rely on it. He does not have the attributes of a hypothetical officer. However, it confirms our own view of s 29(5) awareness. He is an experienced official dealing with high value complex tax disputes. His reluctance to raise an assessment until after the Court of Appeal decision seems to us to be quite telling. He had been on the case for several years. It would be surprising if an officer of his experience refrained from issuing an assessment if he had formed the view that there was in relation to the Appellant's tax return, an insufficiency of tax. He did not do so in October 2006 when he first examined the Appellant's tax return and he was a specialist, a different creature from the hypothetical officer, who would have been in no better state of awareness on 31 January 2006 when the enquiry window closed. This does not mean that all HMRC have to do to justify a discovery assessment is lead the evidence of an officer to say that he or she would not have been aware of an insufficiency of tax having regard to the s 29(6) information available at the material time. Such evidence would be inadmissible. We refer to paragraph 65 above. We would also be slow to criticise Dr Branigan, even if it were relevant to do so, for being over cautious.

79. We do not consider it helps the Appellant to drill down into the detail of the tax return's content. It is well known that information in a return (particularly where, as here, a marketed tax avoidance scheme is involved) often seeks to draw a balance between providing just the minimum amount of information needed to exclude a discovery assessment and yet provide sufficient to discourage the opening of an enquiry. In our view, there is force in the HMRC submission that a taxpayer should not be allowed to take advantage of perceived shortcomings in the information provided in the return to argue that those shortcomings ought to have led a hypothetical officer to conclude that there was an insufficiency of tax. Inference is not a substitute for disclosure (see Charlton at paragraph 79). The return is certified as being complete and accurate. The Tribunal would not lightly be persuaded to allow an appeal, part of the basis of which was the taxpayer's own failure to submit a return which was accurate and complete. Lord Bannatyne expressed the view that the disclosure in the white space (which we have set out above) was a carefully crafted disclosure seeking to pass through the initial checks carried out by HMRC but in no way meeting the test of clearly alerting to an actual insufficiency (2010 SLT 993 at paragraph 115). If that is the test, we agree that it has not been met in the proceedings before us.

> 80. We recognise that our approach is somewhat different from Lord Bannatyne's analysis. As can be seen from the previous paragraph, his Lordship adopted the dictum of Auld LJ in *Langham* (… at paragraphs 94, 104 and 107) that it was incumbent upon the taxpayer to clearly alert the officer to an insufficiency (*Langham* at paragraph 36). We prefer to concentrate on the actual language of s 29(5) rather than a paraphrase of the wording. It seems to us that Auld LJ was not using these words to identify a test for deciding whether the negative condition in s 29(5) was met. Rather, he was considering the range of information on the basis of which the hypothetical officer could have been reasonably expected to be aware of an insufficiency. Towards the end of his judgment, he applies the language of s 29(5) as the test (paragraph 38).
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> 81. In our view, therefore, HMRC have discharged the onus of fulfilling the negative condition contained in TMA s 29(5)."

The Note of Appeal

[68] In the Note of Appeal, it is submitted that the FTT erred in law in concluding that the test in s 29(5) was satisfied. This submission was amplified in argument.

Submissions

[69] In terms of s 29(5), an HMRC inspector, having discovered that an assessment to tax is insufficient, may only make an assessment in the further amount that ought to be charged to tax if, when he ceased to be entitled to give notice of his intention to enquire into the taxpayer's return, which occurred in this case on 31 January 2006, he could not reasonably have been expected, on the information made available to him before that time, to be aware of the insufficiency. That information is made available to him in the circumstances described in s 29(6). For present purposes all that is relied upon is the taxpayer's return and the information the existence of which could reasonably be expected to be inferred from that return: s 29(6)(a) and (d)(i). It was common ground between the parties that, in contrast to the position under s 29(1), where the test was subjective, s 29(5) turned on the objective awareness of the hypothetical HMRC officer or inspector. It was also common ground that the requisite level of knowledge for the purposes of 29(5) is the same as that which is required for a discovery under s 29(1). In other words, the test is not whether the information available to the hypothetical inspector as at that date was sufficient to enable him to form a clear view that there was an insufficiency, having resolved all legal and factual disputes about that matter. It was enough that the information available to him at that time justifiedt the amendment to the tax return which he then sought to make: see *HMRC* v *Lansdowne Partners Ltd*. As Sir Andrew Morritt, Chancellor, put it at para [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."

See also at paras [69]-[70] per Moses LJ. On this basis Mr Gordon submitted that HMRC could succeed on s 29(5) if and only if they could show that the hypothetical officer would not have been able to justify an assessment based upon the information in the taxpayer's tax return.

[70] At the heart of the dispute, according to Mr Gordon's argument, was the identification of the hypothetical officer and the qualities possessed by such an officer. Under reference to the remarks of Sir Andrew Morritt in *Lansdowne* at para [50], he submitted that it was necessary to assume "an officer of reasonable knowledge and

understanding". That might appear obvious. But he went on to refer in detail to the decision of the UT in *Charlton* at paras 54-65. From these paragraphs he sought to draw the distinction between a "hypothetical officer", with whom s 29(5) was concerned, and a "typical or average officer" with whom it was not. The distinction between the two concerns the level of knowledge or expertise of the officer. A typical or average officer might be perfectly competent but may not, perhaps will not, be a specialist and will not be familiar with some of the more complex tax avoidance schemes. The characteristics of a hypothetical officer, on the other hand, will vary from case to case, and the test of reasonable awareness, with which s 29(5) is concerned, must be applied to the particular context in which the question arises and without regard to any perceived lack of expertise or specialisation of individual officers: *Charlton* at para 58. Accordingly, the hypothetical officer "must be assumed to have such level of knowledge and understanding that would reasonably be expected in an officer considering the particular information provided by the taxpayer": *ibid* at para 58. He would usually be able to deal with complex difficult issues, though there might be some exceptions: *ibid* at para 59. In summary, the hypothetical officer "must be assumed to have such level of knowledge and understanding that would reasonably be expected in an officer considering the particular information provided by the taxpayer": *ibid* at para 65.

[71] Mr Gordon submitted that the FTT had erred in law in its approach to the question arising under s 29(5). First, it had failed properly to follow the guidance in *Charlton*. Instead of the hypothetical officer referred to above, with the level of knowledge and understanding reasonably to be expected in an officer considering the particular information provided by the taxpayer, it had looked instead to some normal or reasonable officer thereby, in effect, de-skilling that hypothetical officer to the extent that the terms of s 29(5) would provide very little or no safeguard to the taxpayer against a late assessment. Secondly, although recognising that the test of "awareness" for the purpose of s 29(5) was intended to be the same as that of "discovery" for the purpose of s 29(1), it had in fact applied a test more akin to knowledge or certainty. The hypothetical officer would have seen that a capital loss of £2,665,000 was being claimed on the disposal of assets described as "capital redemption contracts" and that, in the full description of the disposal, that the assets did in fact appear to be "capital redemption contracts"; and he would be assumed to have a working knowledge of how capital gains tax works (including the non-availability of losses in cases of exempt assets) and knowledge of HMRC's views at the time that capital redemption contracts were not within the charge to capital gains tax. He would therefore have had reason to believe that the £2,665,000 loss said to have arisen on a capital redemption contract was wrongly claimed. Had it applied the correct legal test the FTT would have considered the tax return and asked whether the hypothetical officer with that level of knowledge and understanding would have reason to believe that the £2 million loss was wrongly claimed; or whether it would have justified the exercise of the power to raise an assessment and make good the insufficiency. The hypothetical officer did not have to be in a position to predict the factual and legal disputes which might follow such an assessment; the relevant test was simply whether an assessment would be within the range of an officer's possible courses of action based solely on the facts revealed in the tax return. Mr Gordon submitted that the answer to those questions would be obvious. The hypothetical officer would have reason to believe that the £2 million loss was wrongly claimed and would have considered that the making of an assessment to make good the insufficiency was justified, even if he did not know for certain whether that assessment would be upheld.

[72] That was what Mr Gordon called the taxpayer's "prosaic" case. He outlined also another route to the same conclusion replicating, as he put it, the steps outlined in *Charlton*, but I do not propose to set this out in any detail here.

[73] For HMRC, Mr Anderson made the point that the question of whether s 29(5) was satisfied must depend on the facts and circumstances of each particular case. It was not therefore appropriate to cite other cases as authority on the facts of those cases and seek to translate those factual conclusions to the present. He submitted that the FTT had not erred in law in their approach to the identification of the hypothetical HMRC officer. Their approach was supported by decades of authority. For a recent authority, he referred me to *Healthcare at Home Ltd* v *Common Services Agency* 2014 SC (UKSC) 247. Nor did the tribunal err in law in its approach to the question of "awareness". The question was what an officer would reasonably be aware of, not what such an officer might have done. He relied upon the detailed reasoning of the tribunal in the passages set out above.

Discussion

[74] I am not persuaded that the FTT has erred in law in the manner suggested by Mr Gordon. Although they clearly found difficulty with the hypothetical officer, and the level of knowledge and expertise expected of him, it does not seem to me that the FTT in fact applied any different test from that which would have been applied by the UT in *Charlton*. Nor to my mind have they applied any different test of awareness.

[75] I have some sympathy with the FTT's comment (in para 60) doubting whether Parliament could have intended that the issue of the hypothetical officer's reasonable awareness for the purpose of s 29(5) should be as complex, sophisticated and nuanced as some of the more recent cases appear to indicate. Despite Mr Gordon's protestations to the contrary, I consider that that description of the approach in cases such as *Charlton* is well justified.

[76] The question of what constitutes "awareness" that the assessment to tax in the tax return is insufficient should not of itself give rise to any great difficulty, though there is, to my mind, some force in the FTT's criticism in para 71 that it is difficult to see why a conclusion reached by the officer (from his consideration of the matter), though not his perception and understanding, should be excluded from his state of awareness.

[77] More problematic is the test of whether the hypothetical officer ought reasonably at the cut-off date to have been aware of that insufficiency in tax, from the tax return itself (and any documents the existence of which could reasonably be expected to be inferred by that officer from that tax return). If, as the FTT suggest at paras 65-67, that question ought to be answered by reference to the reasonable (or ordinarily competent) HMRC officer, then the difficulty is reduced, if not entirely eliminated. The reasonable officer will be expected to have a reasonable knowledge and understanding of tax law and of HMRC practice, policy and procedure. But he would not be expected to have specialist knowledge of these matters. On that basis he would reasonably be expected to pick up inconsistencies in the tax return, excessive deductions and the like; but he would not be expected to identify, understand and unravel tax avoidance schemes such as SHIPS or CRCs. The arcane world of SHIPS and CRCs would be outwith his experience and training. On this point I agree with the observations of the FTT at para 74. If, therefore, the question of awareness is to be answered by reference to the standards of a reasonably competent HMRC officer, then I agree with the conclusions of the FTT set out in para 67. The tax return and documents

identified within it would not have led him to the conclusion (or to an awareness, call it what you will) that there was an insufficiency of tax. By contrast, the hypothetical officer envisaged in *Charlton* is expected to have a significantly greater level of knowledge and expertise. But how is this to be defined? The answer given by Mr Gordon is that he should have the level of knowledge and understanding reasonably to be expected of an officer considering the particular information provided by the taxpayer in his return and accompanying documents: see *Charlton* at para 58. As the FTT point out at para 70, that formulation appears to beg the question. How is the level of knowledge and expertise expected of the hypothetical officer to be determined? What is reasonable to expect of an officer in a situation where he is presented with a tax return in which a tax avoidance scheme is used? The return will presumably be considered, if it is considered at all, by one of a number of HMRC inspectors of ordinary competence; so, unless the particular inspector has some familiarity with the scheme, and spots that the scheme is being used, or unless an inspector without any detailed knowledge realises that some tax avoidance scheme is being used which requires some more expert consideration to be given to it, how is the matter to be taken further? Is every inspector to whose attention the tax return is brought expected to identify that such a scheme is being used, and to form a view as to its likely validity? The answer given in *Charlton* appears to be: Yes, except in those exceptional cases where the scheme is particularly complex or, maybe, where a new scheme is used, he will be expected to spot the use of a tax avoidance scheme and form a view as to its effectiveness. Like the FTT, I do not find this solution to be particularly satisfactory.

[78] Mr Gordon made the point that if the FTT's approach was correct, and the question of reasonable awareness was to be judged from the standpoint of the ordinarily competent HMRC officer without the expertise required to identify and understand complex tax avoidance schemes, then s 29(5) would seldom, if ever, provide an obstacle to HMRC raising an assessment after the expiry of the time limited for it to give notice of enquiry. But it seems to me, with respect, that the converse is also true. If Mr Gordon's approach is correct, and the hypothetical officer has the knowledge and understanding to identify and understand all but the most complex tax avoidance schemes, then the hurdle presented by s 29(5) would prove almost insurmountable in all but a handful of cases. I do not consider that Parliament could have intended to prevent assessments being made simply because the tax avoidance scheme used by the taxpayer was beyond the immediate comprehension and analysis of the reasonably competent HMRC officer.

[79] Were it not for the wealth of authority which has grown up in this area, I would have adopted a construction of s 29(5) which did not depend upon the identification of a "hypothetical officer" but focused more on the knowledge and expertise which the officer whose awareness was in question could reasonably be expected to have. It seems to me, with great respect to those who have pronounced on this matter before, that subsections (1) and (5) of s 29 must be read together. Subsection (1) is concerned with the discovery that an assessment to tax in the taxpayer's return is insufficient. I use this as a shorthand for all the various things that might be discovered as listed in paragraphs (a)-(c) of that subsection. It is now clearly established that that subsection looks to the subjective state of mind of the officer in question. It is also clearly established that when it refers to him "discovering" such an insufficiency, it does not require any firm knowledge on his part; it simply refers to him forming the view, coming to the conclusion or having reason to believe, whichever expression one prefers, that there is an insufficiency. If he makes such a discovery then, subject to subsections (2) and (3), he may make an assessment in order to make good the loss of tax. Subsection (3) provides, in short, that no assessment shall be made unless one of two

conditions is fulfilled, the second of those being the condition in subsection (5). This condition is that at the time when "an officer" of HMRC ceased to be entitled to give notice of its intention to enquire into the taxpayer's return (in the present case 31 January 2006), "the officer" could not have been reasonably expected to be aware of the situation mentioned in subsection (1), i.e. the insufficiency. To the untutored mind, that reference to "the officer" would appear to be a reference back to the officer ("an officer") mentioned at the beginning of subsection (5) who, at the cut-off date, ceased to be entitled to give notice of his intention to enquire into the taxpayer's return. In other words, it is a particular individual, not an abstract hypothetical officer with the knowledge and expertise mentioned in *Charlton* nor an average or reasonable officer riding the fiscal equivalent of the Clapham omnibus. As has been noted elsewhere, the section appears to contemplate that, as may well have happened in the past, each tax return would be considered by an individual officer who would consider its contents, form a view as to its accuracy and take a decision whether or not to give notice of his intention to enquire into it. Whether or not it is that same officer who subsequently makes the discovery in terms of subsection (1) is perhaps unimportant. The important point is that the right under subsection (1) to make an assessment upon discovering that the assessment to tax in the return is insufficient is qualified by the proviso in subsection (5) that an assessment cannot be made if the insufficiency could reasonably have been discovered by the officer handling the case at the cut-off date from the information made available to him by the taxpayer. The discovery in subsection (1) finds its counterpart in the state of awareness in subsection (5). They involve the same level of knowledge or awareness and effectively mean the same thing. It seems to me that the question of reasonableness comes in, not in the need to construct a fictional hypothetical officer but rather in the test of whether the actual officer ought reasonably to have been aware of the insufficiency at the cut-off date from information provided by the taxpayer.

[80] Approaching the matter in this way, it would be clear that the test for awareness under subsection (5) was precisely the same as the test for discovery under subsection (1). The matter would then have turned to a large extent upon the evidence of the officer handling the file and dealing with the tax return at the relevant time: first as to when he made the discovery (of the insufficiency); and second as to whether he ought reasonably to have been aware of these same matters before the cut-off date. The question of reasonableness would arise in this context as an objective critique of his actions, his thinking, his understanding and the like. It would be tested by reference to the standards of knowledge and expertise reasonably to be expected of an HMRC officer dealing with tax returns raising this kind of question and giving this amount of information. I would not demur in any way from the characteristics in terms of knowledge and expertise to be expected of the officer set out in *Charlton*, but the question would be subtly different. In terms of the formulation of the test in subsection (5), the question would be whether the officer's lack of awareness of the insufficiency as at that date could properly be categorised as unreasonable.

[81] Applying this to the present case, the focus of the enquiry under s 29(5) would be upon the consideration given to the matter by Dr Branigan at and before 31 January 2006. Subsection (5) would be satisfied unless it could be shown that his lack of awareness was unreasonable. On the findings of the FTT I do not consider that that conclusion could possibly have been reached. In that case, subsection (5) would have been satisfied.

[82] However, I do not base myself on this approach as to how the section might have been interpreted. The point was not argued before me. I am content to base my

decision on my conclusion that, despite their criticisms of some of the approach laid down in *Charlton*, the FTT have in fact applied the test of the hypothetical officer imbued with the characteristics of knowledge and expertise to be expected of someone receiving and considering that type of information. As the FTT says at para 66, the test involves judgments of fact and degree. Whether it is put as a characteristic of the ordinarily competent HMRC officer, or as part of the knowledge and understanding which the *Charltonesque* hypothetical officer would bring to bear on an examination of the tax return, I agree with the observations of the FTT at paras 74 and 77. I would not expect the hypothetical officer as early as 31 January 2006 to have any real understanding of the arcane world of CRCs. Some might have been aware of SHIPS – SI had begun investigations into SHIPS in 2004 – but investigation into CRCs was lagging behind the investigation into SHIPS. By 2005 Dr Branigan was leading a small team identifying and analysing various tax avoidance schemes, including CRCs. Even in 2006 there was "considerable uncertainty" (as the FTT found) within HMRC as to whether CRC schemes worked. The first decision in relation to SHIPS (in the *Drummond* case) came in July 2007. That litigation rumbled on until the decision of the Court of Appeal in 2009. Although some officers of HMRC might in January 2006 have had their doubts about the effectiveness of CRCs, doubts shared by others in the profession, and might have been suspicious of a tax return referring to CRCs, I do not see how it can be said that the hypothetical officer, imbued with the characteristics of knowledge and expertise to be expected of someone receiving and considering the type of information contained in the tax return, ought from the information in the return and associated documents to have been aware (in the sense used in s 29(5)) not only that a tax avoidance scheme was being used but also that it was a tax avoidance scheme which did not work, with the result that the assessment to tax in the return was insufficient.

[83] In those circumstances no error of law is disclosed relating to this part of the appeal. The power to reconsider any findings of fact in terms of s 12(2)(b) of the Tribunal, Courts and Enforcement Act 2007 does not arise. Nor is it possible to contend that any of the FTT's findings are susceptible to challenge under *Edwards* v *Bairstow*. But even if the FTT did err in law in its identification of the characteristics of knowledge and expertise to be expected on the hypothetical officer, having considered the matter afresh I have come to the same conclusion.

Decision

[84] The appeal on the point relating to s 29(5) therefore fails.

Disposal

[85] For the reasons set out above the appeal against the decision of the FTT is refused. I anticipate that costs should follow the event, but I shall formally reserve the question of costs in case either party wishes to make submissions on it.

LORD GLENNIE

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