TC01902

Appeal number: TC/2010/08616

CAPITAL GAINS TAX – Whether a 'discovery' – Whether conditions of either s 29(4) or (5) Taxes Management Act 1970 fulfilled – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID STEPHEN SANDERSON **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
PETER DAVIES

Sitting in public at 45 Bedford Square, London WC1 on 28 and 29 November 2011 with further written submissions received from the parties on 13 January 2012.

Keith M Gordon and Ximena Montes Manzano, Counsel, instructed by Bramhall solicitors, for the Appellant

David Yates, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. David Stephen Sanderson appeals against a "discovery assessment" issued under s 29 of the Taxes Management Act 1970 ("TMA") on 11 January 2005 in relation to capital gains tax of £713,011.48, plus interest, that had arisen in 1998-99 as the result of his participation in a widely marketed scheme, known as the Castle Trust scheme (the "Scheme"), which had proved to be ineffective.

2. David Yates, who appeared for HM Revenue and Customs ("HMRC") contends that this was because the arrangement was a sham and/or the key transactions upon which the planning depended never took place whereas Keith Gordon, who appeared with Ximena Montes Manzano for Mr Sanderson, put it somewhat less bluntly, explaining that the arrangements were ineffective due to improper implementation by the promoter.

3. However, for the purposes of this appeal it is not necessary for us to consider the Scheme, or why it failed, other than note that it sought to create and distribute capital losses to UK individuals who had potential capital gains tax liabilities in 1997-98, 1998-99 and 1999-00. It is described in more detail by the Special Commissioner (Charles Hellier) in *Corbally-Stourton v HMRC* [2008] STC (SCD) 207 at [11 – 13] which, like the present appeal, raised issues relating to a discovery assessment under s 29 TMA.

4. Although, throughout this decision, we refer to the Respondents as "HMRC" this also includes, where appropriate, references to the former Inland Revenue.

Evidence

5. We were provided with a Hearing Bundle containing documents and correspondence relating to both the Scheme and Mr Sanderson, including a copy of his 1998-99 self-assessment tax return from which the employment pages were missing.

6. In addition to the documentary evidence we heard from Mr Peter Thackeray of HMRC who, before taking up his present position with HMRC in 2007, was an investigator in HMRC's Special Compliance Office (now Specialist Investigations).

7. Although Mr Thackeray agreed in cross examination that it was "more likely than not" that Mr Sanderson's return had been sent to HMRC with a covering letter, it was not certain whether this was the case and in any event neither party was able to produce a copy of such a letter.

Facts

8. Although there was no agreed statement of facts, there was no real dispute as to the underlying facts and chronology.

9. From 1999 to 2007 Mr Peter Thackeray was part of a team of HMRC's Special Compliance Office ("SCO") and Specialist Investigation Services ("SIS") officers investigating the Scheme. As over 200 taxpayers had participated attempts to identify them were made carrying out a manual review of all tax returns submitted for the years concerned in which more than £200,000 had been claimed as a capital loss.

10. In July 1999 the SCO received, from the Office of Supervision of Solicitors ("OSS"), a list of names and addresses of individuals who had paid to purchase losses through the Scheme. These were recorded on a database, separate from all other HMRC databases, of individuals who were part of investigation cases being carried out by the SCO.

11. As the list included Mr Sanderson's full name, address, the Scheme fees paid and the amount of the loss "acquired" Mr Thackeray obtained the file from Mr Sanderson's district tax office. Following a review the file was returned to the office with a letter on 10 November 1999 from Mr Thackeray in which he noted that Mr Sanderson's 1997-98 and 1998-99 tax returns had not been submitted to HMRC. Although he requested that these be sent to him when received by the District Office there was no further communication from that office.

12. A colleague of Mr Thackeray's at the SCO checked HMRC's self-assessment computer records in June, August and September 2000. She found that Mr Sanderson's returns for 1997-98 and 1998-99 had not been filed. However, no further searches of the self-assessment records were undertaken by HMRC. Had they been it would have been noted that Mr Sanderson's 1998-99 return, although due by 31 January 2000, was received by HMRC on 24 February 2003.

13. In the additional information, "white space", section of the return, using the specific wording agreed by leading tax Counsel, supplied to Mr Sanderson by Hanover Veriti Limited a promoter of the Scheme in a letter dated 10 June 1999, it was stated:

> EUROPEAN AVERAGE RATE OPTION (TRADE NO. 82831)
> I am entitled to the loss of £1,825,663 by virtue of the provision of TCGA 19992 s 71(2). The loss is part of a loss of £1,000,000,000 which accrued to the Trustees of the Castle Trust on 8 April 1997, on the disposal of a European Average Rate Option (Trade No. 82831) relating to shares in Deutsche Telecom
>
> BENEFICIAL INTEREST IN THE CASTLE TRUST
> On 24 November 1998, I purchased for a fee (part of which is contingently payable) from the Trustees of the Charter Trust 2.273% of their beneficial interest in the Trust Fund of the Cstle [sic] Trust. The interest determined on 25 November 1998, when I became absolutely entitled to receive from the Trustees of the Castle Trust the sum of £16.04

14. Neither Mr Thackeray, nor anyone else at the SCO, was aware that Mr Sanderson's 1998-99 return had been filed. Mr Thackeray candidly admitted that if searches had been carried out in 2003 after Mr Sanderson had submitted his return it

would have been called for and an enquiry made within the time window under s 9A TMA. He also accepted that had he seen the return following its submission he could have made an assessment based on the information in the return by 30 April 2004.

15. In May 2003 SIS were provided with a spreadsheet by KPMG. This detailed the fees paid by clients of the providers of the Scheme, Coutts Bank, Haines Watts and KPMG. Mr Sanderson's name was included on the spreadsheet. However, at this stage the focus of HMRC's checks was based upon the individuals named in the OSS list but who were not included in the KPMG spreadsheet.

16. Following negotiations between HMRC and the Trustees of the Scheme a closure notice was issued on 27 November 2003 reducing the loss claim by the Trustees from £1,000,000,000 to nil. Mr Thackeray wrote to all of the taxpayers concerned on 4 January 2004 to notify them of this and setting out the terms of a settlement on offer.

17. On 7 January 2004 Hanover Veriti Limited wrote to Mr Sanderson in the following terms:

> As you are aware, the Inland Revenue challenged the Castle Trust losses on the basis firstly that the transaction leading to the loss was in law, a sham and, secondly, that it lacked commercial purpose. The Castle trustee took advice from Leading Tax Counsel and he expressed the view that there was insufficient evidence and witnesses to show that the payments underlying the transaction were actually effected. He was, therefore, unable to advise the Trustee to continue with its challenge of the Inland Revenue. The Trustee (and the steering committee) has reluctantly accepted that advice.

18. Although Mr Sanderson did not contact HMRC or make any amendment to his 1998-99 return following receipt of this letter he did contact his accountants, Upton Wilson & Co who, on 23 February 2004, sent an email to Haines Watts seeking advice. The email, of 26 February 2004, in reply concluded:

> At this stage I would suggest you do nothing on this matter until you hear from the Revenue. If an enquiry notice is issued or the matter is raised by them please let me know.

19. It was only in October 2004 on a final review of the Scheme, after most participants had settled, that HMRC began to focus on Mr Sanderson. Although he was able to access a computer record of Mr Sanderson's 1998-99 return and identify that a capital gain had been returned and a loss claim made, Mr Thackeray was unable to ascertain whether the Scheme was the source of the loss claimed without a copy of the paper return.

20. As he was unable to obtain a copy of Mr Sanderson's 1998-99 paper return from within HMRC Mr Thackeray wrote to Upton Wilson, Mr Sanderson's accountants, on 19 November 2004 asking him to provide "a copy of the relevant pages of his 1998-99 return". On 22 November 2004 Upton Wilson sent a copy of Mr Sanderson's 1998-99 return to Mr Thackeray by fax.

21. On receipt of the return Mr Thackeray realised that it included a claim for losses under the Scheme and on 11 January 2005 he issued the discovery assessment which is the subject matter of this appeal.

Legislation

22. Section 29 TMA, insofar as it applies to this appeal, provides:

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
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> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
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> (b) that an assessment to tax is or has become insufficient, or
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> (c) that any relief which has been given is or has become excessive,
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> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) …
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) ... in the same capacity as that in which he made and delivered the return,
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> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board—
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
>
> (b) informed the taxpayer that he had completed his enquiries into that return,
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.
>
> (6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

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

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

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer, whether in pursuance of a notice under section 19A of this Act or otherwise; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above –

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

Issues

23. Mr Sanderson's solicitors have accepted, in their letter of 11 October 2010, to HMRC that the Scheme "failed to achieve its stated objective and, for present purposes … there was a loss of tax". Therefore, as this appeal concerns the question of whether, as a matter of principle, HMRC were entitled to raise the discovery assessment on Mr Sanderson it is necessary for us to consider:

(1) Whether there was a discovery by HMRC (s 29(1) TMA).

(2) If so, as Mr Sanderson has made and delivered a return, whether:

(a) Whether the insufficiency of tax was attributable to the negligent conduct on the part of Mr Sanderson or anyone acting on his behalf (s 29(4) TMA); or

(b) Whether, at the conclusion of the enquiry window for Mr Sanderson's 1998-99 return, an officer could not reasonably have been expected on the information available made available to him (as defined by s 29(6) TMA) to have been aware of the insufficiency of tax (s 29(5) TMA).

Discovery

24. Although there appears to be agreement that a discovery of an insufficiency of tax is required for an assessment to be made under s 29(1) TMA (see *Langham (Inspector of Taxes) v Veltema* [2004] STC 544 at [11]) any common ground between the parties ends there.

25. Mr Gordon contends that a discovery cannot be made if an officer reaches a view that could and should have been reached by an officer at an earlier stage whereas

Mr Yates submits that a discovery can occur despite there being no new facts or a changed view of the law and a new inspector simply taking a different view from his predecessor is sufficient.

26. We agree with Mr Yates that it is not necessary for there to be new facts or a changed view of the law and find support from the recent decision of the Court of Appeal in *Hankinson v HMRC* [2011] EWCA Civ 1566 where Lewison LJ said, at [15-16]:

> [15] "I begin with section 29(1) [TMA]. This sub-section comes into operation if an officer of the Board "discovers" an undercharge. The word "discovers" in this context has a long history. Although the conditions under which a discovery assessment can be made have been tightened in recent years following the introduction of the self-assessment regime, the meaning of the word "discovers" in this context has not changed. In *R v Commissioners for the General Purposes of the Income Tax for Kensington* [1913] 3 KB 870 Bray J said that it meant "comes to the conclusion from the examination he makes and from any information he may choose to receive"; and Lush J said that it was equivalent to "finds" or "satisfies himself". In *Cenlon Finance Co Ltd v Ellwood* [1962] AC 782 the House of Lords considered the meaning of the word "discovers". They rejected the argument that a discovery entailed the ascertainment of a new fact. Viscount Simonds said:
>
> > "I can see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation."
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> [16] Lord Denning said:
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> > "Mr Shelbourne said that "discovery" means finding out something new about the facts. It does not mean a change of mind about the law. He said that everyone is presumed to know the law, even an inspector of taxes. I am afraid I cannot agree with Mr Shelbourne about this. It is a mistake to say that everyone is presumed to know the law. The true proposition is that no one is to be excused from doing his duty by pleading that he did not know the law. Every lawyer who, in his researches in the books, finds out that he was mistaken about the law, makes a discovery. So also does an inspector of taxes."

27. Therefore, the fact that Mr Thackeray may have had sufficient evidence to reach a conclusion that there was an insufficiency of tax sooner than he did, does not, in our judgment, preclude him from reaching that conclusion and making a discovery at a later date.

28. Although we were referred to the decision of the House of Lords in *Scorer v Olin Energy Systems Ltd* [1985] AC 645 as authority for the proposition that the re-

visiting of old facts cannot amount to a discovery we note that the issue in that case was whether an agreement, under s 54 TMA, by the Inspector to the taxpayer's computation claiming a deductible loss precluded HMRC from raising a subsequent discovery assessment when they changed their mind about the correct tax treatment of the loss.

29. We agree with, and adopt, the comments of Lewison LJ in *Hankinson*, in relation to *Scorer v Olin Energy*, where he said, at [32-33]:

> [32] "Thus the question [in that case] concerned the scope of the agreement. That in turn was in effect a question of construction. Lord Keith of Kinkel (who gave the leading speech) made two points. First he said that the material presented in the taxpayer's computation "was sufficient to bring home to the mind of an ordinarily competent inspector in his position precisely what they were claiming". Second he said (p. 658) that:
>
> > "The situation must be viewed objectively, from the point of view of whether the inspector's agreement to the relevant computation, having regard to the surrounding circumstances including all the material known to be in his possession, was such as to lead a reasonable man to the conclusion that he had decided to admit the claim which had been made."
>
> [33] This is a wholly orthodox approach to the construction of any agreement in writing. To paraphrase a well-known statement: the House was ascertaining the meaning that the documents would have conveyed to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the agreement. I cannot see that this case bears on the point we have to decide."

Statutory Conditions for Discovery Assessment

30. Section 29(3) TMA provides that where, as in this case, a return has been submitted, a taxpayer "shall not be assessed unless one of the two conditions mentioned below is fulfilled."

31. The first condition, contained in s 29(4) TMA, is that the insufficiency of tax was due to the negligent or fraudulent of the taxpayer or a person acting on his behalf. The second condition, in s 29(5) TMA, is that at the time the enquiry window had closed or an enquiry was completed, 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 insufficiency of tax.

32. It is clear from *Hankinson* that it is for the Tribunal to decide whether either condition is satisfied. However, before we examine the conditions it is first necessary to consider the burden of proof.

33. Mr Gordon contends that it is for HMRC to establish that either of the conditions has been fulfilled.

34. He referred us to the decision of Henderson J who, when considering the equivalent corporation tax discovery provisions contained in paragraphs 43 and 44 of schedule 18 of the Finance Act 1998, in *HMRC v Household Estate Agents* [2008] STC 2045 said, at [48]:

> "… it seems to me that the burden of establishing that paragraphs 43 or 44 apply must rest on HMRC, because in the absence of any evidence of fraud or negligent conduct (paragraph 43), or of material to satisfy the test of objective non-awareness (paragraph 44), there would be no basis for a conclusion that either of those paragraphs applied, and nothing to displace the general rule that discovery assessments may not be made. I would add, however, that in relation to paragraph 44 the question is unlikely to be of much practical significance, because the nature of the enquiry is an objective one and the return and accompanying documents which have been submitted to HMRC should always be available. So cases where there is no evidence, or where the Commissioners are unable to reach a conclusion without recourse to the burden of proof, should be rare if not non-existent. With regard to paragraph 43, placing the burden upon HMRC would accord with the long-established general rule, before self-assessment, that the Revenue had to establish fraud or wilful default in order to make an assessment outside the normal six year time limit: see for example *Hudson v Humbles* (1965) 42 TC 380 at 384 and *Brady v Group Lotus Car Companies plc* [1987] STC at 635, 60 TC 359 at 386 per Dillon LJ."

35. However, Mr Yates submitted that the comments of Henderson J were obiter and that the correct approach was taken by the Special Commissioner (Michael Tildesley) in *County Pharmacy Ltd v HMRC* [2005] STC (SCD) 729. This was a discovery case in which HMRC had not adduced the actual return before the hearing. The Special Commissioner's reasoning at [43-46] was as follows:

> [43] The absence of the 2000-01 return raised two questions:
>
> (1) Was the return essential in order to make a determination about whether the Respondents have complied with section 29(5) TMA 1970?
>
> (2) Upon whom did the legal and evidential burden rest in respect of the requirements of section 29(5) TMA 1970?
>
> [44] The satisfaction of the condition under section 29(5) that the Inspector could not have been reasonably expected to be aware of the insufficiency is dependent upon what information was provided by the taxpayer. Section 29(6) TMA 1970 circumscribes the categories of information which the Inspector has to consider for the purposes of section 29(5). The taxpayer's return is at the core of the information requirements imposed by section 29(6) TMA 1970. I, therefore, conclude that consideration of the contents of the return together with any accompanying documents was essential in order for me to make a decision about whether the Respondents have complied with the condition in section 29(5) TMA 1970. I disagree with Mr Death's proposition that I can infer the nature of the contents of the return from

> the computer print-out summary of the return and the P11D provided by County Pharmacy Ltd because the inferences would amount to speculation on my part. There was no suggestion that the 2000-01 return had been lost or destroyed when different arguments might apply.
>
> [45] Mr Death presented the issue of discovery on the footing that the legal burden rested with the Respondents to establish that they had complied with the condition in section 29(5) of TMA 1970. Section 29(8) TMA 1970, however, states that
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> > "An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above (*sections 29(4) & (5), my italics)* is fulfilled shall not be made otherwise than on appeal against the assessment".
>
> I am of the opinion after considering the wording of section 29(8) that the legal burden of proving that the Respondents had not complied with the condition in section 29(5) rests with the taxpayer on the balance of probabilities. Thus in this Appeal it would have been Mr Morris' responsibility to have adduced evidence of his tax return and accompanying documents to establish that he had made an honest and accurate return and alerted the Revenue of the potential insufficiency of the assessment. The evidential burden would then shift to the Respondents to show that the Inspector could not have been reasonably expected from the information provided by Mr Morris to be aware of the insufficiency of the tax.
>
> [46] Mr Morris has not adduced evidence of his tax return and accompanying documents for 2000/01. I am, therefore, satisfied that he has not established on the balance of probabilities that the Respondents have failed to comply with the condition in section 29(5) TMA 1970. Thus the discovery assessment for 2000/01 was validly made.

36. With respect to the Special Commissioner, whose decision is not binding on us, we prefer the approach of Henderson J in *Household Estate Agents* that it is for HMRC to establish that either s 29(4) or (5) TMA applied as without evidence of fraud or negligent conduct, or of information to fulfil the test of non-awareness, there would be no basis to conclude that either subsection applied. We also note that such an approach was tacitly approved by the Court of Appeal in *Hankinson* even though, as Mr Yates pointed out, such observations do not convert the obiter comments of Henderson J into binding precedent.

37. We now turn to the conditions in s 29(4) and (5) TMA.

The Condition in s 29(4) TMA

38. This condition is fulfilled if the insufficiency of tax was due to the negligent or fraudulent conduct of the taxpayer or a person acting on his behalf (s 29(4) TMA). As there is no allegation of fraud in this case, in order for this condition to be satisfied it is necessary for HMRC to establish that the under assessment of tax was due to negligent conduct on the part of Mr Sanderson or a person acting on his behalf.

39. It is clear from the decision of the Upper Tribunal in *Colin Moore v HMRC* [2011] STC 1784 that while a taxpayer has an obligation to submit an accurate self-assessment return the question as to whether or not he has been negligent is one of fact.

40. In the view of the Tribunal Judge (Roger Berner) in *Anderson (Deceased) v HMRC* [2009] UKFTT 258 TC at [22]:

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

41. Mr Yates advanced three examples of negligent conduct by or on behalf of Mr Sanderson, first, that the 1998-99 return was negligently prepared as by using the pre-ordained disclosure it failed to refer to the continuing investigation or that HMRC had reached a preliminary conclusion that the Scheme was a sham; secondly, the late submission of the return which prejudiced HMRC's ability to open an enquiry in co-ordinated manner with other users of Scheme; and thirdly the failure to notify HMRC following receipt of the letter, dated 7 January 2004, from Hanover Veriti Limited.

42. However, in *AB (a firm) v HMRC* [2007] STC (SCD) 99 the Special Commissioners (Stephen Oliver QC and Dr Brice) said, at [105]:

> "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 proper and 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."

43. It is clear, given the nature of the Scheme, that Mr Sanderson did take proper and appropriate advice in relation to the preparation and the disclosure on his return. Also following receipt of the Hanover Veriti Limited letter he sought the advice of his accountant who took and relied on the advice of Haines Watts to "do nothing on this matter until you hear from the Revenue".

44. In the circumstances we do not consider that he engaged in negligent conduct but in acted as a reasonable taxpayer exercising due diligence would have done.

45. With regard to the late submission of the return, even if we were to consider that this did amount to negligent conduct on the part of Mr Sanderson, given that the insufficiency of tax was attributable to the failure of the Scheme and not the lateness of the return it cannot satisfy the condition in s 29(4) TMA. Therefore, as the insufficiency of tax was not due to the negligent conduct of Mr Sanderson or a person acting on his behalf the condition in s 29(4) has not been fulfilled.

46. As such it is necessary to consider the second condition, contained s 29(5) TMA.

The Condition in s 29(5) TMA

47. For this condition to be fulfilled it is necessary at the time the enquiry window had closed, or an enquiry was completed, 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 insufficiency of tax.

48. Information is made available to an officer only if it is of a type specified in s 29(6) TMA. It is clear from *Langham v Veltema* that s 29(6) TMA constitutes an exhaustive list of the sources of information available and not merely an inclusive definition. Unlike a discovery, which depends on an individual inspector reaching a conclusion that there has been an insufficiency, as Auld LJ said in *Langham v Veltema*, at [44]:

> "… the subsection provides an objective test of awareness of insufficiency, expressed as a negative condition in the form that an officer "could not have been reasonably expected … to be aware of the" insufficiency. It also allows, as section 29(6) expressly does, for constructive awareness of insufficiency, that is, for something less than an awareness of an insufficiency, in the form of an inference of insufficiency."

49. As the Special Commissioner pointed out in *Corbally-Stourton* the statutory reference is to 'an officer' of the Board and not to any particular officer; this entails a hypothetical officer rather than any real individual; and the hypothetical officer must be endowed with knowledge of elementary arithmetic, and some knowledge of tax law, all of which he will apply to the prescribed sources of information. We note that this approach has recently been confirmed by the Court of Appeal in *HMRC v Lansdowne Partners Limited Partnership* [2011] EWCA Civ 1578.

50. Mr Gordon submits that the failure by HMRC to adduce all of the documents covered by s 29(6) TMA, namely the employment pages of Mr Sanderson's 1998-99 return and (if it ever existed) a covering letter sent with the return, and/or evidence to explain its absence means that they are unable to establish that the condition at s 29(5) TMA has been satisfied.

51. He relies on the passage in *Household Estate Agents* referred to above (in paragraph 34) in which Henderson J says the "return and accompanying documents which have been submitted to HMRC should always be available."

52. In response, Mr Yates contends that, as Mr Sanderson has called no evidence and makes no positive case that either the employment pages or a possible covering letter in fact make a disclosure different to that set out in the white space of the return which would have alerted HMRC, discharging the burden is comparatively easy as HMRC are not required to prove beyond all reasonable doubt but simply on a balance of probabilities. He refers us to:

(1) The contents of Mr Sanderson's Notice of Appeal dated 4 February 2005 that:

> My argument is that the condition in subsection 5 was not fulfilled because at 30 April 2004 an officer of the Board could have been reasonably expected, on the basis of information made available to him before that time to be aware of the situation mentioned in subsection 1. The information made available was contained within the Capital Gains Tax pages and the "Additional Information" space of my completed Income Tax Return and therefore satisfies the requirement contained within subsection 6 of Section 29 Taxes Management Act, as reproduced above.

(2) A letter from Mr Sanderson to Mr Thackeray, dated 20 July 2005, in which he wrote:

> I can advise you that as my return was not under enquiry I was able to confirm that correct disclosure (using the specific wording agreed by leading Counsel and supplied directly to me by Hanover Veriti) had been made on my return.

(3) The letter from Hanover Veriti Limited, dated 10 June 1999 which was prescriptive as to what disclosure should be given.

(4) The email of 23 February 2004 from Mr Sanderson's accountants which strongly suggests that they simply used the Hanover Veriti Limited wording:

> If no enquiry is made, the Hanover Veriti Ltd letter requests confirmation that 'correct' disclosure was made on the clients tax return. We presume this related to the standard wording supplied by Hanover Veriti. Please confirm if there was anything else specifically with regards to the trust losses that should be disclosed.

53. In the circumstances we find that it was more likely than not that the only relevant disclosure for the purposes of s 29(6) TMA was that contained in the "white space" and capital gains tax pages of Mr Sanderson's 1998-99 return and accept the submission of Mr Yates that it is inherently unlikely that either Mr Sanderson or his accountant would have wished to have departed from the words suggested by leading Tax Counsel.

54. We therefore reject Mr Gordon's submission that the absence of the employment pages from Mr Sanderson's 1998-99 return and any covering letter sent with it to HMRC is sufficient to prevent the condition in s 29(5) TMA from being fulfilled and turn to the question of whether the information provided in the return was enough to preclude HMRC from making the discovery assessment.

55. The decision of the Court of Appeal in *Lansdowne* provided some clarity on the nature of the relevant test for the purpose of s 29(5) TMA.

56. Moses LJ , at [70], put the question as follows:

> "Whether the taxpayer has provided sufficient information to an officer, with such understanding as he might reasonably be expected to

> have, to justify the exercise of the power to raise the assessment to make good the insufficiency."

57. In this case the only information made available to HMRC by Mr Sanderson, within the meaning in s 29(5) and (6) TMA, was that included in the "white space" on his 1998-99 return. This used the same words, as advised by leading Tax Counsel that had been used in, and regarded as insufficient by the Special Commissioner, in *Corbally-Stourton*.

58. In relation to the disclosure in that case the Special Commissioner said, at [66]:

> "It seems to me that an inspector equipped with a reasonable knowledge of tax law could reasonably be expected to conclude from the Appellant's disclosure that something was going on, and that Mrs Corbally-Stourton had participated in a tax scheme. It would be reasonable to expect him to wish to question the workings of the scheme and the genesis and existence of the remarkable £1 billion loss. But he would also be aware that some tax schemes work and deliver the benefits claimed. There is nothing … in the disclosure to suggest that this scheme did not work. In my judgment an inspector could not reasonably be expected to conclude from the clear hints that there was a scheme that it was unlikely that it would work."

59. Although we see no reason why these comments of the Special Commissioner should not apply in the present case Mr Gordon contends that due to passage of time that, by 30 April 2004 when the enquiry window closed, HMRC had the requisite knowledge to justify raising an assessment which they did not have on 31 January 2001 when enquiry window closed in *Corbally-Stourton*.

60. He referred to the evidence of Mr Thackeray, a specialist in regard to the Scheme, who confirmed that he only needed to see Mr Sanderson's tax return to confirm his suspicions that the Scheme losses had been claimed and said that he could have raised an assessment in 2004, based on the information in the return.

61. Mr Gordon, relying on *Charlton v HMRC* [2011] UKFTT 467 (TC), submitted that the knowledge of the relevant specialist, Mr Thackeray, should be attributed to the hypothetical officer who would, on 30 April 2004, have been justified in exercising the power in s 29(1) TMA to assess. He contends that it is irrelevant why no such action was taken but that this is sufficient to preclude the condition in s 29(5) TMA from being fulfilled.

62. In considering the approach of the hypothetical officer, the Tribunal Judge (Howard Nowlan) in *Charlton* said, at [122]:

> "We consider that the ban on raising further enquiries about the facts, implicit in the Court of Appeal's decision in *Veltema*, and indeed in sub-section 29(6), has no bearing on how we should expect the notional officer to approach his proper task of then considering the information and deciding whether or not he should raise assessments. And if it is glaringly obvious either that the relevant officer should consider the law, and possibly refer to published material or, where an

> SRN number is disclosed, simply send an e-mail or make a phone call to colleagues and ask for guidance, this is precisely how we should treat the notional officer as proceeding."

63. However, in *Lansdowne* the Chancellor, Sir Andrew Morritt, at [47-49], referred to the importance of identifying the information made available to the hypothetical officer and agreed with counsel for HMRC that oral information given by a taxpayer's representative to HMRC at a meeting fell outsider the scope of s 29(6) TMA and consequently the information made available to the hypothetical officer. In that case the information only came within s 29(6)(d)(ii) TMA because a note of the meeting was sent by HMRC to the taxpayer's representative who tacitly accepted its accuracy.

64. For this reason we accept the submission of Mr Yates that if actual oral information given by a taxpayer or his representative at a meeting is insufficient for the purposes of s 29(6) TMA, we should not treat a non-existent telephone call from a hypothetical officer to a specialist as a sufficient basis for the attribution of the knowledge of the relevant specialist in relation to the Scheme to the hypothetical officer.

65. In the circumstances we find that, at the time the enquiry window closed, the hypothetical officer could not have been reasonably expected, on the basis of the information made available to him before that that time to be aware of the insufficiency of tax. We therefore find that the condition in s 29(5) TMA was fulfilled and that HMRC were entitled to raise the discovery assessment and agree with the Special Commissioner in *Corbally-Stourton* when he said, at [55]:

> "It seems to me that, however generally unfair it might seem that an inspector, who knew he could have assessed at the relevant time but did not, can raise a later assessment because the section 29(6) information was not sufficient on its own to enable him to reach that conclusion, it is impossible to read the legislation as not having that effect."

Conclusion

66. The appeal is therefore dismissed.

Right of Appeal

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

JOHN BROOKS

TRIBUNAL JUDGE

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