[2021] UKFTT 0054 (TC)

TC08040

INCOME TAX – discovery assessment – tax avoidance scheme – ground of appeal against the quantum of assessment and not the efficacy of the scheme – ss 29 and 34 of Taxes Management Act 1970 – whether assessment validly made – pre-condition under s 29(5) – whether a hypothetical officer could have been reasonably expected to be aware of the insufficiency from the information made available; no – whether assessment stands good; yes – onus for displacing assessment regarding quantum on the appellant – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/04581

BETWEEN

MR CYRUS CONTRACTOR **Appellant**

-and-

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

TRIBUNAL: JUDGE HEIDI POON
DR CAROLINE SMALL

The hearing took place on 28 and 29 September 2020

With the consent of the parties, the form of the hearing was V (video) on the remote platform hosted by the Video Hearings Service of HMCTS. Having considered parties' responses in relation to the format of the hearing, Directions were issued on 13 July 2020 for the hearing to take place by video link on the basis that it was not in the public interest during the pandemic to hold a face to face hearing. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Mark Turner, instructed by TJL Assessments Ltd, for the Appellant

Miss Rebecca Arnold, litigator of HM Revenue and Customs' Solicitor's Office for the Respondents

DECISION

INTRODUCTION

1. The appellant, Mr Cyrus Contractor, appeals against a discovery assessment to income tax in the sum of £31,600 in relation to the tax year ended 5 April 2015. The assessment was raised by the respondents ('HMRC') on 12 March 2019 under s 29 of the Taxes Management Act 1970 ('TMA') following an investigation into a mass marketed tax avoidance scheme.

2. The principal issue for determination, as parties put it, concerns the quantum of the assessment, in that whether as a matter of fact, there was additional income assessable on the appellant in the year 2014-15 in the light of the information gathered from the investigation of the tax avoidance scheme.

APPLICABLE LAW

3. The following provisions from TMA relevant to this appeal are set out in the Annex.

   (1) Section 29 provides for the requisite conditions to be met for a discovery assessment to be valid.

   (2) Section 34 provides for the ordinary time limit for an assessment under s 29 to be made within 4 years after the end of the year of assessment to which it relates.

   (3) Section 50 provides for the Tribunal's jurisdiction on an appeal.

EVIDENCE

Witness evidence

4. For the respondents, Officers Michael Tyler and Zakir Hussain appeared as witnesses, and were cross-examined by Mr Turner. Their witness statements were adopted as evidence in chief, supplemented by their answers to questions put to them by the Tribunal and Mr Turner. We find both witnesses reliable and credible, and we accept their evidence as to matters of fact.

5. For the appellant, two short witness statements were provided by:

   (1) Mr Mark Aylwin Turner, Designate Partner of Runnymede Services LLP ('Runnymede') from its incorporation on 19 April 2012 until it was dissolved on 19 December 2017; and

   (2) Ms Tina Lorraine Bandyle, director and owner of IFL Management Ltd ('IFL') since 11 February 2002.

6. Neither Mr Turner nor Ms Bandyle were called as witnesses for cross-examination, and the substance of their short witness statements are related later in the decision. While not appearing as a witness, Mr Turner appeared instead as the appellant's representative.

7. Noting that the entity of which Mr Turner was the designate partner had been dissolved, the Tribunal tried to ascertain the capacity in which Mr Turner is acting in these proceedings at the outset. Mr Turner was equivocal, but went on to state that he was instructed by TJL Assessments Ltd, which would appear to be a business owned by Ms Bandyle. The Tribunal asked if any professional designation should be recorded after Mr Turner's name, and he confirmed in the negative. In response to the Tribunal's further questions, Mr Turner also stated that TJL Assessments Ltd is now the appellant's tax agent.

Documentary evidence

8. The joint bundles of documents provided to the Tribunal contain the following sections:

   (1) Section A paginated A1 to A20 contains the appeal documents;

(2) Section B (B21 – B31) contains the witness statements of the two witnesses for the appellant (not called), and two witnesses for the respondents (called);

(3) Section C (C1 – C33) contains the correspondence of the enquiry leading to the issue of the discovery assessment;

(4) Section E (E1 – E42) contains the Disclosure of Tax Avoidance Schemes ('DOTAS') letter from HMRC with the description heading of 'Arrangements using a foreign currency loan', and Companies House records of the entities in the Scheme;

(5) Section F (F1 to F6) contains the appellant's returns for the tax periods from 2011-12 to 2016-17;

(6) Third party documents obtained under Schedule 36 notices are paginated as:

(a) Section D (D1 to D60) contains communications emanating from third parties in relation to the Scheme, and trust repayments and bank statements;

(b) Section G (G1 to G115) contains more third party documents and information, bank statements, leaving letters of entities, and loan agreements;

(c) Section H (H1 to H102) contains invoices between scheme entities and bank statements of some of the scheme entities;

(d) Section I (I1 to I108) contains bank statements, correspondence, leaving letters and a sample contract between the scheme provider and the contractor;

(e) Section J (J1 to J129) contains third party contracts of the various entities involved in the Scheme, and invoices between entities;

(f) Section K (K1 to K75) contains transaction listings from Barclays Online Banking showing movements of funds, redacted in many instances for payers into the account, invoices to entities; agreements ('Contract for Services) between the scheme provider and the contractors.

Admission of further documents

9. On 23 September 2020, HMRC applied to the Tribunal to admit an additional document, designated as 'G70 unredacted'. The application was not forwarded in time for the Tribunal to consider before the hearing, and Ms Arnold made an oral application as a preliminary matter.

10. On 'G70 unredacted', the headings: '**Drawings Cyrus Contractor'** and '**Total Drawings Cyrus Contractor**' are identifiable, while they are redacted on the G70 that has been included in the bundle. In their application, HMRC draw the Tribunal's attention to the fact that G70 was included in HMRC's List of Documents; was referred to in the Statement of Case and Officer Tyler's witness statement. The headings on the original G70 were redacted in error, and that the appellant is not prejudiced by the inclusion of the unredacted G70.

11. It is clear to us that the redaction on the original G70 included was done to protect the identity of other names and entities unrelated to this appeal. By error, the redaction went too far by blackening out the two key headings. The document G70 was originally provided to HMRC by the appellant's representative without redaction, and no objection was raised by the appellant's representative to the lodgement of the unredacted G70. For these reasons, the Tribunal granted the application to admit the unredacted G70.

12. Apart from the unredacted G70, the Tribunal requested the production by HMRC of the appellant's Self-Assessment ('SA') return filed for the year 2014-15, since reference was made as to the contents of the return proper during evidence.

FINDINGS OF FACT

Officer Tyler's evidence

13. Mr Tyler is an officer of the Counter-Avoidance Team in HMRC. He has been the 'Technical Lead' within the team investigating the arrangements used by Mr Contractor, Officer Tyler is the decision maker in relation to the discovery assessment for 2014-15, and the 'case owner' throughout the course of the enquiries into the SA returns filed for Mr Contractor for the other years; namely: 2011-12, 2012-13, 2015-16 and 2016-17.

14. From Officer Tyler's evidence, and the documents included, we find the following facts in relation to the enquiries led by Officer Tyler into the mass marketed avoidance scheme ('the Scheme'), and how those enquiries in relation to the Scheme led to the discovery assessment raised on the appellant for 2014-15.

Enquiries into Berwick Associates (2011) LLP

15. In 2013, Officer Tyler took responsibility for the enquiries into the Scheme, which led to the enquiry into Mr Contractor as a partner of one of the UK entities involved in the Scheme.

(1) The UK entities involved in the Scheme included:

  (a) Berwick Associates (2011) LLP ('**Berwick**')

  (b) Choice Premier Ltd ('**Choice Premier**')

  (c) Computer Contracts Ltd ('**Computer Contracts**')

  (d) IT Contracts Finance Ltd ('**IT Contracts Finance'**)

(2) Tina Bandyle and Mark Turner were the directors of Choice Premier, Computer Contracts, and IT Contracts Finance.

(3) Berwick LLP has two designated partners: Mr Mark Turner and Mr Michael Kerridge.

(4) Prior to the commencement of the arrangements, Mr Mark Turner resigned his directorship in some of these companies.

(5) The appellant, Mr Contractor, joined Berwick as a partner on 13 June 2011.

16. Between March 2013 and March 2014, enquiries were opened into the tax returns of the majority of the partners of Berwick for the tax years 2011-12, and 2012-13. However, Mr Contractor's 2011-12 return was submitted late on 30 April 2014. Unlike the majority of the partners of Berwick, the enquiry into Mr Contractor's 2011-12 and 2012-13 returns was not opened until 8 June 2015. Both of Mr Contractor's returns disclosed 'foreign exchange loans' in the white box section.

The arrangements with 'foreign exchange loans'

17. In March 2014, HMRC began investigating the arrangements run by Berwick and Choice Premier, referred to as the Foreign Exchange Scheme ('**Forex**').

18. The Forex arrangements involved loans being made to participants in depreciating foreign currencies, and then repaid as part of the mechanism, but leaving a large 'gain' which is said to be non-taxable.

The emergence of new entities associated with Forex

19. During the investigations into the Forex arrangements, HMRC identified further entities involved in the Scheme, being:

(1) Runnymede Services LLP ('**Runnymede**');

(2) International Corporation based in the Seychelles ('**InterCorp Seychelles**');

(3) Mapleseed Limited based in Abu Dhabi ('**Mapleseed A-D**').

(4) Méte Corporation Ltd based in the Seychelles (**Méte Seychelles).**

20. Runnymede was set up in April 2012 with Mr Turner as the designated partner to run the same arrangements alongside Berwick. Later investigations showed that Runnymede was created following a disagreement between Mr Turner / Ms Bandyle and Mr Kerridge.

21. Even though Runnymede had been created in 2012, which was the year prior to Officer Tyler commenced his investigations into the Scheme in 2013, Officer Tyler only became aware of the existence of Runnymede around 2016. In other words, Runneymede had been running the Scheme for three or four years before its existence became known to Officer Tyler's team.

22. At around the same time as Runnymede emerged as an entity associated with running the Scheme, it also became apparent that the offshore entities involved in the Scheme had changed from InterCorp Seychelles to Mapleseed A-D, and Méte Seychelles by late 2013.

The Transition from Forex to 0% Loan

23. The change in the offshore entities used in running the Scheme would seem to coincide with the transition of the loan mechanism from being foreign exchange loans to 0% loans, as evidenced by the communications issued between 30 December 2013 and 2 January 2014 by Mark Turner and Tina Bandyle in their capacity as directors of Choice Premier. The communications advised the users of the Scheme that the Forex mechanism had run its course, and they were changing to a new and simpler model based on loans at 0% interest.

24. By January 2014, the Forex arrangements ceased to be used, and was replaced by the 0% loan mechanism. All users moved to 0% loan model for the remainder of 2013-14. The implications of opting into the 0% Loan Scheme were two-fold.

(1) First, users would have to leave Berwick and Runnymede if they were members and contract their self-employed services to Runnymede.

(2) They would then provide their self-employed services via a UK company as an intermediary, although no contract or details regarding this arrangement in relation to Runnymede is held.

25. In March 2014, all members of Berwick resigned their positions. In April 2014, all members of Runnymede also resigned their positions. The resignations were timed to be in advance of the start of the tax year 2014-15.

26. Since the users of Forex had resigned their positions in the two LLPs, HMRC were unable to compile a complete list of users who might have opted into the 0% Loan Scheme.

The arrangements known as the 'Mapleseed' scheme

27. The arrangements using the 0% loan mechanism were considered by HMRC to be materially different from the Forex arrangements and were investigated as a separate scheme under the designation of 'Mapleseed'.

28. On 14 August 2015, a meeting was held with Mr Kerridge, who is an accountant and was a designated partner of Berwick, and represented a large number of clients affected by both the Forex and Mapleseed schemes. During the meeting, an overview of the arrangements as understood by Mr Kerridge was provided to HMRC. This confirmed the involvement of:

(1) **Runnymede**, and the individuals providing their self-employed services to Runnymede;

(2) **IFL Management Ltd** ('IFL') emerged to be the intermediary UK company through which the self-employed services of the individuals contracted with Runnymede were provided;

(3) **Advantage xPO** ('Advantage xPO') would appear to be the entity to front the customers who have contracted with users of the Scheme to provide IT services; Advantage xPO would render service invoices on behalf of the individual IT contractors to their respective customers/ clients for the IT services provided;

(4) **Advantage Trust**, which is registered in Belize, and plays a role in repaying the 0% loans on behalf of the Scheme users.

29. Pausing here, we note the following in relation to the intermediary entity IFL.

(a) From Tina Bandyle's witness statement, she stated that she is the 'director and owner of IFL Management Ltd since 11 February 2002'.

(b) IFL had previously been known by HMRC as providing 'traditional' payroll services, and as such no enquiries had been opened into IFL.

30. In evidence, Officer Tyler related his understanding of the arrangements for the Mapleseed scheme, and the steps involved to move remittance payments for the services provided by the users of the Scheme around the entities before reaching the individual users. The arrangements are here illustrated with the use of a round sum remittance figure of £40,000.

(1) IFL sent an invoice for £40,000 to Advantage xPO on behalf of a self-employed service provider 'P';

(2) Advantage xPO paid IFL £40,000 (with remittance received from end-customers of P's services) in settlement of the IFL invoice;

(3) IFL 'split' the receipt of £40,000, typically in a ratio of 1:3 between Runnymede and Méte Seychelles;

(4) Runneymede received £10,000 from IFL, and paid P £10,000;

(5) Méte Seychelles received £30,000 from IFL;

(6) Mapleseed A-D received £30,000 from Méte Seychelles;

(7) P received a 0% loan for £30,000 from Mapleseed A-D.

31. The 0% loan received by P is repaid by The Advantage Trust registered in Belize. No information is held of where the trust gets the money to repay the 0% loans, or why the Trust chooses to do so.

Enquiries into users of the Mapleseed Scheme

32. HMRC consider the Mapleseed arrangements were in place to avoid tax on the full earnings of the individuals using the Scheme. Throughout 2016 and 2017, HMRC opened enquiries into the tax returns of all former partners of the two LLPs (Berwick and Runnymede) for the tax year 2014-15, unless information was already held by HMRC which suggested that an individual was no longer using the Scheme.

33. However, no enquiry was opened into the appellant's 2014-15 return because:

(a) Mr Contractor did not declare partnership income on his 2013-14 return;

(b) Mr Contractor was not listed as a partner of either Berwick or Runnymede on their LLP returns for the year 2013-14.

Key documents obtained from enquiries into entities

34. While there was no direct enquiry opened into Mr Contractor's 2014-15 tax return for the above reasons, the discovery of what HMRC believed to be an insufficiency of tax in relation to Mr Contractor's tax position for 2014-15 came in a roundabout way, through the enquiries opened into entities owned and/or directed by Mark Turner and /or Tina Bandyle.

35. Besides opening enquiries into the returns for 2014-15 of individuals who were believed to have used the Mapleseed scheme, HMRC also opened Corporation Tax ('CT') enquiries into companies that were associated with the Scheme, which included Choice Premier, IFL, Computer Contracts. These companies associated with the Scheme were all run from the same premises used by Mark Turner and/or Tina Bandayle. The dates of the CT enquiries opened into these companies are as follows.

(1) On 16 November 2016, into IFL for APE 31/12/2015;

(2) On 16 November 2016, into Computer Contracts for APE 31/10/2015;

(3) On 26 January 2017, into Choice Premier for APE 28/02/2015;

(4) On 23 April 2018, into IFL for APE 31/12/2016;

(5) On 28 June 2018, into Computer Contracts for APE 31/10/2016.

36. On 14 November 2016, enquiries were also opened into the partnership returns of Runnymede for the tax periods 2014-15 and 2015-16.

37. On 16 December 2016, HMRC wrote to the appellant, informing him that they were aware of 'a sample agreement' he had entered with MJ Kerridge & Co; that the sample agreement provided information of some 15 individuals represented by MJ Kerridge & Co, and confirmed that each individual used Forex arrangements. HMRC also advised the appellant that in their view, the Forex arrangements whereby the appellant received 'gains' following the provision of loans in depreciating foreign currencies does not work to avoid a tax liability.

38. Further information gathered from the enquiries into entities associated with the Scheme enabled HMRC to identify payments that were connected to Mr Contractor. Two key documents paginated as G70 and K61 were extensively referred to in Officer Tyler's evidence.

Document G70 (from Runnymede)

39. On 3 May 2017, the document **G70** was provided by Runnymede to HMRC in response to the enquiries that had been opened into the LLP on 14 November 2016. The schedule would appear to have been printed on 28 April 2017 (at 7:19 AM) and contains details as follows.

40. The Title Headings of G70 are: Runnymede Services LLP; **Transaction Detail by Account**; 6 April 2014 through 5 October 2015. There are 9 columns of entries in the schedule.

(1) Column 1 is 'Type', followed by the description '*Drawings Cyrus Contractor*', and by the type being 'Cheque' all the way down.

(2) Column 2 is 'Date', and ranged from the first date being '30/04/2014' to the last entry being '30/09/2015'. There are 18 dates in the listing, corresponding to the end of each of the 18 months from April 2014 to September 2015, albeit for the month of December 2014, the date is represented by the entry for 5 January 2015, while the month of August 2015 is aligned with the date of 1 September 2015.

(3) Column 3 is 'Num' and has the number '29' against the 30/04/2014 cheque entry, and '37' against the 28/11/2014 cheque entry; the significance of 29 and 37 is unclear.

(4) Column 4 is 'Name' and the entry is '**NSP**s' all the way down, which transpired to be the acronym for 'Notional Salary Payments' .

(5) Colum 5 is 'Memo' and is blank all the way through.

(6) Column 6 is 'Clr' and is also blank all the way through.

(7) Column 7 is for 'Split' and has 'Current Account' as the entry throughout.

(8) Column 8 is 'Amount' and is consistently at £6,000 for every month, with the exception of the cheque dated 30/05/2014 which is recorded to be at £3,000.

(9) Column 9 is 'Balance' and is the cumulative total of the cheques that have been drawn to date.

41. The amounts and the balances are stated with a negative sign in front, as appropriate with a ledger printout that is recording the account position of Runnymede. The sub-heading of '*Total Drawings Cyrus Contractor*' is read against the cumulative balance £105,000 stated on the ledger at 30 September 2015, while the cumulative balance as at 31 March 2015 (for the 12-month period from 1 April 2014) is stated at £69,000.

Document K61 (from IFL)

42. On 6 June 2018, over a year after HMRC's receipt of G70, another document (paginated as K61) was received in relation to IFL, which connected a sum totalling £68,000 to the appellant for the 3-month period from January to March 2015.

43. K61 is a schedule in landscape format, and contains 48 entries across 9 columns under the headings as follows.

(1) Column 1 for 'Type' and the entry is 'Invoice' throughout;

(2) Column 2 for 'Date' shows a date range spanning from 30/01/2015 (the first entry) to 31 October 2015 (the last entry, being the 48th entry);

(3) Column 3 for 'Num' appears to be the listing of the invoice numbers as each number is distinct and some are consecutive in clusters;

(4) Colum 4 for 'Memo' gives details as '**Fees for the services of Cyrus Contractor**, w/e 21.12.14' (the first entry) and so on; the detail in common for all 48 entries is highlighted in bold here, and the only variant is the date on which the week ended.

(5) Column 5 is partially redacted, and would appear to list the 'Bank details and Bank name' into which payments are to be made;

(6) Colum 6 for 'Name' has the constant entry as 'Advantage xPO Ltd' throughout, which would appear to be the entity being invoiced by IFL;

(7) Column 7 for 'Qty' would appear to be the number of days worked in the week period to which the fee memo relates;

(8) Column 8 for 'Sales Price' would appear to be the daily rate of fee for the appellant, which is at £1,000 per day.

(9) Column 9 for 'Amount' is the extrapolation of the total fees payable for an invoice.

44. The first 16 entries on K61 concern the invoices rendered in relation to fees payable for the periods denoted as 'w/e 21.12.2014' to 'w/e 29.03.15', and shows the following patterns:

(a) Invoices were rendered in batches with the first entry dated 30 January and the next six entries dated 31 January 2015;

(b) The numbering of invoices within the same batch tends to be consecutive;

(c) For example, the seven invoices rendered in January 2015 were numbered from 19065 to 19071, but the three invoices all rendered on 23 February 2015 were

numbered 19187, 19188, and 19190 (with the number 19189 missing in the sequence), while the six invoices all rendered on 31 March 2015 were numbered consecutively from 19873 to 19878.

(d) Two invoices had a nil value, being 19065 in relation to the w/e 28.12.14, and 19187 for the w/e 08.02.15, when the memo entry for both indicated 'holiday' was taken for the week.

(e) All other invoices rendered up to 31 March 2015 were for 5 days of fees each week, except for the invoice in relation to w/e 04.01.15 for 3 days of fees.

45. For the remaining 32 entries on K61, which cover the periods from w/e 05.04.15 to w/e 08.11.15, similar patterns can be observed:

(a) Only one nil value invoice was rendered for w/e 11.10.15;

(b) 21 invoices were for 5 days per week;

(c) 8 invoices were for 4 days per week;

(d) 2 invoices were for 3 days per week.

46. The Tribunal asked whether there was a preceding schedule to K61 to show the invoice listing for the nine months from April to December 2014. Officer Tyler explained that since the enquiry opened on 16 November 2016 into IFL was for APE 31/12/2015, the information so obtained from that enquiry meant that IFL records only started from January 2015. HMRC therefore did not have the schedule that might have recorded similar invoice listing in relation to 'Fees for the services of Cyrus Contractor' for the first nine months of the tax year 2014-15.

47. The fact material to the quantum issue of the discovery assessment under appeal is that the first 16 entries on K61 for invoices raised between January 2015 and March 2015 in relation to the 'Fees for the services of Cyrus Contractor' totalled £68,000.

48. The remaining 32 entries on K61 in relation to invoices raised between April 2015 to October 2015 totalled £143,000. This is not the figure that directly concerns this appeal. There is also a grand total of over £6 million in the figure of £6,277,427.91 at the bottom of K61, which would seem to be a cumulative total of preceding entries not evident on K61.

Enquiries into the appellant's tax position

49. In parallel to the ongoing enquiries into the entities involved in running the Mapleseed scheme, HMRC also opened enquiries into Mr Contractor's SA returns under s 9A TMA.

(1) On 8 December 2017, the enquiry into the return for 2015-16 was opened;

(2) On 27 July 2018, the enquiry into the return for 2016-17 was opened.

50. Before opening the enquiry into 2016-17, Officer Tyler had written to the appellant on 13 July 2018 to inform him of the Advertising Standards Authority ('ASA') Ruling into claims made on the **Williams Gordon Ltd** website, which ASA found to be 'wholly misleading' as there was not 'sufficient evidence showing that the scheme complied with the appropriate tax requirements … [or] … to show that their advertised scheme did not involve tax avoidance'.

51. Officer Tyler continued in the letter by stating that he was making the appellant aware of the ruling as Mr Turner is a director of William Gordon Ltd according to Companies House records, and that the appellant had used other schemes marketed by entities or websites connected to Mr Turner, and likewise with claims subject to the ASA ruling.

52. On 15 November 2018, HMRC wrote to the appellant and his agent Thomas & Co, advising that HMRC believed that his SA return for 2014-15 were 'inaccurate', explaining that:

> 'This is because you used arrangements where payments were received that were described as non-taxable. These payments were in reality connected to the provision of your services and as such should have been declared as taxable income.'

53. The letter requested information so that HMRC could confirm the amount of tax that the appellant should have paid. Neither the appellant nor his agent responded to the request.

The SA return submitted for 2014-15

54. The Tribunal requested the production of the return proper of the appellant's submitted SA return for 2014-15, which was made available by HMRC before the second day of hearing.

55. The return would appear to have been submitted by Thomas & Co based in Coventry, and the only entries in the return relate to the self-employment income of Mr Contractor as a 'Consultant' (per return), with £69,000 being the turnover, and a claim of allowable expenses of £300, leaving net profit of £68,700 as taxable income.

56. The relevant pages of the return to self-assess the income tax and NIC liabilities, and the white space for disclosure show the following details.

(a) Total tax liabilities at £20,695.51, with Class 4 NIC being at £3,588.51; (income tax charge being at £17,107);

(b) Box 10 on the page is marked with a cross to claim a reduction of the 2015-16 payments on account;

(c) Box 11 stated the figure for the first payment on account for 2015-16 to be reduced to £5,000;

(d) Box 17 is the white space for disclosure, and the entry states:

> 'Notes for box 10 – Reason for claim – My business profits are down'

The cross-examination of Officer Tyler

57. In relation to the document K61, Officer Tyler's witness statement states at para 4.2 that:

> 'I noted the similarity of the two amounts but the proven link between Mr Contractor, Runnymede Services and IFL Management Ltd clarified in my mind that he has used a tax avoidance scheme and on that basis I decided that I had made a discovery of an insufficiency of tax.'

58. In cross-examination of Officer Tyler, Mr Turner asked a series of questions in challenge to Officer Tyler's discovery. Under the heading of 'Let's follow the monies', Mr Turner set out a number of intermediaries, before putting the question to Mr Tyler: 'Would you consider it plausible that the money received by IFL was through a number of intermediaries?' This question, in itself, seemed to suggest that the direction of fund movements was from intermediaries to IFL. However, the flow of the funds was in contra direction to that suggested by the question when Mr Turner went through invoices to follow the monies as follows.

(1) IFL invoiced services for Cyrus Contractor;

(2) Passed the money to **Jupiter Online Ltd UK** ('Jupiter Online');

(3) Jupiter Online passed the money to Mete Corporation offshore;

(4) Mete Corporation provided Runnymede the money to pay Mr Contractor;

(5) That the £68,000 (on K61) evidenced the monies received by Runnymede eventually to pay Mr Contractor.

59. The entity Jupiter Online was not on HMRC's chart of entities associated with the Scheme, and was introduced by Mr Turner in cross-examination, by reference to an invoice that has been lodged as H40, which shows the following details:

(a) Invoice raised by Jupiter Online at an address in Egham, TW20 9UW;

(b) Company VAT registration number is stated as 208477891;

(c) Tax date is shown as 31/03/2015; Invoice No 2

(d) Invoice is rendered to IFL Management Ltd, at Runnymede Malthouse Business Centre, Egham, Surrey TW20 9BD;

(e) Description of the invoice has three entries:

(f) 'Professional Fees for the period January 2015'; Rate at £295,315.24;

(g) 'Professional Fees for the period February 2015'; Rate at £430,862.34;

(h) 'Professional Fees for the period March 2015'; Rate at £539,678.93;

(i) The Amount which is supposed to be an extrapolation from the Rate against each entry is identical to the Rate;

(j) Subtotal is £1,265,8565.51;

(k) VAT total is £0.00;

(l) Total of the invoice is £1,265,8565.51.

60. Referring to document H52, which is supposed to be the bank statement of IFL's business account in the period from 9 January to 14 January in 2015 (the year is not visible), there is an entry on 12 January by Internet Banking to Jupiter Online for the sum of £127,685.79. It was put to Officer Tyler that this sum of 'money out' represented a payment by IFL to settle the invoice from Jupiter Online. The same bank statement also shows that IFL received 'money in' from some 12 payers over the 6-day period in January 2015, with the bigger sums being:

(a) "Advantage Resource" for £4,500 on 9 January

(b) "Dept of Health" for £11,520

(c) An internet transfer from a redacted payee for £150,000

(d) "IT Skillfinder" for £12,960

(e) "Intellectual Cap" for £9,406.81

(f) "E-Synergy Solution" for £8,316

61. Further to the sum of £4,500 received on 9 January, an identical sum of £4,500 was received by IFL from Advantage Resource on 16 January (H53), 23 January (H56); 30 January (H58) of the bank statements that have been lodged.

62. By 'following the monies' Mr Turner then took Officer Tyler to the invoices rendered by Mete Corporation to Jupiter Online under K20 to K22 with the following details:

(1) Invoice No 69 dated 31 January 2015: Qty 1, Description 'Provision of Professional Fees for January 2015'; Rate £295,315.24; Amount £295,315.24;

(2) Invoice No 72 dated 28 February 2015; Qty 1, Description 'Provision of Professional Fees for February 2015'; Rate £430,862.34; Amount £430,862.34;

(3) Invoice No 76 dated 31March 2015; Qty 1, Description 'Provision of Professional Fees for March 2015'; Rate £539,678.93; Amount £539,678.93.

63. The journey in following the monies continued with Mr Turner taking Officer Tyler to G62, which is an invoice from Runnymede to Mete Seychelles, with the tax date being 30 September 2015, invoice No. 9 and description being:

(a) Fee for professional services, period 1.4.15 – 30.9.15 at Rate: £679,3000;

(b) Fee for professional services, period 1.4.15 – 30.9.15 at Rate: £17,928.33;

(c) The VAT is at 'Z' and the total is stated at £697,228.33.

64. At each leg of this journey to follow the monies, the question being put to Officer Tyler was that no evidence could have traced IFL's invoice listing on K61 to any payments being made by IFL to Mr Contractor, since by following the monies, amounts invoiced by IFL moved to Jupiter Online, from Jupiter Online to Mete Corporation, from Mete Corporation to Runnymede. Officer Tyler's reply to each of these questions was that he had no basis to trace what monies were being moved from one intermediary to another, since the invoices were *not* particularised with any detail to enable any meaningful matching to enable tracing to be done.

Re-examination of Officer Tyler

65. During re-examination, Officer Tyler was asked to comment on the similarity in the sum of £69,000 paid to Runnymede on G70, and the sum of £68,000 for fees for the services of Cyrus Contractor from IFL's invoice listing on K61. Officer Tyler confirmed that:

(a) G70 was provided by Runnymede on 3 May 2017 and the £69,000 was the cumulative total over the 12-month period from April 2014 to March 2015;

(b) K61 was provided by IFL on 6 June 2018, and the £68,000 was the cumulative balance for fees in relation to the week ended 21 December 2014 to 29 March 2015; and covered invoices only in the last quarter of 2014-15.

The issuance of the discovery assessment

66. On 12 March 2019, Officer Hussain, who is 'Higher Compliance Officer' in the Counter Avoidance unit, issued a notice of further assessment under s 29 TMA in relation to Mr Contractor's return for 2014-15. The Notice assessed the overall tax liabilities to be £52,295.51, less £20,695.51 already paid, leaving a balance of additional tax payable of £31,600. His evidence focused on the correspondence he sent to the appellant and his agent Thomas & Co.

67. The covering letter was sent in the name of Officer Hussain, and accompanied the notice of assessment, and reads as follows:

> 'Your return for 2014-15 was submitted on the 7 January 2016 and the period for enquiry has passed.
>
> Information has come to light that shows that you may have received additional payment that are not shown on your tax return. These additional payments arose via the provision of your services to Runnymede and investigations into these payments have led me to believe that tax should be paid on these payments.'

68. By email dated 28 May 2019, Mr Contractor wrote to HMRC requesting an update on the progress of his appeal, advising that he had received three letters from Debt Management.

69. On 31 May 2019, HMRC received an appeal from the appellant shown to be dated 28 March 2019. HMRC accepted the late appeal despite the reason why the appeal was received nearly two months late remained unknown. The letter appealed against the revised figures included in the notice of assessment dated 12 March 2019.

70. On 18 June 2019, Officer Hussain replied to Mr Contractor by email, advising him that the collection proceedings for the £31,600 had been postponed, and of the basis upon which HMRC had issued the notice of assessment for 2014-15, Officer Hussain advised as follows:

(1) That the notice of assessment was raised under s 29 TMA for the reason of 'protecting the potential tax at risk', since no s 9A enquiry had been opened into the return for 2014-15.

(2) That information received by HMRC shows that Mr Contractor 'may have received additional payment that are not shown on [his] tax return' as a result of Runnymede provided contractor services to end-user clients via a UK company.

(3) The UK company split this income and paid a small percentage to Runnymede which paid it to Mr Contractor as a Notional Salary Payment (NSP); the remainder of the money was paid offshore via companies in the Seychelles and Abu Dhabi.

(4) The company in Abu Dhabi called Mapleseed Ltd paid loans to Mr Contractor which were repaid by another entity registered in Belize.

(5) Mr Contractor was invited to provide details such as full unredacted bank statements for the year 2014-15 that would assist HMRC in reviewing the assessment.

71. In cross-examination, Mr Turner's questions focused on the role of Officer Hussain in raising the discovery assessment while he was not the actual officer who could claim to have made the discovery. Mr Turner also asked Officer Hussain if he could confirm that he was 'an office of the Board' in terms of s 29(5) TMA. Officer Hussain answered that he was unsure.

72. In response to questions in re-examination, Officer Hussain stated the following clearly.

(1) That it was Officer Tyler who made the discovery and instructed Officer Hussain to issue the discovery assessment.

(2) That he has been employed by HMRC since 15 April 1995, and that he was employed by HMRC when he issued the discovery assessment on 12 March 2019.

(3) That the discovery assessment was issued under the direction of Officer Tyler.

THE APPELLANT'S CASE

73. The appellant's principal challenge is on the ground of quantum, and that is to say 'no additional /undeclared income has been discovered, and that no additional /undeclared income has been received by the appellant' because:

(1) IFL invoiced £68,000 for the appellant's services for the year from 1 January to 31 December 2014;

(2) The appellant received payments of £69,000 from Runnymede for the tax year 2014-15, which was declared with £300 deducted for accountants' fees;

(3) Runnymede received the monies to pay the appellant £69,000 from IFL via two intermediaries; namely Jupiter Online and Mete Corporation;

(4) No payments were made to the appellant during 2014-15 by IFL or Jupiter Online or Mete Corporation.

74. In support of the first ground, Mr Turner averred that Tina Bandyle, in her capacity as director and owner of IFL since 11 February 2002, has stated in her witness statement lodged on 8 October 2019 that:

> '1. IFL Management Ltd have made not payments to the appellant
>
> 2. The appellant is not party to any contracts that IFL Management Ltd is or has been party to

> 3. No information has been provided to HRMC in the course of Corporation Tax enquiries into IFL Management Ltd that support or evidence additional payments to the appellant
>
> 4. The appellant has at no time been employed by IFL Management Ltd'

75. In addition, Mr Turner referred to his witness statement, dated 11 October 2019, in which he made one statement in his capacity as 'Designate Partner of Runnymede Services LLP from its incorporation on 19 April 2012 until it was dissolved on 19 December 2017', namely:

> '1. No information has been provided to HMRC in the course of Partnership Tax Return enquiries into Runnymede Services LLP that support or evidence additional payments to the appellant.'

76. The second ground of appeal concerns the 'discovery' so recorded as made in Officer Tyler's witness statement, in relation to which Mr Turner submitted that:

(1) Officer Tyler knew that IFL made no payments to the appellant in the periods in question from the financial records of IFL including bank statements made available;

(2) Officer Tyler stated that IFL passed monies to Runnymede to make payments to individuals;

(3) There is 'no supporting logic' that a tax avoidance scheme had been used and no logic that Mr Tyler had discovered an 'insufficiency of tax' to meet the criteria under s 29 TMA.

77. The third issue raised by Mr Turner is to say that the appellant is 'yet to have sight of documentary confirmation that the assessment was indeed issued by a member of the board' as provided for in the TMA. Mr Turner submitted that s 29 TMA does not provide for a discovery assessment to be issued for the reason as stated by Office Hussain, that is: 'as no enquiry under [s 9A TMA] is in place for this period, HMRC is protecting the potential tax at risk for this period by issuing this assessment'.

HMRC'S CASE

78. In relation to the time limit issue, Ms Arnold submitted the ordinary time limit of four years applies as provided under s 34 TMA. The year of assessment related to 2014-15, and the ordinary time limit expired 4 years after the end of the tax year in question on 5 April 2019. The discovery assessment was raised on 12 March 2019 before the expiry of the time limit.

79. Ms Arnold submitted that HMRC have met the burden that they have discovered a loss of tax in terms of s 29 (1) TMA.

(1) Officer Tyler did not have evidence which would identify an insufficiency of tax prior to 6 June 2018, when the document K61 was provided to HMRC.

(2) It was only on review of K61 that it was identified that IFL sales invoices included entries amounting to £68,000 for Mr Contractor.

(3) The appellant's return for 2014-15 had declared turnover of £69,000.

(4) Officer Tyler cross referenced K61 from IFL with G70 from Runnymede, and came to the conclusion that the appellant had received two sums of payments, being £68,000 on K61 (from IFL) and £69,000 on G70 (from Runnymede).

(5) The discovery was made against the factual backdrop of the Mapleseed arrangements, which the appellant was understood to have used.

(6) As such, Officer Tyler's discovery was made in terms of s 29(1) TMA and satisfied the two-stage test in *Anderson*[1] and the 'threshold' test in *Charlton*[2].

80. In addition to there being a discovery under s 29(1) TMA, one of the two further conditions under s 29(4) and s 29(5) TMA must also be met. HMRC rely on the condition set out under s 29(5) being met in the present case. As the appellant's 2014-15 return was filed on 7 January 2016, the time limit for opening a s 9A(2) TMA enquiry expired on 7 January 2017. The statutory question posed by s 29(5) is whether the officer could have been reasonably expected to be aware of an actual insufficiency on the basis of the information made available to him before the closure of the enquiry window.

81. The investigations into the Mapleseed Scheme was ongoing and far from complete. It was not until information was obtained from IFL on 6 June 2018 that it could be concluded that additional tax may be due. It is submitted that an officer viewing the appellant's 2014-15 return as submitted could not have been aware of this additional information. The existence of such material could not have been reasonably inferred from the 2014-15 return.

82. In relation to the quantum of the assessment, Ms Arnold highlighted the letter sent to the appellant and his agent on 15 November 2018, in which HMRC warned of the issue of a discovery assessment, and invited the appellant to provide information for quantifying the assessment. The appellant failed to respond, and without evidence to the contrary, the discovery assessment was issued based on the information received from IFL.

83. Officer Tyler instructed Officer Hussain to raise an assessment, and the quantum of the assessment was referenced to the amounts on IFL's invoice listing on K61. Both Officer Tyler, who made the discovery, and Officer Hussain, who raised the discovery assessment, were acting as officers of HMRC at all relevant times, and meet the requirement under s 29 TMA for being 'an officer of the Board'.

DISCUSSION

84. The appellant's case is staked on the issue of the quantum of the assessment. The efficacy of the scheme for tax avoidance purposes has not been contended by the appellant; neither party has made any submissions thereon; nor will this Tribunal consider the efficacy of the scheme.

85. In his skeleton argument, Mr Turner made reference to 'secondary issues' in this appeal, which are in relation to the nature of discovery made by Officer Tyler, and the procedural aspect of how the assessment came to be raised by Officer Hussain. These issues are, in effect, contentions against the validity of the discovery. While these grounds have been contended as 'secondary issues', the matter as concerns the validity of the discovery assessment is primary, and to be determined in priority over the substantive matter as concerns quantum.

86. The order of the issues to be considered, and the respective burden of proof to be borne by the parties are as follows. The standard of proof is on the balance of probabilities.

(1) HMRC bear the burden to establish the validity of the discovery assessment in relation to: (a) the 'discovery' issue pertaining to the statutory conditions under s 29(1) and s 29(5) TMA, and (b) the 'time limit' issue under s 34 TMA.

(2) If HMRC discharge the burden as regards the validity issue of the assessment, then the burden reverses to the taxpayer to displace the assessment; otherwise the assessment stands good by virtue of s 50(6) TMA.

---

[1] *Jerome Anderson v HMRC* [018] UKUT 0159 (TCC)

[2] *Charlton and others v HMRC* [2012] UKUT 770 (TCC)

The 'discovery' issue

Statutory conditions

87. The discovery assessment issued on 12 March 2019 was pursuant to s 29 TMA, which confers the power on HMRC to raise a back duty assessment if the condition under s 29(1) obtains, namely: *If an officer of the Board or the Board discover,* as regards any person (the taxpayer) and a year of assessment an '*insufficiency*'[3] in the assessment.

88. Where a taxpayer has delivered a return for the relevant year, and no enquiry has been opened into the submitted return, an additional condition under either s 29(4) or s 29(5) is required for a discovery assessment to be validly issued. In this appeal, the relevant condition relied on is under s 29(5), which provides that at the time when an officer of the Board ceased to be entitled to open an enquiry under ss8 or 8A for the relevant year of assessment,

> '*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.' (emphasis added)

89. Whether the condition under s 29(5) is met falls to be considered in conjunction with s 29(6), which defines '*the information made available*' to an officer of the Board for the purposes of s 29(5). In particular, the subsection relevant to this appeal is under s 29(6)(d)(i):

> '(d) the 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; …'

Section 29(1) condition

90. Whether the condition under s 29(1) is met has been considered by authorities and the salient precepts are the following:

(1) It involves the crossing of a 'threshold' from non-awareness to awareness of the existence of an insufficiency: *Charlton.*

> '[28] … the word "discovers" does connote change, in the sense of a threshold being crossed. At one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view. That is the only threshold that has to be crossed. … It is, we think, evident that the relevant threshold for there to be a discovery may be crossed as a result of a "eureka" moment just as much as by painstaking research.'

(2) No new information, of fact or law, is required for the threshold to be crossed, as found by the House of Lords in *Cenlon Finance*[4]:

> 'I can see no reason for saying that a discovery of undercharge can arise only where a new fact has been discovered. The words are apt to include any case in which it newly appears that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation.' (Viscount Simonds)
>
> 'Mr Shelbourne [for the taxpayer] said that "discovery" means finding out something new about the facts. It does not mean a change of mind about the law. He said that everyone is presumed to know the law, even an inspector of taxes. I am afraid I cannot agree with Mr Shelbourne about this. It is a mistake to say that everyone is presumed to know the law. The true proposition is that

[3] The word *insufficiency* is used here as a shorthand for the contents under s 29(1)(a), (b) and (c).

[4] *Cenlon Finance Co. Ltd v Ellwood* (1962) 40 TC 176, at page 204.

> no one is to be excused from doing his duty by pleading that he did not know the law. Every lawyer who, in his researches in the books, finds out that he was mistaken about the law, makes a discovery. So also does an inspector of taxes.' (Lord Denning)

(3) 'In law, indeed, very little is required to constitute a case of "discovery"': *Jonas v Bamford*[5]. The requisite threshold for there to be a discovery is therefore low: 'All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment'; 'no new information, of fact or law, is required for there to be a discovery': *Charlton* at [37].

(4) In *Hankinson*[6] Lewison LJ stated the test under s 29(1) is a 'subjective' one, as pertaining to the actual officer who has formed the view that there was an insufficiency.

> '[18] That section 29(1) is dealing with the *subjective views* of the officer concerned is borne out by the consequence of the making of a discovery viz. that he may make an assessment of the amount "which ought in his … opinion" to be charged to make good the loss of tax.' (italics added)

(5) The Court of Appeal in *Hankinson* also confirmed that the meaning of 'discovery' has not changed in relation to the self-assessment regime.

> '[15] … Although the conditions under which a discovery assessment can be made have been tightened in recent years following the introduction of the self-assessment regime, the meaning of the word "discovers" in this context has not changed ... it meant "comes to the conclusion from the examination he makes and from any information he may choose to receive"; … it was equivalent to "finds" or "satisfies himself". …'

Conclusion on s 29(1) condition

91. In the present case, Officer Tyler is the actual officer who made the discovery of insufficiency in Mr Contractor's 2014-15 self-assessment return. As said, we accept Officer Tyler's evidence without qualification as to matters of fact; we find him to be a straightforward, credible and reliable witness. Furthermore, from his evidence and the documents examined, we find that the condition under s 29(1) is met, upon the emergence of the new document K61.

92. On 3 May 2017, the schedule G70 was provided to Officer Tyler by Runnymede, which shows £69,000 as the cumulative total of payments made to Mr Contractor by Runnymede in 2014-15. On the face of it, the information contained in G70 appeared to tally with the declared turnover of £69,000 in Mr Contractor's self-assessment return for the year 2014-15. Thus far, there was no reason or evidence to consider that there was any insufficiency in tax assessment.

93. More than a year after G70 was produced, however, a new document was provided in June 2018 to Officer Tyler, and by a different entity, namely IFL. The schedule K61 was not an isolated document produced by a third-party specifically in relation to Mr Contractor as such, but was produced by IFL at that juncture as a result of enquiries being opened into IFL's tax affairs. It was the document K61 which provided Officer Tyler with new information hitherto unavailable, and it was this newness of information that enabled him to make the discovery of insufficiency in relation to Mr Contractor's tax assessment for 2014-15.

94. The discovery is underpinned by Officer Tyler forming a view that there existed a nexus between the document K61 originating with IFL and Mr Contractor. From his evidence, we have no doubt that the knowledge Officer Tyler had accumulated over the years as the

---

[5] *Jonas v Bamford* (1973) 51 TC 1, at page 23.

[6] *Derek William Hankinson v HMRC* [2011] EWCA Civ 1566

Technical Lead of a series of investigations into schemes known to be associated with Mr Turner and/or Ms Bandyle had been essential to the making of this discovery soon after the receipt of K61. As Officer Tyler stated in evidence: 'the proven link between Mr Contractor, Runnymede Services and IFL Management Ltd clarified in my mind that he has used a tax avoidance scheme and on that basis I decided that I had made a discovery of an insufficiency of tax' (§57).

95. The proven link has been painstakingly constructed in evidence to enable us to make findings of fact that: (a) Mr Contractor was a partner of Berwick, which had Mr Turner as a designated partner; (b) Mr Contractor was a participant of the Forex Scheme which involved the entity Runnymede, of which Mr Turner was a designated partner; (c) Mr Contractor's 2011-12 and 2012-13 returns disclosed 'foreign exchange loans' in the white box, which would appear to be a minimum disclosure as concerns the Forex Scheme; (d) Mr Contractor's declared turnover of £69,000 for 2014-15 was paid to him via Runnymede, which was an entity involved in the Mapleseed Scheme; (e) Mr Contractor's name appears line after line on IFL's schedule K61 in relation to the weekly invoices IFL rendered to Advantage xPO Ltd for 'Fees for the services of Cyrus Contractor', and IFL was another entity involved in the Mapleseed Scheme.

96. In the present case, the relevant new information emerged from the document K61 was the evidential basis for Officer Tyler's discovery, and it was his background knowledge of the workings of the tax avoidance schemes promoted, administered, and managed by Mr Turner, and of Mr Contractor's association with entities related to Mr Turner, that enabled Officer Tyler to cross the threshold of non-awareness to awareness that there was an insufficiency in tax assessment in Mr Contractor's 2014-15 return. In reaching the foregoing conclusions, we are also satisfied that Officer Tyler has acted honestly and reasonably in relation to the new information that came to his attention in the form of K61. Section 29(1) condition is met.

97. Mr Turner contended against s 29(1) condition being met on the ground that the notice of assessment was issued by Officer Hussain who was not the officer who made the actual discovery. The statutory wording of s 29(1), however, expressly provides against such contention by using the encompassing reference of 'an officer of the Board' or 'the Board'. The collective identity of the Board is sufficient to cover a situation where the actual officer who has made the discovery of insufficiency has delegated the task of issuing the consequent assessment to another officer of the Board.

98. Nothing turns on the factual distinction in the respective roles attributable to the two officers here. Section s 29(1) condition is met, and is not nullified by Officer Tyler as the actual officer who has made the discovery of insufficiency instructing Officer Hussain to carry out the administrative procedure in relation to the issuance of the discovery assessment.

Section 29(5) condition

99. The Court of Appeal in *Hankinson*[7] concluded that the power contained in s 29(1) could be exercised by an actual officer on making a discovery, and that the question of whether the pre-condition under s 29(4) or s 29(5) had been satisfied is an objective fact, and for any dispute in relation to this objective fact to be settled by way of appeal as provided under s 29(8).

100. The test under s 29(1) is different from the test under s 29(5), as highlighted by the purposive construction of the two conditions by Patten LJ in *Sanderson*[8].

> '[25] I do not accept that ss.29(1) and (5) import the same test and that the Revenue's power to raise an assessment is therefore directly dependent on the

[7] *Derek William Hankinson v HMRC* [2011] EWCA Civ 1566

[8] *David Stephen Sanderson v HRMC* [2016] EWCA Civ 19

> level of awareness which the notional officer would have based on the s.29(6) information. The exercise of the s.29(1) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on all the available information at the time when the discovery assessment is made. Section 29 (5) operates to place a restriction on the exercise of that power by reference to a hypothetical officer who is required to carry out an evaluation of the adequacy of the return at *a fixed and different point in time on the basis of a fixed and limited class of information*. ***The purpose of the condition is to test the adequacy of the taxpayer's disclosure,*** *not to prescribe the circumstances which would justify the real officer in exercising the s.29(1) power*. Although there will inevitably be points of contact between the real and the hypothetical exercises which ss.29(1) and (5) involve, the tests are not the same.' (italics and emphasis added)

101. The features of the tests under ss 29(1) and (5) can be distinguished in terms of:

(a) *Conferment v. restriction* – s 29(1) confers the power to make a discovery assessment, while s 29(5) places a restriction on the exercise of that power;

(b) *Positive v. negative* – s 29(1) provides for a positive condition to be met for the exercise of the power, while s 29(5) is expressed as a negative condition for the restriction to operate;

(c) *Subjective v. objective* – s 29(1) is a subjective test pertaining to a real officer, while s 29(5) is an objective test as applied to a notional officer;

(d) *Binary v. evaluative* – s 29(1) is a binary test of a threshold being crossed from non-awareness to awareness of an insufficiency by an actual officer, while s 29(5) is a evaluative test as to what a hypothetical officer could reasonably be expected to be aware of, based on the information available;

(e) *Variable v. fixed point in time* – the time reference of s 29(1) is at the variable point in time of discovery when the actual officer has crossed the threshold of awareness, while s 29(5) is concerned with what a notional officer could reasonably be aware of, based on the information available at a fixed point in time as defined by the statute.

102. The principles as concerns the evaluative test under s 29(5) from case law are as follows.

(1) The test s 29(5) is concerned with '*an inspector's objective awareness*', not what an inspector could reasonably have been expected to do, (such as opening an enquiry when a return does not disclose insufficiency): *Veltama*[9] at [33].

(2) The test concerns *awareness* first and foremost, and that the 'awareness of an insufficiency does not require resolution of any potential dispute': Moses LJ at [70] in *Lansdowne*[10]. 'The statutory condition turns on the situation which a notional officer could reasonably have been expected to be aware of'; and that awareness 'is a matter of perception and of understanding, not of conclusion'.[11]

---

[9] *Langham (Inspector of Taxes) v Veltema* [2004] EWCA Civ 193, [2004] STC 544

[10] *HMRC v Lansdowne Partners Limited Partnership* [2011] EWCA Civ 1578

[11] Moses LJ expressed at [70] his 'polite disapproval' of any judicial paraphrase of the wording of the condition under s 29(5), and his 'doubt' as to the approach of the Special Commissioners in *Corbally-Stourton v HMRC* [2008] STC(SCD) 907, and of the Outer House in *R (on the application of Pattullo) v HMRC* [2010] STC 107, namely, 'that to be aware of a situation is the same as concluding that it is more probable than not'.

(3) In relation to any dispute of fact or law a hypothetical officer may come across, the Chancellor (Sir Andrew Morritt) in *Lansdowne* stated that:

> '[56] … I do not suggest that the hypothetical inspector is required to resolve points of law. … It is enough that the information made available to him justifies the amendment to the tax return he then seeks to make. Any disputes of fact or law can then be resolved by the usual process.'

(4) The Upper Tribunal in *Charlton* gave guidance on the attributes of a hypothetical officer in relation to the pre-condition at [65] – [66]:

> (a) Section 29(5) does not require the hypothetical officer to be given the characteristics of an officer of general competence, knowledge or skill only.
>
> (b) The officer must be assumed to have such level of knowledge and understanding that would reasonably be expected in an officer considering the particular information provided by the taxpayer.
>
> (c) The test should not be constrained by reference to any perceived lack of specialist knowledge in any section of HMRC officers.
>
> (d) Reasonableness falls to be tested, not by reference to a living embodiment of the hypothetical officer, with assumed characteristics at a typical or average level, but by reference to the circumstances of the particular case.
>
> (e) Consequently, the hypothetical officer must not be regarded as the embodiment of HMRC as a whole, who has possession of information relevant to his awareness that is held elsewhere within HMRC or known to any particular officer including the officer dealing with the case.

(5) Judge Reid in *Pattullo*[12] aptly set out the context of the evaluative test under s 29(5) and the relevant evidence to be taken into account.

> '[65] Courts and tribunals are used to considering objectively and deciding questions of reasonableness such as what a reasonable person, the man on the Clapham omnibus, the officious bystander, a reasonably competent professional, … or how a fair minded and informed observer would view a particular situation. There are no doubt many other inhabitants in this legal village in which everyone always acts in a fair, reasonable and balanced manner, only considers the relevant and always disregards the irrelevant. … The courts are sometimes assisted in this exercise of objective assessment by evidence of standards set by institutions, professional bodies, codes of practice, or experts. However, the courts and tribunals are not bound by such evidence but generally take it into account. … Normally, the Court would make its own objective evaluation on a properly informed basis against the background circumstances. The Tribunal would not hear evidence from an individual offered as a candidate for the role of the hypothetical officer….'

Section 29(6) prescription of information

103. The construction of s 29(6) in relation to the categories of information made available to a hypothetical officer in the context of the self-assessment regime is summarised below.

(1) Auld LJ in *Veltema* concluded that s 29(6) is a provision '*only* of categories of information emanating from the taxpayer' by applying a purposive interpretation.

> '[36] … the key to the [self-assessment] scheme is that the Inspector is to be shut out from making a discovery assessment under the section only when the

[12] *Neil Pattullo v HMRC* [2014] UKFTT 841 (TC)

> taxpayer or his representatives, in making an honest and accurate return or in responding to a s 9A enquiry, have clearly alerted him to the insufficiency of the assessment, ... That scheme is clearly supported by the express identification in s 29(6) only of categories of information emanating from the taxpayer.'

(2) The statutory wording of s 29(6) points to the intention of Parliament that the list of information under s 29(6) is meant to be *exhaustive*.

> '[36] … if [the draftsman] had intended that the categories of information specified in s 29(6) should not be an exhaustive list, he could have expressed its opening words in an inclusive form, for example, "For the purposes of the subsection (5) above, information … made available to an officer of the Board *includes any of the following*'. (italics original)

(3) As the third member in *Veltema*, Arden LJ gave her interpretation of s 29(6)(d)(i), (which differed from Chadwick LJ's by being more narrowly construed) as follows.

> '[51] As I see it, s 29(6)(d)(i) does not attribute to the inspector information which is not reasonably to be inferred from information within s 29(6)(a) – (c). The matters set out in those paragraphs are all categories of information actually supplied by the taxpayer. The valuation was not produced. Moreover, in circumstances such as this the valuation might not in fact support the figure in the taxpayer's tax return. In that event, in my judgment on the true construction of s 29(6)(d)(i) the [hypothetical] inspector is not to have attributed to him the further information that he would actually have obtained if he had asked for that valuation, unless and until it is produced to him.'

(4) In *Household Estate Agents*[13], Henderson J stated at [33] that he preferred the approach of Arden LJ in *Veltema* (to Chadwick LJ's), on the basis that he found it 'to be more in accord with the wording of the subsection and the restrictive approach to its interpretation favoured by the all three members of the Court of Appeal [in *Veltema*]'.

(5) In *Charlton* the Upper Tribunal construed s 29(6)(d)(i) as setting the bounds of inferences that can be read into s 29(6)(d)(i) in relation to the purpose of the test under s 29(5), which is a test of the adequacy of a taxpayer's disclosure by self-assessment.

> '[78] The correct construction of s 29(6)(d)(i) is that it is not necessary that the hypothetical officer should be able to infer the information; an inference of the existence and relevance is all that is necessary. However, the apparent breadth of the provision is cut down by the need, firstly, for any inference to be reasonably drawn; secondly that the inference of relevance has to be related to the insufficiency of tax, and cannot be a general inference of something that might, or might not, shed light upon the taxpayer's affairs; and thirdly, the *inference can be drawn only from the return etc provided by the taxpayer*.' (italics added)

Conclusion on s 29(5) condition

104. The temporal reference for s 29(5) purposes is statutorily prescribed by s 29(5)(a) as being '*the time*' when an officer of the Board 'ceased to be entitled to give notice of his intention into the taxpayer's return' under s 8 or s 8A of TMA.

105. In the present case, Mr Contractor's 2014-15 return was filed on 7 January 2016 before its filing due date of 31 January 2016, which means the enquiry window closed on the first anniversary of the date of filing on 7 January 2017.

---

[13] *HMRC v Household Estate Agents Limited* [2007] EWHC 1684 (Ch)

106. The evaluation we have to undertake is whether *on the basis of the information made available to him before 7 January* 2017, a hypothetical officer could not reasonably have been expected to be aware of the insufficiency in Mr Contractor's 2014-15 return.

107. *Veltema* makes it clear that the only categories of information for evaluating what a hypothetical officer could have been reasonably aware of at 7 January 2017 are those listed under s 29(6), and the list is meant to be exhaustive, and to cover information emanating from the taxpayer. The hypothetical officer is not required to infer what information may have existed outwith the information already made available by the taxpayer, such as the schedule K61 emanating from IFL; nor is the hypothetical officer required to do any investigative enquiry in order to meet s 29(5) condition.

108. The s 29(5) test is one of *awareness* of insufficiency: the hypothetical officer is not required to arrive at a conclusion of insufficiency based on probabilities.

109. As at 7 January 2017, the only information made available to a hypothetical officer of HMRC was contained in Mr Contractor's self-assessment return for 2014-15; see §§55-56. In terms of white space disclosure, it was in relation to a claim for reduction of the first payment on account to £5,000 for the following tax year 2015-16 from what would otherwise be £10,347, (being 50% of the actual tax liabilities per figures returned for 2014-15). The claim was indicative that Mr Contractor's returned income for 2015-16 would be nearly half of what he was declaring for 2014-15.

110. In relation to s 29(5), HMRC's burden is to establish, that at the time enquiry window closed (s 29(5)(a)), an officer could not have been reasonably expected to be aware of the 'situation mentioned in subsection (1)' on the basis of the information made available as provided under s 29(6). The purpose of the condition is to test the adequacy of the taxpayer's disclosure. On the basis of the information contained in the return, that being the categories of information emanating from Mr Contractor as prescribed under s 29(6), a hypothetical officer could not have been reasonably aware of the insufficiency in Mr Contractor's tax assessment for 2014-15 as described above in fulfilment of the condition under s 29(1).

111. As summarised by the Court of Appeal in *Sanderson*, 'Section 29 TMA is designed to deal with inaccuracies in the process of self-assessment' (at [10]). The corollary is that there is an obligation placed on the taxpayer under self-assessment, which is 'to provide a correct assessment of his tax liabilities and to support that assessment with such information as may be necessary to substantiate the figures' (at [11]). If a taxpayer has made full disclosure in the self-assessment return, then the condition under s 29(5) can debar the exercise of that power. However, the correct emphasis of '[t]he purpose of the condition is to test the adequacy of the taxpayer's disclosure, not to prescribe the circumstances which would justify the real officer in exercising the s.29(1) power' (at [25]).

112. On the basis of the information made available in Mr Contractor's 2014-15 return, we conclude that HMRC have discharged the burden that the condition under s 29(5), to be applied with reference to s 29(6) information, is satisfied.

The time limit issue

113. The validity of a discovery assessment is subject to statutory time limits as provided under s 34 and s 36 TMA. Under s 34, the general position is that an assessment under s 29 TMA may not be made more than four years after the end of the year of assessment to which it relates. The 'ordinary time limit' is extended to six years in a case where the loss of tax was brought about carelessly by a taxpayer (s 36(1) TMA), and further extended to twenty years where the loss of tax is brought about deliberately (s 36(1A) TMA). HMRC do not seek to

invoke s 36 TMA, and submit that the issuing of the assessment was within the ordinary time limit under s 34 TMA.

> **34 Ordinary time limit of four years**[14]
>
> (1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, [an assessment to income tax or capital gains tax may be made at any time [not more than 4 years after the end of] the year of assessment to which it relates.]
>
> [(1A) . . .]
>
> (2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.

114. The time limit issue as respects the exercise of the power under s 29 TMA is to be settled by reference to the 'statutory limitations as to the time' as observed by Moses LJ in *Tower MCashback LLP*[15]:

> '[24] … There are statutory limitations as to the time at which the sufficiency or otherwise of the information must be judged. These provisions underline the finality of the self-assessment, a finality which is underlined by strict statutory control of the circumstances in which the Revenue may impose additional tax liabilities by way of amendment to the taxpayer's return and assessment.'

115. Mr Contractor's 2014-15 return was filed on 7 January 2016 before the filing due date of 31 January 2016, which means the enquiry window closed on the first anniversary of the date of filing on 7 January 2017. No enquiry was opened into the return before 7 January 2017, which means the assessment to additional tax has to be raised under s 29 TMA.

116. In this respect, HMRC rely on s 34 TMA in relation to the time-limit requirement. The ordinary time limit for raising the discovery assessment expired on 5 April 2019, being four years after the end of the year of assessment ended on 5 April 2015. We conclude therefore that the discovery assessment issued on 12 March 2019 to Mr Contractor was within the ordinary four-year time limit provided under s 34 TMA.

Whether the assessment stands good

The burden of proof

117. The Tribunal's jurisdiction on appeal is under s 50(6) TMA, which provides that if the tribunal decides that the appellant is over charged by the s 29 assessment, then the assessment shall be reduced accordingly, otherwise the assessment 'shall stand good'.

118. The significance of an assessment 'standing good' in relation to burden of proof is explicated by Judge Gammie in *Hull City*[16].

> '[58] This "stand good" language has been part of the Management Acts since at least section 57 of the Taxes Management Act 1880. It is the statutory basis for concluding that the taxpayer has the legal burden of demonstrating that he is overcharged by an assessment. The justification for placing this burden on the taxpayer, even though it may be that the Revenue which is asserting the

[14] The words '4 years' in the section heading substituted the predecessor heading of '6 years' by virtue of the Finance Act 2008, s 118(1), Sch 39, paras 1, 7(1)

[15] *Tower MCashback LLP 1 v HMRC* [2010] EWCA Civ 32, [2010] STC 809

[16] *Hull City (Tigers) Ltd v HMRC* [2017] UKFTT 0629 (TC)

> tax is due, is that the taxpayer and not HMRC is ordinarily in possession of the relevant facts and figures. Essentially, HMRC are entitled to call for an explanation from the taxpayer of the circumstances surrounding the determination of his tax position and ultimately put the taxpayer to proof of the facts behind those circumstances. In that respect HMRC may issue an assessment because they are in possession of particular evidence suggesting that the taxpayers explanation is untrue but it may also be that HMRC are not satisfied that what the taxpayer is telling them fully explains the particular circumstances with which they appear to be confronted. That is the justification but it is the particular statutory language used that places the legal burden on the taxpayer to satisfy the tribunal that the assessment is wrong and should be reduced or discharged.'

Whether the burden discharged by the appellant

119. Case law authorities have repeatedly held that the burden lies on the taxpayer to establish the correct amount of tax due in an appeal against a discovery assessment.

(1) In *Norman v Golder*, the taxpayer sought to argue that the onus of establishing the correctness of the assessment lies upon the Crown, and that the onus of proving that the assessment is incorrect does not lie on the taxpayer. Lord Greene MR firmly rejected the notion: 'The point really is not arguable'; the statute 'makes it clear, beyond possibility of doubt, that the assessment stands, unless and until the taxpayer satisfies the Commissioners that it is wrong'.[17]

(2) In *Haythornthwaite v Kelly*, Lord Hanworth MR similarly stated, that 'it is quite plain that the Commissioners are to hold the assessment standing good unless the … Appellant – establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside'.[18]

(3) In *Johnson v Scott*, the High Court judgment by Walton J affirming the Commissioners' decision in favour of the Crown was upheld by the Court of Appeal. The pertinent remark by Walton J in this case highlights why the onus of proof has to lie with the taxpayer, because: 'The true facts are known, presumably, if known at all, to one person only, the taxpayer himself.'[19]

(4) In *Van Boeckel*, Woolf J stated that:

> '… unless the situation is one where no material is before the commissioners on which they can reasonably base an assessment, the commissioners are not required to make investigations. If they do make investigations, then they have got to take into account the material disclosed by those investigations. …' [20]

(5) In *Bi-Flex Caribbean*, Lord Lowry stated that:

> 'The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgement assessment, as the cases have established, do not serve to displace the validity of the assessments, which are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows

[17] *Norman v Golder* (1944) 26 TC 293, at page 297.

[18] *Haythornthwaite and Sons Ltd v Kelly* (1927) 11 TC 657, at page 667.

[19] *Johnson v Scott* [1978] STC 48, at 56(j) to 57(a).

[20] *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290, at 296.

> positively what corrections should be made in order to make the assessments right or more nearly right.'[21]

120. The appellant's case is staked almost exclusively on the two witness statements lodged by Mr Turner and Ms Bandyle, but neither of them were available for cross-examination. In deciding what weight can be given to their witness statements, we have regard to the principles derived by Brooke LJ from the relevant line of authority in *Wisniewski*[22]:

> '(1) In certain circumstances, a court may be able to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.'

121. The witness statements by Mr Turner and Ms Bandyle have been related verbatim at §§74-75. Both witnesses were aware of the extensive investigations being conducted by HMRC in relation to the schemes involving the use of entities associated with them. The assertions in their witness statements seek to remove any nexus between Mr Contractor as the service provider and the fee payments received by IFL. Both witnesses, in making those assertions that there was no evidence to link additional payments to Mr Contractor, would be aware that they have a case to answer, since HMRC have contended against the basis of those assertions. The substance of both statements has not been put to proof in the absence of cross-examination, and the witness statements are therefore mere assertions. Consequently, we conclude that no weight can be accorded to either statement.

122. We have no evidence from the appellant himself; we can give no weight to the witness statements lodged for the appellant. We have only the documentary evidence obtained from associated entities of the Scheme. We find that Mr Turner's attempt to follow the monies fails to sever the nexus that is to us clearly evidenced by K61, whereby IFL was invoicing weekly for services rendered by Mr Contractor. The schedule K61 with the columns of details establish the nexus between Mr Contractor as the service provider and those sums invoiced weekly by IFL for his service; the details contained in the schedule K61 are part and parcel of accounting records fundamental to the running of any business.

123. The schedule K61 is particularised to establish the nexus between Mr Contractor as the service provider and the receipts by IFL for 'Fees for the services of Cyrus Contractor'. In contrast, Mr Turner's attempt to follow the monies was through documents that are devoid of any particularisation. If anything, the attempt to follow the monies raises more questions for us than it answers: huge sums of monies with unspecified descriptions were being moved around entities on a regular basis, crossing jurisdictional borders a few times for unspecified reasons; the quantum in each case renders it impossible to match the disparate sums that make up the

---

[21] *Bi-Flex Caribbean v The Board of Inland Revenue* [1990] 63 TC 515, at 522.

[22] *Wisniewski v Central Manchester Health Authority* [1998] EWCA Civ 596

total; the direction of travel for the sequence of entities involved is unclear and not necessarily in the order as put forward by Mr Turner; no valid commercial reasons are evident for these movements of funds. In conclusion, the attempt to follow the monies raises questions for us as to whether all these entities are part of an orchestrated mechanism to throw any investigators off the scent of the original nexus between the appellant as the service provider and the fee receipts by IFL in relation to the services he had so provided.

124. In cross-examination, Mr Turner asked Officer Tyler whether he would consider it plausible that the money received by IFL was through a number of intermediaries. Such a question is peculiar in the context of what Officer Tyler could have known in comparison with what the appellant would have known. As Lewison LJ observed at [24] in *Hankinson*: 'the material necessary to form a concluded view of that question would almost always be in the taxpayer's possession and would not have accompanied his self-assessment return' for the notional officer to be aware of the insufficiency in tax assessment.

125. Aside the question of nexus, the appellant's case in relation to the quantum issue is that the £69,000 declared in the 2014-15 return as turnover was the same £68,000 as evidenced on K61. Mr Turner sought to demonstrate that the £69,000 declared per G70 was somehow traceable to the £68,000 listed on K61. We are unable to conclude that the sum of £68,000 listed on K61 corresponded to the total of £69,000 recorded on G70 for the following reasons.

(1) While the total of £69,000 on G70 is close to the £68,000 on K61, they are not identical, and no satisfactory explanation has been given for the numerical discrepancy.

(2) Far more significantly for present purposes, the two sums related to different time periods: G70 covered the twelve months from April 2014 to March 2015, while K61 covered only a quarter of the tax year, being the three months from January 2015 to March 2015.

126. In *Nicholson v Morris*[23], the taxpayer appellant Mr Nicholson, who was a clerk to barristers, elected not to give evidence in his appeal against additional tax assessments for what the Revenue discovered to be underdeclared fee income. Goff LJ stated that the provision under s 50(6) TMA meant that the commissioners (at first instance) 'were legally bound' to confirm the additional assessments, unless it appeared to them that the appellant was overcharged; the onus was on the appellant to satisfy the commissioners, 'which he failed to do, notably because he did not give any evidence'. In relation to whether the assessment stands good, it is material that Mr Contractor has similarly elected not to give evidence.

Whether quantum to increase

127. We have considered carefully the evidence put forward for the appellant that he was overcharged; we are not satisfied that the appellant has discharged the burden that he was overcharged. On the contrary, having considered the evidence, and applying the legal principle of presumption of continuity, we are of the view that the assessment is conversative in quantum.

128. We heard Officer Tyler's evidence that the investigations into the Scheme show a pattern of movement of funds by IFL, whereby a fraction of the total receipt of the fee payments from end clients was transferred to Runnymede for payment to the relevant service providers in the Scheme, while three or four times of that sum to Runnymede would be transferred to several intermediaries before 'loan' payments were made to the relevant scheme users. In other words, after receipt by IFL, the split of fees between Runnymede and intermediaries is in the ratio of 1:3 or 1:4.

[23] *Nicholson v Morris* (C.A.) [1977] STC 162

129. In the present case, the split ratio would appear to be 1:3, since if the £68,000 listed on K61 represented the *quarterly* total of the fees received by IFL for Mr Contractor's services, then around 25% of that total was remitted via Runnymede, corresponding to the £18,000 being recorded on G70 as having been paid in the corresponding quarter to Mr Contractor by Runnymede. On the balance of probabilities, the numerical and temporal discrepancies between K61 and G70 would appear to match the explanation of the pattern of split of fee receipts between Runnymede and intermediaries as established by Officer Tyler's team investigating into the Scheme.

130. For the purposes of this appeal, the relevant figures on K61 are restricted to the quarter from January to March of 2015. However, we note from K61 that the pattern of fees being invoiced by IFL for 'Fees for services of Cyrus Contractor' in the period from April to November 2015 (post-dating the tax year 2014-15) continues with clockwork regularity at the daily rate of £1,000, (see §45). The reduction of payment on account for 2015-16 by the appellant would suggest that the pattern of split of fees for 2015-16 to Runneymede would be reduced to 20% or more from the 25% operative in 2014-15. In our judgment, it would have been entirely legitimate for the respondents to apply the presumption of continuity to the nine-month period preceding January 2015. We are of the view that the quantum of underdeclared earnings by the appellant would have been in the region of £50,000 per quarter (being £68,000 less £18,000), making the overall under-declaration for the tax year 2014-15 to be £200,000.

131. Under s 50(7), if on appeal, the tribunal decides that the appellant is undercharged to tax, the assessment shall be increased accordingly. While the Tribunal has the jurisdiction to increase the quantum of the assessment under appeal in accordance with the conclusion we have reached, it is not our intention to increase the quantum of the assessment.

132. We understand that this assessment is protective in nature, and this appeal may be a lead case for similar cases to come. In due course, HMRC may address the quantum issue and other years of assessment when the investigations are concluded. We determine the appeal by reference to s 50(6) only, by concluding that the appellant has not satisfied us that he was overcharged. Consequently, the assessment raised on the basis that the £68,000 identified on K61 represents underdeclared income in the appellant's tax return for 2014-15 stands good.

DISPOSITION

133. The appeal is accordingly dismissed. The discovery assessment for additional income tax liability in the quantum of £31,600 is confirmed in full.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

134. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 23 FEBRUARY 2021

ANNEX

LEGISLATION

Section 29 TMA

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 which ought to have been assessed to income tax, … have not been assessed, or

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

(c) [not relevant]

the officer or, as the case may be, the Board may, … make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) [not relevant]

(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 [not relevant]

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

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

(b) informed the taxpayer that he had completed his enquiries into that return,

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

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

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

(b) […];

(c) […]; 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.

(7) In subsection (6) above –

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes –

(i) a reference to any return of his under that section for either of the 2 immediately preceding chargeable periods; and

(ii) [not relevant]; and

(b) any reference in paragraphs (b) to (d) to the taxpayer include a reference to a person acting on his behalf.

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant year of assessment is a reference to –

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made.

Section 34 TMA

34 Ordinary time limit of 4 years

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.

(2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.

Section 50(6) TMA

50 Procedure

[…]

(6) If, on appeal notified to the tribunal, the tribunal decides –

(a) that the appellant is over charged by a self-assessment;

(b) that any amounts contained in the partnership statements are excessive; or

(c) that the appellant is over charged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.