TC03958

Appeal number: TC/2013/02221

CAPITAL GAINS TAX – Discovery assessment; tax avoidance scheme involving capital redemption policies; whether HMRC officer discovered that chargeable gains ought to have been assessed or relief refused, whether an assessment was insufficient, or whether any relief given was excessive; whether officer of HMRC could not have been reasonably expected to be aware of the chargeable gains, insufficiency or excess relief; TMA 1970 s 29; what constitutes such awareness; tests to be applied; Res Judicata and judicial review proceedings; abuse of process; application to set aside Direction refusing to allow Grounds of Appeal to be amended; The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 Rule 6(5); Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NEIL PATTULLO **Appellant**

- and -

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

TRIBUNAL: JUDGE J GORDON REID QC, FCIArb
MR PETER R SHEPPARD, FCIS, FCIB, CTA

Sitting in public at George House, Edinburgh on 18, 19 and 20 March 2014

Keith Gordon, barrister for the Appellant on the instructions of AVN Venus Tax LLP, Leeds

Iain Artis, Advocate on the instructions of the Office of the Advocate General, for the Respondents

DECISION

Introduction

1. This appeal raises three issues, namely (1) the validity of a *discovery* assessment issued in January 2010, relating to the Appellant's Self Assessment Tax Return for the year 2003/04, charging tax of £835,400.60 in respect of a claim to set off against capital gains, a capital loss created by entering into various tax planning arrangements, (2) whether the issue of validity has already been determined by the Court (*res judicata*), and (3) whether the grounds of appeal may be expanded at this late stage to challenge the underlying soundness of the assessment (and possibly its quantification), if valid, ie to contend that the tax avoidance scheme actually worked.

2. These, or substantially the same, tax planning arrangements, were considered in *Drummond v HMRC* 2007 Spc00617 (Sir Stephen Oliver QC) (see paragraph 18), [2008] STC 2707 (Ch) (Norris J) (see paragraph 23) and [2009] STC 2206 (Ct of Appeal) (see paragraph 27). The taxpayer's appeals failed. Permission to appeal to the Supreme Court was refused in November 2009.

3. A Hearing took place at Edinburgh on 18, 19 and 20 March 2014. The Appellant was represented by Keith Gordon, barrister, on the instructions of AVN Venus Tax LLP, Leeds. He led the evidence of Andrew D Wells, FCIT, a tax partner with AVN. Iain Artis, advocate, appeared on behalf of the Respondents (HMRC) on the instructions of the Office of the Advocate General. Mr Artis led the evidence of Dr Nicholas Branigan, an experienced official, with HMRC Specialist Investigations (SI), which, throughout the period with which this appeal is concerned, had responsibility for the investigation of complex cases of fraud or avoidance where significant amounts of tax were at risk. This included marketed avoidance schemes.

4. A bundle of documents was produced along with skeleton arguments and authorities.

Statutory Background

5. On receipt of a taxpayer's self-assessment tax return, HMRC may open an enquiry into the return. They must normally do so and if appropriate amend the taxpayer's self-assessment return within a certain period (TMA s 9A). Here, that period expired on 31 January 2006, without an enquiry having been opened and without the Appellant's tax return being amended. S29 enables an assessment to be raised by HMRC outwith that period if certain conditions are met. These conditions are set out in s29, which insofar relevant, provided at the material time as follows:-

> 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 ……. chargeable gains which ought to have been assessed to capital gains tax have not been assessed, or

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

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

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

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of all 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)

(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.

6. S37 of the Taxation of Chargeable Gains Act 1992 was discussed at length in *Drummond* as its proper interpretation was critical to the effectiveness of the tax avoidance scheme under consideration. S37 provided *inter alia* as follows:-

> 37(1) — There shall be excluded from the consideration for a disposal of assets taken into account in the computation of the gain any money or money's worth charged to income tax as income of, or taken into account as a receipt in computing income or profits or gains or losses of, the person making the disposal for the purposes of the Income Tax Acts.

7. As shall be seen from an examination of *Drummond* the purpose of s 37 is to avoid double taxation and thus to deduct from disposals an amount already taken into account for income tax purposes. Its purpose is not to create a massive tax loss by some form of fiscal alchemy involving transactions with no other purpose than constituting the magic ingredients with which the fiscal alchemy is performed.

Grounds of Appeal

8. The Appellant contends in his Notice of Appeal that the *provisions of section 29(1)TMA are not satisfied in relation to the assessment.* He further argues that

> *Section 29 TMA does not apply in this case as a) fraudulent or negligent conduct on the part of the appellant or a person acting on his behalf did not occur (and this has not been alleged) and b) the disclosure on which the discovery is alleged was contained in the tax return submitted by the appellant so section 29(5) is not satisfied*

9. The Appellant therefore says firstly that there was no *discovery* at all within the meaning of s29(1)(a), (b) or (c), and secondly, that by the date of closure of the statutory enquiry window, HMRC could have been reasonably expected on the basis of information then available and contained in the Appellant's return or reasonably to be inferred therefrom, to be aware of the insufficiency of tax assessed in the Appellant's return.

Facts

Tax Returns - general

10. The legislation appears to assume that when a tax return is submitted it will be examined by an officer of HMRC. Practice is somewhat different. Unless the taxpayer leaves the calculation of tax due to HMRC, it is not normally the case that the return will be examined by an individual officer. The data harvested from each return is inserted into a database by HMRC officers. This is a purely clerical copying exercise and involves no consideration of the contents of a return. The initial and sometimes the only examination of a taxpayer's return is carried out by a computer. The computer is programmed to carry out an initial risk assessment based on various algorithms and filters. The detail was not discussed in evidence.

The Appellant's Tax Return

11. The Appellant' tax return for the year 2003/04 was received by HMRC, on time, on 31 January 2005. No enquiry was opened under section 9A TMA by 31 January 2006. His return was obtained from store and received at the Edinburgh SI on 23 October 2006, when Dr Branigan *examined* it. The return contained *inter alia* the following entries.

12. At Box 24.1 the Appellant has entered his signature below the words *The information I have given in this Tax Return is correct and complete to the best of my knowledge and belief.*

13. That part of his return relating to his Capital Gains Tax liability contained the following entry:-

	Enter date of Acquisition	Enter Date of Disposal	Disposal proceeds	Losses arising
Capital Redemption Contracts	04/03/04	08/03/04	£ *	£2,665,000.00

* The row in this column was blank

14. At Box 8.1, total gains are noted as £2,143,097. At Box 8.2, the total losses are stated to be £2,701,938. This sum is carried forward to Box 8.10. Neither the basic or economic loss of £60,000 (£2,665,000 less £2,600,000) or its calculation is set out anywhere in the return. While the figures from which that economic loss can be calculated are to be found within the return, this is not how the Appellant calculated the capital loss. In spite of the information contained within the tax return, there is no explanation within the return as to how the loss claimed arose.

15. At Box 8.22, under the heading *Additional Information*, the following is set out:-

> *1 On 24 February 2004 I settled an interest in possession trust with £6,000.*
> *2 The trust is called "The Pattullo 2004 Life Interest Settlement".*
> *3 I Borrowed on commercial terms a sum of £2,665,000 from Investec Bank UK Ltd and settled this amount into the trust.*
> *4 The Trustees "Nexus Trustee Company Limited" used the funds to acquire a number of Capital Redemption Contracts on 1 March 2004 for £2,665,000 from Rockville International Corp.*
> *5 The trustees appointed the Capital Redemption Contracts to me on 4 March 2004.*
> *6 I surrendered the Capital Redemption contracts on 8 March 2004 and received redemption proceeds of £2,600,000.*
> *7 This has given rise to a capital loss as a consequence of s37(1) TCGA 1992 amounting to £2,665,000.*

There is also a sheet entitled CLIENT SCHEDULE TO CAPITAL GAINS PAGES. Below the heading are *inter alia* the following entries:-

Personal /Business assets	Date	Year	Gain; Loss
Capital Redemption Contracts			
Disposal	08/04/2004	*	
Acquired	04/03/2004	(£2,665,000.00)	
Chargeable gains (allowable loss) after reliefs		£2,665,000	

*The row in this column was left blank

16. It can be seen that the disposal proceeds are not shown. There is also no reference to income tax charges on the return. How section 37 operates is not explained in the return. It is neither clear nor obvious, on the basis of the information contained in the return that an insufficiency of tax is being declared.

17. There is no clear calculation explaining how the loss of £2,665,000 is reached.

18. The time limit for opening an enquiry into the Appellant's return under s9A TMA was 31 January 2006. No such enquiry was opened.

Tax Avoidance Schemes

19. In 2004 there were already a number of investigations within SI involving the surrender of second hand life insurance policies (SHIPS). These relied on a mismatch between chargeable events legislation and capital gains legislation. A variant of these schemes was investigated by SI Edinburgh. Subsequently, all SHIPS investigations were consolidated and dealt with by SI at Bristol. Legislation subsequently prevented the successful operation of SHIPS schemes.

20. The existence of tax arrangements involving Capital Redemption Contracts (CRCs) was identified in late 2004 and featured in returns submitted for the tax year 2003/04. Responsibility for managing HMRC's response to these schemes was given to SI Edinburgh. Dr Branigan was appointed the project leader of a team of investigators.

21. In late 2004, Dr Branigan ascertained that CRCs were being used to achieve the same tax advantages thought to apply to SHIPS. A CRC policy is an arcane and specialist product. Most officers of HMRC would not know what it was. These schemes first appeared in tax returns for the year 2003/04. They were not then covered by avoidance scheme disclosure regulations. This made them difficult to identify.

22. Dr Branigan was in charge of investigating and managing the HMRC response to these schemes. By some point in 2005, Dr Branigan had a team of about four tax officials working on the identification and analysis of various tax avoidance schemes. That team, was based, as he was, in Edinburgh. The investigation project was registered on HMRC's internal case management system in May 2005. The team's first task was to set up systems to identify participants in the scheme. The scheme was given the code or project name CRC Mk II because of the existence of previous schemes in the 1990s. Descriptions of the arrangements were published on the HMRC intranet. The intranet pages gave various details of the disclosures likely to be made in a tax return and instructions to local officers to contact Edinburgh SI. Patterns gradually came to be identified, eg the involvement of the same bank, insurance company, solicitors or accountants. Most participants were eventually identified by HMRC, frequently outwith the time for opening an enquiry under TMA s9A.

23. Some 925 participants in the scheme have been identified. This represents what is thought to be about 97% of the participants. There have been 909 open enquiries and investigations. In those cases the contents of the returns were examined to determine whether a *discovery assessment* should be issued. Some cases were investigated under Code of Practice 8. This applies to cases where serious fraud is not suspected. These investigations are not conducted with criminal prosecution in mind. In a number of cases it was concluded that no discovery assessment was possible; no investigation took place and the loss claimed under the scheme was, in effect, allowed.

24. Taxpayers' loss claims have amounted to some £2,186,774,738. Of that sum, about £317.2m have been recovered by HMRC. In some cases, an enquiry was not opened within the statutory period provided for by s9A TMA. More recent legislation has expressly prevented the operation of such schemes by clarifying that CRCs are not chargeable assets for capital gains tax purposes.

25. The deployment of CRCs appears to have been the tax avoidance industry's reaction to that anti-avoidance legislation although CRCs were used for tax avoidance purposes in the 1930s and again in the late 1990s. Capital redemption business carried on by insurance companies consists of effecting (on the basis of actuarial calculations) contracts, which, in return for one or more fixed payments, a sum or a series of sums of a specified amount becomes payable on a specified date or over a period. The nature of the insurance business must not be life insurance. UK insurance companies do not carry on capital redemption business. This is because of the various complexities of regulatory issues relating to insurance law in the United Kingdom. All CRCs involved in tax avoidance schemes were issued by non-UK resident companies.

26. The law was changed with effect from 10 February 2005 by virtue of the Finance (No 2) Act 2005 Schedule 7 paragraph 14 when changes were made to corporation tax. Changes to the treatment of CRCs for capital gains tax purposes applied with effect from 5 December 2005. This, as we have noted, prevents the

effective operation of the CRC Mk II scheme by clarifying that CRCs are not chargeable assets for capital gains tax purposes.

27. The basis of the scheme was to take advantage of the fact that there might be both an income tax charge and a chargeable gain for capital gains tax purposes as CRCs were treated for tax purposes essentially as if they were life insurance policies. For income tax purposes the chargeable gain is the surrender consideration less the amount paid for the contract by the trustee. Here, that resulted in a loss. (£2.6m – £2.665m)

28. For capital gains tax purposes, the chargeable gain equals the surrender consideration less the value on appointment out of trust. This would normally be a negligible gain. However, the scheme relies on an interpretation of s37 of the Taxation of Chargeable Gains Act 1992 to the effect that the consideration of £2.6m should be excluded from the calculation as it has already been included in the computation made for income tax purposes. This results in a capital loss equal to the value of the capital redemption contract on its appointment out of the trust to the Appellant.

29. In 2006 there was considerable uncertainty within HMRC whether CRC schemes *worked*. HMRC's Manual at CG69004 (dated September 2003) stated that *Capital Redemption Policies are not within the charge to Capital Gains Tax. Under such a policy, on payment of a sum of money, the insurer guarantees to the insured a larger sum payable on a specified future date or dates; payment is independent of any contingency*. However, many practitioners in the tax industry were proceeding on the basis that that view was wrong.

30. The appeal in *Drummond* was referred to the Special Commissioners in about October 2006 and was heard in April 2007. The Special Commissioner's decision was issued in July 2007. His decision on s37(1) was upheld by Norris J on 23 July 2008. Norris J's decision was, in turn, upheld by the Court of Appeal on 25 June 2009. In November 2009, permission to appeal to the Supreme Court was refused. The *Drummond* litigation became final (as Mr Gordon accepts in his Skeleton Argument paragraph 52).

Disclosure Regulations

31. Disclosure of the CRC scheme was not required by law. The CRC MkII scheme was marketed before the coming into force of the Tax Avoidance (Prescribed Descriptions of Arrangements) Regulations 2004 SI 2004/1863 and the Tax Avoidance Schemes (Information) Regulations 2004 SI 2004/1864. Although some promoters made a disclosure, most participants did not include the Scheme Reference number on their tax returns. The Appellant did not do so.

32. Full disclosure of a tax avoidance scheme will not guarantee the opening of an enquiry. This is because full disclosure of such a scheme in the *white space* on the return will not necessarily trigger action when the first (and possibly) the only examination of the tax return is carried out electronically by a suitably programmed

computer. There would, however, be a greater risk of an enquiry being opened if full or greater disclosure is made.

Investigation of the Appellant's Affairs

33. By about October 2006, Dr Branigan and his team of four HMRC officers had been investigating these schemes for over a year. They had carried out some technical analysis of the arrangements but had not fully got to grips with all the arguments and the proper interpretation of the relevant legislation. What triggered HMRC's interest in the Appellant at that stage is unknown. Dr Branigan examined the Appellant's tax return and noted (i) that he had an interest in the trust, (ii) a CRC was acquired and almost immediately disposed of, (iii) the involvement of Rockville International Corporation and Investec Bank (UK) Ltd, (iv) the reference to section 37 of the 1992 Act, and (v) that a large loss was claimed. In October 2006, the Appellant was identified as a possible participant in the CRC Mk II Scheme. Further investigation ensued. At that stage, Dr Branigan did not consider that there was a sufficient basis to raise an assessment, although he was of the view that there was sufficient to justify further investigation. We have no reason to doubt the soundness of that view by such an experienced and senior HMRC officer.

34. On 28 October 2006, the Appellant was informed that his affairs were under investigation. When the return was examined in October 2006, it was not clear to Dr Branigan and his team how the Appellant claimed section 37 operated. While this no doubt raised suspicions, even strong suspicions, in the minds of Dr Branigan and his team, this did not make them aware that that return disclosed an insufficiency of tax or that there was a reasonable prospect of establishing that there were such an insufficiency. Accordingly, Dr Branigan wrote to the Appellant on 23 October 2006 stating that he had *reason to believe that in 2003/04* the Appellant had *participated in arrangements whose sole or main purpose was the avoidance of tax* and requested the production of certain specified documents. The Appellant declined to produce any documentation and none has ever been produced. At that stage Dr Branigan had not formed a view on whether the scheme was effective.

35. At this stage (end of 2006 beginning of 2007) tax avoidance schemes, involving second hand insurance policies (SHIPS), had come under further scrutiny. An investigation into these schemes had been under way since 2003. These schemes also invoked section 37 of the 1992 Act. A participant in that scheme (*Drummond*) appealed against an assessment in about January 2007. A special commissioner heard the appeal in April 2007 and issued a decision favourable to the Crown in July 2007. The decision was appealed. No further steps had been taken by Dr Branigan or his team to challenge the CRC policy schemes while the SHIPS litigation continued. He was not involved in the appeal proceedings relating to *Drummond* or any high level discussions on SHIPS within HMRC.

36. By letter to the Appellant dated 28 September 2007, Dr Branigan informed him that he had obtained the consent of the General Commissioner to issue a Notice under s20(1) TMA requiring him to produce specified documents (relating to the CRC policy and related trust and financial arrangements). However, the notice referred to

the (wrong) tax year, 2004/05 and may also have given less than the statutory period of 30 days to comply with it. Further correspondence ensued between Dr Branigan and the Appellant's tax advisers. A fresh notice was prepared. Dr Branigan presented his application for consent to issue a section 20(1) notice to a General Commissioner on 28 August 2008. After a hearing lasting some 70 minutes and a short adjournment, the General Commissioner granted the application. The notice was issued to the Appellant on the same day. The purpose of the notice was to consider whether there was an insufficiency which would justify an assessment based on HMRC's state of knowledge at that time.

37. The 2008 Notice stated that a marketed tax avoidance scheme involving capital redemption policies was being investigated, and that, in order to establish whether a discovery assessment could be made, it was necessary for HMRC to consider *the basic transactional documentation and any related correspondence.*

38. The Appellant did not comply with the 2008 notice. Instead, his tax advisers intimated that he would be issuing judicial review proceedings to set aside the s20 Notice. A judicial review petition was lodged in the Court of Session on 12 January 2009. It sought reduction of the s20 Notice. A Hearing took place in May 2009 before Lord Bannatyne, who issued an Opinion on 7 October 2009, dismissing the petition. The Appellant reclaimed. In the meantime *Drummond* was decided in favour of the Crown on 25 June 2009 and permission to appeal to the Supreme Court was refused in November 2009. In the light of these developments the discovery assessment now under challenge in these proceedings was raised. The reclaiming motion became pointless and was subsequently (in August 2010) abandoned on terms agreed between the parties.

39. Dr Branigan's thinking at the time was that following the *Drummond* decision in June 2009, he was satisfied that there was an insufficiency. Although the Appellant had never produced the documents sought by the section 20 notice, this was no longer necessary. The *Drummond* decision in the Court of Appeal held that the scheme did not work. All decisions held, essentially that the surrender proceeds of the policies were not to be excluded from the consideration for their disposal. The tax avoidance scheme, which created a large but entirely artificial capital loss by excluding those proceeds, therefore failed.

40. That interpretation of s37 of the 1992 Act applied to the Appellant's scheme, and so there was an insufficiency of tax. An assessment was accordingly issued on 13 January 2010 in the sum of £835,400.60. The assessment was appealed on or about 5 February 2010. The matter was taken no further at that time. Following the Upper Tribunal's decision in *Charlton* (see below), the Appellant, through his advisers, requested an internal review in January 2013. This led to the assessment being confirmed in March 2013, when the Appellant lodged the present appeal.

Submissions

41. Both parties produced comprehensive Skeleton Arguments, which we do not repeat in detail. Mr Artis, for HMRC, commended the reliability and credibility of Dr

Branigan. He submitted that s29(1) gave HMRC a power, a discretion to issue a discovery assessment. An objective test fell to be applied. He referred to various paragraphs of *Charlton v HMRC* [2013] STC 866. As long as the assessment was raised within the relevant statutory time limit, it could not be said to be stale. Reference was also made to *Sanderson v HMRC* [2013] UKUT 0623 (TCC), *Hankinson v HMRC* [2012] STC 485, *Lee v HMRC* (2008) Sp Com 715, and *Corbally-Stourton v HMRC* [2008] STC (SCD) 907. He submitted that mere suspicion that there is an insufficiency of tax or that there is a fighting chance that an assessment if raised will survive, is not enough. The probabilistic approach is to be preferred (*Corbally* at paragraphs 42 and 43). The test is not whether HMRC can *get away* with making an assessment but whether there was probably an insufficiency.

42. Here, Mr Artis submitted there were a number of discoveries. First, it was discovered that the Appellant had used a particular KPMG scheme, because of the reference in the return to Investec Bank UK Ltd and Rockville International Corp. Second, there was a recognition that Capital Redemption policies were chargeable within the CGT regime and many taxpayers were making claims to that effect; the HMRC guidance was not correct. Third, the *Drummond* challenge constituted a form of discovery at each stage of the appeal process. By November 2009, there was no longer any need to obtain documents relating to the scheme.

43. In relation to s29(5) the relevant time to consider the position was 31 January 2006. Reference was made to *Langham v Veltema* [2004] STC 544, *Charlton, HMRC v Landsdowne Partners Ltd Partnership* [2012] STC 544.

44. Part of the Appellant's argument was that it was clear from the return that there was an economic loss of £65,000 yet a claimed loss of £2.6m. What was relevant was awareness, actual or constructive, and not what an officer might reasonably have done. The list of information in s29(6) was exhaustive. Mr Artis submitted that the questions of *awareness* and *discovery* were part of the same equation. But awareness should not be confused with something that is more probable than not. The question was whether the disclosure was sufficient to make a hypothetical officer aware of that insufficiency. The taxpayer's duty was to provide sufficient information to make plain the basis on which the return has been made. Here, the Appellant should have referred to the Scheme, and mentioned the £2.6m in the appropriate boxes in his tax return. The return does not explain how the loss of £2.6m arises in comparison with other assets. There are no working calculations, and no mention of how the economic loss fits in. The information provided was inadequate. Even a specialist officer would, at most, have suspected that there might be an insufficiency. An appellant who omits significant details in his tax return should not be allowed to take advantage of that fact by saying that such omission ought to have led a hypothetical officer to conclude that there was an insufficiency of tax. The taxpayer cannot be allowed to take advantage of the defects of disclosure in his return and pull himself up by his own bootstraps.

45. In his Skeleton Argument, Mr Artis set forth a detailed argument to the effect that the s29(5) issue had already been decided in the Appellant's petition for judicial review, and was therefore *res judicata*. He referred to *Smith v Sabre Insurance* 2013

SC 569. The question was what was litigated and what was decided. This approach applies to tribunals as well as the courts. Reference was made to *British Airways v Boyce* 2001 SC 510, *Hoystead v Taxation Commissioners* [1926] AC 155, *MacNiven v Westmorland Investments Ltd* [2003] 1 AC 311. The main attack by the Appellant in the judicial review proceedings was against the power of HMRC to issue the s20(1) notice, based on the disclosure in his tax return. Lord Bannatyne was not satisfied that the information in the return should have clearly alerted the hypothetical officer. The Appellant is not entitled to re-visit that conclusion.

46. As an alternative to the *res judicata* argument, Mr Artis submitted that the attempt to re-visit the s29(5) point was an abuse of process. He referred to *Clarke v Fennoscandia Ltd (No 3)* 2005 SLT 511 2008 SC (HL) 122, *Hunter v Chief Constable of the West Midlands* [1982] AC 529, *Tonner v Reiach & Hall* 2008 SC 1, *Durwin Banks v HMRC* LON 2006/0791, *Bennett v CEC* [2001] STC 137, and to Rules 2, 5, 8 and 15 of this Tribunal's Rules. He submitted that it was essentially fair and just for the Tribunal to exercise its powers to prevent re-litigation of questions that have already been decided on the same facts and for the same tax period in a court of competent jurisdiction.

47. Mr Gordon for the Appellant, amplified his detailed Skeleton Argument. He submitted that s29(1) TMA applies a subjective test, whereas s29(5) focussed on the objective awareness of the hypothetical officer, although there was considerable overlap. He referred to *Landsdowne.* The ingredients of a *discovery* were (i) the level of knowledge an officer had to possess to be in a position to raise an assessment in a particular case. He referred to *Charlton* (ii) the process of acquiring sufficient knowledge and adopted *Charlton* at paragraphs 28 and 37; (iii) the discovery could not be stale; the officer must act on the knowledge within a reasonable period (*Charlton* paragraph 41 and *Corbally* at paragraph 44), and (iv) the discovery must have taken place after the closure of the enquiry or enquiry window (*Lee*).

48. He submitted that there was no obligation to make additional disclosure on the *white space* on the tax return. The level of information provided does not have to be as much as to tell the officer with certainty that tax has been underpaid. The dicta in *Charlton* should be followed. He also referred to *Langham, Corbally, HMRC v Household Estate Agents Ltd* [2005] STC 2045, and *Sanderson.* Whether a hypothetical officer ought reasonably to have been aware of the insufficiency was a question of fact and degree. It was not a question of probability. Lord Bannatyne's views should not be followed.

49. With reference to the HMRC Manual, he submitted that Dr Branigan accepted that the Appellant's treatment of Capital Redemption contracts was contrary to the Revenue's publicly stated position in the Manual. The hypothetical officer would have known what HMRC's public view was and should have concluded that the return was not in accordance with the HMRC position and this would have justified an assessment. The hypothetical officer would be aware of the existence of the *Drummond* case which was *pretty far down the line.* He would therefore know that these schemes were susceptible to challenge. He would appreciate the mismatch between the economic loss and the loss claimed. The tax return contained sufficient

detail. It did not need to mention the scheme. The hypothetical officer did not need to decide whether the scheme worked.

50. HMRC's argument on *res judicata* was misconceived. What was decided in court was essentially an interlocutory matter. A taxpayer who loses an appeal against an assessment in one tax year may make the same points about the same type of transaction in an appeal against an assessment in a subsequent year (*MacNiven*). Lord Bannatyne did not determine that s29(5) was satisfied. He said that he could not be satisfied that it had been shown there is no real or sensible prospect of a power under s29 being competently exercised. Moreover, the Appellant has an absolute right to appeal against any assessment to tax which (as here) is not a self-assessment (TMAs 29(8), s31(1)(d)). The TMA provides for *res judicata* in s54. Reference was made to *Barnett v Brabyn* [1996] STC 716 and *Durwin Banks v HMRC* (2008) VDT 20695.

51. Mr Gordon submitted that, in any event, the subject matter was not the same. Here, the subject matter is the validity of the assessment. Lord Bannatyne expressed the question before him as to whether it had been shown there is no real or sensible prospect of a power under s29 being competently exercised. The Appellant has not brought fresh litigation; he is responding to the assessment and defending his rights. The result in the Court of Session could not be properly described as final. They were superseded and rendered unnecessary by reason of the issue of the assessment. The s20 notice became academic and further proceedings would have been a waste of time and resources. Reference was made to *Arnold v National Westminster Bank plc* [1991] 2 AC 93 to support the submission that HMRC are not entitled to assert different facts from those set out in Dr Branigan's affidavit and accepted by Lord Bannatyne.

52. Mr Gordon adopted essentially similar reasoning to resist the HMRC submissions of abuse of process. He submitted that taxpayers are generally free to re-litigate issues decided against them in earlier appeal proceedings. What the Appellant has done is entirely reasonable. The HMRC challenge is itself an abuse of process.

Discussion

Section 29(1)

53. Having regard to the facts as we have found them to be, it is clear that while a series of discoveries may have been made as a consequence of the decision of the Special Commissioner and the High Court, the critical decision was the emphatic judgment of the Court of Appeal issued in June 2009, endorsed by the refusal to give permission to appeal to the Supreme Court in November 2009. At that stage, either in June 2009 or November 2009, what may have been a suspicion even a strong suspicion was converted to the positive view that there was an insufficiency of tax. This view newly appeared between June and November 2009 and plainly, in our view, constitutes a *discovery* within the meaning of s29(1).

54. In making the findings of fact narrated above, we have relied on the documents produced and, in particular, the evidence of Dr Branigan. We found him to be honest,

straightforward, reliable and credible. He was the subject of extensive cross-examination and we were impressed by the care he took over his comprehensive answers. We reject the attack on his reliability in a skilful cross-examination by Mr Gordon which, among other matters, compared Dr Branigan's affidavit in the judicial review proceedings with his evidence before this Tribunal. It is true that there were differences; some aspects of his evidence were not covered in his affidavit. However, we are of the view that Dr Branigan was not attempting to depart from his basic views and recollection. Rather, he was at pains to ensure that we had the complete picture. The circumstances in which his affidavit came to be prepared for the purposes of the judicial review proceedings were not before us. However, it is within the experience of the Tribunal that these documents sometimes have to be produced at short notice, and may be directed to what may seem important at the time but which become less significant subsequently, where other matters not previously thought to be of significance, assume an importance not hitherto appreciated. Dr Branigan had ample opportunity to reflect before providing and giving evidence to this Tribunal. It seems to us that his evidence before us, insofar as it is different from his affidavit, is likely to have been more comprehensive and accurate.

55. In evidence, Dr Branigan modified the affidavit he produced before Lord Bannatyne in the judicial review proceedings. He accepted that full disclosure of a tax avoidance scheme will not guarantee the opening of an enquiry. This is because full disclosure of such a scheme in the *white space* on the return will not necessarily trigger action when the first (and possibly) only examination of the tax return is carried out electronically by a suitably programmed computer. Dr Branigan also said in evidence, and we accept, that there would be a greater risk of an enquiry being opened if full or greater disclosure is made. This seems to us to be only common sense. It is essentially part of the cat and mouse game played by promoters of tax avoidance schemes (some of which work and others do not) to provide sufficient information to avoid the opening of an enquiry and to negate or reduce the prospect of a discovery assessment after the enquiry window has closed and before statutory time bar precludes the raising of an assessment. We refer to this below in paragraph 79.

56. We therefore conclude that for the purposes of s29(1) of TMA an officer of HMRC discovered that relief which had been given was or had become excessive (this is how the Appellant put the issue in his Skeleton Argument - paragraph 27(a)). The discovery occurred in 2009 as we have described. The assessment was raised in January 2010. The assessment was not time-barred or stale. The deadline for raising the assessment was 31 January 2010 (TMA s34(1) - as it was enacted at that time). Even, if the *discovery* could be said to have been made at an earlier stage, for example when the Special Commissioner or the High Court issued their decisions in *Drummond* in 2007 and 2008 respectively, the *discovery* would still not have been time-barred. If, on that hypothesis, it could be said that it was not acted on promptly, it nevertheless still met the statutory deadline.

57. In reaching the foregoing conclusions in relation to s29(1) we have, we think, followed the thrust of the Upper Tribunal's reasoning in *Charlton* in relation to s29(1). After a lengthy review of the authorities, and relying in particular upon the

opinion of Lord Normand in *IRC v Mackinlay's Trs* 1938 SC 765 and other cases in turn relying on Lord Normand's opinion, the Upper Tribunal concluded that for there to be a *discovery* all that is required is that it has newly appeared to an officer, acting honestly and reasonably that there has been an insufficiency[1] in an assessment. This can be for any reason including a change of view or opinion or the correction of an oversight. New information about the facts or the law is not required (paragraphs 37, 39, 44). The approach in this part of *Charlton* has been followed in *Sanderson*, at paragraphs 20-24).

58. In *Charlton* the tax return for the tax year 2006/07 was lodged before 31 January 2008. HMRC did not open an enquiry into it. In March 2009, HMRC became aware that the taxpayer was a participant in a scheme similar but not identical to the scheme in *Drummond.* The officer in charge (Mr Cree) who gave evidence before the First-tier Tribunal did not raise assessments immediately but waited until after it became clear that the Court of Appeal's judgment in *Drummond* would not be appealed to the Supreme Court (paragraph 11). Although this date is not identified in the Upper Tribunal's decision in *Charlton*, we know from the proceedings before us and an examination of the reports in *Drummond* that the Supreme Court refused permission to appeal on 29 November 2009. The Upper Tribunal in *Charlton* concluded (paragraph 37) that a delay in raising an assessment merely to accommodate the final determination of another appeal which was material to the liability question, did *not* result in the conclusion (that there was an insufficiency of tax) losing its essential newness for the purposes of section 29(1).

Section 29(5)

59. Even although, if we are correct thus far, HMRC have satisfied the provisions of s29(1) (the onus lying on them), they must also satisfy the provisions of s29(5), the onus again lying on them to do so.

60. The essential ingredient of the condition is that the officer could not have been reasonably expected to be aware of the insufficiency. The word *reasonably* requires the Tribunal to assess what the notional or hypothetical officer ought to have been aware of. The provisions of s29(5), unlike s29(1) thus set an objective test or standard which has to be met. A number of authorities have analysed this provision in great detail. However, we do not think Parliament could have intended that the issue should be as complex, sophisticated and nuanced as some of the more recent cases appear to indicate.

61. Parliament has imposed a negative condition or test which must be met by HMRC. It is that *an officer could not have been reasonably expected on the basis of the information* then *made available …to be aware of* the insufficiency of tax. The reference to *an officer* indicates an objective test. What the actual officer (if any) was aware of is not relevant. It is what the Tribunal considers *an officer* could or could not have been reasonably expected to be aware of that is important.

[1] We have used the word *insufficiency* as shorthand for the contents of s29(a), (b) & (c)

62. Section 29(6) expressly states what is meant by *information made available* to such an officer. For present purposes, such information is made available if it is contained in the taxpayer's return or is information the existence of which and the relevance of which as regards the question of insufficiency of tax *could reasonably be expected to be inferred* by such an officer. The source of all the information which is to be the basis of the Tribunal's decision on the question of the state of awareness of the notional officer is therefore the taxpayer. This will include his agents. This is an exhaustive list (see Auld J in *Langham v Veltema* at paragraph 36).

63. Finally, whether the negative condition is met falls to be tested, in effect, on the date of closure of the statutory enquiry window (here, 31 January 2006).

64. The Tribunal's assessment of the notional officer's state of awareness is therefore based partly on objective facts and partly on its view of the conclusion which the notional officer ought reasonably to have reached; and therefore of what he ought reasonably to have been expected to be aware on the basis of that information found as fact to exist at the relevant date (and any information inferred therefrom). This point was noted by Lady Arden in *Langham v Veltema at* [2004] STC 544 at paragraph 51; and followed by Newey J in *Sanderson* at paragraph 41. The conclusion to be reached is either awareness of an insufficiency of tax, or something less than such an awareness, such as suspicion that there is an insufficiency, or the need for further investigation, or satisfaction that there is no such awareness. Put another way, would the notional officer's assessment of the situation make him aware that there was an insufficiency of tax?

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 a reasonably careful driver should reasonably have been aware of and what he or she ought reasonably to have done or refrained from doing, or how a fair minded and informed observer would view a particular situation. There are no doubt many other inhabitants of 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. The only evidence of that nature came from Dr Branigan without objection as to its admissibility. 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 hypothetical officer. Dr Branigan's evidence did not fall into the category. He was and is a specialist investigating officer.

65A Since drafting the foregoing paragraph, we have noted the observations of Lord Reed in *Healthcare at Home Ltd v CSA* [2014] UKSC 49, at paragraphs 1-4. What we have said, we think, reflects his Lordship's views. We have endeavoured to evaluate what a hypothetical officer could or could not have been reasonably expected to be aware of on the basis of the information available at the material time.

66. We have to determine what knowledge and understanding the hypothetical or notional officer might reasonably be expected to have. We have to make such determination in the light of the particular facts and circumstances of the present appeal. Comparison with the facts of other cases is of limited assistance and possibly of no assistance. The Tribunal can apply its expertise in tax matters and take account of the relevant evidence led. The Appellant makes a number of assertions as to what the hypothetical officer ought to have been aware, and the knowledge and experience with which he ought reasonably to have been imbued. The use of the words *an officer* and *reasonably to have expected* import considerable flexibility into the test, and give the Tribunal a discretion over the factors they consider to be influential and the weight to be attached to them. Mr Gordon accepted that the matter was one of *fact and degree* (*Charlton* paragraph 93).

67. Here, we are concerned *not* with what an officer ought reasonably to have done but with what he could reasonably have been expected to be aware of. S29(5) focusses exclusively on specific categories of information, here the Appellant's tax return, and any information which can reasonably be inferred therefrom. Thus, a detailed knowledge of the law is not such information. Nor is a detailed knowledge of HMRC practice, policy and procedure. While the hypothetical officer may have a working knowledge of these matters, our evaluation is that this would not lead him to the conclusion that there was an insufficiency of tax.

68. The Upper Tribunal in *Charlton* concluded that the form AAG1 submitted by the promoters of the scheme in question should be regarded as information made available for the purposes of s29(5) (paragraph 82). This fell to be inferred from the inclusion in the return of the Scheme Reference number (SRN). The First-tier Tribunal determined that due to administrative slip ups an enquiry was not opened (2011SFTD 1160 at paragraph 18). That tribunal concluded that it was absolutely obvious from the information in the tax return that the appellants had participated in artificial tax avoidance schemes to generate capital losses; the disclosure of the SRN for the scheme reinforced that view (paragraph 119 and 121). The tribunal also noted that the taxpayer had disclosed *with perfect accuracy the essential features of the scheme.* In that tribunal's view, the notional officer ought to have been aware that it was *instantly obvious that a tax avoidance scheme had been implemented.* The background of fact and assessment disclosed in the First-tier tribunal's decision which formed the backcloth to the Upper Tribunal's decision was very different from the facts as we have found them to be in the proceedings before us.

69. Critical to the Upper Tribunal's decision in *Charlton* on the question whether the condition in section 29(5) was fulfilled was that

1 the notional officer would have been sufficiently aware of the law relating to second hand insurance policies to be able to appreciate the unusual nature of the entries in the return.
2 He would be aware of the High Court Judgment in *Drummond* (paragraph 90).
3 The information provided to the notional officer does not have to explain how the scheme works (paragraph 93).

4 The notional officer does not require to be given the characteristics of an officer of general competence, knowledge or skill only (paragraph 65).

5 The notional 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 (paragraph 65).

6 It is not necessary that the notional officer should be able to comprehend all the workings of the scheme, or the legal and factual arguments that might arise or be able to form a reasoned view of those matters (paragraph 93).

70. The Upper Tribunal in *Charlton* observed that seeking some form of typical or average officer is futile (paragraph 55). That does not seem to us to be entirely consistent with the judicial approach to the imputed knowledge or awareness of a reasonable individual in various circumstances. The Upper Tribunal observed that the hypothetical officer must be assumed to have such level of knowledge and understanding that would reasonably be expected in an officer considering the particular information (paragraphs 58 and 65). However, that simply begs the questions, how is that level of knowledge to be determined and what is *reasonable* to expect of such an officer.

71. The Upper Tribunal noted that the test was one of awareness, a matter of perception and understanding, and not one of certainty or probability (paragraph 92); and not one of conclusion. However, a state of awareness, understanding or perception seems to be the result of the application of the test rather than the test itself (cf paragraph 58). Moreover, it is difficult to see why a conclusion is excluded from a state of awareness. One plus one equals two. Two is the result of adding one to one. It is a conclusion. Knowing that one plus one makes two is a state of awareness. We agree, however, that the awareness of a hypothetical officer is not to be measured by probabilities. Probability is normally deployed to determine facts. The deemed awareness of the hypothetical officer is determined by reference to the s29(6) information available, the attributes he is deemed to have, and the thought processes with which he is imbued.

72. The basis of the Upper Tribunal's decision appears to be that the difference between the allowable loss claimed and the income declared was enough to justify an officer making an assessment. How they reached that view, beyond adopting the forthright views of the First-tier tribunal is not entirely clear. It seems ultimately they expressed an overall view, which they were no doubt entitled to do. For the First-tier tribunal, it was abundantly plain that the section 29(5) test was not met. The Upper Tribunal came to the same conclusion but for different reasons (as noted in *Sanderson* at paragraph 42).

73. *Charlton* does not constrain us to decide this appeal in favour of the Appellant. The facts were in reality quite different and we heard different evidence, of which only a limited amount is relevant to our objective evaluation. In *Charlton* there was a much fuller explanation in the tax return. There was also a Scheme Reference Number although the Upper Tribunal would have reached the same decision had there been no such reference.

74. However, an HMRC officer, in order, ever, to become aware of an insufficiency of tax must have some general knowledge of tax law and practice. We do not consider that it is reasonable to expect him to be aware of the arcane world of capital redemption contracts or that they are specifically mentioned in the HMRC Manual. Even if it is assumed that an officer was aware of the entire contents of the HMRC Manual, we do not consider that it necessarily follows that an officer could have been reasonably expected to be aware that there was an insufficiency of tax disclosed in the Appellant's tax return. While an officer might have been suspicious, that suspicion would not give him the necessary awareness. He might have taken certain steps such as consult colleagues. However, that is not relevant because the statutory test relates to what awareness is to be attributed to an officer by reference to specified information, and not to what he might reasonably have *done* or what further information he might have gleaned by taking such steps. That would not be the type of information specified in s29(6).

75. Even if such an officer had taken such steps, we could not reach any conclusion on what the fruits of those enquiries might have been. At most he might have ascertained that there was an appeal on its way to or pending before the Special Commissioners dealing with what might at that time have appeared to be a similar scheme. That might have made an officer suspicious, but it is impossible to conclude that he could be reasonably expected to have become aware of an insufficiency of tax. He may well have reasoned that there might be an insufficiency of some unspecified amount of tax. But that is not enough. That does not constitute awareness of an actual insufficiency of tax whatever the amount might be.

76. Moreover, even if the hypothetical officer is taken to have been aware that the loss claimed in the tax return was attributable to a tax scheme, the hypothetical officer would also be aware that some tax schemes work and deliver the benefits claimed. There is no rule that the existence of an obvious tax scheme means that a hypothetical officer would be entitled to make an assessment (see *Sanderson* at paragraphs 50 and 51).

77. In our view, a reasonable reading of the Appellant's return would not make a hypothetical officer aware that there was an insufficiency of tax. He could not reasonably have become aware of an insufficiency. The information was incomplete as several boxes were blank. The white space gave minimal details. CRCs and their use as part of tax avoidance arrangements would not be generally known to a hypothetical officer at the relevant date. It took several years and three rounds of appeals to determine the proper scope of s37 of the 1992 Act. As at 31 January 2006, *Drummond* would at best have been at an embryonic stage. We doubt whether a hypothetical officer would have been aware of it at that time. It could not be said to have been *far down the line* as Mr Gordon contended. While it may be the case that a very close examination might enable further details to be deduced, and with hindsight the claim for such large tax relief might seem so suspicious as to infer that this was an illegitimate tax scheme as a result of which there was an insufficiency of tax declared, we do not consider it appropriate to approach the question of awareness in that way for the purposes of s29(5).

78. This is our own assessment of what we consider an officer could or could not reasonably be expected to be aware of. However, it is plain that that was also the view of Dr Branigan. We do not rely on it. He does not have the attributes of a hypothetical officer. However, it confirms our own view of s29(5) *awareness.* He is an experienced official dealing with high value complex tax disputes. His reluctance to raise an assessment until after the Court of Appeal decision seems to us to be quite telling. He had been *on the case* for several years. It would be surprising if an officer of his experience refrained from issuing an assessment if he had formed the view that there was in relation to the Appellant's tax return, an insufficiency of tax. He did not do so in October 2006 when he first examined the Appellant's tax return and he was a specialist, a different creature from the hypothetical officer, who would have been in no better state of awareness on 31 January 2006 when the enquiry window closed. This does not mean that all HMRC have to do to justify a discovery assessment is lead the evidence of an officer to say that he or she would not have been aware of an insufficiency of tax having regard to the s29(6) information available at the material time. Such evidence would be inadmissible. We refer to paragraph 65 above. We would also be slow to criticise Dr Branigan, even if it were relevant to do so, for being over cautious.

79. We do not consider it helps the Appellant to drill down into the detail of the tax return's content. It is well known that information in a return (particularly where, as here, a marketed tax avoidance scheme is involved) often seeks to draw a balance between providing just the minimum amount of information needed to exclude a *discovery* assessment and yet provide sufficient to discourage the opening of an enquiry. In our view, there is force in the HMRC submission that a taxpayer should not be allowed to take advantage of perceived shortcomings in the information provided in the return to argue that those shortcomings ought to have led a hypothetical officer to conclude that there was an insufficiency of tax. Inference is not a substitute for disclosure (see *Charlton* at paragraph 79). The return is certified as being complete and accurate. The Tribunal would not lightly be persuaded to allow an appeal, part of the basis of which was the taxpayer's own failure to submit a return which was accurate and complete. Lord Bannatyne expressed the view that the disclosure in the white space (which we have set out above) was *a carefully crafted disclosure seeking to pass through the initial checks carried out by HMRC but in no way meeting the test of clearly alerting to an actual insufficiency* (2010 SLT 993 at paragraph 115). If that is the test, we agree that it has not been met in the proceedings before us.

80. We recognise that our approach is somewhat different from Lord Bannatyne's analysis. As can be seen from the previous paragraph, his Lordship adopted the dictum of Auld LJ in *Langham* (see 2010 SLT 993 at paragraphs 94, 104 and 107) that it was *incumbent* upon the taxpayer *to clearly alert the officer to an insufficiency* (*Langham* at paragraph 36). We prefer to concentrate on the actual language of s29(5) rather than a paraphrase of the wording. It seems to us that Auld LJ was not using these words to identify a test for deciding whether the negative condition in s29(5) was met. Rather, he was considering the range of information on the basis of which the hypothetical officer could have been reasonably expected to be aware of an

insufficiency. Towards the end of his judgment, he applies the language of s29(5) as the test (paragraph 38).

81. In our view, therefore, HMRC have discharged the onus of fulfilling the negative condition contained in TMA s29(5).

Res Judicata

82. We reject HMRC's argument. We would find it surprising if a judicial review application in relation to one statutory document (or more accurately a decision to issue such a document), excluded an express statutory appeal against a different statutory document, even although there was a factual or legal link between them. In our view, subject to s54, the Appellant's statutory right to appeal the validity of a statutory assessment under TMA s31(1)(d) cannot be excluded by judicial review proceedings. This follows from the language of s31 and *Barnett* and *Durwin Bank.* This seems to us to be a complete answer to HMRC's argument.

83. In any event, it seems highly questionable whether Lord Bannatyne determined the same or even substantially the same issue as we have determined. The issue before him was the legality of a decision to issue a s20 TMA notice. His determination was that he *could not be satisfied that it has been shown there is no real or sensible prospect of a power under s29 being competently exercised* (2010 SLT paragraph 116). We are not, in this statutory appeal, concerned with what may or may not be a real or sensible prospect, but with the validity or invalidity of an assessment in the light of the relevant evidence we have heard and the facts as we have found them to be.

Abuse of Process

84. In our view, HMRC's argument has no merit. The essence of abuse of process is conduct which the court characterises as unacceptable, whether it be extraordinary delay, repeated attempts to re-litigate the same issue, some sort of collateral attack on a court's final decision, the improper use of court procedures or some other conduct. The categories of abuse of process are not closed. While it may be said that the Appellant, through his tax advisers, has acted aggressively, we do not consider that he has acted improperly or in a manner which a court would or even might characterise as unacceptable. He was entitled to raise judicial review proceedings. Substantial arguments were advanced on his behalf. Although he lost, his case was not hopeless or unstateable.

85. We have already concluded that taking judicial review proceedings does not emasculate an appellant's statutory right of appeal to this Tribunal. The Appellant has exercised that right. For other reasons, his appeal fails, but we cannot possibly describe his conduct (through his tax advisers) as being of such a character as to constitute an abuse of process. We therefore do not need to consider whether we, as a statutory Tribunal, have power to deal with abuse of process.

Amendment to Grounds of Appeal

86. On 3 January 2014, the Appellant applied to extend his Grounds of Appeal by adding the sentence

> *The capital gains tax assessment is wrong on substantive grounds; HMRC are incorrect to rely on the Drummond decision in the Court of Appeal.*

87. In his Application, the Appellant stated that there was a *substantive point that concerns the relevance and application of the decision of the Court of Appeal in the case of Drummond that has not hitherto been pursued.*

88. After considering HMRC's response in a letter dated 17 January 2014, the Tribunal refused the Application on the same date when a written decision was issued. Some comment has been made about the speed with which the application was refused. The Tribunal judge happened to be in George House that day and decided to consider the matter there and then. He spent several hours doing so. There was nothing to indicate the need or desire for further representations from either party. Proper consideration was given to the arguments *hinc inde* and this was reflected in the written decision. It is unusual for a tribunal to be criticised for being efficient.

89. In refusing the Application, the Tribunal noted that the Appellant proposed to alter his Grounds of Appeal in the hope that something favourable, which he did not propose to argue, and had not identified, would emerge from another appeal. It was also noted that it was unclear whether the Appellant was seeking to challenge the soundness of *Drummond* and, if so, on what basis.

90. On 27 January 2014, the Appellant applied (in a 14 page document, prepared by Mr Gordon) to the Tribunal to set aside its Direction dated 17 January 2014. HMRC provided full written submissions (11 pages) in response. The Tribunal deferred consideration of the application until the conclusion of the proceedings in March. Neither Mr Gordon nor Mr Artis added anything significant to these written submissions.

Appellant's arguments in support of reconsideration of refusal to amend

91. The Appellant argues that the refusal was unfair and was based on flawed and misleading submissions from HMRC. Late amendments and late notices of appeal are frequently allowed in a variety of circumstances. It would be unfair for the Appellant to have to pay tax if his appeal on the validity of the assessment fails and *Drummond* is ultimately shown to be wrong. The matter was raised with HMRC in November 2013 when their response was *far more muted* than it was in January 2014.

92. The Appellant submitted that we have jurisdiction to allow an amendment in relation to the underlying soundness of the assessment. HMRC have indicated that there is a doubt about this. However, the January 2014 application was not refused on jurisdictional grounds and we are content to proceed, without deciding, on the basis that we have jurisdiction.

93. The Appellant points to the fact that there are or were about a dozen appeals concerning the implementation of similar arrangements to the SHIPS schemes, which assert that *Drummond* was wrongly decided. Some, he says, have been before the tribunal for over two years. He disputes that HMRC would be prejudiced by the amendment. The Appellant would simply join the other cases, which would not lead to any material expense for HMRC keeping the file open.

94. The Appellant also has an appeal against a closure notice for the tax year 2005/06. It relates to the refusal to allow losses to be carried forward from 2003/04, and to a similar scheme (to the CRP scheme referred to above) entered into in the tax year 2005/06. The Appellant accepts that the CRP schemes depended upon the same legislative framework as the scheme in *Drummond*. He referred to correspondence from the HMRC officer dealing with the current CRP appeals to the effect that further appeals might be added to a rule 18 direction. Any procedural complexities can be overcome.

HMRC Response

95. HMRC submit that the test for setting aside a direction is to be found in *DDR Distributions Ltd v HMRC* [2012] UKFTT 443 (TC). Essentially, it should be done only if the interests of justice demand it and the circumstances are exceptional. Here, there were no exceptional circumstances. There was no error of law and no procedural irregularity, and none founded on. The assertion that the court *might* change its view of the law, would enable any application to amend or appeal to be allowed, however late. That would be extraordinary. Whether the Appellant is ultimately liable for the tax assessed is not the touchstone of fairness and is not relevant.

96. The right of appeal, having regard to the internal review and appeal procedures which occurred did not include the underlying soundness of the assessment. Reference was made to TMA ss31, 31A(5), 49E(2) & (4) and to *Tower McCashback* [2011] 2 AC 457 at paragraphs 83 and 84.

97. The Appellant must be assumed to have accepted the soundness of *Drummond*. He does not seek to distinguish it and does not say why it is wrong. Moreover, the HMRC response to the application in January was not *wholly misleading*. HMRC are bound to be prejudiced by an indefinite postponement of the determination of the appeal. The Appellant does not propose to litigate the *Drummond* point in the present proceedings.

98. While there are a number of appeals before the tribunals which assert that *Drummond* was wrongly decided, none specifies why. HMRC have sought specification of the basis of the assertion but no such specification has yet been produced. Strike out applications have been made in a number of appeals.

Decision

99. We decline to grant the application to set aside the Direction dated 17 January 2014, refusing to allow the Grounds of Appeal to be amended as proposed. We are content to apply the test set out in *DDR Distributions Ltd* recently followed by

the Upper Tribunal in *Clear plc (in Liq) v Director of Border Revenue* 2014 UKUT (TCC) 10/4/2014 paragraphs 44 and 45. The Appellant does not found on any error of law or procedural irregularity. Nor does he found on any material change of circumstances since the Direction was issued in January 2014. There are no over-arching circumstances which suggest, far less establish, that it is in the interests of justice to set aside the Direction and allow the Grounds of Appeal to be amended as proposed.

100. Even if we were satisfied that we should set aside the Direction and consider the question of amendment afresh (see Tribunal Rules 5(1), (3)(c) and 6(5)), we would still have refused to allow the Grounds of Appeal to be amended as proposed.

101. As we have indicated, we are prepared to proceed on the basis that we have jurisdiction to entertain such a proposed amendment, even although, throughout, the Appellant's appeal has focussed exclusively on what parties have described as the *procedural issue* relating to the validity of the *discovery* assessment, rather than the underlying soundness of the assessment. The Appellant has been professionally advised in relation to his appeal against the 2010 assessment relating to his 2003/2004 tax return. It is reasonable to infer that he was advised that in the light of the decisions in *Drummond* he had no reasonable prospect of establishing that the scheme on which he relied, worked.

102. For reasons which are not clear to us, there are a number of appeals pending which are based on SHIPS or CRP schemes which seek to challenge the soundness of *Drummond.* The Appellant says (paragraph 20 of their Application) that some of these appeals have been before the tribunals (in England) for over two years. The Appellant also says that the *underlying basis of the assessment in the present case is the Drummond decision and that is precisely the same point which at least 12 other taxpayers (with appeals already before the Tribunal) are revisiting* (Application paragraph 24).

103. The Appellant produced written submissions by HMRC seeking to have the *lead case* (Rule 18) procedure apply to these 12 cases. The outcome of that application was not then known. However, Directions were subsequently issued on 8 April 2014 (see below). Whether the purpose of the application is to enable all 12 cases to be struck out together or the number reduced is not clear. However, we do not think it matters.

104. HMRC say they do not know what the basis is of the *challenge* to *Drummond.* The Appellant does not tell us. It seems remarkable that appeals have been before the tribunals in England mounting a challenge to an interpretation of a particular statutory provision which has been decided in favour of HMRC by the Court of Appeal, and an application to appeal to the Supreme Court refused, where the basis of the challenge still remains unspecified.

105. In *The Appellants in the SHIPS Appeals Case Management Group v HMRC,* Judge Kempster, following a hearing in the First-tier Tribunal on 13 December 2013, issued Directions on 8 April 2014 in relation to a Rule 18 Application by HMRC. We

assume that this was the hearing to which the HMRC submissions mentioned by the Appellant, refer. Issues of confidentiality appeared to have taken up some time and have complicated matters. The schemes are described as *post Drummond SHIPS Schemes.* The Directions issued do not include CRP appeals. They do not identify the lead case or cases. They do not specify the common issues. There is no discussion at all as to the basis on which *Drummond* is said to be wrong or distinguishable. The Directions appear to be a framework for setting out proposed common issues, lodging various bundles with a view to a further case management hearing in due course at which the terms of the Rule 18 Direction will or at least may be decided. Regrettably, the Directions do not identify the argument, even in general terms, upon which these dozen or so appeals appear to proceed.

106. In these circumstances, we can only classify the prospects of success of such appellants and those of the Appellant as hopeless or at best remote. The Court of Appeal would be bound to follow its own decision. It also seems most unlikely that permission would be given to appeal to the Supreme Court.

107. In these circumstances, we do not see any unfairness in restricting this appeal to the grounds which the Appellant has all along pursued. He sees a bandwagon on which he wishes to jump and secure a free ride, by allowing other appellants to argue his case free of expense to him. Unfortunately for him, the bandwagon has no wheels and is going nowhere fast or even at a moderate pace.

108. Moreover, there is at least general prejudice to HMRC if the grounds are amended. The final determination of this dispute will be open ended and beyond the effective management of this Tribunal. Administrative costs will increase. HMRC will not be able to close their books on this appeal in the usual way.

109. Here, the Appellant does not even propose to argue the point (whatever it is, if it exists at all) before us. He has not even specified what it is. His proposed amendment is hopelessly lacking in specification, even for the modest standards of flexible, informal tribunal procedure. He proposes, as we understand it (see paragraph 29 of his Application submissions), that this appeal be sisted pending the outcome of the 12 or so appeals still pending. That does not seem to us to be satisfactory. This appeal may endure for several more years. These 12 appeals may be abandoned, settled or struck out. We cannot say whether the grounds of appeal in those cases will ever be properly specified.

110. We do not consider that it would be fair and just to allow a vague amendment to the Grounds of Appeal at this stage. It would immediately be defenceless to an application for further specification or to strike it out. There is no indication that any such specification could be provided. It would cause delay and we would not be able to give proper consideration to the issues because it does not identify them. All this would cause additional administrative time and expense.

111. The Appellant says that he will be prejudiced if he is not allowed to amend if *Drummond* is held to be wrong. He says he will have paid a large amount of tax which is not ultimately due. The reality is that he cannot explain why *Drummond* is

wrong. There is no compelling reason why the Inner House would not follow it and permission to appeal to the Supreme Court has already been refused. The Appellant's so-called prejudice is balanced by the fact that as the law stands, he seeks to achieve a windfall by avoiding a substantial tax liability on the basis that although the tax is due, it is not payable as the assessment in dispute is invalid.

112. Accordingly, if we ought to have set aside the Direction dated 17 January 2014 and consider the Application afresh, the result would be the same, viewing the various considerations put to us as fairly and justly as we are able to do.

Summary

1. For the purposes of s29(1) of TMA an officer of HMRC discovered that relief which had been given was or had become excessive. The discovery occurred in 2009. The assessment was raised in January 2010. The assessment was not time-barred or stale. The deadline for raising the assessment was 31 January 2010 (TMA s34(1).

2. A reasonable reading of the Appellant's return would not make a notional or hypothetical officer aware that there was an insufficiency of tax. For the purposes of s29(5)&(6), a notional or hypothetical officer could not have been reasonably expected on the basis of the information made available on the relevant date to be aware of the insufficiency of tax.

3. Subject to s54, the Appellant's statutory right to appeal the validity of a statutory assessment under TMA s31(1)(d) cannot be excluded by judicial review proceedings. HMRC's arguments based on *res judicata* fail.

4. The Appellant's conduct (through his tax advisers) cannot be described as being of such a character as to constitute an abuse of process. HMRC's arguments based on *abuse of process* fail.

5. The Application to set aside the Direction dated 17 January 2014 and to allow the Grounds of Appeal to be amended is refused.

Result

113. **The appeal is dismissed.**

114. 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.

J GORDON REID QC
TRIBUNAL JUDGE

RELEASE DATE: 26 August 2014