TC02107

Appeal number: TC/2011/07232
TC/2011/07233

INCOME TAX – discovery assessment – section 29 TMA 1970 – whether officer could reasonably have been expected to be aware of understatement of income – information made available pursuant to section 29(6) – whether agent's conduct negligent – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) MR DANIEL BROWN **Appellants**
(2) MR MATTHEW BROWN

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MR NOEL BARRETT

Sitting in public at Bradford on 14 May 2012

Mr Michael Hall a former Inspector of Taxes for the Appellant

Miss Joanna Bartup of HMRC for the Respondents

DECISION

Background

1. These two appeals arise out of the same facts and were listed to be heard together. The appellants are brothers and were shareholders and directors in a company called Phoenix Electronic Services UK Limited ("Phoenix"). Both appellants contend that HMRC was not entitled to make what is known as a "discovery assessment" against them in relation to tax year 2007-08. They accept that their tax returns for that year understated their income resulting in underpayments of tax of £17,953 and £46,483 respectively. However they say that the assessments are invalid because the conditions necessary to raise discovery assessments set out in *Section 29 Taxes Management Act 1970* were not satisfied.

2. There was no real dispute as to the underlying facts save in respect of one matter (negligent conduct) which we consider below. No witness evidence was led before us and our findings of fact are based on the documentary evidence contained in the bundle prepared by HMRC. We first deal with certain background findings of fact before considering the statutory framework which permits the respondents to make discovery assessments. We then consider the parties' submissions and give our decision on the issue of whether HMRC was entitled to make the discovery assessments which are under appeal.

Background Findings of Fact

3. The Appellants were at all material times directors of Phoenix. The share capital of Phoenix as at 31 May 2007 comprised 500,000 £1 ordinary shares. On 31 March 2008 the first appellant sold 25,000 ordinary shares and the second appellant sold 75,000 ordinary shares. In each case the purchaser was Phoenix so that the transaction was a purchase by Phoenix of its own shares.

4. The appellants instructed a firm called Accountants for Small Business Limited ("ASB") as their accountants and that firm acted on behalf of the appellants in making their tax returns. The first appellant's return was submitted on 1 August 2008 and the second appellant's return was submitted on 2 August 2008. In each case the returns included a capital gains tax computation showing chargeable gains of £14,589 and £62,138 respectively with tax due at 40% on those amounts.

5. In 2008-09 Phoenix made further purchases of its own shares which were again shown on the appellants' tax returns as giving rise to chargeable gains.

6. The enquiry window for the 2007-08 returns closed on 31 January 2009. Thereafter the only basis upon which HMRC could make an assessment in relation to that tax year was by way of discovery assessment. On 17 September 2010 HMRC wrote to the appellants and to ASB indicating that it appeared their 2007-08 tax returns were inaccurate. In particular that the proceeds of the share transactions should have been treated as distributions by Phoenix and subject to Income Tax rather

than Capital Gains Tax. At the same time HMRC opened an enquiry into the appellants' 2008-09 tax returns.

7. In response to this correspondence, ASB immediately accepted on behalf of the appellants that the transactions ought to have been treated as distributions. In letters dated 21 October 2010 ASB stated as follows in relation to 2008-09:

> *"I inadvertently overlooked certain restrictions that are applicable for such distributions to be treated as capital rather than income. As a result, Mr Brown accepts that the disposal of shares bought back by the Company should have been treated as a dividend distribution."*

8. A similar concession was made in relation to 2007-08 but at the same time ASB contended that HMRC were not entitled to make a discovery assessment. Correspondence in relation to this issue continued and ultimately led to discovery assessments being made on 16 May 2011 and to the present appeals. The amount of the discovery assessments is not in dispute.

The Law

9. The power of HMRC to enquire into a self-assessment tax return is in *Section 9A Taxes Management Act 1970* ("*TMA 1970*"). That section sets out various time limits in which notice of intention to enquire must be given. For present purposes it is not disputed that the time for an enquiry into the 2007-08 returns expired on 31 January 2009.

10. In circumstances where the period in which a notice of enquiry can be given has expired, it may still be possible for HMRC to make an assessment where a loss of tax is discovered. *Section 29 TMA 1970* sets out the circumstances in which a discovery assessment, can be made. The following provisions of *section 29* are relevant for present purposes:

> *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, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or*
> >
> > *(b) …*
> >
> > *(c) …*
>
> *the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.*
>
> *(2) …*

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

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

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

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.

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

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

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

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

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

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

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

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

11. There is no dispute in these appeals that income which ought to have been assessed to tax has not been assessed. HMRC must therefore establish that one of the two conditions in subsections (4) and (5) are satisfied. On these appeals they contend that both conditions are satisfied.

12. The first condition is relatively straightforward. HMRC must establish that the omission of income from the appellants' tax returns was brought about as a result of negligent conduct on the part of the appellants or ASB. In this context, negligent conduct is to be judged by reference to the reasonable taxpayer. The test was described by Judge Berner in *Anderson (deceased) v Revenue and Customs Commissioners* [2009] UKFTT 206 at [22], cited with approval by the Upper Tribunal in *Colin Moore v Revenue and Customs Commissioners* [2011] UKUT 239 (TCC):

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

13. A similar test will apply in relation to an agent. What would a reasonable agent exercising reasonable diligence in the completion and submission of the return have done?

14. The second condition is not so straightforward and has been the subject of consideration by the Court of Appeal in a number of recent cases. The first of those cases is *Langham v Veltema [2004] STC 544* where Auld LJ described the operation of the second condition in the following way:

> "*32. If, as here, the taxpayer has made an inaccurate self-assessment, but without any fraud or negligence on his part, it seems to me that it would frustrate the scheme's aims of simplicity and early finality of assessment to tax, to interpret section 29(5) so as to introduce an obligation on tax inspectors to conduct an intermediate and possibly time consuming scrutiny, whether or not in the form of an enquiry under section 9A, of self-assessment returns when they do not disclose insufficiency, but only circumstances further investigation of which might or might not show it…..*
>
> *33. More particularly, it is plain from the wording of the statutory test in section 29(5) that it is concerned, not with what an Inspector could reasonably have been expected to do, but with what he could have been reasonably expected to be aware of. It speaks of an Inspector's objective awareness, from the information made available to him by the taxpayer, of "the situation" mentioned in section 29(1), namely an actual insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an insufficiency, as suggested by Park J. If he is uneasy about the sufficiency of the assessment, he can exercise his power of enquiry under section 9A and is given plenty of time in which to complete it before the discovery provisions of section 29 take effect.*
>
> …

36 The answer to the second issue– as to the source of the information for the purpose of section 29(5) - though distinct from, may throw some light on, the answer to the first issue. It seems to me that the key to the scheme is that the Inspector is to be shut out from making a discovery assessment under the section only when the taxpayer or his representatives, in making an honest and accurate return or in responding to a section 9A enquiry, have clearly alerted him to the insufficiency of the assessment, not where the Inspector may have some other information, not normally part of his checks, that may put the sufficiency of the assessment in question. If that other information when seen by the Inspector does cause him to question the assessment, he has the option of making a section 9A enquiry before the discovery provisions of section 29(5) come into play. That scheme is clearly supported by the express identification in section 29(6) only of categories of information emanating from the taxpayer…"

15. The Court of Appeal in *HMRC v Lansdowne Partners Limited Partnership* [2011] EWCA Civ 1578 considered how much and what information it is necessary to provide to HMRC in order to avoid the possibility of a discovery assessment. The Chancellor at [50] formulated the issue in the following terms:

"*In these circumstances the question is whether on this information an officer of the Board could have been reasonably expected to be aware that the amount of the profits included in the partnership return was insufficient. Plainly it is necessary to assume an officer of reasonable knowledge and understanding.*"

16. At first instance in the same case (*HMRC v Lansdowne Partners Limited Partnership [2010] EWHC 2582 (Ch)*) Lewison J as he then was helpfully summarised the law at [46] and [49] as follows:

"46. In Langham v Veltema [2004] STC 544 the Court of Appeal considered section 29 and discovery assessments. In my judgment that case establishes the following propositions:

i) "Awareness" is the officer's awareness of an actual insufficiency in the self-assessment in question, rather than an awareness that he should do something to check whether there is an insufficiency (§ 33);

ii) The test whether an officer could reasonably have been expected to be aware of an actual insufficiency is an objective test (§ 33);

iii) The sources of information referred to in section 29 (6) are the only sources of information to be taken into account in deciding whether an officer ought reasonably to have been aware of the actual insufficiency (§§ 36, 51);

iv) The information in question must clearly alert the officer to the insufficiency of the assessment (§ 36).

…

49. In Corbally-Stourton Mr Hellier pointed out (correctly in my judgment) that:

> *i) The statutory reference is to "an officer" of the Board, not to any particular officer;*
>
> *ii) This entails a hypothetical officer rather than any real individual;*
>
> *iii) The hypothetical officer must be endowed with knowledge of elementary arithmetic, some knowledge of tax law, and some tax law, all of which he will apply to the prescribed sources of information.*"

17. In addition to the law relating to discovery assessments it is also necessary to say something about the principles which govern the taxation of the disposal proceeds in circumstances where a company purchases its own shares.

18. In general a distribution made by a company will be chargeable to income tax in the hands of an individual recipient. *Section 209 Income and Corporation Taxes Act 1988* ("ICTA 1988") defines the term "distribution" for these purposes. In particular by *section 209(2)(b)* it includes:

> "*… any other distribution out of the assets of the company (whether in cash or otherwise) in respect of shares in the company, except so much of the distribution, if any, as represents repayment of capital on the shares …*"

19. In general, therefore, any sum paid by a company in purchasing its own shares in excess of the capital contributed in respect of those shares will be a distribution and subject to income tax. However *section 219* operates to exclude from the meaning of the term distribution a payment made by a company in purchasing its own shares where the company is an unquoted trading company (such as Phoenix) and certain conditions are satisfied. For present purposes a payment is excluded by *section 219(1)(a)* where:

> "*[the purchase] is made wholly or mainly for the purpose of benefiting a trade carried on by the company … and does not form part of a scheme or arrangement the main purpose of which or one of the main purposes of which is –*
>
> *(i) to enable the owner of the shares to participate in the profits of the company without receiving a dividend, or*
>
> *(ii) the avoidance of tax …*"

20. *Section 225* makes provision for a company to make a written application to HMRC for advance clearance confirming whether or not section 219 will apply to an intended transaction.

21. *Section 226(1) ICTA 1988* provides that if a company purchases its own shares and treats the transaction as one to which *section 219* applies (ie not a distribution)

then it must make a return of the transaction to the inspector within 60 days of the payment giving particulars of the payment and the circumstances by reason of which it is treated as falling within *section 219*.

22. Finally in this context it is relevant to note that HMRC have issued a statement of practice (SP2/82) indicating how the test in *section 219(1)(a)* is applied, in particular the circumstances in which the purchase will be treated as wholly or mainly benefiting a trade carried on by the company. It also outlines the information required in applying for a clearance under *section 225*.

Submissions

23. The issue which we have to decide is whether, on the facts as we find them, one or other of the two conditions set out in *s29(4), (5)* are satisfied so as to entitle HMRC to make discovery assessments. The onus is on HMRC to establish that the conditions are satisfied.

24. The primary submission made by Miss Bartup was that on 31 January 2010 an officer could not have been reasonably expected on the basis of information available to him to be aware that there was an understatement of income. She also relied upon a submission that the understatement of income was attributable to negligent conduct on the part of ASB although that was very much a secondary argument and she did not make detailed submissions on the point.

25. Miss Bartup submitted that an officer could only have been expected to be aware of the understatement if he had known:

(1) That the shares disposed of by the appellants had been purchased by Phoenix.

(2) That the conditions allowing capital gains tax treatment set out in *section 219* were not satisfied.

26. In the words of Auld LJ quoted above, Miss Bartup submitted that the appellants had not clearly alerted the inspector to the insufficiency of the assessment. She also relied on a decision of the First-tier Tribunal in *Abdul Omar v HMRC [2011] UKFTT 722 (TC)* although with respect that decision appears to be on its own facts and does not take matters further than the law we have outlined above.

27. Mr Hall for the appellants helpfully provided his submissions in writing. We carefully read those submissions during the course of the hearing and subsequently. We can summarise them for present purposes as follows:

(1) That a reasonable officer would have inferred that the appellants were selling their shares to Phoenix, and

(2) That a reasonable officer would have inferred that the share sale was not wholly or mainly for the purpose of benefiting a trade carried on by the company.

28. In each case Mr Hall submits that those inferences could be drawn from material available in the tax returns together with other material easily available to a reasonable HMRC officer. The other material was available to HMRC without making third party enquiries and was not restricted by *section 29(6)*. If necessary, Mr Hall submitted that the inferences could be drawn only from material available in the tax return.

29. We deal with the parties' more detailed submissions in our decision below.

Decision

30. Firstly Mr Hall invites us to find that a reasonable officer would have inferred that the appellants were selling their shares to Phoenix.

31. The basis on which Mr Hall invites that inference is that the appellants' tax returns show that they were directors of and employed by Phoenix. The returns show each appellant had a small salary from Phoenix of £5,016. They also show larger dividends of £55,555 for each appellant and although the paying company is not identified the return shows that they owned a large number of shares in Phoenix. The shares in Phoenix were also sold for a large consideration of £100,000 in the case of the first appellant and £300,000 in the case of the second appellant. Phoenix was a close company and the appellants had only one employment. Of the tax declared as payable on the return of the second appellant 15.81% related to employment and dividend income and 84.19% related to the capital gain declared.

32. We accept and find the facts stated in the previous paragraph but we do not accept the inference which we are invited to draw from those facts. The facts say nothing about the identity of the purchaser of the shares. The purchaser could just as easily have been another family member or business associate. The leap Mr Hall invites us to make is too great. Indeed in our view if an inspector had assumed the purchaser was Phoenix then it would have been an unjustifiable assumption.

33. In support of his submission that we are entitled to take into account information above and beyond *section 29(6) TMA 1970*, Mr Hall referred us to a decision of the First-tier Tribunal in *Charlton & Others v HMRC [2011] UKFTT 467 (TC)*. That was a case on very different facts to the present and was concerned with a tax avoidance scheme. As a matter of fact the FTT held that based on what was in the return it should have been obvious to a reasonably competent tax inspector that a tax avoidance scheme had been implemented. If that inspector had sought guidance from colleagues he would soon have realised that immediate assessments should have been made (See paras [122] and [128] – [134]). At [122] the FTT said:

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

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

34. Decisions of the FTT are not binding upon us, and we note that the decision in *Charlton* is the subject of an appeal to the Upper Tribunal. In any event it does not assist us on the facts of the present case. In *Charlton* the FTT was not suggesting that the officer should be taken to know the results of further enquiries in relation to the underlying facts. Rather it was suggesting he should be taken to know the results of enquiries as to how the law applied to facts derived from the material identified in *section 29(6)*. Even if the decision in *Charlton* is correct it does not assist the appellants in the present appeals.

35. Mr Hall suggests that the officer would be expected to consult the inspector who dealt with Phoenix's corporation tax returns. However that is an enquiry involving a fact finding exercise and is outside the scope of what the FTT in *Charlton* was suggesting. It is also inconsistent with the principles outlined by the Court of Appeal in *Langham v Veltema*. Whatever was on Phoenix's corporation tax file is not information available to the officer as defined by *section 29(6)*.

36. Mr Hall invites us to consider other information which he says would be available to the officer, such as that contained in the company accounts for the year ended 31 May 2008. For the reasons given above, such information is not to be taken into account for the purposes of *section 29(5)*.

37. In support of his submission that we can take into account other information outside that specified in *section 29(6)* Mr Hall referred to *Langham v Veltema* where he says on the facts of that case it was permissible to treat the contents of a P11D as being available to the reasonable inspector. However that is the basis upon which Park J dismissed the appeal of HMRC at first instance and it was clearly overruled by the Court of Appeal in allowing the further appeal of HMRC. Auld LJ set out his interpretation of *section 29(5), (6)* clearly at paragraphs [33] and [36]. He goes on to observe at [37] and [38] that P11D information was irrelevant given his construction but even on the construction adopted by Park J it added little if anything to the *section 29(6)* information. Chadwick LJ and Arden LJ agreed with the analysis of Auld LJ although neither specifically refers to the P11D.

38. It is true that Chadwick LJ suggests at [48] that the reasonable inspector must be treated as having additional information which he might reasonably have called for. Mr Hall did not refer us to this paragraph, however it is inconsistent with the judgment of Auld LJ cited above and Arden LJ expressly disagrees at [51] of her judgment. To this extent therefore Chadwick LJ was in a minority and this part of his judgment does not represent good law.

39. In the circumstances we find that there is no reasonable inference that the shares had been sold to Phoenix.

40. Secondly, and even if there was a reasonable inference that the shares had been sold to Phoenix, we accept Miss Bartup's submission that the officer would not know whether the facts were such that *section 219 ICTA 1988* applied to exclude the payment from the definition of 'distribution'. In particular whether the payment was made wholly or mainly for the purpose of benefiting a trade carried on by the company. In this regard Mr Hall relied on paragraph 3 of SP 2/82 which states as follows:

> "*If the company is not buying all the shares owned by the vendor, or if although the vendor is selling all his shares he is retaining some other connection with the company - for example, a directorship or an appointment as consultant - it would seem unlikely that the transaction could benefit the company's trade, so the trade benefit test will probably not be satisfied…*"

41. Mr Hall submitted that it was unlikely the trade benefit test could be satisfied. However the fact that something is likely or unlikely is not the test to be applied in the context of *section 29(5) TMA 1970*. The question is whether the officer would be aware of an actual insufficiency such that he would make an assessment without the need for further enquiries. Moses LJ in *HMRC v Lansdowne Partners Limited Partnership [2011] EWCA Civ 1578* at [70] stated as follows:

> "*The statutory condition turns on the situation of which the officer could reasonably have been expected to be aware. Awareness is a matter of perception and of understanding, not of conclusion. I wish, therefore, to express doubt as to the approach of the Special Commissioner in Corbally-Stourton v Revenue and Customs Comrs [2008] STC (SCD) 907 and of the Outer House in R(on the application of Patullo) v Revenue and Customs Commissioners [2010] STC 107, namely, that to be aware of a situation is the same as concluding that it is more probable than not. The statutory context of the condition is the grant of a power to raise an assessment. In that context, the question is whether the taxpayer has provided sufficient information to an officer, with such understanding as he might reasonably be expected to have, to justify the exercise of the power to raise the assessment to make good the insufficiency.*"

42. It is not therefore sufficient for the officer to think it likely that there is an insufficiency. In the present circumstances he would want to make further enquiries to establish the facts. Indeed paragraph 3 of SP 2/82 continues:

> "*… However, there are exceptions; for example, where a company does not currently have the resources to buy out its retiring controlling shareholder completely but purchases as many of his shares as it can afford with the intention of buying the remainder where possible. In these*

circumstances, it may still be possible for the company to show that the main purpose is to benefit its trade."

43. In our view even if the officer knew that the shares had been purchased by Phoenix he would not have made an assessment based on the information in the 2007-08 tax return. He would still have needed to make enquiries as to whether the trade benefit test was satisfied, for example identifying whether the appellants had remained directors of Phoenix after the sale and if so why. There was no evidence from which he could reasonably have inferred that the directorships continued or ceased at or about the time of the share sale. If they continued the officer would still need to know the circumstances in which they continued to see if the test in *section 219(1)(a) ICTA 1970* was satisfied.

44. Mr Hall further submitted that the officer would have known that the trade benefit test was not satisfied because the company had not made a return of the payment pursuant to *section 226(1) ICTA 1988*. The return is to be made by the company to its inspector. We accept and find as a fact that no such return was made. Again, however for the reasons given above this is not information which falls to be taken into account for the purposes of *section 29(5)*. In any event, it could not be assumed that the company was aware of its obligation to make such a return, especially when the directors had treated the disposal proceeds as being subject to capital gains tax. At best there was an inconsistent treatment which would require further enquiry and explanation.

45. In response to Miss Bartup's submission that the appellants had not clearly alerted the inspector to the insufficiency of the assessment, Mr Hall submitted that this was not relevant on the facts of the present case. He suggested that the obligation on a taxpayer to clearly alert HMRC to an insufficiency in a self assessment only arises where figures included in the return are open to interpretation or uncertain. We do not accept Mr Hall's submission. Whatever the cause of the insufficiency if the information identified in *section 29(6)*, including any disclosure in the return itself, is not sufficient for the reasonable inspector to know that there was an insufficiency then HMRC can make a discovery assessment.

46. Mr Hall submitted that HMRC made just the inferences he invites when they first commenced the enquiry into the 2008-09 return on 17 September 2010. In a letter of the same date the officer indicated that it appeared the 2007-08 return was inaccurate. In particular the officer identified that the shares had been sold to Phoenix and that the circumstances were such that the proceeds over and above the original cost of the shares represented a distribution. However our reading of this correspondence is that it was part of the fact-finding involved in an enquiry. In particular the letter asserts that the shares were sold to Phoenix and that the proceeds represented an income distribution. It then states:

"*Please let me have your agreement to this or any representations that you might wish to make.*"

47. It is clear to us and we find as a fact that as at 17 September 2010 the officer who opened the enquiry did not have sufficient information to make an assessment. He was aware that Phoenix had purchased the shares but he could not have known with sufficient certainty whether the payment was made wholly or mainly for the purpose of benefiting the trade of the company. In addition we find as a fact that at the time the enquiry was opened the inspector who opened the enquiry had a copy of the Form 169 submitted to Companies House which showed that the company had purchased the shares. It is also likely and we find as a fact that he had obtained and considered the annual accounts of Phoenix and the information contained therein. None of that is information available to the officer as defined by *section 29(6)*.

48. In the circumstances we find that there is no reasonable inference from the information available that the sale was not wholly or mainly for the purposes of benefiting a trade carried on by Phoenix.

Conclusion

49. For the reasons given above we are satisfied that HMRC were entitled to make discovery assessments against both appellants. There is no issue as to the quantum of those assessments and in the circumstances we confirm them. The appeals are therefore dismissed.

50. We did not hear detailed submissions in relation to whether ASB were negligent in failing to treat the disposal proceeds from the sale of shares in Phoenix as distributions. The letter from ASB in which it says it "*inadvertently*" overlooked the restrictions does point towards that conclusion. However we have not heard evidence from ASB in relation to this aspect of the appeals. Whilst the point was taken in HMRC's Statement of Case the correspondence leading to the appeals did not contain any discussion of whether there was negligent conduct. In those circumstances we do not consider it appropriate to make any finding of fact in that regard. Because of our findings in relation to the second condition in *section 29(5) TMA 1970* it is not necessary for us to do so.

51. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 28 June 2012