**[2012] UKFTT 770 (TCC**

**Appeal number: FTC/73/2011**

***Capital Gains Tax – whether discovery assessments valid – s 29, Taxes Management Act 1970 - meaning of "discovery" – inference of information under s 29(6)(d)(i) – inclusion of DOTAS scheme reference number in return - whether an officer could not have been reasonably expected to be aware of an insufficiency of tax (s 29(5)) – nature of the hypothetical officer***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

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

**- and -**

**DR MICHAEL CHARLTON**
**MRS BARBARA CORFIELD**
**MRS BARBARA CORFIELD (executrix of MR J CORFIELD DECEASED)** **Respondents**

**TRIBUNAL: MR JUSTICE NORRIS**
**JUDGE ROGER BERNER**

**Sitting in public at The Rolls Building, Fetter Lane, London EC4 on 15 – 16 October 2012**

**Christopher Tidmarsh QC and Akash Nawbatt, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants**

**Keith Gordon and Ximena Montes Manzano, instructed by Premier Strategies Limited, for the Respondents**

DECISION

1. During the tax year 2006/07, each of the Taxpayers (that is to say, Dr Charlton and Mr and Mrs Corfield) entered into arrangements designed to create allowable losses for capital gains tax purposes to set off against capital gains arising in the same year. Put briefly, those arrangements entailed the purchase of an existing (and thus "second-hand") life assurance policy, the effecting of a partial surrender of that policy and the subsequent final surrender of the policy.

2. A similar, but not identical, scheme was considered in the case of *Drummond v Revenue and Customs Commissioners* [2009] STC 2206 (CA). The original decision that that scheme failed was reached by the special commissioner (Sir Stephen Oliver QC) in a decision released on 5 July 2007. That decision was upheld on 23 July 2008 by Norris J in the High Court and an appeal from that judgment was dismissed by the Court of Appeal on 25 June 2009. The result was that it was accepted that the arrangements entered into by the Taxpayers failed to give rise to the anticipated capital losses.

3. The question for the First-tier Tribunal was whether the discovery assessments that had been raised against each of the Taxpayers were valid. If they were not, then despite the arrangements failing on technical grounds, the self assessments made by the Taxpayers, setting off the losses against capital gains and reducing the tax liabilities accordingly, would remain undisturbed.

4. The First-tier Tribunal (Judge Nowlan and Mrs Watts Davies) decided that the discovery assessments were not valid because the condition in s 29(5) of the Taxes Management Act 1970 ("TMA") (the only relevant condition) had not been fulfilled. The Taxpayers could not therefore, by virtue of s 29(3), be assessed under s 29(1) TMA. The Taxpayers' appeal was accordingly allowed, and it is from that decision that HMRC now appeal. The Taxpayers also cross-appeal on certain issues that the First-tier Tribunal decided against them.

5. Before the First-tier Tribunal, the appeal was by the Taxpayers. In this tribunal the appeal is that of HMRC. In this decision, to avoid using the somewhat confusing terms "Appellants" and "Respondents", we shall refer to the Appellants as HMRC and to the Respondents as the Taxpayers.

**The law**

6. So far as material, s 29 TMA provides as follows:

> **29 Assessment where loss of tax discovered**
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

*(a)* that 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)* …

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

…

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

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

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

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

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

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

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

**The facts**

7. The arrangements entered into by the Taxpayers fell within the provisions of the Finance Act 2004 requiring disclosure to HMRC of tax avoidance schemes (the "DOTAS" – disclosure of tax avoidance schemes – rules). In accordance with the DOTAS rules, and in particular the Tax Avoidance Schemes (Information) Regulations 2004, the promoters of the scheme notified it to HMRC on form AAG1 on 1 November 2006. An amended version of the form AAG1 was submitted by the promoter on 7 February 2007. On 16 February 2007 the scheme was given a DOTAS scheme reference number ("SRN"). The allocation of an SRN did not indicate any judgment on the part of HMRC whether or not the proposed scheme achieved any particular outcome.

8. The final version of the form AAG1 set out, as a summary of the proposal or arrangements, that "A capital loss arises to an individual through the partial withdrawal and surrender/sale of life assurance policies." It explained the various steps and the expected tax treatment under the detailed statutory provisions referred to. In doing so it complied with a specific request from HMRC that the form AAG1 should refer to "the specific legislation, including sub-sections, from which the expected tax advantage arises".

9. The Taxpayers submitted their tax returns for the tax year 2006/07 before the due filing date of 31 January 2008, but after the special commissioner's decision in *Drummond*. The SRN was included in the relevant part of each of the returns, namely under Other Information under item 23.5 and 23.6. The "white spaces", where additional information was provided, were each completed (except for amounts) in the same terms (as advised by the scheme promoters). By way of example, the late Mr Corfield stated the following in the relevant white spaces of his return:

> [In the Foreign pages] "6.39 I acquired an AXA Isle of Man Ltd life assurance policy on 27 October 2006 for £205303.92. Subsequently, I made a partial surrender of the policy on 15 November 2006 for proceeds of £192577.45. I later sold my residual interest in the policy on 28 November 2006 for £9981.41.
>
> As the partial surrender and sale occurred in the final insurance year of the policy, the entries in box 6.6 to 6.8 relate to the disposal of the policy."

Items 6.6 and 6.8 required a return of gains on foreign life insurance policies etc. In 6.6, Mr Corfield had inserted "1" as the number of years, and in 6.8 he had returned the amount of £58.00 as the gain.

> [In the Capital Gains pages, in the section for Other Shares and Securities – further information] "0.0000 shares were sold in Life Assurance policy [sic]. I acquired an AXA Isle of Man Ltd life assurance policy on 27 October 2006 for £205303.92. Subsequently I made a partial surrender of the policy on 15 November 2006 for proceeds of £192577.45. I later sold my residual interest in the policy on 28 November 2006 for £9981.41. The loss on sale is calculated as the difference between the sale proceeds and the cost of acquisition. Proceeds from the partial surrender are excluded from the capital gains calculation as they have already been taken into account as a receipt in computing income for the purposes of income tax."

In the calculation pages for capital gains (pages CG2 and CG3), various gains were returned, totalling £197,825, in each case with allowable losses deducted. Those losses derived from the loss detailed on those pages as relating to the disposal of a "Life Assurance Policy" with disposal proceeds of £9,981 and losses arising of £195,323.

10. HMRC did not open enquiries into the Taxpayers' tax returns. This was in contrast to other participants in the scheme arranged by the same promoter. In all there were 41 participants, 38 of whom (that is excluding the Taxpayers) had enquiries raised prior to the latest time for opening an enquiry into the self assessment returns of the Taxpayers. HMRC had thought that it had opened an enquiry into Mrs Corfield's return, but the letter (which had been prepared and dated 8 January 2009) was not sent. By the time, on 31 January 2009, the enquiry window had closed in respect of each of the Taxpayers, the High Court had affirmed the decision of the Special Commissioner in *Drummond*.

11. Various procedures within HMRC failed to result in enquiries being opened into the Taxpayers' returns. It was only when Mr Cree, the officer in charge of coordinating all investigations into so-called SHIPs (second-hand insurance policies) schemes of the nature of this case became aware in March 2009 of what had happened, and called for the papers, that consideration was given to the making of assessments under s 29. He did not make those assessments immediately; instead he waited until after the Court of Appeal's judgment in *Drummond* and after it became clear that there would be no appeal to the Supreme Court.

**The decision of the First-tier Tribunal**

12. In allowing the appeal, the First-tier Tribunal concluded that the condition in s 29(5) for the raising of discovery assessments was not met because:

> (1) an officer could reasonably have been expected to consult his specialist colleagues, and would accordingly have been aware of the insufficiency in the Taxpayers' tax returns (FTT Decision, [122] and [132]); or

(2) if it was wrong to suppose that the officer could be expected to consult a specialist, the officer:

(a) would have been aware that the claimed tax treatment depended on the exclusion of a gain that had been taken into account for income tax purposes whereas no income had been returned; and

(b) could legitimately take the view that it might well be decided that something should only rank as having been taken into account for income tax purposes when in reality that treatment had been demonstrated (FTT Decision, [127] and [133]).

13. HMRC contend that the First-tier Tribunal was wrong in both respects.

14. The First-tier Tribunal rejected arguments of the Taxpayers that:

(1) the meaning of "discovery" connotes that there has to have been the emergence of something new, and that since nothing new had emerged after the closure of the enquiry window, no proper "discovery" had been made. On this the First-tier Tribunal accepted the argument of HMRC that a discovery assessment can be made merely where the original officer of HMRC changes his mind or a new officer takes a different view (FTT Decision, [74]); and

(2) because the tax return gave the scheme reference number, then the information in the form AAG1 is deemed by s 29(6) to be information supplied to the officer for s 29(5) purposes.

15. The Taxpayers cross-appeal in both those respects.

16. As the question of the meaning of "discovers" in s 29(1) is essentially a threshold question, we propose to start with that. We shall then consider the submissions on s 29(5), coupled with those on s 29(6).

**The meaning of "discovers"**

17. At its heart the dispute between the parties on this issue is whether, as the Taxpayers argue, the word "discovers" implies a requirement for something new to have arisen, or, as HMRC submit, a discovery can be said to be made whenever an officer of HMRC realises that insufficient tax has been assessed.

18. In support of his argument for the Taxpayers, Mr Gordon put forward four propositions:

(1) That a "discovery" requires a threshold to be crossed; that is, from the position of not knowing to the position of having reason to believe;

(2) That to cross that threshold requires something new, for example a new fact or a new understanding of the law. Merely revisiting prior knowledge does not amount to a discovery;

(3) That these principles apply whether or not there is an earlier HMRC assessment which has been determined either under the provisions of s 54 TMA or by a decision of the Tribunal (governed by s 50(10)); and

(4) That the corporate knowledge of HMRC is relevant. An officer merely looking at an old file cannot be said to make a discovery.

19. For HMRC, Mr Tidmarsh submitted that the First-tier Tribunal, for the reasons it gave, had correctly rejected the Taxpayers' argument. He submitted further that the point has since been put beyond doubt, at least at this level, by the judgment of the Court of Appeal in *Hankinson v Revenue and Customs Commissioners* [2012] STC 485. We turn first, therefore, to consider whether *Hankinson* is conclusive in this respect.

20. The question of the meaning of "discovers" was not before the Court of Appeal in *Hankinson*. The issue in that case was whether the power contained in s 29(1) could be exercised by an officer of HMRC only where the officer had considered whether the conditions in s 29(4) and s 29(5) had been satisfied, or alternatively whether it was sufficient that the officer had merely discovered that there had been an insufficiency for the year of assessment in question, as set out in s 29(1), with the question of whether s 29(4) and s 29(5) had been satisfied being one of objective fact to be decided, in case of dispute, by way of appeal.

21. In the course of his judgment, Lewison LJ (with whom Mummery LJ and Sir Mark Waller agreed) traced the provisions of s 29, beginning with s 29(1). He referred (at [15]) to the fact that the word "discovers" in this context has a long history, and that, even though the conditions under which a discovery assessment may be made have been tightened following the introduction of self assessment, nevertheless the meaning of the word "discovers" has not changed. Thus, in *R v Commissioners for the General Purposes of Income Tax for Kensington, ex parte Aramayo* 6 TC 279 at 283, Bray J said that it meant "comes to any conclusion from the examination he makes and from any information he may choose to receive" and Lush J said that it was equivalent to "finds" or "satisfies himself". Lord Justice Lewison then continued:

> "In *Cenlon Finance Co Ltd v Ellwood (Inspector of Taxes)* (1962) 40 TC 176, [1962] AC 782, the House of Lords considered the meaning of the word 'discovers'. They rejected the argument that a discovery entailed the ascertainment of a new fact. Viscount Simonds said ((1962) 40 TC 176 at 204, [1962] AC 782 at 794):
>
> > 'I can see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation.' "

22. Mr Gordon argues that the assertion by HMRC that it is well-established that a discovery does not require the ascertainment of something new, is not supported by *Hankinson* or by *Cenlon Finance*. He points to the particular language used, which refers to the ascertainment of a new fact, and not to anything wider than that.

23. We agree with Mr Gordon that, on its own, *Hankinson* cannot be regarded as conclusive. The discussion of s 29(1) in that case was not directed to the meaning of "discovers" but to contrast the essentially subjective nature of the test in s 29(1), referring as it does to the officer's opinion, with the objective conditions in s 29(4) and (5). We turn therefore to consider his submissions on the propositions he has advanced.

*A threshold must be crossed*

24. We have referred, in the context of what Lewison LJ said in *Hankinson*, to *Aramayo*. In that case, Bray J found that "discovers" cannot mean to ascertain by legal evidence. But it is nevertheless the case that an officer's discovery must be a reasonable conclusion from the evidence available to him. To that extent, although the test in s 29(1) is a subjective test, an element of objectivity is introduced in examining the reasonableness of the officer's conclusion (see *R v Commissioners of Taxes for St Giles and St George, Bloomsbury, ex parte Hooper* [1915] 3 KB 768, at 782).

25. Mr Gordon argues that although the dicta in earlier authorities such as *Aramayo* and *Hooper* could be interpreted in such a way as to support an extremely wide meaning of "discovers" (namely simply having reason to believe) this should not be relied upon as it arose only because the requirement for a threshold to be crossed was not in dispute in those cases. He submits further that those cases in fact support the argument that a threshold must be crossed.

26. Mr Gordon argues that the First-tier Tribunal was wrong when it said, at [55], that these earlier cases "became authority for the proposition that a simple change of mind, or the different opinion of a new Inspector on unchanged facts and law, were sufficient to justify a discovery assessment". He submits that the present case does not even involve a change of opinion; it merely reflects the correction of an earlier oversight, where HMRC's view of the law was sufficiently formed and simply not acted upon.

27. In support of this argument, Mr Gordon referred us to what Lord Denning had said in *Cenlon Finance* ([1962] AC 782 at 799), namely that if a lawyer reads his text book and realises he was mistaken about the law he will make a discovery. Mr Gordon of course accepts that the threshold is crossed when the lawyer learns a new point of law. However, if the same lawyer, having fully considered the matter and having reached a conclusion, then thinks about the matter further and (without the benefit of further research into the facts or the law) simply changes his mind, then Mr Gordon says that this is not a discovery that his first conclusion was wrong; it is merely a change of opinion.

28. We agree with Mr Gordon that the word "discovers" does connote change, in the sense of a threshold being crossed. At one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view. That is the only threshold that has to be crossed. We do not agree that the lawyer, in Lord Denning's example, would be regarded as having made a

discovery any the less by waking up one morning with a different conclusion from the one he had earlier reached, than if he had changed his mind with the benefit of further research. It is, we think, evident that the relevant threshold for there to be a discovery may be crossed as a result of a "eureka" moment just as much as by painstaking research.

*There must be something new*

29. The mere fact that a threshold must be crossed does not mean that something more than a change of opinion is required. Mr Gordon's second proposition, however, is that for the crossing of the threshold to amount to a discovery for s 29(1) purposes, there must be a change of position, which he says must generally be by reference to knowledge of the facts or of the law.

30. In this context, Mr Gordon again referred us to *Cenlon Finance*. In that case, in the House of Lords, Viscount Simonds (at 794) described the question as being whether the word "discovers" (in s 41(1) of the Income Tax Act 1952, a precursor to s 29(1)) covers the case where no new fact has come to light but the revenue authorities have formed the opinion that upon a mistaken view of the law the taxpayer has been undercharged in his original assessment. Viscount Simonds referred to the fact that the Court of Appeal in *Cenlon Finance* had followed its earlier decision in *Commercial Structures Ltd v Briggs* 30 TC 477, which in turn had preferred a decision of Finlay J in *Williams v Grundy's Trustees* [1934] 1 KB 524 to that of Rowlatt J in *Anderton and Halstead Ltd v Birrell* 16 TC 200, and had followed a decision of the Court of Session in *IRC v Mackinlay's Trustees* 22 TC 305. In *Mackinlay's Trustees* Lord Normand had said (at p 312):

> "I do not think it is stretching the word "discovers" to hold that it covers the finding out that an error in law has been committed in the first assessment, when it is desired to correct that by an additional assessment."

31. With that background, Viscount Simonds stated that he considered that the decision in *Mackinlay's Trustees* was clearly right and found the judgment of Lord Normand in that case wholly convincing. He concluded, in the passage cited by Lewison LJ in *Hankinson* to which we have earlier referred, by saying that the statutory words were apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged.

32. In *Commercial Structures*, the case concerned the taxable amount of certain rents which depended on the terms on which a property was let. The taxpayer contended that, as the inspector of taxes had at all material times been in possession of full information as to the terms of the letting, he had not made any discovery which would justify the making of the relevant assessments. In his judgment, Tucker LJ referred (at 492 – 493) to what Lord Normand had said in *Mackinlay's Trustees* (at 311 and 313):

> "I think the word 'discover' in itself, according to the ordinary use of language, may be taken simply to mean 'find out'. What has to be

found or found out is that any properties or profits chargeable to tax have been omitted from the first assessment."

"Of course, if there were any reason in the context for restricting the word 'discover' to the discovery of an error in fact, that restriction would necessarily receive effect, but in my opinion the context points, not to any such restriction, but, on the contrary, to so wide a meaning that the word ought to be held to cover just the kind of discovery which was made here, when the Special Commissioners found out that, by reason of a misapprehension of the legal position, certain of the profits chargeable to tax had been omitted from the first assessment."

33. Having cited those passages, Tucker LJ continued (at 493):

"All I can say, with respect, is that what is there stated by Lord Normand appears to me completely to fit the present case, and I can do no more than say that the way he puts it convinces me that the argument of the Crown is the one which should be accepted by us. I can do no more than adopt the language of Lord Normand, and will not attempt to say the same thing in poorer language. I think, although it is true that in that case he may not have been dealing with a mistake in the general law of the country as distinct from a mistake in the interpretation of a document, the case was rather on the border line. He was dealing with the proper application of Section 20 of the Income Tax Act, 1918, to the provisions of the particular deed to the exclusion of clause 15. But however that may be, I think the language of Lord Normand is applicable, and the reasoning is equally applicable to mistakes made with regard to the general law or rather, I should say, to the discovery of the effect of the general law upon a particular set of facts."

34. *Commercial Structures* was a case where there was no new fact, and no new decision on the law. The only thing that had happened was that the inspector had had a change of view. There was no additional information that had led to that change of view. The case was argued by the taxpayer on the basis that the inspector could not possibly have discovered something purely by changing his mind without anything new coming to his attention or without learning anything from other inspectors or those above him. The Court of Appeal, following *Mackinlay's Trustees*, and not *Anderton* or *British Sugar Manufacturers Ltd v Harris* 21 TC 528, in which contrary views had been expressed, found in favour of the Crown.

35. That it seems to us, when viewed in the context of the approval of the House of Lords in *Cenlon Finance*, disposes of the Taxpayers' arguments on s 29(1). We should add that Mr Gordon referred us to the judgment of Cohen LJ in *Commercial Structures* in an attempt to resurrect *Anderton* as support for his submissions in this respect. He referred in particular to the fact that Cohen LJ had said (at 494) that the *Anderton* case "was clearly rightly decided". However, that cannot assist Mr Gordon's argument. In making this comment, Cohen LJ was referring to the real decision in *Anderton* on the substantive case whether certain deductions were wrongly allowed, and not to the conclusion reached by Rowlatt J on the discovery issue.

36. Rowlatt J's conclusion in *Anderton* was that the word "discover" did not include a mere change of opinion (at 208). A different conclusion was reached by Finlay J in *Grundy's Trustees*, in which he declined to follow *Anderton* to the extent that it would mean that an inspector could never make a discovery on a change of opinion. That was the view adopted by the Court of Appeal in *Commercial Structures*, and in the Court of Appeal in *Cenlon Finance* [1961] 1 Ch 634, where (at 650) Upjohn LJ expressed some doubt whether Rowlatt J would have reached the conclusion he did in *Anderton* on the basis of the law as stated in *Commercial Structures*. The reasoning of the Court of Appeal in *Cenlon Finance* was upheld by the House of Lords. *Anderton* has since then been of no assistance to submissions of the nature made by Mr Gordon.

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 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. But that would not, in our view, include a case, such as this, where the delay was merely to accommodate the final determination of another appeal which was material to the liability question. Such a delay did not deprive Mr Cree's conclusions of their essential newness for s 29(1) purposes.

*Relationship with ss 50(10) and 54 TMA*

38. Our conclusions on the first two of Mr Gordon's propositions mean that we can deal with his third quite shortly. In our judgment the way in which the discovery assessment rules work, both independently and in the context of s 50(10) (decision of tribunal to be final and conclusive, subject to rights of review and appeal, and other matters in the tribunal's procedure rules and the Taxes Acts) and s 54 (agreement having consequences of determination of appeal), is clear.

39. As we have described, other than the conclusion itself, nothing new has to arise for there to be a discovery. Subject to satisfying one of the conditions in s 29(4) and (5), such a discovery assessment will be valid. However, both the taxpayer and HMRC are bound by determinations or deemed determinations under s 50(1) and s 54 TMA, and to the extent they are so bound, HMRC may not raise again the same point through a discovery assessment under s 29 (*Cenlon Finance*, per Upjohn LJ at 651). Nevertheless, such an assessment is not precluded if it is founded upon a point other than the particular subject matter which was the subject of agreement or determination (*Scorer v Olin Energy Systems Ltd* [1985] 1 AC 645, per Lord Keith of Kinkel at 656). The cases on the relationship between s 29 and s 50(1) and s 54 TMA provide no assistance to Mr Gordon's submissions on the meaning of discovery.

*Corporate knowledge*

40. The fourth of Mr Gordon's propositions is that, not only must there be something new, but that it must be something new to HMRC as a whole (so far as is relevant to the taxpayer). It is not sufficient for the matter to be new to the officer making the assessment.

41. In support of this proposition, Mr Gordon postulates the alternative, which he argues cannot be correct. He says that in such a case the requirement for there to be a discovery could be simply circumvented by an officer, for whom the facts and legal position are stale, passing a file to a colleague with a comment along the lines of "this taxpayer has underpaid tax". The colleague could then be said to have discovered the under-assessment.

42. On the basis of our finding that nothing new is required except the conclusion, the question in a case such as that put by Mr Gordon would, we suggest, not be on the collective corporate knowledge of HMRC, but on the newness of the conclusion. Without deciding the matter, we can certainly envisage an argument that the passing of a file from one HMRC officer to another could not have the effect of refreshing a conclusion that was no longer new. But that does not depend on something new being discovered by reference to HMRC's collective knowledge. It is solely concerned with the newness of the conclusion.

43. We find no support in *Cenlon Finance* in the Court of Appeal for what Mr Gordon submitted was its finding in favour of the taxpayer on the question whether an officer looking afresh at a position previously taken by a colleague can give rise to a discovery. The Court of Appeal in *Cenlon Finance* was considering the effect of an agreement under what is now s 54. That court did not consider any wider question as to the meaning of discovery; it was bound by its own decision in *Commercial Structures*. *Cenlon Finance* cannot be relied upon to support the arguments of Mr Gordon in this respect.

*Conclusion on the meaning of "discovers"*

44. For the reasons we have given, we dismiss the Taxpayers' cross-appeal on this issue. The First-tier Tribunal was in our view correct to conclude as it did at [74] that a discovery assessment can be made merely where the original officer of HMRC changes his mind or where a different officer takes a different view.

**The condition in s 29(5)**

45. The First-tier Tribunal decided that, in determining whether an officer could not have been reasonably expected, on the basis of the information made available to him, to be aware of the insufficiency, the notional officer would either have considered the law himself or, more appropriately still, in light of the information on the tax return regarding the SRN reference number, would have sought guidance from specialist colleagues.

46. Mr Tidmarsh submits that the First-tier Tribunal was wrong. He argues that s 29(5) simply requires the tribunal to consider the awareness of a hypothetical officer of reasonable skill and knowledge. It is, he argued, inconsistent with the statutory test and authority to expect that the officer would consult specialist colleagues. Section 29(5) asks solely of what the officer might reasonably be expected to be aware; it does not ask what the officer might reasonably be expected to do or of what HMRC as a body might be aware or of what the officer might be aware had he made enquiries amongst specialist colleagues.

47. In support Mr Tidmarsh referred to the Court of Appeal judgment in *Langham v Veltema* [2004] STC 544. There the taxpayer received for no consideration a transfer of a house from a company of which he was the sole director and which was controlled by him and his wife. The return information included a value of £100,000. Subsequently, the company submitted a return to a different inspector showing the same value, but in this case the matter was referred to the District Valuer and a valuation of £145,000 was eventually agreed. An additional assessment on £45,000 was made on the taxpayer.

48. In the High Court, Park J, agreeing with the general commissioners, held that the discovery assessment failed to satisfy the condition in s 29(5). He held that the inspector could reasonably have been expected to refer the valuation to the District Valuer, and the District Valuer could reasonably have been expected to respond with an opinion that the value was greater than £100,000.

49. That conclusion was rejected by the Court of Appeal. The leading judgment was given by Auld LJ, with whom both Chadwick and Arden LJJ agreed. The first issue addressed by Auld LJ was whether awareness or inference of actual insufficiency is required to negative the condition, or whether awareness that the sufficiency of the assessment was questionable be sufficient, and whether the tribunal should also take into account what enquiry the information made available could reasonably have been expected to prompt the inspector to undertake and the likely result of that enquiry. On that issue Auld LJ concluded (at [32] – [33]):

> "**[32]** If, as here, the taxpayer has made an inaccurate self-assessment, but without any fraud or negligence on his part, it seems to me that it would frustrate the scheme's aims of simplicity and early finality of assessment to tax, to interpret s 29(5) so as to introduce an *obligation* on tax inspectors to conduct an intermediate and possibly time consuming scrutiny, whether or not in the form of an enquiry under s 9A, of self-assessment returns when they do not disclose insufficiency, but only circumstances further investigation of which might or might not show it. I should emphasise that I say that, not in reliance on Miss Simler's information to the court that the Revenue do not customarily make much of an initial check of self-assessment returns and accompanying documents. Such practice, if it is general, cannot affect the proper interpretation of the statutory provisions, though it would appear to me to be consistent with the aims of simplicity and speed of the new statutory scheme as I read it, namely that there is nothing in the Act that obliges a Revenue officer to enquire into a return, for

> example in a case such as this, to obtain expert valuation evidence for the purpose of checking the accuracy of a valuation indicated in a return.
>
> **[33]** More particularly, it is plain from the wording of the statutory test in s 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 s 29(1), namely an actual insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an insufficiency, as suggested by Park J. If he is uneasy about the sufficiency of the assessment, he can exercise his power of enquiry under s 9A and is given plenty of time in which to complete it before the discovery provisions of s 29 take effect."

50. Mr Tidmarsh further submits that the First-tier Tribunal's reasoning on this aspect is also inconsistent with the judgment of the Court of Appeal in *Revenue and Customs Commissioners v Lansdowne Partners Limited Partnership* [2012] STC 544. That case concerned whether HMRC could make a discovery amendment to a partnership return in circumstances where management fees had been deducted from partnership income because they had been "rebated" and at least some of the "rebates" had been made to partners. The relevant provisions (for partnerships) were in s 30B TMA, and are materially the same as those in s 29 (for individuals). The case raised the issue whether an officer could have reasonably been expected to be aware of facts and law to justify his making the amendment.

51. In addressing this question, the Chancellor, Sir Andrew Morritt, said (at [50]):

> "In these circumstances the question is whether on this information an officer of the Board could have been reasonably expected to be aware that the amount of the profits included in the partnership return was insufficient. Plainly it is necessary to assume an officer of reasonable knowledge and understanding. He would have been aware of the decision of the House of Lords in *Arthur Young*[1]. He would see from the partnership return and statement that the income included management and performance fees and that some of them had been deducted from the income because they had been 'rebated'. He would know from the letter from Mr Tai that at least some of those rebates had been made to limited partners in LPLP. And he would know from his general knowledge of *Arthur Young* and s 74(1)(a), ICTA that payments to partners are not usually deductible for tax purposes."

52. Having asked himself the question whether that was enough, and having considered *Langham v Veltema*, in particular the passages from the judgment of Auld LJ to which we have referred, the Chancellor concluded (at [58]) that the question was whether the hypothetical inspector would, on the basis of the documents before him, have been aware of "an actual insufficiency". On the basis of the information

[1] *Mackinlay (Inspector of Taxes) v Arthur Young McClelland Moores & Co* [1989] STC 898

made available, and the officer's deemed knowledge of *Arthur Young*, the Chancellor found that he would. However, the Chancellor went on to say that he did not suggest that the hypothetical inspector is required to resolve points of law. Nor need he forecast and discount what the response of the taxpayer may be. It is enough that the information justifies the amendment (or assessment) that is sought to be made. Any disputes of fact or law can then be resolved by the usual processes.

53. We think it is plain from what Auld LJ said in *Langham v Veltema* that the question to be addressed is the awareness of an officer, and not on what an officer might do. We do not consider that it is the right approach to take as a starting point a hypothetical officer with limited knowledge and then to assume, however glaringly obvious it might be to do so on that hypothesis, that the officer would seek guidance from other "real" officers within HMRC. That is not what s 29(5) requires the tribunal to consider. We do not accept that the strictures adopted in *Langham v Veltema* are confined to enquiries concerning facts. In our view, the language of awareness in s 29(5) precludes any assumption that a notional officer would consult more specialist colleagues. In our judgment the First-tier Tribunal made an error of law in following this path.

*The hypothetical officer*

54. Mr Gordon submitted an alternative analysis of s 29(5) which, whilst not requiring any assumption of what a hypothetical officer might do, would nonetheless imbue that officer with all the necessary expertise to be able to deal with any (or perhaps any but the most complex) of returns. He argued that s 29(5) referred only to an officer, and did not specify the nature or characteristics of that officer. The officer in question is thus a truly hypothetical officer, and not a typical or average officer.

55. As a matter of statutory construction, we consider an approach along these lines has considerable merit. The officer referred to in s 29(5) is a legal fiction. He does not require to be imbued with personality or any particular characteristics. To do so inevitably involves seeking some form of typical or average officer, the search for which, in our view, is futile. The purpose of s 29(5) is to make it clear that the test of reasonable awareness is objective, and does not depend on the particular individual officer who considers the information made available.

56. Section 29(5) is focused on the quality and extent of the information, and not on the quality of the officer, or the extent of the officer's knowledge. Section 29 provides a balance between the taxpayer and HMRC. The ability of HMRC to make a discovery assessment is balanced by the protection afforded to a taxpayer who, before the enquiry window closes, makes an honest and complete return. The emphasis therefore is on what the taxpayer provides. It would disturb the balance of s 29 to infer from s 29(5) a particular notional officer of only limited ability.

57. The requirement to consider a purely notional officer makes irrelevant the particular officer who considers the return. It also makes irrelevant the way in which HMRC organises itself into separate departments dealing with certain specialist issues. As Auld LJ noted in *Langham v Veltema* (at [32]), the customary practices of

HMRC cannot affect the proper interpretation of s 29(5). The average officer may not be a specialist, but in our view the requirement of s 29(5) to consider the reasonableness of the awareness of a hypothetical officer does not carry with it the need to confine the view to that through a prism of the eyes of an officer of only general capability and experience.

58. There is thus no single eponymous hypothetical officer. Nor is there any single benchmark of the knowledge and experience the hypothetical officer should be expected to have. The test of reasonable awareness must be applied to the circumstances of each case. The necessity to assume an officer of reasonable knowledge and understanding, recognised by the Chancellor in *Lansdowne* (at [50]), does not suggest that such reasonable knowledge and understanding must be confined to an assumed average, to be applied in all cases. How would such an average be determined? The test of reasonable awareness must in our view be applied to the particular context in which the question arises, and without regard to any perceived lack of expertise or specialisation of individual officers. The officer must be assumed to have such level of knowledge and understanding that would reasonably be expected in an officer considering the particular information provided by the taxpayer.

59. That is not to say that there might not be cases where the complexity of the relevant law would lead to a conclusion that, even where the taxpayer has disclosed enough factual information, such a hypothetical officer could not reasonably be expected to be aware of an insufficiency. That was the view expressed by Moses LJ in *Lansdowne* (at [69]). In that case the court found that the legal points were not complex or difficult. But we find support for our view that complexity or difficulty should not routinely present an obstacle (as they would if all specialist knowledge had to be assumed away) from the fact that Moses LJ considered this only to be a mere possibility, and thus at most an exception and not the rule.

60. Mr Tidmarsh argued that the hypothetical officer should be assumed to be only an officer of sufficient competence to deal with the taxpayer's affairs as a general matter. He should not be assumed to have knowledge applicable to a scheme that would not commonly arise. He submitted that the balance between taxpayers and HMRC would be maintained in a complex case because in such a case the taxpayer could choose the level of disclosure he would make. We accept, as a general proposition, that the more complex the case the more information that might be required to be provided to give rise to a reasonable awareness of the insufficiency. But in our view that illustrates the correct focus of s 29(5): that it is on the quality and extent of the information made available, and not on the qualities of the hypothetical officer.

61. Mr Tidmarsh referred us to certain passages from the decision of the special commissioner (Charles Hellier) in *Corbally-Stourton v Revenue and Customs Commissioners* [2008] STC (SCD) 907, which he argued were inconsistent with the submissions of Mr Gordon in this respect. At [59] the special commissioner said that in applying s 29(5) there should be taken into account the general knowledge and skill that might reasonably be attributed to an officer. He went on (at [66] to describe the hypothetical inspector as being "equipped with a reasonable knowledge of tax law".

62. We do not consider that the special commissioner was attempting to lay down any general test of the level of knowledge or expertise of the hypothetical officer. He was making the point (correctly) that the test is one of objective awareness of an officer, and not objective awareness of the inspector who made the assessment (see [59]), and he was rightly concluding that this test did not depend on evidence of what another HMRC officer might have concluded or what such an officer might expect an inspector to conclude (see [65]). An assumption that the hypothetical officer must have a "reasonable" knowledge of tax law does not mean an assumption of an average or typical level of knowledge; it means a level of knowledge reasonable in the particular circumstances of the case.

63. Nor are we dissuaded from this view by the descriptions of the applicable level of knowledge and skill of the hypothetical officer in other cases. In *R (on the application of Pattullo) v Revenue and Customs Commissioners* [2010] STC 107, in the Outer House of the Court of Session, Lord Bannatyne referred (at [107]) to the officer having "the general knowledge and skill that might reasonably be attributed to him". In deciding in that case that an inspector of such skill or knowledge could not have been aware, from the information provided on the taxpayer's return, of an actual insufficiency, Lord Bannatyne accepted evidence that the HMRC specialist in the particular area could not say if the taxpayer was a party to the scheme in question or, if he was, that there was an actual insufficiency. Thus, in that case, an officer with specialist knowledge could not have reasonably been aware of the insufficiency. The reference to "general knowledge and skill" cannot therefore, in our view, be taken as a generic description applicable in all cases.

64. Nor do we consider that the reference by the First-tier Tribunal (Judge Avery Jones and Mr Menzies-Conacher) in *Swift v Revenue and Customs Commissioners* [2010] SFTD 553 to "an ordinary competent inspector" was intended to set the benchmark at a level which excluded relevant expertise. Indeed, in that case, the tribunal expected the inspector to have known of the published view of HMRC that no double taxation relief was available in the case of an LLC, and to have been aware of the position if the income had been reported on the foreign pages of the tax return with a claim for double taxation relief. As it was, the use of the partnership pages sufficiently obscured the position that it was found that a reasonable inspector could not have been expected to work out the status of the taxpayer and the double tax relief position. It was the nature of the information, and the way it was presented, that was material, not any lack of knowledge or skill on the part of the hypothetical officer.

65. Our conclusion on this point, therefore, is that s 29(5) does not require the hypothetical officer to be given the characteristics of an officer of general competence, knowledge or skill only. The officer must be assumed to have such level of knowledge and understanding that would reasonably be expected in an officer considering the particular information provided by the taxpayer. Whilst leaving open the exceptional case where the complexity of the law itself might lead to a conclusion that an officer could not reasonably be expected to be aware of an insufficiency, the test should not be constrained by reference to any perceived lack of specialist knowledge in any section of HMRC officers. What is reasonable for an officer to be aware of will depend on a range of factors affecting the adequacy of the information

made available, including complexity. But reasonableness falls to be tested, not by reference to a living embodiment of the hypothetical officer, with assumed characteristics at a typical or average level, but by reference to the circumstances of the particular case.

66. This conclusion does not have the consequence that the hypothetical officer must be regarded as the embodiment of HMRC as a whole. He cannot in this way be treated as possessing information relevant to his awareness that is held elsewhere within HMRC or is known to any particular officer, including the officer dealing with the case. That is clear from *Langham v Veltema*, and from the exhaustive nature of the information that can be considered to be made available to the hypothetical officer in accordance with s 29(6). Our conclusion relates only to the knowledge and skill to be attributed to the hypothetical officer in each case. In particular, we do not accept Mr Gordon's argument that the reference to "an officer" in s 29(5) should be construed as a reference to HMRC as a whole. The use by Lewison J of "HMRC" in this context in *Lansdowne* (High Court, [2011] STC 372, at [59]) is clearly not intended to represent the test, which is immediately expressed in terms of "an officer of the Board" in the succeeding paragraphs.

**Information made available by inference**

67. The First-tier Tribunal accepted (at [136]) HMRC's argument that the mere fact that the notional officer is to be treated by s 29(6) as being aware that, once an SRN has been allocated to a particular scheme, an AAG1 form, with relevant scheme information on it, must exist, does not mean that the notional officer must be treated as being aware of the content of that information.

68. We have concluded that the hypothetical officer is not the embodiment of HMRC as a whole, and so cannot be treated in that way as having access to the content of the form AAG1. However, Mr Gordon submitted that the Tribunal was wrong in the way it interpreted s 29(6)(d)(i) TMA.

69. We have set out the legislation earlier, but the dispute in this connection is on what is meant by:

> "For the purposes of [s 29(5)] above, information is made available to an officer of the Board if –
>
> …
>
> (d) it is information the existence of which, and the relevance of which as regards the situation mentioned in [s 29(1)] above –
>
> (i) could reasonably be expected to be inferred by an officer of the Board from information falling within [s 29(6)(a) to (c)] above"

70. From this we can immediately conclude that the test is again an objective test, looking at what the hypothetical officer could reasonably infer from the taxpayer's return or any claim, and accompanying documents, or documents, accounts or

particulars produced or furnished by the taxpayer or his agent for the purpose of HMRC enquiries. The information is only treated as made available for s 29(5) purposes if both its existence and relevance could reasonably be inferred.

71. Mr Tidmarsh submitted that if information was to be inferred, the hypothetical officer must be able to infer what the information is. He referred us to passages from the judgments of Chadwick LJ and Arden LJ in *Langham v Veltema*. Lord Justice Chadwick had taken the view (at [48]) that the inspector could reasonably have been expected to be aware of what he would have discovered if he had called for information as the value of the property which then existed, namely the taxpayer's valuation reports. Lady Justice Arden (at [51], by contrast, said:

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

72. In *Revenue and Customs Commissioners v Household Estate Agents Ltd* [2008] STC 2045, Henderson J (at [33]) preferred the approach of Arden LJ, on the basis that it seemed to him to be more in accord with the wording of s 29(6) and the restrictive approach to its interpretation favoured by all three members of the Court of Appeal.

73. To illustrate the Taxpayers' case on this issue, Mr Gordon gave us an example of a white-space disclosure in a taxpayer's return to the effect that capital gains calculations had been based on a valuation report prepared by specialists in share valuation. He submitted that the hypothetical officer could infer from this, first, that there was in existence a valuation report, and secondly that the report explained the basis of some of the entries on the taxpayer's capital gains pages. Mr Tidmarsh took matters further, suggesting, by reference to the facts in *Swift*, that on this basis the hypothetical officer could be regarded as inferring the existence and relevance of the constitutional documents of the LLC.

74. It is clear that s 29(6) should be construed in a manner consistent with the purpose of the overall scheme of s 29(5). That purpose was described by Auld LJ in *Langham v Veltema* in the following terms:

> "It seems to me that the key to the scheme is that the Inspector is to be shut out from making a discovery assessment under the section only when the taxpayer or his representatives, in making an honest and accurate return or in responding to a s 9A enquiry, have clearly alerted him to the insufficiency of the assessment, not where the Inspector may have some other information, not normally part of his checks, that may put the sufficiency of the assessment in question. If that other information when seen by the Inspector does cause him to question the

> assessment, he has the option of making a s 9A enquiry before the discovery provisions of s 29(5) come into play. That scheme is clearly supported by the express identification in s 29(6) only of categories of information emanating from the taxpayer. It does not help, it seems to me, to consider how else the draftsman might have dealt with the matter. It is true, as Mr Sherry suggested, he might have expressed the relevant passage in s 29(5) as 'on the basis *only* of information made available to him', and the passage in s 29(6) as 'For the purposes of subsection (5) above, information is made available to an officer of the Board if, *but only if*,' it fell within the specified categories. However, if he had intended that the categories of information specified in s 29(6) should not be an exhaustive list, he could have expressed its opening words in an inclusive form, for example, 'For the purposes of subsection (5) above, information … made available to an officer of the Board … *includes any of the following*'."

75. On that basis, we do not consider that s 29(6)(d)(i) can have the wide meaning sought by the Taxpayers. That in our view would have the result that Mr Veltema's valuation report would have to have been inferred from the value inserted in his tax return, and would thus be contrary to what Arden LJ considered permissible. It would also have the clearly unintended consequence of enabling any document that could reasonably be assumed to exist effectively to be treated as if it were before the hypothetical officer. We reject that construction.

76. On the other hand, we do not accept Mr Tidmarsh's submission that the hypothetical officer must be able to infer the actual content of the information. If that had been the case, s 29(6)(d)(i) would not have referred expressly to the need to infer the existence and relevance of the information. Examples given by Mr Tidmarsh, in answer to questions from the Tribunal, to illustrate information which would be regarded as having been made available on this basis served only to illustrate that this interpretation would deprive the provision of practical meaning.

77. By way of illustration, Mr Tidmarsh suggested a case where a taxpayer claimed that he was non-resident on the basis of full-time employment outside the UK for a whole tax year. On the employee pages of the tax return he returned substantial UK employment income. It is said that, on the basis of s 29(6)(d)(i), an officer could reasonably infer that there is a significant employment in the UK, so as to justify the making of an assessment. In our view, this does not illustrate any meaningful application of s 29(6)(d)(i). The inference made by the officer is not one of the availability and relevance of information on which a s 29(5) conclusion could be based; it is the conclusion from the tax return itself. No other information is required than that in the tax return. The same analysis applies to a further example given by Mr Tidmarsh, where an officer was able to conclude, from the fact that all the directors of a company had UK addresses, that a company was not managed and controlled outside the UK. The information referred to in s 29(6)(d)(i) must relate to something more than the thought processes by which the officer would reasonably conclude that an assessment was justified.

78. The correct construction of s 29(6)(d)(i) is that it is not necessary that the hypothetical officer should be able to infer the information; an inference of the

existence and relevance of the information is all that is necessary. However, the apparent breadth of the provision is cut down by the need, firstly, for any inference to be reasonably drawn; secondly that the inference of relevance has to be related to the insufficiency of tax, and cannot be a general inference of something that might, or might not, shed light upon the taxpayer's affairs; and thirdly, the inference can be drawn only from the return etc provided by the taxpayer.

79. As we have described, the balance provided by s 29 depends on protection being provided only to those taxpayers who make honest, complete and timely disclosure. That balance would be upset by construing s 29(6)(d)(i) too widely. Inference is not a substitute for disclosure, and courts and tribunals will have regard to that fundamental purpose of s 29 when applying the test of reasonableness.

80. On this basis, we do not consider that, without more, the relevance of a valuation report that had not been provided by a taxpayer such as Mr Veltema to HMRC could reasonably be inferred. Whilst such a valuation report would clearly be relevant to value, it would not, in our view, be the case that its relevance to an insufficiency of tax could be inferred, unless there were some other information in the return that suggested that there was an insufficiency. Nor, for the same reason, do we consider that documents such as the constitutional documents of an entity could be inferred from the mere fact that the entity had a particular legal form. There would have to be something in the return or other relevant documents provided by the taxpayer that would reasonably lead the hypothetical inspector to infer that the constitutional documents were relevant to an insufficiency of tax.

81. That conclusion, in our judgment, follows from the terms of s 29(6)(d)(i) itself, construed purposively in accordance with the scheme of s 29 as a whole. There is in our view no ambiguity in that language such as to justify resort to *Hansard* in accordance with the tests laid down by Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593, at 640C. Accordingly, although Mr Gordon invited us to consider the debate on the Finance Bill 1994 in Standing Committee A on 15 February 1994 in the event of ambiguity, we do not need to do so to reach our conclusion on this issue.

82. We turn therefore to consider whether, in the light of our conclusion on the construction of s 29(6)(d)(i), the form AAG1 submitted by the promoters of the scheme should be regarded as information made available for the purpose of s 29(5). The SRN was included in each Respondent's tax return, but on a different page to the white space disclosures of the scheme and the pages setting out the capital gains computations and the figure for income on the surrender of the policy. We are, however, in no doubt that, first, the existence of the form AAG1 could reasonably have been expected to have been inferred by the hypothetical officer, and secondly, that the physical separation of the SRN number from other relevant entries on the tax return would not have prevented an officer from making the necessary link between them so as reasonably to infer the relevance of the form AAG1 to the insufficiency.

83. Mr Tidmarsh submitted that there was nothing in the tax returns, other than surmise, that connected the SRN with the claim for the allowable loss. The question is not, however, one of connection, but one of reasonable inference. Although the

hypothetical officer would have seen that the SRN was entirely separate from other entries in the return, it would have been reasonable for him to conclude, having regard to the claim for a loss without a concomitant gain or income from the policy, that the two were linked.

84. The circumstances of the form AAG1 in our view make it reasonable for its existence and relevance to be inferred. An officer would be aware of the significance of an SRN, and of the fact that a promoter would have been required, under s 308(1) of the Finance Act 2004, to have provided information, in the form AAG1, to HMRC. He would also be aware that the information would have to have been sufficient so as might reasonably be expected to enable an officer (that is, a hypothetical officer such as himself) to "comprehend the manner in which the proposal is intended to operate" (reg 3, Tax Avoidance Schemes (Information) Regulations 2004). Indeed, the form AAG1 in the instant case was rejected by HMRC until it was put in precisely that form. In our view, the form AAG1 is just the sort of information the availability and relevance of which might reasonably be inferred from the inclusion of the SRN in a return which also discloses tax effects consistent with tax planning.

85. The Taxpayers accordingly succeed on this element of their cross-appeal.

**Was the condition in s 29(5) fulfilled?**

86. The First-tier Tribunal decided (at [129]) that, applying the test in s 29(5) to the case where the notional officer was assumed to have made no enquiry of specialist colleagues and carried out no other research, the hypothetical officer should be treated as being aware that:

- the taxpayers realised capital losses in amounts roughly equivalent to the gains that they realised on the disposal of quoted investments, and indeed in significant amounts;
- those losses derived from transactions in insurance policies that were held for very short periods, not seemingly consistently with the two most obvious situations in which insurance policies might be taken out and held;
- the transactions in relation to the insurance policies oddly occasioned small actual losses, but were also treated, very much more surprisingly, as occasioning very large capital losses for tax purposes, in a figure greatly in excess of the actual small losses;
- the losses were said to derive from the fact that the amount received on the partial surrenders of the policies had been taken into account for the purposes of income tax, notwithstanding that no income had been declared as deriving from the policies

87. It may be noted that the tribunal referred to there being "no income" declared as deriving from the policies. In fact, some income was declared, but in very small

amounts. That minor error does not, in our view, detract from the findings of the tribunal in this respect.

88. The First-tier Tribunal also found that the text in the tax return had not been confined to summarising facts, but had given a sufficient indication of the tax thinking underlying the transaction for the tribunal to be able to "realise instantly precisely how it was thought that the scheme worked for tax purposes." The tribunal had been at pains not to consider the law in relation to schemes involving second-hand insurance policies, and on that basis to conclude nevertheless that the way in which the schemes worked was instantly obvious to it. The tribunal's conclusions in this respect were summarised at [31] of its decision. We need not refer to that in detail, nor to the detailed explanation which Mr Tidmarsh provided to us. We need only say that we accept that the tribunal had not properly understood the way this scheme worked, in particular the way in which a charge to income tax was sought to be avoided.

89. But in our view none of this matters. It serves only to illustrate the very point that the Chancellor and Moses LJ were making in *Lansdowne*. It is not necessary that the hypothetical officer should understand precisely how a scheme works, or any claimed tax treatment is said to arise. All that is needed is that from the information made available to the hypothetical officer he can reasonably be expected to be aware of the insufficiency of tax such as to justify an assessment.

90. In our judgment, as well as an officer being aware of the matters referred to above, amended in respect of the small amounts of income that were declared, he would also have been sufficiently aware of the law relating to second-hand insurance policies to be able to appreciate the unusual nature of the entries in the return, and he would have been aware of the High Court judgment in *Drummond*. Furthermore, as we have found, he would be treated by virtue of s 29(6)(d)(i) as having the information in the form AAG1.

91. Mr Tidmarsh argued that the judgment in *Drummond* was not something of which the hypothetical officer should reasonably be expected to be aware. He argued that this was a complex and sophisticated area of law, contrasting that with *Lansdowne*, where it was held that the matter in question ought to have caused no difficulty (see, for example, Moses LJ, at [60]). Mr Tidmarsh argued that, in *Drummond*, even in the courts different views had been taken. We ourselves consider that the decisions in *Drummond* are essentially consistent, but that is not material for this purpose. A detailed analysis, such as was undertaken in the appeal process, is not required in order that an officer can come to the view that there is an insufficiency so as to justify an assessment. As Moses LJ made clear in *Lansdowne* (at [69]), "awareness of an insufficiency does not require resolution of any potential dispute". There is no need for the hypothetical officer to engage with himself in the complex debate that might take place following the assessment. In our view, rejecting HMRC's submissions in this respect, the hypothetical officer is not to be shut out from awareness of *Drummond* by reason of some supposed limitation on his abilities and knowledge.

92. We accept that the test is not whether the officer should have opened an enquiry. There is a clear distinction between cases where the information made available to the officer merely raises questions, which can only be resolved by the obtaining of further information, and those where the available information provides awareness of an insufficiency that is sufficient to justify the making of an assessment. *Langham v Veltema* is an example of the former case; *Lansdowne* an example of the latter. Where the enquiry window remains open, it will often be the case that an officer, faced with a taxpayer's return that could itself justify an assessment, will open an enquiry in the normal course. That may either resolve an issue in favour of the taxpayer, or provide confirmation of the need to make an amendment to the taxpayer's return. Once the enquiry window has closed, that option is no longer available, but the mere fact that an officer might have made such enquiries had it been open for him to do so, does not mean that he cannot reasonably be expected to have been aware, from the information he does have available, of the insufficiency so as to justify the making of an assessment. The test is one of awareness, and not one of certainty or even probability. It is, as Moses LJ said in *Lansdowne* (at [70]), a matter of perception and of understanding, not of conclusion.

93. We do not accept that there is any overriding requirement that the information has to explain how the scheme works (although in this case we consider that would in any event be met by the availability of the form AAG1), nor that the information must specify, if it be the case, that the view adopted by the taxpayer is different from that taken by HMRC. It is a question of degree in all cases. In this case we take the view, in common with the First-tier Tribunal, that the factors the tribunal identified as being those the hypothetical officer would have known from the information made available to him (even disregarding the form AAG1) were of themselves sufficient so that the hypothetical officer should have been aware of the insufficiency. It is not necessary that the hypothetical officer should have been able to comprehend all the workings of the scheme, or the legal and factual arguments that might arise, or be able to form a reasoned view of those matters. Having regard to the knowledge and understanding that we consider the hypothetical officer might reasonably be expected to have, the difference between the allowable loss claimed and the income declared was enough, in our judgment, to justify an officer making the assessment.

94. When one also takes into account, as in our view is the correct approach, the information in the form AAG1 which is treated as having been made available to the hypothetical officer by inference under s 29(6)(d)(i), the hypothetical officer would all the more reasonably be expected to be aware of the insufficiency.

95. In all the circumstances, we conclude that, on the basis of the information made available to him before the closure of the enquiry window, an officer would have been reasonably expected to have been aware of the insufficiency of tax such as to justify an assessment. The condition in s 29(5) is not therefore fulfilled, and HMRC's appeal must fail.

**Decision**

96. In light of our conclusions:

(1) We allow the cross-appeal of the Taxpayers in part. We allow the cross-appeal in respect of s 29(6) TMA, but we dismiss the cross-appeal in relation to s 29(1).

(2) We dismiss HMRC's appeal.

**MR JUSTICE NORRIS**
**UPPER TRIBUNAL JUDGE ROGER BERNER**

**RELEASE DATE: 20 December 2012**