[2013] UKUT 0623 (TCC)

Appeal number FTC/46/2012

CAPITAL GAINS TAX – validity of a "discovery" assessment under section 29(1) of the Taxes Management Act 1970 - whether a "discovery" – whether conditions of section 29(4) and (5) of the Act satisfied

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

DAVID STEPHEN SANDERSON **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE NEWEY

Sitting in public in London on 16 and 17 October 2013

Mr Keith Gordon and Miss Ximena Montes Manzano, instructed by Bramhall solicitors, for the Appellant

Mr David Yates, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

5 1. This case concerns the validity of a "discovery" assessment made pursuant to section 29 of the Taxes Management Act 1970 ("the TMA"). The assessment in question relates to 1998-1999 but was not made until January 2005. In a decision dated 20 February 2012, the First-tier Tribunal (Judge John Brooks and Mr Peter Davies) upheld the assessment. However, the appellant, Mr 10 David Sanderson, appeals against that decision.

Basic facts

2. On 24 February 2003, HM Revenue and Customs ("HMRC") received from 15 Mr Sanderson his tax return for the year ended 5 April 1999. The return disclosed chargeable gains totalling nearly £1.8 million. The return also, however, stated that losses of more than £2 million had been incurred. The losses were almost entirely attributed to "Beneficial Interest in the Castle Trust". The following additional information was provided in the "white 20 space" in the return:

> "EUROPEAN AVERAGE RATE OPTION (TRADE NO. 82831)
>
> I am entitled to the loss of £1,825,663 by virtue of the provisions of 25 TCGA 1992 s.71(2). The loss is part of a loss of £1,000,000,000, which accrued to the Trustees of the Castle Trust on 8th April 1997, on the disposal of a European Average rate Option (Trade No. 82831) relating to shares in Deutsche Telecom.
>
> 30 BENEFICIAL INTEREST IN THE CASTLE TRUST
>
> On 24th November 1998, I purchased for a fee (part of which is contingently payable) from the Trustees of the Charter Trust 2.273% of their beneficial interest in the Trust Fund of the Castle Trust. The 35 interest determined on 25th November 1998, when I became absolutely entitled to receive from the Trustees of the Castle Trust the sum of £16.04."

Mr Sanderson was thus seeking to use arrangements referred to as the "Castle 40 Trust Scheme" to eliminate his exposure to capital gains tax.

3. A helpful description of the Castle Trust Scheme is to be found in *Corbally-Stourton v HMRC* [2008] STC (SCD) 907. In that case, Mr Charles Hellier, sitting as a Special Commissioner, explained the Castle Trust Scheme in these 45 terms:

"11. I find that scheme was intended to operate in the following manner:

(1) On 11 March 1997 Mr Tanreer Makhdumi executed a deed under Guernsey law settling £125,000 on Legis Trust of Guernsey as trustee of the Castle Trust. The principal beneficiary was the settlor's mother who was resident in Pakistan.

(2) It was expected by those involved in the promulgation of the scheme that, through the agency of Exco Bierbaum Securities GmbH, (a derivatives broker and member of the Frankfurt Stock Exchange) … the trustees would enter into two reciprocal derivative contracts. Under the first contract the trustees were to become obliged to make a set payment to the counterparty (PDR) if the average price of Deutsche Telecom Shares over the set life of the contract exceeded a set figure, and if the average was lower than that figure then the counterparty would make payment of the same sum to the trustees. Under the second contract the obligations to pay were the reverse.

(3) The terms of the derivative contracts expressed that both would expire on 8 April 1997 when settlement would be made. The set payment was £1 billion.

(4) On 4 April 1997 the trustees, through the agency of Exco, arranged to terminate the option which was then in the money, and in consequence £999,288,500 was to be paid by PDR to an account of the trustees with UBS. Because the trustees retained the other, out of the money, contract under which they had a contingent liability of £1 billion which would mature on 8 April 1997, the UBS bank account was assigned by way of security to PDR.

(5) On 7 April UK resident trustees were appointed in place of the Guernsey resident trustees.

(6) On 8 April 1997 the out of the money derivative matured and the trustees were to pay PDR £1 billion of which the vast majority would come from the £999,288,500 which was to have been paid to them on 4 April 1997.

12. The object of these transactions was to give rise to an allowable loss of £1 billion in the hands of the trustees when they were UK resident, but for the gain of £999,288,500 to fall outside the UK capital gains net—being realised by non-UK resident trustees for the benefit of non-UK resident beneficiaries. The next steps involved the parcelling up of the allowable loss and the making of arrangements to enable it to accrue to UK taxpayers. These arrangements relied on the provisions of s 71(2) TCGA as they stood prior to their

amendment in 1999. Under those provisions, where a person became absolutely entitled to trust property as against the trustees, any allowable loss which had accrued to the trustees which was represented in that property and could not be used by the trustee in the year in which the person became absolutely entitled was to be treated as accruing to the person who so became entitled. Thus if a taxpayer acquired an absolute interest in part of the trust property he would become entitled to part of the allowable loss which would otherwise have accrued to the benefit of the trustees.

13. This parcelling up and allocation was to take place by the following steps:

(i) later in 1997 three new trusts, the Charter Trust, the Magnus Trust, and the Zennith Trust were created;

(ii) the trustees of the Castle Trust made appointments of parts of the Castle Trust property to each of these new trusts. The appointments were made contingent upon Mr Makhdumi's mother surviving until noon on 25 November 1998;

(iii) the trustees of the three new trusts sold shares of their contingent interests in the Castle Trust to UK taxpayers;

(iv) on 25 November 1998, Mrs Makhdumi being still alive, the UK taxpayers became absolutely entitled as against the Castle trustees to parts of the Castle Trust property, and thus eligible under s 71(2) to inherit the unused allowable losses of the Castle Trust."

4. HMRC were aware of the Castle Trust Scheme by mid-1999, and it was the subject of investigation over an extended period by a team of officers drawn from the Special Compliance Office ("SCO") and Special Investigation Services. One of the officers was a Mr Peter Thackeray.

5. In July 1999, the SCO received from the Office of Supervision of Solicitors a list of names and addresses of individuals who had paid to purchase losses through the Castle Trust Scheme. As the list included Mr Sanderson, Mr Thackeray obtained his file. At that stage, Mr Sanderson's 1998-1999 tax return had not yet been submitted, and Mr Thackeray asked for it to be forwarded to him when the District Office received it. In 2000, someone else from the SCO checked HMRC's computer records and found that Mr Sanderson's 1998-1999 return had not been filed. In the event, it was not until the autumn of 2004 that Mr Thackeray became aware that Mr Sanderson's 1998-1999 return had been filed. At Mr Thackeray's request, Mr Sanderson's accountants, Upton Wilson, faxed him a copy of the return on 22 December 2004.

6. By then, it had been established that the Castle Trust Scheme was ineffective. It appears from the *Corbally-Stourton* decision (at [17]) that by early 2002 HMRC "had received information that there was no record of the transactions in the derivatives at Exco and that the counterparty, PDR, was connected to the Castle Trust trustees because PDR was a settlement settled by Mr Makhdumi". At all events, following negotiations between HMRC and the trustees of the Castle Trust a closure notice was issued on 27 November 2003 reducing their loss claim from £1,000,000,000 to nil. On 4 January 2004, Mr Thackeray wrote to all of the relevant taxpayers, including Mr Sanderson, to notify them of the closure notice and inform them of settlement proposals.

7. On 7 January 2004, Hanover Veriti Limited, which had been a promoter of the Castle Trust Scheme, informed Mr Sanderson in a letter as follows:

> "As you are aware, the Inland Revenue challenged the Castle Trust losses on the basis firstly that the transaction leading to the loss was in law, a sham and, secondly, that it lacked a commercial purpose. The Castle Trustee took advice from Leading Tax Counsel and he expressed the view that there was insufficient evidence and witnesses to show that the payments underlying the transaction were actually effected. He was, therefore, unable to advise the Trustee to continue with its challenge of the Inland Revenue. The Trustee (and the steering committee) has reluctantly accepted that advice."

8. At this stage, Mr Sanderson contacted Upton Wilson, who in turn, on 23 February 2004, sent an email to another firm of accountants, Haines Watts, asking for advice. Haines Watts, who (in common with Coutts Bank and KPMG) had been providers of the Castle Trust Scheme, replied on 26 February. Their email concluded:

> "At this stage I would suggest you do nothing on this matter until you hear from the Revenue. If an enquiry notice is issued or the matter is raised by them please let me know."

9. On 10 January 2005, Mr Thackeray wrote to inform Upton Wilson that he would be making a discovery assessment. The assessment at issue in these proceedings was issued on the following day.

The legislative framework

10. The power to make a "discovery" assessment is conferred by section 29(1) of the TMA. At the relevant time, this was in these terms:

> "If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
(b) that an assessment to tax is or has become insufficient, or
(c) that any relief which has been given is or has become excessive,

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

11. By virtue, however, of section 29(3) of the TMA, no discovery assessment is possible in respect of a year for which the taxpayer has delivered a self-assessment return unless one of the two conditions specified in the next subsections is satisfied. The first of these, contained in section 29(4), was that:

> "the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf."

The second condition is to be found in section 29(5). This states as follows:

> "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."

12. Section 29(5) of the TMA is supplemented by section 29(6). This provided as follows:

> "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) are notified in writing by the taxpayer to an officer of the Board."

The decision

13. The issues the First-tier Tribunal ("FTT") had to consider were summarised in these terms in its decision (at [23]):

> "(1) Whether there was a discovery by HMRC (s 29(1) TMA).
>
> (2) If so, as Mr Sanderson has made and delivered a return, whether:
>
> (a) the insufficiency of tax was attributable to the negligent conduct on the part of Mr Sanderson or anyone acting on his behalf (s 29(4) TMA); or
>
> (b) at the conclusion of the enquiry window for Mr Sanderson's 1998–99 return, an officer could not reasonably have been expected on the information available made available to him (as defined by s 29(6) TMA) to have been aware of the insufficiency of tax (s 29(5) TMA)."

14. The FTT answered issue (2)(a) in favour of Mr Sanderson. It stated (at [44]):

> "we do not consider that [Mr Sanderson] engaged in negligent conduct but … acted as a reasonable taxpayer exercising due diligence would have done."

It went on to conclude (at [45]):

> "as the insufficiency of tax was not due to the negligent conduct of Mr Sanderson or a person acting on his behalf the condition in s 29(4) has not been fulfilled."

15. The FTT decided the other issues against Mr Sanderson. With regard to issue (1), the FTT accepted the submission advanced on behalf of HMRC, taking the view (at [27]) that:

> "the fact that Mr Thackeray may have had sufficient evidence to reach a conclusion that there was an insufficiency of tax sooner than he did, does not, in our judgment, preclude him from reaching that conclusion and making a discovery at a later date."

16. As for issue (2)(b), the FTT considered the condition specified in section 29(5) to be satisfied. It stated (at [65]):

> "In the circumstances we find that, at the time the enquiry window closed, the hypothetical 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 of tax. We therefore find that the condition in s 29(5) TMA was fulfilled and that HMRC were entitled to raise the discovery assessment and agree with the special commissioner in *Corbally-Stourton* when he said ([2008] STC (SCD) 907, para 55):
>
> 'It seems to me that, however generally unfair it might seem that an inspector, who knew he could have assessed at the relevant time but did not, can raise a later assessment because the s 29(6) information was not sufficient on its own to enable him to reach that conclusion, it is impossible to read the legislation as not having that effect.'"

17. Mr Sanderson's appeal was accordingly dismissed.

The issues on the present appeal

18. Mr Sanderson now challenges the FTT's conclusions on issues (1) and 2(b), and HMRC have cross-appealed in relation to issue 2(a). Like the FTT, therefore, I need to address:

   (i) whether the disputed assessment was made following a "discovery" for the purposes of section 29(1) of the TMA;

   (ii) whether the insufficiency of tax is attributable to "negligent conduct on the part of the taxpayer or a person acting on his behalf" within the meaning of section 29(4) of the TMA. HMRC's case in this respect is now focused on the conduct of Upton Wilson;

   (iii) whether by the time he ceased to be entitled to give notice of intention to enquire into Mr Sanderson's 1998-1999 return an officer of HMRC could reasonably have been expected to have been aware from information within section 29(6) of the TMA that there was an insufficiency of tax.

19. I take these issues in turn below.

Section 29(1): Discovery

20. For an officer of HMRC to be able to make an assessment pursuant to section 29(1) of the TMA, he must "discover" an insufficiency. (Like judges in previous cases, I use the word "insufficiency" as shorthand for the contents of section 29(1)(a), (b) and (c) of the TMA.)

21. Guidance as to what the word "discover" means in this context is to be found in *Charlton v HMRC* [2012] UKFTT 770 (TCC), [2013] STC 866. In that case, the Upper Tribunal (Norris J and Judge Berner) said this (at [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."

22. Mr Keith Gordon, who appeared with Miss Ximena Montes Manzano for Mr Sanderson, submitted that there was no relevant discovery in the present case and, hence, that the assessment at issue is a nullity. Mr Gordon's case, in summary, is that HMRC (in general) and Mr Thackeray (in particular) were well aware of Mr Sanderson's participation in the Castle Trust Scheme before Mr Sanderson had even submitted his tax return and that, by the time he did so, they were also firmly of the view that the scheme did not achieve its objectives. The fact that Mr Thackeray may not have acted on what he knew does not mean, Mr Gordon said, that he discovered an insufficiency in 2004.

23. In contrast, Mr David Yates, who appeared for HMRC, stressed that Mr Thackeray did not even become aware that Mr Sanderson had filed his 1998-1999 return until October 2004. It is irrelevant (so it is said) that Mr Thackeray might have realised that Mr Sanderson had claimed losses on the strength of the Castle Trust Scheme had he kept track of the information held by HMRC.

24. As already mentioned, the FTT concluded that:

> "the fact that Mr Thackeray may have had sufficient evidence to reach a conclusion that there was an insufficiency of tax sooner than he did, does not, in our judgment, preclude him from reaching that conclusion and making a discovery at a later date."

I agree. As was stated in *Charlton*, "[a]ll that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment." In the present case, it newly appeared to Mr Thackeray in late 2004 that there was an insufficiency as regards Mr Sanderson's 1998-1999 return. It is true that Mr Thackeray had known earlier both that Mr Sanderson had bought losses through the Castle Trust Scheme and that the scheme was open to challenge. Mr Thackeray was not, however, focusing on Mr Sanderson and was unaware even of the filing of the 1998-1999 return, let alone its contents. While Mr Thackeray may have been alive to the possibility of Mr Sanderson relying on the losses he (Mr Sanderson) had bought when, say, he (Mr Thackeray) obtained Mr Sanderson's file in 1999, he will not have known before 2004 that the 1998-1999 return in fact included a loss claim. Even had he been aware that the return had been filed (which he was not), he could not have been certain until he saw it that Mr Sanderson had not decided against relying on the Castle Trust "loss" or to carry it forward to a later year. In the circumstances, the FTT was in my view amply justified in concluding that Mr Thackeray discovered the relevant insufficiency only in 2004.

Section 29(4): Negligent conduct

25. To explain HMRC's submissions on the section 29(4) point, I need to refer in more detail to the correspondence mentioned in paragraphs 7 and 8 above.

26. As stated above, Hanover Veriti's letter of 7 January 2004 informed Mr Sanderson that the trustee of the Castle Trust had accepted that it should not continue to contest HMRC's challenge to the Castle Trust Scheme. The letter concluded:

> "You will be aware that the Trustee retained a success fee in an escrow account. If your claim for losses was subject to an enquiry by the Inland Revenue and you will now be withdrawing that claim these funds will be refundable…. If however your loss claim is not under enquiry we would appreciate you confirming that correct disclosure was made on your tax returns and that the claim has been allowed."

27. Upton Wilson's email of 23 February 2004 to Haines Watts was in these terms:

> "Our above named client was involved in the Castle Trust loss scheme and claimed for the losses on his tax return for the 5th April 1999. However, his return for that year was not submitted to the Inland

Revenue until 20th February 2003 and not processed until 28th February 2003. We understand that the Revenue have therefore until 28th February 2004 to enquire into this return.

5 Given the letter received at this office from Hanover Veriti Ltd concerning another of our clients in the scheme, and the subsequent failure of the scheme, we should be grateful to receive your advice on the basis that Mr Sanderson does not receive an enquiry notice. Is there another way that the Inland Revenue can look at this at a later date?

10

In the event of an enquiry in the next week or so, will the same treatment apply to Mr Sanderson as to the clients already under enquiry?

15 If no enquiry is made, the Hanover Veriti Ltd letter requests confirmation that 'correct disclosure' was made on the clients tax return. We presume this relates to the standard wording supplied by Hanover Veriti. Please confirm if there was anything else specifically with regards to the trust losses that should be disclosed.

20

With regard to the 'claim being allowed', all that has been received is a self assessment acknowledgement which states the usual 'the tax return has been processed without any need for correction', does this suffice?

25 We should be grateful for clarification of the above any other advice you may have."

28. Haines Watts' reply of 26 February read as follows:

30 "Hanover Veriti papers did not indicate that this was your client and therefore their letter went straight to the client.

You will appreciate that we know little about your client and can therefore only comment generally.

35

I am surprised that the return was submitted so late as if it had gone in earlier the Revenue would have had difficulty challenging your clients claim for relief at this stage.

40 Where a return is submitted late, the enquiry window ends on the 12 month anniversary of the quarter day next following delivery…. The enquiry window where a return is submitted in Feb 2003 will therefore run through to 30 April 2004….

45 As Mr Sanderson's involvement is presumably now known to IR there must be a strong possibility that they will raise an enquiry notice. I see no reason if they do why the 'settlement' treatment available in other

> cases would not be equally available to Mr Sanderson if an enquiry is opened.
>
> We are not yet aware how the Revenue will look to deal with cases where the normal enquiry window has been missed. In particular, we do not know if they will seek to maintain that the circumstances are such that they can make a 'discovery' where the normal enquiry periods would not apply….
>
> As regards 'correct disclosures' if you used the one previously advised by Hanover Veriti this was based on leading tax Counsel advice and therefore the Revenue should accept that correct disclosure has been made. We do not know as yet of course whether the IR will challenge whether the recommended disclosures are sufficient to prevent them seeking to re-open under 'discovery' rules.
>
> At this stage I would suggest you do nothing on this matter until you hear from the Revenue. If an enquiry notice is issued or the matter is raised by them please let me know."

29. In keeping with this advice, no steps were taken by either Upton Wilson or Mr Sanderson himself to amend the 1998-1999 return, and the enquiry window closed at the end of April 2004 without HMRC having issued an enquiry notice.

30. HMRC argued before the FTT that the insufficiency of tax was attributable to negligent conduct on the part of Mr Sanderson. The FTT observed, however, as follows (at [43]):

> "It is clear, given the nature of the Scheme, that Mr Sanderson did take proper and appropriate advice in relation to the preparation and the disclosure on his return. Also following receipt of the Hanover Veriti Limited letter he sought the advice of his accountant who took and relied on the advice of Haines Watts to 'do nothing on this matter until you hear from the Revenue'."

The FTT went on to conclude that, in the circumstances, Mr Sanderson had not engaged in negligent conduct but acted as a reasonable taxpayer exercising due diligence would have done.

31. HMRC do not challenge the conclusion that Mr Sanderson was not himself negligent. They contend, however, that there was negligent conduct on the part of persons acting on Mr Sanderson's behalf, viz. Upton Wilson. It is suggested that it was negligent of Upton Wilson to advise Mr Sanderson not to alert the HMRC tax office dealing with his tax affairs, and/or amend his 1998-1999 return, when it was realised that the basis of his loss claim could not be sustained. The fact that Upton Wilson consulted Haines Watts is, HMRC

maintain, of no help to Mr Sanderson on this point since (a) Haines Watts were not independent but had been intimately involved in the promotion of the Castle Trust Scheme and (b) Upton Wilson's email exchange with Haines Watts was focused on what Mr Sanderson could get away with rather than what he was under a duty to do.

32. It is common ground that the FTT said little in its decision about whether Upton Wilson had been negligent. Mr Yates complained that the FTT had omitted to consider Upton Wilson's position. In contrast, Mr Gordon suggested that the FTT's decision reflected the way in which the case had been argued before it: there was, he said, no argument or evidence about Upton Wilson's conduct. In this respect, Mr Gordon's recollection differed from that of Mr Yates, who thought that he had questioned Upton Wilson's role before the FTT. I do not think I need to try to determine who is right since I did not understand Mr Gordon to contend that I should not allow HMRC to raise the issue before me.

33. As Mr Gordon pointed out, the FTT did state in its decision that the insufficiency of tax was "not due to the negligent conduct of Mr Sanderson <u>or a person acting on his behalf</u>" (emphasis added). Arguably, that involves a finding that Upton Wilson were not negligent which would be susceptible to challenge only on the limited grounds explained in *Edwards v Bairstow* [1956] AC 14 and *Procter & Gamble UK v Revenue and Customs Commissioners* [2009] EWCA Civ 407, [2009] STC 1990. I am content, however, to proceed on the basis that I should consider Upton Wilson's conduct afresh. I am as well placed to consider the point as the FTT since (a) Mr Thackeray was the only person to give evidence before the FTT and (b) none of the matters on which he was challenged is, as I understand it, relevant to whether Upton Wilson were negligent.

34. In *Moore v HMRC* [2011] UKUT 239 (TCC), [2011] STC 1784, Judge Bishopp, sitting in the Upper Tribunal, noted (at [15]) that there can be "no doubt that any taxpayer completing a self-assessment return has a duty to take care when doing so". If a taxpayer completes a return carelessly and too little tax is paid as a result, section 29(4) of the TMA will clearly be in point: the insufficiency will be attributable to negligent conduct on the part of the taxpayer. The position must be similar if, instead of filling out a return himself, a taxpayer entrusts the task to an adviser and that adviser is careless. It may well be that the adviser would have acted in breach of a duty of care to the taxpayer, but that would not be essential. What would matter would be that the adviser had failed to take proper care when undertaking the fulfilment of the taxpayer's responsibilities to HMRC.

35. Mr Yates argued that a taxpayer's duty of care does not end with the filing of his return. Mr Yates submitted that a taxpayer has a duty to correct matters if he learns that a claim for relief made in his return was ill-founded, at least if the error emerges before the (long) period allowed for making such a claim

has expired (as to which, see sections 42(9) and 43(1) of the TMA). In support of his contention, Mr Yates drew an analogy with the decision of the Court of Appeal in *With v O'Flanagan* [1936] 1 Ch 575. In that case, a representation made to induce the plaintiffs to enter into a contract was treated as continuing until the contract was signed. Lord Wright MR, with whom Romer LJ and Clauson J expressed agreement, said (at 584-585):

> "The underlying principle is also stated again in a slightly different application by Lord Blackburn in *Brownlie v. Campbell*. I need only quote a very short passage. Lord Blackburn says: 'when a statement or representation has been made in the *bonâ fide* belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on, and still more, inducing him to go on, upon a statement which was honestly made at the time when it was made, but which he has not now retracted when he has become aware that it can be no longer honestly persevered in.' The learned Lord goes on to say that would be fraud, though nowadays the Court is more reluctant to use the word 'fraud' and would not generally use the word 'fraud' in that connection because the failure to disclose, though wrong and a breach of duty, may be due to inadvertence or a failure to realize that the duty rests upon the party who has made the representation not to leave the other party under an error when the representation has become falsified by a change of circumstances. This question only occurs when there is an interval of time between the time when the representation is made and when it is acted upon by the party to whom it was made, who either concludes the contract or does some similar decisive act; but the representation remains in effect and it is because that is so, and because the Court is satisfied in a proper case on the facts that it remained operative in the mind of the representee, that the Court holds that under such circumstances the representee should not be bound."

36. On balance, however, I have not been persuaded that the insufficiency in the present case is attributable to negligent conduct on the part of Upton Wilson. It seems to me that, regardless of whether Mr Yates is right that a taxpayer has a duty to correct mistakes (as to which I do not think I need express a final view), it was reasonable for Upton Wilson in the particular circumstances of this case not to advise Mr Sanderson that he should contact HMRC in early 2004. My reasons include these:

(i) Taxpayers are required by statute to submit tax returns, and every such return will include, in accordance with section 8 of the TMA, a declaration by the person making the return that it is correct and complete to the best of his knowledge. In contrast, there is no statutory provision imposing an obligation on a taxpayer to tell HMRC about

something in a filed return that he subsequently finds to be erroneous. The most that can be said is that a failure to correct an error can potentially affect a taxpayer's exposure to penalties (see sections 95 and 97(1) of the TMA). There is thus no question of Upton Wilson having ignored a provision obliging a taxpayer to correct a return;

(ii) By 2004 it had not been held by any Court that a taxpayer has a duty to inform HMRC of past mistakes. (In fact, that remains the position today so far as I am aware.) Upton Wilson cannot therefore be said to have overlooked relevant case law;

(iii) I doubt whether the time limits applicable to loss claims are of any real relevance. I cannot see why the fact that Mr Sanderson could have delayed submitting any loss claim should affect whether he had an obligation to tell HMRC about a claim he had already submitted;

(iv) Section 9ZA of the TMA allows a person to amend a return up to 12 months after the filing date. In the present case, however, the filing date for Mr Sanderson's 1998-1999 return had long since passed by 2004 (see section 8(1A) of the TMA). Mr Sanderson was not therefore entitled to amend his return after he received the Hanover Veriti letter of 7 January 2004;

(v) Upton Wilson consulted Haines Watts and were advised by them to "do nothing on this matter until you hear from the Revenue". While Haines Watts may not have been independent, Upton Wilson will have been entitled to regard them as having particular expertise in relation to matters relating to the Castle Trust Scheme;

(vi) It was reasonable to assume that HMRC were already aware of Mr Sanderson's participation in the Castle Trust Scheme, it having been referred to in Mr Sanderson's 1998-1999 return.

37. In the circumstances, HMRC's cross-appeal fails.

Section 29(5): Awareness of insufficiency

38. Mr Gordon disputes the FTT's view that the section 29(5) condition was satisfied in the present case. Mr Gordon argued that an officer could reasonably have been expected to be aware by the relevant date of an insufficiency. Mr Yates, on the other hand, maintained that the FTT arrived at the correct conclusion.

Case law

39. I was referred to a number of cases in which sections 29(5) and 29(6) of the TMA have been considered: *Langham v Veltema* [2004] EWCA Civ 193,

[2004] STC 544; *HMRC v Household Estate Agents Ltd* [2007] EWHC 1684 (Ch), [2008] STC 2045; *Corbally-Stourton v HMRC*; *HMRC v Lansdowne Partners LLP* [2011] EWCA 1578, [2012] STC 544; and *Charlton v HMRC*.

5 40. The points emerging from the authorities seem to me to include the following:

(i) The "officer" referred to in section 29(5) is not any actual officer of HMRC but a hypothetical one. He is to be assumed to have "reasonable knowledge and understanding" (*Lansdowne Partners*, at [50]). In
10 *Charlton*, the Upper Tribunal concluded (at [65]):

"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
15 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
20 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
25 embodiment of the hypothetical officer, with assumed characteristics at a typical or average level, but by reference to the circumstances of the particular case";

(ii) The 29(5) condition will be satisfied unless the hypothetical officer
30 could have been reasonably expected to be aware of an "actual insufficiency". As Auld LJ explained in *Langham v Veltema* (at [33]), the statutory test in section 29(5):

"is concerned, not with what an Inspector could reasonably have been
35 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
40 check whether there is such an insufficiency…."

In *Charlton*, the Upper Tribunal observed (at [92]):

"There is a clear distinction between cases where the information made
45 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";

(iii) As that last quotation suggests, what matters is whether the information deemed to be available to the hypothetical officer would have justified him in raising an assessment to make good the insufficiency. Morritt C said in *Lansdowne* (at [56]):

"I do 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 made available to him justifies the amendment to the tax return he then seeks to make. Any disputes of fact or law can then be resolved by the usual processes."

In the same case, Moses LJ said (at [69]):

"awareness of an insufficiency does not require resolution of any potential dispute. After all, once an amendment is made, it may turn out after complex debate in a succession of appeals as to the facts or law, that the profits stated were not insufficient."

Moses LJ went on (at [70]):

"the question is whether the taxpayer has provided sufficient information to an officer, with such understanding as he might reasonably be expected to have, to justify the exercise of the power to raise the assessment to make good the insufficiency."

Moses LJ left open, however, at [69]:

"the possibility that, even where the taxpayer has disclosed enough factual information, there may be circumstances in which an officer could not reasonably be expected to be aware of an insufficiency by reason of the complexity of the relevant law".

In *Charlton*, the Upper Tribunal commented (at [89]):

"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";

(iv) The focus is on what the officer could have been reasonably expected to be aware of <u>from the information listed in section 29(6)</u>. "[H]owever generally unfair it might seem that an inspector who knew he could

have assessed at the relevant time but did not, can raise a later assessment because the s 29(6) information was not sufficient on its own to enable him to reach that conclusion, it is impossible to read the legislation as not having that effect" (*Corbally-Stourton*, at [55]);

(v) With regard to section 29(6)(d)(i), the Upper Tribunal explained as follows in *Charlton* (at [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."

41. In *Langham v Veltema*, two members of the Court of Appeal differed on one point. Henderson J referred to this in the *Household Estate Agents* case (at [33]):

"Chadwick and Arden LJJ both agreed with the judgment of Auld LJ, but there was one additional point on which they disagreed. Chadwick LJ expressed the view (see [2004] STC 544 at [48], 76 TC 259 at [48]) that the inspector could reasonably have been expected to be aware of what he would have discovered if he had called for the information as to the value of the asset which then existed. However, Arden LJ disagreed and emphasised (see [2004] at [51], 76 TC 259 at [51]) that 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) to (c), ie the return and accompanying documents supplied by the taxpayer. She continued:

> '[51] 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.'

On this point I respectfully prefer the approach of Arden LJ, which seems to me to be more in accord with the wording of the subsection and the restrictive approach to its interpretation favoured by all three members of the Court of Appeal."

42. I should perhaps add:

(i) Some of the reasoning of the Special Commissioner in the *Corbally-Stourton* case was doubted in *Lansdowne* (see especially Moses LJ at [70]);

(ii) The *Charlton* case had not yet reached the Upper Tribunal when the FTT released its decision in the present case, and, while the Upper Tribunal upheld the FTT's decision in *Charlton*, it adopted significantly different reasoning.

The significance of Mr Sanderson's tax return

43. It is clear from section 29(6)(a) of the TMA that the information made available to an officer for the purposes of section 29(5) includes information contained in the taxpayer's tax return for the relevant year. It is accordingly common ground that Mr Sanderson's 1998-1999 return is to be treated as having been available to the hypothetical officer.

44. Mr Gordon argued that the information in that return was of itself more than sufficient to entitle the hypothetical officer to raise an assessment in respect of the insufficiency as at 30 April 2004 (when HMRC ceased to be entitled to give notice of an intention to enquire into the return). The officer would, Mr Gordon argued, have been justified in making an assessment removing the effect of the loss claim on the strength of the contents of the tax return.

45. The features of the tax return to which Mr Gordon drew attention included these:

(i) The disparity between the size of the loss to which Mr Sanderson claimed to be entitled (viz. £1,825,663) and the income Mr Sanderson said that he had received from the Castle Trust (viz. £16.04);

(ii) The fact that the loss was of comparable size to, and thus in effect cancelled out, the gain reported in the return;

(iii) The fact that the loss could be seen to be derived from an asset that Mr Sanderson had held for just a day;

(iv) The fact that the loss was stated to be part of a loss of an exceptionally large round sum (viz. £1 billion); and

(v) The fact that the £1 billion loss was attributed to the disposal of a derivative.

46. Mr Gordon also suggested that the hypothetical officer considering Mr Sanderson's tax return would have realised that section 71 of the Taxation of Chargeable Gains Tax Act 1992 ("the TCGA"), to which there was reference in the return, had been radically overhauled by the Finance Act 1999 to counter abuse. Mr Gordon noted, too, that Mr Thackeray accepted in cross-examination before the FTT that "it would have been obvious even to the most junior officer in the local tax office that any losses claimed under the Castle Trust scheme ought to be treated with care".

47. Mr Gordon argued that, in the circumstances, it would have been appropriate for the hypothetical officer to make an assessment on the basis of the principle derived from the decision of the House of Lords in *WT Ramsay Ltd v IRC* [1982] AC 300. Lord Nicholls of Birkenhead explained the *Ramsay* case in these terms in *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, [2005] STC 1:

> "29 The *Ramsay* case … liberated the construction of revenue statutes from being both literal and blinkered. It is worth quoting two passages from the influential speech of Lord Wilberforce. First, at p 323, on the general approach to construction:
>
> 'What are "clear words" is to be ascertained upon normal principles: these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded.'
>
> 30 Secondly, at pp 323-324, on the application of a statutory provision so construed to a composite transaction:
>
> 'It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded.'
>
> 31 The application of these two principles led to the conclusion, as a matter of construction, that the statutory provision with which the court was concerned, namely that imposing capital gains tax on chargeable gains less allowable losses was referring to gains and losses having a commercial reality ('The capital gains tax was created to operate in the real world, not that of make-belief') and that therefore:
>
> 'To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by

a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, there is not such a loss (or gain) as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function.' (p 326)

32 The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311, 320, para 8: 'The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.'"

48. In a passage endorsed by the House of Lords in the *Barclays Mercantile* case, Ribeiro PJ said this about the *Ramsay* principle in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46, (2004) 6 ITLR 454 (at [35]):

"[T]he driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

49. Mr Yates submitted that Mr Sanderson's tax return would not on its own have revealed an "actual insufficiency" to an officer. He pointed out that the return did not disclose a number of the features of the Castle Trust Scheme that are apparent from the explanation of it quoted in paragraph 3 above. Among other things, the return made no mention of the existence of a reciprocal derivative contract (let alone the fact that the two such contracts matured in different financial years), of the switch from a Guernsey trustee to a UK trustee or of the fact that the £1 billion loss was almost entirely funded from a matching gain. For there to have been any question of an officer invoking the *Ramsay* principle, he would (Mr Yates said) have had to know at the very least that there was a reciprocal contract. It would have been that that would have enabled him to contend that the £1 billion "loss" (and hence Mr Sanderson's share of it) lacked commercial reality.

50. I accept that submission. It seems to me that the tax return might have alerted the hypothetical officer to the fact that Mr Sanderson was seeking to take advantage of a tax scheme, but it did not contain enough information to make the officer aware of an "actual insufficiency" or to justify the making of an assessment. Mr Yates said that any assessment would have been based on a mere whim. It would at any rate have been speculative. The mere fact that Mr Sanderson's loss was attributable to a tax scheme would not have meant that it was open to challenge. The hypothetical officer would have been "aware that some tax schemes work and deliver the benefits claimed" (to use words of Mr Hellier in *Corbally-Stourton*, at [66]). The fact that it had been felt necessary to amend section 71 of the TCGA in 1999 might have led an officer to believe that the scheme Mr Sanderson used was one of those that (prior to the passing of the Finance Act 1999) worked.

51. Mr Gordon sought to derive assistance from a passage in the *Charlton* decision in which (at [93]) the Upper Tribunal said that "the difference between the allowable loss claimed and the income tax declared was enough … to justify an officer making the assessment". The Upper Tribunal was effectively saying (so Mr Gordon submitted) that, if a tax return makes it obvious that a tax scheme has been undertaken, that will of itself entitle an officer to make an assessment. I agree, however, with Mr Yates that this is to place a weight on the passage which it cannot bear. The Upper Tribunal's words related to the particular facts before it and were not intended to represent a general rule.

<u>Other information held by HMRC</u>

52. Mr Gordon's fallback position was that information that HMRC held about the Castle Trust Scheme should be attributed to the hypothetical officer. Mr Gordon described his submissions to this effect as "more audacious".

53. One of Mr Gordon's arguments was to the effect that the hypothetical officer is to be treated as having been imbued with "the belief generally held within HMRC that 'the Castle Trust arrangements' represented 'a capital gains tax avoidance scheme where artificial capital losses have been created … transferred to UK trusts that have allowed their beneficiaries to use them'". However, neither FTT's decision nor the evidence before it seems to me to sustain the assertion that a belief about the Castle Trust Scheme was "generally held" within HMRC. The reality will surely have been that relatively few members of HMRC's staff knew anything about the scheme. Mr Gordon's submission also appears to me to run counter to the case law. In *Charlton*, for example, the Upper Tribunal rejected (at [65]) any suggestion of the hypothetical officer being "regarded as the embodiment of HMRC as a whole". It went on:

> "[The hypothetical officer] 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."

54. Mr Gordon's other argument relied on section 29(6)(d)(i) of the TMA. As already mentioned, that provides for the hypothetical officer to be treated as having had made available to him "information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above [i.e. the insufficiency] … could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above". Mr Gordon submitted that, in the present case, the hypothetical officer would have known from the 1998-1999 return (in other words, from information falling within section 29(6)(a)) that Mr Sanderson had participated in a tax scheme involving the Castle Trust and could reasonably be expected to infer that HMRC would have other information about the Castle Trust which would be of relevance.

55. *Charlton* involved a comparable issue. In that case, the taxpayer had included in his tax return the reference number ("SRN") that a scheme in which he had taken part had been given by HMRC in the context of the "DOTAS" (disclosure of tax avoidance schemes) rules. The Upper Tribunal concluded that the hypothetical officer was to have attributed to him the form AAG1 by which the promoters of the scheme had notified HMRC of it. The Upper Tribunal said this (at [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."

56. Earlier in its decision, however, the Upper Tribunal had said this about section 29(6)(d)(i):

> "[78] … [T]he 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."

57. On balance, I do not consider that section 29(6)(d)(i) of the TMA applies in the present case. My reasons include these:

(i) Section 29(6) is principally concerned with information supplied by the taxpayer. The idea is evidently that (in the absence of negligence on the part of the taxpayer or a person acting on his behalf) HMRC should not be able to go behind a return after the enquiry window has closed if the taxpayer himself provided HMRC with information from which the existence of an insufficiency could reasonably be deduced. In the present case, however, Mr Sanderson disclosed nothing about the Castle Trust Scheme beyond what was contained in his 1998-1999 return;

(ii) While section 29(6)(d)(i) is not confined to information supplied by the taxpayer, the authorities establish that the provision is to be construed restrictively (see *Langham v Veltema*, *Household Estate Agents* and *Charlton*);

(iii) Mr Gordon's approach to section 29(6)(d)(i) could involve the hypothetical officer having attributed to him information that it would be difficult or impossible for an officer processing a tax return to discover within an organisation as large as HMRC (for example, as to the affairs of other taxpayers and from returns dating back a number of years). It would also appear to imply that the hypothetical officer could be deemed to have available to him information in the hands of the taxpayer that the taxpayer had himself chosen not to supply to HMRC. Parliament is unlikely to have intended such consequences;

(iv) It seems to me that, for section 29(6)(d)(i) to apply, the hypothetical officer must be able to infer (and not just guess at) the existence of specific information (albeit not its actual content) of definite relevance to the existence of an insufficiency. That was the case in *Charlton*: the fact that there was an SRN inevitably meant that a form AAG1 had been lodged, and that form was bound to contain information about the scheme in question. In contrast, an officer considering Mr Sanderson's 1998-1999 return could, I think, have done no more than surmise that HMRC would somewhere have other information about the Castle

Trust and that, if it did, it could cast light on Mr Sanderson's loss claim. In my view, that is not good enough for the purposes of section 29(6)(d)(i).

5 58. In short, I do not accept the submission that information that HMRC held about the Castle Trust Scheme should be attributed to the hypothetical officer.

Conclusion

10 59. In the circumstances, I shall dismiss Mr Sanderson's appeal.

15 **Mr Justice Newey**

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