[2020] UKFTT 266 (TC)

TC07750

INCOME TAX – loan interest relief disallowed– whether open to HMRC to issue discovery assessments - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/01136

BETWEEN

WILLIAM HAYES

Appellant

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE DAVID BEDENHAM
JOHN ROBINSON

Sitting in public at Taylor House, London on 12 February 2020

The Appellant appeared in person

David Street, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal by Mr Hayes against:

(1) an assessment made under s 29(1) of the Taxes Management Act 1970 ("TMA 1970") for the year ended 5 April 2011 in the sum of £11,581.19; and

(2) an assessment made under s 29(1) TMA 1970 for the year ended 5 April 2012 in the sum of £11,169.69.

2. The assessments were made because HMRC formed the view that loan interest relief that had been claimed by Mr Hayes in each of those years was not allowable.

3. Mr Hayes was a member of Ivancroft LLP. Ivancroft was part of a tax arrangement referred to as Icebreaker. An iteration of the Icebreaker arrangement was considered in *Icebreaker 1 LLP v HMRC* [2010] UKUT 477 (TCC). Another iteration of the Icebreaker arrangement was considered by the FTT in *Acornwood v HMRC* [2014] UKFTT 416 (TC*)* as upheld by the Upper tribunal (Nugee J) in *Acornwood LLP and Ors v HMRC* [2016] UKUT 361 (TCC).

4. In *Acornwood*, Nugee J described the later iteration of the Icebreaker arrangement as follows:

> "In essence the individual members who participated in the partnerships contributed some money of their own and a rather larger amount of borrowed money to the LLPs, in order to provide finance for a range of creative projects. Each LLP claimed to have made a significant trading loss in its first year which the individual members sought to claim as an allowable loss against their income tax liability".

5. In its decision in *Acornwood,* the FTT considered the LLP's use of the borrowed monies and concluded that the monies were "sterile" and were not used for trading purposes.

6. On consideration of the FTT's decision in *Acornwood*, HMRC formed the view that claims by individual members for interest relief on the loans under s 383 of the Income Tax Act 2007 should be disallowed. As a result, Mr Hayes was issued with discovery assessments.

THE APPELLANT'S APPEAL

7. Mr Hayes does not seek to challenge HMRC's conclusion that the interest relief he had claimed should be disallowed. Rather, Mr Hayes appeals on the basis that HMRC were prohibited from using s 29 TMA 1970 to assess him to tax. In this regard, Mr Hayes submitted:

(1) There was no "discovery" because HMRC had all the relevant information necessary from his tax returns – no new information came to HMRC's attention so there was no "discovery".

(2) The relevant tax returns were made on the basis of, or in accordance with, the practice generally prevailing at the time they were made. Therefore, s 29(2) TMA 1970 applies and HMRC were prohibited from assessing Mr Hayes.

(3) Section 29(5) TMA 1970 was not satisfied and, therefore, pursuant to s 29(3) TMA 1970 HMRC were prohibited from assessing Mr Hayes.

(4) The assessments were stale.

8. Mr Hayes filed a witness statement. That statement contained limited factual evidence (none of which was contentious) and instead largely contained opinion and submissions of law. In those circumstances, HMRC did not cross examine Mr Hayes on his statement.

HMRC'S RESPONSE TO THE APPELLANT'S APPEAL

9. HMRC filed witness statements from two HMRC officers, Iain Stannard and Terence Holmes, who were tasked with considering the implications of *Acornwood* and implementing a strategy to engage with taxpayers and recover any insufficiencies of tax. Both officer gave evidence before us during which they confirmed the accuracy of their respective witness statements and answered questions put to them.

10. In summary, HMRC's case was as follows:

(1) Following HMRC's consideration of the FTT's decision in *Acornwood*, HMRC reviewed Mr Hayes' tax returns and concluded that the loan interest relief claimed was not allowable and therefore there was an insufficiency of tax. Accordingly, there was a valid "discovery" within the meaning of s 29(1) TMA 1970.

(2) Section 29(2) TMA 1970 is of no application because the relevant tax returns were not made on the basis of or in accordance with the practice generally prevailing at the time they were made. The loans monies were not used by the LLPs for trading purposes (as discussed by the FTT in *Acornwood*), and Mr Hayes has not adduced any evidence to show that claiming loan interest relief on loans used for non-trading purposes was a relatively long established principle or a practice generally supported by tax advisors and HMRC.

(3) Section 29(5) TMA 1970 is satisfied on the facts of the present case because a hypothetical officer would not have been reasonably expected on the information available within the enquiry window to be aware that an assessment to tax was or had become insufficient. There was very limited information available in relation to the Mr Hayes' claim to loan interest relief and the hypothetical officer would not have been aware that there was an insufficiency during the enquiry windows.

(4) The concept of staleness does not exist. In any event, even if there is such a concept, the assessments in this case were not stale.

RELEVANT LEGISLATION

11. Section 9A TMA 1970 provides in relevant part:

> "(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry")–
>
> (a) to the person whose return it is ("the taxpayer"),
>
> (b) within the time allowed.
>
> (2) The time allowed is–
>
> (a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered;
>
> …"

12. Section 29 TMA 1970 provides in relevant part:

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment
>
> "(a) that any income, unauthorised payments under section 208 of the Finance Act 2004 or surchargeable unauthorised payments under section 209 of that Act or relevant lump sum death benefit under section 217(2) of that Act which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) Where—
>
> (a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and
>
> (b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed, the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.
>
> (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.
>
> …
>
> (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;
>
> …
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.
>
> (6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—
>
> (a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;
>
> (b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he

made the return, or in any accounts, statements or documents accompanying any such claim;

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

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

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

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

(7) In subsection (6) above—

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

(i) a reference to any return of his under that section for either of the two immediately preceding year of assessments

(ii) where the return in under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

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

13. Section 383 of the Income Tax Act 2007 provides:

"(1) A person who pays interest in a tax year is entitled to relief for the tax year for the interest if–

(a) the loan on which the interest is payable is a loan to which a provision specified in subsection (2) applies,

(b) the interest is eligible for relief in accordance with this Chapter, and

(c) the person makes a claim.

(2) The provisions are–

…

(e) section 398 (loan to invest in partnership),

(3) The amount of the relief given under subsection (1) is equal to the amount of the interest eligible for relief.

…"

14. Section 398 of the Income Tax Act 2007 provides:

"(1) This section applies to a loan to an individual that is used in one or more of the ways specified in subsection (2).

(2) The ways are–

(a) purchasing a share in a partnership,

(b) contributing money to a partnership, by way of capital or premium, that is used wholly for the purposes of the trade or profession carried on by the partnership,

(c) advancing money to a partnership that is so used

…"

EVIDENCE AND FINDINGS OF FACT

15. As set above, Mr Hayes gave relatively limited and uncontroversial factual evidence in the form of a witness statement.

16. We heard live evidence from HMRC officers Iain Stannard and Terence Holmes. We found them both to be straightforward and honest witnesses. We accept their evidence of fact.

17. We also considered the documentation contained within the hearing bundle.

18. On the basis of the above, we make the following findings of fact:

(1) In his 2008/09 tax return, Mr Hayes claimed sideways loss relief in relation to losses arising in Ivancroft LLP.

(2) The 2008/09 tax return submitted by Ivancroft referred to Mr Hayes' membership of the LLP.

(3) On 11 May 2010, HMRC notified Mr Hayes that an enquiry had been opened into the 2008/09 tax return submitted by Ivancroft. HMRC went on to explain that until the enquiry into Ivancroft's return was completed, that part of Mr Hayes' return that related to his membership of the LLP would remain subject to an open enquiry.

(4) Documents provided during the enquiry into Ivancroft's 2008/09 tax return showed that Ivancroft was part of the Icebreaker arrangement and that Mr Hayes had taken out a loan of £400,000 which had been used to part-fund his contribution to Ivancroft.

(5) The enquiry into Ivancroft's 2008/09 tax return was completed on 15 December 2011). During this enquiry, HMRC "uncovered the fact that the loan that [Mr Hayes] claimed to be using for the purpose of the partnership's trade was not being used for that after all."

(6) Mr Hayes' tax return for the year ended 5 April 2011 was filed on 1 November 2011. The enquiry window therefore closed on 1 November 2012. In that return, Mr Hayes declared his interest in Ivancroft. Under "qualifying loan interest payable in the year", Mr Hayes entered a figure of £30,663. The white space was left empty.

(7) Mr Hayes' tax return for the year ended 5 April 2012 was filed on 9 January 2013. The enquiry window therefore closed on 9 January 2014. In that return, Mr Hayes declared his interest in Ivancroft. Under "qualifying loan interest payable in the year", Mr Hayes entered a figure of £29,924. The white space was left empty.

(8) On 7 May 2014, the FTT released its decision in *Acornwood*. On consideration of this decision, HMRC decided that loan interest relief claims by individual members of LLPs that formed part of the Icebreaker arrangement fell to be disallowed.

(9) Prior to the release of the FTT's decision in *Acornwood*, HMRC had not formed the view that that the interest relief claims by individual members of the LLPs fell to be disallowed. We note that at paragraph 43 of HMRC's Statement of Case it was said "HMRC never took the view that the loan interest relief from the *Icebreaker* scheme was allowable". Mr Street explained to us that this was an attempt to convey that HMRC had never allowed loan interest relief to be claimed if the loan was not wholly and exclusively for business purposes. Moreover, when Mr Hayes cross examined Officer Holmes about the meaning of this paragraph of the Statement of Case, Officer Holmes stated "I can only repeat that it was what the judge said in *Acornwood* that led us to the view that loan

interest was not properly claimable…the lightbulb came on for me because of the judge's findings…". We accept the explanation given by Mr Street and, moreover, the evidence given by Officer Holmes.

(10) Following the FTT's decision in *Acornwood*, HMRC began to review the tax returns submitted by the individual members of the LLPs to ascertain whether or not a claim for loan interest relief had been made and in what amount. In Mr Hayes' case this review was completed in August 2014.

(11) On 19 August 2014, HMRC wrote to Mr Hayes notifying him of the FTT's decision in *Acornwood*. Within that letter HMRC stated that "no interest relief is available for any other loans you took out to fund your investment in the partnership".

(12) On 14 October 2014, HMRC wrote to Mr Hayes with an estimate of his tax liability (including as a result of the loan interest relief being disallowed). That letter stated that various assumptions had been made in calculating the liability, and that HMRC "would like to work with you to ensure that we have accurate figures in our calculations". Officer Stannard explained, and we accept, that the letter was sent with a view to seeing whether a settlement could be reached with Mr Hayes. There was further correspondence between HMRC and Mr Hayes in October and November 2014.

(13) No settlement having been reached, on 9 March 2015, HMRC raised the assessment for the year ended 5 April 2011. At this point, HMRC still hoped that there might be scope for settling matters but proceeded to raise the assessment so as to do so within 4 years.

(14) From March 2015, there continued to be some correspondence between HMRC and Mr Hayes (or his representatives) including relating to settlement.

(15) On 25 January 2016, HMRC wrote to Mr Hayes' representative stating "In our calculations for the 2010/11 and 2011/12 tax years, we have disallowed the relief claimed on qualifying loan interest because we believed that all of this interest related to your client's loan from Ivancroft LLP. However, you have indicated that this may not be correct". HMRC then asked Mr Hayes' representative to provide further information by 11 February 2016.

(16) No settlement having been reached, on 18 February 2016, HMRC raised the assessment for the year ended 5 April 2012.

(17) On 14 March 2016, Mr Hayes wrote to HMRC stating his view that it was not open to HMRC to raise discovery assessments in relation to the years ended 5 April 2011 and 5 April 2012. Mr Hayes stated "My returns for those years are neither careless, negligent or fraudulent…all my figures were supplied by either my employer or Icebreaker and the return filed by a bona fide accountant. So there was full disclosure and the relevant information was in the returning officer's possession". Furthermore and more importantly…change of opinion on information that has previously been made available to HMRC is not grounds for a discovery, as has clearly happened here." This view was repeated in further correspondence sent in 2016, 2017 and 2018.

(18) On 24 October 2018, HMRC issued two "View of the Matter" letters in which it was confirmed that HMRC stood by the decision to disallow Mr Hayes' claim for loan interest relief in the years ended 5 April 2011 and 5 April 2012.

(19) Following a request by Mr Hayes, HMRC conducted a statutory review. The conclusion of that review was notified to Mr Hayes on 1 February 2019. On review, HMRC upheld the decision to raise the discovery assessments.

DISCUSSION AND DECISION

19. We remind ourselves that it is for HMRC to show that they made a discovery and that the assessments were validly raised. With that in mind, we consider below each of the contentions made by Mr Hayes.

There was no "discovery" because HMRC had all the relevant information necessary from Mr Hayes' tax returns – no new information came to HMRC's attention so there was no "discovery"

20. In *Charlton v HMRC* [2012] UKFTT 770 (TCC) (a decision of the Upper Tribunal, despite the neutral citation), the Upper Tribunal stated at paragraph 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, a change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself…"

21. Paragraph 37 of *Charlton* was cited with approval by the Court of Appeal in *Tooth v HMRC* [2019] EWCA Civ 826 at [60].

22. We are satisfied that, having considered the FTT's decision in *Acornwood*, HMRC revisited Mr Hayes' tax returns. On revisiting those returns, and in view of what was said by the FTT in *Acornwood*, it newly appeared to an officer that the interest relief claims therein made were not allowable and, therefore, there was an insufficiency of tax assessed. There was, then, a discovery within the meaning of s 29(1) TMA 1970. The discovery occurred in August 2014.

23. We note that in the review letter dated 1 February 2019, the review officer stated:

> "HMRC carried out an enquiry into Ivancroft's 2008/09 return. This enquiry [which concluded in December 2011] uncovered the fact that the loan that you claimed to be using for the purpose of the partnership's trade was not being used for that after all".

HMRC called no evidence to suggest that what the review officer said in that letter was factually inaccurate (Officers Stannard and Holmes only became involved after the release of the FTT's decision in *Acornwood.* They were not involved in the enquiry into Ivancroft's return for the year ended 5 April 2009 return and gave no evidence in relation to that enquiry). In those circumstances, we take the review officer's statement at face value. However, even though it appears that by December 2011 HMRC had uncovered that the loan taken out by Mr Hayes was not being used for the purposes of Ivancroft's trade, there is no evidence to suggest that at that stage (or at any point prior to August 2014), anyone within HMRC applied any thought to whether the interest relief claimed on that loan fell to be disallowed and whether, therefore, there was an insufficiency in an assessment. Indeed, the evidence of Officer Holmes, which we accept, was that it was only after the FTT's decision in *Acornwood* that it dawned on HMRC that they might be able to disallow the interest relief claims made by the individual LLP members and so it was only then that HMRC first began to look at the tax returns of the individual members with a view to disallowing the interest relief claims.

24. Mr Hayes' submission that there was no discovery was predicated upon a discovery only being possible where new information has come to light. As is clear from the Upper Tribunal's decision in *Charlton*, that submission is misconceived.

s 29(2) TMA 1970 applies because the relevant tax returns were made on the basis of or in accordance with the practice generally prevailing at the time they were made

25. In *HMRC* v *Household Estate Agents Ltd* [2007] EWHC 1684 (Ch), Henderson J considered the meaning of and correct approach to the words "the practice generally prevailing at the time" in paragraph 44 of the Finance Act 1998. Henderson J stated:

> "Without attempting to give an exhaustive definition, it seems to me that a practice may be so described only if it is relatively long-established, readily ascertainable by interested parties, and accepted by HMRC and taxpayers' advisers alike…"

26. Henderson J also stated that the burden was on the taxpayer to establish both an operative mistake in the return and the practice generally prevailing at the time the return was filed.

27. Mr Hayes submitted that prevailing practice at the time that he filed his return was for interest relief to be claimed by individual members of the LLPs in relation to the loans.

28. HMRC submitted "the Appellant has not provided any evidence to suggest that claiming loan interest relief on loans that were made for non-trading purposes was a relatively long established practice" that was accepted by HMRC and taxpayer advisers alike.

29. We accept HMRC's submission. The operative error in the tax returns was claiming interest relief in relation to loans used for non-trading purposes. It was for Mr Hayes to show that it was prevailing practice (i.e. was relatively long-established, readily ascertainable by interested parties, and accepted by HMRC and taxpayers' advisers alike) to claim interest relief on loans used for non-trading purposes. Mr Hayes has failed to satisfy us that this was a prevailing practice at the relevant time.

30. We therefore reject Mr Hayes' submission that s 29(2) TMA 1970 applies in his case.

Section 29(5) TMA 1970 not satisfied

31. In *Sanderson v HMRC* [2016] 4 WLR 67, Patten LJ stated:

> "The power of HMRC to make an assessment under section 29(1) following the discovery of what, for convenience, I shall refer to as an insufficiency in the self-assessment depends upon whether an 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 insufficiency". It is clear as a matter of authority:
>
> (1) that the officer is not the actual officer who made the assessment (for example Mr Thackeray in this case) but a hypothetical officer;
>
> (2) that the officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law: see *Revenue and Customs Comrs v Lansdowne Partners LP [2012] STC 544* ;
>
> (3) that where the law is complex even adequate disclosure by the taxpayer may not make it reasonable for the officer to have discovered the insufficiency on the basis of the information disclosed at the time: see Lansdowne at para 69;

(4) that what the hypothetical officer must have been reasonably expected to be aware of is an actual insufficiency: see *Langham v Veltema [2004] STC 544* per Auld LJ, at paras 33–34:

> "33. More particularly, it is plain from the wording of the statutory test in section 29(5) that it is concerned, not with what an Inspector could reasonably have been expected to do, but with what he could have been reasonably expected to be aware of. It speaks of an Inspector's objective awareness, from the information made available to him by the taxpayer, of 'the situation' mentioned in section 29(1), namely an actual insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an insufficiency, as suggested by Park J. If he is uneasy about the sufficiency of the assessment, he can exercise his power of inquiry under section 9A and is given plenty of time in which to complete it before the discovery provisions of section 29 take effect.
>
> "34. In my view, that plain construction of the provision is not overcome by Mr Sherry's argument that it is implicit in the words in section 29(5) '*on the basis of* the information made available to him' and also in the provision in section 29(6)(d) for information, the existence and relevance of which could reasonably be inferred from information falling within section 29(6) (a) to (c), that the information itself may fall short of information as to actual insufficiency. Such provision for awareness of insufficiency 'on the basis' of the specified information or from information that could reasonably be expected to be inferred therefrom does not, in my view, denote an objective awareness of something less than insufficiency. It is a mark of the way in which the subsection provides an objective test of awareness of insufficiency, expressed as a negative condition in the form that an officer 'could not have been reasonably expected … to be aware of the' insufficiency. It also allows, as section 29(6) expressly does, for constructive awareness of insufficiency, that is, for something less than an awareness of an insufficiency, in the form of an inference of insufficiency." (My emphasis.)

(5) that the assessment of whether the officer could reasonably have been expected to be aware of the insufficiency falls to be determined on the basis of the types of available information specified in section 29(6) . These are the only sources of information to be taken into account for that purpose: see *Langham v Veltema*, at para 36…"

32. In *Langham v Veltema* [2004] EWCA Civ 193, Auld LJ stated:

> "…it is plain from the wording of the statutory test in section 29(5) that it is concerned, not with what an Inspector could reasonably have been expected to do, but with what he could have reasonably expected to be aware of. It speaks of an Inspector's objective awareness, from the information made available to him by the taxpayer, of 'the situation' mentioned in section 29(1), namely an actual insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an insufficiency."

33. In *Sanderson,* Patten LJ stated:

> "It is important to emphasise that the decision in Lansdowne did not involve any qualification of what Auld LJ in Langham identified as the question posed by the second section 29(5) condition. The hypothetical officer must, on an objective analysis, be made aware of an actual insufficiency in the assessment by the matters disclosed in the section 29(6) information.
>
> The passages in the judgments of the Chancellor and Moses LJ as to the level of the officer's awareness were directed to the Revenue's argument that the disclosures made required inferences to be drawn about the accuracy of the self-assessment based on certain legal assumptions and that the officer could not be expected to resolve issues of law in determining the impact of the information supplied. In the face of such uncertainties, the officer could not be taken to be "aware" of an insufficiency. The decision in Lansdowne confirmed that the officer was not required to resolve (or even be able to assess) every question of law (particularly in complex cases) but that where, as Moses LJ expressed it, the points were not complex or difficult he was required to apply his knowledge of the law to the facts disclosed and to form a view as to whether an insufficiency existed. That is a matter of judgment rather than the application of any particular standard of proof. And the reference to the officer needing to reach a conclusion which justified the making of a discovery assessment has to be read in that context."

34. Mr Hayes submitted that on the basis of the information available, a hypothetical officer would, within the enquiry window for each of the relevant tax returns, reasonably be expected to be aware of the insufficiency of tax. Mr Hayes submitted that as *Icebreaker 1 LLP v HMRC* was decided before he submitted his returns for the years ended 5 April 2011 and 5 April 2012, "the hypothetical officer would have been aware of the structure of the Icebreaker LLPs" and would have known that the loan interest relief was not allowable.

35. In relation to the tax return for the year ended 5 April 2011, the information available to the hypothetical officer within the enquiry window was:

(1) Mr Hayes was a member of Ivancroft (as much could be ascertained from Mr Hayes' return and Ivancroft's return for the year ended 5 April 2009); and

(2) Mr Hayes had made a claim to interest relief on loans (as much could be ascertained from Mr Hayes' return).

36. However, there was also an enquiry into Ivancroft's return for the year ended 5 April 2009 (and Mr Hayes' return for the year ended 5 April 2009). As part of that enquiry, HMRC received documents which showed that:

(1) Ivancroft formed part of the Icebreaker arrangement; and

(2) Mr Hayes had taken out a loan of £400,000 to part-fund his contribution to Ivancroft.

37. In the review letter dated 1 February 2019, the review officer stated:

> "HMRC carried out an enquiry into Ivancroft's 2008/09 return. This enquiry uncovered the fact that the loan that you claimed to be using for the purpose of the partnership's trade was not being used for that after all. HMRC completed their enquiry into Ivancroft's 2008/09 return on 15 December 2011, which was before the end of the enquiry window for your 2010/11 return. By s 29(7)(a)(ii), HMRC's officer must be assumed to know of the conclusion of that enquiry. So, by s29(5)(a), the officer would have had all the facts needed to know about the problem with your return. But, as I have mentioned earlier,

> HMRC only became aware of the full meaning of the law in May 2014 when the first tier tribunal conclusion in Acornwood was released. …an HMRC officer needed not just the facts from your return and the partnership return, but the understanding of the law that HMRC only got in May 2014. The enquiry window for your 2010/11 return closed on 31 October 2012. At that point, HMRC did not have everything in place to make a discovery assessment about your tax liability, so they are not blocked from making an assessment."

38. We do not think that the position advanced in the review letter withstands scrutiny. It seems to us that the hypothetical officer would know that, pursuant to s 383 and s 398 of the Income Tax Act 2007, interest relief was only allowable on loans used for the purposes of "the trade or profession carried on by the partnership". Therefore, if the hypothetical officer knew within the enquiry window that loan interest relief was being claimed in relation to a loan "that you claimed to be using for the purpose of the partnership's trade [but] was not being used for that after all", we consider that hypothetical officer would be aware of the insufficiency.

39. In his submissions before us, Mr Street on behalf of HMRC advanced a slightly different position to that set out by the review officer. Mr Street submitted:

(1) On the available information, the hypothetical officer would not have known that the loan interest relief claim made by Mr Hayes in his 2010/11 return related to the loan that was used to contribute to Ivancroft. This could have been made clear in the white space, but was not.

(2) In any event, even if the hypothetical officer did know from the available information that the loan interest relief claim made by Mr Hayes in his 2010/11 return related to the loan that was used to contribute to Ivancroft, the hypothetical officer would not have been aware of the insufficiency because it was only once the FTT decision in *Acornwood* was released that it became clear that interest relief claimed by the individual members of the Icebreaker LLPs could be disallowed.

40. The second submission advanced by Mr Street is materially the same as that made by the review officer in the 1 February 2019 letter. For the reasons set out at paragraph 38 above, we do not accept that submission.

41. However, we do accept the first submission made by Mr Street. On the information available, the hypothetical officer would not have known that the loan interest relief claimed by Mr Hayes in the 2010/11 return related to the loan that was used to contribute to Ivancroft. We accept that the hypothetical officer might reasonably have suspected that this was the case and might have opened an enquiry or conducted a check but, as made clear in *Langham*, that is not the test. Because it was not apparent on the information available that the loan interest relief claimed in the 2010/11 tax return related to the loan that was used to contribute to Ivancroft, the hypothetical officer would not have been aware during the enquiry window that there was an insufficiency. In these circumstances, the fact that *Icebreaker 1* had already been decided by this point does not assist Mr Hayes.

42. Accordingly, s 29(5) TMA 1970 is satisfied in relation to the year ended 5 April 2011.

43. In relation to the tax return for the year ended 5 April 2012, the information available to the hypothetical officer within the enquiry window was:

(1) Mr Hayes was a member of Ivancroft (as much could be ascertained from Mr Hayes' return);

(2) Mr Hayes had made a claim to interest relief on loans (as much could be ascertained from Mr Hayes' return);

The information contained in Ivancroft's return for the year ended 5 April 2009 and the information obtained during the enquiry was no longer available to the hypothetical officer – s29(7)(ii) applied. The returns filed by Ivancroft in 2009/10 and 2010/11 referred to Mr Hayes' membership but said nothing about Ivancroft forming part of the Icebreaker arrangement or about Mr Hayes' having used the loan monies to contribute to Ivancroft.

44. On the information available, the hypothetical officer would *not* know:

(1) that there was a connection between the loan interest relief claimed and Mr Hayes' membership of Ivancroft;

(2) that Ivancroft formed part of the Icebreaker arrangement;

(3) that the loan monies were being put to use such that interest was not allowable.

In those circumstances, we are of the view that in relation to the return for the year ended 5 April 2012, the hypothetical officer would not have been aware on the information available of the insufficiency of tax. Accordingly, s 29(5) TMA 1970 is satisfied in relation to the year ended 5 April 2012.

The assessments were stale

45. Mr Hayes submitted that discovery assessments could become "stale". He referred us to *Beagles v HMRC* (2018) UKUT 380 (TCC). He submitted that the assessment raised against him were stale because "HMRC had already opened an enquiry into [his] 2008/9 tax return and should have known about the loan interest then."

46. HMRC submitted that discovery assessments cannot become stale and, in any event, on the facts of this case the assessments were not stale.

47. The concept of staleness has been recognised by the Upper Tribunal in a number of cases including *Beagles*, *Patullo v HMRC* [2016] UKUT 270 (TCC) and *Tooth.* Those decisions are binding on us.

48. We therefore accept Mr Hayes' submission that discovery assessments can become stale.

49. We have concluded that the discovery in the present case was made in August 2014. The assessment for the year ended 5 April 2011 was raised on 9 March 2015 i.e. just over 6 months after the discovery. We do not think that a delay of 6 months is sufficient to mean that the discovery has lost its "newness" such as to be stale. In any event, we conclude that even if (which we very much doubt) a delay of 6 months can ever justify a finding of staleness, it cannot do so in this case. HMRC did not simply sit on their hands during the period between the discovery and the issuing of the first assessment; HMRC engaged with Mr Hayes including with a view to settlement.

50. The assessment for the year ended 5 April 2012 was raised on 18 February 2016 i.e. just under 18 months after the discovery. Such a lengthy delay can lead to a discovery losing its "newness" (on the facts of *Charlton* it was said that the passage of 18 months would render the discovery stale). However, as held at paragraph 53 of *Patullo,* whether or not a delay has caused a discovery to lose its newness is fact sensitive. In circumstances such as here where HMRC notified Mr Hayes of his estimated liabilities (in October 2014) and continued to engage with him in relation to his liability (including with a view to settlement), we do not think it can properly said in this case that the discovery lost its newness.

51. For the reasons set out above, we dismiss this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

52. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant

to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DAVID BEDENHAM

TRIBUNAL JUDGE

RELEASE DATE: 23 JUNE 2020