Appeal number: TC/2014/06281

CAPITAL GAINS TAX – validity of discovery assessment issued under s 29(1) TMA – whether an insufficiency of capital gains tax was brought about carelessly - appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR ALAN ANDERSON	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER MR NOEL BARRETT

Sitting in public at the Royal Courts of Justice, Strand, London on 7 November 2015

Mr Ben Elliott, instructed by PricewaterhouseCoopers, as Counsel for the Appellant

Mrs Lynne Gray, an officer of the Respondents, for the Respondents ("HMRC")

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DECISION

1. The appellant appealed against a discovery assessment issued by HMRC under s 29 of the Taxes Management Act 1970 ("**TMA**") on 26 February 2013 for £830,387 of capital gains tax asserted to be due for the tax year 2007/08 in respect of the sale of the appellant's shares in Anson Limited ("**Anson**"). The issue was whether HMRC were entitled to issue the assessment on the basis there was a discovery of an insufficiency of capital gains tax brought about by the careless behaviour of the appellant (under s 29(4) TMA).

Facts

2. We have based our findings of fact on the evidence presented to the tribunal being bundles of documents and the evidence of the appellant.

Sale of shares in Anson Ltd in 2007/08 tax year

3. At the period in question the appellant had for some time owned a 50% shareholding in and been a director of Anson, a company which manufactured and marketed specialist oil and gas field products. The other 50% of the shares in Anson was held by the appellant's brother, Mr Robert Anderson.

4. The appellant had held shares in the company since 1981 when his father set up the business. The appellant focused on the sales and financial aspects of the business whilst his brother focused on the operational aspects and product development. From the early 2000s the appellant took a less active role in the affairs of the business. He stepped down as director in 2003 but remained a salaried employee. From that time his day to day involvement was limited but he was consulted by his brother on more significant or strategic issues.

5. In the 2007/08 tax year the appellant and his brother sold their shares in Anson to ANS (1002) Limited, a wholly owned subsidiary of ANS (1001) Limited ("**HoldCo**"). The consideration was the issue of shares in HoldCo as further explained in the appellant's tax return for this year (see 8 below). The sale took place on 4 April 2008.

6. It is not disputed that, on the sale, the appellant made a disposal of his shares in Anson for chargeable gains purposes which triggered a taxable chargeable gain in the tax year 2007/08. It is not disputed that the gain was correctly calculated by reference to the open market value of the shares at the disposal date and that for capital gains purposes the appellant acquired the shares in HoldCo, which he received as consideration for the disposal, for an amount equal to that market value. The dispute relates to the figure used by the appellant as the open market value.

7. In his tax return for 2007/08 the appellant used £36 million as the proceeds/open market value to be brought into account in the capital gains computation on the disposal. This was based on the shares in Anson having an open market value, at the disposal date of 4 April 2008, of £72 million. This was the amount of an offer for the

purchase of all of the shares in Anson made by the Weir Group on 25 March 2008. HMRC assert that they later discovered that the market value at that date was a higher amount (thereby increasing the capital gain on the share sale from that shown in the return) and that the appellant was careless to use the lower, in their view, incorrect amount, as explained below.

8. The "Any other information" box (or "whitespace") in the capital gains pages of the appellant's tax return for the tax year 2007/08 contained the following statement:

> "On 4 April 2008 Alan Anderson sold his shares in Anson Limited to ANS (1002) Limited, a wholly owned subsidiary of ANS (1001) Limited. The consideration was settled by ANS (1001) Limited issuing 36,000,000 shares of 10p each at a premium of 90p per share to Alan Anderson. In return for ANS (1001) Limited issuing such shares ANS (1002) Limited would owe ANS (1001) Limited £72m (i.e. an intercompany loan). The market value of Anson Limited and its subsidiaries at 4 April 2008 was taken to be £72 million. This was based on a written offer from a third party dated 25 March 2008 for the whole of the share capital of Anson Limited. Under UK legislation "relieving provisions" exist where, in certain circumstances, shares in a company are exchanged for shares in another company. In such circumstances, the new shares "step into the shoes" of the old shares and as such the shareholders are not deemed to have sold those shares.
>
> However these provisions cannot be applied to this transaction as the relief is only available if the shares are issued by the acquiring company, ANS (1002) Ltd. In this instance the relieving legislation is therefore not in point and Alan Anderson triggered a capital gains tax disposal on his shares as at 4 April 2008."

9. The Weir Group had made two previous offers for the purchase of the shares in Anson of £60 million on 15 January 2008 and of £68.5 million on 25 January 2008 (all offers together are referred to as the "**Weir offers**").

Sale of shares in HoldCo in the 2008/09 tax year

10. On 2 April 2009 Mr Anson and his brother sold their shares in HoldCo to National Oilwell Varco ("**NOV**") for a total of £88,607,734. The appellant's share of the sale proceeds was £44,303,867.

11. In his tax return for the tax year 2008/09 the appellant accounted for a chargeable gain on the sale of the shares in HoldCo computed on the basis that he acquired his shares in HoldCo for £36 million (being the figure used as the open market value of the shares in Anson at 4 April 2008).

12. The "Any other information" box (or "whitespace") in the capital gains pages of the appellant's tax return for the tax year 2008/09 contained the following statement:

> "On 4 April 2008 I sold my shares in Anson Limited to ANS (1002) Limited, a wholly owned subsidiary of ANS (1001) Limited. The consideration was settled by ANS (1001) Limited issuing 36,000,000 shares of 10p each (at a premium of 90p per share) to me. The market value of Anson Ltd was taken to be £72m therefore my deemed disposal proceeds were £36,000,000. Please see my 2008 tax return for details of the gain triggered by the issue of shares in ANS(1001). On 2 April 2009 I disposed of my entire shareholding in ANS (1001) for £42,303,867. As previously advised £36,000,000 of the sale proceeds have already been accounted for by way of my 2008 tax return".

HMRC enquiry into 2008/09 tax year

13. On 8 December 2010 HMRC issued a notice of enquiry into the appellant's tax return for the tax year 2008/09 under s 9A TMA. During the course of the enquiry, HMRC queried the figure of £36 million used by the appellant as the open market value of the shares at 4 April 2008.

14. The enquiry was conducted by Miss S Carson of HMRC. From the correspondence the main focus of the enquiry in 2011 and early 2012 was on certain fees which had been deducted in the 2008/09 capital gains computation. The correspondence is with PricewaterhouseCoopers ("**PwC**") who were acting for the appellant at all relevant times.

15. In a letter of 8 July 2011 from Miss Carson to PwC HMRC's queries appear under a heading "Legal and Professional Costs". Most of the questions listed clearly relate to the fees issue. However, Mr Elliott has queried whether some of the questions indicate that Miss Carson was considering the valuation of the shares at that stage (see 72). In question 1 Miss Carson notes that her understanding was that PwC were appointed to advise in relation to the sale of Anson including the business market position, factors which could influence any potential sale or the proceeds and potential purchasers. She asked for confirmation of whether that was correct. At question 5 Miss Carson asked if there was any connection between the appellant and either Weir or NOV. We have commented further on Mr Elliott's submissions in the discussion.

16. In a letter of 14 June 2012 Mr Forte of the Shares and Assets Valuation team at HMRC wrote to PwC noting that he had been asked by his colleague at the High Net Worth Unit to consider the value of the appellant's 50% shareholding in Anson which was sold on 4 April 2008. Mr Forte asked a number of questions in relation to the figure of £36 million used by the appellant as the market value of those shares.

17. On 13 July 2012 PwC wrote to HMRC explaining the basis of the £36 million valuation.

18. In a letter dated 22 October 2012 PwC wrote to HMRC and confirmed, on a without prejudice basis, that they agreed to a value of the appellant's shares in Anson at 4 April 2008 of £44,303,867. In their letter they noted that:

> "this will lead to a repayment of capital gains tax for the 2009 year end (excluding interest) of £1,241,566.92 and carried forward (unrestricted) capital losses of £1,396,673".

19. The correspondence also refers to PwC having a conversation with HMRC on 9 October 2012 during which PwC had noted that, if the revised valuation was agreed for 2008/09, the 2007/08 tax year could not be reopened as HMRC were out of time to do so. This was also stated in letters of 26 June 2013 and 12 September 2014.

20. On 26 February 2013 HMRC wrote to PwC as follows:

> "In my letter [of 16 November 2012] I mentioned that it was my intention to remove the current 2008/09 capital gains tax charge and raise a discovery assessment for the year 2007/08. These adjustments reflect your agreement to the valuation of £88,607,734 at 4 April 2008, this figure was previously £72,000. I have raised the assessment under section 29 Taxes Management Act 1970."

21. The letter then sets out a revised capital gains tax calculation for the tax year 2007/08 showing additional capital gains tax of £830,381 and continues:

> "I have now made these changes, removing the capital gains charge for 2008/09 and raised the assessment for 2007/08. Please find the enclosed copy of a notice issued to your client to reflect this assessment. I have sent him a copy of this letter for his information. The overall result is a repayment due to Mr Anderson of £388,527.58. The discovery assessment is covered by the tax no longer charged to 2008/09. Please see his latest statement for the precise amounts."

22. In a letter of 22 March 2013 PwC wrote to HMRC to appeal against the discovery assessment and they sent a further letter on 26 June 2013 explaining the client's grounds for appeal in further detail. At paragraph 14 of that letter PwC note that following the agreement to the revised revaluation of the shares in Anson:

> "This gave rise to a tax repayment of £1,241,566.92 for 2008/09 and the enquiry for that year is now closed".

23. In a letter of 12 September 2014 from PwC to HMRC it is again noted that the enquiry for the 2008/09 year was closed.

24. HMRC upheld their decision on review in a letter of 22 October 2014. The review letter essentially made many of the points HMRC have made in their submissions below. In that letter HMRC record that following the revaluation of the shares:

"This resulted in the Capital Gain declared on your tax return for 2008 to 2009 being reduced to nil as the acquisition cost in that year increased resulting in no gain for the year".

Appellant's evidence on valuation issue

5 25. We found the appellant to be a credible witness and we accept his evidence as set out below.

26. The initial offer made by Weir for the purchase of the shares in Anson "came out of the blue". The appellant would have happily agreed to the offer at that price but his brother thought a higher offer might be possible and entered into negotiations 10 with Weir. Both the appellant and his brother would have had to agree to a sale for it to go ahead.

27. Weir was (and is) a FTSE 100 company with no connection to Anson. Weir was and is a major player in the oil and gas sector and at the time was a competitor of Anson. Weir initially made the approach through their advisers, KPMG. Weir said in 15 their correspondence that Anson's business would be an excellent match for their expansion plans. The appellant's brother lead the negotiations and this lead to the higher offers, all of which were made subject to due diligence to be carried out by Weir.

28. The appellant did not doubt that the offer was serious. Weir had raised their 20 offer twice after consulting with their corporate development committee. They met with the appellant's brother several times. There was a proposal for someone from Weir to come to address the staff but the appellant's brother was concerned that a presentation from a US corporate executive would unsettle the staff. The appellant's brother was also nervous about letting Weir, as a competitor, have access to 25 commercially sensitive information as part of the due diligence process which they could use if the deal fell through.

29. At about the time when the Weir offers were received PwC were appointed as financial advisers to the appellant and his brother and Dickinson Dees were appointed as their lawyers. PwC's role was to oversee the sale process and advise on strategic 30 options. The corporate finance team at PwC suggested a managed bid process and that a restructuring would be appropriate. PwC did not recommend obtaining a formal valuation of the company at that point as the offers from Weir were on the table. They said that the true value of the business when it was eventually sold, whether it turned out to be higher or lower than £72 million, would emerge from the 35 sale process. The appellant thought that was reasonable and so far as he was aware there was no requirement in law or in HMRC's manuals or practice that a taxpayer must get a "professional" valuation, whatever that might mean, when identifying an open market value for capital gains tax purposes.

30. The appellant and his brother decided to go ahead with the managed sale 40 process. It was expected that Weir would participate in the process which they did

initially. The hope was that the appellant and his brother would obtain a higher price for the sale of their business but they understood that there were no guarantees.

31. The appellant understands from PwC that by January 2009 the only remaining credible buyers were NOV and LDC, a private equity backed bid. The NOV bid was preferred for a number of reasons including that there was some doubt as to whether LDC could finance the purchase and part of their offer was for an issue of loan notes whose value would depend on the company's future performance. Weir withdrew from the process.

32. The sale process was drawn out as NOV had many questions. The appellant's brother suspected that NOV were looking for a reason to adjust the price down as they thought that, with the onset of the financial crisis, the order book and profits might be under pressure. However, from January 2009 NOV received the company's monthly management accounts and these showed profits of around £2 million a month. There was no reason for a downward price adjustment.

33. The appellant believes that there were two factors at play from April 2008, when the Weir offers were made, to April 2009, when the shares in HoldCo were sold: the strength of the oil and gas sector and the devaluation of sterling against the US dollar.

34. The oil and gas sector does not necessarily move to the same cycle as the wider economy. The global economy is one factor but so are things like political events and output levels. Also many of the major players are awash with cash and so are more resilient to short term financial problems.

35. At this time the shale gas boom in the US was really taking off which lead to a massive increase in demand for products to support that industry including products such as those produced by Anson. The company's range of flowline products were used by major companies in the "fracking" industry and that was one of the reasons NOV were interested in buying the business. The order book for the business was very strong by the end of 2008. In early 2008 two of the major orders were in the pipeline but with their completion and the strong commercial performance cash reserves built up.

36. In April 2008 £1 was worth just under $2. In April 2009 £1 was worth about $1.4. In the appellant's view this meant that a sterling denominated asset like the shares in Anson became a significantly more affordable asset for a US company. For example, if NOV had wanted to buy the shares in Anson in April 2008 for £84 million, in US dollar terms, this would have cost it $168 million. When NOV purchased the shares in HoldCo in April 2009, £84 million was the equivalent of $117 million.

37. It, therefore, did not strike the appellant as at all odd that the shares in Anson could be valued in sterling terms at £72 million in April 2008 and then be sold (through the sale of shares in HoldCo) for £84 million a year later. The business had

performed well in that period and the purchasing power of US buyers had increased enormously because of the decline in sterling compared with US dollars.

38. PwC prepared the appellant's 2007/08 tax return and they advised that the open market value of the shares in Anson in early April 2008 was £72 million. The appellant was happy to be guided by PwC on this. It made sense to him given that Weir were willing to pay £72 million on 25 March 2008 and that offer was still on the table in April 2008 when the shares in Anson were transferred on the restructuring. The appellant had no incentive to include a low market value because of the effective increase in the rate of capital gains tax in 2008/09 (as that was the last year in which taper relief applied). The appellant recalls that at a meeting PwC had said that they thought it would be difficult to support an open market value in excess of £72 million because at that time there had been no higher offer.

39. He also recalls attending a meeting at which the valuation was discussed at which there were around 15 members of PwC present and a few of the lawyers. The appellant queried why he would need to obtain a further "professional" valuation, as HMRC suggest he should have done, when he had advice on the topic from so many professionals.

40. The appellant relied on the £72 million open market value in accordance with this professional advice. If the £72 million had been offered by an unknown party, with no resources behind it, then it might have been a different story but this was a genuine offer from a major player with obvious reasons for wanting to buy the company and with the resources to back it up.

41. The appellant noted that in his view there are a couple of important things to note about the letter PwC sent to HMRC on 22 October 2012 agreeing the revised valuation. It was made with a view to drawing a line under the enquiry into the 2008/09 tax year which by then had been on-going for almost 2 years. The letter did not say anything about the 2007/08 year which HMRC had not enquired into. It certainly did not say that the appellant accepted that he was careless or wrong to use the £72 million figure for the 2007/08 tax return. He maintains that £72 million is within the reasonable range of valuations for the shares in Anson both on the information available to him and his advisers now but, in particular, on the information available in April 2008.

42. It seems to the appellant that HMRC were aware at the time of the letter that they were too late to enquire into the 2007/08 return and that PwC did not think HMRC had the ability to raise a discovery assessment for 2007/08. If HMRC thought that increasing the April 2008 value to £84 million would lead to a loss of tax overall then the simplest thing would have been for them to leave the April 2008 open market value at £72 million. Instead 4 months later, on 26 February 2013, HMRC raised a discovery assessment for the tax year 2007/08 alleging the appellant had been careless.

Law

Legislation relating to completion of enquiries under s 9A(1) TMA

5 43. Under s 28A(1)A TMA an enquiry under s 9A(1) is completed:

> "when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions."

44. In this section "the taxpayer" means the person to whom notice of enquiry was given.

10 45. Under s 28A(2) TMA a closure notice must either:

> "(a) state that in the officer's opinion no amendment of the return is required, or
>
> (b) make the amendments of the return required to give effect to his conclusions."

15 *Legislation regarding discovery assessments*

46. The provisions enabling HMRC to make a discovery assessment are set out in s 29 TMA. Section 29(1) provides that:

> "If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment:
>
> 20 (a) that any…….. chargeable gains which ought to have been assessed to capital gains tax have not been assessed,
>
> …..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
> 25 in order to make good to the Crown the loss of tax.

47. Where a taxpayer has made and delivered a return under s 8 or 8A TMA he shall not be assessed under s 29(1) in respect of that year of assessment and in the same capacity as that in which he made the return unless one of two specified conditions is satisfied (s 29(3) TMA). It is agreed that only the following condition,
30 in s 29(4) TMA, is relevant here:

> "the situation mentioned in subsection (1) above [that chargeable gains which ought to have been assessed to capital gains tax have not been assessed] was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf".

35 48. For these purposes under s 118(5) TMA:

"a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation."

49. It is established and is not disputed that HMRC bear the burden of proving that and officer/the Board has discovered that chargeable gains which ought to have been assessed have not been assessed and that that situation was brought about by carelessly by the appellant (or a person acting on his behalf). The standard of proof is the ordinary civil standard of proof of on the balance of probabilities.

50. The assessment was made by HMRC outside the usual 4 year time limit. There is a 6 year time limit for the making of such an assessment where the insufficiency of capital gains tax is brought about by the taxpayer's careless behaviour (under s 36 TMA). Again the onus is on HMRC to establish that this condition is satisfied.

Postponement application

51. A few days before the hearing HMRC made an application for the hearing to be postponed on the grounds that the enquiry for the tax year 2008/09 had not been closed. In their view the hearing should not proceed until they had dealt with the closure of the enquiry and made appropriate adjustments which may involve also adjusting the position as regards the 2007/08 tax year. The appellant submitted that the enquiry for the tax year 2008/09 had in fact been closed. We decided that it was necessary to decide whether the enquiry had been closed or not as the first issue.

HMRC's submissions on application

52. HMRC contended that their letter of 26 February 2013 (see 20 and 21) did not constitute a closure notice, in particular, as it was not issued to the taxpayer himself but rather to PwC, it did not refer to closure of the enquiries and it did not make or enclose the amendment required to the appellant's tax return for 2008/09. An internal manual change only had been made in HMRC's systems as regards the required amendment for the tax year 2008/09 but no document in this respect had been issued to the appellant. HMRC had not referred to the enquiries being closed in any of the correspondence. HMRC had thought that the appellant accepted that the corollary of him accepting the revised valuation was that he would have to pay additional capital gains tax in respect of the 2007/08 tax year and had acted in good faith on that assumption.

Appellant's submissions on application

53. The appellant submitted that the letter of 26 February 2013 met the requirements of the legislation for an enquiry to be regarded as at an end. It is clear from the Upper Tribunal decision in the case of *Portland Gas Storage Limited v HMRC* [2014] UKUT 0270 (TCC) that regard is to be had to the substantive effect of the relevant communication and not simply the form. There is no formality prescribed for the issue of a closure notice. Following the approach in that case, the requirement is to consider what the relevant taxpayer would reasonably have assumed from the letter of 23 February 2013. The appellant could only have assumed from the

letter that the enquiry was closed and that the letter set out HMRC's conclusions. The *Portland Gas* decision is set out in further detail in the discussion.

54. HMRC refers to the amendment made to the 2008/09 return as having been made internally only but the amendment is shown as made on the HMRC website accessible by PwC as the appellant's agent. That shows an amendment for the 2008/09 year as "enquiry amendment on 25 Feb 2013 - 1241566.92". This shows that the relevant amendment has been made. Moreover the relevant change can only have been made by the letter of 23 February 2013.

55. Both parties have acted on the assumption that the enquiry was completed at that time. It has been referred to as such in the correspondence on a number of occasions with no comment otherwise from HMRC. HMRC have raised this as an issue only a few days before the hearing.

56. PwC had pointed out to HMRC that if they wished to proceed with the revised valuation they/their client did not accept that the position for the tax year 2007/08 could be reopened as HMRC were out of time to do so. This was noted on a phone call with HMRC and referred to by PwC in their letters to HMRC of 26 June 2013 and 12 September 2014 (see 22 and 23).

Decision on closure notice and postponement application

57. Having considered all of the above submissions, we decided that the letter of 26 February 2013 satisfied the conditions of s 28A(1) TMA such that HMRC's enquiry into the appellant tax return for the tax year 2008/09 was completed on that date.

58. That section provides that an enquiry under s 9A TMA is completed when an officer of the Board by notice informs the taxpayer that he has completed his enquiries and states his conclusions. The closure notice must either state that no amendment is required or make the amendment required to give effect to the officer's conclusions.

59. On the authority of the *Portland Gas* case, as cited by the appellant, the notice does not need to be in a prescribed form and it may be given in more than one document. The question is what, in the overall factual context, the intended recipient could reasonably have been expected to have understood from the notice.

60. In the *Portland Gas* case the Upper Tribunal essentially said that the same approach should be adopted as was taken in relation to whether an enquiry was opened in *Cooltinney Developments Limited v HMRC* [2011] UKFTT 252 (TC). The *Cooltinney* case considered whether a mistake, in what was intended to be a notice of enquiry into a land transaction return for stamp duty land tax purposes, rendered it invalid. At [47] of the *Portland Gas* case the Upper Tribunal quoted [31] to [33] of the *Cooltinney* case as follows:

> "In applying the first of these tests we need to consider what it is that is to be regarded as the notice. What para 12, Sch 10 requires is that HMRC "give notice" of their intention to enquire into a land

> transaction return. It does not say give a notice. There can be no assumption therefore that the notice be comprised in a single document, nor, where more than one document is sent to the purchaser, that any one of those documents should be regarded as *the* notice. The notice in these cases was given by means of the collection of documents sent to the purchaser.
>
> On that basis we find that the notice given by HMRC to each of the Appellants on 18/19 August 2008 was substantially in conformity with Part 4 FA 2003. No formality is prescribed for the notice, and there are no specific provisions for what it must contain. The only requirement is that it gives notice of the intention to enquire into a land transaction return. Whilst there was an error in the letter sent to each appellant, the copy of the letter sent by HMRC to the Appellant's adviser, and COP 25, both contain the necessary reference to land transaction returns, and contain information about the process.
>
> As regards the second test, we find that the requirement that the intended effect be reasonably ascertainable is apt to apply an objective test. On that basis, having regard to what Lord Steyn said in *Mannai* (at p 767G), "[the] issue is how a reasonable recipient would have understood the notices". But one does not, in the context of s 83(2), have regard only to a hypothetical reasonable recipient. It is necessary to consider, therefore, the characteristics of the recipient, its own knowledge (or lack of it) and the overall factual context in considering what the intended recipient could reasonably have been expected to have understood from the notice."

61. At [51] the Upper Tribunal goes on to state that:

> "In our view the reasoning in *Cooltinney* is equally applicable to the form of a closure notice; no formality is prescribed for the notice."

62. In our view, looking at all the circumstances, the appellant could only reasonably have been expected to have concluded from HMRC's letter of 23 February 2013 that HMRC had completed their enquiries and that their conclusions were set out in that letter. It is clear that HMRC had no more enquiries to make and had made up their minds as to the appropriate action to take by amending the return for the tax year 2008/09 and issuing a discovery assessment for the tax year 2007/08.

63. We note HMRC's assertion that the letter does not meet the requirement for the taxpayer to be informed of the completion of the enquiries as it was addressed to PwC. As PwC was acting as the appellant's agent in this matter, we regard a letter to them to be sufficient as regards the appellant being informed. In any event Miss Carson refers in the letter to having sent the appellant a copy for his information

64. We also note that the closure notice must make the amendment required to give effect to the officer's conclusions. Miss Carson refers several times in the letter to making changes to the 2008/09 tax return. She starts by noting that she had mentioned in her previous letter that she proposed to remove the capital gains tax charge for 2008/09 and to issue a discovery assessment for 2007/08. She goes on to say:

> "I have now made these changes, removing the capital gains charge for 2008/09 and raised the assessment for 2007/08......The overall result is a repayment due to Mr Anderson of £388,527.58. The discovery assessment is covered by the tax no longer charged to 2008/09."

65. Although Miss Carson refers to the relevant amendment to the 2008/09 position as having taken place and that she "has made" the amendment, we regard the notice itself as essentially making the amendment. This accords with the fact that HMRC actioned the amendment for 2008/09 by adjusting the taxpayer's account as shown on the website accessible by PwC as the appellant's agent.

66. On the basis that the enquiry for the 2008/09 tax year has been completed, the grounds for HMRC's postponement application fall away. We decided, therefore, to proceed to hear the appeal.

Main issue – valid discovery assessment

Appellant's submissions

67. The appellant made the submissions set out in 68 to 85.

68. It is for HMRC to show that there has been a discovery of an insufficiency of capital gains tax and that it results from the carelessness of the appellant.

Discovery

69. As regards when there is a "discovery" in the case of *Revenue and Customs Commissioners v Charlton* [2013] STC 866 at [37] the Upper Tribunal held that:

> "All that is required is that it has "newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that an assessment should be issued, but for some reason the assessment is not made within a reasonable period after the 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".

70. According to the above, whilst the threshold for a discovery is relatively low, there must be a new conclusion reached by HMRC within a reasonable time period prior to the issuing of the assessment.

71. HMRC has not adduced sufficient evidence to prove, on the balance of probabilities, that HMRC had made a discovery. The appellant referred to the tribunal case of *Gardiner v Revenue & Customs Commissioners* [2014] UKFTT 421 (TC) as regards what is required as evidence. In this case HMRC are seeking to rely on the documents produced in the bundle only as satisfactorily evidencing that they made a discovery within the meaning set out above with no witness evidence of the relevant HMRC officer to support this. On the basis of the decision in *Gardiner* the production of documents alone cannot support HMRC's contention.

72. In any event, HMRC have to prove that a conclusion was reached and that it was reasonable and "new". In this case, there is no real evidence as to when HMRC realised that in their view additional tax was due for the tax year 2007/08. It could have been some considerable time before the assessment was actually issued such that their conclusion had lost its newness by that point. There are indications that HMRC was considering the valuation position as early as July 2011 (see 15) but the discovery assessment was not made until 23 February 2013.

Causal connection between discovery and carelessness

73. HMRC also has to prove to the required standard that there is a causal connection between the appellant's alleged carelessness and the loss of tax. This is because the provisions apply where the situation in s 29(1) TMA (being the insufficiency of tax) was *brought about* carelessly or deliberately by the taxpayer or a person acting on his behalf. That establishing the causal connection in effect is a "free standing" requirement of s 29(1) is clear from the decision in this tribunal in *Sanderson v Revenue and Customs Commissioners* [2012] UKFTT 207 (TC) (see [41] to [45]).

74. HMRC argue that the appellant was careless as he ought to have obtained a further independent professional valuation in respect of his shares in Anson in April 2008. HMRC has not provided any evidence that a professional valuer would have valued the shares at a higher amount. Such a valuer may well have looked to the Weir offer and valued the shares at £72 million. There is simply no evidence, therefore, that the failure to obtain another valuation caused an insufficiency of capital gains tax.

Carelessness

75. In any event the appellant was not careless as he relied upon professional advice which was not obviously wrong and was entirely reasonable in the circumstances.

76. In the case of *Anderson v HMRC* [2009] UKFTT 206 it was held at [22] that:

> "The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done."

77. This test was also relied upon in the Upper Tribunal decision in *Moore v HMRC* [2011] UKUT 239.

78. In the earlier case of *AB (a firm) v HMRC* [2007] STC (SCD) 99 the Special Commissioners stated the following at [105] (as referred to by this tribunal in the *Sanderson* case (see [42] and [43] of that case):

> "We are of the view that the question whether a taxpayer has engaged in negligent conduct is a question of fact in each case. We should take the words of the statute as we find them and not try to articulate principles which could restrict the application of the statutory words. However, we accept that negligent conduct amounts to more than just being wrong or taking a different view from the Revenue. We also accept that a taxpayer who takes appropriate professional advice with a view to ensuring that his tax return is correct, and acts in accordance with that advice (if it is not obviously wrong), would not have engaged in negligent conduct."

79. In this case the appellant relied on the advice of PwC which was reasonable and not careless in the circumstances. Regardless of the correctness of the advice it was advice provided by a highly reputable accountancy firm and was not obviously wrong and, therefore, it is not appropriate to find that the appellant was careless in the submission of his return.

80. It was entirely reasonable to rely on the Weir offer of £72 million as evidencing the market value of the shares in Anson on 4 April 2008. The following principles of share valuation are relevant in this context:

(1) The test for valuing unquoted shares is the price which those shares might reasonably be expected to fetch on a sale in the open market (s 272 and s 273 of the Taxation of Capital Gains Act 1992 ("**TCGA**")).

(2) The date at which the value of the shares must be ascertained is the date of the relevant disposal (4 April 2008) not the date that the return is submitted or any later date.

(3) One must not use hindsight when valuing shares but must rely solely upon information available at the time that the transaction occurred. This is confirmed in HMRC's CGT Manual at CG16360.

(4) In estimating "the price which those assets might reasonably be expected to fetch on sale in the open market" a contemporary offer from an unconnected potential purchaser is highly relevant. HMRC's guidance confirms that it is reasonable to value shares in accordance with their anticipated value in a prospective sale (HMRC Shares and Assets Valuations (SAV)).

81. Applying the above principles the decision to rely on Weir's offer (and not to commission a further valuation) when valuing the company for the purposes of the April 2008 share sale was entirely reasonable in the circumstances:

(1) On the evidence of the appellant, the Weir offer of £72 million was an open market offer from a serious potential purchaser which was carefully considered and was almost accepted by Anson's shareholders:

(a) Weir were an unconnected third party who had experience of other corporations in the oil and gas industry and were highly interested in acquiring Anson in early 2008.

(b) The final offer was the result of careful calculations and negotiation between Weir and Anson's shareholders using all available information at the time, including family remuneration and the senior management bonus plan.

(c) Weir were advised on their offer by external advisers, KPMG.

(d) The appellant and his brother almost accepted the Weir offer and in fact the process was sufficiently advanced that they were discussing which Weir representative would come to address the Anson staff. The appellant himself would have been happy to accept Weir's initial offer of £60 million albeit he appreciated that there was a hope that the company might sell for more following the restructuring and PwC's involvement.

(e) The Weir offer was never rejected and Weir participated in the managed sale process with their offer of £72 million but then withdrew for unknown reasons.

(2) The Weir offer was received on 25 March 2008, only 10 days before the disposal of the shares in Anson on 4 April 2008, and was still "on the table" on 4 April 2008.

(3) The later sale of the shares in HoldCo has to be ignored in estimating the value of the shares in Anson at 4 April 2008. As set out above, it is a fundamental principle of valuation that hindsight must not be applied.

(4) There is no obligation in legislation or case law that an additional valuation must be obtained. Nor does HMRC's guidance impose any requirement for such a further valuation.

(5) Reliance on a valuation of a higher or lower amount than £72 million would be questionable where a real offer has been obtained from a prospective purchaser for that amount.

(6) It was contrary to the appellant's interests to under estimate the value of the share in Anson. The tax year 2007/08 was the last year in which taper relief applied. The appellant qualified for this. It was, therefore, in his interests to maximise the gain arising in that year to obtain the maximum possible benefit from that relief.

(7) The appellant gave full details of the basis for the valuation in his 2007/08 tax return.

(8) HMRC assert that, as at the time of the offer no due diligence was carried out, it is possible that the offer could have been revised either up or down after due diligence was undertaken. However, as a matter of common sense and

practical experience it would be most unusual for the offered purchase price to go up following a due diligence exercise, the purpose of the exercise being to identify any potential problems or risks for the purchaser.

82. The appellant was advised at all relevant times by PwC corporate finance specialists who considered the appropriate method for valuing the shares. For the reasons set out the advice given by PwC that no further valuation was required was reasonable and it was appropriate to rely on a contemporary open market offer.

83. Even applying hindsight (which is not permitted) there is no reason to think that the figure of £72 million was not correct. The increased consideration in fact obtained on the sale of the shares in the holding company is easily explained:

(1) No competent valuer could fail to appreciate the significance of the £72 million Weir offer and its weight in determining value in the open market at that time.

(2) The appellant has given evidence that:

(a) By April 2009 the prospects of the oil and gas industry were rising and the Anson business was more attractive and valuable as its products were in higher demand and it had greater cash reserves.

(b) The appellant's brother noted that the company had not been prepared for sale in early 2008 whereas it had been so prepared by early 2009.

(c) The group's profits had increased from approximately £5.3 a year in 2007 to approximately £2 million a month by early 2009 which would normally increase a company's market value – in particular if one adopts a price-earnings ratio valuation method.

(d) Between April 2008 and April 2009 PwC had been acting as corporate finance advisers and had been actively marketing the Anson group with the specific intention of increasing the value of its shares.

(e) The dramatic decline in the value of sterling against the US dollar explains why a US purchaser (NOV) was able and willing to pay more in sterling for the Anson group in April 2009 than it would have in April 2008. Dollar based purchases in the oil and gas industry had much more buying power in April 2009 than they did in April 2008 and, therefore, the market conditions for the purchase of the Anson group had changed dramatically.

(3) From the oil and gas industry's perspective the value of Anson actually remained relatively constant in 2008 and 2009. HMRC's reliance on the 2009 sale price as an indicator that the April 2008 valuation was too low is an overly simplistic analysis. There is no reason to assume the £72 million was an underestimate.

84. HMRC have not sought to adduce any evidence that a further valuation exercise would have valued Anson any higher or lower than the Weir offer which was used.

There is no evidence that a valuation of £72 million was outside the range which a further valuation would have provided.

85. Overall the Weir offer was a contemporary, serious offer which represented the best indication of the market value of the company on 4 April 2008. It was neither necessary nor appropriate to commission a further valuation in the circumstances. Any reference to the later sale agreed with NOV would have been contrary to the generally prevailing valuation principles (albeit it would have been in the appellant's interests to use that price). The advice provided to the appellant was reasonable and was certainly not obviously wrong. It cannot be concluded that the appellant was careless.

HMRC's submissions

Discovery assessment

86. HMRC made the submissions set out in 87 to 105.

87. It suffices for HMRC to have made a discovery under s 29(1) TMA if a new fact is discovered. For example, this was the conclusion reached in the tribunal case of *John Herbert v The Commissioners for Her Majesty's Revenue & Customs* [2015] UKFTT 0203 (TC) (see [98]).

88. In this case the new fact which has been discovered by HMRC, as evidenced in the correspondence produced in the bundles, is the agreement of the value of the shares in Anson as at 4 April 2008 at the higher amount. The higher value was agreed between the parties and, on that basis, HMRC did not expect to have to call an expert witness to support the valuation position.

89. As to the appellant's assertion that the discovery was not sufficiently new, there is nothing in the legislation to say that the assessment has to be issued within a particular time of the discovery having been made.

90. On the issue raised by the appellant as to the lack of a link between the carelessness of the appellant and the loss of tax, HMRC noted that Mr Elliott gave his own opinion that if due diligence had been carried out on the shares in Anson when the Weir offer was made this would have given a lower valuation. That is simply his opinion and should be disregarded. There is no available evidence to support any such assertion.

Careless

91. The definition of carelessness or negligence was set out in the case of *Blyth v The Company of Proprietors of the Birmingham Waterworks* (1856) 11 Exch 781, in which Alderson B stated that:

> "negligence is the omission to do some thing which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a

> prudent and reasonable man would not do. The defendants might be liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done."

92. HMRC do not consider that the appellant was prudent and reasonable to rely on a bid from a single party and not seek to obtain an independent market valuation report when there was a very significant sum at stake and a clear obligation to establish the correct valuation figure.

93. In HMRC's guidance at EM5140 it is stated:

> "If a valuation from an appropriately qualified professional has been obtained to establish liability it may be difficult to show that the taxpayer has not taken reasonable care. Unless the taxpayer personally has the professional ability to make a realistic valuation, you could argue that not seeking professional help amounts to a lack of reasonable care."

94. HMRC is not aware that the appellant has any qualifications as a professional valuer. There is no evidence that whoever was behind the proposed offer for the purchase of the shares in Anson for £72 million, put forward by Weir, had any qualifications professionally to value the business. There is no clear evidence that Weir consulted any professional adviser to arrive at their valuation. At the time of the offer no due diligence was carried out and it is quite possible that the offer could have been revised either up or down after due diligence was undertaken. HMRC again notes that Mr Elliott gave his own opinion that if due diligence had been carried out this would have given a lower valuation. That is simply his opinion and should be disregarded. There is no available evidence to support any such assertion.

95. A single third party offer is more likely to be a conservative one. It is not sufficient to rely on such a single offer at a time when, not only had there been no due diligence undertaken, but no professional valuation or other comparative bids had been sought. HMRC note that the appellant and his brother chose not to allow Weir to carry out the due diligence exercise.

96. HMRC also note that the appellant decided not to sell the shares for £72 million. When the appellant completed his 2007/08 tax return on 24 April 2009 the shares in Holdings had already been sold for some £16 million more than the £72 million valuation. This should have caused the appellant to reflect on the valuation to be used.

97. A taxpayer has an obligation to take care when submitting a tax return that it is accurate. In the case the appellant relied on a valuation that not only did he not find acceptable as he did not accept the offer for the sale of his shares but also that was provided by a third party who did not have the qualifications to support it. The appellant has not fulfilled his obligations to submit an accurate return as he chose not

to have the unprofessional valuation checked. A prudent taxpayer would have checked the valuation with a professional valuer.

98. The appellant did not consider the sale for a higher amount in April 2009 as a reason for checking that the valuation he used was in fact correct. He had up to January 2010 to amend his tax return for 2007/08 or to seek an independent professional valuation. He did neither.

99. The disposal of the shares in Anson to the relevant holding company was not an arm's length transaction and there are references in HMRC's guidance that, in such circumstances, a professional valuation is recommended.

100. The appellant provided details in the white space on this return that £72 million was based on a written offer from a third party but he did not provide any further information as to why he could reliably accept that figure as the true market value and on what appropriate professional basis that offer had been arrived at. Such entries were not held to be sufficient to prevent HMRC issuing a discovery assessment in the *Moore* case which states the following in the head note:

> "The assessments in the instant case were based not upon what the taxpayer had written in the additional sheets, but on what he had entered in the boxes. His setting out the information on an additional sheet did not give him the protection of s 29(4) TMA."

101. HMRC's Shares and Assets Valuers did not accept the £72 million as the market value. In their opinion the £88.6 million offer some 12 months later was achieved following the onset of the difficult overall market conditions arising from the credit crunch and an argument could be made for a higher price in April 2008. Their professional opinion is that the true market value could have been in excess of £101 million.

102. The appellant has given evidence that PwC was engaged to provide assistance on the sale process and this resulted in the business being marketed through a formal competitive bid process. This demonstrates that the appellant wanted to invite offers from different sources and could suggest that he felt it more sensible and professional at the time to consider more than one offer being made with the likelihood that he could achieve more for the business.

103. HMRC consider that it is not reasonable for the appellant to consider a bid from just one interested party and to rely on this as a reasonable guarantee of the open market value. It would also appear that the appellant did not think that this was reasonable and, therefore, he decided to openly market the business and invite bids from other interested parties. HMRC cannot understand why the appellant found it reasonable to use that bid as the open market value when submitting his tax return.

104. The appellant has given evidence that he relied on the advice of PwC as regards the share valuation. However, reliance on a third party agent is not generally a reasonable excuse. There is no evidence as to what qualifications the relevant persons at PwC have as regards such valuations issues.

105. HMRC believe a reasonable and prudent person, in fulfilling their obligations to submit a complete and accurate return, would have sought the opinion of a suitably qualified professional valuer to determine what the true market value was of the appellant's shares in Anson at the time they were disposed of in April 2008.

5 **Discussion on main issue**

106. The issue is whether HMRC is entitled to make a discovery assessment for additional capital gains tax due from the appellant for the tax year 2007/08 on the disposal of his shares in Anson. The question is first, whether an officer of HMRC made a discovery that, for the tax year 2007/08, chargeable gains have not been 10 assessed which ought to have been assessed and secondly, whether that situation was brought about by the carelessness of the appellant.

Was there a discovery of an insufficiency of tax?

107. We note that it is established (and not disputed in this case) that the burden is on HMRC of proving, on the balance of probabilities, that there was a discovery of an 15 insufficiency of tax. As set out in the Upper Tribunal decision in the *Charlton* case to which we were referred the threshold for there to be a discovery is relatively low. It suffices if it has "newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment". That can be "for any reason, including a change of view, change of opinion, or correction of an oversight". The requirement 20 for newness relates to the conclusion itself and not the reason for the conclusion. The Upper Tribunal noted that there could be cases where a conclusion would lose its "essential newness" if the assessment is not made within a reasonable time after the conclusion is reached.

108. HMRC assert that this requirement is satisfied on the basis that the relevant 25 officer, Miss Carson, newly concluded that additional capital gains tax was due for the tax year 2007/08. It is asserted that Miss Carson realised this when the Shares Valuation division of HMRC came to the view that the shares in Anson had a higher value at 4 April 2008 than that used by the appellant in his chargeable gain calculation in his 2007/08 tax return and this value was accepted by the appellant. The only 30 evidence produced to the tribunal is in the form of correspondence between the parties. It appears HMRC rely on the letters from Miss Carson of 12 November 2012 and 26 February 2013 taken in the overall context of that correspondence.

109. In our view, there is sufficient evidence from the correspondence that, in the course of the enquiry into the appellant's tax return for 2008/09, it newly appeared to 35 Miss Carson, acting honestly and reasonably, that additional capital gains tax was due, once she became aware that the open market value of the shares in Anson was, in her colleagues' view, higher than that used by the appellant. Following the approach taken in *Charlton*, this suffices for there to be a discovery within the meaning of s 29(1) TMA.

40 110. We note the appellant's contentions that such evidence does not suffice, in particular as Miss Carson was not called as a witness, on the basis of the comments of

Judge Cannan in the *Gardiner* case. In that case, Judge Cannan was critical of HMRC in seeking to rely on documents in the bundle produced to the tribunal as evidence as to the truth of their contents, without any supporting witness evidence, in a case where the onus was on HMRC to prove a prima facie case of negligence against the taxpayer.

111. Judge Cannan noted at [29] that in the ordinary course of civil litigation where a document is disclosed, unless specific objection is taken, the document is treated as authentic. However, where a party relies on a document as evidence of a statement in the document, it must still be proved by production of the document. Production is not simply by counsel or a representative handing up the document, but by a witness qualified to say what it is. In that case no witness was called and Judge Cannan noted that HMRC had not sought to ask the tribunal to exercise their discretion under Rule 15(2) of the rules governing the tribunal to admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom. At [32] and [33] Judge Cannan concluded:

> "Without the benefit of argument, our initial view would have been that in these particular appeals it would not be appropriate to admit documents in evidence without a witness adducing those documents and explaining the reliance placed on them. These are penalty appeals and in our view the appellants are entitled to put the respondents to strict proof. They are also entitled to know and question what significance is placed on particular documents in support of the allegation of negligence. The respondents were on notice as to the appellants' position and chose not to adduce the witness evidence.
>
> In the absence of evidence to support the respondents' case on negligence we have concluded that they have failed to satisfy the burden of establishing a prima facie case of negligence."

112. We do not regard Judge Cannan's decision as authority that it would necessarily be inappropriate in all circumstances for the tribunal to accept documentary evidence of a discovery. It is clear that Judge Cannan considered that approach as justified in those "particular appeals" which were penalty appeals concerning alleged negligence. Whilst the current case similarly relates to alleged careless behaviour, we are here looking only at the initial question of whether HMRC has satisfied the burden of proving that an officer made a discovery of an insufficiency of capital gains tax. There is a further separate issue of what suffices as regards proving carelessness on the part of the appellant should HMRC be taken to have satisfied that burden, which in our view, they have. That is not to say that documentary evidence alone would suffice in all cases but here we consider that there was a discovery to be clear from what has been provided. Moreover we note that there is no challenge by the appellant to the validity of the relevant correspondence provided in the bundle.

113. We also note the appellant's comments on the fact that there is little evidence as to when exactly Miss Carson formed the view that there was an insufficiency of

capital gains tax in the tax year 2007/08. We note Mr Elliott's comments that there are indications that Miss Carson was considering the valuation aspect of the capital gains computation as early as July 2011 (see 15 and 72). We do not consider that there is sufficient evidence that Miss Carson had made a discovery at that time as, at that stage, she was merely asking questions. It is perhaps possible that Miss Carson could be held to have made the discovery once the valuation team at HMRC became involved in July 2012 (see 16). However, even if Miss Carson could be regarded as having made the discovery as early as July 2012, in these circumstances we do not regard the passage of time from then until the issue of the discovery assessment on 23 February 2013 as sufficient for the conclusion to have lost its "newness".

Carelessness

114. The next question is whether the situation in s 29(1), being the asserted insufficiency of capital gains tax, which was discovered by HMRC, was brought about carelessly by the taxpayer or a person acting on his behalf. A loss of tax or a situation is brought about carelessly by a person if the person "fails to take reasonable care" to avoid bringing about that loss or situation (s 118 TMA).

115. It is clear, and again was not disputed, that the burden of proof is on HMRC. HMRC must demonstrate that, to the usual civil standard of proof (on the balance of probabilities), the appellant failed to take reasonable care to avoid bringing about the asserted insufficiency of capital gains tax for the tax year 2007/08.

116. Section 29(4) TMA used to refer to the relevant situation being attributable to fraudulent or negligent conduct and the parties both cited a number of authorities which had considered the meaning of the term negligence in this context. This was changed to refer to careless or deliberate conduct with effect from 1 April 2010 under schedule 39 of the Finance Act 2008.

117. The appellant referred to the Upper Tribunal in *Colin Moore* which in effect approved the objective formulation of the test of negligence in *Anderson* as requiring consideration of what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done. The appellant also referred to the Special Commissioners decision in *AB* where they accepted that a taxpayer who takes appropriate professional advice with a view to ensuring that his tax return is correct, and acts in accordance with that advice (if it is not obviously wrong), would not have engaged in negligent conduct. HMRC referred to the *Blyth* case, which is a nineteenth century tort liability case.

118. The change made to s 29(4) TMA to refer to careless or deliberate conduct was part of a number of changes which the Government stated (in explanatory notes issued in 2008 with the draft legislation) were made to align the position with the terms used in the revised penalty regime introduced earlier by schedule 24 to the Finance Act 2007. For penalties purposes those provisions replaced the concepts of fraudulent and negligent conduct with deliberate and careless conduct, as part of introducing a more uniform penalty regime across different taxes. In outline, under

that regime, a taxpayer may be liable to a penalty where there is a careless inaccuracy due to the failure by the taxpayer to take reasonable care.

119. There is some suggestion in materials published at the time that the use of the term careless in the penalty provisions was not intended to make any material change to the negligence test which applied previously. In the explanatory notes published with the draft legislation in 2007, it was stated that these terms "provide a uniform language for behaviours, using more accessible language across the taxes covered." The notes went to state that the effect of the provisions is that "where a person has taken reasonable care in completing their return, claim, accounts or other document used to ascertain tax liability and has taken reasonable steps to notify any errors within a reasonable timeframe, no penalty will arise." The consultation document which was published before the draft legislation (entitled "A new approach for penalties for incorrect tax returns") said (at 5.6) that the term "failure to take reasonable care" would "incorporate the terms 'negligent conduct' and 'negligence."

120. However, our view is that, even if it is permissible to look to such materials for guidance as to the intent of Parliament in interpreting legislation, the statements in the materials are not sufficient to conclude that the two terms are simply interchangeable. Although there are indications that the change in terminology was not intended to give materially different results (at any rate as regards penalties), Parliament has chosen to use different words and it is those words which must be interpreted. The starting point must be that the term "careless" as further defined as a "failure to take reasonable care" has to be interpreted according to the usual principles of statutory interpretation.

121. In the context of the penalty provisions, the careless test has been held by the tribunal to require consideration of the conduct which could be expected of a prudent and reasonable taxpayer in the position of the taxpayer in question. For example, in the case of *David Collis v Revenue & Customs* [2011] UKFTT 588 (TC), Judge Berner noted the following at [29]:

> "That penalty applies if the inaccuracy in the relevant document is due to a failure on the part of the taxpayer (or other person giving the document) to take reasonable care. We consider that the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question."

122. Similarly in *Hanson v HMRC* [2012] UKFTT 314(TC), Judge Cannan said at [21]:

> "What is reasonable care in any particular case will depend on all the circumstances. In my view this will include the nature of the matters being dealt with in the return, the identity and experience of the agent, the experience of the taxpayer and the nature of the professional relationship between the taxpayer and the agent."

123. Our view is that the correct approach in this context also is to follow that adopted in *Collis* and *Hanson* of assessing what a reasonable hypothetical taxpayer would do in all the applicable circumstances of the actual taxpayer. It seems to us that this follows from the wording of the provision which looks at a failure to take reasonable care by the person in question. The "reasonable care" which should be taken is to be assessed by reference to what a reasonable and prudent taxpayer would do looking at an objective hypothetical standard. But what that reasonable and prudent taxpayer would do is not assessed in a vacuum but by reference to the actual circumstances of the taxpayer in question. We see no reason why any different interpretation should apply as regards the use of this term in the discovery assessment provisions. That Parliament chose to use the same term, in each case as further defined as "a failure to take reasonable care", indicates that the same approach is to be taken in both contexts.

124. In this case, therefore, the question is what action a prudent and reasonable taxpayer, in all the circumstances of the appellant, would have taken to avoid bringing about the "situation", being the asserted insufficiency of capital gains tax as regards the sale of his shares in Anson.

125. In our view, an assessment of what a reasonable and prudent taxpayer would do must be made in the context of the self assessment system and the tax rules in place at the relevant time. It is an essential part of a self assessment system that there is an obligation on a taxpayer himself correctly to include all taxable income and gains in a tax return and account for the tax due on it. Our view is that the hypothetical reasonable and prudent taxpayer can be attributed with an awareness of this obligation and with the need to be mindful to take reasonable steps to fulfil that obligation.

126. In the context of correctly declaring a gain on the disposal of shares with, as here, a potentially high value, we would expect a reasonable and prudent taxpayer to take all reasonable steps to ensure he/she is satisfied that the correct amount is being declared in the tax return. As the level of capital gain depends on the market value of the shares disposed of at the disposal date, this includes the taxpayer taking reasonable steps to establish what that market value is. As we must look at a hypothetical taxpayer but one in the particular circumstances of the appellant, we consider it reasonable to attribute to the hypothetical taxpayer, the knowledge and understanding which could reasonably be expected of a taxpayer with the appellant's background of for many years owning shares in and acting as director of a substantial business with responsibility for its financial affairs.

127. For capital gains purposes market value is defined in s 272 TCGA to mean the price which the shares might reasonably be expected to fetch on a sale in the open market. As regards unlisted shares such as these, s 273 TCGA states that for the purposes of making this market value assessment, it shall be assumed there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if he were proposing to purchase it from a willing vendor by private treaty and at arm's length. It is established that this is a hypothetical test – the question being what price the shares would fetch on a sale between a willing hypothetical seller and purchaser.

128. The appellant has given evidence that he relied on the advice of PwC that it was appropriate to use the figure of £36 million as the market value of his shares in Anson on the basis of an offer of £72 million for the purchase of all the shares in Anson received from Weir, an independent third party. The offer was received only 10 days before the sale of the shares in Anson and the appellant described it as "still being on the table" at the disposal date.

129. The appellant states that he was advised by the PwC corporate finance team but we were not presented with any evidence as to who at PwC provided the advice and what their precise qualifications were. The appellant recalls attending a meeting at PwC at which there could have been as many as 15 professionals from PwC present at which he was advised that using the £36 million figure was the correct thing to do. He states that it did not occur to him to seek any other advice given the level of professional advice he was taking from such a reputable firm as PwC.

130. The appellant's evidence indicates that he did nevertheless give some thought to the appropriateness of relying on the amount of the offer as being the market value. He states (see 38) that it made sense to him given that Weir were willing to pay £72 million on 25 March 2008 and that offer was still on the table in April 2008 when the shares in Anson were disposed of. He notes (see 40) that if the £72 million had been offered by an unknown party with no resources behind it then it might have been a different story but this was a genuine offer from a major player with obvious reasons for wanting to buy the company and with the resources to back it up. He also refers to not having any doubt that the offer from Weir was a serious offer (see 28).

131. In our view, in these circumstances, it is reasonable for a taxpayer to rely on the advice provided by the corporate finance team of a leading firm of accountants engaged to advise on the sale of the shares in question. We expect a reasonable taxpayer, in the context of a sale of shares generating a substantial gain, to ensure that he fully understands the basis of the advice, mindful of the fact that it is his obligation to ensure the correct capital gain is included in the return. Where, as here, the hypothetical taxpayer is to be attributed with the level of knowledge and understanding we would expect of a person of the appellant's background, we would not expect such a taxpayer blindly to accept advice, even though provided by highly reputable professionals, without giving due consideration to understanding fully the advice and to some extent, depending on the type of advice and what can reasonably be expected, assessing whether it makes sense. A person who is not himself a qualified professional in the type of advice sought clearly cannot be expected to be able fully to evaluate the advice given and indeed hence why he is taking professional advice. However, a person with the understanding and knowledge that may reasonably be attributed in this case, may be expected to question advice if there is a reason to do so which ought to be apparent to such a person. We note that the Special Commissioners in *AB* seem to have taken a similar approach in the context of the negligence test as they concluded that it is reasonable for a taxpayer to rely on professional advice if is not "obviously wrong".

132. In this case, we consider that the appellant did what could be expected of a person acting reasonably and diligently, attributed with the knowledge and

understanding that could reasonably be expected of him, when selling a substantial asset. It is clear from his evidence that, whilst the appellant relied on PwC's advice, he did fully consider the basis for the advice he was being given and whether it made sense (see 38 and 40). We do not consider that there was any reason for a person in the appellant's circumstances, acting reasonably and diligently, to question the advice received.

133. We would not expect such a taxpayer to question the credentials of those at the professional firm who have been selected to provide him with the advice unless there is any reason of which the taxpayer ought reasonably to be aware to do so. There is no evidence of any such reason from the fact that the advice was provided by members of the corporate finance team at PwC. Nor would we expect such a taxpayer to obtain another professional opinion again unless there is reason to do so, of which the taxpayer ought to reasonably be aware, such as that any qualification put upon the advice by the firm may limit its reliability.

134. In any event we do not regard it as careless to rely on a third party offer made for the purchase of shares only days before the disposal date as the best evidence of the market value of the shares at that date. As noted the test under ss 272 and 273 TCGA is by reference to a sale between a hypothetical willing seller and purchaser in the open market on the assumption the purchaser has all available information such a prudent purchaser would have. It is clear that the market value which has to be assessed under this test is that at the time of the disposal.

135. In the context of that test, it is reasonable to suppose that, although the test is a hypothetical one, the best evidence of such market value is an actual offer made for the shares by a willing purchaser in the open market very soon before the valuation date and which was "still on the table" at that date. From the evidence, Weir was a willing purchaser who made the offer on such information as a prudent purchaser would require. It is difficult to see that, had the appellant sought another opinion from an expert in share valuation, that person would not have had primary regard to the Weir offer in assessing market value for the purposes of this test.

136. Given there was such an offer from a third party which it was reasonable to suppose was the best evidence of market value, we do not consider that there is a failure to take reasonable care in not taking steps to obtain any further valuation. Indeed, as noted it is not at all obvious that if any other valuer had become involved that valuer would not have simply looked to the Weir offer as the best evidence of market value under the particular market value test in question.

137. We note HMRC put forward arguments based on the fact that the appellant did not accept the Weir offer and then started a managed bid process for the sale of the Anson business. We cannot see what relevance this has as to whether the appellant failed to take reasonable care in using the figure of £36 million as the market value of the shares at the disposal date. The fact that the appellant and his brother then hoped to achieve a higher price at a later date does not evidence that the market value used was not based on a careful and reasonable assessment.

138. HMRC also refer to their own guidance as stating that obtaining a professional valuation is advisable in some circumstances. We have seen nothing in HMRC's guidance which indicates that a person in the appellant's circumstances should have taken a further valuation.

139. HMRC notes that the appellant was aware of the higher price actually achieved for the sale of the shares in April 2009 (through the sale of shares in HoldCo) when the tax return for 2007/08 was submitted. HMRC query why the appellant did not question the valuation at that point. We cannot see that a reasonable and prudent person would necessarily revisit an earlier valuation, due to a higher price being achieved later, given the issue was the value at an earlier time. In any event we accept the appellant's evidence that there were valid reasons why the value had risen in the period from April 2008 to April 2009 (see 33 to 37 above) such that this would not have lead a reasonable and prudent taxpayer to revise the valuation used at the earlier date.

140. HMRC also put some emphasis on the fact that the offer of £72 million made by Weir was subject to due diligence and therefore could have gone up or down. We do not think that this affects matters. It would be reasonable for a taxpayer to suppose that the purpose of the due diligence would be to identify any material issue affecting the viability of the purchase from the purchaser's perspective and accordingly, if anything, the price offered by the third party would go down if the due diligence identified any such issue.

141. We note the appellant's argument that any insufficiency of capital gains tax in the tax year 2007/08 could not be regarded as *brought about* by the appellant's failure to obtain another valuation given that there is no evidence that the valuation would have been for a higher amount. As we have concluded that the appellant did not fail to take reasonable care in using the figure of £36 million as the market value, this issue falls away.

142. Finally we note that HMRC stated that they thought that the appellant and PwC, in agreeing to the revised valuation for the tax year 2008/09, were also agreeing to the discovery assessment for 2007/08. However, there is no evidence that this was the case. On the contrary it is clear from the correspondence that at the relevant time PwC pointed out that, in their view, HMRC were not able to issue a discovery assessment for the tax year 2007/08.

Conclusion

143. For all the reasons set out above, HMRC are not entitled to issue a discovery assessment for the tax year 2007/08 on the basis that there was a discovery of an insufficiency of capital gains tax brought about carelessly by the appellant. It follows that HMRC are out of time to issue such an assessment. The appellant's appeal is allowed.

144. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal

against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

HARRIET MORGAN

TRIBUNAL JUDGE
RELEASE DATE: 16 MAY 2016