[2018] UKFTT 0530 (TC)

TC06700

Appeal number: TC/2016/02522

PROCEDURE – application for specific disclosure of documents – exercise of discretion to require disclosure – rules 5(3), 16 and 27(2) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 – application granted in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

JANET ADDO **Appellant**

- and -

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

TRIBUNAL: JUDGE ASHLEY GREENBANK

Sitting in public at Taylor House, Rosebery Avenue, London on 6 June 2018

James Ramsden QC and Conrad McDonnell, counsel, instructed by Reynolds Porter Chamberlain LLP for the Appellant

Aparna Nathan, counsel, and Marika Lemos, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision relates to an application made by the appellant, Ms Janet Addo, for a direction or an order that the respondents, the Commissioners for Her Majesty's Revenue and Customs ("HMRC") produce to the Tribunal and the appellant five categories of documents listed in a schedule to the application.

2. The documents to which the application relates are referred to in a witness statement of Mr Andrew Finch, an officer of HMRC, dated 3 August 2017, which was served by HMRC as part of these proceedings. Details of the documents are set out in Appendix 1 to this decision notice. The wording in Appendix 1 follows the form of the application that has been made by the appellant.

Background

3. The appeal relates to discovery assessments made on Ms Addo under s29 of the Taxes Management Act 1970 ("TMA") for the tax years 2009-10 and 2010-11 in relation to her participation in a tax avoidance scheme, which is referred to by HMRC as a "contractor loans scheme".

4. Without getting into the detail of the scheme, it included arrangements in which an Isle of Man company, acting as the appellant's employer, provided funds to an offshore employee benefit trust which made loans to the appellant. The Isle of Man company changed its name on various occasions. At one point, it was known as Aston Management Limited and it has been referred to as "AML" in the proceedings before me. In summary, HMRC's case is that the appellant is subject to income tax on certain amounts arising from these arrangements either as employment income or under s720 or s727 of the Income Tax Act 2007 (the "transfer of assets abroad provisions").

5. The appeal has not been formally designated as a lead case, whether under rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTR") or otherwise. However, numerous other taxpayers have implemented similar planning and this case is likely to be treated, albeit informally, as a "test case" (see the decision of Judge Richards on certain procedural aspects of this appeal issued on 28 November 2016 as *Janet Addo v. Revenue and Customs Commissioners* [2016] UKFTT 0787 (TC) at [19]).

6. The appellant's grounds of appeal include whether or not the discovery assessments comply with the provisions of s29 TMA and, in particular:

> (1) whether or not a "discovery" within the meaning of s29(1) TMA was made in the appellant's case; and
>
> (2) whether the conditions in s29(5) TMA are met (it being accepted that Ms Addo's return was not careless or deliberately incorrect within the terms of s29(4) TMA).

The burden of proof on the validity of an assessment under s29 TMA falls on HMRC.

7. In addition, there is an open issue between the parties as to whether or not the appellant's grounds of appeal extend to a challenge to the validity of the discovery assessments on the grounds that her tax returns were originally filed in accordance with the practice generally prevailing at the time within s29(2) TMA. At the hearing, HMRC raised a question as to whether or not the appellant needed to apply to amend her grounds of appeal to include this ground. The issue was not argued before me and no application was made at the hearing by or on behalf of the appellant to amend her grounds of appeal. I have decided this application purely on the basis of the appellant's pleaded case under s29(1) and s29(5) and without reference to s29(2).

8. Witness statements in the substantive appeal were served in 2017. The witness statements included, for HMRC, a witness statement of Andrew John Finch, an officer of HMRC, dated 3 August 2017 and a witness statement of Lesley Jane Stopp, also an officer of HMRC, dated 11 October 2017. Mr Finch led the HMRC investigation into contractor loans schemes. Miss Stopp was the HMRC officer responsible for a team engaged to issue assessments in respect of such schemes.

9. In a letter from the appellant's solicitors to HMRC dated 31 January 2018, the appellant's solicitors made a request to HMRC for disclosure of various documents which were referred to in the witness statements (including the documents which are referred to in Mr Finch's statement and which are set out in Appendix 1).

10. A case management hearing took place on 9 February 2018. At that hearing:

(1) the Tribunal heard argument on the order of submissions at the hearing of the appeal, bearing in mind that HMRC carried the burden of proof on the issues relating to the validity of the assessments under s29 TMA;

(2) the Tribunal also considered the appellant's request for an order for disclosure of documents by HMRC, an application for which was made orally at the hearing.

11. Following the hearing, the Tribunal (Judge Richards) issued directions dated 14 February 2018. In those directions, the Tribunal directed the parties to seek to agree further directions regarding the appellant's request for disclosure of documents. The Tribunal also issued a reasoned decision on 23 February 2018 regarding the order of submissions at the substantive hearing. That decision is published as *Janet Addo v. Revenue and Customs Commissioners* [2018] UK FTT 0093 (TC).

12. The parties submitted agreed directions regarding the disclosure of documents for approval by the Tribunal on 18 April 2018. Those directions included the following at [4] to [6]:

> "4. The Respondents shall conduct a reasonable and proportionate search for the documents described in the Schedule attached to these Directions ("the Schedule") and no later than 20 April 2018 the Respondent shall either provide each such document or, where a document or category of documents described in the Schedule is not

> provided, by further witness statement(s) signed as a statement of truth:
>
> a. confirm that the search has been conducted;
>
> b. describe the extent of that search; and
>
> c. so far as relevant, confirm that there are no documents of the category described in any paragraph of the Schedule, and/or that the documents did not or do not exist.
>
> 5. Subject to Direction 6, HMRC shall send and deliver to the appellant copies of any of the documents identified in the course of the search referred to in Direction 4 above which are relevant to the present proceedings.
>
> 6. The Respondents shall not be required to disclose documents identified in the course of the search referred to in Direction 4 which are protected by privilege, confidentiality and public interest immunity, or which have been requested by the appellant but which are not relevant to the present proceedings or which have been requested but which it would be disproportionate to disclose ("the Protected Documents")."

13. The Schedule referred to in Direction 4 of the agreed directions included (amongst other documents) the documents set out in Appendix 1 to this decision and which are the subject of the application for a direction or an order for disclosure that has been made to the Tribunal.

14. On 23 April 2018, HMRC Solicitor's Office wrote to the appellant's solicitors. The letter enclosed documents uncovered by the searches which HMRC did not claim to be "Protected Documents" as defined in the agreed directions. It also enclosed four witness statements, including statements from Mr Finch and Miss Stopp, describing the scope of the searches that had been undertaken and identifying documents set out in the Schedule to the agreed directions that did not exist.

15. In that letter, HMRC claimed that the documents set out in Appendix 1 to this decision are "Protected Documents" and declined to provide them on that basis. HMRC did not claim privilege or public immunity in respect of them. HMRC described its reasons for resisting disclosure of each category of documents in identical terms:

> "The purported relevance of such a document to an issue that the Tribunal has to determine is unknown to the Respondents, the Appellants having elected not to provide such reasons. Such documents are considered to be confidential and sensitive. In all the circumstances of this appeal, the disclosure of such documents would be a disproportionate exercise of case management powers."

16. On 4 May 2018, the appellant made an application for a direction or an order for disclosure of the documents set out in Appendix 1 to this decision notice.

The relevant documents

17. The relevant documents or categories of documents are referred to in the witness statement of Mr Finch dated 3 August 2017. That witness statement is expressed to be given by Mr Finch "in support of HMRC's case on raising an assessment under [s29 TMA]".

18. In his statement, Mr Finch gives evidence surrounding the conduct of HMRC's investigation into contractor loans schemes. Mr Finch describes himself as HMRC's "technical consultant in respect of contractor loans schemes" and "project lead" for HMRC's investigation into contractor loans schemes from November 2011 onwards. In short, Mr Finch was in charge, or jointly in charge, day to day operations in relation to HMRC's investigation into contractor loans schemes at all material times.

19. The witness statement focuses upon the circumstances in which HMRC developed its argument that amounts arising under the contractor loans schemes may be subject to income tax either as employment income or, more particularly, under the transfer of assets abroad provisions. It also contains Mr Finch's evidence of the development of HMRC's response to such schemes and the manner in which HMRC began opening enquiries and raising assessments in relation to them.

20. In the paragraphs below, I have sought to identify the context in which Mr Finch refers to the various documents in his witness statement. In doing so, I have referred to relevant passages from his witness statement. These are, of course, matters of evidence which will need to be tested at the substantive hearing.

The paragraph 24 documents

21. The first request relates to paragraph 24 of the witness statement, which reads as follows:

> "24. As a matter of day to day practice, Specialist Investigations teams were required to consult with a specialist ToAA team on any case that involved those provisions before a final conclusion as to their applicability could be formed. All other parts of HMRC apart from the High Net Worth Unit were and are required to refer all potential ToAA issues to the specialist team. These rules were regarded as complex provisions which were not applicable to the majority of the work being undertaken by the SI teams. In that sense I regarded them as a specialist area of Tax law. From my conversations with Mr Griffin it was clear he regarded the ToAA provisions as a strong possibility to challenge the [contractor loans schemes]. I felt that further input from the specialist team was required to properly consider the strength of the argument."

22. In her application, the appellant requests "copies of all material relating to consultations between the Specialist Investigations teams and the specialist ToAA team" referred to in paragraph 24 of the witness statement "in late 2010 and early 2011", which are relevant to the contractor loans schemes. The references in the witness statement and in the application to the "ToAA team" are references to the

group of technical specialists within HMRC handling issues relating to the transfer of assets abroad provisions. I have used the same terminology in this decision notice.

23. At this stage in the statement, Mr Finch is referring to his discussions with a member of the HMRC investigation team, Mr Griffin, in the period shortly after Mr Finch took over responsibility for the team. From the chronology of the events described in Mr Finch's witness statement, my understanding is that these discussions must have taken place in late 2011 and early 2012.

24. This request for disclosure requires a little explanation. At first sight, the paragraph does not appear to refer to any documents at all. As Mr Finch noted in his supplementary witness statement dated 20 April 2018, the reference in this paragraph to "discussions between the between the Specialist Investigations teams and the specialist ToAA team" is a reference to HMRC's internal protocols which require the specialist investigation teams to refer relevant matters to the ToAA team.

25. Mr Ramsden's explanation is that the application refers to the matters which are discussed in immediately following the paragraphs of Mr Finch's statement, principally paragraphs 26 to 28. These include: the cases of the three individuals which are mentioned in the extract from paragraph 28, which I have set out at [27] below; the discussion with counsel in relation to the cases of taxpayers whose cases were the basis for the litigation in *Philip Boyle v Revenue and Customs Commissioners* [2013] UKFTT 723 (TC) ("*Boyle*") (in paragraph 26 of the statement); and the meeting with a tax agent regarding the treatment of various taxpayers who had entered into contractor loans schemes (in paragraph 27 of the statement). He says that the request is for documents relating to consultations with the ToAA team in relation to those three matters. His request also extends to any other similar consultations to which Mr Finch has not referred or where those three matters depended on another case. In summary, he says that, given Mr Finch's evidence in paragraph 24 regarding the need for the specialist investigation teams to consult the ToAA team in relation to such matters, the ToAA must have been consulted in respect of these matters.

26. I have referred to the documents covered by this request as "the paragraph 24 documents".

The paragraph 28 documents

27. The next category of documents is referred to in paragraph 28 of Mr Finch's witness statement. It reads as follows:

> "28. Following on from my conversations and discussions with the Anti-Avoidance Group, on 2 March 2012 Mr Griffin had sought advice from the ToAA specialists, who were based at the time within a small team in HMRC's Specialist Personal Tax directorate. In particular, he sought advice in respect of 3 individuals who had taken part in [contractor loans schemes] (none being AML). The specialists responded on 4 April 2012 confirming that they considered there was a

> prima facie case for the use of these provisions in relation to the taxpayers."

28. In its application, the appellant requests disclosure of copies of any material relating to the discussions referred to in this paragraph and the response of the relevant specialists of 4 April 2012. In addition to evidence of Mr Finch's discussions with the Anti-Avoidance Group, this material relates to advice sought by Mr Griffin from the ToAA team concerning three other individuals who had taken part in contractor loans schemes, none of which were schemes in which AML was involved. The response of 4 April 2012 referred to in the request is a response from the ToAA team confirming that they considered that there was a prima facie case for the use of the transfer of asset abroad provisions in these cases.

29. I have referred to the documents covered by this request as "the paragraph 28 documents".

The paragraph 31 document

30. The next document is referred to in paragraph 31 of Mr Finch's witness statement. Paragraph 31 states:

> "31. In April 2012, as part of a wider restructure where various themes of EBT avoidance were to be jointly led across our Local Compliance and Specialist Investigations directorates, Ms Clubb joined me (from Local Compliance) as joint Project Leaders. Also at this time, HMRC's Anti-Avoidance Board decided to accelerate work on the larger mass-market schemes, and asked an independent team to review each area of work. The remit of the Independent Review Panel ("IRP") was to independently consider the operations, the logistics and the technical arguments to challenge the [contractor loans schemes], and provide recommendations on how the work in challenging them should be conducted with a view to efficient resolution. After consideration the IRP proposed a three step approach to recover the tax due. Step one was to protect the revenue at stake, which involved opening enquiries and issuing assessments for the individual taxpayers that were engaged with the schemes we were dealing with. The second step was to publish a settlement opportunity and try to settle as many of the [contractor loan scheme] cases as possible within HMRC's settlement policy and guidance. The third step of the proposal was to respond to any litigation that occurred subsequent to the first two steps. Ms Clubb and I were available to assist the IRP where necessary and were provided with a first draft of the report on which we were invited to comment. The panel also sought input from specialist teams in the department where they felt is necessary to do so, such as discussing with employment income and ToAA specialists."

31. In its application, the appellant requests disclosure of the report from the independent review panel referred to in this paragraph, which, according to Mr Finch, reported to HMRC on "the operations, the logistics and the technical arguments to challenge the [contractor loans schemes] and to provide recommendations on how the work in challenging them should be conducted with a view to efficient resolution".

The report of this panel, according to Mr Finch's evidence, was instrumental in the development by HMRC of a handling strategy to challenge contractor loans schemes to which he refers later in this statement.

32. I have referred to the document covered by this request as "the paragraph 31 document".

The paragraph 32 documents

33. The next request relates to paragraph 32 of Mr Finch's witness statement. In this paragraph , Mr Finch states:

> "32. A handling strategy for the opening of enquiries and the raising of discovery assessments was then formally adopted after discussions of the IRP proposals with HMRC's senior leaders and stakeholders. This strategy anticipated the opening of enquiries under s9A TMA 1970 and the making of assessments under s29 TMA 1970 in respect of users of [contractor loans schemes], including the AML scheme, where an insufficiency of tax was found. Across all of the schemes there were several thousand enquiries to open and assessments to raise. Ms Clubb and I were therefore offered the use of a team to initiate the agreed strategy and start the work. On 27 September 2012, I attended by way of telephone a meeting to discuss what resource would be required and where it would come from. I asked for a team that would be available for the long term as I was of the opinion that the work would most likely last for over a year if not longer. The board agreed to provide a team to us to use and agreed that they would be a long term appointed resource. This was confirmed several weeks later and the team in question was the team led by Miss Lesley Stopp. This was a "personal tax compliance" team based in Bedford. Miss Stopp is an experienced officer of HMRC and she was already familiar with avoidance work, including the raising of assessments and the opening of enquiries. This was the first time I had worked with Miss Stopp. The immediate task was to open over 4000 enquiries for 2010/11 where we were still within the 12 month s9A deadline to do so. Several hundred of these were opened by another officer while Miss Stopp's team were preparing to start our work."

34. This is a request for copies of notes and other documents relating to the handling strategy that was adopted by the case of HMRC following the independent review panel report. It is this handling strategy which, according to Mr Finch, leads to the appointment of Miss Stopp and her team to undertake the work of raising assessments and opening enquiries.

35. I have referred to the documents covered by this request as "the paragraph 32 documents".

The paragraph 36 documents

36. The final category of documents is referred to in paragraph 36(b) of Mr Finch's witness statement. Paragraph 36(b) reads as follows:

> "b. On 31 August 2012, Ms Clubb and I discussed the various scenarios - which by then had been developed but which still were not specific to any one scheme - with the then HMRC Discovery specialist. Our discussion also covered other hypothetical points which, in our view, could have arisen in respect of discovery assessments made on users of [contractor loans schemes], including whether or not s29(4) and/or (5) TMA 1970 were met."

37. This is a request for disclosure of notes of a discussion between Ms Clubb and Mr Finch and the HMRC discovery specialists on 31 August 2012. As can be seen from the extract from paragraph 31 of Mr Finch's statement at [30] above, Ms Clubb was, at this time, the joint project leader with Mr Finch in relation to the investigation into contractor loans schemes. According to Mr Finch's statement, the discussion would appear to concern various factual scenarios developed by Ms Clubb designed to test whether or not a discovery assessment could be made in each of them. It would appear from Mr Finch's statement that these scenarios referred to contractor loans schemes in general and were not focussing particularly on users of the AML scheme or specifically on the facts of the appellant's case, but the scenarios were designed to test whether or not discovery assessments could be made in individual cases.

38. I have referred to the documents covered by this request as "the paragraph 36 documents".

The parties' submissions

The appellant's submissions

39. Mr Ramsden makes the following submissions on behalf of Ms Addo.

40. The appellant should be entitled to disclosure of all of the relevant material under rule 27(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTR"). The documents are documents on which HMRC "intends to rely" in the proceedings within FTR rule 27(2)(b) and in accordance with FTR rule 27(3) the appellant should be entitled to inspect or take copies of those documents. The appellant does not require the Tribunal to exercise any discretion in her favour.

(1) The documents are all referred to directly or indirectly in the witness statement of Mr Finch. The witness statement is expressed to be in support of HMRC's case for assessment under s29 TMA and so the material must be material on which HMRC is intending to rely.

(2) Mr Finch will need to refer to the material in his evidence. He will be giving evidence of his opinion of the meaning of documents and correspondence in 2012. If the appellant does not have access to the material, she will not be in a position to test that evidence and the Tribunal will not be in a position to determine whether or not Mr Finch's description of the documents or his understanding of them is correct.

(3) The documents are important as evidence of the state of mind of Mr Finch and the collective knowledge of HMRC's officers at the relevant time. They

may demonstrate the point at which the relevant HMRC officers dealing with the case (Mr Finch, Miss Stopp or their teams) made a "discovery" for the purpose of s29(1) TMA. They may be relevant to determining the point at which the hypothetical HMRC officer should have been aware of an insufficiency of tax for the purposes of the condition in s29(5); the level of awareness of the hypothetical officer at the relevant time must be in part informed by the actual level of knowledge of HMRC officers at the time.

41. Even if the appellant is not entitled to disclosure under FTR rule 27(2)(b), the Tribunal should exercise its discretion to direct or order disclosure of the material under FTR rule 5(3) or FTR rule 16.

(1) The key principle that the Tribunal must bear in mind when deciding how to exercise its discretion to direct or order disclosure in accordance with the overriding objective to deal with cases fairly and justly (FTR rule 2(1)) is whether or not the document in question is relevant to the proceedings (Sales J in *Revenue and Customs Commissioners v Ingenious Games LLP and others* [2014] UKUT 0062 (TCC) ("*Ingenious*")). For the reasons given above, the documents are relevant to the issues in these proceedings.

(2) There may be reasons why, notwithstanding the relevance of the document to the proceedings, the Tribunal might refuse to direct or order disclosure. Those reasons include confidentiality, privilege, public interest immunity or where the obligation imposed on the other party might be disproportionate given the nature of the proceedings. None of those factors apply here: HMRC has not made any claim for public interest immunity or privilege; the Tribunal could deal with questions of confidentiality by permitting HMRC to redact relevant documents; the search for any documents cannot be "disproportionate" as Mr Finch must have identified the material so that he could refer to it for the purpose of preparing his witness statement.

(3) HMRC have raised an argument that the documents are "sensitive". This is not a ground for non-disclosure.

(4) Any disclosure must relate to the "transaction as a whole". It is not permissible for a party to make partial disclosure (Mann J in *Fulham Leisure Holdings Limited v Nicholson Graham & Jones* [2006] EWHC 158 (Ch)).

42. In relation to the specific requests contained in the application, Mr Ramsden makes the following points:

(1) The paragraph 24 documents relate to conversations between the ToAA team and the Specialist Investigations teams. It is improbable that these discussions were not evidenced in writing in some form. Mr Finch justifies the reference to the ToAA team on the basis that the transfer of assets abroad provisions are complex provisions. The reference of issues to the ToAA team is relevant to his evidence. In consideration of the issues under s29(1) and s29(5), the evidence is directly relevant to Mr Finch's state of mind at the time. It is also directly relevant to what he believed was Mr Griffin's view at the time.

(2) The paragraph 28 documents provide evidence of the discussions with the Anti-Avoidance Group and the request for and advice from the ToAA team referred to in that paragraph. The documents are clearly relevant to whether or not a discovery is made in this case. Mr Finch refers in paragraph 29 of his witness statement to the fact that, although the advice related to three other taxpayers, it also applied "in principle across all [contractor loans schemes]". It is clear from statements in the witness statement that the documents are relevant to Mr Finch's state of mind in April 2012 and without the documentary evidence, it is not possible to test Mr Finch's assertion as to his state of mind at that time. The request is not disproportionate. Mr Finch should be able to identify these documents easily. They are referred to in his witness statement. If and to the extent that the disclosure would involve disclosure of information relating to other taxpayers, which might be regarded as confidential, those details could be redacted.

(3) The paragraph 31 document is a single document, the independent review panel report. The report is clearly relevant. Mr Finch refers to the conclusions from the report in his statement. The witness statement refers to "technical arguments" but it does not contain any detail of what those arguments might be. Without the evidence, it is not possible to test this evidence. The request cannot be disproportionate. It is a request for a single document that is identified in the witness statement.

(4) The paragraph 32 documents relate to the handling strategy adopted by HMRC. Mr Finch refers to this strategy as being "formally adopted". It is inconceivable that it was not written down. It is clearly relevant to the process of issuing discovery assessments for contractor loans schemes. There is a direct reference to the AML schemes. The appellant seeks disclosure of the strategy together with any correspondence that would help to explain it. If the request for other correspondence might be regarded as disproportionate, the reasons need to be explained. But even if that were the case, it cannot apply to the strategy itself.

(5) The paragraph 36 documents relate to a meeting on 31 August 2012 involving Mr Finch, Ms Clubb and the HMRC discovery specialists. There is direct reference to s29(5). It is clear that this is material relied upon by HMRC discharge of the burden under s29. It is directly relevant to what happened in the team in Bedford, led by Miss Stopp, in the two year period during which the assessments were being made.

HMRC's submissions

43. For HMRC, Ms Nathan puts her case slightly differently from the manner in which she put her case in her skeleton argument. Her main submissions are as follows.

44. The documents and material that are requested in the application are not evidence on which HMRC relies. The relevant test in FTR rule 27(2)(b) is whether or not HMRC intends to rely on the evidence. The documents which HMRC has disclosed and Mr Finch's witness statement and evidence are sufficient to discharge the burden

on HMRC under s29(1) or s29(5) TMA. HMRC does not need to rely on the other documents.

45. The appellant has not explained how the documents and material for which it has applied for an order are relevant to the appeal.

(1) The test in s29(1) focusses on the relevant HMRC officer. The focus is therefore on the particular officer concerned (see for example *Anderson v Revenue and Customs Commissioners* [2018] UKUT 159 (TCC) ("*Anderson*") at [24]). The particular officer in this case is Miss Stopp not Mr Finch. In applying s29(1), it is necessary to identify the particular return and the insufficiency in question. The only person who considered the appellant's return and the insufficiency in question was Miss Stopp, not Mr Finch. It is Miss Stopp's evidence on that issue that is critical. Evidence of internal discussions between other HMRC officers and the state of HMRC's collective thinking at any one time is irrelevant. It is Miss Stopp's view that matters.

(2) Section 29(5) TMA focusses on the awareness of a hypothetical HMRC officer. However, the hypothetical officer's awareness is determined by reference to information provided by the taxpayer as referred to in s29(6). This is an exhaustive list (see *Langham v. Veltema* [2004] EWCA Civ 193, [2004] STC 544 per Auld LJ at [36]). None of the documents in question emanated from Ms Addo. They cannot therefore be relevant to the question as to whether the condition in s29(5) is satisfied. The evidence of Mr Finch and Miss Stopp is irrelevant to this question. Once again, evidence of the internal discussions between HMRC officers is also irrelevant.

46. In considering whether to exercise its discretion to order disclosure, the Tribunal must have regard to whether or not it would be disproportionate to impose that order. The Tribunal must take into account all of the relevant circumstances. These will include the relevance of the documents to the proceedings (i.e. whether or not the documents are probative of an issue in the proceedings); the extent of the disclosure already made by the parties; the cost to the party that is subject to the order of meeting its requirements; the probative value of the documents that are requested; and the sensitivity of the documents that are requested.

(1) HMRC has conducted an extensive search. It has given a clear statement that it has disclosed all of the documents that relate to the appellant.

(2) Further searches are not justified. The appellant's request would extend the search to other officers who have not been involved in the appellant's case. That would be disproportionate.

(3) The sensitivity of the documents is a relevant issue. It is part of the consideration of the question of proportionality. The documents are sensitive. They relate to the internal operations of HMRC whilst it was considering common issues relevant to this type of scheme in general, or issues relevant to this scheme in general rather than issues relating to this particular taxpayer. There need to be good reasons for disclosure of this type of material. There is no good reason in this case. If the order is made, there is material risk of

prejudice to HMRC and to HMRC's approach in anti-avoidance cases (*Prudential Insurance Company Limited v. Revenue and Customs Commissioners* (2006) VAT Tribunal Decision No. 19675 ("*Prudential*").

(4) Although, as a general rule, it may be appropriate for the other party to be permitted to inspect documents that are referred to in a witness statement served by a party to proceedings, the matter should remain within the discretion of the court or tribunal. Where confidentiality and sensitivity are an issue, the question for the court or tribunal is whether or not it is necessary to order disclosure of the documents in order to dispose of the proceedings fairly and justly (*Blue Holdings (1) Pte Limited v National Crime Agency* [2016] EWCA Civ 760 ("*Abacha*") at [28] – [31]).

47. In relation to the specific requests made in the application, Ms Nathan makes the following points:

(1) In relation to the paragraph 24 documents, Ms Nathan reiterates the response set out in HMRC's letter of 23 April 2018. Furthermore she says the request is disproportionate. The documents in question concern matters which do not directly effect the appellant's case.

(2) She makes similar points in relation to the paragraph 28 documents.

(3) In relation to the paragraph 31 document, Ms Nathan again makes similar points. In the case of this report, however, she adds that the independent review panel report is clearly a document that relates to "issues governance". She contrasts "issues governance" with "case governance" which, she says, involves tax analysis applicable to the cases of individual taxpayers. It would be disproportionate to order the disclosure of documents dealing with issues governance, which do not directly affect the appellant.

(4) The paragraph 32 documents relate to internal HMRC discussions and thought processes about issues usually at the level of the schemes in question. Some of these schemes are not the same as the AML scheme. The documents relate to "issues governance" and do not directly affect the appellant. It would be disproportionate to direct their disclosure in this case.

(5) The paragraph 36 documents again do not directly affect the appellant. They do not relate to the discovery made by Miss Stopp.

Discussion

The Tribunal rules governing disclosure of documents

48. The FTRs contain various provisions regarding the disclosure of documents. In complex and standard cases, subject to any direction to the contrary, each party is required to advise the other of the documents on which that party intends to rely or produce in proceedings and, except in the case of privileged documents, to permit the other party to inspect and take copies of them. FTR rule 27 provides:

27.— Further steps in a Standard or Complex case

(1) This rule applies to Standard and Complex cases.

(2) Subject to any direction to the contrary, within 42 days after the date the respondent sent the statement of case (or, where there is more than one respondent, the date of the final statement of case) each party must send or deliver to the Tribunal and to each other party a list of documents—

(a) of which the party providing the list has possession, the right to possession, or the right to take copies; and

(b) which the party providing the list intends to rely upon or produce in the proceedings.

(3) A party which has provided a list of documents under paragraph (2) must allow each other party to inspect or take copies of the documents on the list (except any documents which are privileged).

49. On its face, this obligation is relatively limited. It falls far short of "standard disclosure" under the Civil Procedure Rules ("CPR"). There is no obligation, for example, under FTR rule 27, on a party to proceedings before the Tribunal to disclose documents which are prejudicial to its own case. This is in contrast to CPR rule 31.6 which expressly requires, in CPR rule 31.6(b)(i), a party to disclose such documents. CPR rule 31.6 provides:

31.6 Standard disclosure—what documents are to be disclosed?

Standard disclosure requires a party to disclose only–

(a) the documents on which he relies; and

(b) the documents which–

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction.

50. Furthermore, the CPRs make specific provision for disclosure of documents that are referred to in statements of case, witness statements and affidavits. CPR rule 31.14 provides:

31.14 Documents referred to in statements of case etc.

(1) A party may inspect a document mentioned in–

(a) a statement of case;

(b) a witness statement;

(c) a witness summary; or

(d) an affidavit(GL).

> (2) Subject to rule 35.10(4), a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed in the proceedings.

51. There is no express requirement for such disclosure in FTR rule 27. However, the FTRs do permit the Tribunal to make orders and directions which require a party to disclose documents. In particular, FTR rule 16 provides, so far as relevant:

> **16.— Summoning or citation of witnesses and orders to answer questions or produce documents**
>
> (1) On the application of a party or on its own initiative, the Tribunal may—
>
> (a) … ;
>
> (b) order any person to … produce any documents in that person's possession or control which relate to any issue in the proceedings.
>
> (2) …
>
> (3) No person may be compelled to … produce any document that the person could not be compelled to give or produce on a trial of an action in a court of law in the part of the United Kingdom where the proceedings are due to be determined.
>
> (4) A person who receives [an]… order may apply to the Tribunal for it to be varied or set aside if they did not have an opportunity to object to it before it was made or issued.
>
> (5) A person making an application under paragraph (4) must do so as soon as reasonably practicable after receiving notice of the summons, citation or order.
>
> (6) [An] … order under this rule must—
>
> (a) state that the person on whom the requirement is imposed may apply to the Tribunal to vary or set aside the summons, citation or order, if they did not have an opportunity to object to it before it was made or issued; and
>
> (b) state the consequences of failure to comply with the … order.

FTR rule 5(3) also provides:

> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
>
> (a) …
>
> (b) …;
>
> (c) …;
>
> (d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;
>
> …

52. The Tribunal therefore has a discretion to order, under FTR rule 16, or direct, under FTR rule 5(3)(d), that any party produce a document to the Tribunal and/or another party.

Disclosure under FTR rule 27

53. I will deal first with the extent of disclosure required under FTR rule 27.

54. As I have mentioned above, Mr Ramsden on behalf of Ms Addo submitted that the documents listed in Appendix 1 are documents referred to in a witness statement and so are documents on which HMRC "intends to rely" at the hearing. On that basis, he says Ms Addo should be entitled to inspect and take copies of the documents as of right under FTR rule 27 without the need for the Tribunal to exercise any discretion in the making of an order under FTR rule 16 or a direction under FTR rule 5(3)(d).

55. Ms Nathan on the other hand submits that the level of disclosure under FTR rule 27 is determined simply by reference to HMRC's intention. HMRC intends to rely on the evidence of the witness and does not intend to or need to rely on or produce the documents at the hearing. So they are not within the scope of the disclosure required by FTR rule 27.

56. On this point, I agree Ms Nathan. As I have described above, the wording of FTR rule 27 suggests that the level of disclosure that is required by the rule is relatively limited and, for example, falls well short of standard disclosure under the CPRs. FTR rule 27 provides the default level of disclosure in standard and complex cases. It would appear that the rule is designed for the majority of cases before the Tribunal in which the burden is on the appellant and HMRC will have obtained the vast majority of the evidence on which it intends to rely from the appellant as part of the enquiry process.

57. Under FTR rule 27, it is open to a party to decide the documents on which it intends to rely or to produce at the hearing whether to support its own case or to disprove the case as put by the other party. If the relevant party chooses not to produce a particular document to which a witness refers that may well reduce the value of the evidence given by the witness and affect the strength of that party's case overall. That is a matter for the Tribunal to assess and is a risk that the relevant party takes. While I accept Mr Ramsden's point that, if it is read in this way, the effect of the rule is that the level of disclosure under rule 27 is left largely in the hands of the disclosing party, in my view, on its terms, rule 27 does not require a party to disclose any other documents.

58. That does not mean, of course, that that is the level of disclosure that a party ought to make. All parties are under a duty "to help the Tribunal to further the overriding objective" to deal with cases fairly and justly (FTR rule 2(4)). This obligation must extend to the level of disclosure made by the parties to other parties and to the Tribunal. However, if the level of disclosure made by a party under rule 27, whilst abiding by the strict terms of the rule falls short of the level that would be required to further the overriding objective, that is a matter that can be addressed by the making

of orders or directions under rule 16 or rule 5(3)(d) whether on the application of the other party or by the Tribunal acting on its own initiative.

Disclosure under FTR rule 5(3)(d) or FTR rule 16

59. This leads me to the principles which should govern the exercise of discretion by the Tribunal to order or direct the disclosure of documents under FTR rules 16 or 5(3)(d).

60. As a starting point, given the existence of the requirement to make disclosure of documents in FTR rule 27, it must be the case that the discretion of the Tribunal extends beyond ordering the disclosure of documents on which a party intends to rely or which a party intends to produce in proceedings. However, the question remains: to what principles should the Tribunal have regard when exercising that discretion?

61. In this context, I was referred by the parties to the decision of Sales J, as he then was, in *Ingenious*. In that case, Sales J was considering an appeal by HMRC against an order of the tribunal judge, inter alia, dismissing HMRC's applications for disclosure of documents by the taxpayer (Ingenious Games) and certain third party disclosure orders. Sales J allowed HMRC's appeal and said this at [67] and [68]:

> "**67** In my judgment, the most important point on the present interlocutory appeal is that in order for the main appeal to be determined fairly and justly, in accordance with the overriding objective, HMRC should have an equal opportunity to review the further relevant documents held by ITP, IFP2 and Ingenious Games which they have not yet disclosed to HMRC and which they do not wish themselves to rely upon in the appeal. Put another way, it would be unfair and unjust for ITP, IFP2 and Ingenious Games to be able to suppress or keep from the view of HMRC and the FTT relevant documents which may be harmful to their case, as a consequence of the limitation on the extent of HMRC's inspection of documents during the investigatory stage as a result of a sensible co-operative approach to the conduct of the investigation which was agreed as being in the interests of both sides. Even allowing for some weight to be attached to the interest of avoiding delay by postponing the hearing of the appeal, scheduled for March 2014, the Judge's decision was not compatible with a proper consideration of the issues in the appeal (see rule 2(2)(e) of the Rules, set out above). In the particular circumstances of this case, I consider that the Judge fell into error and reached a conclusion which was clearly wrong.
>
> **68** I also consider, with respect, that the Judge erred in law in the approach he formulated in paras. [14] and [15] of the decision. In my view, the Judge was wrong to hold:
>
> (i) in para. [14], that the Rules "are not intended to enable one party to make generalised requests for information from another party." This was an unduly narrow approach. As rule 2 makes clear, the Rules are intended to be interpreted and applied so as to enable the FTT "to deal with cases fairly and justly". If the circumstances of a case are such

that comparatively wide or general orders for disclosure are necessary to enable the FTT to deal with that case fairly and justly, the Rules are intended to enable a party to make such generalised requests for disclosure. As explained above, this will be rare in tax cases, because usually HMRC will have seen the full documentation held by a taxpayer during the investigation stage, and the default disclosure provision in rule 27 of the Rules reflects this. But in the unusual circumstances of this case, the fair determination of the appeals did require the FTT to entertain and allow the request for further disclosure made by HMRC;

(ii) in para. [14], that HMRC's request for information was too general and, in para. [15], that HMRC's request was "a fishing expedition". HMRC's request for documents was, in my view, properly formulated by reference to the Statements of Case for the appellants served in early August 2013. HMRC had to ask for disclosure of documents in relatively general terms, because they did not know what documents relevant to the issues pleaded in the Statements of Case the appellant partnerships might hold. They asked only for disclosure of documents relevant to the pleaded cases of ITP, IFP2 and Ingenious Games which they had not yet been shown. I do not consider that it is appropriate to characterise this as a fishing expedition. It is a request for disclosure of documents which in accordance with normal standards of justice and fairness would ordinarily be expected to be given in litigation of this complexity and value. There was not time at the hearing before me to go through HMRC's requests one by one to see if they were too wide, and it was in any event proposed that HMRC should review and so far as possible refine or reformulate their requests for disclosure to take account of the lengthy witness statements recently served for the appellant partnerships. Although Mr Milne submitted that some of the requests were too broadly formulated by usual standards of disclosure in civil litigation, he accepted that at least some of them were not. I have read the requests and would comment, on a provisional basis and noting that I have not had the benefit of detailed argument item by item, that they appear to me to be properly formulated by reference to the Statements of Case and the issues arising on the appeals. They did not strike me as unduly or improperly wide in any respect. I comment below on the one area where I did hear substantive argument (disclosure in relation to projects considered but not taken forward or commenced but abandoned before completion); and

(iii) in para. [15], that the requirement to disclose further documents would be an additional burden on ITP, IFP2 and Ingenious Games "that could only be justified by some special circumstance" and that there was no such circumstance in this case. I respectfully consider that in putting the matter in this way the Judge departed too far from the basic approach which the FTT is required to adopt, namely to ask in accordance with rule 2 what is required to enable it to deal with a case "justly and fairly". It is fair to say that where the FTT has issued directions for trial a good reason within the overriding objective will need to be shown to justify a departure from or supplementation of those directions; but I think that to use the phrase "special circumstance" as the Judge used it in the context of his decision

> indicates that he considered that some higher threshold than this had to be surmounted by HMRC. Even if one takes the phrase used by the Judge to mean no more than the proper threshold, in my opinion he misapplied the proper test and erred in law by holding that HMRC could not satisfy it. According to the usual standards of justice in heavy civil litigation, such as these proceedings, it is just and fair for a party to see documents held by its opponent relevant to that opponent's pleaded case, in order to see whether they undermine that case or support the party's own case in opposition. The Judge was wrong to characterise this in pejorative terms as a "fishing expedition" and so discount it as a factor. The need to do justice between the parties was a ground which gave good and compelling reason to order the further disclosure sought by HMRC, or (using the Judge's phrase) a "special circumstance" requiring such disclosure."

62. From that passage, it is clear that the guiding principle for the Tribunal in exercising its powers to order or direct the disclosure of documents is to ask what is required to enable it to deal with the case "fairly and justly", in accordance with the overriding objective in FTR rule 2(1).

63. It is also clear that, subject to the matters to which I refer below, it should ordinarily be regarded as fair and just for a party to be entitled to review documents held by the other party or to which the other party has access which are relevant to the issues in the case, even if those documents are not documents on which the other party itself intends to rely (and so the documents are not within FTR rule 27) and even if they are detrimental to the other party's case.

64. In this context, I also agree with comments of Judge Richards in *Tower Bridge GP Limited v Revenue and Customs Commissioners* [2016] UKFTT 0054 (at [23]) that the concept of "relevance" should not set "an unduly high bar" and should be taken, in principle, to include documents or information that might advance or hinder a party's case or which may lead to "a train of enquiry" that might advance or hinder a party's case.

65. Furthermore, in my view, it must ordinarily be fair and just for a party to be entitled to review documents that are referred to in the other party's pleaded case or in witness statements served by that other party in support of its case. As I have mentioned, this is a requirement of CPR rule 31.14, and, whilst I accept that the CPRs are not directly applicable in proceedings before the Tribunal, that rule simply reflects the fact that basic fairness requires that the parties are placed on an equal footing as regards their opportunities to review the evidence and to test it before the Tribunal. There are statements to this effect (once again, in the context of the CPRs) in the judgment of Gross LJ in the Court of Appeal in *Abacha* (at [29]) to which I was referred by the parties and which I have set out below at [75].

66. That having been said, it does not follow that just because a document may be relevant or may be referred to in a witness statement served on behalf of one party that the other party is entitled as of right to review it. The Tribunal retains discretion in the exercise of its powers in accordance with the overriding objective.

67. The FTRs in rule 2(2) set out some examples of the factors that the Tribunal should take into account in the exercise of its powers to deal with the case fairly and justly. These include "dealing with the case in a ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and resources of the parties" (rule 2(2)(a)). The application of the overriding objective therefore encompasses a concept of proportionality and it will be appropriate to consider, in this context, whether an order or direction for disclosure would be disproportionate in terms of other factors such as the nature and importance of the proceedings, the burden imposed upon the disclosing party and the likely relevance of the documents or information requested to the issues in the case.

68. In this context, it is also accepted that that the Tribunal should in considering the exercise of its powers have regard to whether the documents are likely to be confidential in nature. This issue was the subject of submissions by the parties in this case and I have addressed it separately at [71] to [82] below.

69. There are also clearly accepted valid objections to disclosure. The Tribunal will respect valid claims for privilege or public interest immunity in relation to relevant documents.

70. At this point, I should comment briefly on the relevance of the CPRs. The CPRs do not directly apply to proceedings in the Tribunal. However, although I was not guided to any authority on the point, it does seem to me that the CPRs provide useful guidance as to the extent of disclosure that should be ordered by the Tribunal having due regard, of course, to the nature of the proceedings before it.

Should the Tribunal have regard to the "sensitivity" of the documents when considering whether to order or direct disclosure?

71. Ms Nathan made various submissions concerning the confidentiality or sensitivity of the documents for which disclosure was requested and the extent to which the Tribunal should take into account such issues in the exercise of its discretion to order or direct the disclosure of documents or information. I will deal with that issue now.

72. In summary, Ms Nathan made the following submissions:

(1) even where a document was regarded as relevant to an issue in the proceedings or was referred to in a witness statement, the court or tribunal retains a discretion as to whether to order disclosure;

(2) in exercising that discretion, the sensitivity of the material should be a factor which the court or tribunal takes into account when assessing the proportionality of ordering any disclosure;

(3) the documents in this case were sensitive in that they referred to the operations of HMRC at a scheme level rather than in relation to the assessment made on this particular taxpayer. The Tribunal would need to identify a good reason for ordering disclosure before granting such an order in relation to the

publication of documents which might be prejudicial to HMRC's investigation of avoidance cases.

73. In response Mr Ramsden noted that Ms Nathan did not seek to argue that the documents in question were confidential in terms of their being subject to any duty of confidentiality to a third party. She simply argued that the documents were "sensitive". Ms Nathan's argument sought to elevate sensitivity of the material to a ground for non-disclosure. The sensitive nature of documents was not a ground for non-disclosure. If and to the extent that the documents did contain confidential information – for example, details of other taxpayers – the Tribunal could address this issue by permitting HMRC to redact the relevant information.

74. I was referred by Ms Nathan to the decision of the Court of Appeal in *Abacha*. That case involved an appeal against the refusal by the High Court of an application to inspect a request for mutual legal assistance made by the US Department of Justice to the National Crime Agency in the context of an order prohibiting the dealing with or disposal of certain assets within the UK. The request for assistance itself had been referred to in a witness statement and so fell within the terms of CPR Rule 31.14 to which I have referred to above.

75. Having decided that the relevant documents were "mentioned" in the relevant witness statement (and so, on its face, CPR rule 31.14 applied), Gross LJ turned to the question of whether or not under the terms of the CPR's, the appellant had the right to inspect the documents. He said this at [28] - [31].

> "**28** First, the mere fact that a document is "mentioned" in one of the documents specified in CPR r. 31.14(1) does not automatically and without more entitle the other party to inspect it. The Court retains a discretionary jurisdiction to refuse inspection.
>
> **29** Secondly, the general rule is clear. Ordinarily, if under CPR r. 31.14(1) a document is "mentioned", inter alia, in a witness statement, the other party has a right to inspect it. The reason was well-stated by Nourse LJ in *Rafidain Bank v Agom Sugar* [1987] 1 WLR 1606, at pp. 1610–1611:
>
> > "The party who refers to the documents does so by choice, usually because they are either an essential part of his cause of action or defence or of significant probative value to him. …the material provisions were evidently intended to give the other party the same advantage as if the documents referred to had been fully set out in the pleadings…"
>
> In CPR terminology, I would accept Mr Stanley's submission that CPR r. 31.14 reflects basic fairness and principle in an adversarial system; in accordance with the overriding objective, the parties are to be on an equal footing.
>
> **30** Thirdly, the right to inspect under CPR r. 31.14 is not, however, unqualified; it is instead subject to CPR rules based limits, which may be invoked by the party resisting inspection — the burden resting on that party to justify displacing the general rule. Thus, "proportionality" is part of the overriding objective CPR r. 1.1(2)(c) and, in an

> appropriate case, it would be open to a party to oppose inspection on the ground that it would be "disproportionate to the issues in the case": CPR r. 31(3)(2) . In determining any such issue of proportionality, a Court would very likely have regard to whether inspection of the documents was necessary for the fair disposal of the application or action. So too, the mere mention of a privileged document in (for example) a statement of case may not of itself lead to a loss of the privilege; CPR r. 31.14 is to be read with and subject to CPR r. 31.19(3) and (5) : see, *Rubin v Expandable Ltd* (supra), at [39]; Civil Procedure, Vol. 1, 2016, at 31.14.5 and 31.19.1.1.
>
> **31** Fourthly and further, it was not argued before us and there is nothing to suggest that the RSC approach to confidentiality has changed under the CPR; see, for instance, Civil Procedure , at 31.3.6. Accordingly, while disclosure and inspection cannot be refused by reason of the confidentiality of the documents in question alone, confidentiality (where it is asserted) is a relevant factor to be taken into account by the Court in determining whether or not to order inspection. The Court's task is to strike a just balance between the competing interests involved – those of the party asserting an entitlement to inspect the documents and those of the party claiming confidentiality in the documents. In striking that balance in the exercise of its discretion, the Court may properly have regard to the question of whether inspection of the documents is necessary for disposing fairly of the proceedings in question: see, *Science Research Council v Nasse* [1980] AC 1028 , esp. at pp. 1065-1066 (Lord Wilberforce), 1074 (Lord Edmund-Davies) and 1087-1088 (Lord Scarman)."

76. This discussion does support Ms Nathan's basic proposition that the fact that a document may be relevant to the issues in the case or may be referred to in a witness statement does not automatically entitle the other party to disclosure (*Abacha* [28]). The Tribunal retains a discretion which remains to be exercised in accordance with the overriding objective.

77. The *Abacha* case concerned documents which were regarded as confidential in nature. It is equally clear from the extract from Gross LJ's judgment (at [31]) that, where issues of confidentiality do arise, such issues are not a bar to disclosure but need to be taken into account by the Tribunal in determining whether to order or direct disclosure. The cases to which Gross LJ refers also suggest that – where disclosure is required in order to deal with the matter fairly and justly, but an order for disclosure would result in a breach of confidence – the Tribunal should still seek to balance the interests of the party asserting an entitlement to inspect the documents with those of the party claiming confidentiality or the person to whom the duty of confidence is owed. That may involve imposing conditions on divulging the documents or allowing confidential information that is not required in order to address the issues in the case to be redacted.

78. However, as Mr Ramsden pointed out, I did not understand Ms Nathan to submit that any of the documents which are the subject of this application are subject to any duty of confidentiality which is owed to any third party except to the extent that they may contain information relating to individual taxpayers other than Ms Addo. Rather

Ms Nathan submits that the documents are "sensitive" in that their disclosure may be prejudicial to HMRC's future investigation of tax avoidance cases and that, in considering the proportionality of ordering or directing disclosure, the Tribunal should have regard to the sensitive nature of the material.

79. On this issue, Ms Nathan referred me to a decision of the VAT Tribunal (Dr John Avery Jones) in *Prudential*. That case involved a claim by HM Customs & Excise for public interest immunity in relation to certain unpublished parts of Customs & Excise Manuals on the grounds that "disclosure would prejudice the assessment or collection of tax or assist tax avoidance or evasion".

80. The Tribunal accepted the claim by HM Customs & Excise for public interest immunity in relation to the relevant parts of the Manuals. At [9], the Tribunal said this:

> "**9** I have read the documents for which PII is claimed. I can say in general terms that the unpublished parts of the version of the Manual existing at the relevant time contain what has, in my view, been aptly described in the correspondence as "the operational criteria the Commissioners use when an application is made." Although procedural, publication could cause serious harm if taxpayers knew what Customs were looking out for by taxpayers presenting relevant facts in a way that avoidance would be unlikely to be detected. I therefore consider that the first limb is satisfied. The same is true of the unpublished parts of the revised version of the Manual with the exception of paragraph 59 which it can be seen from the heading (which is published) that it contains examples of situations where revenue protection powers may be used. These example are new to that version of the Manual and do not contradict anything in the earlier version. They are therefore not relevant to the present appeal. On the second limb, there is nothing in the unpublished parts of the then current Manual that would assist the Appellant in knowing whether the decision appealed against was, or was not, in accordance with the Commissioners' policy, or in showing whether the decision in this case was unreasonable."

81. The present case is, of course, rather different. HMRC have made not made any claim for public interest immunity in relation to the documents which are the subject of this application. Rather Ms Nathan argues that the Tribunal should also take into account the sensitivity of the documents in considering whether or not to order disclosure.

82. I have not had sight of the relevant documents or information and so I am in no position to determine the extent to which they may or may not be regarded as "sensitive". While I do, of course, take into account the nature of the documents in determining their likely relevance to the issues in this case and the proportionality of ordering or directing their disclosure, my concern with the general proposition is that "sensitivity" might easily become a cloak to disguise an unwillingness to disclose documents that are unhelpful to a party's case. That is not a good reason for non-disclosure. For that reason, I do not accept the general proposition that the alleged

sensitivity of the documents – falling short of circumstances in which a claim for public interest immunity could be made or in which disclosure may of result in a breach of confidence - is itself a particular factor that I should take into account.

Other points of principle arising from the parties' submissions

83. Before I turn to the application of those principles to the specific requests for disclosure made by the appellant, I will deal with two other issues of more general principle that have emerged from the submissions made by the parties: (a) whether or not the relevant officer for the purpose of the application of s29(1) is Miss Stopp and not Mr Finch (and so documents referred to by Mr Finch cannot be relevant to the issues that arise in relation to s29(1)); and (b) whether or not documents that did not emanate from Ms Addo herself can be relevant to the issues that arise in relation to s29(5).

84. In addressing these issues, I will need to refer to the wording of s29 TMA. For ease of reference, the text of relevant extracts from s29 TMA is set out at Appendix 2 to this decision notice.

(a) The relevant officer for the purpose of section 29(1) TMA

85. The first issue that I should address is Ms Nathan's submission that for the purposes of determining whether or not a discovery is made, it is only Miss Stopp's state of awareness that is relevant for the purposes of section 29(1). Ms Nathan says that it is only the insufficiency in Miss Addo's return that is relevant for this appeal. Miss Stopp was the officer responsible for the review of that return. She is the officer that made the assessment. It is only her awareness of the insufficiency that matters. For these reasons, she says, the evidence of Mr Finch's state of mind is not relevant nor, she says, is the evidence of the general approach of HMRC in relation to contractor loans schemes.

86. In support of this submission, Ms Nathan referred me to the decision of the Upper Tribunal (Morgan J and Judge Berner) in *Anderson*. She pointed to the summary of the principles derived from the case law set out at [24] of the decision of the Upper Tribunal and to the focus on the particular officer who makes the discovery. For example, she referred to the statement in sub-paragraph (2) of [24] that "the concept an officer discovering something involves, in the first place, *an actual officer* having a particular state of mind in relation to the relevant matter" (my emphasis).

87. I reject the submission that it is only Miss Stopp's evidence that is relevant to the issues under s29(1).

88. As an initial point, I have to say that I find this a rather surprising submission to the extent that appears it to render Mr Finch's evidence irrelevant. Mr Finch's statement itself states that it is made "in support of HMRC's case on the raising of an assessment pursuant to section 29 TMA". The thought that his evidence is therefore irrelevant to the key issues relating to section 29(1) would seem unlikely.

89. In any event, it is not clear to me that it is only Miss Stopp's awareness of an insufficiency which is relevant. This is a particular type of case. It involves an investigation into a mass-marketed anti-avoidance scheme. There are several variations of this scheme, promoted by different promoters. Thousands of individual taxpayers have participated in the scheme. HMRC's approach to the investigation is quite understandably, not to consider the issues at the level of individual returns, but to consider the issues raised by them, sometimes at the level of the category of schemes as a whole and sometimes at the level of a particular promoter's scheme. When it comes to raising assessments in relation to these schemes, HMRC, perhaps inevitably, given the number of taxpayers involved, adopts a production-line approach to the consideration of the returns, the identification of any insufficiency and the issue of assessments.

90. The result is that many different HMRC officers are involved in the process of considering the relevant technical issues, identifying returns to which they may be relevant and issuing the assessments themselves. Does this mean that the operation of section 29(1) should be limited in its application to the consideration of whether there is an insufficiency by the officer that actually issues the assessment in a case such as this where for perfectly legitimate operational reasons the process of making discoveries and raising assessments has been fragmented? To my mind, that would be a surprising conclusion.

91. Nor do I agree that it is a conclusion that is necessarily supported by the case law. In its decision in *Revenue and Customs Commissioners v Tooth* [2018] UKUT 38, the Upper Tribunal (Marcus Smith J and Judge Hellier) accepted that more than one officer may be involved in the process of making a discovery and raising an assessment for the purpose of s29(1). This may happen in a number of different ways. So, for example, at [77] the Upper Tribunal acknowledges that in an appropriate case more than one officer can make the "discovery":

> "**77** Whether or not there is a discovery is essentially subjective: it is the officer's (*or officers'*) state of mind that matters." (my emphasis)

The point is confirmed in the footnote (footnote 36) to [77], where the Upper Tribunal states:

> "We see no reason why officers in combination cannot make a discovery. Indeed that is confirmed by reference to the "Board" (a collective) in s29(1) TMA."

Furthermore, the Upper Tribunal accepts at [79](2) that one officer may make a discovery and another might make the assessment.

92. For these reasons, it seems to me that the evidence that is potentially relevant to the making of the discovery in this case goes well beyond the evidence of Miss Stopp. It may be that a discovery can be regarded as being made by Mr Finch and Miss Stopp collectively; or by Mr Finch or one of his team (with the making of the assessment being delegated to Miss Stopp and her team); or by Miss Stopp on the basis of information provided by Mr Finch and his team. That is a matter that can be

decided by the Tribunal at the substantive hearing having heard the evidence. I do not need to decide which approach is correct nor which is applicable in this case.

(b) Documents which do not emanate from the taxpayer

93. As I have mentioned, Ms Nathan submitted that the documents that could be relevant to the appellant's pleaded case under s29(5) were limited by reference to s29(6). Section 29(6) refers to documents and information provided by the taxpayer or in documents or information, the existence of which could be inferred from information provided by the taxpayer. This list is exhaustive (see Auld J in *Langham v. Veltema* at [36]). So correspondence between HMRC officers and internal HMRC documents could not be relevant to that issue.

94. Mr Ramsden's response to this point is simply that the s29(5) test relates to the state of awareness of a hypothetical HMRC officer based on the information referred to in s29(6). He suggested that, in order to determine this point, it was necessary to consider the issue in two parts. First it was necessary to determine what the actual officers handling the case knew at the relevant time and then ask what the hypothetical officer should have known. Evidence of the state of awareness of the actual officers at the time was primary evidence on this issue and so was relevant to the appellant's case.

95. There was broad agreement between the parties that s29(5) requires that an HMRC officer could not have been reasonably expected to have been aware of the insufficiency of tax at the relevant cut-off time from the information made available to him at the time. The relevant cut-off time is the time at which the officer ceased to be entitled to enquire into the return or, in a case where a notice of enquiry had been given, at the time at which a closure notice was issued. The case law authorities suggest that this test is an objective one in that it is to be performed by reference to the state of awareness of a hypothetical HMRC officer and not the actual officer who was considering the return (see, for example, *Pattullo v. Revenue and Customs Commissioners* [2016] UKUT 0270 (TCC), [2016] STC 2043 ("*Pattullo*") at [82]).

96. The information that is treated as made available to the hypothetical officer is set out in s29(6). In summary, this is information that is contained in the return or accompanying documents provided by the taxpayer or information the existence of which and the relevance of which as regards the insufficiency of tax could reasonably be expected to be inferred by such an officer from the return and any accompanying documents.

97. As Ms Nathan submitted, the information that is treated as made available to the hypothetical inspector is limited to the information set out in s29(6). It is an exhaustive list. So other documents are not relevant for the purposes of determining the information that should be regarded as available to the hypothetical inspector at the relevant time.

98. However, that is not the end of the matter. For the purposes of the condition in s29(5) it is also necessary to determine whether, on the basis of that information, the

hypothetical HMRC officer could not have been reasonably expected to be aware of the insufficiency of tax at the relevant time. That test requires the Tribunal to consider the level of knowledge of tax law and HMRC practice, policy and procedure that the hypothetical inspector should be expected to apply to that information in order to assess if he or she should have been aware of the relevant insufficiency.

99. There are various formulations in the case law of the level of knowledge that the hypothetical officer is to be treated as possessing for this purpose (see for example the discussion in the judgment of Lord Glennie in *Pattullo* at [77], [78] and [82]). These include the level of knowledge and understanding of "an officer of reasonable knowledge and understanding" (see Sir Andrew Morritt C in *Revenue and Customs Commissioners v Lansdowne Partners Limited Partnership* [2011] EWCA Civ 1578, [2012] STC 544 at [50]) and the level of knowledge and understanding "that could reasonably be expected of an officer considering the particular information provided by the taxpayer" (see the decision of the Upper Tribunal (Norris J and Judge Berner) in *Revenue and Customs Commissioners v Charlton* [2012] UKUT 770, [2013] STC 866 at [65]).

100. I do not need to determine for present purposes which formulation is the most appropriate. It is sufficient that the train of enquiry may be informed by evidence of the level of knowledge generally within HMRC at a given time. This will inform the Tribunal's conclusion as to the level of knowledge that would be expected of the hypothetical HMRC officer. For that reason, I do not accept Ms Nathan's basic submission that it can only be which documents fall within s29(6) are relevant to the issues presented by s29(5). However, it does mean that I will need to determine the relevance of the material that is requested within the context of the issues at stake in this case. I have done this in my discussion of the various categories of documents below.

Application of those principles to the requests for disclosure

101. I will now turn to the application of those principles in the present case.

102. In doing so, I bear in mind that the level of disclosure that is appropriate in this case has already been the subject of directions made by the Tribunal and agreed by the parties. That being the case, I should be reluctant to diverge from the previous direction without good reason for doing so. In any event, I do not perceive any material inconsistency between the description of "protected documents" in the directions issued by the Tribunal on 18 April 2018 and the principles that I have set out above.

103. I also take into account the nature of these proceedings. Although the amount of tax at stake is relatively small, this is as Judge Richards commented in the earlier proceedings, in effect, a "test case". The parties are treating the case with a degree of importance that may not otherwise be warranted by the amount at stake. The issues are complicated and, in my view, there should therefore be a presumption that both parties will disclose relevant material to each other.

The paragraph 24 documents

104. As explained by Mr Ramsden, this request relates to discussions between the specialist investigation teams and the ToAA team in relation to the application of the transfer of assets abroad provisions to contractor loans schemes. The request concerns the advice given by the ToAA team in relation to the various matters referred to in paragraphs 26 to 28 of the witness statement. Mr Ramsden also seeks to extend the request to "other similar consultations which Mr Finch has not expressly set out, in particular, where those three matters in turn depended similarly on some other case".

105. This part of Mr Finch's witness statement refers to the process by which HMRC came to the view that the transfer of asset abroad provisions might provide a means of challenge to contractor loan schemes. It is potentially part of the process by which a "discovery" of the insufficiency of tax was made which led to the assessment on Ms Addo.

106. Given the context – namely that of a mass-marketed scheme where the analysis is being developed at a scheme level or possibly at the level of general principles applicable to schemes of this type – it is perhaps inevitable that the technical arguments are developed in the context of a few specimen taxpayers and then applied to others or perhaps even at a higher more theoretical level than applied to the users of that type of scheme generally. This appears to be the process that Mr Finch is describing in his statement.

107. I am satisfied that the consultations with the ToAA team in relation to the three taxpayers referred to in Mr Finch's witness statement at paragraphs 25 and 28 are relevant to the development of Mr Finch's thinking in the present case, which may form part of the process of a discovery being made. As Mr Finch himself describes in his witness statement (at paragraph 29): "whilst the advice from the ToAA specialist was specific to the three taxpayers to whom I have referred above, it also applied in principle across all of the [contractor loans schemes], provided that the users were ordinarily resident within the UK. This included users of the AML scheme."

108. I am also satisfied that the other matters referred to in paragraphs 26 and 27, being respectively the consultation regarding the schemes that led to the *Boyle* case and the discussions regarding contractor loans schemes with the tax agent referred to in paragraph 27 of Mr Finch's witness statement, are likely to be equally relevant to the development of Mr Finch's analysis in this case. It seems likely, given Mr Finch's evidence in paragraph 24 that those matters would also have been the subject of discussions with the ToAA team. If and to the extent that documents relate to those discussions exist, I accept that they will be relevant in the development of Mr Finch's thinking leading up to his conclusion at the end of paragraph 27 of his witness statement that: "I was from this time firmly of the view that [the transfer of assets abroad provisions] applied to the AML and other [contractor loans schemes] and that they could be used to recover the lost tax."

109. The discussions with the ToAA team in relation to the three taxpayers referred to in paragraph 28 are directly referred to in the witness statement. Whilst the

discussions with the ToAA team in relation to the other matters are not directly referred to in Mr Finch's statement, I agree with Mr Ramsden that Mr Finch is likely to have been aware of any discussions with the ToAA team and advice given by the ToAA team. If Mr Finch's analysis forms part of the discovery process, these consultations are likely to have been part of that process.

110. The correspondence with and advice from the ToAA team would have been available to Mr Finch at the time and at the time of preparation of his statement. Accordingly, my starting point is that it is appropriate that the appellant should have access to that correspondence so that it is placed on an equal footing and for the purpose of testing his evidence.

111. I have considered whether there are any good reasons not to order or direct disclosure in this case. I do not think that there are.

(1) The relevant matters are limited to those described by Mr Finch in his statement. It is not disproportionate to require HMRC to identify and disclose correspondence in relation to them.

(2) Ms Nathan has not sought to argue that the disclosure of the documents would breach any confidence. The documents may refer to information concerning other taxpayers and which constitutes confidential information. In such cases, the appellant has accepted that it would be appropriate for such information to be redacted.

112. As regards Mr Ramsden's request for other material relating to discussions with the ToAA team on other matters, I refuse the application.

113. Mr Finch has set out in his witness statement the various matters that were relevant to his thinking and the development of his awareness of the application of the transfer of assets abroad provisions to contractor loans schemes. It is these matters which are relevant to the development of his of the applicability of the transfer of asset abroad provisions to the contractor loans schemes and so to the section 29(1) issue.

114. As regards to section 29(5) issue, as I have discussed, the section 29(5) test relates to the state of awareness of the hypothetical officer at the relevant time. In this case, the relevant time is either 31 January 2012 or 31 January 2013.

115. The test may focus upon the type of inspector who it is reasonable to expect would be dealing with this type of information (see *Charlton* [65]). Mr Finch was the HMRC officer in charge of the investigation at the relevant times. He has given evidence of the matters that affected his awareness. I have indicated that I am prepared to order or direct disclosure of information that affected his awareness of the application of the transfer of assets abroad provisions to contractor loans schemes. I am not convinced that ordering or directing disclosure of this additional material would materially assist the Tribunal in dealing with the matter fairly and justly. The additional material would not assist the Tribunal in forming a view of the general level of knowledge and awareness of the law and practice that the hypothetical

inspector should be regarded as having at the relevant time. It may provide some further background to the general level of awareness within HMRC of the applicability of the transfer of asset abroad provisions to contractor loans schemes at particular times. But it is difficult to see that the Tribunal's determination of the appropriate knowledge and awareness to be attributed to the hypothetical officer would be much advanced given that it would already have before it evidence of the level of awareness of the officer who was leading the investigation into contractor loan schemes at the time.

116. It would therefore, in my view, be disproportionate to require HMRC to identify and disclose, in effect, all the communications between the ToAA team and the relevant special investigations teams in relation to all such cases. The chances that such evidence would be relevant to the issues in this case do not justify the time and expense to which HMRC would be put in order to meet that request.

The paragraph 28 documents

117. There is a degree of overlap between the request for the paragraph 28 documents and the request for the paragraph 24 documents to which I have just referred.

118. The request refers to Mr Finch's discussions with the Anti-Avoidance Group and the discussions between Mr Griffin and the ToAA team in relation to the three individual taxpayers who had participated in contractor loans schemes other than the AML scheme and the response of the ToAA team on 4 April 2012.

119. I am satisfied that this material is potentially relevant to the issues in this case for similar reasons to those which I have given for the paragraph 24 documents. Even if these discussions did not relate to the AML scheme, it is clear that they played an important part in the development of Mr Finch's thinking in relation to the application of the transfer of asset abroad provisions and so may be particularly relevant to the section 29(1) issue in this case. This is expressly stated to be the case for the discussions relating to the three individual taxpayers (see the statement in paragraph 29 of the witness statement to which I refer at [107] above).

120. As before, I do not discern any particular reason why I should not order or direct disclosure in this case.

(1) It would not be disproportionate to order disclosure. The material has been clearly identified it must have been available to Mr Finch at the time of the preparation of his witness statement.

(2) Although the material may contain information that is confidential because it relates to other taxpayers, the appellant has accepted that such information can be redacted.

The paragraph 31 document

121. This request relates to the independent review panel report which advised HMRC on the approach to counteracting contractor loans schemes. The report, it would

appear, was an important stage in the development of HMRC's response and led to the adoption of the handling strategy to which Mr Finch refers in his witness statement at paragraph 32 and the appointment of the compliance team led by Miss Stopp to raise the assessments.

122. Ms Nathan argues that the report relates to "issues governance" rather than "case governance" and so the issues discussed in the report are not directly relevant to the appellant's case and it would be disproportionate to order its disclosure.

123. The question for me is whether or not it is appropriate to order or direct disclosure to enable the Tribunal to deal with this case "fairly and justly" in accordance with the overriding objective. The report is expressly referred to by Mr Finch in his statement in support of HMRC's position in relation to section 29. He notes that the report assesses the technical arguments to challenge contractor loans schemes (including, by inference, the AML schemes in which the appellant participated). He refers to its conclusions as part of his narrative explaining the adoption of the handling strategy, the appointment of Miss Stopp's team and the process of raising discovery assessments to participants in the contractor loans schemes, including the appellant. The report is clearly relevant to that narrative. This evidence is potentially relevant to the process of making a discovery, the general level of awareness of the issues within HMRC at the time, and HMRC's response to the discovery of insufficiencies in relevant returns (including that of the appellant). For these reasons, I start from the presumption that the report should be disclosed to the appellant in order to ensure that the parties start on an equal footing in relation to this evidence.

124. Once again, in my view, there is no material reason why I should not order or direct disclosure of the report.

(1) It will not be disproportionate to order disclosure. It is a single identified document and must be relatively easy for HMRC to trace.

(2) There has been no claim by HMRC that the report is confidential. HMRC say that the report is "sensitive". For the reasons that I have given, I do not accept that material evidence should not be disclosed simply because a party regards the document as sensitive. No claim has been made by HMRC for public interest immunity in relation to the report and no claim for privilege has been made.

The paragraph 32 documents

125. This request relates to the holding strategy adopted by HMRC following the report of the independent review panel.

126. For the reasons which I have discussed in relation to the report of the independent review panel itself (see [123] above), the strategy is clearly relevant to the development of HMRC's response to the contractor loans schemes. The strategy is not referred to as a specific document in Mr Finch's witness statement. However, as Mr Ramsden asserts, it is almost inconceivable that it was not reduced to writing.

127. For reasons similar to those which I gave in relation to the report itself, I see no good reasons why I should not order or direct disclosure of the handling strategy in this case.

128. The appellant also requests disclosure of "copies of all contemporaneous notes relating to the handling strategy or any other subsequent document relating to the handling strategy". Whilst it may be that some such correspondence is of some assistance in explaining some aspects of the strategy, it is difficult to determine that issue without having had an opportunity to review the terms of the strategy in advance. The handling strategy is referred to by Mr Finch as a staging post in the development of HMRC's response to contractor loans schemes. My impression is that the disclosure of the strategy itself should be sufficient to enable the appellant to test Mr Finch's evidence in this respect. Furthermore it is likely that a request for disclosure of all correspondence relating to the strategy would be disproportionate to the benefit that could be obtained from the disclosure in terms of testing the evidence of Mr Finch. For this reason, I will not order or direct disclosure of the related correspondence.

The paragraph 36 documents

129. This request relates to notes of a discussion between Miss Clubb, Mr Finch and the discovery assessment specialist within HMRC.

130. Once again, this discussion is an important part of the process between the determination of the potential liability under the transfer of asset abroad provisions to the issue of the assessments. My presumption is that the notes should be disclosed as the discussion is referred to by Mr Finch; disclosure will put the parties on an equal footing and will enable the appellant to test Mr Finch's evidence.

131. Once again, in my view, there is no material reason why I should not order or direct disclosure of the notes of that discussion.

(1) It will not be disproportionate to order disclosure. The parties to the discussion are easily identifiable and their notes of the meeting should be reasonably easily traceable.

(2) HMRC does not claim that the notes are confidential. Its sole reason for resisting disclosure is that the documents are sensitive. For the reasons that I have given, I do not accept that it is appropriate not to order or direct disclosure simply because a party regards the document as "sensitive".

Decision

132. In summary, I grant the appellant's application for disclosure of the following documents referred to in Mr Finch's witness statement of 3 August 2017:

(1) copies of all notes of consultations between specialist investigations teams and the specialist ToAA team which are relevant to the contractor loans schemes referred to in paragraphs 25, 26 and 27 of Mr Finch's statement;

(2) copies of notes of the discussions with the Anti-Avoidance Group, any material constituting the request for advice by Mr Griffin to the ToAA team and the response of the ToAA team of 4 April 2012 referred to in paragraph 28 of Mr Finch's statement;

(3) a copy of the independent review panel report referred to in paragraph 31 of Mr Finch's statement;

(4) a copy of the handling strategy referred to in paragraph 32 of Mr Finch's statement;

(5) copies of notes of the discussion held on 31 August 2012 referred to in paragraph 36(b) of Mr Finch's statement.

133. In all cases, to the extent that the relevant documents contain confidential information relating to other taxpayers, HMRC shall be entitled to redact the material so that confidential information is not disclosed.

134. I will issue a direction in accordance with the conclusions that I have reached separately.

Rights of appeal

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

ASHLEY GREENBANK
TRIBUNAL JUDGE

RELEASE DATE: 3 September 2018

Appendix 1

Documents referred to in witness statement of Andrew Finch dated 3 August 2017:

a. **At Paragraph 24:** copies of all material relating to the consultations between Specialist Investigations teams and the specialist ToAA team referred to in that paragraph in late 2010 and early 2011 and which are relevant to contractor loans schemes

b. **At Paragraph 28:** copies of any material relating to the discussions referred to in that paragraph and the response of 4 April 2012 relevant to contractor loans schemes

c. **At Paragraph 31:** a copy of the Independent Review Panel report referred to

d. **At Paragraph 32:** copies of all contemporaneous notes relating to the handling strategy or any other subsequent document relating to the handling strategy. If they don't exist, or no longer exist, this should be confirmed by a short witness statement, together with the reasons why

e. **At Paragraph 36(b):** copies of all notes of the discussion held on 31 August 2012

Appendix 2

Extracts from section 29 TMA 1970

29 Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment —

(a) that any income, unauthorised payments under section 208 of the Finance Act 2004 or surchargeable unauthorised payments under section 209 of that Act or relevant lump sum death benefit under section 217(2) of that Act which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax have not been assessed, or

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

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

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) …

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) in a case where a notice of enquiry into the return was given—

(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

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

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

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

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

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

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

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