[2019] UKFTT 0503 (TC)

CORPORATION TAX – Claim for chargeable gains rollover relief (following a compulsory purchase) in respect of expenditure on constructing buildings on land already held – conclusion that such expenditure did not amount to "acquiring other land" for the purpose of the relief and therefore that the claim was invalid but that the discovery assessment issued by the Respondents in this respect was based on a discovery which was "stale" and was therefore invalid – appeal upheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07306

Appeal number: TC/2018/04373

BETWEEN

ORIEL DEVELOPMENTS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 27 and 28 June 2019

Mr Keith M Gordon, instructed by Croner Taxwise Limited, for the Appellant

Mr Mark Fell, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondent

DECISION

INTRODUCTION

1. This decision relates to a discovery assessment (the "Discovery Assessment") which was issued by the Respondents on 23 May 2018 for the Appellant's accounting period ending 31 August 2010 in the amount of £351,928.42. The Respondents allege that the Discovery Assessment has been properly issued pursuant to their powers under paragraph 41 of Schedule 18 to the Finance Act 1998 (the "FA 1998") because the provisional declaration claiming rollover relief under Section 247(1) of the Taxation of Chargeable Gains Act 1992 (the "TCGA") which was made by the Appellant pursuant to Section 247A of the TCGA expired on 31 August 2014 without the Appellant's having made a valid claim for rollover relief under Section 247(1) of the TCGA.

THE FACTS

2. The parties have agreed that the following are the relevant facts for the purposes of this appeal:

Background

(1) the Appellant carries on a business of letting/developing business units and is based at Flurry Bridge, County Armagh;

The "old land"

(2) the Appellant had owned land (2.24 acres) at Lower Foughill Road, County Armagh. On 27 November 2009, the Appellant disposed of that land under a Compulsory Purchase Order instigated by the Department of Finance (Northern Ireland). That disposal therefore satisfied the requirement in Section 247(1)(a) of the TCGA;

(3) the gross proceeds from the disposal were £1,303,000. Costs relating to the disposal amounted to £1,500. Allowable costs and indexation amounted to £95,531 and £23,666 respectively. Accordingly, without further relief, the disposal would have given rise to a chargeable gain of £1,182,303;

The provisional Section 247 claim

(4) in accordance with the procedures in Section 247A of the TCGA, the Appellant's corporation tax self-assessment ("CTSA") return for the Appellant's accounting period ending 31 August 2010 contained a provisional rollover relief claim. There is no argument that this provisional claim was in any way invalid;

The reinvestment

(5) in due course, on 16 April 2012, the Appellant reinvested the entire proceeds arising from the disposal in the construction and erection of 16,000 square feet of industrial workspace in two blocks on land that the Appellant already owned at Flurrybridge Enterprise Park. Those construction costs amounted to £1,367,500;

(6) the Appellant duly claimed relief under Section 247 of the TCGA and understood itself, contrary to the Respondents' case, to have superseded the provisional claim/ declaration (as per Sections 247A(3) and 153A(3)(a)) of the TCGA;

(7) it is common ground that Sections 247(1)(a) and 247(1)(b) of the TCGA are satisfied. It is also common ground that the exclusions set out in Section 248 of the TCGA are not engaged in this case. Accordingly, the substantive issue turns solely on whether the condition in Section 247(1)(c) of the TCGA is met – being whether the

reinvestment was "applied … in acquiring other land". Other land is specifically referred to within Section 247(1)(c) of the TCGA as "new land";

The Respondents' enquiry and decision

(8) on 15 May 2014, the Respondents opened an enquiry into the Appellant's CTSA return in respect of the Appellant's accounting period ending 31 August 2010, requesting information;

(9) the Appellant's adviser responded on 11 July 2014 noting (inter alia) that the reinvestment consisted of the construction of units on land already owned by the Appellant;

(10) by 12 August 2014, an Officer of the Respondents had formed the view that this meant that the claim under Section 247 of the TCGA was invalid because the Respondents' position was that new land cannot include "the cost of buildings or additions to buildings on land that is already owned". In her letter of 12 August 2014, the Respondents' Caseworker (Ms Deborah Rodgers) wrote:

"In light of this guidance I cannot accept your claim for asset roll over relief and tax on the original disposal will be due";

(11) subsequent correspondence between the parties debated the correctness of the parties' respective positions. This culminated on 18 September 2015. On that date, Ms Rodgers issued a closure notice (in relation to the Appellant's CTSA return in respect of the Appellant's accounting period ending 31 August 2012) making a modification to that return. The closure notice also reiterated the Respondents' position regarding the claim under Section 247 of the TCGA made in relation to the Appellant's accounting period ending 31 August 2010. The letter concluded:

"In conclusion I do not agree that your client has met the conditions for Business Asset Rollover Relief under s247 TCGA 1992. As the "relevant day" as per s153A(5)(b) (31 August 2014) has passed the tax on the disposal is due. An assessment for the period to 31 August 2010 will be raised under s153A(4) TCGA 1992. This assessment will be based on the figures in the CG computation already provided in your client's 31 August 2010 return";

(12) however, the Respondents did not in fact make any assessment until 23 May 2018. Instead, on 6 October 2015, the Respondents made an amendment to the Appellant's CTSA return in respect of the Appellant's accounting period ending 31 August 2010. It was later established in *The Commissioners for Her Majesty's Revenue and Customs v Benham (Specialist Cars) Ltd* [2017] UKUT 389 (TCC) ("*Benham*") that an amendment was not appropriate in a case such as this. (The Upper Tribunal's decision of 11 October 2017 upheld the decision of the First-tier Tribunal which was published on 9 May 2016);

(13) an appeal was made and statutory review was requested by the Appellant's adviser on 29 October 2015 and acknowledged by the Respondents' reviewer on 17 December 2015. The statutory review period was subsequently extended by agreement between the parties on 15 March 2016;

(14) the Appellant's adviser agreed to extend the review period until the release of the Upper Tribunal's decision in *Benham*. The Upper Tribunal's decision was released on 11 October 2017 and the Respondents' review conclusion letter followed on 15 May 2018;

(15) the Respondents raised an assessment under paragraph 41(1) of Schedule 18 to the FA 1998 (ie the Discovery Assessment), on 23 May 2018. The effect of the Discovery Assessment was to replace the prior amendment which had been deemed to be an unsuitable approach in *Benham*; and

(16) in the Respondents' Statement of Case, it is asserted that the Discovery Assessment is based upon a discovery made by Dr Michael Coffey, an Officer of the Respondents, in May 2018.

3. In addition to the agreed facts set out above, Dr Coffey gave evidence at the hearing to the following effect:

(1) he had become the tax specialist with responsibility for the Appellant's case on 5 October 2017, when the case papers had been transferred to him by a colleague, a Mr Richard McNeil. However, he had not read the file until he received a copy of the letter described in paragraph 3(4) below;

(2) prior to his taking over the case, another colleague, a Ms Deborah Rodgers, had amended the Appellant's CTSA return in respect of the accounting period ending 31 August 2010, the amendment had been the subject of an appeal by the Appellant and the appeal had been stood over until the release of the decision in *Benham*;

(3) he had regularly liaised with his contact in the Respondents' Solicitor's Office, a Mrs Laurie Hogan, to remain abreast of developments;

(4) on 15 May 2018, he had received copies of a review conclusion letter of the same date (the "Review Letter") which Mrs Hogan had sent to the Appellant and its agent. He had then read the decision in *Benham* to inform his understanding of why the conclusion stated in the Review Letter – which was that an assessment would be issued in respect of the relevant accounting period – was necessary. He realised then that the assessment in question was needed because the manner in which the Respondents had previously sought to address the fact that the declaration made under Section 247A of the TCGA had expired without the Appellant's having made a valid claim for rollover relief under Section 247 of the TCGA – by making an amendment to the Appellant's CTSA return in respect of the relevant accounting period – was invalid as a result of the decision in *Benham*;

(5) he had researched the relevant legislation in the TCGA and concluded that the claim for rollover relief which had been made by the Appellant did not satisfy the condition in Section 247(1)(c) of the TCGA and that no valid claim for rollover relief had been made by the Appellant prior to the date on which the declaration under Section 247A of the TCGA expired (ie 31 August 2014);

(6) he had inspected the case file, including all past internal and external correspondence and advice from the Capital Gains Specialists within the Respondents, in order to gain an understanding of the background to the case, and he had inspected the Appellant's tax computation for the relevant accounting period and CTSA return for the accounting period ending 31 August 2012 (in which the rollover relief claim had been made), in order to satisfy himself that the Appellant had taken the rollover relief which it had purportedly claimed into account in that tax computation;

(7) he had concluded from the above that no valid claim for rollover relief had been made by the Appellant prior to 31 August 2014, when the declaration under Section 247A of the TCGA expired and he had therefore determined that there had been a loss of tax and that Section 153A(4) of the TCGA, as amended by Section 247A of the TCGA, required him to raise an assessment in order to reverse the effect of the declaration;

(8) he accepted that this conclusion was essentially the same as the conclusion which had been reached by Ms Rodgers when she had amended the Appellant's CTSA return in respect of the relevant accounting period in 2014; and

(9) he had then asked his manager for, and received from his manager, authority to raise the assessment under paragraph 41(1) of Schedule 18 to the FA 1998 and had issued the Discovery Assessment on 23 May 2018.

THE RELEVANT LAW

4. The provisions relating to rollover relief in the case of a compulsory purchase are set out in the TCGA.

5. Section 247 of the TCGA provides as follows:

"247 Roll-over relief on compulsory acquisition

(1) This section applies where—

(a) land ("the old land") is disposed of by any person ("the landowner") to an authority exercising or having compulsory powers; and

(b) the landowner did not take any steps, by advertising or otherwise, to dispose of the old land or to make his willingness to dispose of it known to the authority or others; and

(c) the consideration for the disposal is applied by the landowner in acquiring other land ("the new land") not being land excluded from this paragraph by section 248.

(2) Subject to section 248, in a case where the whole of the consideration for the disposal was applied as mentioned in subsection (1)(c) above, the landowner, on making a claim as respects the consideration so applied, shall be treated for the purposes of this Act—

(a) as if the consideration for the disposal of the old land were (if otherwise of a greater amount or value) of such amount as would secure that on the disposal neither a gain nor a loss accrues to him; and

(b) as if the amount or value of the consideration for the acquisition of the new land were reduced by the excess of the amount or value of the actual consideration for the disposal of the old land over the amount of the consideration which he is treated as receiving under paragraph (a) above.

(3) If part only of the consideration for the disposal of the old land was applied as mentioned in subsection (1)(c) above, then, subject to section 248, if the part of the consideration which was not so applied ("the unexpended consideration") is less than the amount of the gain (whether all chargeable gain or not) accruing on the disposal of the old land, the landowner, on making a claim as respects the consideration which was so applied, shall be treated for the purposes of this Act—

(a) as if the amount of the gain so accruing were reduced to the amount of the unexpended consideration (and, if not all chargeable gain, with a proportionate reduction in the amount of the chargeable gain); and

(b) as if the amount or value of the consideration for the acquisition of the new land were reduced by the amount by which the gain is reduced (or, as the case may be, the amount by which the chargeable gain is proportionately reduced) under paragraph (a) above.

(4) Nothing in subsection (2) or subsection (3) above affects the treatment for the purposes of this Act of the authority by whom the old land was acquired or of the other party to the transaction involving the acquisition of the new land.

(5) For the purposes of this section—

(a) subsection (2) of section 152 shall apply in relation to subsection (2)(a) and subsection (2)(b) above as it applies in relation to subsection (1)(a) and subsection (1)(b) of that section; and

(b) subsection (3) of that section shall apply as if any reference to the new assets were a reference to the new land, any reference to the old assets were a reference to the old land and any reference to that section were a reference to this.

(6) Where this section applies, any such amount as is referred to in subsection (2) of section 245 shall be treated as forming part of the consideration for the disposal of the old land and, accordingly, so much of that subsection as provides for a deemed disposal of other land shall not apply.

(7) The provisions of this Act fixing the amount of the consideration deemed to be given for the acquisition or disposal of assets shall be applied before this section is applied.

(8) In this section—

"land" includes any interest in or right over land; and

"authority exercising or having compulsory powers" shall be construed in accordance with section 243(5)."

6. Section 248 of the TCGA stipulates that land is precluded from falling within Section 247(1)(c) of the TCGA if, inter alia, "it is a dwelling-house or part of a dwelling-house (or an interest in or right over a dwelling-house), and…by virtue of, or of any claim under, any provision of sections 222 to 226 the whole or any part of a gain accruing on a disposal of it by the landowner at a material time would not be a chargeable gain" and, for that purpose, "a material time" is stated to mean any time during the period of 6 years beginning on the date of the acquisition referred to in Section 247(1)(c) of the TCGA.

7. It is common ground that Sections 247(1)(a) and 247(1)(b) of the TCGA are satisfied. It is also common ground that the exclusions set out in Section 248 of the TCGA are not engaged in this case. Accordingly, the substantive issue in relation to the rollover relief claim turns solely on whether the condition in Section 247(1)(c) of the TCGA is met – being whether the consideration for the disposal was "applied … in acquiring other land". Other land is specifically referred to within Section 247(1)(c) of the TCGA as "new land".

8. Pursuant to Section 247A of the TCGA, a company which disposes of land by way of a compulsory purchase is entitled to declare in its CTSA return in respect of the relevant accounting period that:

(1) the whole or any specified part of the consideration for the disposal will be applied in the acquisition of other land ("the new land");

(2) the acquisition will take place as mentioned in Section 152(3) of the TCGA; and

(3) the new land will not be land excluded from Section 247(1)(c) of the TCGA by Section 248,

whereupon, until the declaration ceases to have effect, Section 247 of the TCGA will apply as if the acquisition had taken place and the company had made a claim under that section and Sections 153A(3) to (5) of the TCGA apply as if references in those provisions to Sections 152 or 153 of the TCGA were references to Section 247 of the TCGA.

9. Sections 153A(3) to (5) of the TCGA, as so amended, provide as follows:

"(3) The declaration shall cease to have effect as follows–

(a) if and to the extent that it is withdrawn before the relevant day, or is superseded before that day by a valid claim made under [Section 247], on the day on which it is so withdrawn or superseded; and

(b) if and to the extent that it is not so withdrawn or superseded, on the relevant day.

(4) On the declaration ceasing to have effect in whole or in part, all necessary adjustments–

(a) shall be made by making or amending assessments or by repayment or discharge of tax; and

(b) shall be so made notwithstanding any limitation on the time within which assessments or amendments may be made.

(5) In this section "the relevant day" means–

…in relation to corporation tax, the fourth anniversary of the last day of the accounting period in which that disposal took place."

10. The Upper Tribunal held in *Benham* that Section 153A(4) of the TCGA does not itself give rise to a freestanding right for the Respondents to make or amend assessments when a declaration made under Section 153A of the TCGA (or, by parity of reasoning, Section 247A of the TCGA) expires without the taxpayer's having made a valid claim for rollover relief. Instead, it is necessary for the Respondents to rely on their powers under Schedule 18 to the FA 1998.

11. In that regard, paragraph 41 of Schedule 18 to the FA 1998 provides as follows:

"(1) If an officer of Revenue and Customs discovers as regards an accounting period of a company that—

(a) an amount which ought to have been assessed to tax has not been assessed, or

(b) an assessment to tax is or has become insufficient, or

(c) relief has been given which is or has become excessive,

he may make an assessment (a "discovery assessment") in the amount or further amount which ought in his opinion to be charged in order to make good to the Crown the loss of tax.

(2) If an officer of Revenue and Customs discovers that a company tax return delivered by a company for an accounting period incorrectly states—

(a) an amount that affects, or may affect, the tax payable by that company for another accounting period, or

(b) an amount that affects, or may affect, the tax liability of another company,

he may make a determination (a "discovery determination") of the amount which in his opinion ought to have been stated in the return."

12. Finally in relation to the relevant law, as one of the issues which falls to be determined in this decision is a procedural one, mention should be made of the Tribunals, Courts and Enforcement Act 2007 and The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273)(the "Tribunal Rules") which have been made pursuant to that Act and which govern the conduct of proceedings before the First-tier Tribunal.

13. Rule 25(2) of the Tribunal Rules provides that "[a] statement of case must—

(a) in an appeal, state the legislative provision under which the decision under appeal was made; and

(b) set out the respondent's position in relation to the case."

14. However, this requirement is subject to Rule 7(2) of the Tribunal Rules, which provides that, "[if] a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include…waiving the requirement" and to Rule 2 of the Tribunal Rules, which requires the First-tier Tribunal to give effect to the overriding objective – of dealing with cases fairly and justly – whenever it exercises any power under the Tribunal Rules or interprets any rule.

THE ISSUES

15. There are three issues which need to be determined in the course of this decision. These are as follows:

(1) The "Discovery Assessment Issue" – have the Respondents acted within their powers under Section 153A(4) of the TCGA and paragraph 41(1) of Schedule 18 to the FA 1998 in issuing the Discovery Assessment?

(2) The "Rollover Claim Issue" – did the Appellant's claim for rollover relief in respect of its expenditure on the construction and erection of the buildings described in paragraph 2(5) above satisfy the condition in Section 247(1)(c) of the TCGA? That is to say, did the Appellant apply the disposal consideration described in paragraphs 2(2) and 2(3) above "in acquiring other land"?

(3) The "Procedural Issue" – in litigating the Rollover Claim Issue, are the Respondents entitled to adduce the argument that the expenditure in question was not applied in making an "acquisition" (because the buildings on which the expenditure was incurred came to be owned other than by way of an acquisition)?

16. It is common ground that the burden of proof in relation to the Discovery Assessment Issue and the Procedural Issue is on the Respondents, whilst the burden of proof in relation to the Rollover Claim Issue is on the Appellant.

THE DISCOVERY ASSESSMENT ISSUE

Introduction

17. The Discovery Assessment Issue is logically the first issue which should be addressed in this decision because, if it is determined that the Discovery Assessment did not satisfy the conditions set out in paragraph 41(1) of Schedule 18 to the FA 1998 which need to be satisfied in order for the issue of the Discovery Assessment to be valid, then the appeal must succeed regardless of the position in relation to the other two issues.

18. The statutory provisions which are relevant to the Discovery Assessment Issue are Sections 153A(3) to (5) of the TCGA, as amended by Section 247A of the TCGA, and paragraph 41(1) of Schedule 18 to the FA 1998. The relevant provisions are set out in paragraphs 9 to 11 above.

19. It may be seen from the provisions that:

(1) where a declaration under Section 247A of the TCGA ceases to have effect, Section 153A(4) of the TCGA imposes a duty on the Respondents to make or amend an assessment "notwithstanding any limitation on the time within which assessments or amendments may be made"; and

(2) if an Officer of the Respondents discovers as regards an accounting period of a company that:

(a) an amount which ought to have been assessed to tax has not been assessed; or

(b) an assessment to tax is or has become insufficient; or

(c) relief has been given which is or has become excessive,

then that Officer may make a discovery assessment in the amount or further amount which ought in his opinion to be charged in order to make good to the Crown the loss of tax.

20. The question which needs to be resolved in determining the Discovery Assessment Issue is whether the Respondents have acted within their powers under Section 153A(4) of the TCGA and paragraph 41(1) of Schedule 18 to the FA 1998 in issuing the Discovery Assessment.

The arguments in relation to the Discovery Assessment Issue

21. Before I set out the respective arguments of the parties in relation to the Discovery Assessment Issue, I propose to set out certain aspects of the law in relation to discovery that are relevant to this appeal.

Crossing the threshold

22. It is common ground that the concept of discovery is not confined to the discovery of a new fact but is also apt to include the discovery of an error of law (see *Cenlon v Ellwood* [1962] AC 782 at page 794). In addition, it is common ground that, in order for there to be a discovery, it is merely necessary that a threshold is crossed from a position of not knowing to a position of having reason to believe (see *Charlton and Others v The Commissioners for Her Majesty's Revenue and Customs* [2013] STC 866 ("*Charlton*") at paragraphs [18](1) and [28]). That crossing of the threshold does not need to stem from any new information of fact or law. It is merely necessary for it to become clear to an Officer, acting reasonably and honestly, that one of the three circumstances mentioned in paragraphs 19(2)(a) to (c) above has arisen for any reason, including a change of view or a change of opinion (see *Charlton* at paragraphs [18](2) and [37]).

23. The Upper Tribunal went on to say the following at paragraph [37] in *Charlton*:

"The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment."

Staleness

24. The above language touches on an issue which is fundamental to this appeal – namely, the fact that a discovery may in some cases be deprived of its validity by virtue of becoming "stale". The parties are at odds on whether the discovery upon which the Discovery Assessment is based is deprived of its validity on those grounds.

25. I will outline in due course the various matters on which the parties' disagreement in this area is based but first I should provide a little more detail on the case law which relates to the issue of staleness.

26. *Charlton* is just one of a number of appellate decisions which have considered the question of whether the word "discovers" imports a concept of staleness into the discovery provisions. Other important decisions in this area are the Court of Appeal decision in *The Commissioners for Her Majesty's Revenue and Customs v Tooth* [2019] EWCA Civ 826 ("*Tooth*") and the Upper Tribunal decisions in *Pattullo v The Commissioners for Her Majesty's Revenue and Customs* [2016] STC 2043 ("*Pattullo*") and *Beagles v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 380 (TCC) ("*Beagles*"). (Each of those cases related to an assessment issued under Section 29 of the Taxes Management Act 1970 (the "TMA") and not paragraph 41(1) of Schedule 18 to the FA 1998 but it is common ground that nothing turns on that distinction in the present case as the word "discovers" is used in both provisions.)

27. Whilst the statements made in relation to staleness in *Charlton* were obiter, the same was not the case in *Pattullo*, *Tooth* and *Beagles*, where the concept of staleness was part of the ratio for the relevant decision. An appeal against the Upper Tribunal decision in *Beagles* is shortly to be heard by the Court of Appeal and an application for leave to appeal to the Supreme Court against the Court of Appeal's decision in *Tooth* is currently being sought.

28. In *Pattullo*, at paragraph [52], the Upper Tribunal observed that:

"…the requirement for the discovery to be acted upon while it remains fresh appears to me to arise on the natural meaning of s 29(1) itself. That sub-section provides that "if" HMRC discover certain matters then they may, subject to what follows later in the section, make an assessment in the amount needed to make good the loss of tax. The word "if", like many words in the English language, has a variety of shades of meaning. It may be purely conditional. But it may equally have a temporal aspect, as in the expression "if and when" (e.g. if the sun comes out we shall go to the beach). I do not regard this as stretching the meaning of "if". The context makes it clear that an assessment may be made if and when it is discovered that the assessment to tax is insufficient. It would, to my mind, be absurd to contemplate that, having made a discovery of the sort specified in s 29(1), HMRC could in effect just sit on it and do nothing for a number of years before making an assessment just before the end of the limitation period specified in s 34(1)".

29. The Court of Appeal decision in *Tooth* is of particular significance in this context, because of the striking similarity between the facts in *Tooth* and the facts in this case. In *Tooth*, the taxpayer made a claim to carry back losses deriving from a tax avoidance scheme against income in an earlier tax year of assessment. The Respondents initially challenged the claim under Schedule 1A of the TMA but, following a decision by the Supreme Court in another case (*The Commissioners for Her Majesty's Revenue and Customs v Cotter* [2013] UKSC 69 ("*Cotter*")), they realised that they should have challenged the claim either by amending the taxpayer's return under Section 9ZB of the TMA or by opening an enquiry into the taxpayer's return under Section 9A of the TMA. It was by then too late to do either of those things and therefore the Respondents issued a discovery assessment under Section 29 of the TMA. The discovery assessment was issued some four and a half years after the Respondents had purported to challenge the claim under Schedule 1A of the TMA.

30. In his decision in *Tooth*, Floyd LJ, with whom the other two Lord Justices of Appeal agreed as regards the discovery question, held that the discovery which had triggered the issue of the discovery assessment was not the discovery that the original assessment was insufficient – because the evidence suggested that the Respondents had been of that belief well before the decision in *Cotter* was made - but rather the discovery that Schedule 1A was not the appropriate mechanism to use to challenge that insufficiency. As Floyd LJ put it at paragraph [61] in *Tooth*:

"In the present case the officer must have newly discovered that an assessment to tax is insufficient. It is his or her new conclusion that the assessment is insufficient which can trigger a discovery assessment. A discovery assessment is not validly triggered because the officer has found a new reason for contending that an assessment is insufficient, or because he or she has decided to invoke a different mechanism for addressing an insufficiency in an assessment which he or she has previously concluded is present."

31. Floyd LJ then went on to note that the Respondents had failed to show that the discovery which they had made as a result of the decision in *Cotter* was that the assessment was insufficient. On the contrary, the facts and pleadings (and the findings of the First-tier Tribunal) in that case all indicated that, even before that decision, the Respondents were of the view that the taxpayer's self-assessment was insufficient and that their sole discovery as a result of that decision was that they had chosen the wrong mechanism to address that insufficiency in using Schedule 1A of the TMA – see paragraphs [63], [64], [66], [67], [72] and [73] in *Tooth.*

32. In this context, it is helpful to compare the decision in *Tooth* to the Upper Tribunal decision in *Atherton v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKUT 0041 (TCC) ("*Atherton*"), which was published shortly before the hearing in the Court of Appeal in *Tooth*. The facts of *Atherton* were broadly similar to those in *Tooth* in that it was another case where the Respondents had chosen to use Schedule 1A of the TMA to challenge a claim to carry back a loss and then made a discovery assessment when it became apparent from the decision in *Cotter* that they should instead have used their powers under Sections 9ZB or 9A of the TMA. However, unlike the facts in *Tooth*, a critical feature of the findings of fact

in *Atherton* was that, prior to the decision in *Cotter*, the Respondents, whilst being aware that the loss claim was invalid, had been of the view that the taxpayer's self-assessment was not insufficient. This was because they considered that the loss claim in question had been made outside the taxpayer's self-assessment return. Thus, the decision in *Cotter* did trigger a new discovery in that it was only then that the Respondents realised that the taxpayer's self-assessment was insufficient (see paragraphs [25] and [26] and paragraphs [29] to [33] in *Atherton*).

33. As a result, the Upper Tribunal in *Atherton* held that the realisation which resulted from the decision in *Cotter* did amount to a relevant discovery for the purposes of Section 29 of the TMA because:

(1) what the Respondents had then discovered was that the claim in question had been included in the taxpayer's self-assessment return (as opposed to being a stand-alone claim which was amenable to challenge under Schedule 1A of the TMA); and

(2) therefore this discovery meant that it was only then that they realised that there was an insufficiency in the taxpayer's self-assessment. Prior to that realisation, the Respondents had considered that the claim had been made outside the taxpayer's self-assessment return and therefore that there was no insufficiency in the taxpayer's self-assessment.

34. It can be seen that, despite the fact that *Atherton* and *Tooth* were addressing similar circumstances, the key difference between the two was that, whereas in *Tooth*, the facts and pleadings (and the findings by the First-tier Tribunal) in that case demonstrated that the Respondents were of the view that the taxpayer's self-assessment was insufficient even before the decision in *Cotter*, and that the realisation which the Respondents had made as a result of the decision was simply that they had used the wrong mechanism to address that insufficiency, in *Atherton*, the facts and pleadings (and the findings by the First-tier Tribunal) in that case demonstrated that the realisation which the Respondents had made as a result of the decision in *Cotter* was that the taxpayer's self-assessment was insufficient.

35. The distinction between *Tooth* and *Atherton* demonstrates that, in discovery cases, great significance needs to be accorded to the precise nature of the realisation which has led to the discovery assessment in question.

Corporate knowledge

36. An important question in relation to the issue of staleness is the relevance of that which might most appropriately be termed the "corporate knowledge" of the Respondents. In other words, to what extent might a discovery which is made by one Officer of the Respondents be precluded from being regarded as fresh by the fact that it is the same discovery as has previously been made by another Officer of the Respondents?

37. In that respect, the Upper Tribunal in *Charlton* said the following:

"Corporate knowledge

[40] The fourth of Mr Gordon's propositions is that, not only must there be something new, but that it must be something new to HMRC as a whole (so far as is relevant to the taxpayer). It is not sufficient for the matter to be new to the officer making the assessment.

[41] In support of this proposition, Mr Gordon postulates the alternative, which he argues cannot be correct. He says that in such a case the requirement for there to be a discovery could be simply circumvented by an officer, for whom the facts and legal position are stale, passing a file to a colleague with a comment along the lines of 'this taxpayer has underpaid tax'. The colleague could then be said to have discovered the under-assessment.

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

[43] We find no support in Cenlon Finance in the Court of Appeal for what Mr Gordon submitted was its finding in favour of the taxpayer on the question whether an officer looking afresh at a position previously taken by a colleague can give rise to a discovery. The Court of Appeal in Cenlon Finance was considering the effect of an agreement under what is now s 54. That court did not consider any wider question as to the meaning of discovery; it was bound by its own decision in Commercial Structures. Cenlon Finance cannot be relied upon to support the arguments of Mr Gordon in this respect."

32. The same question was addressed by the Upper Tribunal in *Tooth v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 38 (TCC) ("*Tooth UT*") at paragraphs [79](6) and (7), where the following points were made:

"(6) What, however, if two different officers independently make the same discovery? In our judgment, as a matter of ordinary English, a discovery can only be made once. We accept that section 29(1) TMA is framed by reference to the subjective state of mind of an officer or the board, but what is a "discovery" is an objective term. It seems to us that in this case, the first officer makes the discovery; the second officer simply finds out something that is new to him. In particular if one officer is made aware of, and accepts, the conclusion of another officer it cannot be said that the first officer made a discovery.

(7) We consider that such a construction is necessary for the protection of both the taxpayer and officers of HMRC:

(a) The taxpayer, as we have found, should be protected from stale assessments. It follows that, if the first officer – for whatever reason – having made the discovery and (following the two-stage process we have described in paragraph 79(2) above) having determined not to issue an assessment, that outcome ought to be binding on HMRC. No doubt such an officer would record his discovery, and the reason for not issuing an assessment, in the files.

(b) As to HMRC's position, in their own interests, officers need to have clarity as to what constitutes a "discovery" for the purposes of section 29(1) TMA. For example, any second officer making a "discovery" in succession to another officer might, should an assessment be issued, be faced with a contention that his "discovery" was in some way an illicit attempt to re-open a stale point. Inevitably, there would have to be questions regarding what the second officer knew of the first officer's work, and whether the second officer's "discovery" was related to that of the first officer and so not his own at all. As can be seen from paragraph 88(7) below, we consider that this is a case where HMRC's officers would have benefited from a clear understanding of the requirements of section 29 TMA."

38. The Upper Tribunal went on to say, at paragraph [85] in *Tooth UT*, that:

"If the FTT found that Mr Williams simply 'discovered' what another officer of HMRC already knew in August 2009, then (for the reasons we have given) we consider that this was no discovery by Mr Williams at all."

39. I must confess that I do not find the passages set out above to be very easy to follow. In particular, if one were to be untrammelled by any prior authority or desire to make the legislation work in a practical manner, one might well conclude that, given that the discovery provisions require one to examine the subjective state of knowledge of an individual Officer of the Respondents, when that Officer passes over a threshold "from the position of not knowing to the position of having reason to believe" (as it is described at paragraph [18](1) in *Charlton*),

that would always be a new conclusion (and discovery) as regards that Officer, regardless of whether the same conclusion (and discovery) had been reached at an earlier stage by another Officer of the Respondents. However, it is clear that the Upper Tribunal in the above cases have not adopted that approach. In those examples, the status of the discovery by the later Officer as a fresh discovery has been called into question by reference to the conclusion reached by the other Officer at the earlier stage. Thus, the Upper Tribunal has made it clear that "corporate knowledge" is potentially a relevant concept in the context of staleness, particularly where, in the words of the Upper Tribunal in *Tooth UT,* "one officer is made aware of, and accepts, the conclusion of another officer".

40. Although the extract set out above from *Tooth UT* was obiter - as noted in *Beagles* at paragraph [57], the Upper Tribunal decided the case on the quite separate basis that there was no inaccuracy in the taxpayer's return - the Upper Tribunal's conclusion on this subject is supported by the decision of Floyd LJ in the Court of Appeal in *Tooth.* Floyd LJ did not address this issue directly. Instead, he focused on the fact that the discovery made by the Respondents at the later date was that the Respondents had chosen to use the wrong mechanism to counter the insufficiency in the taxpayer's self-assessment and not that there was an insufficiency in that self-assessment. However, it is implicit in the manner in which his judgment is expressed that he was treating the Respondents as a single entity and ascribing to the Officer who made the discovery assessment in that case the state of knowledge held by his colleagues at the earlier date.

41. With that introduction, I now turn to the respective arguments of the parties in relation to the Discovery Assessment Issue, pausing only to note that, although the precise question which is raised by the Discovery Assessment Issue has not previously been determined by a court or tribunal, there has been previous judicial commentary in relation to matters which have direct relevance to the issue.

Primary argument – discovery by Dr Coffey

42. Mr Fell's primary argument was that, when Dr Coffey examined the Appellant's file in May 2018, he discovered that a relief had been given to the Appellant in respect of the Appellant's accounting period ending 31 August 2010 and that that relief had become excessive. That discovery preceded the Discovery Assessment by only a short time and therefore it had not become stale by the time that the Discovery Assessment was issued.

43. In response, Mr Gordon said that the discovery which Dr Coffey had then made was identical to the discovery which had been made by Ms Rodgers in 2014 (or at the very latest in 2015). He pointed out that:

(1) in a letter to the Appellant of 12 August 2014, Ms Rodgers had explained why the construction of new buildings on existing land did not qualify for rollover relief and had gone on to say that "I cannot accept your claim for asset roll over relief and tax on the original disposal of land will be due";

(2) on 18 September 2015, Ms Rodgers had issued a closure notice to the Appellant in relation to the Appellant's CTSA return in respect of its accounting period ending 31 August 2012 and that closure notice alluded to the fact that Ms Rodgers did not agree that the Appellant had met the conditions to claim rollover relief in respect of its accounting period ending 31 August 2010 with the result that "[an] assessment for the period to 31 August 2010 will be raised under s153A(4) TCGA92";

(3) on 6 October 2015, the Respondents had purported to amend the Appellant's CTSA return by increasing the chargeable gains to reflect the removal of the relief claimed and

would not have done that if they did not believe at that time that the relief was excessive; and

(4) in his evidence at the hearing, Dr Coffey had admitted that there was no difference between the nature of his discovery in May 2018 and Ms Rodgers's earlier discovery.

In Mr Gordon's view, the above was emphatic evidence that the Respondents had made the discovery which Dr Coffey had purported to make in 2018 well before the time of Dr Coffey's involvement.

Secondary argument – discovery by Ms Rodgers

44. Mr Fell submitted that, even if I were to agree with Mr Gordon that the discovery made by Dr Coffey was the same as the discovery which had been made by Ms Rodgers and therefore that the relevant discovery in this case was the discovery by Ms Rodgers, which he did not accept, there were three reasons why that should not invalidate the Discovery Assessment in this case.

45. The first of those was that, notwithstanding the decisions in *Pattullo*, *Beagles* and *Tooth*, each of which is binding on me, the Respondents reserved the right to argue, should this appeal proceed further, that it is not possible for a discovery assessment to be held to be invalid on staleness grounds.

46. The second of those was that none of the cases referred to above involved a discovery assessment made following the application of Section 153A(4) of the TCGA, which, as amended by Section 247A of the TCGA, specified that, where a declaration under Section 247A of the TCGA ceased to have effect, the Respondents had a duty to make or amend an assessment "notwithstanding any limitation on the time within which assessments or amendments may be made". Mr Fell made two points in this regard.

47. First, he pointed out that the section imposed an absolute obligation on the Respondents to make an assessment in such circumstances. In this regard, Mr Fell drew my attention to paragraph [58] of the Upper Tribunal's decision in *Benham*, in which the Upper Tribunal made the following observation in relation to the possibility that the Respondents in that case should have made a discovery assessment in similar circumstances to these:

> "Although it is Benham's position that HMRC could, and should, have made a discovery assessment early in this saga, Mr Gordon reserves its position should HMRC seek hereafter to make a discovery assessment. He suggests that it may be such that an assessment could be challenged on one or both of two grounds: first, that a discovery can become stale and cannot be acted on so as to support a discovery assessment and that, on the facts of the present case, the discovery will be stale when an assessment is made; secondly, that it would be an abuse of process for HMRC to make a discovery assessment in all the circumstances of the case. We express no view on the merits of either of those potential challenges should HMRC raise a discovery assessment, although we note that the first challenge, if correct, would qualify the apparent absolute requirement in section [153A] that the necessary adjustments shall be made".

48. In response, Mr Gordon submitted that there was nothing significant about the fact that the provision imposed an obligation on the Respondents to make an assessment or an amendment. That fact alone did not suffice to mean that there could be no circumstances in which the Respondents would lack the power to make an assessment or amendment. Just as the tax legislation imposed obligations on a taxpayer which the taxpayer did not, or was unable to, meet, so too could the tax legislation impose obligations on the Respondents which the Respondents did not, or were unable to, meet. In relation to both a taxpayer and the Respondents, the fact that the tax legislation imposed an obligation simply meant that there would be consequences for a failure to fulfil the relevant obligation. It did not mean that the

relevant obligation had necessarily to be fulfilled. In the same way that a taxpayer might be obliged in certain circumstances to file a tax return and, if it failed to fulfil that obligation, would suffer a consequence in the form of penalties, so too might the Respondents be obliged to issue an assessment or make an amendment but, if it lacked the power to do so, suffer a consequence in the form of being unable to collect tax which it would otherwise have been able to collect.

49. Secondly, Mr Fell pointed out that the concept of staleness amounted to a temporal restriction and therefore that the exclusion of time limitations required by Section 153A(4)(b) of the TCGA meant that staleness had no place in relation to assessments which were made pursuant to Section 153A(4) of the TCGA. In effect, he said, the relevant language in Section 153A(4)(b) of the TCGA should be regarded as requiring the word "discovers" in paragraph 41(1) of Schedule 18 to the FA 1998 to be read as if it did not include the concept of staleness.

50. In support of this proposition, Mr Fell noted that, in the passage from paragraph [52] in *Pattullo*, set out in paragraph 28 above, the Upper Tribunal had referred to the word "if" in the phrase "if an officer of the Board or the Board discover" as having, in that context, "a temporal aspect" and that the same point was repeated in paragraph [47] of the same decision, where the concept of staleness was described as bringing "a temporal element to s 29(1)". Mr Fell added that, similarly, in paragraph 6 of Mr Gordon's skeleton argument for the hearing, Mr Gordon had himself referred to the concept of staleness as a "temporal restriction". It followed that, when Section 153A(4)(b) of the TCGA expressly required "any limitation on the time within which assessments or amendments may be made" to be disregarded, that requirement meant that the concept of staleness should also be disregarded because staleness was a temporal restriction.

51. As further support for this proposition, Mr Fell submitted that there was nothing in the language used in Section 153A(4) of the TCGA itself to indicate that the remedies to which it referred had to be deployed immediately. It was therefore consistent with the proposition that all temporal restrictions on the issue of assessments should be disregarded, even those which were not expressed as such in the legislation.

52. In response, Mr Gordon submitted that the phrase "any limitation on the time within which assessments or amendments may be made" in Section 153A(4) of the TCGA was referring to the express time limits which existed in the legislation – such as, in this case, the time limit in paragraph 46 of Schedule 18 to the FA 1998. He said that the staleness concept was not a "limitation on the time within which assessments or amendments may be made", as such. Instead, it was merely part of the meaning of the word "discovers", as interpreted by the courts. In other words, the need for a discovery to remain fresh was simply one of the pre-conditions which needed to be passed before a discovery assessment could be made. In effect, it was conceptually no different from the requirement (in Sections 29(4) and 29(5) of the TMA or paragraphs 43 and 44 of Schedule 18 to the FA 1998) that, before a discovery assessment could be made, there needed to be a careless or deliberate error by the relevant taxpayer or the "could not have reasonably been expected…to be aware" test needed to have been passed.

53. In support of his position, Mr Gordon referred me to paragraphs [49] to [55] in *Pattullo*, in which the Upper Tribunal, after setting out the parties' respective arguments in relation to the relationship between, on the one hand, the concept of staleness and, on the other hand, the statutory time limit for making assessments, held that the First-tier Tribunal in that case had erred by "eliding the concept of staleness with that of time bar".

54. Mr Fell's third reason for saying that, even if the relevant discovery in this case was the discovery by Ms Rodgers, he was of the view that the delay between Ms Rodgers's discovery

in 2014 or 2015 and the issue of the assessment in 2018 was not too long, given the circumstances of the delay, and therefore Ms Rodgers's discovery had retained its freshness.

55. Mr Fell submitted that a period of time which passed while the outcome of relevant litigation was awaited should not be treated as making a discovery stale – see *Charlton* at paragraph [37] – and that, in this case, the Respondents had been awaiting the outcome of relevant litigation in the form of the litigation in *Benham*. The Discovery Assessment had been issued very shortly after the litigation in *Benham* had concluded.

56. Mr Gordon submitted that:

(1) in this case, the delay between Ms Rodgers's discovery and the assessment had been three or four years - depending on precisely when Ms Rodgers had formed the view that the Appellant's expenditure on the construction of the new buildings on its existing land did not qualify for rollover relief - and there was no reported case in which the Respondents had been allowed to sit on a discovery for longer than nine months;

(2) in *Pattullo*, a period of between two and seven months following the outcome of relevant litigation had been found to be acceptable but the Upper Tribunal said that a period of eighteen months would have been too long (see paragraph [57]);

(3) in *Gordon and Others v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 307 (TC) ("*Gordon*"), a delay of three years, or even two years, had been found to be too long (see paragraph [126]); and

(4) in *Beagles*, a delay of two and a half years had been found to be too long (see paragraph [86]).

57. However, Mr Fell pointed out that the cases described in paragraph 56 above by Mr Gordon did not contradict the assertion set out in paragraph 55 above for the following reasons:

(1) in *Pattullo*, the eighteen month period which was considered to be too long arose after the relevant litigation had been determined. It was not attributable to the ongoing conduct of the relevant litigation;

(2) in *Gordon*, the First-tier Tribunal in question made the point that the delay in that case was distinguishable from the delay in *Charlton* in that it was not attributable to a decision in another case which was material to whether the liability existed. (There had been other relevant litigation in that case but Mr Fell alleged that that litigation related to the Respondents' collection and management powers and not to whether or not a liability existed.) The First-tier Tribunal in that case had said that:

> "There was nothing to prevent HMRC issuing assessments under s 29 TMA at an earlier stage, or opening enquiries into the returns within the relevant time limits, but then not pursuing those assessments or enquiries if and when they chose to exercise their collection and management powers not to do so. But that is not what they decided to do."

However, said Mr Fell, that was not the position in this case because the relevant litigation in this case – the litigation in *Benham* – did go to the question of liability – that is to say, whether an amended CTSA return gave rise to a valid liability - and not merely collection and management. The facts in this case were therefore on all fours with the facts in *Charlton*; and

(3) in *Beagles*, the Upper Tribunal held that, on the basis of the facts found by the First-tier Tribunal in that case, the relevant discovery had been made prior to the relevant litigation (see paragraphs [71] to [74]). Thus, the relevant litigation was not ongoing at the time of the discovery and the Officer in question was not waiting for the decision in the relevant litigation throughout the whole period between the discovery and the issue

of the assessment. In addition, in that case, the Respondents had not taken steps to keep the discovery fresh over the period between discovery and assessment. The Upper Tribunal had accordingly distinguished *Charlton* (see paragraphs [79] to [86]).

58. Mr Fell said that, in contrast to the facts in *Beagles*, the delay in this case was entirely attributable to the ongoing litigation in *Benham* - the Discovery Assessment had been issued within a reasonable period of time after the litigation in *Benham* had been concluded – and, during the period in which the litigation in *Benham* had been continuing, the Respondents had taken all the steps which were open to them to maintain the freshness of Ms Rodgers's discovery by engaging actively with the Appellant in relation to the fact that the remedy adopted by the Respondents might not be appropriate. For instance:

(1) at paragraph 10 of the Appellant's letter to Mrs Hogan of 12 January 2016 in relation to the statutory review, the Appellant had informed the Respondents that the remedy which the Respondents were then pursuing of amending the Appellant's return was inappropriate and that the question of which remedy was appropriate was the subject of litigation at that time;

(2) in her letter of 24 February 2016, Mrs Hogan had informed the Appellant that she had asked for advice from the Respondents' technical specialists and therefore asked the Appellant to consent to a further extension to the statutory review period, to which extension the Appellant agreed in its response of 29 February 2016;

(3) an exchange of emails took place between Mrs Hogan and the Appellant's representative between 11 March 2016 and 15 March 2015 in which Mrs Hogan alluded to the ongoing litigation and offered to defer the outcome of the statutory review until after the decision in the ongoing litigation was published and the Appellant's representative accepted that offer;

(4) in the Review Letter, Mrs Hogan referred to the reasons for the deferral of the outcome of the statutory review and to the fact that the Appellant had consented to that deferral. She also explained that, as a result of the decision by the Upper Tribunal in *Benham*, the amendment to the Appellant's CTSA return was going to be cancelled and a discovery assessment would be issued instead; and

(5) finally, in the letter of 23 May 2018 accompanying the Discovery Assessment, Dr Coffey had explained that the Discovery Assessment was replacing the amendment to correct the previous procedural error which the Respondents had made.

59. In response, Mr Gordon submitted that the steps which the Respondents had taken were insufficient to maintain the freshness of Ms Rodgers's discovery. In his view, in addition to amending the Appellant's CTSA return, the Respondents should have issued a protective assessment under paragraph 41(1) of Schedule 18 to the FA 1998 to guard against the possibility that the amendment would be held to be invalid. In other words, the Respondents should have adopted both remedies simultaneously.

60. I invited both parties to make written submissions in relation to this question following the hearing.

61. In his written submission, Mr Fell pointed out that the language in paragraph 41(1) of Schedule 18 to the FA 1998 required the discovery assessment to be "in the amount or further amount which ought in [the opinion of the Officer issuing the relevant discovery assessment] to be charged in order to make good to the Crown the loss of tax". As had been noted in *Anderson v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 159 (TCC) ("*Anderson*"), a decision in relation to similar wording in Section 29 of the TMA, this required the Officer in question to reach a view on the amount required to make good the loss of tax in

question. However, in this case, from the time when the Respondents had made the relevant amendment to the Appellant's CTSA return in 2015 through to the decision of the Upper Tribunal decision in *Benham* in October 2017, no Officer could have reached the view that any amount was so required because, in the opinion of the Respondents, the Respondents had the power to remedy the position by amending the Appellant's CTSA return (which it had done) and therefore there was no loss of tax to make good by virtue of issuing an assessment.

62. It was not enough for the Appellant to argue in this context that, in a situation where the effectiveness of the amendment was credibly being challenged in other relevant litigation, the hypothetical Officer would reasonably have been able to reach the view that an amount of tax was required to be assessed. This was because the issue was whether the hypothetical Officer could credibly reach the view on a subjective basis and not whether the view could reasonably be reached on an objective basis – see *Anderson* at paragraph [24](5).

63. In addition, the Appellant could not say that the Respondents had failed to provide the evidence required to establish that the hypothetical Officer would not have been able to reach the view. That was because the position which the Respondents had adopted in the litigation in *Benham* was a matter of public record and clearly showed that the Respondents' view was that amending the Appellant's CTSA return was an effective remedy in these circumstances. It was therefore absurd to suggest that an Officer who would have been able to reach the view that an amount of tax still needed to be assessed might exist within the Respondents.

64. Mr Fell accepted that there were circumstances where the Respondents were empowered to, and did, make protective assessments – such as in circumstances where:

(1) the effectiveness of an opening of an enquiry was being challenged and the Respondents wished to protect themselves against a situation where that challenge was subsequently upheld;

(2) a time limit was approaching; or

(3) one or other of two persons had a liability to tax and the Respondents issued an assessment to each person in order to ensure that they did not lose the ability to tax at all by choosing the wrong person initially and then being time-barred from assessing the right person.

However, those situations were all very different from the present circumstances. In those cases, no amendment or assessment would have been made prior to the issue of the protective assessment whereas, in this case, the Respondents had already implemented a remedy which they considered to be a valid means of collecting the tax in question. Moreover, this case was different from the circumstances on which Arden LJ was commenting in *Cotter* at paragraph [30], where Arden LJ suggested that the Respondents could have opened simultaneous enquiries. An enquiry did not give rise to a liability to tax, in contrast to the amendment of a CTSA return or the issuing of an assessment.

65. Finally, the VAT legislation was of no relevance in this context as the wording in Section 73(1) of the Value Added Tax Act 1994 (the "VATA") was very different from the wording in paragraph 41(1) of Schedule 18 to the FA 1998. The former simply referred to "the/an amount" which the Respondents "may" assess to the "best of their judgment" in circumstances where no return was filed or a return appeared to be incomplete or inaccurate. The latter was much more limited because it referred to the assessment of the amount "which ought in [the opinion of the relevant Officer to be charged to make good…the loss of tax".

66. Mr Fell added that, even if the Respondents had had the power in law to issue such a protective assessment, it would have been highly undesirable for the Respondents to do so because:

(1) that would have given rise to a separate and additional tax debt which would be treated by the courts as being owed by the Appellant – see *Vieira v The Commissioners for Her Majesty's Revenue and Customs* [2017] EWHC 936 (Ch) ("*Vieira*") – and therefore, even if the Respondents were to decline to collect the debt, the debt's existence would be potentially problematic in a corporate context;

(2) the existence of both an amendment and an assessment in parallel would have given rise an inefficiency in the review and appeal processes for the Appellant;

(3) the Respondents would have been vulnerable in the appeal process in relation to the protective assessment to a striking out application by the Appellant – on the grounds that the Respondents would be unable to offer as evidence a witness statement from an Officer to the effect that the Officer had reached the view that the sum shown in the assessment was required to be charged to make good the loss of tax; and

(4) it caused no prejudice to the Appellant, and was more straightforward and economic, to wait until the litigation in *Benham* had been resolved before making a decision as to whether or not an assessment was needed (a process to which Mr Fell said that the Appellant had in fact agreed in the correspondence referred to in paragraphs 58(1) to (5) above).

67. In the written submission of the Appellant's representative, Croner Taxwise Limited ("Croner"), following the hearing, Croner made two points in support of the Appellant's contention that the Respondents should have issued a protective discovery assessment in this case.

68. First, Croner drew my attention to the decision of the Court of Session in *University of Glasgow v Customs and Excise Commissioners* [2003] STC 495 ("*Glasgow*") which it said demonstrated that the arguments summarised above had been advanced by the taxpayer in that case and firmly rejected. It added that, in paragraph [16] of its decision in *Glasgow*, the Court of Session had expressly made reference to the fact that alternative and mutually incompatible assessments were permissible in the area of direct tax and that such a course of action had "long been accepted as being a sensible and proper way of dealing with difficult cases" and "a practical and workable machinery for the ultimate recovery of the tax properly due".

69. Secondly, Croner said that the Appellant wished to make it clear that it had never agreed to the Respondents' waiting until the litigation in *Benham* had been completed before they decided whether or not to issue a discovery assessment. Instead, what the Appellant had agreed was that the statutory review process in relation to the amendment which had been made by the Respondents to the Appellant's CTSA return– and which had led to the statutory review process - could be delayed until the validity of the amendment had been determined. There had been no discussion between the parties in relation to whether the Respondents might issue a discovery assessment instead of relying on the amendment if the amendment were shown to be invalid.

70. In their oral submissions at the hearing and in the written submissions which I invited them to make following the hearing, both parties went on to address a further issue which would arise in the event that I were to conclude that the relevant discovery in this case was Ms Rodgers's earlier discovery.

71. That issue was that, in that case, the Officer who had issued the Discovery Assessment (Dr Coffey) was not the same Officer as the Officer who had made the relevant discovery (Ms Rodgers), whereas the language in paragraph 41(1) of Schedule 18 to the FA 1998 strongly suggested that the Officer who made the relevant discovery also needed to issue the relevant assessment.

72. In Mr Fell's view, there were two reasons why it would be permissible for Dr Coffey to have issued the Discovery Assessment in this case despite the fact that it was Ms Rodgers who had made the relevant discovery.

73. The first was Section 2(4) of the Commissioners for Revenue and Customs Act 2005 (the "CRCA"), which provided that:

"Anything (including anything in relation to legal proceedings) begun by or in relation to one officer of Revenue and Customs may be continued by or in relation to another."

This provision allowed for continuity where an Officer left the service of the Respondents. It had been the subject of judicial comment by the First-tier Tribunal in *Goldshine Trade Limited v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 0601 (TC) at paragraph [101] and *Elder v The Commissioners for Her Majesty's Revenue and Customs* [2014] UKFTT 728 (TC) at paragraph [46] and by the Special Commissioners in *PC Clarke v The Commissioners for Her Majesty's Revenue and Customs* [2009] STC (SCD) 278 at paragraph [22]. Mr Fell submitted that the ambit of the provision was wide enough to cover circumstances like the present.

74. Mr Fell submitted that, in the alternative, Section 113(1B) of the TMA provided that, where an Officer of the Respondents has decided to make an assessment to tax under, inter alia, paragraph 41 of Schedule 18 to the FA 1998, "and [has] taken all other decisions needed for arriving at the amount of the assessment, [he] may entrust to some other officer of the Board responsibility for completing the assessing procedure, whether by means involving the use of a computer or otherwise, including responsibility for serving a notice of the assessment on the person liable". Mr Fell said that, in this case, when the file was passed to Dr Coffey by one of Ms Rodgers's successors (Dr Coffey's predecessor, Mr McNeil), as Dr Coffey had explained in his evidence, that amounted to the entrustment of the completion of the assessing procedure to Dr Coffey by Ms Rodgers.

75. Mr Fell made two further points in this respect as follows:

(1) first, whilst it might be said that his wide construction of Section 2(4) of the CRCA was such that Section 113(1B) of the TMA was effectively otiose, there was nothing in the latter provision which qualified the language in the former provision and the real focus and point of the latter provision was the fact that it made it clear that completion of the assessment process by another Officer could be effected by way of computer, which was not a point expressly covered by the former provision; and

(2) it would be absurd and impractical in an organisation as large as the Respondents that the death, dismissal or resignation of an Officer would preclude the issue of a discovery assessment by another Officer and, as there were no other provisions in the legislation which catered for one Officer to issue an assessment based on a discovery by another Officer, the construction of the two provisions which he had advanced above must be correct.

76. In response, Mr Gordon said that he accepted the general proposition that the legislation must be construed in such a way as to allow for the possibility that a discovery assessment could be issued by a different Officer from the Officer who made the relevant discovery. Clearly, the Respondents should not be precluded from issuing a discovery assessment if, before the Officer who made the discovery got around to issuing the assessment, that Officer left the service of the Respondents. However, in his view, the language used in the two provisions called for some kind of nexus between the relevant discovery and the issue of the assessment, in which the issue of the assessment could be seen as the culmination of a process which was started by the relevant discovery. In this case, the facts showed that no such nexus existed and it would be ridiculous to regard the issue of the Discovery Assessment by Dr Coffey

as the completion of a process which had been started by Ms Rodgers. There was no evidence of entrustment by Ms Rodgers or of the continuation of a single process. Instead, the issue of the Discovery Assessment by Dr Coffey was a new event triggered by Dr Coffey's reading of the file. The evidence showed that, before that, the Respondents considered that the amendment to the Appellant's CTSA return would suffice to remedy the loss of tax arising as a result of the invalid claim to rollover relief.

Tertiary argument – discovery by Dr Coffey

77. A third line of argument advanced by Mr Fell was that, even if the discovery made by Dr Coffey was the same as the discovery which had been made by Ms Rodgers, that should not mean that the later discovery by Dr Coffey could not qualify as the relevant discovery for the purposes of paragraph 41(1) of Schedule 18 to the FA 1998 because there was no concept of "corporate knowledge" within the Respondents which meant that Dr Coffey's discovery could not count as a fresh discovery in its own right.

78. In that regard, Mr Fell said that, to the extent that I considered myself to be bound by paragraph [42] in *Charlton*, paragraphs [79](6) and [85] in *Tooth UT* and the approach taken by the Court of Appeal in *Tooth* to hold otherwise, then the Respondents reserved the right to argue, should this appeal proceed further, that no such concept existed.

79. In response, Mr Gordon relied on the decisions described above to establish that the concept of "corporate knowledge" within the Respondents did exist and therefore that it was not possible for the discovery made by Ms Rodgers to be refreshed simply by Dr Coffey's reading the file and reaching precisely the same conclusion as Ms Rodgers had done.

80. In the alternative, Mr Fell submitted that, even if the concept of "corporate knowledge" within the Respondents did exist and that there were circumstances in which an earlier discovery would preclude a later discovery from qualifying as the relevant discovery for the purposes of paragraph 41(1) of Schedule 18 to the FA 1998, the present case did not fall within those circumstances. Mr Fell alluded to the fact that, just as the modern consensus is that Newton and Leibniz both independently invented calculus, so too might it be said that Ms Rodgers and Dr Coffey had both independently discovered that an excessive relief had been given to the Appellant and therefore it was possible for Dr Coffey's discovery to validate the Discovery Assessment notwithstanding the fact that it was the same as Ms Rodgers's discovery.

81. However, Mr Gordon described that analogy as wholly inappropriate, given that Dr Coffey had made his discovery only after reading the file. It was not a discovery which Dr Coffey had reached wholly independently of Ms Rodgers's discovery.

"Fall-back" argument – discovery by Dr Coffey

82. Finally, Mr Fell submitted that, even if his first three arguments failed, then there was an additional fall-back argument to the following effect.

83. Paragraph 41(1) of Schedule 18 to the FA 1998 had three distinct limbs to it in that a distinction was drawn between:

(1) discovering that an amount of tax which ought to have been assessed had not been assessed;

(2) discovering that an assessment to tax had become insufficient; and

(3) discovering that a relief had been given which was, or had become, excessive.

84. The discovery which Ms Rodgers had made fell within the third category. She had discovered that the Appellant had obtained an excessive relief from tax because the declaration

which the Appellant had made under Section 247A of the TCGA had not been superseded by a valid claim for rollover relief.

85. In contrast, the discovery which Dr Coffey had made fell within one of the first two categories and arose as a result of his realisation that:

(1) the Appellant had obtained an excessive relief from tax because the declaration which the Appellant had made under Section 247A of the TCGA had not been superseded by a valid claim for rollover relief; and

(2) the remedy which the Respondents had adopted to cure that excessive relief – namely, the amendment to the Appellant's CTSA return – had not been valid, as determined by the Upper Tribunal in *Benham*.

86. Thus, although both Dr Coffey's discovery and Ms Rodgers's discovery related to the same loss of tax and the same invalid claim, Dr Coffey's discovery was a different discovery from Ms Rodgers's discovery.

87. Mr Fell relied on the Upper Tribunal decision in *Atherton* as demonstrating that the fact that a later discovery related to the same loss of tax as an earlier one did not prevent the later discovery from being a fresh discovery. He said that this was not a case where the later realisation by the Respondents was that they needed to invoke a different mechanism for addressing an insufficiency of which they had been aware for some time – see *Tooth* at paragraph [61] – and where the later realisation by the Respondents was "confined to the realisation that they had used the wrong mechanism", as had been alleged on the part of the taxpayer in *Atherton* – see *Atherton* at paragraph [33]. Instead, the later realisation by the Respondents was a case where it had "newly appeared" to the Respondents (as per Viscount Simmonds in *Cenlon* at page 794) that an amount of tax which ought to have been assessed had not been assessed or that an assessment to tax had become insufficient.

88. In response, Mr Gordon submitted that this argument had already been raised by the taxpayer in *Tooth* and had failed in that case – see paragraph [72] in Tooth. The later discovery in that case – and this one - was simply that the remedy which the Respondents had originally pursued in order to address the fact that one or more of the circumstances in paragraph 41(1) of Schedule 18 to the FA 1998 was present had proved to be invalid. Thus, this was a case where the later realisation by the Respondents was that they needed to invoke a different mechanism for addressing an insufficiency of which they had been aware for some time and a case where the later realisation by the Respondents was "confined to the realisation that they had used the wrong mechanism". The later realisation was not a new discovery that one or more of the circumstances in paragraph 41(1) of Schedule 18 to the FA 1998 was present.

89. Mr Gordon added that the Respondents might have framed their fall-back argument slightly differently, as follows. They might have said that the later discovery by Dr Coffey was a discovery by him that Ms Rodgers should have issued an assessment to the Appellant instead of amending the Appellant's CTSA return and that her failure to do so meant that an amount which ought to have been assessed (by Ms Rodgers) had not been assessed. However, that argument too would be bound to fail because, if it were permissible, it would completely emasculate any concept of staleness. It would inevitably mean that the Respondents would be able to negate the staleness argument in every case by purporting to discover at a later date that they should have issued a discovery assessment at an earlier date. In that way, the staleness clock would always be capable of being reset.

Final point

90. Finally in connection with the parties' respective arguments in relation to the Discovery Assessment Issue, I should record for completeness that Mr Gordon did suggest in his oral

submissions at the hearing that, as an alternative to his arguments based on the proposition that Ms Rodgers had discovered in 2014 or 2015 that the Appellant's rollover relief had become excessive, he wished to argue instead that the Respondents had simply failed to adduce sufficient evidence to show the time at which Ms Rodgers's earlier discovery had been made. However, I do not consider that this alternative argument is tenable in the light of the agreed facts set out in paragraphs 2(10) and 2(11) above and therefore do not propose to address it in the discussion which follows. I would add that Mr Gordon clearly accepted at paragraph [14] of his skeleton argument that "the operative discovery took place in 2014 (or at the latest in 2015)".

Discussion in relation to the Discovery Assessment Issue

91. I would start this section of my decision by saying that, based on:

(1) the agreed facts;

(2) my examination of the correspondence which has passed between the parties; and

(3) the testimony of Dr Coffey,

I have concluded as a finding of fact that the discovery which was made by Dr Coffey in May 2018 differed from the discovery which was made by Ms Rodgers in 2014 or 2015 in only one respect. This was that, in addition to discovering that there had been an invalid claim to rollover relief and therefore that an amount of tax which ought to have been assessed had not been assessed, Dr Coffey also discovered that, as a result of the decision in *Benham*, the appropriate remedy for curing the deficiency in tax which had resulted from the invalid claim to rollover relief was to issue an assessment, as opposed to the remedy which the Respondents had hitherto adopted, which was to amend the Appellant's CTSA return in respect of the accounting period ending 31 August 2010. Thus, apart from his discovery that the Respondents had adopted the wrong mechanism for dealing with the invalid claim to rollover relief, Dr Coffey's discovery was identical to the discovery by Ms Rodgers.

92. This conclusion of fact means that, in my view, I am bound by the decision of the Court of Appeal in *Tooth* to conclude that the relevant discovery in this case was the discovery by Ms Rodgers and not the discovery by Dr Coffey. This is not a case like *Atherton* where the later discovery encompassed the realisation that one or more of the three circumstances set out in paragraph 41(1) of Schedule 18 to the FA 1998 (or, in the case of *Atherton*, Section 29(1) of the TMA) existed when the Respondents had not previously been aware that that was the case – see paragraphs [25] and [26] and paragraphs [29] to [33] in *Atherton*. Instead, the existence of one or more of those circumstances was already known to the Respondents prior to the involvement of Dr Coffey. Dr Coffey's discovery was simply that the Respondents had used the wrong mechanism to address the existence of the relevant circumstances. I believe that, in this respect, the facts in this case are identical to those in *Tooth*, with the result that I am precluded by the decision in *Tooth* from finding that Dr Coffey's discovery was sufficient to trigger the issue of the Discovery Assessment – see paragraphs [63], [64], [66], [67], [72] and [73] in *Tooth*.

93. The above means that I am bound to conclude that Mr Fell's primary argument summarised in paragraphs 42 and 43 above, Mr Fell's tertiary argument summarised in paragraphs 77 to 81 above and Mr Fell's fallback argument summarised in paragraphs 82 to 89 above must necessarily fail, at least at this stage of the litigation process.

94. Turning then to Mr Fell's secondary argument, my conclusions are as follows.

95. Mr Fell submitted that, even if the relevant discovery in this case was the discovery by Ms Rodgers, there were three reasons for concluding that this should not invalidate the issue of the Discovery Assessment in this case.

96. The first was that he reserved the right to argue, should this appeal proceed further, that a discovery assessment should be incapable of being held to be invalid on staleness grounds in any circumstances. I propose to say no more in relation to that reason as I consider that I am bound by the decisions in *Pattullo*, *Beagles* and *Tooth* to hold that, generally, a discovery assessment can be held to be invalid on staleness grounds.

97. However, Mr Fell's second reason does need to be addressed, as it is based on the proposition that, by requiring limitations on the time within which an assessment or amendment may be made to be disregarded, Section 153A(4)(b) of the TCGA negates the concept of staleness in this case, even if the concept is pertinent in other discovery cases.

98. In this regard, I will not rehearse again the arguments of the parties which are set out in detail in paragraphs 46 to 53 above.

99. I will say only that I prefer the submissions of Mr Gordon on behalf of the Appellant in this regard. In my view, the staleness concept is not a "limitation on the time within which assessments or amendments may be made", as described in Section 153(4)(b) of the TCGA. Instead, it is simply a judicial gloss on the meaning of the word "discovers" and, as such, a hurdle which needs to be addressed before a discovery assessment may be made. It is to be distinguished from the express time limits which exist in the legislation, such as the one in paragraph 46 of Schedule 18 to the FA 1998. In effect, I agree with Mr Gordon that treating the staleness concept as a limitation as to the time within which assessments may be made would involve "eliding the concept of staleness with that of time bar", which the Upper Tribunal in *Pattullo* considered to be an error made by the First-tier Tribunal in that case.

100. I note that there is no binding authority to the contrary on this question – in the passage from paragraph [58] in *Benham* which I have cited in paragraph 47 above, the Upper Tribunal expressly declined to express any view on it. And, in relation to the reservation which the Upper Tribunal in *Benham* expressed as to the resulting qualification on the "apparent absolute requirement" in Section 153A to make an assessment, I do not see why the mere fact that the Respondents are expressed to have an obligation to issue an assessment means that there should be no circumstances in which such an assessment should be incapable of being issued. As Mr Gordon pointed out, it would not be the only example of a situation where the tax legislation stipulates an obligation which may or may not be met.

101. I should add at this juncture that I do not find the decision in *Benham* to be entirely enlightening in relation to the circumstances in which the Respondents would be precluded from fulfilling their obligation in Section 153A(4) of the TCGA to issue an assessment because they do not have the power under Schedule 18 of the FA 1998 to do so. The decision does not say anything about the fact that the Respondents' power to issue an assessment under paragraph 41(1) of Schedule 18 of the FA 1998 is not dependent solely on the satisfaction of the conditions set out in that paragraph. Instead, their power to do so is also contingent on:

(1) the satisfaction of one of the conditions set out in paragraphs 43 and 44 of Schedule 18 to the FA 1998; and

(2) the inapplicability of the circumstances described in paragraph 45 of Schedule 18 to the FA 1998.

102. It is implicit in the conclusion in *Benham* to the effect that "the correct approach is to regard Schedule 18 as providing an exhaustive code for the making of assessments and amendments save to the extent that some other provision supplements (and [possibly] also overrides or displaces) the provisions of that Schedule" that no assessment can be issued pursuant to the injunction in Section 153A(4) of the TCGA to do so unless all of the conditions precedent to the exercise of the power to issue an assessment under paragraph 41(1) of Schedule 18 to the FA 1998 (apart from

time limits) have been met. And that necessarily includes satisfaction of the above contingencies.

103. The contingencies were not expressly discussed in the decision in *Benham* – presumably because, in the light of its conclusion that the disputed decision in that case did not amount to an assessment, it was unnecessary for the Upper Tribunal to consider whether the decision satisfied the relevant contingencies. However, it is pertinent to consider those contingencies in this case because a failure in relation to either or both of the contingencies would lead to a situation in which the Respondents would lack the power to fulfil their obligation to issue an assessment in compliance with Section 153A(4) of the TCGA and that absence of power would be for reasons other than a limitation as to time. And, if that is a situation where the Respondents would be precluded from fulfilling their obligation to issue an assessment in compliance with Section 153A(4) of the TCGA, then why shouldn't a case where a discovery has become stale (so that a significant condition in paragraph 41(1) of Schedule 18 to the FA 1998 itself has not been satisfied) be another such example?

104. More generally, I have noted that, although the Respondents attempted to deal with the satisfaction of the conditions in paragraphs 43 and 44 of Schedule 18 to the FA 1998 at paragraphs [64] to [69] of the Statement of Case, they did not address in the Statement of Case the contingency in paragraph 45 of Schedule 18 to the FA 1998.

105. Whatever the position in relation to those contingencies in the present case, I do not consider that the concept of staleness as an inherent part of construing the word "discovers" in paragraph 41(1) of Schedule 18 to the FA 1998 can properly be described as a "limitation on the time within which assessments …may be made" for the purposes of Section 153A(4)(b) of the TCGA. It follows that, in my view, the exclusion effected by that section of limitations as to time does not preclude the staleness concept from applying in the context of discovery assessments which are purported to be issued pursuant to Section 153A of the TCGA and paragraph 41(1) of Schedule 18 to the FA 1998.

106. The conclusions which I have drawn so far mean that I am compelled to conclude that the issue of the Discovery Assessment was invalid unless the third reason given by Mr Gordon for upholding the validity of the Discovery Assessment should succeed – namely, that, taking all the circumstances in this case into account:

(1) the discovery made by Ms Rodgers was not stale at the time when the Discovery Assessment was issued by Dr Coffey; and

(2) the tax legislation does not preclude the issue of the Discovery Assessment by a different Officer (Dr Coffey) from the Officer (Ms Rodgers) who made the discovery which led to the issue of the Discovery Assessment.

107. I believe that the answer to the first of these questions ultimately turns on whether the Respondents were entitled to issue a protective discovery assessment while they awaited the outcome of the decision in *Benham*. I say this for the reasons which follow.

108. I start by noting that the period of time which elapsed between the making of Ms Rodgers's discovery and the issue of the Discovery Assessment was considerable – some three to four years. In the light of the case law cited in paragraphs 56 and 57 above, a period of that length would generally be too long for a discovery to retain its "essential newness" (adopting the words used in *Charlton* at paragraph [37]).

109. On the other hand, as Mr Fell pointed out, the correspondence which passed between the parties shows that the Respondents actively engaged with the Appellant in relation to the dispute over that period.

110. It is true that, when it was eventually issued, the Discovery Assessment could hardly have taken the Appellant by surprise. As early as 12 January 2016, the Appellant had written to the Respondents to point out that amending the Appellant's CTSA return was an inappropriate remedy for the shortfall in tax resulting from the alleged invalid claim. And it is also true that, on each of 20 January 2016, 29 February 2016 and 15 March 2016, the Appellant consented to extensions to the statutory review period in relation to the amendment in order that the statutory review could take into account the outcome of the litigation in *Benham*.

111. If Mr Fell is correct in saying that the Respondents were precluded from issuing a protective discovery assessment while the litigation in *Benham* continued, then these factors might well justify the lengthy delay between Ms Rodgers's discovery and the issue of the Discovery Assessment. This is because, in that case, it might fairly be said that the Respondents were doing all they could to maintain the freshness of the original discovery while they pursued the remedy of amending the Appellant's CTSA return.

112. However, if Mr Gordon is right in his submission that the Respondents were entitled to issue a protective discovery assessment within that period, then I consider that the steps taken by the Respondents over the period in question did not suffice, in and of themselves, to maintain the freshness of Ms Rodgers's discovery over such a long period. In that case, I would say that it was incumbent on the Respondents to have issued a protective discovery assessment whilst the litigation in *Benham* ran its course.

113. Turning, therefore, to the question of whether the Respondents were entitled to issue a protective discovery assessment while the litigation in *Benham* continued, I prefer the submissions of Mr Gordon to those of Mr Fell. I consider that:

(1) Mr Gordon is correct in saying that there is no meaningful distinction between the power of the Respondents to issue a protective assessment pursuant to Section 73(1) of the VATA – which was the subject matter of the decision in *Glasgow* - and the power of the Respondents to issue a protective assessment pursuant to paragraph 41(1) of Schedule 18 to the FA 1998 – which is the subject matter of this part of this decision. In the former case, the relevant legislation requires any assessment of the amount which is due from the taxpayer to be made "to the best of [the Commissioners'] judgment", whilst, in the latter case, any assessment of the amount which is due from the taxpayer must be "in the amount or further amount which ought in [the relevant Officer's] opinion to be charged in order to make good to the Crown the loss of tax". The language in both provisions postulates that the Respondents are obliged to exercise the relevant power to assess in such a way as to make good a loss of tax. It is therefore implicit in the fact that the issue of a protective assessment was an accepted course of action for the Respondents to take in the circumstances of *Glasgow* that the same must be true in this case. In effect, the decision in *Glasgow* demonstrates that, in considering whether the Respondents have properly exercised their power to assess under paragraph 41(1) of Schedule 18 to the FA 1998, the Respondents are entitled to ignore the fact that the relevant loss of tax might well be recovered by virtue of another course of action – ie the issue of another assessment or, as in this case, the making of an amendment to an assessment - which the Respondents have taken;

(2) it is clear from the content of the analysis in *Glasgow* that the concept of issuing protective assessments is well-established in the context of direct taxes. The issue in *Glasgow* was simply whether the same concept should be extended to VAT. Mr Fell explained that the Respondents were not seeking to argue that the issue of protective assessments in relation to direct taxes was generally precluded. Instead, he based his submission on the fact that, on the facts of this case, where the Respondents were of the view that the amendment which they had made to the Appellant's CTSA return meant

that the insufficiency in tax had already been remedied, it was impossible for an Officer of the Respondents to form the view that a protective discovery assessment was necessary to cure the insufficiency. However, the analysis in *Glasgow* in relation to the language used in Section 73(1) of the VATA answers this submission, by parity of reasoning;

(3) moreover, when one turns to the direct tax cases in which the issue of alternative assessments has been upheld, it can be seen that a similar objection to the one made by Mr Fell could have been raised by the decision-making bodies in those cases. For example, in *Lord Advocate v McKenna* 61 TC 688, the assessments in question were made under Section 29(1)(b) of the TMA as it stood at the time. This provided as follows:

"(1) Except as otherwise provided, all assessments to tax shall be made by an inspector, and—

(a) if the inspector is satisfied that any return under the Taxes Acts affords correct and complete information concerning profits in respect of which tax is chargeable, he shall make an assessment accordingly,

(b) if it appears to the inspector that there are any profits in respect of which tax is chargeable and which have not been included in a return under Part II of this Act, or if the inspector is dissatisfied with any return under Part II of this Act, he may make an assessment to tax to the best of his judgment."

It can be seen that the language used in Section 29(1)(b) of the TMA as set out above would be open to the same objection in the case of alternative assessments to direct tax to the one raised by Mr Fell – namely, how could an assessment be made to the best of the relevant inspector's judgment if there was an alternative assessment or remedy in place which, if valid, would preclude the need for the assessment? The same objection could have been made in relation to the alternative assessments in *Bye v Coren* 60 TC 116;

(4) The Court of Session in *Glasgow* also dealt with the practical consequences of having two distinct assessments in relation to the same subject matter, noting that the fact that a protective assessment had been issued would not entitle the Respondents to recover both the amount shown in the protective assessment and the amount shown in the alternative assessment – see *Glasgow* at paragraphs [11] and [14]. It is therefore nothing to the point that it was held in *Vieira* that a bankruptcy court was not obliged to set aside a statutory demand for an amount shown in a tax assessment because of the existence of an extant appeal against the tax assessment. As noted by the Court of Session in *Glasgow* at paragraph [14], two assessments can be inter-related and, as such, "mutually exclusive and not exigible in the aggregate. It is quite clear that no court would knowingly grant decree in such circumstances for the aggregate amount. Nor would it be proper for the commissioners to institute legal proceedings for the aggregate";

(5) the terms of Section 32 of the TMA also tend to cast doubt on Mr Fell's proposition. That provision allows the Board to direct all or part of an assessment to be vacated in circumstances where "a person has been assessed to tax more than once for the same cause and for the same chargeable period". Whilst it is clearly possible for such circumstances to arise inadvertently, it does suggest that the existence of an alternative assessment or other remedy does not, in and of itself, preclude the issue of an assessment to the best of the relevant inspector's judgment and therefore that the language in paragraph 41(1) of Schedule 18 to the FA 1998 (and of course Section 29(1) of the TMA) on which Mr Fell is relying is insufficient to preclude the issue of a protective assessment;

(6) I do not regard the decision in *Anderson* as casting any doubt on the above conclusion. The question which was in issue in *Anderson* was the approach to be taken in determining whether the relevant Officer had discovered that there was an

insufficiency of tax – that is to say, the first stage in the discovery process. The approach to be taken in determining how to make good any insufficiency so discovered was not, in any meaningful sense, the subject matter of the decision in *Anderson* (notwithstanding a brief aside on that point in paragraph [24](5) of the decision); and

(7) finally, I am slightly reinforced in my conclusion by the fact that, in *Gordon*, the First-tier Tribunal reached the view that the Respondents should not have allowed the ongoing litigation in relation to the Respondents' collection and management powers to prevent it from issuing a discovery assessment in that case – see paragraphs [122](4) and [126] in *Gordon*. The tribunal drew a distinction in that context between litigation which was pertinent to whether or not there had been an under-assessment – which would justify a delay in issuing a discovery assessment and prevent the discovery from becoming stale – and litigation which was pertinent solely to whether or not to issue an assessment to make good the under-assessment – which would not. The present appeal is on all fours with the latter scenario given that the litigation in *Benham* had no relevance to whether or not any of the circumstances in paragraph 41(1) of Schedule 18 to the FA 1998 existed but instead related solely to the remedy to be adopted where one or more of such circumstances existed.

However, I accept that *Gordon* was not a case where the Respondents had already taken steps to remedy the under-assessment which they considered to be effective. Instead, in *Gordon*, the Respondents were considering whether they wished to take steps to remedy the under-assessment at all. It is therefore distinguishable from the present facts to that extent and does not itself gainsay Mr Fell's submission that the issue of a protective assessment in this case was precluded by the existence of the amendment to the Appellant's CTSA return.

114. The above conclusion means that, even before considering the second question mentioned in paragraph 104 above, I am of the opinion that the third reason given by Mr Fell for upholding the Discovery Assessment on the basis of the discovery by Ms Rodgers also fails, with the result that, in my view, the issue of the Discovery Assessment in this case was invalid.

115. However, for completeness, I should add that, in relation to that second question – namely, whether it was permissible for Dr Coffey to issue the Discovery Assessment on the basis of Ms Rodgers's discovery:

(1) it is not clear to me that Section 113(1B) of the TMA quite encompasses the circumstances in the present case. This is because it is not a case where Ms Rodgers had decided to make a discovery assessment and "taken all other decisions needed for arriving at the amount of the assessment" before entrusting completion of the assessing procedure to Dr Coffey. Instead, it was Dr Coffey who decided to make the discovery assessment, based on his review of the file. Dr Coffey's involvement in the process therefore went some way beyond the purely ministerial acts which the section appears to contemplate; and

(2) it is perhaps easier to construe Ms Rodgers's discovery as a process "begun" by Ms Rodgers, which process was then continued by her successors, including Dr Coffey, and ultimately led to the issue of the Discovery Assessment by Dr Coffey. In that case, the issue of the Discovery Assessment by Dr Coffey would fall within the ambit of Section 2(4) of the CRCA. I should add that, in this regard, that I was not entirely persuaded by Mr Gordon's submission that the issue of the Discovery Assessment by Dr Coffey should be seen as an entirely new process and not as the culmination of a process begun by Ms Rodgers. It seems to me that it is quite difficult to say, on the one hand, that, in relation to identifying the person who made the relevant discovery, Dr Coffey did not make a

new discovery because he merely read the file and reached the same conclusion as Ms Rodgers and, on the other hand, that, in relation to the ability of Dr Coffey to issue the Discovery Assessment, there was no connection between the process commenced by Ms Rodgers and the issue of the Discovery Assessment by Dr Coffey.

116. It is not necessary to decide the point, given the conclusion which I have reached on the first question mentioned in paragraph 104 above.

117. It is also unnecessary for me to consider the procedural question of whether, given that the Respondents' Statement of Case in this appeal was based on the proposition that the discovery which led to the issue of the Discovery Assessment was a discovery by Dr Coffey, and not Ms Rodgers, it is open to the Respondents at this stage to rely on the discovery by Ms Rodgers to justify the issue of the Discovery Assessment.

118. My conclusion in relation to the Discovery Assessment Issue is sufficient to determine this appeal in favour of the Appellant. However, in deference to the detailed submissions which the parties have made in relation to the other two issues, I have summarised below both the parties' respective arguments, and my conclusion, in relation to each of those issues.

THE PROCEDURAL ISSUE

Introduction

119. Although the Rollover Claim Issue appears next on the list of issues which is set out in paragraph 15 above, it makes sense to deal with the Procedural Issue before considering the Rollover Claim Issue, given that it relates to the arguments which the Respondents are entitled to adduce in relation to the Rollover Claim Issue and therefore should logically be determined before tackling the Rollover Claim Issue.

120. In their skeleton argument for the proceedings in relation to the appeal, which was delivered to the Appellant two weeks before the hearing, one of the Respondents' submissions in relation to the Rollover Claim Issue was that the construction of buildings on land did not involve any relevant "acquisition" by the Appellant. In making that submission, the Respondents observed that the TCGA makes a distinction between property which comes to be owned by virtue of an acquisition and property which comes to be owned without any acquisition – for example, by way of physical creation. In support of their view that the TCGA makes this distinction, the Respondents cited:

(1) Section 2(1)(c) of the TCGA, which expressly refers to "property created by the person disposing of it or otherwise coming to be owned without acquiring it"; and

(2) the explanation of that language by Knox J, at first instance in the case of *Kirby v Thorn EMI* [1986] 1 WLR 851 ("*Kirby*") at page 855.

121. In the view of the Respondents, the reference in Section 247(1)(c) of the TCGA to the relevant company's "acquiring other land" therefore excluded property which came to be owned other than by way of an acquisition and, as the process of constructing a building on land did not involve an "acquisition" of those buildings, the expenditure which the Appellant had incurred on construction could not fall within Section 247(1)(c) of the TCGA.

The arguments in relation to the Procedural Issue

122. Mr Fell made the point that the issue had been pre-figured in the terms of the Review Letter – in which Mrs Hogan explained to the Appellant why the rollover relief claim which the Appellant had made was invalid – and in the Respondents' Statement of Case. He added that, in any event, the issue was purely a question of law and not fact and therefore that the two week period between the receipt by the Appellant of the Respondents' skeleton argument and

the hearing had been ample time for the Appellant to get to grips with the argument. On that basis, Mr Fell submitted, even if I were to conclude that the argument did not meet the requirement of Rule 25(2)(b) of the Tribunal Rules – the requirement for the Statement of Case to set out the Respondents' position in relation to the case - I should in any event exercise my discretion in accordance with Rule 7(2) and Rule 2 of the Tribunal Rules to allow the Respondents to make the argument.

123. For his part, Mr Gordon submitted that the appearance of this argument in the Respondents' skeleton argument was the first time in the proceedings that this argument had been raised by the Respondents and that, accordingly, the Respondents should be precluded from making the argument at the hearing. Mr Gordon said that, had the Appellant been made aware at an earlier stage in the proceedings that the argument was going to be adduced, then it might have been able both:

(1) properly to marshal its legal arguments against the proposition in question by showing that the word "acquiring" in Section 247(1)(c) of the TCGA was apt to include buildings which were constructed; and

(2) to collect factual evidence to show that the nature of the buildings in this case was such that they could be said to have been "acquired".

Discussion in relation to the Procedural Issue

124. I reserved my position on the question at the hearing because I wanted to look at the documentation referred to above and to consider the submissions made above.

125. Having done so in the period following the hearing, I would make the following preliminary observations:

(1) I believe that it would be a fair summation of both the Review Letter and the Statement of Case that:

(a) the Respondents did make the point that the expenditure in respect of which the Appellant was claiming rollover relief was not expenditure incurred in acquiring land but was instead expenditure incurred in enhancing land; but

(b) the Respondents did not expressly draw to the Appellant's attention the precise distinction which it drew in its skeleton argument between property which comes to be owned by virtue of an acquisition and property which comes to be owned other than by way of an acquisition, such as property created by the owner;

(2) I think that it would also be fair to say that the reader of the Review Letter might be forgiven for concluding that the main thrust of the Respondents' arguments was very largely to do with whether the newly-constructed buildings could qualify as "other land" for the purposes of Section 247(1)(c) of the TCGA, as opposed to whether the newly-constructed buildings could be said to have been "acquired";

(3) for example, at the foot of page 2 of the Review Letter, Mrs Hogan noted that:

"The dispute lies in the interpretation of the term "*new land*" within the legislation and whether or not the construction of buildings on land already owned by the company qualifies as "*new land*" for roll-over relief under S247 TCGA 1992",

before proceeding to outline the arguments against that proposition until the top of page 4 of the letter. There is no doubt that, in those pages, the sole issue which the Review Letter was addressing was the question set out above. Indeed, Mrs Hogan said in the middle of page 3:

"So the question is: does the term "land" within S247 TCGA 92, therefore, include buildings?";

(4) however, at the top of page 4 of the Review Letter, Mrs Hogan made a sharp change of direction when she moved on to outline the conclusions which the Respondents' technical specialist had reached. At that point, she noted that, in order "for S247 to apply it requires the acquisition of other land ("the new land")" and that "[if] you have land and construct a building on it then, as a matter of general law, you do not thereby acquire land or an interest in land…There is no acquisition of land or of an interest in land". She then stated quite clearly in the paragraph dealing with Extra-Statutory Concession D22 ("ESC D22") that "there is no dispute around the meaning of land but rather whether that land has been acquired";

(5) it is therefore quite surprising to observe that, in her conclusion at the top of page 5 of the Review Letter, Mrs Hogan again reverted to the point made at the start of the letter by noting that "in summation, it is clear from the legislation that "*new land*" may comprise any land **including** buildings on that land as well as any interests in or rights over land. However, "*new land*" does not include the cost of buildings, or additions to buildings on land that is already owned";

(6) the result is that the Review Letter appears to have been drafted by two different people, one of whom was focused on whether buildings constructed on land already owned could qualify as "other land" and the other of whom was focused on the question of whether the construction of buildings on land already owned could be said to amount to the "acquisition" of other land;

(7) the Statement of Case was more clearly directed to the question of "acquisition" than the Review Letter in that the Respondents repeatedly made the point in the Statement of Case that expenditure on the construction of a building on land already owned was enhancement expenditure in relation to the land already owned and not the acquisition of new land;

(8) for example, paragraph 26 stipulated that the point at issue was whether the application of the compulsory purchase disposal proceeds in constructing commercial units "constitutes the acquisition of "new land"", paragraph 33 noted that the reason why the construction of buildings on land already owned would not satisfy Section 152 of the TCGA in the absence of ESC D22 was that "the cost of the building constitutes enhancement expenditure of an old asset, namely the land" and paragraphs 52 and 53 stated that:

"The Respondents contend that there are a number of definitions of land, all of which have been advanced by the Appellant. The Respondents submit that the definitions of land are supportive of their case in that they do not distinguish buildings as separate and distinct assets from the land itself….Rather, they emphasise that the term 'land' is inclusive of the buildings upon the land and any rights/interest in the land. Although land includes 'interests in land', as the Appellant has not acquired new land, rather enhanced land, there has not been an acquisition of an interest in land";

(9) even so, the fact that the Respondents referred in paragraph 46 of the Statement of Case to the fact that "[the] Appellant applied the entire proceeds...in the acquisition [my emphasis] of commercial units (buildings) which were constructed on land already owned by the Appellant" reveals that the Respondents had, at that stage, not yet alighted on the argument which they adduced in their skeleton argument – namely, that buildings constructed on land which is already owned are property which comes to be owned without being acquired.

126. The two questions which I need to address in this context are twofold:

(1) first, did the argument in question form part of "the [Respondents'] position in relation to the case" as set out in the Statement of Case, as is required by Rule 25(2) of the Tribunal Rules; and

(2) secondly, if it did not, would it be fair and just to allow the Respondents to adduce the argument at this stage?

127. In relation to the first of these questions, I do not think that the argument in question did form part of the Respondents' position in relation to the case as set out in the Statement of Case. It is true that the word "acquisition" does appear with regularity in the Statement of Case in the context of the phrase "the acquisition of other land" but, in my view, that is merely because the statutory provision is phrased in that way. Throughout the Statement of Case, the Respondents seek to distinguish between, on the one hand, the enhancement of an existing asset and, on the other hand, the acquisition of a new asset and it is in that context that the word "acquisition" is used. The fact that the Respondents were not at that stage placing any emphasis on the word "acquisition" as a test in and of itself is demonstrated by their use of the term "acquisition" in the context of solely the buildings themselves in paragraph 46 of the Statement of Case. I therefore believe that the Statement of Case did not set out this argument in a clear enough manner that it can be said to have been part of the Respondents' case as set out in the Statement of Case.

128. Having said that, I have reached the conclusion that the argument should be admitted for the following reasons:

(1) first, I think that it is clear from the Statement of Case that the burden of proof was on the Appellant to establish that the expenditure in question had been incurred on the acquisition of land – as opposed to the enhancement of land - and it is implicit in that question that whether or not the construction of the buildings on the Appellant's existing land amounted to an "acquisition" of those buildings was one which the Appellant would need to address in order to satisfy that burden of proof; and

(2) secondly, I accept Mr Fell's submission that this is purely a question of law and therefore that the two week period between the receipt by the Appellant of the Respondents' skeleton argument and the hearing was sufficient time for the Appellant to deal with the argument in its submissions.

129. For that reason, I have taken the argument into account in my consideration of the Rollover Claim Issue. Having said that, for reasons which will become apparent, I do not consider that the argument advances the Respondents' case in relation to the Rollover Claim Issue in any meaningful respect.

THE ROLLOVER CLAIM ISSUE

Introduction

130. The Rollover Claim Issue may be simply described. It is this. In using the compulsory purchase disposal proceeds to incur expenditure on the construction of new buildings on land which it already owned, did the Appellant thereby "acquire other land" for the purposes of Section 247(1)(c) of the TCGA?

The arguments in relation to the Rollover Claim Issue

131. Mr Fell relies on three arguments in this respect.

Acquisition or enhancement?

132. First, he says that the expenditure in question was not incurred on an acquisition of a new interest in land. Instead, it was incurred on enhancing an existing asset – namely, the land on which the buildings were constructed. In support of this argument, Mr Fell directed me to Section 24(3) of the TCGA, which expressly provides that, for the purposes of a negligible value claim under Section 24 of the TCGA, it is permissible to treat a building as being separate

from the land on which it stands. This, said Mr Fell, demonstrated that the general rule was that a building is simply part of the asset comprising the land on which it stands. The existence of that general rule was also revealed by the exceptional nature of Section 155 TCGA, which treats buildings and land as distinct assets for the purposes of the general rollover relief rules. In this respect, the general rule in the TCGA was consistent with the general principles of land law.

133. Turning to the specific part of the TCGA which was in issue in this case, Mr Fell pointed out that the exclusion of dwelling houses from the relief in Section 247 of the TCGA which was set out in Section 248 of the TCGA showed that the general rule noted above applied – in other words, for the purposes of the exclusion, a building (in this case, a dwelling house) was being treated as indistinguishable from the land on which it stood. It was quite clear from the language used in Section 248 of the TCGA that what that provision was intended to exclude was both the dwelling-house (or part thereof) and the land on which the dwelling-house (or part) was situated, in each case, in respect of which any of the exemptions in Sections 222 to 226 of the TCGA applied. It made no sense to read the exclusion as applying solely to the dwelling-house (or part) alone and not also to the land on which the dwelling-house (or part) was situated.

134. In his submissions, Mr Gordon made it clear that, in taking the position which it was taking, the Appellant was not seeking to by-pass the general principles of the TCGA or the general principles of land law. He accepted that, pursuant to both sets of principles, a building constructed on land would form part of the land on which it was constructed. However, even though the building would thereby become part of the same asset as the land on which it was constructed, it was nevertheless itself "land" for the purposes of Section 247(1)(c) of the TCGA because Section 288 of the TCGA defined land as including "messuages, tenements, and heriditaments, houses and buildings of any tenure". As such, it was clear that the buildings in this case were "other land" for the purposes of Section 247(1)(c) of the TCGA.

135. Mr Gordon said that the language used in Section 248 of the TCGA tended to support his position because it referred to the exclusion of certain land from Section 247(1)(c) of the TCGA before referring to the land in question as "a dwelling-house or part of a dwelling-house". This, said Mr Gordon, showed that a building could constitute "land" in and of itself although he conceded that, if the Appellant's interpretation of Section 247(1)(c) of the TCGA were to be correct, then only the dwelling-house (or part) in respect of which any of the exemptions in Sections 222 to 226 of the TCGA applied would fall to be excluded from that section by Section 248 of the TCGA, and not also the land on which the dwelling-house (or part) was situated.

Acquisition or creation?

136. Secondly, Mr Fell put forward the argument which is the subject of the Procedural Issue – namely that, in order for Section 247(1)(c) of the TCGA to be satisfied, there needs to be an "acquisition" and that not all property which comes to be owned has necessarily been acquired. In support of this argument, Mr Fell pointed to the dicta of Knox J in *Kirby* to which I have referred in paragraph 120(2) above as demonstrating that not all property which is owned has necessarily been acquired and said that, in this case, the buildings were an example of property that had been created without being acquired.

137. For his part, Mr Gordon pointed out that there was no definition of the word "acquiring" for the purposes of Section 247 of the TCGA and that Section 21 of the TCGA was simply defining property which would constitute "assets" for the purposes of the Act. It was not defining the word "acquisition". In addition, the passage from *Kirby* on which Mr Fell was placing reliance was dealing with the question of whether property had to be in existence before

it could be the subject of a disposal. It was not dealing with the question of what amounted to an acquisition.

The purposive construction

138. Thirdly, Mr Fell said that the purpose of the relief in Section 247 of the TCGA was to allow a person who had suffered a compulsory purchase to replace the land so purchased with other, newly-acquired, land. It was not to allow that person to use the compulsory purchase disposal proceeds to construct a new building on its existing land. He said that, in this respect, the purpose of Section 247 of the TCGA was different from the purpose of the general rollover provisions in that the latter was to encourage reinvestment and growth in promoting the activities of the relevant business whereas the former was the narrower one of simply ensuring that a person whose land had been the subject of a compulsory purchase could replace the land so purchased without adverse consequences – it was not, he said, the wider purpose of encouraging reinvestment more generally.

139. Mr Gordon responded by noting that there was no policy reason for the legislation to distinguish between the application of the compulsory purchase disposal proceeds on the acquisition of new land with a building already on it or the application of the compulsory purchase disposal proceeds on the construction of a new building on land which was already owned. In both cases, the person who had suffered the compulsory purchase should be allowed to replace the land and buildings which were the subject of the compulsory purchase with land and/or buildings which fulfilled the same function without crystallising the tax on the gain arising out of the compulsory purchase.

140. As part of their submissions, both parties made more general submissions in relation to the distinctions between Section 247 of the TCGA and the general rollover provisions. They agreed that, in the general rollover provisions, Section 155 of the TCGA expressly distinguished between land and buildings, treating them as distinct assets for the purposes of those rules. In addition, ESC D22 – which did not apply in the context of the rollover in Section 247 of the TCGA - allowed enhancement expenditure to qualify for relief.

141. Mr Fell said that this demonstrated that, for the purposes of Section 247 of the TCGA, expenditure on the construction of a new building should not be treated as qualifying for relief. This was because, in the context of the relief in Section 247 of the TCGA, there was no separate category of relief for expenditure on buildings and ESC D22 did not apply to treat enhancement expenditure as qualifying for relief.

142. In response, Mr Gordon submitted that:

(1) the distinction drawn between land and buildings in the context of the general rollover provisions, together with the fact that ESC D22 did not apply to claims under Section 247 of the TCGA, did not cast doubt on the Appellant's arguments in relation to the Rollover Claim Issue. On the contrary, to the extent that it was relevant to take the differences between the two codes into account, those features tended to support the Appellant's construction of Section 247(1)(c) of the TCGA;

(2) the general rollover provisions were an entirely separate code which had its roots in the original chargeable gains legislation. At that time, the definition of "land" in what is now Section 288 of the TCGA did not exist and therefore it was necessary to make it clear that expenditure on buildings would still qualify for the relief. That was not the case in the context of the relief in Section 247 of the TCGA because, by the time that that provision was enacted, Section 288 of the TCGA made it clear that a reference to "land" included the buildings on the land; and

(3) similarly, the fact that ESC D22 applied in the context of the general rollover provisions but not in the context of the relief in Section 247 of the TCGA supported his proposition that the construction of a new building on existing land was apt to fall within the language used in Section 247(1)(c) of the TCGA as it stood. That was why there was no need for ESC D22 to apply in relation to claims under the section.

Discussion in relation to the Rollover Claim Issue

143. I should say at the outset that, leaving aside the question of whether expenditure on enhancing one asset can also be said to be acquisition expenditure on another – a question which is at the heart of this issue and which I discuss further below - I do not believe that there is anything in the argument to the effect that entering into a contract in order to secure the construction of a building cannot amount to an "acquisition" of that building in the general sense of that word. In other words, I do not think that a newly-constructed building obtained pursuant to a construction contract is an example of an asset which has come to be owned by being created, as opposed to being acquired.

144. When one looks at the examples given by Knox J in *Kirby* of the sorts of assets which can come to be owned without being acquired, it is noteworthy that they are all very different from paying a third party to construct a building. Knox J refers to three examples of assets which can come to be owned without being acquired - a painting or a sculpture, goodwill in a business which was started *de novo* and a natural increase in livestock (see *Kirby* at page 855). No doubt, if we were here considering an individual who had himself laid brick upon brick in the construction process, then the analogy with a painting or sculpture might be more compelling. But where we are considering a construction contract under which a company has paid a third party to construct a building on its land, I see no reason to regard the building which results from that contract as having not been "acquired" in the general sense of the word "acquired". The building in that case has been acquired in just the same way as if it had been purchased only after it was fully completed.

145. Some support for this conclusion may be found in the Solicitor's advice set out at tab 63 of the Documents Bundle for the hearing. In that advice, the Solicitor discussed the question of when a building which is erected pursuant to a building contract can be said to be "acquired" for the purposes of the general rollover provisions. Given that land and buildings fell to be treated as distinct assets for the purposes of those provisions, the question of whether expenditure on enhancing one asset could also be said to be acquisition expenditure on another did not arise and, on that basis, the Solicitor proceeded to deal with identifying the time of the acquisition. He did not say that, because the newly-constructed building would have been created by the builder, it could not have been acquired by the person who acquired title to the building once constructed. Similarly, in the Technical Division advice set out at tab 64 of the Documents Bundle, it was noted that "the construction, but not the conversion, of a building constitutes the acquisition [my emphasis] of an asset for roll-over relief purposes".

146. In other words, leaving aside the question of whether expenditure on enhancing one asset can also be said to be acquisition expenditure on another, just as an asset which is not affixed to land – such as a car or loose plant and machinery - can be said to be "acquired" when it comes into existence pursuant to a construction contract, the same is true of a building which comes into existence by way of a construction contract.

147. Moreover, I think that the Respondents implicitly admitted this to be the case when they said in paragraph 46 of the Statement of Case that "[the] Appellant applied the entire proceeds...in the acquisition [my emphasis] of commercial units (buildings) which were constructed on land already owned by the Appellant".

148. However, that is not the end of the matter because, in this case, the buildings in question were affixed to the land on which they were situated and therefore, for the purposes of the TCGA, the expenditure in question constituted enhancement expenditure in relation to that land for the purposes of Section 38(1)(b) of the TCGA. The question is how that should affect the application of the language in Section 247(1)(c) of the TCGA.

149. I have found this to be a somewhat finely-balanced point.

150. On the one hand, I agree with Mr Gordon that:

(1) the newly-constructed buildings constitute "land", by virtue of the definition of "land" in Section 288 of the TCGA and on general property law principles;

(2) therefore, leaving aside the question of whether enhancement expenditure in relation to one asset can also amount to acquisition expenditure on another, the Appellant "acquired" "land" when it acquired the buildings; and

(3) there is no discernible policy reason to exclude expenditure incurred on the construction of new buildings from the ambit of the relief in Section 247 of the TCGA when that relief is available for expenditure incurred on the acquisition of new land with buildings already situated on it. If the purpose of the relief is to enable the person which has suffered the compulsory purchase to be able to apply the disposal proceeds in replacing that which it has lost by virtue of the compulsory purchase without crystallising the gain on the disposal, then that purpose is served just as well by allowing the person in question to expend the disposal proceeds on constructing new buildings on some of its existing land as it is by allowing the person in question to acquire new land with buildings already situated on it.

151. On the other hand, I agree with Mr Fell that:

(1) the TCGA as a whole distinguishes very clearly between expenditure incurred on the acquisition of an asset – which qualifies as base cost in the asset pursuant to Section 38(1)(a) of the TCGA – and expenditure incurred on the enhancement of an asset – which qualifies as base cost in the asset pursuant to Section 38(1)(b) of the TCGA;

(2) in this case, the expenditure incurred in constructing the buildings constituted enhancement expenditure in relation to the land on which the buildings were situated; and

(3) the drafting in Section 248 of the TCGA – whilst being deficient no matter which way one construes it – tends to favour Mr Fell's position in that, in my view, it is clear that the exclusion in question is meant to apply both to the dwelling-house (or part) in respect of which any of the exemptions in Sections 222 to 226 of the TCGA applies and to the land on which the dwelling-house (or part) is situated, again in respect of which any of the exemptions in Sections 222 to 226 of the TCGA applies. It is not meant to apply solely to the dwelling-house (or part) in respect of which any of the exemptions in Sections 222 to 226 of the TCGA applies, without regard to the land on which that dwelling house (or part) stands. To construe the provision in any other way would be illogical. And, once one construes the provision in that way, it is clear that the "land" to which reference is made in the preamble to Section 248(1) of the TCGA is to the land, together with the dwelling-house (or part) which is situated on the land, and not simply to the dwelling-house (or part) alone. If that construction is right, then, by parity of reasoning, the reference to "land" in Section 247(1)(c) of the TCGA is not apt to include a situation where the expenditure in question has been incurred solely on constructing a building on existing land, as opposed to acquiring new land (whether or not there is a building on the new land).

152. On balance, I have decided that Mr Fell's position in relation to the Rollover Claim Issue is to be preferred notwithstanding the arguments set out in paragraph 150 above. Whilst I recognise that there is no good policy reason for limiting the relief in Section 247 of the TCGA to the acquisition of new land, it seems to me that to describe the construction of buildings on existing land as falling within the phrase "acquiring…land" would run counter to the general approach in the TCGA and to established principles of land law. When buildings are constructed on existing land, the owner of the land does not thereby acquire a new interest in land. Instead, the owner merely enhances its existing interest in the land on which the newly-constructed buildings are situated. The fact that Section 38 of the TCGA makes such a clear distinction between acquisition expenditure and enhancement expenditure tends to reinforce this conclusion, as does the fact that, in my view, the exclusion in Section 248 of the TCGA is intended to encompass both the dwelling-house (or part) and the land on which the dwelling-house (or part) is situated. Since that exclusion is the subject of a cross-reference in Section 247(1)(c) of the TCGA, logic suggests that the reference to the acquisition of land in the latter provision should be construed in a manner which is consistent with that construction of Section 248 of the TCGA.

153. I do not regard the arguments of the parties in relation to the differences between the language used in Section 247(1)(c) of the TCGA and the language used in the general rollover provisions to be determinative on this point. In other words:

(1) contrary to the submissions of Mr Gordon, I do not think that, just because the definition of "land" in Section 288 of the TCGA was in place at the time when Section 247 of the TCGA was enacted whereas that definition was not in place when the predecessor provisions to the general rollover relief code were enacted, or that ESC D22 applies in the context of the general rollover relief code but not in the context of the relief under Section 247 of the TCGA, that necessarily means that the draftsman of the latter provision intended the reference to "acquiring other land" to encompass the construction of a new building on existing land. That difference could just as easily indicate that the draftsman of the latter provision intended the relief which was conferred by the provision to be limited to the acquisition of new land (whether or not there was a building on the new land) in contrast to the general rollover relief code; but

(2) on the other hand, contrary to the submissions of Mr Fell, I do not think that, just because, in the context of the relief in Section 247 of the TCGA, there is no separate category of relief for expenditure on buildings and ESC D22 does not apply to treat enhancement expenditure as qualifying for relief, that necessarily means that the draftsman of Section 247 of the TCGA intended the relief which was conferred by the provision to be limited to the acquisition of new land (whether or not there was a building on the new land). That difference could just as easily indicate that the draftsman of Section 247 of the TCGA intended the relief which was conferred by the provision to extend to the construction of a new building on existing land in the same way as the general rollover relief code and considered that the drafting had the desired effect.

154. For the above reasons, if I had not determined the Discovery Assessment Issue in favour of the Appellant, I would have dismissed the appeal on the basis that the construction by the Appellant of the new buildings on its existing land did not amount to "acquiring other land" within the meaning of Section 247(1)(c) of the TCGA.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

155. 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 Rules. 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.

TONY BEARE
TRIBUNAL JUDGE
RELEASE DATE : 2 AUGUST 2019