[2020] UKFTT 0025 (TC)

TC07531

INCOME TAX - Scion Structured Products Ltd Scheme

Discovery Assessments - Whether statutory conditions satisfied? - Yes, in relation to each Appellant - Observations on role of Alternative Dispute Resolution in the context of discovery assessments

Whether Appellants engaged in a non-trade business? - Yes - Appropriate characterisation of Minimum Annual Payments - Whether these were taxable as the Appellants' income? - Section 609 ITTOIA - Yes - Whether interest payments wholly and exclusively incurred so as to render them deductible? - No - Appeals dismissed

Appeal numbers: TC/2015/03038 (Mr Good)
TC/2016/04719 (Mr Ryan)

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) MR THOMAS WILLIAM GOOD **Appellants**
(2) MR JAMES SEAN RYAN

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MRS HELEN MYERSCOUGH ACA CTA

Sitting in public at Taylor House, Rosebery Avenue, London, on 22-26 October 2018, with further written submissions from both parties regarding the decision of the Upper Tribunal in *Ingenious Games v HMRC* [2019] UKUT 0226 (TCC), each dated 27 September 2019

Mr Rupert Baldry QC, instructed by Ian Walker Tax LLP, London, for the Appellants

Ms Aparna Nathan (now, QC) instructed by General Counsel and the Solicitor for HMRC, for the Respondents

DECISION

1. This is our decision in relation to the following.

   (1) As to the First Appellant, Mr Good:

   (a) The conclusions expressed and the amendments made to his self-assessment return for 2007/8 in a Closure Notice issued on 9 September 2010 under section 28A *Taxes Management Act 1970*, which disallowed a loss claim made by him under sections 64 and 72 of the *Income Taxes Act 2007*;

   (b) Discovery assessments for three successive years - 2010/11; 2011/12, and 2012/13 - each discovery assessment being in respect of receipts (called Minimum Annual Payments or 'MAPs') from Scion Film Scheme ('the Scheme') arrangements in which Mr Good was a participant.

   (2) As to the Second Appellant, Mr Ryan:

   (a) A discovery assessment for 2011/12, also being in respect of receipts of MAPs from Scheme arrangements in which Mr Ryan was a participant.

2. At the time of the hearing before us, there were still open enquiries:

   (1) In relation to Mr Good, in relation to 2008/9 and 2009/10 (i.e., the two tax years between the Closure Notice and the earliest Discovery Assessment);

   (2) In relation to Mr Ryan, in relation to 2007/8, 2009/10, and 2010/11.

3. We are not called upon to consider any issues in relation to those open enquiries.

4. The underlying procedural issue is whether the statutory conditions laid down by section 29 of the *Taxes Management Act 1970* ('TMA 1970') have been met in relation to each of the discovery assessments which are the subject of these present appeals. In relation to each appeal by each appellant, this is something upon which HMRC bears the burden, and a large part of the evidence from HMRC which we read and heard (and which was transcribed and made available to us) focussed on this issue.

5. The underlying substantive issue, common to both Appellants, concerns the appropriate tax treatment of the 'Minimum Annual Payments' ('MAPs') arising from the Scheme arrangements in which each of the present Appellants participated. In Mr Good's case, this involves consideration of the Revenue amendment made by the Closure Notice. In relation to both appellants, if the discovery assessments were made lawfully (in a procedural sense), then the burden shifts to each Appellant to demonstrate (albeit, only to the civil standard - namely, the balance of probabilities) that the assessment in question is wrong.

6. The key issue to be decided is whether the MAPs should be charged to income tax, without any deduction for interest payments payable in respect of a leveraged loan.

7. Pursuant to the order of Judge Raghavan made on 18 March 2017, the Appeals of both Appellants were case-managed and heard together. But, and even though the law is the same for both Appellants, we naturally remind ourselves that we are dealing with two distinct appeals by two distinct Appellants, and that we should be careful that our findings of fact in relation to one Appellant (for example, any findings in relation to that particular Appellant's subjective views or beliefs or intention) should not influence or inform our findings in relation to the other Appellant.

8. Although we had initially considered the possibility of issuing two decision notices, we have concluded that there is no need to do so. Whilst the particular film rights acquired by each Appellant, and the sums involved, differ, there are no material differences between the facts pertaining to each Appellant which are of relevance in determining the question whether the MAPs are, as a matter of principle, taxable as income.

Mr Good's tax returns and assessments

9. As to Mr Good, we find as follows:

(1) In relation to 2007/8 (Closure Notice):

(a) His 2007/8 return was filed online on 4 July 2008. The return, including the self-employment pages, were prepared for Mr Good by S4 Financial plc and he approved the return for submission;

(b) The self-employment page of his return stated that he was engaged in the business of "Trading in Film Rights", which had started on 25 March 2008, with his books made up to 5 April 2008;

(c) He claimed a turnover of £102,029 in this self-employment, with total expenses of £1,990,367, being £1,901,784 as cost of goods, £88,563 as accountancy, legal and other fees, and £20 bank, credit card and other financial charges;

(d) The turnover of £102,029 was taken from from a 'Profit and Loss Account' sent to him from Scion, described as 'Right to Future Income' (page 946 of the bundle);

(e) The £1,901,784 as cost of goods was taken from a 'Profit and Loss Account' sent to him from Scion, described as 'Direct Costs: Revaluation of Debtors' (ibid.);

(f) He claimed to have realised a net trading loss in 2007/8 of £1,888,225, with the same sum as a net business loss for tax purposes;

(g) He sought to set-off loss of £1,238,721 from 2007/8 against other income for 2007/8;

(h) He sought to carry back £649,504 to previous year(s) and set-off against income (or capital gains);

(i) Box 101 said:

"Please note losses of £649,505 are claimed under s 72 ITA 2007 to be set against early years (sic). This sum should extinguish all income for 2004/5, 2005/6, and 2006/7 and result in a refund due for earlier years of £235,701.60.

The balance of losses remaining of £1,238,721 is therefore being claimed against income of the same year (i.e., 2007/8) under s 64 ITA 2007.

(j) No information was given in the 'White Space' in Box 16 of the Tax Calculation Summary;

(k) An (in-time) enquiry was opened on 24 September 2008;

(l) A letter was sent to S4 Financial plc, on that same date, indicating that the enquiry was being opened, and attaching an 'Information Request;

(m) On 14 October 2008, Mr Good's advisers provided HMRC with some, but not all, of the Scheme documentation, including the Business Plan (but not including the Registration Pack referred to in that plan); the Acquisition Agreements, short form assignments, Distribution Agreements; Deeds of Security Assignment; Assignment, Notice of Assignment and Payment direction;

(n) The 'loan documents' referred to in Point 4 of that letter were not provided, and were requested on 1 December 2008, as was the Registration Pack referred to in the Business Plan;

(o) The loan documents were sent on 26 January 2009;

(p) Officer Stack took over responsibility for the enquiry on 8 April 2009;

(q) The Closure Notice under appeal was issued by Mr Stack on 9 September 2010, pursuant to an application made by Mr Good on 2 March 2010, and a closure direction of the Tribunal (Judge Poole and Ms Johnson) released on 18 May 2010;

(r) The Closure Notice disallowed the trading loss claimed;

(s) Mr Good now concedes that no 'sideways' relief will be available for any loss that may be determined to have arisen to Mr Good in 2007/8, although Mr Good has indicated that he "may seek to roll the loss forward to be used against future profits";

(t) The Closure Notice was appealed by virtue of a letter dated 1 October 2010.

(2) In relation to 2010/11 (Discovery Assessment)

(a) His return was filed electronically (and timeously) on 20 November 2011, by him personally. He was given a submission receipt reference number ending '3Q' (page 416 of the bundle) and took an HTML copy of the return (page 404 of the bundle);

(b) Box 14 of the self-employment pages included a figure for "turnover" of £136,812;

(c) A figure of £140,250 was included in Box 24 of the self-employment pages as an expense comprising 'Interest on bank and other loans'. That figure was taken from a Profit and Loss Account for that year, sent to Mr Good by Scion, which Profit and Loss Account was provided to HMRC under cover of an email from his advisers on 3 August 2017 (page 982A of the bundle);

(d) A net business loss for tax purposes of £4,052 was stated;

(e) He gave a Tax Avoidance Scheme reference number;

(f) The enquiry window closed on 20 November 2012 without any enquiry having been opened;

(g) On 17 March 2015, HMIT Old wrote to inform Mr Good that HMRC intended to raise a discovery assessment for this year under sections 29(1) and (5) of *Taxes Management Act 1970*. The key passage in that letter was Officer Old's view that "...on the face of it, the interest payments you received towards the leveraged loan - referred to as Minimum Annual Payments ('MAPs') - are taxable without any deduction for interest payments. Therefore, the MAP (sic) are taxable in full and this gives rise to income that ought to be assessed to income tax' (underlining in the original);

(h) The discovery assessment, in the sum of £58,816,69, was issued on 19 March 2015;

(i) It was appealed by way of a letter dated 30 March 2015.

(3) In relation to 2011/12 (Discovery Assessment):

(a) His return was filed electronically on 7 January 2013;

(b) Box 14 of the self-employment pages included a figure for "turnover" of £136,529;

(c) A figure of £140,250 was included in Box 24 of the self-employment pages as an expense comprising 'interest on bank and other loans';

(d) He gave a Scheme Reference number with an expected year of advantage of 2007/8;

(e) The enquiry window closed on 7 January 2014 without any enquiry having been opened;

(f) On 10 February 2016, HMRC's Mrs Adeyinka Omole, a CTA Tax Specialist, wrote to inform Mr Good that she intended to raise a discovery assessment for this year;

(g) The discovery assessment was issued on 14 March 2016. The amount charged was £61,024.90;

(h) On 17 March 2016, payment of the whole amount assessed was postponed;

(i) It was appealed by way of a letter dated 22 March 2016.

(4) In relation to 2012/13 (Discovery Assessment):

(a) His return was filed electronically on 27 November 2013;

(b) Box 14 of the self-employment pages included a figure for "turnover" of £136,529;

(c) A figure of £140,250 was included in Box 24 of the self-employment pages as an expense comprising 'interest on bank and other loans';

(d) The enquiry window closed on 27 November 2014 without any enquiry having been opened;

(e) On 27 March 2017, HMRC's Mrs Omole informed Mr Good that she intended to raise a discovery assessment for this year;

(f) The discovery assessment was issued on 29 March 2017. The amount charged was £60,944.90;

(g) It was appealed by way of a letter dated 24 April 2017;

(h) Payment of the whole sum assessed was postponed by way of a letter on 27 April 2017.

10. In relation to all Mr Good's returns in dispute, the year in which the expected advantage arose was year ending 5 April 2008.

Mr Ryan's tax returns and assessment

11. As to Mr Ryan, we find as follows:

(1) In relation to 2007/8, there is an open enquiry, opened (timeously) on 25 November 2008;

(2) There is no enquiry in relation to 2008/09, and the enquiry window has now closed;

(3) There is an open enquiry in relation to 2009/10, opened on 24 January 2012;

(4) There is an open enquiry in relation to 2010/11, opened on 21 December 2012.

12. In relation to 2011/12 (Discovery Assessment) which is under appeal:

(1) His return was filed on 31 January 2013;

(2) The Scheme's SRN was declared on the return;

(3) Box 14 of the self-employment pages included a figure for "turnover" of £63,498;

(4) A figure of £64,080 was included in Box 24 of the self-employment pages as an expense comprising 'interest on bank and other loans';

(5) He claimed a net business loss of £1250;

(6) There is nothing relevant in the white space (Box 102);

(7) The enquiry window closed on 31 January 2014 without any enquiry having been opened;

(8) On 6 January 2016, HMRC's Ms Omole informed Mr Ryan that she intended to raise a discovery assessment for this year;

(9) The discovery assessment was issued on 28 January 2016. The amount assessed was £32,398;

(10) It was appealed by way of a letter from his accountants, Davies Gimber Brown LLP, dated 9 February 2016, supplemented by a further letter dated 23 February 2016;

(11) On 18 February 2016, HMRC agreed to postpone the entire assessed amount.

The Scheme

13. Each of the Appellants was a participant in the Scion Structured Products Ltd Scheme ('the Scheme'). Its first year of implementation was 2007/8.

14. The Scheme was a tax avoidance scheme. It was disclosed to the Respondents by way of a completed AAG on 27 April 2007. This summarised the arrangements as follows:

> "A trade, set up through which an individual will enter into a series of transactions to purchase, enhance, exploit and sell film distribution rights worldwide. The individual undertaking the trade will incur expenditure on purchasing discrete film distribution rights with the intention of selling or exploiting those rights in return for the right to participate in the proceeds of the exploitation of the same discrete film distribution rights."

15. The Explanation on the AAG says as follows:

> "2. Additional financing is offered in order to assist in the funding of the purchase price of the discrete film distribution rights by way of a loan which is full recourse as to interest and limited recourse as to capital repayments.
>
> 3. In the early years of the trade it is anticipated that a loss will be incurred as a result of the incurral of expenditure (and a lack of income) which will be available for sideways loss relief."

16. The Respondents gave it a Scheme Reference Number ('SRN') (07541980) on 28 September 2009.

17. The essential steps of the Scheme are set out in HMRC's Amended Combined Statement of Case.

18. But, in broad terms, the Scheme involved a film studio selling the distribution rights to a film to a Scion film rights company. That film rights company would then sell or license the film rights to investors, amongst whom were the Appellants.

19. The Appellants would then ostensibly be trading in the buying, selling and exploitation of film rights.

20. In general, a Scheme user was required to contribute 21% of the cost of the film distribution rights, with the remaining 79% being provided by way of a loan from a Scion lender for a six year term.

21. That loan would be made available by a Scion lender on limited recourse terms (that is, limited recourse as to capital but full recourse as to interest): **'the Loan'**.

22. The terms of the sale of the film rights would be for a share of profits supported by a 'Minimum Annual Payment' ('MAP') sufficient to meet the interest obligations under the Loan.

23. The Registration Agreement provides that the participant shall 'irrevocably agree' that the participant 'acknowledges' their understanding that 'you will be required to enter into security arrangements with the Lender pursuant to which you will grant in favour of the Lender a charge and an assignment of, inter alia, your right, title and interest in part or all of the sale proceeds payable to you from exploitation of the Film Rights acquired'.

24. An investor would sell the film rights in return for a share of the revenues arising from the exploitation of the film rights. An investor would use a proportion of the sale proceeds to repay the Loan and would retain approximately 45% of the revenues, leaving the investor with a trading profit.

25. As to the tax benefits, it was anticipated that the loss resulting from the fees and expenditure on the film rights acquisition would be available for sideways loss relief and that the interest on the loan would be deductible.

Agreed Facts

26. There is an Amended Statement of Agreed Facts. That document is undated and unsigned, but is agreed and was produced in early February 2018. It is annexed to this Decision Notice.

27. The Scion Arrangements were promoted and implemented by Scion companies, being companies within a group collectively referred to as the 'Scion Group'.

As to Mr Good

28. On dates between 25 March 2008 and 4 April 2008, Mr Good executed a suite of documents relating to the acquisition and exploitation of rights in two films - 'Repossession Mambo' and 'Tenure'. He put in £300,000 of his own money and borrowed £1.7m from Scion Film (Guernsey) Limited, making a total capital contribution of £2m.

29. In outline, Mr Good, entered into:

(1) A Registration Agreement signed by him on 25 March 2008 relating to the acquisition and exploitation through sale of film rights and contribution of capital to the trade, whereby he irrevocably agreed (inter alia) that he acknowledged his

> 'understanding that you will be required to enter into security arrangements with the Lender pursuant to which you will grant in favour of the Lender a charge and an assignment of, inter alia, your right, title and interest in part or all of the sale proceeds payable to you from exploitation of the Film Rights acquired" (see Clause 6; page 1231 of the bundle);

(2) An 'Advisory Agreement' with Scion Media Ltd;

(3) A Loan Agreement with Scion Film (Guernsey) Ltd;

(4) Two powers of attorney appointing Scion Media Ltd as his attorney in relation to each of the films;

(5) In relation to 'Tenure', an Assignment, Notice of Assignment and Payment Direction directing Scion Distribution Ltd to pay the MAPs payable to the Appellant in relation to 'Tenure' under the Distribution Agreement to Scion Bank in satisfaction of liability arising under the Appellant's loan agreement with Scion Film (Guernsey) Ltd;

(6) In relation to 'Repossession Mambo', a Notice of Assignment and Payment Direction directing Scion Film Distribution Ltd to pay the MAPs payable to the Appellant in relation to 'Repossession Mambo' under the Distribution Agreement to Scion Film Funding (Guernsey) Ltd in satisfaction of liability arising under the Appellant's loan agreement with Scion Film Funding (Guernsey) Ltd.

30. The 'Distribution Agreement Relating to Certain Film Rights', dated 4 April 2008, made between Mr Good as vendor and Scion Distribution Ltd as purchaser:

(1) Recites that the vendor 'owns the Distribution Rights and wishes to exploit them through sale';

(2) Recites that the vendor has agreed to execute the Deed and assign the Distribution Rights to the Purchaser for the Term;

(3) By Clause 1.1, assigns to the Purchaser for the Term, all his right, title and interest in the Distribution Rights;

(4) Clause 3 ('Distribution Receipts Entitlement') provides that:

> "3.1 In consideration of and subject to a valid and effective assignment of the Distribution Rights pursuant to Paragraph 1.1., Vendor shall be entitled to the following payments:
>
> (i) the Minimum Annual Payments [....]
>
> [...]

3.3 By way of a minimum entitlement, Purchaser shall pay to Vendor to be received by Vendor on 5 April in each year from 5 April 2009 up to and including 5 April 2015, the following amounts:

[....]

(the above payments being referred to as the "Minimum Annual Payments")

31. The 'Assignment, Notice of Assignment and Payment Direction' entered into on 4 April 2008 between Scion Distribution ('SDL'), Mr Good ('Sole Trader'), Scion Film Financing (Guernsey) Ltd ('Scion Bank') and Scion Rights Limited ('SRL'):

(1) Recites the loan agreement entered into between Scion Bank and Mr Good, whereby Scion Bank has agreed to make a loan available to Mr Good to enable him to purchase certain distribution rights in films;

(2) Recites the Distribution Agreement between SDL and Mr Good, whereby SDL had agreed to pay Mr Good 'certain consideration in return for the transfer by [Mr Good] of certain distribution rights in the film to SDL' (that 'certain consideration being the MAPs);

(3) Mr Good assigns all his benefit (including the MAPs) under the Distribution Agreement to Scion Bank;

(4) Mr Good 'irrevocably and unconditionally directs' SDL 'to pay Scion Bank or as Scion Bank may direct, until repayment in full of the aggregate amount of all indebtedness ... the MAPs"

(5) Scion Bank undertakes to Mr Good to apply all sums received from SDL pursuant to the instant agreement 'against the interest due and owing on, and repayment of the principal amount of, the loan advanced under the ... Loan Agreement."

32. A letter from Scion Film Financing (Guernsey) Ltd dated 4 April 2008 says that "The Directors have today held a Meeting to approve the advancing of a loan to you in connection with your acquisition of certain film rights ..."

As to Mr Ryan

33. Mr Ryan undertook the Scion arrangements in 2007/8 by entering into a suite of agreements with materially the same form and effect as those entered by Mr Good. There were three films involved in his case: 'Burn after Reading', 'Fighting', and 'Frost/Nixon'.

34. It was helpfully clarified for us by Ms Nathan, and it is worthwhile setting down here, that HMRC is not making any allegations of a sham in relation to the documents executed by either Mr Good or Mr Ryan, and does not allege that either of them created or executed documents that did not reflect their intentions. HMRC's position is that the documents "do reflect the intentions of acquiring and disposing of film rights."

35. We should also record, for the avoidance of any doubt, that neither of these appeals involve any allegation of fraud or bad faith against either Mr Good, or Mr Ryan. These appeals concern the appropriate tax treatment of the arrangements which they entered into.

The evidence of the Appellants

Mr Good

36. Mr Good filed a witness statement dated 13 October 2017.

37. His written evidence, in summary, was:

(1) He first worked in the music and entertainment sector in the early 1990s, as a management accountant for a record label and home video distributor, and as part of this role assessed the profitability of audio-visual rights and royalty income;

(2) He later went on to train and qualify as an accountant with Blockbuster Video between 1995 and 1998, and obtained a good understanding of the video rental market, and some understanding of its Italian video rental operation;

(3) In mid-2007 he acquired a net fund of around £1.6m which he wanted to invest;

(4) He first became aware of possibly investing in films (and that such an investment could possibly be made through Scion) in February 2008, as one of two either/or alternatives, the other being "a green investment in South America". He was provided with "some basic documentation";

(5) In March 2008, he decided to resign from his then-role as Group Finance Manager of a PLC, but was not able to step down until June 2008;

(6) He decided that, once he stepped down, he wanted to split his working time into three categories: (i) taking up Non-Executive Director roles; (ii) investing in software firms; (iii) 'starting an investment business for myself which would be family owned';

(7) He decided that the opportunity offered by Scion was appealing "due to my interest in the film sector and my previous employment experience in the entertainment business", and that engaging with Scion would be preferable to himself investing in multiple different films;

(8) The film investments made were part of that latterly-described investment business (itself, being one component of what he intended would be a portfolio career);

(9) Those investments were done as part of conducting a business in the exploitation of film rights;

(10) He had detailed discussions over the course of several meetings with Scion and finally decided, on 25 March 2008, that he wanted to proceed to set up a business trading in film rights;

(11) Scion sent him two recommendation letters:

(a) A letter dated 26 March 2008 in respect of 'Repossession Mambo'; 'Death Race' and 'King of Fighters';

(b) A letter dated 2 April 2008 in relation to 'Tenure', and 'King of Fighters';

38. "After careful consideration", he decided to acquire rights in Repossession Mambo and Tenure, and decided not to acquire rights in the other three films mentioned in the recommendation letters. He made a short written note in relation to each film. The reasons which he gave for choosing these were:

(1) In relation to 'Repossession Mambo' (which later was renamed 'Repo Men'):

(a) Although it was not "his cup of tea" he was attracted by the involvement of Forrest Whitaker (who had won an Academy Award in 2006 for his performance in The Last King of Scotland) and Jude Law;

(b) As his contemporaneous note records, he was also attracted by the availability of loan finance at 80%;

(c) Rights were available for various markets, including Italy;

(d) He was reassured that Repossession Mambo was coming from Universal Studios;

(e) It was a major production with a large budget being released in a major territory;

(2) In relation to 'Tenure', he considered:

(a) It had "strong backing", with Blowtorch Entertainment as its producer;

(b) It had a "good cast" including Luke Wilson, David Koechner, and Gretchen Mol;

(c) It had a well-written script;

(d) It was a small budget, 'feel-good' movie which he believed could do very well at the box office;

(e) He acquired rights in various territories, including Greece and Switzerland. Although the film was being released only in English, he thought that these countries "have a reasonably expat population who traditionally go to see English films";

(f) He also acquired rights in Portugal, Czech Republic and Slovakia.

39. He wrote a short note, on one side of paper, at the time, headed 'Tenure - Invest or Not' which set out the above factors, and which added loan availability at 80%. He noted that he had 'No real time to review as opportunity closes shortly', but decided 'Yes'. Filming was to begin on 14 April 2008.

40. However, ultimately, neither film was very successful.

41. In relation to the structure of the Scheme, his written evidence was that he had understood:

> *"that the MAPs were designed to be effectively self-cancelling with the interest charged on the Loan, and would be payable directly from one Scion entity (namely, Scion Film Distribution Ltd) to another (namely, Scion Film Financing (Guernsey) ... the MAPs and interest charged on the Loan were expected to be effectively self-cancelling, and could effectively be ignored as far as my personal financial result from the business was concerned."*

42. His written evidence was that he had understood that the effect of the documents was that "the MAPs payable by Scion Film Distribution Ltd (in respect of the films) were to be paid directly by (Scion Distribution) to (Scion Film Financing) in satisfaction of the interest charged on the loan funding provided by Scion Financing to assist in the purchase of those rights." He also understood that Scion Financing would have full control over and the exclusive right to receive the MAPs.

43. He received invoices confirming the GBP acquisition costs for the films:

(1) An invoice dated 27 February 2008 and with a tax point of 27 February 2008 in relation to acquisition of the film rights in Repossession Mambo, in the sum of £1,768,491 (at page 1704 of the bundle). Mr Good was unable to recall why the invoice date pre-dated the date upon which he contractually entered into the Scion arrangement, or indeed pre-dated the Business Plan and Registration Pack (which were ostensibly dated 19 March 2008). The date 27 February 2008 is also the date which he gives for becoming self-employed as a 'trader in film rights' in his form CWF1 on 25 March 2008 (page 1726 of the bundle);

(2) An invoice dated 4 April 2008 in relation to Tenure (at page 1706 of the bundle) in the sum of £133,293.

44. After making his investment in this Scheme, as described, he said that his film rights business became his only business interest. He said that it was not a second job, or hobby, and he spent "considerable time each week considering investments within the film industry", involving attendance at a number of seminars, reviewing his investment in the two films, searching for other films, and locating and reading film scripts. He also decided to invest, at some point after April 2008, in an Enterprise Investment Scheme called Artemis Films Limited, and invested £50,000.

45. In relation to things said to have been done in between 26 March 2008 and 10 October 2008, he produced an 'activity log', and he relies on this activity log to show that he was actively involved in running his business in the exploitation of film rights during 2008/9, as well as subsequently. This was not a contemporaneous record, but was produced by him in late 2008, and in advance of a meeting with HMRC, to support his position that he was an active investor spending at least 10 hours per week for a minimum of six months on films. It was done because, as part of his signing with Scion, he had been told that he had to be prepared to prove that he had "done his ten hours a week".

46. Between 26 March 2008 and his entry into the Scheme, it records 21 hours of work, being 10 hours 'prior' to 26 March 2008 (described as 'Scion and S4 plc meetings and documentation'); 10 hours on 26 March 2008 (described as 'Documentation from Rob McDonald Scion'), and 1 hour on 27 March 2008 (described as 'VAT numbers correspondence'. No particular hours are recorded during this period in the columns for Scion Repo Mambo or Scion Tenure. Thereafter, there are 3.5 hours on 27 April 2008 (a Sunday) on the script for Repo Mambo and other timed entries in relation to both films. Overall, there are 33.5 hours recorded on Repo Mambo and 47 hours on Tenure. That table also records Mr Good's involvement with another five films, not through Scion but through Artemis.

47. An undated 'Film Investment Time Log' records 28.5 hours on Mambo and 36.25 hours on Tenure, from scripts (3.5 hours each); 'analysing distributors' (0.5 hr each); meeting with distributors (4 hrs, but only for Tenure); 'monitoring delivery of film is ontime' (0.5 hrs and 1.25 hours for Mambo and Tenure respectively).

48. He also refers to a meeting held with him, HMRC and his adviser, Mr Newbould of S4 Financial, on 16 June 2009. He relies on:

(1) The agenda for the meeting, dated 4 June 2009, and its reference to 'funding including borrowings' (page 1162 of the bundle);

(2) The note of the meeting, and the things discussed there.

49. The purpose of his reliance on events of June 2009 is to support the proposition, set out by Mr Good at Paragraph 91 of his witness statement, that, as at 16 June 2009, "it must have been clear to HMRC that interest was charged on the loan, and that the Minimum Annual Payments due under the Distribution Agreements were required to be paid direct from Distributor to Scion Lender in payment of the interest charged on the loan".

50. He goes further, and argues that the Business Plan (provided to HMRC as early as mid-October 2008, and by Mr Ryan's accountants under cover of a letter dated 9 February 2009), which exists in at least two versions (with the one we have seen one dated 11 May 2007) "is, of itself, sufficient to give a reader of that document an understanding that Minimum Annual Payments due under the Distribution Agreements would be paid direct to the Scion Lender, in satisfaction of interest charged on the loan."

51. There is a copy of this dated 11 May 2007 attached to Mr Good's Witness Statement.

52. He relies in particular, on

(1) Internal Page 4 - 'Financing - The Capital Contribution will be funded in part by the Cash Payment and in part by the Loan as specified in the Registration Pack';

(2) Internal Page 8 - 'Distribution Receipts consist of entitlement to the Minimum Annual Payments and the entitlement to Defined Proceeds. The Minimum Annual Payments, which the Trader will instruct Scion Distribution

Company to pay direct to the Lender, are intended to cover substantially all of the interest liabilities accruing under the loan until the repayment date under the Loan Agreement' (emphasis added by us).

53. He also relies on the filing of his 2009/10 return (16 January 2011) and the giving of the SRN, and the opening of an enquiry (which remains open) on 23 December 2011.

54. He also relies on the filing of his 2010/11 return (20 November 2011), again giving the SRN, and the provision of documentation to HMRC in relation to its 2007/8 enquiry (he says, "in particular, the Loan Agreement, the Business Plan, the Distribution Agreements and Payment Directions") as 'clearly demonstrating that interest was charged on the Loan, with Minimum Annual Payments being paid direct to the lender in accordance with Payment Directions.

55. His oral evidence was:

(1) He had paid £300,000 into a bank account which was run and controlled by Scion as part of the arrangement he signed into;

(2) The £300,000 was part of £350,000 which he had received from the sale of share options;

(3) Profit and loss accounts were produced once a year by Scion, who sent them to him as part of the arrangement, for him to use in his tax returns;

(4) Once he had decided on the films, he signed a document but then the rest was covered by a Power of Attorney, and it was "out of his hands" and that Scion "would take care of the rest", including the MAPs being paid to the bank;

(5) The package of the arrangements was a whole package, and his choice was to take it all, or take none of it ("*a fait accompli: you either do it or you don't*");

(6) He had not seen all of the documentation signed on his behalf;

(7) He had never invested in a partnership or LLP previously;

(8) As far as he was aware, the MAPs would be used to discharge his obligation to pay interest on the £1.7m loan;

(9) The Scion arrangements were the first and only arrangements of this kind that he had ever entered into, and were at the very end of a tax year;

(10) He knew that Scion was aimed at generating losses, and would do so for 2007/08, but intended to generate a repayment in 2007/08 (in part, by using sideways loss relief for previous years) in order to fund his activity going forward;

(11) He was never asked for any extra money;

(12) He did put a DOTAS number when making his 2010/11 online return, and declared the year of advantage as 2007/08, which was the year that Scion had told him to put in.

56. Whilst there is apparently a discrepancy between his version of the return (which includes a DOTAS number) and HMRC's version of the return (which does not) we accept Mr Good's oral evidence - which was given adamantly and consistently - that,

when he made his 2010/11 return online, he put the SRN number in. Mr Good complained, with some justification, that the situation was confusing. Mr Olds agreed, describing the situation was 'really peculiar, bizarre'. He candidly accepted that, if both parties were right, then there was a problem somewhere. He agreed that Mr Good's document showed the SRN and a submission number. Mr Olds intended to raise the matter with the discovery policy holder to alert them "that this has happened in this case" and to see if it is something which needed to be investigated.

57. We find that he had made a return, obtained a submission number, and (perhaps fortunately, as it turned out) printed off a copy for his own records showing a DOTAS number. HMRC confirmed that it did not intend to advance any evidence as to the operation of its computer system in 2010/11 and (for example) self-populating boxes.

Mr Ryan

58. Mr Ryan filed a witness statement dated 12 October 2013. He confirmed this to be true. There were no supplementary questions by way of evidence in chief. He was cross-examined. There were no questions by way of re-examination.

59. His written evidence was as follows:

(1) Since 2000 he has been a senior executive officer of Liberty Global, which is a TV and broadband company;

(2) As a result of discussions in late 2007 at which the opportunity to establish a business involving the exploitation of film rights was explained to him, he obtained a business plan from Scion Media;

(3) He personally made a cash contribution of £210,000, with a loan from Scion of £790,000;

(4) He was required to instruct that the MAPs be paid by Scion Distribution Company direct to Scion Lender, and he understood that those payments "should be sufficient to meet substantially all of the interest due during the term of the loan";

(5) He was required to give security for the Loan by way of a charge over and assignment of rights in the MAPs and 55% of the Defined Proceeds until the Repayment Date (following which the lender would have 100% security over the Defined Proceeds);

(6) That, prior to the Repayment Date, all distributions of the MAPs and 55% of the Defined Proceeds must be applied first to repay the Loan;

(7) Until the Repayment Date, Scion Lender had the exclusive right to receive all the MAPs, which would substantially satisfy the Loan Interest, and "would effectively be self-cancelling against the interest charged on the Loan";

(8) He was aware from the Business Plan that a substantial loss was expected to be incurred in the first year;

(9) He signed the loan agreement on 19 November 2007, and commenced his activity on 4 December 2007.

60. His written evidence was that, in summary, his understanding of the business was that he had no personal right to receive MAPs, which would be paid direct from Scion Distributor to Scion Lender.

61. In summary, his oral evidence was:

(1) The way in which the Scheme was presented to him was that Scion had put together a package that would allow persons to invest in some films and two things would happen. If the films did well, you could make some profit, and if the films did not go well "you had a sort of stopgap default that you could always write off the losses against income tax so that you could have some sort of hedge against the equity you put into the deal";

(2) He accepted that the idea of the 'hedge' was that if you make loss, you can try to set that loss off against other income;

(3) The hedging relied on repayment from HMRC;

(4) £210,000 was the amount that he was willing to risk in the Scheme;

(5) He accepted that, on the one hand, he would be paid the MAPs, and on the other hand they took the interest "and the two net off";

(6) He accepted Ms Nathan's suggestion, put to him in cross-examination, that the idea was that it would absolve him of the obligation "of having otherwise to go into his back pocket to pay the interest;"

(7) He was not really familiar with the concept of the criteria upon which one chooses film rights, but was not given the opportunity to negotiate a price. He was given a schedule by territory on a 'take it or leave it' basis, but on a 'first come first served' basis where certain territories might already have been sold;

(8) Although he spent time trying to understand the Scheme, he did not undertake any extensive research on the actual films. He was "not a big film buff", but tried to pick films which he recognised, or at least where he recognised the actors;

(9) He chose 'Burn After Reading' because of Brad Pitt and John Malkovich ('a sort of crazy American actor');

(10) He did not do "a whole bunch of research" on markets, but bought the territories which he did because they added up to a million pounds, which was what he wanted his total capital investment to be;

(11) He was not very familiar at the time with the 'pecking order' of film profits, and thought that we would receive more defined proceeds than he in fact did;

(12) He did not sign a lot of the documents personally, but the Power of Attorney (at page 2635 of the bundle, dated 26 November 2007) was there in order to allow that to happen;

(13) He was never asked to pay a shortfall towards the interest, and he accepted that he would "never have to put a hand into his own pocket to pay any of the interest because the MAPs would be paying it off";

(14) In relation to his 2011/12 return, he could not explain why the year of tax advantage was 2007/08 and not some later year;

(15) Mr Ryan had not seen, on a year by year basis, any valuation of the right to future income.

62. Mr Ryan also relied on evidence from Robin Brown BA FCA, who is a partner in the firm of Davies Gimber Brown LLP ('DGB') in Leatherhead, and who has ICAEW qualifications. His written evidence is contained in a witness statement dated 12 October 2017.

63. DGB was responsible for the filing of Mr Ryan's tax returns for each of the years 2007/8 to 2011/12 inclusive. That firm used commercially available software called 'CCH PerTax'. His written evidence related to the omission of the year of advantage (2007/08) from the returns for 2008/09, 2009/10, and 2010/11 with the entry '1900-01' being populated instead. As he confirmed in his oral evidence, none of the returns for those years are the subject matter of the appeal before us.

64. It was an agreed fact that both an SRN and the year of advantage 2007/08 were included in the return for 2010/11.

Other evidential matters

65. There was no witness statement, or oral evidence, by or on behalf of any of the Scion entities. Hence, there was no explanation, from those who produced the documents, as to their meaning or effect. Nor, and bearing in mind that Scion produced the annual figures for Mr Good and Mr Ryan to include in their self-assessment returns, was there any explanation as to how those figures had been arrived at, or calculated, or what those figures genuinely represented. One feature of significance in that regard is that it seems to us that the income figures in fact represented a valuation (or revaluation from time to time: see the Notes to the Summary of Accounting Entries for the year ended 5 April 2015, at page 476 of the bundle) of future income, rather than necessarily the exact quantum.

66. In response to a question from the Tribunal it was confirmed by HMRC (and not challenged on behalf of either Appellant) that HMRC had not been provided (and so we were not shown) any record showing what MAPs had ever actually been paid (or notionally paid) to either Mr Good or Mr Ryan. This is subject to the fact that it is common ground that no MAPs were payable in 2007/8, but only from 2008/9.

The evidence of the Respondents

67. HMRC relied on evidence from:

(1) Officer Michael Kenneth Old, an officer in the Counter-Avoidance Directorate (formerly known as 'Specialist Investigations'), contained in his witness statement dated 14 November 2017;

(2) Officer Adeyinka Adetokunbo Omole, an officer in the Counter-Avoidance Directorate, contained in her witness statements dated 14 November 2017, and 8 March 2018.

68. In summary, Officer Old's evidence was:

(1) At the time of these events, he had worked for HMRC for about 30 years, and had worked in Specialist Investigations ('SI") before moving to the Counter-Avoidance Directorate. As of March 2008, he was a Principal Inspector;

(2) His involvement with the Scheme began in around June 2010;

(3) His role was fairly high level, and did not relate to any individual taxpayer;

(4) There was no individual case worker for the Scheme;

(5) Mr Old's initial concern was the large loss that was claimed in the first year following commencement;

(6) HMRC's SI "became aware of the true nature of the Scheme and the impact of MAPs through the process of ADR" which began (albeit for another taxpayer as a lead case, and not at that time involving either Mr Ryan or Mr Good) in July 2012;

(7) Eventually there were 102 taxpayers participating in ADR relating to the Scheme, or a total number of Scheme participants of about 160;

(8) There was a formal mediation meeting on 29 April 2013. He said that "[i]t was during conversations on the day of the mediation meeting that the nature of the MAPs was discussed and HMRC's view was that the figures entered in the individuals' tax returns as - the MAPs receivable - fell to be taxed as pure income profit without any deduction being permitted". That was on the basis that MAPs income which ought to have been assessed to income tax had not been so assessed, resulting in insufficient tax being paid and a loss to the Crown;

(9) Settlement discussions continued until July 2014;

(10) It seemed to him that there was a reasonable possibility that HMRC's Anti-Avoidance Board (AAB) would endorse the settlement proposals "and therefore it seemed unhelpful to issue assessments charging tax which in a short while HMRC may decide was not due."

69. In summary, Officer Omole's evidence was:

(1) She became an Inspector of Taxes and joined the Counter-Avoidance Directorate in November 2014 and began to familiarise herself with the Scheme;

(2) Between November 2014 and June 2015, she reviewed past memos and letters, attended meetings, and discussed the Scheme with Officer Old;

(3) She assumed technical lead responsibility for the Scheme in around June 2015, with Officer Old remaining 'theme lead';

(4) In her new role, she then reviewed the enquiry cover for all the participants in the Scheme, including policy advice on whether the discovery provisions could

be used to make discovery assessments. But the focus of that work, as she explained in her oral evidence, was addressing the accelerated payments position;

(5) We accept her evidence that she saw Officer Old's memo of December 2014 between June and October 2015;

(6) She organised a meeting, which took place on 16 October 2015 to determine if the basis upon which Mr Old had made assessments for 2010/11 could be used for later years;

(7) As a result of that meeting, she understood that she had been 'given the green light' to go ahead and issue discovery assessments for 2011/12;

(8) Mr Good registered his interest in the settlement opportunity in around December 2015;

(9) Mr Ryan registered his interest in the settlement opportunity (which closed on 11 February 2016) in early February 2016;

(10) In relation to Mr Good, she concluded, on the facts, that there was an insufficiency of tax for 2011/12, and that a discovery assessment should be issued. A letter was sent on 10 February 2016 and the assessment issued in March 2016.

The Issues

70. There is an 'Agreed Amended Statement of Issues for Determination'. The Statement of Issues identifies two sets of arguments - 'procedural', and 'substantive' (in that order).

71. During the course of the hearing, and at our request, the parties also produced a 'flow chart' or 'decision tree'. Although this latter document was not entirely agreed, it nonetheless is a useful tool to assist in clarifying the issues and the sequence in which they should be addressed. The flow chart deals with the substantive issues only.

72. The 'procedural' arguments are whether each of the discovery assessments is valid (being a matter upon which HMRC bears the burden). This involves determination (in relation to each of the discovery assessments) whether an officer of HMRC made a discovery of insufficiency pursuant to TMA section 29(1), and, if so, when that discovery was made. If an officer did make such a discovery, we must go on to ask whether the raising of the assessments is precluded by the operation of TMA section 29(5) (it being common ground between the parties that no reliance is being placed on TMA section 29(4)).

73. The substantive issues are somewhat more intricate, and we shall come to them in due course.

74. We follow the parties' running-order and engage first with the discovery issue.

Discovery: the legislation

75. At the material times, s29 TMA 1970 was, so far as material, in the following form:

> "**29. Assessment where loss of tax discovered**
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment —
>
> (a) that any income, which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) [...]
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above —
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) [...]
>
> (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 enquires into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer, whether in pursuance of a notice under section 19A of this Act or otherwise; 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.

76. Subject to certain exceptions, which are not relevant in this case, s34 TMA provided the time limit within which an assessment under s29 TMA could be made:

"34. Ordinary time limit of six years

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax, capital gains tax may be made at any time not later than five years after the 31st January next following the year of assessment to which it relates."

Discussion on Discovery

77. HMRC bears the burden of establishing that the statutory conditions for each discovery assessment were met.

78. The standard of proof is the civil standard; namely, the balance of probabilities.

79. There has been much recent judicial discussion in the higher courts as to the meaning and effect of TMA s 29. It is possible that the position is not yet entirely settled. An appeal against at least one of the decisions to which we were referred, *Hicks v HMRC* [2018] UKFTT 0022 (TC) (Judge Thomas Scott) is due to be heard by the

Upper Tribunal in October 2019. Another - the decision of the Upper Tribunal in *Clive Beagles v HMRC* [2018] UKUT 380 (TCC) (Birss J and Judge Greenbank) (released in November 2018) - is (according to the Court of Appeal Case Tracker) proceeding to the Court of Appeal, but a hearing was stood out in October 2019 'awaiting the decision of the Supreme Court in another case' (although the Case Tracker does not say which one). Neither party invited us to defer making a decision in relation to the discovery assessments. Our task is to decide this present appeal on the law as it stands before us, here and now.

80. The most recent binding articulation of the relevant principles is to be found in the Court of Appeal's decision handed down on 15 June 2019 in *HMRC v Raymond Tooth* [2019] EWCA Civ 826. There, Floyd LJ remarked:

> "60. Both parties accepted that the legal approach to whether there is a "discovery" is correctly set out in this first passage from the decision of the UT in *Charlton & others v RCC* [2012] UKUT 770 (TCC); [2013] STC 866 at [37], where the Upper Tribunal said:
>
> > "37. In our judgment, no new information, of fact or law, is required 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 is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight."
>
> The Upper Tribunal continued:
>
> > "The requirement for newness does not relate to the reason for the conclusion reached by the officer but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment."

81. Floyd LJ went on to remark:

> "61. I agree with the UT's approach in both passages. The requirement for the conclusion to have "newly appeared" is implicit in the statutory language "discover". The discovery must be of one of the matters set out in (a) to (c) of section 29(1) . In the present case the officer must have newly discovered that an assessment to tax is insufficient. It is his or her new conclusion that the assessment is insufficient which can trigger a discovery assessment. A discovery assessment is not validly triggered because the officer has found a new reason for contending that an assessment is insufficient, or because he or she has decided to invoke a different mechanism for addressing an insufficiency in an assessment which he or she has previously concluded is present."

82. In *Tooth*, the Upper Tribunal (Marcus Smith J and Judge Hellier) had decided that the condition in s29(4) TMA was not satisfied on the facts of the case. The Upper Tribunal went on to express its views on the discovery issue. At [79(3)], the Upper Tribunal said this:

> "We entirely agree with the Upper Tribunal in *Charlton* that on making a discovery, HMRC must act expeditiously in issuing an assessment. If, to use the words of *Charlton*, an officer has made a discovery, then any assessment must be issued whilst the discovery is "new".

83. In *Tooth*, the Upper Tribunal also said this at [83].

> "No doubt the facts that triggered the letter of 14 August 2009 could have amounted to a "discovery". However, that would mean that the discovery was made in 2009, whereas the discovery assessment was made some five years later in 2014. If and to the extent that this was the discovery, then (for the reason given in paragraph 79(3) above) the assessment upon which it was based was stale and should never have been made."

84. But *Tooth* can be seen as an illustration of, and consistent with, the situation outlined in *Patullo* of an exceptional case where the conduct of HMRC - "for example their inaction" - resulted in the discovery losing 'newness' by the time that the assessment was made.

85. The present appeals are to some extent perhaps unusual in two regards. The first is that because they are against the backdrop of an ADR process. Secondly, and in relation to Officer Omole's decisions to issue discovery assessments to Mr Good for 2012/13 and 2013/14, HMRC's position is that there was a series of discovery assessments, for successive tax years, made by Officer Omole over a number of years.

The 2010/11 discovery assessment for Mr Good

86. For 2010/11, the enquiry window closed on 20 November 2012.

87. In relation to Mr Good's 2010/11 position, HMRC's position is that no discovery was made until it was made by Mr Old (HMRC's Project Manager with responsibility for the Scion scheme) in late April 2013.

88. Mr Good says that he does not know what new information was available to HMRC on 17 March 2015 which had not been available to it at the closure of the enquiry window on 20 November 2012 (i.e., just over 2 and a half years earlier).

89. HMRC had, by no later than 20 November 2012, the following things:

(1) Mr Good's return for 2010/11 (20 November 2011);

(2) Documents about the Scheme provided to HMRC in October 2008 and/or 26 January 2009;

(3) Information provided to HMRC at a meeting on 16 June 2009.

90. We accept that Officer Old had not looked at any self-assessment returns for Mr Good or Mr Ryan before the ADR meeting on 29 April 2013.

91. We have already found as a fact that the DOTAS number for the Scheme (which would have allowed HMRC to cross-reference to the AAG, which HMRC had received on 27 April 2007) did appear on the 2010/11 return as submitted online by Mr Good. What flows from that is that HMRC did have the DOTAS from Mr Good, on his return, when submitted even though (for some reason which we cannot fathom) HMRC's own system subsequently seems to show that the box was not populated.

92. However, we do not consider that the appearance of the SRN (whether in the return whether in and of itself, or in connection with the information in the AAG, or the other information referred to below) sufficed, even on balance, to put a real or hypothetical officer of HMRC on notice that an insufficiency of tax for 2010/11 existed.

93. The Form AAG1 (which is not a document produced by Mr Good, but by the Scheme), of which we have set out the material part of the text above, does not refer to the MAPs at all, and does not mention anything about deductions being sought against MAPs. It simply refers to the incurring of expenditure, and says "Additional financing is offered in order to assist in the funding of the purchase price of the discrete film distribution rights by way of a loan which is full recourse as to interest and limited recourse as to capital repayments." At its very best, that brief description both lacks detail and is opaque. Moreover, the AAG talks only about the first year (2007/8) and not about subsequent years.

94. We do not consider that the reference to 'interest on bank and other loans' in the self-assessment return for 2010/11 means that the officer should 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 TMA s 29(1). The 'turnover' figure gave no indication that this figure represented the MAPs (as opposed, say, to some other source of income). There was nothing in the return which told HMRC that the business income was the MAPs. No information was provided in the additional information boxes to explain the manner in which the MAPs would be accounted for.

95. The reference on the return to "bank and other loans" is vague. There was no 'bank' loan, in the sense that there was a loan from a bank. The 'other loans' makes nothing clear as to the identity of the lender, the purpose of the lending, or the treatment of the interest payments as against the capital borrowed.

96. Reference to the same thing in 2008/9 and 2009/10 does not suffice either, for the same reasons. Those references suffer from the same vagueness. It is not permissible to read together information for different years of assessment.

97. The Business Plan, the Loan Agreement, the Distribution Agreements, and the Payment Directions were sent to HMRC under cover of the letter sent by S4 to HMRC on 14 October 2008.

98. Particular reliance is placed on the Business Plan, as already set out. It is not a document which can be relied upon as having contractual effect. It says (at internal page 4): 'Tax benefits and financial returns':

> It is expected that in the First Accounting Period, a significant proportion of the Purchase Price should be deductible as a trading expense in the accounts of the Sole Trader, which will include any adjustments to reflect the net realisable value of the Film Rights.
>
> In addition, it is expected that a significant proportion of fees payable to Scion will also be deductible as a trading expense in those accounts. It is assumed that this treatment will be upheld, but the deductibility of such expenses may be challenged, at least in part, by HMRC.
>
> Upon sale of the relevant Film Rights, Scion Distribution Company will have an obligation to pay the Minimum Annual Payments. The Sole Trader will be required to direct the Minimum Annual Payments, paid by Scion Distribution Company, directly to the Lender. These Minimum Annual Payments will not be sufficient to extinguish completely the liabilities of the Sole Trader to the Lender, but should be sufficient to meet substantially all of the interest due during the term of the Loan. The balance of interest payable (if any) during the term of the Loan will be payable by the Sole Trader.
>
> As a result of the transactions contemplated herein, it is anticipated that a trading loss will be incurred in the first Accounting Period."

99. We do not consider that anything decisive can be derived from the terms of the agenda for the June 2009 meeting between Mr Stack and Mr Newbould. It was just an agenda. HMRC's indication that it wanted to discuss the income from the rights sold, and the funding of the purchase rights 'including borrowings' did not express any conclusions. The use of the word 'borrowings' simply does not add any weight to the analysis.

100. There is a note of that meeting signed by HMRC's Mr Stack and Mr Vojak. There is no challenge to the content or accuracy of that note. We do not consider that the information gathered at the meeting on 16 June 2009 was sufficient to put HMRC on notice as to the treatment of the interest and MAPs. The impression from the note is that Mr Good was open and forthcoming. The focus of the meeting was information gathering. He said that he had signed 'a myriad of agreements to buy and sell the film rights in return for the right to the defined proceeds from the film and the minimum annual payments'. There was no discussion of the actual figures on his 2007/8 return, where they had come from, who had produced them, what they related to, or what he thought they related to, or how they related to the documents. The most detail gone into was Mr Good's remark that he thought that there was a small chance he would have to pay the loan interest in 10 years, but that the contracted minimum annual payments 'should cover any amounts due'. Mr Newbould's short letter of 18 June 2009 reflects the discussion in focusing on the issue of trading and the provision of information from third parties.

101. We do not agree with Mr Good's position that the provision of the documents referred to above, together with the meeting on 14 June 2009, meant that "it must have been clear to HMRC that interest was charged on the loan, and that the MAPs due under the Distribution Agreements were required to be paid direct from the Distributor to Scion Lender in payment of the interest charged on the loan." We consider that the true position at the end of that meeting was that outlined by the Tribunal in its decision on the Closure Notice direction: HMRC were awaiting the information requested from Scion in order to fully understand the nature of the Scheme.

102. Mr Good points to Officer Old's 'Detailed Summary of Avoidance Scheme as at May 2011' in support of the proposition that Officer Old did not make a 'discovery' in April 2013. But that document (at page 2970 of the bundle) was not written by Officer Old, but by Officer Stack in May 2011, although it was sent by Officer Old on 23 December 2014 to his colleagues in Business Technical Support.

103. We reject the submission that this document gave rise to a discovery situation:

(1) The focus of the document is on the Year One loss:

> "2. The scheme relies on the use of UK GAAP to write down the value of the rights purchased to create substantial loss claims which the sole traders claim against their general income" (see bundle page 2970);

(2) Officer Stack's principal concern with the Scheme was that no trading was taking place in relation to section 64(1)(a) ITA 2007.

104. We agree with Mr Old's evidence that this document does not make it apparent how the MAPs (which are referred to - inaccurately - as 'A contractual but not guaranteed annual payment equivalent to the loan interest payable in respect of the Scion Loan': our emphasis, and as opposed to 'substantially equivalent to') are taxed.

105. We find that the discovery was made by Mr Old, and followed very shortly after Mr Good's nomination (28 March 2013) as one of the lead cases for an ADR process which had begun in July 2012.

106. Forming a new opinion as to the nature of something - in this case, the declared turnover - is capable of amounting to a new discovery.

107. Some reliance is placed on information in HMRC's hands which had arisen as a result of an ADR process with other users of the Scion schemes. This aspect is not without difficulty, since, in the absence of detailed information about the ADR process, we do not know whether information was provided under cover of privilege, or, if it was, what effect that had on HMRC in relying on information either (i) in assessing other individuals; or (ii) in placing such information before the Tribunal.

108. We agree with HMRC's position that it made a discovery in relation to Mr Good on 29 April 2013. We accept Mr Old's evidence that it was during conversations on the day of the mediation meeting that the nature of the MAPs was discussed and HMRC came to form the view that the figures entered in the individuals' tax returns as turnover - the MAPs receivable - fell to be taxed. His evidence is consistent with the (again,

expressed as 'Without Prejudice', but in relation to which any privilege has doubtless been waived) settlement proposal document which was drawn up after the ADR appointment, and which included proposals as to the treatment of the interest,

109. We accept Mr Old's evidence that the focus, up to the mediation meeting, had been on the Year One loss rather than on the nature of the MAPs. In our view, this was a rational thing for him to focus on because of the large losses declared in Year One, which had attracted and excited his interest (and that of Officer Stack before him).

110. It was put to Mr Old that, even though the Year One loss was the focus, the MAPs nonetheless 'kept cropping up'. We took the inference to be the MAPs were there - in plain sight - throughout. But we accept Mr Old's answer to this, which was that it has to be borne in mind that the MAPs were not payable in Year One, being the year of declared advantage, but only in Years Two onwards. We accept that it was only in the course of the mediation that consideration came to be given more widely to the 'life cycle' of the Scheme - that is, to its operation and effects in Year Two onwards, and that HMRC's understanding of the way in which the Scheme worked 'evolved' following the settlement opportunity, with it 'becoming appreciated that [HMRC] had issues in later years'.

111. Supportive of this is HMRC's Position Statement, dated 25 April 2013 and drafted by a Mr Duivenvoorden of HMRC's Strategic Litigation and Special Investigations Team, which was circulated in connection with that ADR meeting and which was discussed at a plenary session at the beginning of the day of the mediation.

112. The Position Statement was placed before us, apparently without objection, despite being prominently marked 'Without Prejudice'. It is a revealing (and, in our view, reliable and comprehensive) snapshot of HMRC's thinking, on the eve of the mediation meeting, about the Scheme. It is notable that the Position Statement does not mention the tax treatment of MAPs at all. They are not in the five issues which, in HMRC's view, required determination. The principal issue identified in the Position Statement was whether the taxpayers were carrying on a trade (which is consistent with the tenor of the cases being decided by the Tribunal in 2012 and 2013, such as Eclipse and Degorce, which are referred to in footnote 1 of the Position Statement). The Annexure setting out HMRC's 'global overview' was necessarily a high level generic summary of its technical analysis: it had only received disclosure in 2 of 169 instances notified to HMRC. It mentioned the borrowing. It did refer to the Minimum Annual Payments (described as 'an annual amount equivalent to the annual interest payments': see §6.1) but without engaging in any further analysis.

113. We accept Mr Old's evidence that this was because MAPs were not even on the list of HMRC's priorities at that stage. We reject any suggestion that HMRC had (in effect) closed its mind to something which was otherwise obvious, or that HMRC was somehow keeping its view on the MAPs 'up its sleeve' in advance of the mediation. There would simply not have been any point in HMRC doing so.

114. That was despite HMRC "becoming aware" of the impact of MAPs through a process of ADR which had begun (it is important to note - in relation to another

taxpayer, and not to Mr Good) in 2012 and which had been announced by the then-Chancellor of the Exchequer, George Osborne, in December 2012.

115. We accept Mr Old's evidence as to the way in which the ADR appointment on 29 April 2013 had unfolded, that the ADR "was when I first can recollect the prominence of that issue". His recollection, which we accept, was that the lead on the issue was being taken by the taxpayers, and not by HMRC. This is entirely consistent with the detailed explanation which he gave in his oral evidence as to "the background in the avoidance world at the time", an initial concentration on the large loss in year one, without a full appreciation of how long some of the schemes might actually carry on for. As he put it, it was a matter of piecing things together "rather than everything coming at you in one go." We accept his evidence that, even had he looked at the tax returns sooner, he still would not have appreciated how the Scheme worked, since at the time other film valuation write-down schemes had not included the accountancy valuation as turnover or income in year one, and the normal position would not have been to expect to see interest as turnover in subsequent years.

116. The next question which then arises is whether, having made a discovery in April 2013, HMRC's failure to issue a discovery assessment until March 2015 has any effect.

117. As set out by the Court of Appeal in *Tooth*, the requirement for newness does not relate to the reason for the conclusion reached by the officer but to the conclusion itself. So, if an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made "within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment."

118. That is to say, this assessment of "a reasonable period" depends on the circumstances.

119. Between April 2013 and March 2015, the following things happened:

(1) A formal mediation meeting on 29 April 2013;

(2) The rejection of a settlement proposal (referred to as 'ADR1') by HMRC's Anti-Avoidance Board (AAB) on 22 November 2013;

(3) Correspondence relating to that rejection on 11 February 2014;

(4) A meeting between HMRC and representatives to present HMRC's high level view on 1 April 2014, wherein HMRC's Mr Duivenvoorden provided a reasoning of HMRC's thinking in relation to the treatment of the income from MAPs and the interest, and which led to the formulation of further settlement proposals (referred to as 'ADR2');

(5) Further AAB meetings in May 2014, and July 2014, leading to HMRC's decision not to pursue ADR2;

(6) Mr Old's production of a commentary on the Scion scheme for his colleagues in HMRC's discovery team dated 23 December 2014 (this is found behind Tab 217 in the bundle, beginning at page 2962. We accept his evidence

that this was not prepared with any specific individual in mind, but was simply to set out the issues for his colleagues, including 'policyholders', being the people responsible for ensuring consistency in the practical application of legislation. It was asking for the view of the unnamed recipient 'on the merits of raising discovery assessments in respect of the individual participators in the disclosed avoidance scheme';

(7) The response by Officer Wise of HMRC's discovery team to Mr Old on 27 January 2015.

120. That response - 27 January 2015 - is the last act of significance before Mr Old issued the discovery assessment on 19 March 2015.

121. HMRC's explanation why it intended to assess, which explanation was given, at the time, in its letter of 17 March 2015, was this:

> "The discovery of the position only came to light through HMRC's information gathering process in respect of the scheme arrangements. In your case that information had not been available by the close of the enquiry window into your 2010/11 return ... This information, now available, suggests that there is an insufficiency of tax and, therefore, a discovery position exists"

122. In our view, the discovery in April 2013 had not lost the quality of newness by March 2015.

123. In our view, and in the light of the events outlined above, it was reasonable for Mr Old to have decided not to issue an assessment pending the conclusion of the ADR procedure. In one sense, it is true that he did 'park' the assessment. But that decision was not done in a factual vacuum, or arbitrarily. The context, and the concurrent taking place of ADR, is entirely relevant and must be taken into account. He had a good reason which was genuine, and (in his view) reasonable, apprehension, that raising a discovery assessment at the time would have jeopardised the ADR process. He cannot say more about what would have happened had he issued an assessment, because he did not do so. Nor can we. But we accept his evidence on this point, and in our view his decision not to issue any discovery assessment until March 2015 was a matter of professional judgment on his part, exercised rationally and in good faith. We think that it would go too far on the part of the Tribunal were we to find that HMRC should have issued discovery assessments much sooner, notwithstanding the existence of ADR, but on the footing that assessments could have been folded up in any overall settlement.

124. We accept that this was not a straightforward ADR. It involved over 100 taxpayers, some of whom had different interests, who did not share representation, and whose representatives took different approaches. HMRC - reasonably - wanted to achieve broad agreement, and were trying to avoid (in Mr Old's expression) "scattering the population." HMRC's interest was, so far as possible, to deal with all Scheme participants who had chosen to engage in ADR, together.

125. We remind ourselves that the ADR process is one which the Appellant and his representatives chose (for reasons known to them but which they must have considered

best served their own interests) to enter into, and, having entered into it, to continue to engage in. There was no obligation on them to do so. They could have walked away, which would have drawn a clear line under the ADR, but they did not do so.

126. We should also bear in mind the wider policy imperative of the ADR process which is to encourage HMRC and taxpayers to engage co-operatively to resolve their disputes without coming to the Tribunal. It would undermine that process if either HMRC or taxpayers were at risk (i) in the case of a taxpayer, of having to engage in an ADR process with a discovery assessment having been made, and the appeal timetable thereby having engaged; and (ii) in the case of HMRC, to be forced to issue a discovery assessment lest, at the end of the ADR process, if it did not succeed, HMRC would be confronted with an argument as to staleness.

127. Although the unfolding of the ADR process did introduce further delay, the same points arise. This was not a case where (for example) ADR had been initiated, but then nothing happened. HMRC and the Appellant were each taking steps - albeit that those were sometimes were responsive and time-consuming - to keep the ADR process alive so as to seek settlement. We accept Mr Old's evidence that, after the ADR meeting on 29 April 2013, there were other steps being taken, including his need to obtain the view of others in HMRC and to engage with the AAB. Mr Olds did not himself have the authority to settle the dispute without approval.

128. It is plainly impossible for the Tribunal, within the permissible scope of these appeals, even to attempt to isolate or identify any point in the ADR process to say that, at that point, the discovery had lost its quality of newness, and had become stale. That would entail us having to adjudicate on the minutiae of the ADR process itself, which we cannot (and should not) do. Nor can we adjudicate on HMRC's Litigation and Settlement Strategy ('LSS') and whether it was reasonably engaged in an individual case, or whether the outcomes flowing from the application of the LSS were reasonable ones.

129. In this case, the ADR in relation to Mr Good came to an end in July 2014. There then follows a gap until December 2014, when Mr Old wrote his commentary for the discovery team. He did not want to assess until he had their response, which came on 27 January 2015. At the very most, and taking matters most favourably to the Appellant, therefore, there is a 5 month period - from July to December 2014, and approximately 6 weeks (from 17 January 2015 to 19 March 2015). In our view, these periods, even in aggregate, and taking account of the circumstances (including the need to take stock after the ADR had ended unsuccessfully) cannot be described as unreasonable or so as to deprive Officer Old from the ability to make an assessment.

130. For the reasons given above, we consider that Officer Old made a discovery in April 2013, and was entitled issue the discovery assessment in the amount which in his opinion was to be charged in order to make good the loss of tax to the Crown.

131. He could not reasonably have been expected, on the basis of the information made available to him before the end of the enquiry window, of the situation mentioned in

TMA s 29(1). Nor could the true position reasonably have been expected to be inferred by an officer of the Board from the information before HMRC at the time.

Mr Good's 2011/12 discovery assessment

132. The 2011/12 return was filed (timeously) on 7 January 2013, and the enquiry window closed on 7 January 2014.

133. The discovery assessment was issued on 14 March 2016. The 2011/12 assessment was not issued by Mr Olds, but by Ms Omole, who was the Technical Lead with responsibility for the Scion scheme from around June 2015 but who had been involved from late 2014. The issue of the 2011/12 assessment had been foreshadowed by a letter sent by Officer Omole on 10 February 2016. The delay from 10 February 2016 to 14 March 2016 is inconsequential for the purposes of this analysis. Overall, there is a period of about nine months from Ms Omole's involvement to the the issue of discovery assessment.

134. Mr Good argues that he is not aware of any information, available as at 10 February 2016, which had not been available on 7 January 2014, when the enquiry window closed.

135. Mr Good seeks to rely, in relation to the 2011/12 discovery assessment, on the discovery by Officer Olds, made in the ADR process, at the end of April 2013. We disagree with his argument. That was a discovery by Officer Olds in relation to 2010/11. It was not a discovery by Officer Omole in relation to 2011/12. Officer Old's discovery for 2010/11 had not set the clock running in relation to any other year of assessment.

136. In our view, it is significant that Officer Old and Officer Omole met on 16 October 2015 to consider whether the basis upon which the discovery assessment had been issued for 2010/11 could be applied to later relevant years where no enquiries had been opened. That meeting only makes sense if, up till then, HMRC institutionally, and Officer Old and Officer Omole personally, had not, as at 16 October 2015, made any decision, nor even turned their minds to making an assessment for 2011/12. We accept Mr Old's evidence that, when he made his assessment for 2010/11, he had not considered Mr Good's returns for 2011/12 or 2012/13, nor Mr Ryan's for 2012/13. We also accept Mr Old's evidence that, by that time, he was no longer the decision maker in relation to whether discovery assessments should be issued or not. His role by that point was a project manager, keeping a 'watching brief' on what was taking place. We accept his evidence that the thrust of that meeting was not to discuss individual taxpayers, but rather to deal with issues as to the process of handling individual computations, and how HMRC's resources would be best distributed.

137. We also accept Officer Old's evidence that in August 2015, HMRC sent a letter to interested parties, trying to put a time limit on settlement, and that time limit was 11 February 2016. Mr Good indicated that he wanted to take advantage of the settlement opportunity in December 2015. Mr Ryan's indication came later, not long before the deadline.

138. There is an obvious correlation between that 'grace period' in which HMRC was still extending the prospect of settlement, the date of its expiry, and Officer Omole's action in issuing the discovery assessment.

139. There is a dispute as to whether the 2011/12 return had with it, when filed, a Profit and Loss statement as an attachment. We find that no such attachment was filed.

140. Although it is common ground that a discovery assessment can be made where a new officer takes a different view from a previous officer, the Appellant argues that Miss Omole did not make any new discovery, in the sense that she did not take any different view from Mr Old, but simply adopted his view of the files when she took them over.

141. We have already discussed above our findings as to the documents and information which were available to Mr Old before he made the discovery assessment for 2010/11. Insofar as the same materials were before her, the same findings are repeated in relation to Ms Omole. She was in no different, or better, position than Mr Old was or had been earlier.

142. Officer Omole was cross-examined by Mr Baldry QC as to the identical or near-identical wording of Officer Old's explanation for the making of his discovery assessment, and the wording in Officer Omole's letter of 10 February 2016. We accept Officer Omole's evidence that she did not 'cut and paste' Officer Old's assessment into hers, on the footing that HMRC's system would not allow such an action. But it nonetheless makes sense, and does not undermine Officer Omole's credibility as to what she did in February 2016, for her to have adopted wording used by her predecessor, in relation to the same Scheme, and indeed the same taxpayer.

143. In this regard, we accept her evidence, given in re-examination, that she applied her own mind to looking at the tax returns in respect of which she issued discovery assessments. We accept and so find that she did exercise her own independent thought and arrived at her own independent view (for the avoidance of doubt, and so as to avoid undue repetition below) in relation to each of the discovery assessments which she made.

144. We find that her process of working was to look at and consider all the participants' returns for each year of the Scheme, before moving on to consider the returns for all participants for the following year, and so on. That is to say, she did not - having made a discovery in relation to any individual participant for (say) 2011/12 - then go straight on to pick out that individual's return for the next year so as to see whether the same thing had happened then. As far as it is suggested that is what Officer Omole should have done, we reject the suggestion. As far as it is suggested that her failure to have done so meant that, having made a discovery for (say) 2011/12, she was then in possession of sufficient information to make a discovery for (say) 2012/13, we reject the suggestion.

145. We do not consider that the information on the 2011/12 return (being the SRN in Box 18, '2007/8' as the year of advantage in Box 19, and Box 24 claiming "interest on

bank and other loans") were sufficient to alert either the real (Officer Omole) or the hypothetical officer to the discovery situation.

146. She could not reasonably have been expected, on the basis of the information made available to her before the end of the enquiry window, of the situation mentioned in TMA s 29(1). Nor could the true position reasonably have been expected to be inferred by an officer of the Board from the information before HMRC at the time.

147. In our view, we accept that it did newly appear to Officer Omole, acting honestly and reasonably, in February 2016, that there was an insufficiency in an assessment.

148. For the reasons given above, we consider that Officer Omole made a discovery for 2011/12 in February 2016, and was entitled to issue the discovery assessment in the amount which in her opinion was to be charged in order to make good the loss of tax to the Crown.

Mr Good's 2012/13 discovery assessment

149. The 2012/13 return was filed on 27 November 2013, and the enquiry window closed on 27 November 2014. The discovery assessment was issued on 27 March 2017 by Officer Omole.

150. We have already considered above the information available to HMRC at the end of the enquiry window for this year and whether that sufficed to issue an assessment for this year at that time.

151. We do not consider that the information on the 2012/13 return (being the SRN in Box 18, 2007/8 as the year of advantage in Box 19, and Box 24 claiming "interest on bank and other loans" were sufficient to alert either the real (Officer Omole) or the hypothetical officer to the discovery situation.

152. We do not know the precise date upon which Officer Omole first acquired awareness of the Scheme. It was at some time in November 2014. It was potentially within the enquiry window, but we do not know whether it was. But, even if it was, we nonetheless do not consider that she was in a position, in the enquiry window, to have made a discovery. We accept her evidence that her intense focus on the actual returns of the individual taxpayers began in June 2015, and, even then, she was dealing with the years, for all taxpayers together, sequentially - 2011/12 before moving on to 2012/13 and so on.

153. We do not consider it relevant that Officer Omole had issued a discovery assessment, albeit on very similar facts, for 2011/12 in March 2016. That discovery assessment was for 2011/12. The making of a discovery assessment for 2011/12 did not have a material bearing on the making of a discovery assessment for any other, or later, year.

154. For the reasons given above, we consider that Officer Omole made a discovery for 2012/13 in March 2017, and was entitled to issue the discovery assessment in the

amount which in her opinion was to be charged in order to make good the loss of tax to the Crown.

155. She could not reasonably have been expected, on the basis of the information made available to her before the end of the enquiry window, of the situation mentioned in TMA s 29(1). Nor could the true position reasonably have been expected to be inferred by an officer of the Board from the information before HMRC at the time.

Mr Ryan's 2011/12 discovery assessment

156. We remind ourselves that we are only dealing, in the four corners of Mr Ryan's appeal, with the discovery assessment for 2011/12, and not with any open enquiries for any other years.

157. The 2011/12 return was filed timeously on 31 January 2013, and the enquiry window closed on 31 January 2014.

158. On 28 January 2016, HMRC sent Mr Ryan an assessment for 2011/12, although this was foreshadowed by a letter dated 6 January 2016. The assessing officer was Officer Omole.

159. We must consider what was known at the end of the enquiry window.

160. Mr Ryan points to the inclusion, in his 2011/12 return, of an SRN, a deduction claimed in Box 24 of the self-employment page of the return of £64,080 for 'interest on bank and other loans', and the declared year of advantage on Box 19 of the Additional Information Pages of 2007/8. His returns were completed for him by his accountants, and they used information which was passed to them by Mr Ryan who in turn had received it from Scion.

161. For the purposes of this appeal, we do not need to consider the circumstances in which Mr Ryan's electronic returns for earlier years did not declare 2007/8 as the year of advantage, but instead included what was said to be the self-populated entry, generated by the software, of '1900-01'. Nor do we need to consider the effect (if any) which that would or might have had on the discovery situation. That is because those entries are for years which are not under consideration in this appeal.

162. Mr Ryan also relies on documents, provided by DGB to HMRC under cover of a letter dated 19 February 2009, in support of his argument that these, taken together, "clearly demonstrate that interest was being charged on the Loan, with MAPs being paid direct to the lender in accordance with the Payment Directions in satisfaction of the interest charged."

163. He says that he does not know what information was available to Mrs Omole on 6 January 2016 which had not been available to HMRC on 31 January 2014.

164. We do not agree that the above information was sufficient to make HMRC aware of the true position as at 31 January 2014.

165. The opening of enquiries into other years (2007/08, opened in November 2008; 2009/10, opened in January 2012; 2010/11, opened in December 2012) is not, in our view, relevant. Those are enquiries for other years, and not for this one. In relation to discovery assessments, as the legislation makes clear, the assessment relates to information in relation to that year.

166. Nor do we consider that Officer *Old's* discovery, in relation to Mr Good, for the year 2010/11, at the end of April 2013, can be relied upon as precluding Officer Omole - as a new officer, coming to a conclusion of her own - from making a discovery in relation to Mr Ryan in January 2016.

167. For the reasons given above, we consider that Officer Omole made a discovery for 2011/12 in January 2016, and was entitled issue the discovery assessment in the amount which in her opinion was to be charged in order to make good the loss of tax to the Crown.

168. She could not reasonably have been expected, on the basis of the information made available to her before the end of the enquiry window, of the situation mentioned in TMA s 29(1). Nor could the true position reasonably have been expected to be inferred by an officer of the Board from the information before HMRC at the time.

Substantive issues

Income Tax (Trading and Other Income) Act 2005 section 609

169. The discovery assessments which we have considered above were all lawfully issued discovery assessments.

170. However, we then need to consider whether what was being assessed was indeed assessable.

171. The substantive arguments are:

(1) Do the Scheme arrangements constitute a non-trade business involving the exploitation of film rights? If so, do the MAPs fall to be assessed as income under section 609 of the Income Tax (Trading and Other Income) Act 2005? ('**Substantive Issue 1**')

(2) If the MAPs are found to be assessable on the Appellants as income arising from a source other than within ITTOIA s 609, whether they fall to be assessed under some other statutory provision (such as ITTOIA s 687)? ('**Substantive Issue 2**')

(3) If the Appellants' activity is not a 'non-trade business' within s 609, it nonetheless constitutes investment activity, with the consequence that the loan interest payments are not deductible from the MAPs? ('**Substantive Issue 3**')

172. In relation to Mr Good's appeal against his closure notice, Mr Good no longer advances his appeal on the footing that he is engaged in a trade or that he wishes to challenge HMRC's conclusion that he was not engaged in a trade. It is therefore also no

longer asserted by him that 'sideways' relief will be available for any loss that may be determined to have arisen to him in 2007/8. The scope of Mr Good's appeal against the Closure Notice is therefore one against the amendments in the Closure Notice. The arguments in that regard are considered below.

Substantive Issue 1

Whether the Appellants carried on a non-trade business?

173. ITTOIA Section 609 says:

> **Charge to tax on films and sound recordings businesses**
>
> (1) Income tax is charged on income from a business involving the exploitation of films or sound recordings where the activities carried on do not amount to a trade.
>
> Such a business is referred to in this Chapter as a "non-trade business".
>
> (2) Expressions which are used in this Chapter and in Chapter 9 of Part 2 (trade profits: films and sound recordings) have the same meaning in this Chapter as they do in that Chapter.

174. There are two elements. The first is whether there is a business at all. The second is whether, if there was a business, it was a trade.

175. By the time of the hearing, each Appellant had come expressly to accept (following the decisions of Tribunals and the higher courts in *Eclipse Film Partners Nr 35*; *Degorce*; *Samarkand*; and *Ingenious Games* in the FTT, the UT decision not having then emerged) that the Scion arrangements did not give rise to a trade. Hence, it was common ground between the parties that there was no trade.

176. In relation to the trading issue, it is said that the Appellants' position, leading to their acceptance of the point, is that, viewing the facts realistically, all that they did was to enter a 'package of contracts' (under which, the Appellants argue, it was pre-ordained that the rights acquired by each Appellant from one Scion entity under the Acquisition Agreement would be resold by that Appellant to another Scion entity under the Distribution Agreement) in return for an income stream. The Appellants' say that, on a realistic view of the facts (*Ramsay* [1982] AC 300, as applied inter alia in *Barclays Mercantile Business Finance* [2004] UKHL 51) that there was no trade.

177. However, even if it had not been conceded, we would still have found, on the facts, that neither Appellant was engaged in a trade.

178. 'Business' can be a more difficult concept to describe. 'Business' is a wider and more accommodating concept than 'trade'. Something can be a business, albeit that it is not a trade. It is clear that if something is entirely and no more than social activity or pleasure, then it is not a business. But the dividing line between a non-business and a

business (which itself can be done for social activity and pleasure) can be difficult to identify in practice, albeit we accept that the threshold seems to be a relatively low one. We accept that business is capable of embracing almost anything which is an occupation of a duty which requires attention: see *Rolls v Miller* (1884) 27 Ch D 71 at 88 per Lindley LJ (whose views, as the author of the leading practitioners' work on partnerships, and the Partnership Act 1890 are deserving of particular respect), which was cited with approval by Lord Diplock in *Town Investments v Department of the Environment* [1978] AC 359 at 383.

179. In the sphere of films, Sales J in the Upper Tribunal in *Eclipse Film Partners (Nr 35) LLP v HMRC* [2013] UKUT 639, considered section 609 (at Paras [86] et seq) and (at Para [98]) concluded that there is no ambiguity in the wording of section 609, which "plainly contemplates that two types of case may exist and be subject to tax under the code set out in the ITTOIA, namely businesses involving the exploitation of films where the activities do amount to a trade and businesses involving the exploitation of films where the activities do not amount to a trade" (i.e., a 'non-trade business').

180. In relation to Mr Good, we consider that he was carrying out a business, which business was a non-trade business (section 609(1)). His activity as detailed above was enough to qualify as a non-trade business. He did do research (albeit, in our view, somewhat limited and perfunctory) as to which film(s) to select, and the territories in which to acquire rights. He had applied some thought about which film rights to acquire, and the territories in which to acquire them. There was an identifiable structure and system to what he did. It was neither haphazard nor unconsidered.

181. In relation to Mr Ryan, we consider that he, albeit only on balance, was carrying out a business, which business was also a non-trade business. He had spent time studying the business and financial documents, albeit (as he accepted, having heard Mr Good give evidence) less than Mr Good and in a way which was less well-evidenced. As DGB accepted in their letter dated 19 February 2009 (at page 2398 of the bundle) Mr Ryan had not maintained any written evidence of the time which he had spent.

182. But we accept his evidence that he was given lists of films, the actors, their 'box-office draw', and the territories that might be available. He tried to pick films that he thought had people in who he recognised. He was 'totting up' the price of the film rights in various territories so as to reach his desired figure. Again, there was an identifiable structure and system to what he did. It was neither haphazard nor unconsidered.

183. We disagree with Mr Baldry QC's submission that either of these Appellants had 'about as much input as buying a self-select ISA' (with the inference that buying a self-select ISA could not be a non-trade business). That is something upon which we cannot express any view. This is because, on the evidence and materials before us, we simply cannot assess whether doing so would be a genuinely or meaningfully comparable activity. We just do not know how much input is required in buying a self-select ISA, but it may vary from individual to individual. Moreover, neither of these Appellants was choosing one film, and one territory, but a number of films across a number of territories.

Whether the MAPs are "the income" of that non-trade business?

184. Section 611 says:

> **"Person liable**
>
> The person liable for any tax charged under this Chapter is the person receiving or entitled to the income."

185. The next substantive question is whether the MAPs payments are "the income" from that business. This is the issue which really lies at the heart of this dispute. If the MAPs payments are not income, then all questions of income tax (being, in the well-known words of Lord Blackburn, 'a tax on income') fall away.

186. Here, the Appellants essentially recapitulate their argument in relation to the trading issue. They say that, if the MAPs are the product of the so-called 'package' of contracts, then the significance of those contractual arrangements as a whole and for all fiscal purposes (and not just in relation to the issue of trading) should not be ignored. Hence, and in consequence, it is contended that, if all the Appellants did was enter a 'package of contracts' with 'pre-ordained' outcomes (the main one - it is said - being that the rights acquired by each Appellant from one Scion entity under the Acquisition Agreement would be resold by that Appellant to another Scion entity under the Distribution Agreement) then the MAPs cannot be treated as income: moreover, not only on a realistic view of the facts, but 'on any proper view of the facts'.

187. The Appellants argue that their case is precisely in line with the approach set out by the Privy Council in *Carreras Group Ltd v Stamp Commissioner* [2004] UKPC 16, namely that the Appellants do not seek to deny the existence or legality of the MAPs, but maintain that:

> "their fiscal significance must be determined in the light of the fact (which is common ground) they were part of a composite package under which they were payable to Scion Lender. The Appellant's case is that at no stage did they obtain any control over or right to receive the MAPs so that, viewed realistically, the commercial effect of the composite arrangements was that the MAPs paid by Scion Distributor direct to Scion Lender were not income of the Appellant, on a true construction of the statutory provisions."

188. That submission adopts the language of Lord Hoffmann in Carreras Group at Para [8] where he said that "the Courts have tended to assume that revenue statutes in particular are concerned with the characterisation of the entirety of transactions which have a commercial unity rather than the individual steps into which such transactions may be divided."

189. However, the position is more nuanced. As Lord Hoffmann went on to caution at Paragraph [16] of *Carreras:* "it is inherent in the process of construction that one will have to decide as a question of fact whether a given act was or was not part of the transaction contemplated by the statute. In practice, any uncertainty is likely to be

confined to transactions into which steps have been inserted without any commercial purpose. Such uncertainty is something which the architects of such schemes have to accept'.

190. That position was developed later that same year by the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, in which a composition of the Appellate Committee (two of whom, Lords Nicholls of Birkenhead and Hoffmann, had sat in *Carreras*). Lord Nicholls said (at Para [36]):

> "Cases such as these" (referring to *IRC v Burmah Oil* [1982] STC 30; *Furniss (Inspector of Taxes) v Dawson* [1984] STC 153; and *Carreras*) "gave rise to a view that, in the application of *any* taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded. But that is going too far. It elides the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so." (emphasis added by us).

191. The Appellants sought to develop their argument following the release on 26 July 2019 of the Upper Tribunal's decision in *Ingenious Games and others v HMRC* [2019] UKUT 0226 (TCC) (Falk J and Judge Herrington), by making particular reference to Paragraphs 619 to 634 of that decision. The Tribunal, without a hearing, gave permission for written submissions. At the end of September 2019, both parties filed lengthy substantive submissions.

192. Those paragraphs of *Ingenious Games* constitute a section dealing with the FTT's treatment of the 'Borrower's Distributable Receipts' ('BDR') and the FTT's general approach to the relevant contractual provisions (which are contained in, and spread across, a number of inter-locking documents). The Upper Tribunal endorsed the FTT's views (at Paragraphs 154 and 157 of its decision) of the proper reading of the contractual provisions (namely "that the documents must be read as coming into force together and must be read together") and agreed with the FTT's conclusion, on the facts, that the LLPs in Ingenious were never entitled to receive BDR.

193. The core of the Appellants' argument is that they cannot recover any right to MAPs payable under the Distribution Agreement, until the indebtedness under the Loan Agreement has been discharged in full: see Clause 1a of the Assignment, Notice of Assignment and Payment Direction; and Clause 1a of the Payment Directions. The Appellants argue that 'an integral feature' of the Scheme arrangements was that Loan funds were to be paid directly from Scion Lender to another Scion Entity pursuant to a Notice of Drawdown, "so that at no stage did the Loan funds fall outside the possession or control of the companies within the Scion group."

194. The Respondents' argument is that *Ingenious* is of little assistance here. The arrangements there were not the same as here, and in particular the position of the LLPs (which each had a corporate member and individual members) was different from that of the Appellants here. HMRC also invites us to analyse the arrangements "applying

established contractual principles" rather than by immediately resorting to a *Ramsay* analysis.

195. We agree with HMRC:

(1) The analysis in *Ingenious* is in the context of statutory provisions which are different from those in this appeal;

(2) One of the principal questions in *Ingenious* - which informed much of the discussion and analysis in the case- concerns whether the LLPs were carrying on a trade and doing so with a view to profit. That latter does not arise in this case;

(3) The Appellants themselves accept that there are 'structural differences' (sic) between the position of the LLPs in *Ingenious Games*, and the position of the Appellants;

(4) Notwithstanding the points of similarity which are outlined in the Appellants' further written submissions, it nonetheless seems to us that the position of the Appellants in these appeals is materially distinguishable from that of the Appellants in *Ingenious Games*;

(5) 'Interdependency' of agreements is not the touchstone;

(6) The substitutional exercise undertaken by the Appellants in this case, using Paragraphs 154 and 157 of the FTT's decision in *Ingenious Games*, whilst inventive, does not in fact hold true, because the Appellants in these appeals were not in our view "entitled, together with any other entitlement under the ~~CDA~~ (Distribution Agreement) to retain that portion of the receipts equal to ~~BDR (BR)~~ (Minimum Annual Payments) and the ~~LLP~~ (Appellant) entitled to receive the balance, and that there was never a time when the ~~LLP~~ (Appellant) was entitled to receive more."

196. Section 611 is a very short and tightly worded section. No suggestion was made that it was vague or ambiguous. Consistently with that, none of the Parliamentary debates or travaux preparatoires were placed before us (in contrast to the position in relation to section 609 before Sales J in Eclipse). Section 611 refers to the person 'receiving' or 'entitled to' the income. It does not refer to a person 'entitled to receive' the income. In our view, being entitled to the income, and being entitled to receive the income are not the same thing. We read 'receipt' in this sense as meaning 'to take into one's hands or one's possession something offered or given by another), or to take delivery of (something) from another'.

197. In our view, it is possible to have an entitlement to income without that entitlement to income including the entitlement to receive the income. A person engaged in a non-trade business may be 'entitled to' the income without being entitled to receive the income. We therefore accept HMRC's argument that, as a matter of statutory reading, being 'entitled to' the income is a wider concept than being 'entitled to receive'.

198. The issue then becomes what does 'entitled to income' mean. We agree that 'entitled to' income has a relationship with beneficial ownership. We do not consider

that the remarks of Roskill LJ in *Ramson (HM Inspector of Taxes) and others v Gill* (1973) 50 TC 1 at 50D-F, dealing with section 148 of the Income Tax Act 1952, mean that "entitled" must mean, or can only mean, "*legally* entitled" (as opposed to *beneficially* entitled). We consider that the remarks in *Ramson v Gill* were made in the context of a different statutory provision (albeit one containing the expression "received or entitled to") and a different scheme.

199. We agree with HMRC's position that *beneficial* ownership of something (even if falling short of legal ownership) is capable of bringing it within the proper scope of section 611, read purposively.

200. We agree with HMRC that the totality of the arrangements under consideration these appeals, regarded in the light of the guidance in *Carreras* and *Barclays Mercantile*, did mean that the Appellants had an entitlement to MAPs. That entitlement was not a redundant part of the Scheme, or without commercial purpose.

201. In our view, that entitlement was beneficial ownership of the MAPs. That nature or quality of the Appellants' interest in the MAPs was embodied in the fact that the MAPs were used to discharge the Appellants' loan interest obligations.

202. The Appellants' rights in the MAPs constituted an entitlement within the proper meaning and effect of section 611. Their beneficial rights in the MAPs amounted to more than 'a mere legal shell': see *Wood Preservation Ltd v Prior (Inspector of Taxes)* (1968) 45 TC 112 ('the right at least to some extent to deal with the property as your own': per Harman LJ at 133); as discussed and approved in *BUPA Insurance Ltd* [2014] UKUT 262 (TCC) (Asplin J and Judge Ghosh QC) at Para [55] et seq. We have particular regard to Paragraphs [59] and [60] of that discussion where the Upper Tribunal said:

> "...at a slightly lower level of abstraction, critically, any incidents of ownership which amount to more than a 'mere legal shell' amount, in the context of the group/consortium relief provisions, to 'beneficial ownership. In particular, a right to dispose of an asset and enjoy its fruits confers 'beneficial ownership' of that asset, whereas a complete absence of both rights 'bereft of the rights of selling or disposing or enjoying the fruits ...' deprives an owner of 'beneficial ownership...
>
> But so long as an owner has 'the right at least to some extent to deal with the property at [its] own, the owner has 'beneficial ownership' of that asset... Put another way, the legal owner must be bereft of 'all rights which would normally attach to [the asset] to be deprived of beneficial ownership of that asset..."

203. Although those remarks are made in the context of group/consortium relief provisions and section 403 of the *Income and Corporation Taxes Act 1988,* we do not see any good reason why the Upper Tribunal's careful iteration of the concept of beneficial ownership, and the underlying conditions in which it is capable of existing for the purposes of tax legislation, should not apply in this case.

204. We accept HMRC's argument that a person is "entitled to income" within the meaning of section 611 if that income, even if not received by them, can nonetheless be directed or has been directed by that person to be applied for that person's benefit.

205. Hence, if there was an entitlement to income in the above sense (albeit that entitlement fell short of, or did not include, an entitlement *to receive* the income) then section 611 would be satisfied.

206. The MAPs were of direct financial benefit to the Appellants. It does not matter for these purposes that the MAPs were being used to discharge the loan interest rather than going into the Appellants' pockets. The Appellants were liable to pay the loan interest. They could have been called upon to do so, from other resources, if the MAPs had not been paid, or if the MAPs had fallen short of the loan interest.

207. Carrying that across to the scheme under consideration in these appeals, the Appellants were liable for the loan interest (a burden). They directed that the MAPs should be applied towards repayment of the loan interest. Payment of the loan interest was something of benefit to the Appellants. Conversely, it was also obviation of a corresponding disbenefit (i.e., not having to meet the loan interest from other money).

208. This is consistent with Schedule 2 of the Business Plan which showed (using arrows) 'Universal Studio Rights Flow of Funds' which provided that the sole trader was paying interest and repayment of the Loan Principal to the Scion Lender; with the Sole Trader receiving MAPs from the Scion Distributor

209. The Appellants could equally have paid the loan interest using other moneys. There was no restriction by the lender that the loan interest had to be met from the MAPs (so that, for example, if the Appellants had tendered money from another source towards the loan interest, that money would have been refused).

210. Each Appellant had the use and benefit of the MAPs. The use and benefit was meeting the interest on the loans to which each Appellants was otherwise subject.

211. This is consistent with the reasoning and discussion of the Court of Appeal in *Commissioners of Inland Revenue v Paterson* (1924) 9 TC 163. There, a taxpayer borrowed money in order to buy shares from her husband. She borrowed the money on security of her life policy together with the two blocks of her husband's shares which she had bought. The creditor was to receive the dividends to pay the interest on the loan, and then to defray the policy premium on the life policy before paying off the capital of the debt. Any excess would be returned to her. The Court was called upon to consider whether the full amount of the dividends was the taxpayer's income. It was held that it was. Scrutton LJ remarked (at page 182):

> "It seems to me that in any ordinary sense it was the income of the debtor, the lady, which discharged the debts and which she was obliged to allow to be used to discharge the debts by the charge that she had given on that income to the creditor..
>
> [...]

> If it is not the debtor's income, it must be the creditor's income, and I am not sufficiently topsy-turvy to think of a creditor discharging debts due to him out of his own income."

212. This is also consistent with the decision of the Court of Appeal (Stamp LJ, with whom Orr and Eveleigh LJJ agreed) in *Dunmore v McGowan* (Inspector of Taxes) [1978] STC 217 (affirming Brightman J [1976] STC 433) holding that interest credited to a deposit account to which the taxpayer had no access (that account being in the name of his bank, and being held by the bank in effect as security or collateral for a loan which it had made to a third party company with which the taxpayer was concerned) was assessable against the taxpayer (under Schedule D Case III). Stamp LJ agreed with Brightman J's remark:

> "Admittedly the money was locked up in the deposit account while the guarantee subsisted, but it was locked up in such a way that it enured to the taxpayer's benefit at once, either as money coming to his hands or as reducing his liabilities" (emphasis added by us).

213. The MAPs here are functionally equivalent to the interest there. The interest in Dunmore enured for the benefit of the taxpayer. The MAPs here enured for the benefit of the Appellants.

214. Hence, if, at X's request or direction, X's debtor (say, D) is directly paying X's creditor (say, C), without the money actually passing through X's hands, that nonetheless means that the money passing from D to C is being used for X's benefit. The fact that X does not get the cash in their hand does not matter.

215. The MAPs were being dealt with in the way they were (i.e., being directed towards the repayments of the Appellant's loan interest) because the Appellants' had so directed. The Appellants had acquired a beneficial interest in the MAPs which they chose to deploy in a particular way. The substantive analysis is not materially affected by the argument that the Scheme was put to the Appellants as 'all or nothing'. Each appellant knew that the loan was part of the package, and each appellant knew that he had to sign up for the loan in order to get the benefit of the losses.

216. It is a fair point against the Appellants that the Appellants themselves included what they believed to be MAPs figures (irrespective of the basis upon which those had actually been calculated or arrived at, whether MAPs actually paid or a revaluation of the residuary rights) in their tax returns as 'turnover'. We cannot ignore, and should take, at face value, the returns as representing the Appellants' then-belief in the nature of the MAPs.

217. The Appellants rely on the notion of 'control', and say that the Appellants never, at any point, either obtained or had any *control* over the MAPs, but that lay with the lender, who could resist any action to prevent it retaining the MAPs. We reject this argument. It is not entirely clear what precise notion of 'control' (whether in terms of rights simpliciter, or temporally) is being relied upon. But, on any view, the Appellants

controlled the MAPs at the point of entering into the Scheme so as to enable the Appellants to give instructions as to the direction of the MAPs in Years Two and onwards. At that point in time, they were each possessed of a right in relation to the MAPs which they were capable of exercising, and did in fact exercise.

218. We reject the argument that the true effect of the package 'resulted in no real economic activity' by the Appellants. This expression is carefully qualified. There was economic activity (not least, the taking out of the loans, but also the acquisition of rights and the disposal of rights) and that economic activity was real. It was not a sham. The Appellants intended to take out loans; and took out loans. They intended to acquire rights; and rights were acquired. They intended to dispose of rights; and rights were disposed of.

219. We also reject the argument that the loan funding and the MAPs are 'inextricable' and are 'an effectively self-cancelling arrangement'. This argument faces a number of difficulties:

(1) The Appellants have failed to discharge the evidential burden of establishing that this was, as a matter of fact, what actually happened. We have already referred above to the absence of information as to the MAPs and loan interest;

(2) This is not the Appellants' own evidence. For example, the written evidence of Mr Ryan (referring to the so-called 'Business Plan' which he had obtained from Scion) was that his understanding was that the MAPs 'should be sufficient to meet *substantially* all of the interest due during the term of the loan' (emphasis added by us). 'Substantially' is not the same as 'entirely'. A 'self-cancelling arrangement' is not a 'substantially self-cancelling arrangement';

(3) The Business Plan (in the section 'Tax benefits and financial returns') says:

"Upon sale of the relevant Film Rights, Scion Distribution Company will have an obligation to pay the Minimum Annual Payments. The Sole Trader will be required to direct the Minimum Annual Payments, paid by Scion Distribution Company, directly to the Lender. These Minimum Annual Payments will not be sufficient to extinguish completely the liabilities of the Sole Trader to the Lender, but should be sufficient to meet substantially all of the interest due during the term of the Loan. The balance of interest payable (if any) during the term of the Loan will be payable by the Sole Trader;"

(4) Part 4 of the Business Plan ('Questions and Answers') says (at Answer 1):

"The MAPs due should be sufficient to meet substantially all of the interest due under the Loan, with the balance, if any, being paid by the Sole Trader. Ultimately the Sole Trader will be personally liable for the interest due on the Loan until the repayment date under the Loan Agreement and may be required to make payments in the event that the MAPs are not received or are insufficient;"

(5) Number 17 of the Risk Factors says:

"Each Sole Trader is personally liable in respect of interest on the Loan until the repayment date under the Loan Agreement and may be required to make payments in respect of it"

220. The 'substantially', present throughout, is significant. It undermines the alleged 'self-cancelling' nature of the transactions, in the sense that the Business Plan itself contemplates that there may be a shortfall between the MAPs and the loan interest, but is silent as to what would or was supposed to happen then.

221. The Appellants' Loan Agreements each state:

(1) (in the small print at the top) that the borrower is "fully responsible for payments of interest under the Loan until the Repayment Date;"

(2) Clause 4.5 states that:

"For the avoidance of doubt, you acknowledge that you remain fully liable for interest accruing on the Loan until the Repayment Date..."

222. That plain unvarnished provision speaks for itself. The Appellants were each fully liable for interest accruing on their respective Loan. Put colloquially, the Appellants cannot have it both ways: they cannot seek to rely intensely on the strict wording of the contractual terms when it advances their position, but seek to qualify or disregard the strict wording when it does not. The approach has to be consistent. That situation cannot be ameliorated by reference to the alleged 'commercial reality of the position as to the Appellants' purported entitlements in relation to the MAPs'.

223. The commercial reality of the position, looked at objectively, was that there was a loan, carrying interest. The lender/creditor could ultimately, on the terms of the loan agreement simpliciter, look to each Appellant, as its borrower/debtor, for payment of the interest.

224. Although considerable emphasis is placed by Mr Baldry QC on the notion of intention, it would have to be shown that such intention was mutual or shared, as between the lender and borrower, and it has not been shown here. The surest guide to the lender's intentions is the loan agreement. There was no evidence from the lender that it did not intend to rely on its rights as to interest against the Appellants as borrowers in the event of a shortfall, and that this had been communicated to the Appellants. But, and even had there been such evidence, the proper meaning and effect of documents of this kind cannot ordinarily be qualified by oral (parol) evidence to the effect that the lender/creditor would not, in the event of shortfall, look to the borrower/debtor for its interest, or would write the interest off.

225. We reject the argument that the full recourse liability for interest up to the Repayment Date was 'theoretical'. The loan agreements were not articulating theoretical obligations, and the Appellants' liability was not theoretical. It was an actual or real liability.

226. Reliance is placed by the Appellants on the fact that the MAPs for 2013/14 and 2014/15 were not paid, but nonetheless no call has been made by the lender on either Appellant to meet the loan repayments. This is not conclusive, but nor does it shed any real light on the lender's intentions. The absence of enforcement of an obligation does not inevitably connote the non-existence of the obligation. The absence of enforcement may have been for any one of a number of reasons. In the absence of evidence from Scion, we cannot speculate.

227. The only written evidentially admissible material is qualified. Scion Media Ltd in its letter to Mr Good dated 6 August 2014 said (in relation to the period ending 5 April 2014) "The non-payment of interest, which first fell due on 5 April 2014 is an event of default under the loan agreement. However, we understand that whilst the lender continues to reserve all of its rights and remedies in relation to the loan, we also understand that it does not intend to pursue the recovery of any unpaid interest at this time." That does not come from the lender itself, is vague, does not contain any contractually enforceable waiver, and self-evidently does not exclude the possibility of the lender intending to pursue recovery at some later time.

228. In relation to the period ending 5 April 2015, the letter from Scion Media Ltd says that the loan interest due on 5 April 2015 'on your loan, taken out to fund part of the capital you contributed to your trade, was ... not paid in full. The full amount of the interest payable in the period to 5 April 2015 has been included at the rate applicable under the loan agreement and the balance which remains outstanding is shown as a creditor'. The designation of this sum as a creditor indicates the possibility of the loan still being called upon.

229. Nor was default on the loan interest a commercially irrelevant contingency. It was something which was expressly contemplated by the terms of the Business Plan (which, even if not a contractual document, nonetheless forms part of the admissible factual matrix against which the contractual documents fall to be construed).

230. Accordingly, we conclude that the MAPs were income from the non-trade business, and that Mr Good and Mr Ryan can each properly be described as the person receiving or entitled to the income within the proper meaning and effect of section 611.

Whether the loan interest payments made by the Appellants are deductible expenses of the Appellant's non-trade business?

231. This entails consideration of the notion of 'wholly and exclusively' in the context of considering whether the interest expenses were incurred wholly and exclusively to generate the income.

232. We agree with HMRC that the relevant question is whether the expenditure has been incurred wholly and exclusively for the purpose of generating the section 609 income.

233. We have regard to the remarks and guidance of the Upper Tribunal in *HMRC v Investec Asset Finance* [2018] UKUT 69 at Para 48 (itself relying on a passage from the judgment of Millett LJ in *Vodafone Cellular Ltd v Shaw* [1997] STC 734 as

explained by the Upper Tribunal in *Scotts Atlantic Management Ltd v HMRC* [2015] UKUT 66 (TC) (Warren J and Judge Charles Hellier) at [47]-[53]:

> (1) The words "for the purposes of the trade"' mean "to serve the purposes of the trade". They do not mean "for the purposes of the taxpayer" but for "the purposes of the trade", which is a different concept. A fortiori they do not mean "for the benefit of the taxpayer";
>
> (2) Except in obvious cases which speak for themselves, ascertaining the taxpayer's object in making a payment involves an inquiry into the taxpayer's subjective intentions at the time of the payment;
>
> (3) The object of the taxpayer in making the payment must be distinguished from the effect of the payment. A payment may be made exclusively for the purposes of the trade even though it also secures a private benefit. This will be the case if the securing of the private benefit was not the object of the payment but merely a consequential and incidental effect of the payment;
>
> (4) Although the taxpayer's subjective intentions are determinative, these are not limited to the conscious motives which were in his mind at the time of the payment. Some consequences are so inevitably and inextricably involved in the payment that, unless merely incidental, they must be taken to be a purpose for which the payment was made.

234. The Tribunal must take "a robust approach to ascertaining the purposes of the taxpayer": see *Scotts Atlantic* at [53].

235. Applying the above guidance, it is entirely clear from the written and oral evidence of each Appellant, together with consideration of the Scheme documents, that one purpose for incurring the expenditure on the loan interest was to implement the Scheme, with the intent of thereby generating a large loss in Year One, and of securing tax relief in respect of such loss. Each of Mr Good and Mr Ryan had the purpose of using the borrowing so as to put that borrowing (in Ms Nathan's words) "into the merry-go-round of the Scheme in order to realise a loss." We agree with her that the one certainty inherent in this Scheme (and the magnetic feature which had initially attracted HMRC's interest), given that no MAPs were payable in Year One, was the generation of a loss in Year One.

236. By way of a cross-check, in the real world, neither Appellant sought to contend that, if the MAPs had not off-set the interest payable on the loan, that either of them would have entered the Scheme at all, let alone would have entered it to the extent that they did.

237. There were therefore two material, identifiable, purposes:

> (1) To achieve the Year One loss;
>
> (2) Mr Good confirmed in his oral evidence that he intended to generate a repayment in order to fund his ongoing business activity;
>
> (3) Mr Ryan confirmed in his oral evidence that he wanted to make money ('if the films made money') 'and secondly the backstop to losing, if the films didn't

make anything, I had £210,000 in and the hedge against that was being able to take some tax against it'; 'if you did make money that was great; if you didn't make money you had tax cover.'

238. In other words, there was a duality of purpose. There is no need to consider which purpose was dominant, and which was subordinate.

239. We reject the Appellants' argument that HMRC's analysis impermissibly confuses the *object* of a payment (in this case, said to be the production of an income stream) with its *effect* (in this case, said to be the production of a tax loss). Object and effect are not mutually exclusive concepts. In our view, one can still aim to produce, as an object, a tax loss. The attainment of that desired outcome, as an effect, does not mean that the antecedent object disappears.

240. The existence of this duality means that the loan interest cannot have been incurred 'wholly and exclusively' for the purposes of generating the income of the non-trade business which we have already found was being carried on by each Appellant.

241. Therefore, the loan payments were not wholly and exclusively incurred for the purpose of generating the income. They fall outside and cannot be deducted by virtue of ITTOIP section 612(2) ('Calculation of income').

242. We agree with HMRC that the borrowing (and the liability to pay interest in respect of the borrowing) was not undertaken wholly and exclusively for the purpose of generating the section 609 income (i.e., the MAPs). The generation of the MAPs cannot reasonably have been regarded as the purpose of the borrowing because the MAPs, net of the borrowing, were producing next-to-no income. The MAPs were, at best, leaving each Appellant "treading water". We also agree that the capital contribution and the loan cannot be treated separately. Either all were incurred wholly and exclusively for the purpose of generating the income, or none were.

243. Nor, in our view, is the position altered by section 612(3), which provides that, if an expense is incurred for more than one purpose, a deduction may be made for any identifiable part or identifiable proportion of the expense which is incurred wholly and exclusively for the purpose of generating the income. That is because here, it is not possible to identify any part or proportion of the expense which is incurred wholly and exclusively for the purpose of generating the income.

Other deductions sought by Mr Good

244. In relation to Mr Good's appeal against the amendments made by the Closure Notice for 2007/8, HMRC has disallowed the deduction of Year One expenses claimed such as accountancy fees, legal fees, and bank and credit card fees on the footing that those were not incurred wholly and exclusively for the purposes of generating the income.

245. We agree with HMRC. In our view, those expenses (which were all incurred in Year One) are part and parcel, and not independent, of the same. These would not have been incurred but for his entry into the Scheme. These fees and other expenses are in

essence parasitic, and subject to the same analysis. The duality of purpose which renders the loan payments not deductible also catches these payments, which therefore themselves should not be treated as deductible.

Is there a loss to bring forward and set-off?

246. At a fairly late stage (namely, as late as Mr Baldry's Skeleton Argument dated 8 October 2018) it became clear to HMRC that the Appellants were pursuing the argument that, if this point were to be reached in the analysis, then nonetheless there was a 'non-trade' miscellaneous loss which could be brought forward and set off against the income assessed under sections 152 and 153 of the *Income Tax Act 2007*. The effect of bringing forward such miscellaneous loss was said by Mr Baldry to mean that the chargeable profit would be reduced to nil.

247. HMRC objected to this argument on the basis that these appeals had been carefully case-managed, including the requirement (by way of joint application, and endorsed by the Tribunal) that the parties produce an Agreed Statement of Issues for determination. The issue of a loss claim is not in that Agreed Statement, and there was no application to amend either the Agreed Statement, or the Appellants' Statement of Case.

248. HMRC nonetheless accepted - pragmatically - that the Tribunal has wide case-management powers, so long as these are deployed to further the overriding objective. Our attention was drawn to the remarks of the Court of Appeal in *BPP Holdings v HMRC*.

249. In response, Mr Baldry QC contended that the argument had been raised by the Appellants in their respective Grounds of Appeal (Mr Good in his Grounds against the 2012/13 assessment sent to HMRC in April 2017; and Mr Ryan in his Grounds against the 2011/12 assessment sent to HMRC in February 2016). It was accepted that Mr Good had not formally amended his grounds for the other years to include the argument, but it was said that he was plainly indicating that he relied on the point and had not abandoned it.

250. We heard submissions on the substantive point *de bene esse* - that is, without deciding, at that time, whether to allow the Appellants to advance the new argument. It did not add materially to the length or complexity of the evidence; nor of the submissions. It was not quite an ambush. It was point which - although articulated at a very late stage, and hence at short notice - HMRC and Ms Nathan were able to address. We cannot disregard that this was a case in which both parties were represented by highly-experienced Counsel - Mr Baldry QC and Ms Nathan (who shortly thereafter was appointed QC). As such, there was equality of arms.

251. The point is one of law, and deals with the applicability of a single section of a single statute. It flows logically and foreseeably from the conclusion that the Appellants were in receipt of taxable income.

252. Taking all the above into account, we have decided to permit the point to be raised and determined in the scope of these appeals.

253. However, and having done so, in our view, the Appellants' point nonetheless falls to be dismissed.

254. The simple reason is that Section 155 of the *Income Tax Act 2007* provides that a claim for loss relief against miscellaneous income made on or after 1 April 2010 must be made by no later than four years after the end of the tax year in which the loss arise.

255. We agree with HMRC that, in order to claim loss relief under section 155, a claim must be made.

256. In the case of each Appellant, Year One, in which the loss occurred, was 2007/8. As a simple matter of timing, the Appellants in these appeals fall foul of section 155 and are out of time to make any claim for relief.

Substantive Issues 2 and 3

257. On the basis of the above discussion and findings, neither Substantive Issue 2 nor 3 arise.

258. Nonetheless, and lest our conclusions expressed above should fall to be reconsidered, and in deference to the submissions and argument which we heard, we turn (albeit more briefly than our discussion of Substantive Issue 1) to consider and express our views on them.

259. Section 687(1) says:

> **Charge to tax on income not otherwise charged**
>
> (1) Income tax is charged under this Chapter on income from any source that is not charged to income tax under or as a result of any other provision of this Act or any other Act.
>
> (2) Subsection (1) does not apply to annual payments.
>
> (3) Subsection (1) does not apply to income that would be charged to income tax under or as a result of another provision but for an exemption.
>
> (4) The definition of "income" in section 878(1) does not apply for the purposes of this section.
>
> (5) For exemptions from the charge under this Chapter, see in particular—
>
> section 768 (commercial occupation of woodlands), and
> section 779 (gains on commodity and financial futures).

260. Sections 609 and 687 are mutually exclusive. If income falls within section 609, then it cannot fall within section 687: section 687(1).

261. HMRC argues that, if the income does not fall to be charged under section 609, then nonetheless it is chargeable under section 687 (but, if so, without any deduction for the loan interest payments, on the same basis as argued in that regard in relation to section 609). In support of this secondary argument, HMRC contends that the income is taxable under section 687 if the following four conditions are met:

(1) If the MAPs payments are income from any source within the meaning and effect of section 687(1);

(2) The MAPs payments are income arising in the year;

(3) The interest expenses are non-deductible (on the basis that they are not wholly and exclusively incurred for the purpose of generating the income); and

(4) The Appellant is the person receiving or entitled to the income.

262. HMRC seeks to derive support for its stance from the decision of the House of Lords in *Jones v Leeming* [1930] AC 415 (being a decision as to the ambit of income taxable under Schedule D Case VI) especially per Viscount Dunedin (at 359) ("...the profits and gains in Case VI must mean profits and gains eiusdem generis with the profits and gains specified in the preceding five Cases") and the discussion in Whiteman on Income Tax (3rd edition, 1988) §12-20.

263. The Appellants' response is that this does not arise because, if the MAPs are not chargeable to income tax under ITTOIA Chapter 3 Part 5 ('Certain Miscellaneous Income'), then the income is not otherwise chargeable "for the fundamental reason that the MAPs do not constitute income in the Appellants' hands".

264. In broad terms, we agree with HMRC's analysis. We disagree with the Appellants' analysis. On the key issue of whether the MAPs constitute income, we refer to our discussion above.

265. If the primary argument in these appeals had concerned the section 687 decision tree, we would have reached the position that the Appellants were each taxable under section 687, with the Appellants, under section 698, being "the person liable for any tax charged ... [being] the person receiving or entitled to the income."

266. If, contrary to our findings, we had found that the Appellants' activities fell short even of a non-trade business, the Appellants' activities would nonetheless have constituted an investment - namely, the borrowing of money in order to fund arrangements, which resulted in a right on their part to receive the MAPs as an income stream, and which would therefore have been taxable.

Conclusions

267. The whole of Mr Good's appeal is dismissed.

268. The whole of Mr Ryan's appeal is dismissed.

269. We conclude by acknowledging the efforts and expressing our thanks to Mr Baldry QC, Ms Nathan QC, as well as to their respective teams, who handled these appeals in a manner which was co-operative, efficient, and responsive to the Tribunal's requests during the hearing for further information and materials.

270. This document contains full findings of fact and reasons for the decisions.

271. Any party (whether Mr Good, or Mr Ryan, or HMRC) dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Dr Christopher McNall

TRIBUNAL JUDGE

RELEASE DATE: 15 JANUARY 2020