[2018] UKUT 0159 (TCC)

Appeal number: UT/2016/0216

INCOME TAX – discovery assessment – s 29 TMA – meaning of "discover" – subjective and objective tests – whether Revenue officer believed that there had been an insufficiency of tax – whether officer merely had grounds for suspicion – whether it was open to officer to believe that there had been an insufficiency of tax – whether losses claimed to have arisen in a soccer academy trade were available for sideways loss relief – ss 64 and 72 ITA – whether taxpayer carried on a trade – whether on a commercial basis and with a view to or realistic expectation of profit – ss 66 and 74 ITA – whether tax-generated losses –s 74B ITA

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

JEROME ANDERSON **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE MORGAN
JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, The Rolls Building, Fetter Lane, London EC4 on 22 and 23 March 2018

Keith Gordon, instructed by Wilson Wright LLP, for the Appellant

Aparna Nathan, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This is the appeal of Mr Jerome Anderson from the decision of the First-tier Tribunal (Judge Rachel Short and Mrs Rebecca Newns) ("FTT") released on 10 August 2016 and published under the reference [2016] UKFTT 565 (TC). By that decision, the FTT dismissed Mr Anderson's appeal against a discovery assessment issued to him on 2 May 2012 under s 29 of the Taxes Management Act 1970 ("TMA"). The FTT decided, first, that the discovery assessment had been validly made, and secondly that Mr Anderson had not been entitled to the losses he had claimed either under s 64 of the Income Tax Act 2007 or s 72 of that Act.

2. The losses claimed by Mr Anderson were said to have arisen from a trade carried on by Mr Anderson as a sole trader. The trade was said to involve Mr Anderson carrying on activities to acquire a stake in young African footballers whom he would then seek to market to major European clubs.

Background

3. There was no dispute as to the background facts. Those were concisely set out by the FTT at [9] – [18] which can conveniently be repeated here:

> "9. Mr Anderson is a well known football agent. He has worked as a football agent for thirty years and represented some well known players. His work as a football agent is carried out through his company, Jerome Anderson Management Limited.
>
> 10. Mr Anderson was introduced to a soccer academy in South Africa run by Bafana Soccer Developments Limited, a Jersey company ('Bafana') firstly by Mr Steptoe, who set up Bafana and later, as a business opportunity, by Mr Caisley, an independent financial adviser. Bafana had been set up as a training scheme in South Africa to nurture young footballing talent and to promote their prospects in the lucrative European footballing leagues and make money by the successful transfer of talented players.
>
> 11. Bafana was financed by external individuals such as Mr Anderson, who were given the opportunity in return for providing finance to pick players who were being trained at Bafana, securing an interest in any future transfer fees made by Bafana from the players picked.
>
> 12. In his personal capacity Mr Anderson put £2,943,000 into Bafana in January 2009 and picked 3 players in July 2009 from the Bafana academy; Ayanda Patosi, Devon Saal and Armien Campbell, from a list of twenty players provided by Bafana.
>
> 13. Mr Anderson's investment was financed through a loan to him from a Jersey based entity, Maddox Limited. That loan was entered into on 6 January 2009 for an amount of £2,850,000. First and second repayments were due in March 2009 and June 2010 equal to one and two nineteenths respectively of the amount borrowed.

> 14. Mr Anderson's tax return for the 2008-9 tax year, filed on 28 January 2010 included a claim for £3,002,772 of losses described as in relation to 'Bafana Soccor' and a business of football development, which commenced on 6 January 2009.
>
> 15. Bafana went into administration in 2011. Mr Anderson did not make any significant profits from the Bafana Scheme.
>
> 16. HMRC identified six footballers who had participated in what they described as an 'undisclosed tax avoidance scheme' in 2008-9 involving a football academy in South Africa, the 'Bafana Scheme'. HMRC became aware of Mr Anderson's involvement in the Bafana Scheme in the course of its enquiries into other scheme participants.
>
> 17. HMRC raised a discovery assessment on 2 May 2012 under s 29 TMA 1970 which disallowed all of the £3,002,772 losses claimed by Mr Anderson.
>
> 18. Mr Anderson appealed to this Tribunal on 28 May 2012."

Mr Anderson's appeal to this Tribunal

4. Mr Anderson appeals against the FTT's decision with the permission of this Tribunal. Although permission was given on 10 separate grounds, there are essentially two limbs to his appeal. First, in relation to the validity of the discovery assessment, he argues that the FTT erred in law in deciding that there had been a "discovery" by HMRC as required by s 29(1) TMA and that the discovery assessment had been validly made. Secondly, and in any event, Mr Anderson submits that the FTT made errors of law in determining that he was not carrying on a trade and was otherwise precluded from claiming the losses against his general income and gains.

Discovery

The power to make a discovery assessment

5. The discovery assessment of 2 May 2012 was made, or purportedly made, pursuant to s 29 TMA. The power to make such an assessment is conferred by subsection (1) of s 29 but it is useful to set out the whole of the section. Section 29 in the form in which it was on 2 May 2012 was in these terms:

> "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, unauthorised payments under section 208 of the Finance Act 2004 or surchargeable unauthorised payments under section 209 of that Act or relevant lump sum death benefit under section 217(2) of that Act which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax have not been assessed, or
> >
> > (b) that an assessment to tax is or has become insufficient, or
> >
> > (c) that any relief which has been given is or has become excessive,

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

(2) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) [...] in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

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

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

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

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

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

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

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

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

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

(7) In subsection (6) above—

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

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

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

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

(7A) The requirement to fulfil one of the two conditions mentioned above does not apply so far as regards any income or chargeable gains of the taxpayer in relation to which the taxpayer has been given, after any enquiries have been completed into the taxpayer's return, a notice under section 81(2) of TIOPA 2010 (notice to counteract scheme or arrangement designed to increase double taxation relief).

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant year of assessment is a reference to—

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made."

6. The power to make a discovery assessment has existed for a long time. As will be seen, two of the cases to which it is relevant to refer in the following discussion were decided by reference to the power, conferred on the surveyor by s 52 of the Taxes Management Act 1880, to take steps to correct or amend an earlier assessment to tax. When s 29 TMA was originally enacted it contained, at s 29(3), a power for an

inspector or the Board to raise an assessment to tax where he or it discovered an insufficiency of tax.

7. Self-assessment was introduced by the Finance Act 1994. The provisions as to self-assessment and as to the power of the Revenue to enquire into a self-assessment were summarised by Patten LJ in *Sanderson v Revenue and Customs Commissioners* [2014] STC 915 at [10]-[12], as follows:

> "10 Section 29 TMA is designed to deal with inaccuracies in the process of self-assessment. The taxpayer (in the case of an individual) is required by section 8 TMA to make and file a return containing the information which is reasonably required in order to establish the amounts of income and capital gains tax in which he is chargeable and, for that purpose, to deliver with the return such accounts and other documents relating to the information as may be reasonably required. The return must include a self-assessment of the amounts in respect of which the taxpayer is chargeable on the basis of the information provided and taking into account any reliefs claimed: section 9(1) . It must also include a declaration that the return is, to the best of the taxpayer's knowledge, correct and complete: see section 8(2) .
>
> 11 The taxpayer's obligation is therefore to provide a correct assessment of his tax liabilities and to support that assessment with such information as may be necessary to substantiate the figures. The Revenue has power under section 9ZB to amend a return in order to correct obvious errors of principle and calculation. There is also an unlimited power under section 9A to enquire into a section 8 return within the time limits specified in section 9A(2). In the present case, this was the quarter day next after the first anniversary of the delivery of the return. An inquiry extends to: "anything contained in the return, or required to be contained in the return, including any claim or election included in the return": see section 9A(4) .
>
> 12 Section 9C TMA gives an officer power to amend the self-assessment return during an inquiry in order to prevent the loss of tax but where, as in this case, no inquiry was commenced within the section 9A(2) time limit or an inquiry was closed then the Revenue's only power to amend the return is by way of discovery assessment under section 29."

8. With the introduction of self-assessment, s 29 TMA was significantly amended, in particular, for the purpose of introducing safeguards for the benefit of the taxpayer. The position was explained by Moses LJ in *Tower MCashback LLP v Revenue and Customs Commissioners* [2010] STC 809 at [12]-[18] and he added at [24]:

> "24 As I have already observed, apart from a closure notice, and the power to correct obvious errors or omissions, the only other method by which the Revenue can impose additional tax liabilities or recover excessive reliefs is under the new s.29. That confers a far more restricted power than that contained in the previous s.29. The power to make an assessment if an Inspector discovers that tax which ought to have been assessed has not been assessed or an assessment to tax is insufficient or relief is excessive is now subject to the limitations

> contained in s.29(2) and (3) (s.29(1)). S.29(2) prevents the Revenue making an assessment to remedy an error or mistake if the taxpayer has submitted a return in accordance with ss.8 or 8A and the error or mistake is in accordance with the practice generally prevailing when that return was made. S.29(3) prevents the Revenue making a discovery assessment under s.29(1) unless at least one of two conditions is satisfied (s.29(3)). The prohibition applies unless the undercharge or excessive relief is attributable to fraudulent or negligent conduct (s.29(4)) or having regard to the information made available to him the Inspector could not have been reasonably expected to be aware that the taxpayer was being undercharged or given excessive relief (s.29(5). There are statutory limitations as to the time at which the sufficiency or otherwise of the information must be judged. These provisions underline the finality of the self-assessment, a finality which is underlined by strict statutory control of the circumstances in which the Revenue may impose additional tax liabilities by way of amendment to the taxpayer's return and assessment."

9. In the present case, the enquiry window closed on 28 January 2011. There are time limits as to when a discovery assessment under section 29 can be made. The general position, provided by s 34 TMA, is that an assessment may not be made more than four years after the end of the year of assessment to which it relates. The period of four years is extended to six years in a case where the loss of tax was brought about carelessly by the taxpayer (s 36(1) TMA) and is extended to twenty years where the loss of tax is brought about deliberately by the taxpayer (s 36(1A) TMA). The discovery assessment in the present case was made on 2 May 2012 in relation to the 2008/2009 year of assessment and was therefore within the general four year period prescribed by s 34 TMA.

The meaning of "discover"

10. Although the current s 29 TMA is in many respects in different terms from its predecessors, the present s 29(1) continues to use the wording: "[i]f an officer of the Board or the Board discover".

11. The concept of a "discovery" by an officer was considered in detail by the Upper Tribunal (of which Judge Berner was a member) in *Charlton v Revenue and Customs Commissioners* [2013] STC 1033 where many of the earlier cases were reviewed. In the present appeal, it is not in dispute that the concept of a "discovery" by an officer involves the application of a subjective test, as to the officer's state of mind, and an objective test as to whether it is open to an officer to have that state of mind.

12. Mr Gordon for Mr Anderson submits that the discovery assessment made on 2 May 2012 was premature. He submits that the officer (Ms Lampard) who made that assessment either did not have the necessary subjective belief for the making of an assessment, alternatively she could not properly have formed the necessary belief at that time. Mr Gordon submits that on 2 May 2012 the position in relation to a possible challenge to Mr Anderson's self-assessment was far too speculative to enable a discovery assessment to be made. He submits that the result is that the discovery

assessment of 2 May 2012 was invalid. He goes on to submit that because there was no further discovery assessment after 2 May 2012 and because it is now too late (by reason of s 34 TMA) to make a new discovery assessment, Mr Anderson cannot be made to pay more tax than that assessed in his self-assessment. Accordingly, the findings of the FTT on Mr Anderson's ability to claim relief for his alleged trading losses are simply irrelevant to Mr Anderson's tax liability.

13. Ms Nathan submits that the findings of fact made by the FTT show that the officer had the requisite subjective belief that there was an insufficiency of tax and that her belief was a reasonable belief.

14. The submissions of counsel as to the subjective and objective tests for the power to raise a discovery assessment make it necessary to review once again some of the earlier cases on this subject. In that review we will focus on what the cases have to say about the relevant tests. In the passages which follow, we will highlight in bold the statements which may throw light on the relevant subjective and objective tests.

15. The relevant case law begins with the decision of the Divisional Court in *R v Kensington Income Tax Commissioners* [1913] 3 KB 870. That case ultimately went on appeal to the Court of Appeal and to the House of Lords ([1914] 3 KB 429 and [1916] 1 AC 215 respectively) and the decision of the Divisional Court was reversed on other grounds. The decision of the Divisional Court in *Kensington Income Tax Commissioners* was then considered and applied by the Divisional Court in *R v Bloomsbury Income Tax Commissioners* [1915] 3 KB 768. The judgment of Lord Reading CJ in this case, at pp 779-800, summarised what had been held in the earlier case in this way:

> "Our judgment in this case must depend upon the meaning we attribute to the language of certain sections of the statutes relating to income tax. By s. 52 of the Taxes Management Act, 1880, "If the surveyor discovers that any properties or profits chargeable to the duties have been omitted from such first assessments, or that any person so chargeable has not made a full and proper or any return, or has not been charged to the said duties, or has been undercharged in the said first assessments, or has obtained and been allowed from and in such first assessments any allowance, deduction, abatement, or exemption not authorised by the Tax Acts, then" under sub-s. 2, as regards duties chargeable under Sched. D, the additional Commissioners shall make an additional first assessment on any such person in such sum as they think ought to be charged on him subject to objection by the surveyor and to appeal. What meaning is to be given to the word "discovers" in the section? Is it sufficient that the surveyor honestly arrives at the conclusion based upon the material then before him that the applicant carried on business with Jackson within the district and therefore had not made a full and proper return under Sched. D? Or must the facts be established by sufficient legal evidence to justify the conclusion of the surveyor? This question was decided in *Rex v. Kensington Income Tax Commissioners*. Bray J. was of opinion that the words "if the surveyor discovers" mean "**if the surveyor comes to the conclusion from the examination he makes and from any information he may choose to**

> **receive**"; Avory J. thought that the word "discovers" in this section means "**has reason to believe**"; Lush J. took the word as equivalent to "**finds**" or "**satisfies himself**." Although the decision in the case was reversed by the Court of Appeal, the reversal was upon other grounds, and no doubt was expressed as to the interpretation given to the words in question. In fact Pickford L.J. said that he saw no reason to dissent from the above views expressed in the Divisional Court."

16. In *Bloomsbury Income Tax Commissioners*, Avory J considered whether the court could interfere with an honest belief by the surveyor that there was an insufficiency of tax and he said, at p 791:

> "The Court of Appeal having decided that prohibition will lie to the Commissioners at this stage, I think it might be the duty of the Court to interfere if it were shown that they had proceeded or were about to proceed on any erroneous view of the law, but having come to the conclusion which I have already expressed, it appears to me that in the present case such a contention can only succeed **if it were shown that there were no grounds upon which the surveyor or the Commissioners could honestly have believed that the applicant was chargeable, and in my opinion, although there may be difficult questions of fact and of law to be determined upon an appeal to the General Commissioners, and, if necessary, upon a special case to be stated by them, it is impossible to say that the surveyor and the additional Commissioners may not upon the material before them have honestly come to the conclusion that the applicant was chargeable and that the assessment was just and proper**, and there is no ground at this stage for suggesting that the General Commissioners on appeal would not decide the disputed questions according to law."

17. In *Bloomsbury Income Tax Commissioners*, Lush J also considered the court's power to interfere with the belief of the surveyor and said, at 797:

> "I therefore think that the surveyor has jurisdiction to report if he "discovers" that a person is chargeable, and the additional Commissioners have power then to assess, and that if the person assessed is aggrieved his only remedy is to appeal. The facts can then be ascertained. **If there is no evidence to justify the assessment and the General Commissioners go wrong in holding that there is, or if they make any other mistake in law**, their decision can be set right by appeal on a case stated, or possibly then by prohibition."

18. The meaning of the word "discover" was considered by the House of Lords in *Cenlon Finance Co Ltd v Ellwood* [1962] AC 782. The House rejected the argument that a discovery entailed the ascertainment of a new fact. That case was considered by the Upper Tribunal in *Charlton* and the relevant part of the decision in *Charlton* is considered below.

19. The decisions of the Divisional Court in *R v Kensington Income Tax Commissioners* and in *R v Bloomsbury Income Tax Commissioners* were heavily influenced by the scheme of the legislation being considered in those cases. The

scheme of the current version of the Taxes Management Act 1970 is significantly different from the scheme of the earlier legislation. That might have led to an argument that the earlier cases were no longer authoritative and that the meaning of the word "discover" should be considered afresh in the context of the current legislation. In fact, the courts have not adopted that approach. Indeed, in *Hankinson v Revenue and Customs Commissioners* [2012] 1 WLR 2322, Lewison LJ said at [15]:

> "15 … I begin with section 29(1). This subsection comes into operation if an officer of the board "discovers" an undercharge. The word "discovers" in this context has a long history. Although the conditions under which a discovery assessment can be made have been tightened in recent years following the introduction of the self-assessment regime, the meaning of the word "discovers" in this context has not changed. In *R v Kensington Income Tax General Purposes Comrs*, [1913] 3 KB 870, 889 Bray J said that it meant "comes to the conclusion from the examination he makes and from any information he may choose to receive"; and Lush J said, at p 898, that it was equivalent to "finds" or "satisfies himself"."

20. The approach taken in *Hankinson* to the statutory interpretation of the word "discover" in s 29 TMA appears to have been based on the view that before the enactment of the TMA, the word "discover" had an established meaning and when the same word was used in s 29 TMA as originally enacted, the word was intended to have its established meaning. Similarly, the amendments made to s 29 TMA following the introduction of self-assessment were not meant to change the meaning of the word "discover" which continued to be used.

21. In *Charlton*, the Upper Tribunal considered the earlier authorities and, in relation to the specific point which had been argued, said at [28]:

> "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 [this was a reference to *Cenlon v Finance Co Ltd v Ellwood* [1962] AC 782 at 799-800], 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."

22. The Upper Tribunal in *Charlton* also said at [37]:

> "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."

23. Paragraph [37] of the decision in *Charlton* was applied by the Upper Tribunal in *Sanderson v Revenue and Customs Commissioners* [2014] STC 915 at [20]-[24] in relation to what was meant by "discover" in s 29(1). When *Sanderson* was considered by the Court of Appeal, [2016] STC 638, Patten LJ referred to the power under s 29(1), in this way:

> "25 I do not accept that sections 29(1) and (5) import the same test and that the Revenue's power to raise an assessment is therefore directly dependent on the level of awareness which the notional officer would have based on the section 29(6) information. **The exercise of the section 29(1) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on all the available information at the time when the discovery assessment is made.** Section 29(5) operates to place a restriction on the exercise of that power by reference to a hypothetical officer who is required to carry out an evaluation of the adequacy of the return at a fixed and different point in time on the basis of a fixed and limited class of information. The purpose of the condition is to test the adequacy of the taxpayer's disclosure, not to prescribe the circumstances which would justify the real officer in exercising the section 29(1) power. Although there will inevitably be points of contact between the real and the hypothetical exercises which sections 29(1) and (5) involve, the tests are not the same."

24. Since the introduction of self-assessment, there have been comparatively few decisions on the meaning of s 29(1) TMA but there have been rather more as to the meaning and effect of s 29(5) and 29(6) TMA. The principal authorities on s 29(5) and (6) are, now, *Hankinson v Revenue and Customs Commissioners* [2012] 1 WLR 2322, *Revenue and Customs Commissioners v Lansdowne Partners Ltd Partnership* [2012] STC 544 and *Sanderson v Revenue and Customs Commissioners* [2016] STC 638. Although a detailed discussion of the decisions on s 29(5) and 29(6) is not necessary for present purposes, it is helpful to refer to some of the propositions established by those authorities, taken together with the decision in *Charlton* on s 29(1). As will be seen, the decisions identify differences between what is involved under s 29(1) and what is relevant for s 29(5) and 29(6). We consider that the following propositions are now established by the various authorities:

(1) s 29(1) refers to an officer (or the Board) discovering an insufficiency of tax;

(2) the concept of an officer discovering something involves, in the first place, an actual officer having a particular state of mind in relation to the relevant matter; this involves the application of a subjective test;

(3) the concept of an officer discovering something involves, in the second place, the officer's state of mind satisfying some objective criterion; this involves the application of an objective test;

(4) if the officer's state of mind does not satisfy the relevant subjective test and the relevant objective test, then the officer's state of mind is insufficient for there to be a discovery for the purposes of subsection (1);

5 (5) s 29(1) also refers to the opinion of the officer as to what ought to be charged to make good the loss of tax; accordingly, the officer has to form a relevant opinion and such an opinion has to satisfy some objective criterion;

(6) although s 29(1) directs attention to the position of the actual officer, s 29(5) refers to the position of a hypothetical officer: *Sanderson v Revenue and Customs Commissioners* [2016] STC 638 at [25];

10 (7) although there might be some points of contact between the real and the hypothetical exercises required by subsection (1) and subsection (5) respectively, the tests for the two exercises are different: *Sanderson* at [25];

(8) the actual officer referred to in s 29(1) is not required to consider whether the test required for s 29(5) is satisfied: *Hankinson v Revenue and Customs* 15 *Commissioners* [2012] 1 WLR 2322;

(9) for the purposes of s 29(5), one question is what a hypothetical officer would have been "aware of";

(10) for the purpose of s 29(5), the meaning of "awareness" does not require the hypothetical officer to resolve points of law nor to forecast and discount 20 what the response of the taxpayer might be; it is enough that the information made available to the hypothetical officer would justify an amendment to the tax return: *Revenue and Customs Commissioners v Lansdowne Partners Ltd Partnership* [2012] STC 544 at [56]; "awareness" is a matter of perception and understanding, not of conclusion; in order to be "aware" of something, it is not 25 necessary to form a conclusion that the thing is more probable than not: *Lansdowne Partners* at [70]; and

(11) the purpose of s 29(5) is to provide for a cut-off point beyond which an actual officer is not able to raise a discovery assessment; an actual officer is not entitled to raise a discovery assessment under subsection (1) if a hypothetical 30 officer could have been reasonably expected at an earlier defined point in time, on the basis of the information made available to him before that time, to be aware of the matter which the actual officer claims to have discovered under subsection (1); this cut-off point is not reached if before the defined point in time a hypothetical officer would only have had "a mere whim" that there was 35 an insufficiency of tax or could only have "speculated" as to that possibility: the Upper Tribunal in *Sanderson* [2014] STC 915 at [50], upheld on appeal, [2016] STC 638 at [35].

The subjective test

25. It is clear that before an officer makes a discovery assessment, he must have 40 formed a certain state of mind. The question raised on this appeal is: what must the officer think or believe? The three judges in the Divisional Court in *R v Kensington Income Tax Commissioners* all agreed that it was not necessary for the officer to reach a conclusion which was justified by sufficient legal evidence. However, when

describing what was required for this purpose, the three judges expressed themselves in different terms which do not appear to us to describe the same test.

26. Any test which is devised as to the necessary subjective belief on the part of the officer must be a practical and workable test. The expression of the test has to recognise that at the time when an officer thinks that it is desirable to make a discovery assessment, the officer may appreciate that in certain respects he may not be in possession of all of the relevant facts. Further, the officer may foresee that a discovery assessment might give rise to questions of law some of which might not be straightforward.

27. In *Revenue and Customs Commissioners v Lansdowne Partners Ltd Partnership*, when considering the meaning of "be aware of" for the purposes of s 29(5), it was said that "awareness" was a matter of perception not conclusion and that it was possible to say that an officer was "aware of" something even when he could not at that stage resolve points of law and even though he was not then aware of all of the facts which might turn out to be relevant. Although the word "discover" and the phrase "be aware of" cannot be treated as synonyms, we consider that if it is possible to be aware of something when one does not know all of the relevant facts and one cannot foretell how relevant points of law will be resolved, it cannot be said to be premature for an officer to "discover" that same something even when he knows he is not in possession of all of the relevant facts and does not know how relevant points of law will be resolved.

28. In *Sanderson*, Patten LJ described the power under section 29(1) in this way:

> "The exercise of the section 29(1) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on all the available information at the time when the discovery assessment is made."

We consider, with respect, that this test is in accordance with the earlier authorities. This passage describes the test somewhat briefly because, of course, that case concerned s 29(5) rather than s 29(1). Having reviewed the authorities, we consider that it is helpful to elaborate the test as to the required subjective element for a discovery assessment as follows:

> "The officer must believe that the information available to him points in the direction of there being an insufficiency of tax."

That formulation, in our judgment, acknowledges both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not.

The objective test

29. The authorities establish that there is also an objective test which must be satisfied before a discovery assessment can be made. In *R v Bloomsbury Income Tax Commissioners*, the judges described the objective controls on the power to make a discovery assessment. Those controls were expressed by reference to the principles of

public law. In *Charlton* at [35], the Upper Tribunal referred to the need for the officer to act "honestly and reasonably".

30. The officer's decision to make a discovery assessment is an administrative decision. We consider that the objective controls on the decision making of the officer should be expressed by reference to public law concepts. Accordingly, as regards the requirement for the action to be "reasonable", this should be expressed as a requirement that the officer's belief is one which a reasonable officer could form. It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer's belief was not reasonable.

The decision of the FTT in relation to the discovery assessment

31. The FTT began its consideration of the issue as to the discovery assessment by referring to the relevant statutory provisions and listing the authorities to which it had been referred. At [23], it stated that Mr Anderson's case before the FTT was that there had not been a reasonable basis for the making of a discovery assessment as at 2 May 2012.

32. The FTT then described the evidence it had received on this issue. The discovery assessment had been made by a Ms Lampard. She did not give evidence. Instead, evidence for HMRC was given by another officer, Mr Old, who had oversight of Ms Lampard at the material time. The FTT then referred to some of the evidence given by Mr Old and listed the documentary evidence provided to it in relation to this issue.

33. The FTT then summarised the submissions made by the parties. The FTT repeated that Mr Anderson's case was that there was no reasonable basis for Ms Lampard to believe that there had been an insufficiency of tax. Mr Gordon on behalf of Mr Anderson had submitted by reference to *Charlton* that the officer had, honestly and "reasonably", to believe that there had been an insufficiency of tax. It was said that although Ms Lampard may have had "reason to suspect" an insufficiency of tax, there was not enough information to enable her to form the required reasonable belief. It was submitted that Ms Lampard ought to have asked questions, using her powers under Schedule 36 to the Finance Act 2008, but instead she had inappropriately rushed to make a discovery assessment.

34. The FTT then recorded the submissions on behalf of HMRC which referred to the material which was relied upon by Ms Lampard and which, it was submitted, was sufficient to enable her to form the belief that there had been an insufficiency of tax.

35. The FTT then made the following specific findings:

> "47 On the basis of the evidence provided to the Tribunal we make the following findings of fact:
>
> (1) HMRC were first aware of the Bafana Scheme in March 2010.

> (2) Mr Anderson's tax return of 28 January 2010 referred to Bafana Soccor (*sic*), but no further details were stated in the "white space" "*Box 78 loss to be carried back to 2007/8 pursuant to ITA 2007 s 64(2)(b)*".
>
> (3) HMRC were first aware of Mr Anderson's potential involvement in the Bafana Scheme from 1 September 2011 as a result of the receipt of the student allocation sheet referring to Mr Anderson as a participant.
>
> (4) Schedule 36 third party notices were issued on 27 January 2012, to J Anderson Limited, Kemp Thornton and ProVision. Responses were received by HMRC which confirmed that Mr Anderson was a participant in the Bafana Scheme on 24 February 2012, including emails referring to Jerome Anderson and his late payment of a second loan instalment to Maddox and concerns that he had not yet been to South Africa to visit Bafana (the email between Mr Lerner and Mr Steptoe of 27 May 2010).
>
> (5) HMRC did not refer in any of their correspondence with the Appellant to the evidence which they had which suggested that Mr Anderson had not spent sufficient time working on Bafana to substantiate his claim for trading losses."

36. At [51], the FTT expressed its conclusion that HMRC did have sufficient information when the discovery assessment was made to form the basis of a reasonable belief that the losses claimed by Mr Anderson were not due. The FTT then gave more detailed reasons for this conclusion. In the course of giving those reasons, the FTT said the following:

> "51 … We do not consider that HMRC are required to be certain of all relevant facts in order to have a reasonable belief for the purposes of s 29(1). They just need to be sure of enough facts to enable them to determine a reasonable conclusion by the application of logic.
>
> 53 The premise of the discovery legislation is that HMRC have not been given sufficient information from the taxpayer in the first place to be sure what the correct assessment is. The "reasonable belief" required for the purposes of s 29(1) is something more than a suspicion but less than certain knowledge."

37. The FTT then stated:

> "54 At the time when the discovery assessment was issued HMRC knew about the Bafana Scheme: It is correct, as the Appellant argues, that a discovery has to be about an under-assessment for this particular taxpayer, Mr Anderson. However it is our view that facts about other taxpayers can indicate something about Mr Anderson's tax position, if there is a reason to believe that he is a member of a group of taxpayers all of whom have done the same thing; which was true here.
>
> 55 HMRC had evidence of orchestration and central planning of the Bafana Scheme and knew that Mr Anderson was a participant. It was not unreasonable for HMRC to conclude that scheme had been sold to and implemented by all participants in a similar way. The fact that ultimately facts relating to Mr Anderson's participation in the scheme

> turned out to be different than other footballing participants is not relevant to the reasonableness of HMRC's conclusion at this time."

38. The FTT then made further findings to which we refer as the following paragraphs were criticised in the grounds of appeal to the Upper Tribunal:

> "56 HMRC also knew some facts about Mr Anderson's involvement in the scheme from the list of student talent provided in September 2011, which was confirmed by emails received under the Schedule 36 notices of January 2012. At this stage they did not know all the details of Mr Anderson's implementation of the scheme, but they knew from the email of 27 May 2010 that Mr Anderson's advisers had concerns about how much time he had spent in South Africa, suggesting that like other participants in the Bafana Scheme, Mr Anderson's involvement also suffered from implementation issues.
>
> 57 We do not accept the Appellant's extrapolation from the statements made in the *Sanderson* case, which were made in the context of the test in s 29(5) not the test in s 29(1), that for the purposes of s 29(1) knowledge of involvement in a tax planning scheme cannot be enough to form a reasonable basis for a discovery assessment.
>
> …
>
> 66 The Appellant says that the discovery assessment was based on a suspicion not a belief. A suspicion becomes a belief when it is based on logical conclusions derived from what is known. Our view is that even on the basis that all HMRC knew in early May 2012 was that the Bafana Scheme existed, that it was an orchestrated scheme, that its participants included Mr Anderson and that the scheme had implementation issues, that was sufficient to form the basis of a "reasonable belief" that there had been an under-assessment. It was a reasonable and logical conclusion on the basis of what HMRC knew about the Bafana Scheme and Mr Anderson's participation in it, that Mr Anderson had claimed losses derived from the scheme to which he was not entitled.
>
> 67 In fact, contrary to what the Appellant tried to suggest, Ms Lampard did have some specific information about Mr Anderson's own implementation of the Bafana Scheme derived from the emails sent during the summer of 2010 (in particular the email from Mr Steptoe of 27 May 2010) to support her belief that Mr Anderson, like the other participants in the scheme, had claimed trading losses which were not due."

The appeal

39. The grounds of appeal criticised certain of the findings set out in paragraphs [56], [57], [66] and [67] of the decision of the FTT. The grounds of appeal challenged the FTT's conclusion that Ms Lampard had a reasonable basis for her belief that there had been an insufficiency of tax.

40. In the course of Mr Gordon's oral submissions, we suggested that a dispute as to whether there had been a "discovery" potentially involved two issues. The first

potential issue related to what the officer actually believed and whether that belief satisfied the subjective test for a "discovery". The second issue was whether that belief satisfied the objective test for a "discovery". Mr Gordon then asked us to find that Ms Lampard did not actually believe that there had been an insufficiency of tax because she only had a suspicion that there might have been an insufficiency of tax. He also submitted that it was not reasonable for Ms Lampard to believe that there had been an insufficiency of tax. The submission as to Ms Lampard's actual belief related to a matter which was not directly investigated at the FTT nor was it the subject of a ground of appeal. Against that, it might be said that the essential case put forward at the hearing before the FTT was that the only reasonable belief one could form was that there was a reason to suspect an insufficiency of tax and it was implicit in that case that that was the only belief which Ms Lampard actually held.

Conclusion on the discovery assessment

41. Because of the way in which Mr Anderson's case was put before the FTT, there was no clear express finding by the FTT as to the state of Ms Lampard's mind although the FTT expressly held that it was reasonable for Ms Lampard to believe that there had been an insufficiency of tax. It therefore seems to be implicit that the FTT held that she actually believed that which it was reasonable to believe.

42. Mr Gordon took us to the evidence which was before the FTT. On the basis of that evidence, it is clear that Ms Lampard did believe that there was an insufficiency of tax. Her belief went beyond mere suspicion of that matter. At the very least, we consider that it was open to the FTT as the fact-finding tribunal to make the findings of fact which it made. If we now apply the subjective test which we identified earlier, namely whether Ms Lampard believed that the information available to her pointed in the direction of there being an insufficiency of tax, we can clearly conclude that that test was satisfied.

43. The FTT asked itself whether Ms Lampard's belief that there had been an insufficiency of tax was a reasonable belief. It appears that the FTT applied a wholly objective test as to whether her belief was reasonable. We were taken to the evidence before the FTT and, at the very least, we conclude that it was open to the FTT to make that finding on that evidence. However, it seems to us that the FTT applied a stricter test than was necessary. If we apply what we consider to be the correct test, namely, whether Ms Lampard's belief was one which a reasonable person could form on the information available to her, then we would conclude that a reasonable person, acting on that information, could form the belief which she had formed. Indeed, it is obvious that the FTT would also have held that this lower test was satisfied.

44. In the course of argument, submissions were made as to whether a higher or a lower threshold for the concept of "discovery" would be helpful to HMRC. It was suggested by Mr Gordon that if the threshold were too low that might cause a problem for HMRC in practice because when an officer made a discovery which came within s 29(1) TMA, the result might be that HMRC had to act upon that discovery and could not allow time to go by lest the discovery should become "stale" with the result that HMRC would be disabled from making a discovery assessment in reliance upon it. In

Charlton, this possibility was referred to but it did not arise on the facts of that case: see at [37]. Later cases have also considered the possibility of a discovery becoming "stale": see *Pattullo v Revenue and Customs Commissioners* [2016] STC 2043 and *Revenue and Customs Commissioners v Tooth* [2018] UKUT 0038. In the second of these cases, the Upper Tribunal did say that the taxpayer should be protected from HMRC relying upon a stale discovery: see at [79](7)(a).

45. There is no issue as to "staleness" in the present case. Indeed, Mr Anderson's case was that the discovery assessment was premature as there had not been a discovery by 2 May 2012. For that reason, we did not hear any submissions as to the possibility of a discovery becoming stale. In those circumstances, we prefer not to express any further view, one way or the other, on that possibility. However, we do comment that even if such a possibility exists, it does not affect our conclusion as to the correct expression of the subjective and the objective tests relevant to the concept of a discovery.

46. We therefore dismiss the appeal in so far as it challenges the FTT's conclusion that the discovery assessment of 2 May 2012 was valid.

Availability of loss relief

47. Mr Anderson's claim is for what is colloquially known as "sideways loss relief", that is to say the ability to set certain losses against general income or chargeable gains. Such relief is available in certain cases if various conditions are met.

The law

48. The general provision allowing the deduction of trading losses from general income is s 64 of the Income Tax Act 2007 ("ITA") which at the relevant time materially provided as follows:

> "(1) A person may make a claim for trade loss relief against general income if the person—
>
> (a) carries on a trade in a tax year, and
>
> (b) makes a loss in the trade in the tax year ("the loss-making year").
>
> (2) The claim is for the loss to be deducted in calculating the person's net income—
>
> (a) for the loss-making year,
>
> (b) for the previous tax year, or
>
> (c) for both tax years.
>
> (See Step 2 of the calculation in section 23.)
>
> (3) If the claim is made in relation to both tax years, the claim must specify the tax year for which a deduction is to be made first.

> (4) Otherwise the claim must specify either the loss-making year or the previous tax year.
>
> (5) The claim must be made on or before the first anniversary of the normal self-assessment filing date for the loss-making year.
>
> (6) Nothing in this section prevents a person who makes a claim specifying a particular tax year in respect of a loss from making a further claim specifying the other tax year in respect of the unused part of the loss.
>
> (7) This section applies to professions and vocations as it applies to trades.
>
> (8) This section needs to be read with—
>
> (a) section 65 (how relief works),
>
> (b) sections 66 to 70 (restrictions on the relief),
>
> (ba) sections 74A to 74D (general restrictions on relief),
>
> ..."

49. It can be seen that a fundamental condition for the application of sideways loss relief is that the claimant must be carrying on a trade in the tax year in question and the loss must be made in that trade. In this case, the discovery assessment was made, in part, on the basis that HMRC did not accept that Mr Anderson was carrying on the asserted trade.

50. Section 64 is subject to a number of express restrictions. One is that there must not only be a trade in which the loss is made, but the trade must be commercial in the sense provided for by s 66 ITA:

> "(1) Trade loss relief against general income for a loss made in a trade in a tax year is not available unless the trade is commercial.
>
> (2) The trade is commercial if it is carried on throughout the basis period for the tax year—
>
> (a) on a commercial basis, and
>
> (b) with a view to the realisation of profits of the trade.
>
> (3) If at any time a trade is carried on so as to afford a reasonable expectation of profit, it is treated as carried on at that time with a view to the realisation of profits.
>
> (4) If the trade forms part of a larger undertaking, references to profits of the trade are to be read as references to profits of the undertaking as a whole.
>
> (5) If there is a change in the basis period in the way in which the trade is carried on, the trade is treated as carried on throughout the basis period in the way in which it is carried on by the end of the basis period.
>
> (6) The restriction imposed by this section does not apply to a loss made in the exercise of functions conferred by or under an Act.

(7) This section applies to professions and vocations as it applies to trades."

51. HMRC also say that, to the extent that Mr Anderson's activities are held to be a trade, that trade was neither carried on in the relevant period on a commercial basis, nor with a view to the realisation of profits in the trade.

52. A similar relief is provided by s 72 ITA in the case of early trade losses, namely those which arise either in the first tax year in which the trade is carried on or in any of the next three tax years. Unlike the normal trade loss relief, such losses are available for sideways loss relief for the three tax years prior to the year of the loss, and not just the previous tax year:

> "(1) An individual may make a claim for early trade losses relief if the individual makes a loss in a trade—
>
> (a) in the tax year in which the trade is first carried on by the individual, or
>
> (b) in any of the next 3 tax years.
>
> (2) The claim is for the loss to be deducted in calculating the individual's net income for the 3 tax years before the one in which the loss is made (see Step 2 of the calculation in section 23).
>
> (3) The claim must be made on or before the first anniversary of the normal self-assessment filing date for the tax year in which the loss is made.
>
> (4) This section applies to professions and vocations as it applies to trades.
>
> (5) This section needs to be read with—
>
> (a) section 73 (how relief works),
>
> (b) section 74 (restrictions on the relief unless trade is commercial etc),
>
> (ba) sections 74A to 74D (general restrictions on relief),
>
> …"

53. Section 72, and early trade losses relief, has its own restriction by reference to the commercial nature of the trade. That restriction is contained in s 74 ITA, which materially provides:

> "(1) Early trade losses relief for a loss made by an individual in a trade in a tax year is not available unless the trade is commercial.
>
> (2) The trade is commercial if it is carried on throughout the basis period for the tax year—
>
> (a) on a commercial basis, and
>
> (b) in such a way that profits of the trade could reasonably be expected to be made in the basis period or within a reasonable time afterwards.

…”

54. It can be seen therefore that whereas, in the case of trade loss relief, the commerciality restriction in s 66 requires that there be a view to the realisation of profits of the trade without reference to time, the corresponding provision in s 72, in relation to early trade losses relief, imports a further requirement that profits are to be reasonably expected either in the basis period or within a reasonable time afterwards. As with trade loss relief, HMRC do not accept that Mr Anderson was carrying on a trade, and if he was they do not accept that the trade was commercial.

55. A further restriction on both trade loss relief and early trade losses relief is contained in s 74B ITA:

> “(1) This section applies if—
>
> > (a) during a tax year an individual carries on a trade, otherwise than as a partner in a firm, in a non-active capacity (see section 74C),
> >
> > (b) the individual makes a loss in the trade in that tax year, and
> >
> > (c) the loss arises directly or indirectly in consequence of, or otherwise in connection with, relevant tax avoidance arrangements.
>
> (2) No sideways relief or capital gains relief may be given to the individual for the loss (but subject to subsection (5)).
>
> (3) In subsection (1) “relevant tax avoidance arrangements” means arrangements made by the individual the main purpose, or one of the main purposes, of which is the obtaining of a reduction in tax liability by means of sideways relief or capital gains relief.
>
> (4) In subsection (3) “arrangements” includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable).
>
> (5) This section has no effect in relation to any loss that derives wholly from qualifying film expenditure (see section 74D).
>
> (6) Subsection (10) of section 74A (capital gains relief) applies for the purposes of this section.”

56. Capital gains relief means the treatment of a loss as an allowable loss under s 261B of the Taxation of Chargeable Gains Act 1992 (“TCGA”). Such a loss may be claimed to the extent that relief is available and claimed under s 64 ITA (trade loss relief, but not early trade losses relief; see also s 71 ITA), and the relief is not otherwise used in calculating net income for the year or for the purpose of any other relief.

57. The meaning, for the purpose of s 74B ITA, of “non-active capacity” is given by s 74C ITA, which relevantly provides:

> “(1) For the purposes of sections 74A and 74B an individual carries on a trade in a non-active capacity during a tax year if the individual—

(a) carries on the trade at a time during the year, and

(b) does not devote a significant amount of time to the trade in the relevant period for the tax year.

(2) For the purposes of this section an individual devotes a significant amount of time to a trade in the relevant period for a tax year if, in the relevant period, the individual spends an average of at least 10 hours a week personally engaged in activities of the trade and those activities are carried on—

(a) on a commercial basis, and

(b) with a view to the realisation of profits as a result of the activities.

…"

58. To the extent that trade loss relief or early trade losses relief would otherwise be available to Mr Anderson, HMRC's case is that s 74B precludes the availability of any such relief.

Was Mr Anderson carrying on a trade?

59. After analysing the evidence, both oral and documentary, the FTT concluded that Mr Anderson's activities did not constitute a trade. The FTT had regard to those activities, which included Mr Anderson having meetings with Mr Mike Steptoe, who managed the Bafana Soccer Academy, spending time watching certain DVDs during March and April 2009, picking three players in which he was to have a financial interest in July 2009 and meetings with other football contacts in London and Italy to talk about the Bafana opportunity.

60. The FTT recognised, at [164], that there was no reason why activities of the kind carried on by Mr Anderson in this connection could not amount to a trade. The FTT considered that the question would depend on the facts of any particular case. On the facts, the FTT came to the view, at [198], that Mr Anderson's activities were more akin to those of an investor in a market comprising young African footballers, but with no substantial active day to day involvement in the activity. It held, at [199], that Mr Anderson's activities were more analogous to "an investor picking stocks to invest in, rather than a trader who is creating value in those stocks by adding value to a company on a day to day basis". Mr Anderson's activities, found the FTT, did not amount to a trade.

61. In Mr Anderson's grounds of appeal, Mr Gordon criticised the FTT's conclusion in this respect on a number of bases. It was argued that the FTT based its conclusion on irrelevant factors, including the amount of time spent by Mr Anderson personally and the fact that some components of the activities were outsourced. The grounds also sought to identify particular errors of law in the FTT's decision, namely:

(1) Failing, at [179], to recognise that a trade may be conducted by an individual who outsources all the activities of a trade. The grounds suggested taking what was described as an extreme example, that is a company, which

would not undertake any activities personally but would leave all activities to human agents. Furthermore, it was submitted, there are many trading enterprises where the owner (and therefore the trader) is busy undertaking other entrepreneurial activity, whilst leaving the trade in the hands of employees and/or third parties to whom the activities are outsourced.

(2) Taking into account, at [180], the irrelevant consideration as to what was "typical in this market", for which the FTT had no evidence in any event.

(3) Taking into account, again at [180], concerns expressed about the lack of time spent by Mr Anderson in South Africa, and contrary to the evidence attributing those concerns (which had been expressed by Mr Steptoe) to Mr Anderson's advisers. In any event, the fact that Bafana might have wondered how HMRC would respond to the fact that Mr Anderson had not visited South Africa was, it was submitted, totally irrelevant to the question the FTT was required to answer.

62. In tax legislation, the meaning of trade is a matter of law. But whether or not a particular activity constitutes a trade depends on an evaluation of all the facts relating to it against the background of the applicable legal principles. To that extent, the conclusion is one of fact or, more accurately, it is an inference of fact from the primary facts found by the fact-finding tribunal. That was the observation of the Court of Appeal in *Eclipse Film Partners No 35 LLP v Revenue and Customs Commissioners* [2015] STC 1429, at [112]. The Court summarised the position on an appeal in the following way (at [113]):

> "It follows that the conclusion of the tribunal of fact as to whether the activity is or is not a trade can only be successfully challenged as a matter of law if the tribunal made an error of principle or if the only reasonable conclusion on the primary facts found is inconsistent with the tribunal's conclusion. These propositions are well established in the case law: *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 29–32, 33, 36, 38–39, [1955] 3 All ER 48 at 53–54, 55, 58, 59 per Viscount Simonds and Lord Radcliffe respectively; *Ransom v Higgs* [1974] STC 539 at 545, 553, 559–560, [1974] 1 WLR 1594 at 1601, 1611, 1618 per Lord Reid, Lord Wilberforce and Lord Simon respectively; *Marson (Inspector of Taxes) v Morton* [1986] STC 463 at 470, [1986] 1 WLR 1343 at 1348 (Sir Nicholas Browne-Wilkinson V-C). An appeal from the FTT is on a point of law only: Tribunals, Courts and Enforcement Act 2007, s 11.

63. There is no statutory definition of a trade. Section 989 ITA goes no further than to provide that "trade" includes any "venture in the nature of a trade". Nonetheless case law has provided some helpful guidance or signposts. As the Court of Appeal put it in *Eclipse*, at [114]:

> "In *Marson v Morton* [1986] STC 463 at 470–471, [1986] 1 WLR 1343 at 1348–1349 Sir Nicholas Browne-Wilkinson V-C set out a list of matters which have been regarded as a badge of trading in reported cases. He emphasised, however, that the list was not a comprehensive statement of all relevant matters nor was any one of them decisive in all cases. He said that the most they can do is to provide common sense

> guidance to the conclusion which is appropriate; and that in each case it is necessary to stand back and look at the whole picture and, having regard to the words of the statute, ask whether this was an adventure in the nature of trade…"

64. In *Eclipse*, neither party had argued its case by reference to the badges of trade identified in *Marson v Morton*, and the Court of Appeal concluded that the facts of the case before it were not sufficiently analogous to the sources of the badges of trade as to make them of value in those proceedings. In this case, however, Mr Anderson's case was argued substantially by reference to the badges of trade. Those badges were set out by Sir Nicholas Browne-Wilkinson V-C in *Marson v Morton* at pp 470-471:

> "The matters which are apparently treated as a badge of trading are as follows:
>
> (1) That the transaction in question was a one-off transaction. Although a one off transaction is in law capable of being an adventure in the nature of trade, obviously the lack of repetition is a pointer which indicates there might not here be trade but something else.
>
> (2) Is the transaction in question in some way related to the trade which the taxpayer otherwise carries on? For example, a one-off purchase of silver cutlery by a general dealer is much more likely to be a trade transaction than such a purchase by a retired colonel.
>
> (3) The nature of the subject matter may be a valuable pointer. Was the transaction in a commodity of a kind which is normally the subject matter of trade and which can only be turned to advantage by realisation, such as referred to in the passage that the chairman quoted from *Reinhold*? For example, a large bulk of whisky or toilet paper is essentially a subject matter of trade, not of enjoyment.
>
> (4) In some cases attention has been paid to the way in which the transaction was carried through: was it carried through in a way typical of the trade in a commodity of that nature?
>
> (5) What was the source of finance of the transaction? If the money was borrowed that is some pointer towards an intention to buy the item with a view to its resale in the short term; a fair pointer towards trade.
>
> (6) Was the item which was purchased resold as it stood or was work done on it or relating to it for the purposes of resale? For example, the purchase of second-hand machinery which was repaired or improved before resale. If there was such work done, that is again a pointer towards the transaction being in the nature of trade.
>
> (7) Was the item purchased resold in one lot as it was bought, or was it broken down into saleable lots? If it was broken down it is again some indication that it was a trading transaction, the purchase being with a view to resale at profit by doing something in relation to the object bought.
>
> (8) What were the purchasers' intentions as to resale at the time of purchase? If there was an intention to hold the object indefinitely, albeit with an intention to make a capital profit at the end of the day, that is a pointer towards a pure investment as opposed to a trading deal.

On the other hand, if before the contract of purchase is made a contract for resale is already in place, that is a very strong pointer towards a trading deal rather than an investment. Similarly, an intention to resell in the short term rather than the long term is some indication against concluding that the transaction was by way of investment rather than by way of a deal. However, as far as I can see, this is in no sense decisive by itself.

(9) Did the item purchased either provide enjoyment for the purchaser (for example, a picture) or pride of possession or produce income pending resale? If it did, then that may indicate an intention to buy either for personal satisfaction or to invest for income yield, rather than do a deal purely for the purpose of making a profit on the turn. I will consider in a moment the question whether, if there is no income produced or pride of purchase pending resale, that is a strong pointer in favour of it being a trade rather than an investment.

I emphasise again that the matters I have mentioned are not a comprehensive list and no single item is in any way decisive. I believe that in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question—and for this purpose it is no bad thing to go back to the words of the statute—was this an adventure in the nature of trade? In some cases perhaps more homely language might be appropriate by asking the question, was the taxpayer investing the money or was he doing a deal?"

65. The FTT summarised Mr Gordon's submissions in this regard at [132]:

"Applying the badges of trade to Mr Anderson's activities as set out in *Marson v Morton*; (i) the Bafana Scheme was intended to run for a number of years with a repeated pattern of transactions; (ii) there was synergy with Mr Anderson's other activities; (iii) the players' talents could be turned to profit; (iv) the trading was done in way which was typical in this market (at a distance and by looking at DVDs); (v) profits were expected from the Bafana Scheme in a short time; (vi) work was done on the commodities being traded (the young footballers were trained); (vii) the intention was to make a profit in the medium term; (viii) the Bafana Scheme framework was set up for serious money making, not for enjoyment; (ix) the badge which refers to dividing items for sale is not relevant to the Bafana Scheme."

66. The badges of trade, however apposite in a particular case, are no more than signposts or indicators. They cannot be determinative. The correct approach, as has been made clear by the Court of Appeal in *Eclipse*, at [111], is to "… stand back and look at the whole picture and, having particular regard to what the taxpayer actually did, ask whether it constituted a trade." That approach was emphasised by Henderson LJ in *Samarkand Film Partnership No 3 v Revenue and Customs Commissioners* [2017] STC 926, at [59]:

"At the most basic level, it is now clear from *Eclipse*, if it was not clear before, that the question whether what the taxpayer actually did constitutes a trade has to be answered by standing back and looking at

> the whole picture: see [111]. Although it is a matter of law whether a particular activity is capable of constituting a trade, whether or not it does so in any given case 'depends upon an evaluation of all the facts relating to it against the background of the applicable legal principles': see [112]. It follows that it can never be appropriate to extract certain elements from the overall picture and treat them, viewed in isolation, as determinative of the issue. But that, in essence, is what Mr Furness is inviting us to do, when he says that the purchase and leaseback (or onward lease) of a film are inherently trading activities. There is no dispute that such activities are capable of forming part of a trade, and in many contexts the only reasonable conclusion would be that they did form part of a trade. But when the whole picture is examined, the conclusion will not necessarily be the same. The exercise which the FTT has to undertake is one of multi-factorial evaluation, and their conclusion can only be challenged as erroneous in point of law on *Edwards v Bairstow* grounds: see *Eclipse* at [113].

67. The analysis which is required takes as its starting point the actual circumstances of the activity in question. It is not correct, as Ms Nathan appeared at one point to suggest in argument, to seek to identify a description of the putative trade and then to ascertain if the taxpayer's activities correspond to such a trade. What is in point is whether the activities of Mr Anderson as a whole in relation to Bafana amounted to a trade, irrespective of how those activities might have been described.

68. The FTT's consideration of Mr Anderson's activities by reference to the badges of trade, and Mr Gordon's submissions in that regard, was set out at [178] to [182] of the FTT's decision. But the FTT made it clear, both at [183] and by reference to its discussion of and findings in respect of Mr Anderson's activities generally that it was concerned to assess the overall circumstances of the activities being carried on. The FTT's approach in this regard, consistent as it is with the guidance afforded by *Eclipse* and *Samarkand*, cannot be faulted.

69. The FTT considered, at [167], that the logs of activity retained by Mr Anderson were critical evidence in that regard. There is no dispute about the importance of that evidence. The FTT accepted that those logs provided an indication of the time spent by Mr Anderson with respect to Bafana but it was sceptical about the quality of that time. Out of a total of 30 hours logged by Mr Anderson as having been spent watching DVDs of players, the FTT discounted 18 hours which related not to the players at, or likely to be at, Bafana, but to the UEFA Under-17s matches in Turkey, which did not include any Bafana players. The FTT was unconvinced as to the relevance of this activity and whether the amount of time recorded was required in order for Mr Anderson to make decisions as part of his activities in relation to Bafana.

70. The FTT went on, at [172], to consider the business meetings Mr Anderson had with other footballing contacts. It had regard to the evidence of Mr Anderson that he had spent time talking about Bafana opportunities. But the FTT was not persuaded that the whole of Mr Anderson's time in this regard was spent discussing Bafana. Indeed, as the FTT recorded at [116], Mr Anderson explained that he received agency fees in a different capacity as well as the transfer fees to which he was entitled under the Agreement for Services with Bafana. At [163], the FTT found that Mr Anderson

was "also paid in a different, independent, capacity for placing Bafana players in the European market". On the other hand, the FTT accepted, at [175], that two out of three meetings between Mr Anderson and Mr Steptoe were to discuss Bafana related business.

5 71. The FTT's conclusion in this regard was set out at [177]. The FTT did not consider that Mr Anderson had provided sufficiently specific evidence to demonstrate that the time recorded in his logs was time spent seriously pursuing core profit-making activities relating only to Bafana.

72. We now consider Mr Gordon's criticisms of the FTT's treatment of the badges
10 of trade. Mr Gordon submits that the FTT was wrong, first to attempt to find synergy between Mr Anderson's experience as a football agent and the skills required to make a profit from the Bafana activity, and secondly to doubt whether there was indeed a "real synergy". We do not consider the FTT was wrong to ask itself the question in this way. It seems to us to be no more than a way of expressing the second of the
15 badges of trade identified in *Marson v Morton*. But we agree with Mr Gordon that the FTT was wrong to seek to compare those elements of the overall activity for which Mr Anderson was not actively responsible (the training of the players at the academy) with the business of football agent. Whilst there were differences between the Bafana operation, and the way it was intended to work in relation to Mr Anderson, we do not
20 consider it could properly be said that Mr Anderson's interest in the Bafana operation was unrelated to Mr Anderson's other football business activities.

73. We accept, as Mr Gordon submitted, that a trade may be carried on through the agency of others, and that a trade may be carried on notwithstanding that substantial elements of the trade may be sub-contracted. On the other hand, in our judgment, the
25 FTT was entitled to have regard to the activity of Mr Anderson and the extent of his involvement in the asserted trading operations in order to ascertain whether what Mr Anderson was doing amounted to a trade carried on by him.

74. We do not accept Mr Gordon's criticism of the reference by the FTT, at [180], to what was "typical in the market" as being an irrelevant consideration. The FTT
30 was concerned, quite properly, to assess the quality of the time which Mr Anderson said he had spent on Bafana business and whether, as had been submitted in relation to the ninth badge of trade, the framework of the Bafana scheme was set up for serious money making. Mr Anderson's time largely consisted of watching videos and having meetings in Europe. The FTT was entitled to evaluate that method of
35 operation against an alternative means of assessing the Bafana players by travelling to South Africa to assess their performance and character in person. It was Mr Gordon's submission, recorded by the FTT at [132], that trading at a distance and by watching DVDs was typical in the market in terms of the fourth of the badges of trade, and the FTT had therefore to address the issue in those terms. Its finding that it was
40 unconvinced as to the typical nature of that trading in the market concerned was one that was available to it on the evidence and cannot successfully be challenged as an error of law. The evidence before the FTT included an academy brochure in which it was made clear that clients were encouraged to visit the academy. Such visits might be for coaching or to act as a role model, which would have been more apt to a

professional footballer client that to Mr Anderson, but they were also expressed to be for assessment of talent, which was relevant to him. The FTT was entitled to have regard to the fact that Mr Anderson had not visited the academy in assessing the overall picture.

75. Although therefore we consider that the FTT erred in its assessment of the relationship between Mr Anderson's experience as a footballing agent and the Bafana business, that cannot be a basis for disturbing the overall finding of the FTT that Mr Anderson was not carrying on a trade. It is apparent that the Bafana arrangements were self-contained, with their own structure and contractual matrix. In relation to those arrangements Mr Anderson was said to be a sole trader, whereas his other relevant business interests were conducted by a company, and that trade was accordingly not that of Mr Anderson but of the company.

76. The FTT was right to focus on what Mr Anderson actually did, both as regards his meetings in Europe and his viewing of DVDs as recorded in the log which the FTT critically reviewed. The FTT reviewed the evidence, including the oral evidence of Mr Anderson himself. It was, in our judgment, entitled on the basis of that evidence to conclude that this was insufficient to show that Mr Anderson was carrying on a trade in his own right. It was also entitled, in reaching that conclusion, to have regard to what it found to be Mr Anderson's lack of knowledge of what was going on at Bafana, and his lack of understanding of the full impact of the documents he had signed.

77. Before us, Mr Gordon sought also to re-emphasise the application of the badges of trade to the circumstances of the Bafana arrangements. We are not persuaded that this demonstrates any error of law on the part of the FTT. First, the challenges to the FTT's decision in this respect are confined by the grounds of appeal; those are the challenges we have considered above. Secondly, as Mr Gordon acknowledged, the badges of trade are not a checklist, and cannot therefore be determinative. Thirdly, as we have found, there was no error of law in the FTT considering the circumstances of the arrangements as a whole, in particular the activity of Mr Anderson himself.

78. It is, as the FTT recognised, possible for an arrangement for the selection, development and contractual exploitation of a football player to be a trade. Certain of the badges of trade may point in that direction, for example by equating the player to stock-in-trade, the training and development of the player to work done on that item of stock and the intention to seek to earn fees from registration and transfer of the player with a professional club with an intention to sell rather than hold as an investment. It may also, in particular cases, be possible to point towards borrowing as a source of finance as an indication of an intention commercially to exploit the player in the short term. In that latter regard, however, we should say that in our view the reliance placed by Mr Gordon on the financing arrangements in this case was misplaced. Those financing arrangements, involving the deposit by Bafana of the loan amount, the guarantee and giving of security over the deposit, the channelling of the deposit to the lender and the income warranty and indemnity given by Bafana, whilst they might have provided some incentive for Bafana actively to engage in commercial exploitation (in order to obtain releases to it of funds from the deposit),

were unlikely to have done so in the case of a participant such as Mr Anderson whose risk was minimised by the arrangements themselves.

79. Indicators provided by the badges of trade may, in a given case, be relevant for consideration in determining whether, having regard to all the circumstances, what is being done amounts to the carrying on of a trade. It is evident in this case that the FTT had regard to the badges of trade and the way in which those badges might be applied to Mr Anderson's activities within the Bafana arrangements. Subject to what we have said on the synergy question, the FTT was entitled to take the view it did as to the significance of the various indicators, and to conclude as it did having regard to the circumstances of Mr Anderson's activities as a whole. The error in respect of synergy was, for the reasons we have explained, of no significance to the overall conclusion.

Commercial basis and view to or realistic expectation of profit

80. We address these issues separately although it is of course the case that they are relevant considerations to the question whether there is a trade, and there is, as we will note later, an overlap between the two. We do so for two reasons. First, the restrictions contained in s 66 and s 74 ITA assume that there is a trade, notwithstanding a lack of commerciality or a view or reasonable expectation as to the realisation of profits. Secondly, Mr Anderson's grounds of appeal include specific grounds in these respects.

81. The ground of appeal pointing towards commerciality is that the FTT erred in law by ignoring:

(1) the statutory tests and applying too literally the explanation of those tests in *Wannell v Rothwell* [1996] STC 450;

(2) the clear evidence of Mr Anderson's commercial approach (e.g. instructing accountants to verify the commercial validity of the project);

(3) his clear and unambiguous profit motive; and

(4) the unchallenged evidence of the very high profits that could have been made had the scheme been permitted to proceed and Mr Anderson's key player had not suffered injury.

82. The ground of appeal in relation to a view or reasonable expectation as to the realisation of profits is that the FTT erred in law by identifying what further steps Mr Anderson could have taken to maximise his chances of profit, without acknowledging that the steps actually taken by him were in fact sufficient and that the profits did not come to fruition because of a combination of:

(a) the scheme being undermined by HMRC interference; and

(b) the injury to the key player (whose later recovery might still justify Mr Anderson's investment, were the Bafana arrangements still in place).

83. We do not understand the reference in the grounds of appeal to the FTT having ignored the statutory tests, and Mr Gordon did not refer to that argument in his oral submissions. We can safely dismiss it as inapplicable; it is readily apparent that the FTT was keenly aware of the statutory tests it had to apply in this respect.

84. We are also unable to accept that there is any traction in an argument that the FTT applied *Wannell v Rothwell* too literally. *Wannell v Rothwell* was a judgment, of Robert Walker J in the High Court, which was binding on the FTT. It is authoritative, in an area where there is little authority, on the proper approach in law in this context to the meaning of the expression "on a commercial basis".

85. In *Wannell v Rothwell*, the taxpayer, who had formerly been a salaried commodities trader, began dealing on his own account, buying and selling shares and commodity futures. He sustained losses and made a claim for loss relief. A special commissioner, having had evidence from the taxpayer in which he accepted that he might have been casual or lacking in self-discipline, found that he was not trading on a commercial basis. On appeal on a case stated to the High Court, the court declined to interfere with that conclusion.

86. The judge recognised that there might be borderline cases, but described the general principle in the following way (at p461b-d):

> "The deputy Special Commissioner seems to have concluded that because of his lack of commercial organisation the taxpayer, even if carrying on trading activities, could not have been doing so on a commercial basis. I was not shown any authority in which the court has considered the expression 'on a commercial basis', but it was suggested that the best guide is to view 'commercial' as the antithesis of 'uncommercial', and I do find that a useful approach. A trade may be conducted in an uncommercial way either because the terms of trade are uncommercial (for instance, the hobby market-gardening enterprise where the prices of fruit and vegetables do not realistically reflect the overheads and variable costs of the enterprise) or because the way in which the trade is conducted is uncommercial in other respects (for instance, the hobby art gallery or antique shop where the opening hours are unpredictable and depend simply on the owner's convenience). The distinction is between the serious trader who, whatever his shortcomings in skill, experience or capital, is seriously interested in profit, and the amateur or dilettante. There will no doubt be many difficult borderline cases well for the commissioners to decide; and such borderline cases could as well occur in Bond Street as at a car boot sale."

87. Although *Wannell v Rothwell* concerned the way in which the taxpayer's trade was organised, that is not the only matter with which commerciality is concerned. As Henderson LJ said in *Samarkand*, at [90], considerations of profitability cannot be divorced from an assessment of the commerciality of a business, profitability in that sense being real commercial profit as opposed to an excess of income over receipts (see, in that regard, *Samarkand* in the Upper Tribunal, [2015] STC 2135, at [96]).

88. The FTT found, at [185] to [186], that there was insufficient evidence that Mr Anderson's activities through the Bafana Scheme were commensurate with the level of expenditure or profit expectation. The FTT did not consider that Mr Anderson's attitude to the documents and commercial arrangements, especially the loan repayments, were the actions of a businessman who was seriously involved in a commercial trading enterprise with a significant sum of his personal money. The FTT reasoned that, although it would not describe Mr Anderson's actions as those of a "dilettante" (employing the term used by Robert Walker J in *Wannell v Rothwell*), it took the view that Mr Anderson was not (again in *Wannell v Rothwell* terms) a "serious trader seriously interested in profits".

89. Mr Gordon submitted that there was clear evidence before the FTT as to how Mr Anderson approached the activity. Prior to committing any funds, he had carefully sought the advice of his financial advisers, accountants and business advisers and other friends he could trust, including one former senior Revenue officer. He had left the training of the young footballers in the hands of the relevant experts and, it was submitted, applied his own personal expertise to potential employers in Europe. In the meantime, having carefully reviewed the DVDs supplied to him to identify which players he (with his relevant experience) considered to have the most potential. This was not simply a case of watching a training session but reviewing them looking at both talent and temperament. He had secured the right to have first pick of the students, ahead of other participants.

90. Mr Gordon submitted that it was difficult to see what more Mr Anderson could have usefully done to maximise the chances of success for his business, and that this clearly demonstrated that it was carried on on a commercial basis.

91. These submissions read more like submissions on the facts appropriate for a fact-finding tribunal than an argument on an appeal on a question of law. We have no doubt that Mr Gordon made similar submissions to the FTT. His difficulty is that the FTT, having itself considered all the evidence, did not accept those submissions. There is nothing in Mr Gordon's argument that can approach a finding that the FTT erred in law in that respect. The FTT properly considered the test as set out in *Wannell v Rothwell*, including both the organisational element and the issue of the serious pursuit of profit. It had regard to Mr Anderson's investment in the Bafana scheme, and his view that there was a real prospect of making profit by bringing young African footballers to Europe. But it did not regard the carrying on by Mr Anderson of the (assumed) trade as having been on a commercial basis, as required by both s 66 and s 74 ITA. No error of law in the FTT's approach having been identified, the FTT's conclusion cannot be disturbed.

92. Mr Gordon submitted that, having found, as it did at [186], that Mr Anderson was not a dilettante, the FTT refused to accept the logical consequence of this conclusion, namely that the other half of the dichotomy suggested by *Wannell v Rothwell* must inevitably be satisfied. We do not agree. The test, as Ms Nathan argued, is not a binary one. It is not sufficient simply to find that an individual is not an amateur or a dilettante. The tribunal must also consider whether there is a serious interest in profit. The reference by Robert Walker J to difficult borderline cases

indicates that there is no bright-line distinction between the two. The question falls to be resolved as a matter of value judgment. The FTT in this case made no error of principle, and it had regard to all relevant circumstances and nothing irrelevant. Its conclusion cannot be interfered with.

93. For the purpose of both s 66 and s 74 ITA, the issue of commerciality and that of a view to the realisation of profits or a reasonable expectation of profit does not fall to be considered in isolation. In each case the statutory emphasis is on the *carrying on* of the (assumed) trade on a commercial basis and, in the case of s 66(2)(b), with a view to the realisation of profits and, for s 74, in such a way that there is a reasonable expectation of profits. Section 66(3) also deems a trade to be carried on with a view to the realisation of profit if at a given time it is carried on so as to afford a reasonable expectation of profit. The test in s 74 is framed in an objective way, which directs the focus towards the evidence as a whole rather than an assertion as to a subjective expectation, but equally a subjective intention or purpose such as that in s 66(2)(b) may be ascertained not only by an individual's own statements as to view or expectation but also by reference to objective evidence as to the carrying on of the business, including evidence of what the taxpayer did (or failed to do) in the carrying on of the (assumed) trade in pursuit of the asserted profit motive.

94. The FTT, at [187] – [188], considered the evidence as to the prospect of profits from the transfers of players, including one of Mr Anderson's selections (Mr Patosi) whose transfer could have realised a profit had he not been injured at the relevant time, the evidence of Mr Anderson's reliance on professional advisers on the details, but his own "gut feel" for the potential of African players and what was being done at Bafana and his belief in the potential for football in Africa and the merits of developing and supporting talent in the way Bafana did. But the FTT was not convinced that this translated into the provision of value or expertise such as the FTT would have expected of a businessman seriously interested in, or having a view to or reasonable expectation of, profit. In short, what the FTT concluded was that, whilst Mr Anderson might have been aware of the profit potential, and hoped that it might come to fruition, his carrying on of the (assumed) trade did not satisfy the statutory conditions.

95. Mr Anderson's grounds of appeal in this respect criticise the FTT for having sought to identify what else Mr Anderson might have done to maximise profit. We do not regard that as an error of law. The FTT was properly concerned to ascertain Mr Anderson's true purpose or expectation. It needed a benchmark against which to test whether Mr Anderson's activities supported a conclusion that, in carrying on the (assumed) trade, he had a view to or expectation of profit. In assessing what an individual has done in that respect, the FTT was entitled to have regard as well to what had not been done. That was simply a process by which the FTT assessed Mr Anderson's evidence, and it is not one that can be impugned in law. The FTT was fully entitled to conclude that the steps taken by Mr Anderson were not sufficient and that this indicated that his purpose did not meet the statutory requirement. The FTT was fully aware, and took account, of the history of the termination of the Bafana scheme and the injury to Mr Patosi. It cannot be criticised for concluding nonetheless

that the manner in which Mr Anderson carried on his (assumed) trade did not demonstrate that he had a view to or reasonable expectation of profit.

Tax-generated losses

96. Mr Anderson's grounds of appeal in respect of the FTT's finding that s 74B ITA operated to preclude Mr Anderson's claim for loss relief in any event was challenged by Mr Anderson's grounds of appeal in two respects. First, Mr Gordon argued that the FTT had erroneously concluded that the loss arose in connection with "relevant tax avoidance arrangements". He submitted that the FTT wrongly confused the attempted desire for loss relief to be available with the statutory test, in s 74B(3), of main purpose. He argued that there was no evidence to support any assertion that the or a main purpose of Mr Anderson was to reduce a tax liability; on the contrary, he submitted, on Mr Anderson's evidence he was seeking to make a profit and to assist young African footballers.

97. Secondly, and in relation to the requirement in s 74C ITA that in order for an individual not to be treated as carrying on a trade in a "non-active capacity" that individual should spend an average of at least 10 hours a week personally engaged in the activities of the trade, Mr Gordon submitted that the FTT had erred by applying a "wholly and exclusively" test to that time obligation.

98. Having found that Mr Anderson's activities did not constitute a trade, and that even if they had Mr Anderson was not carrying on that trade on a commercial basis and with a view of profit, it was unnecessary for the FTT to reach any conclusion on the application of s 74B. But it nonetheless found that the arrangements were relevant tax avoidance arrangements; it rejected the submission that the paramount considerations were an ethical motivation to invest in South African footballers and an eye for profit, and it concluded that Mr Anderson had not demonstrated that he fulfilled the average activity requirement.

99. In our judgment, these were conclusions that the FTT was entitled to reach and no error of law can be identified in those conclusions.

100. Turning first to the finding that the arrangements were relevant tax avoidance arrangements, we are entirely satisfied that the FTT's conclusion that the obtaining of sideways relief and/or capital gains tax relief was one of the main purposes of the Bafana arrangements was one that was open to it on the evidence. Whilst we accept, as Mr Gordon submitted, that there may well be an expectation in the early years of a trade that set-up costs will give rise to losses, which may enable there to be a claim for sideways loss relief or capital gains tax relief, and that such a circumstance may not of itself lead to a conclusion that the obtaining of such relief is a main purpose, it is necessary to consider the circumstances of each case. In this case, we are satisfied that there was evidence to support a view that the obtaining by Mr Anderson of the loss relief was a main purpose.

101. It is not necessary for us to set out that evidence in its entirety. It will suffice to refer to two items:

(a) The first is a document headed "Bafana Soccer Academy, Cape Town, South Africa – Investment Opportunity" (referred to by the FTT at [124]). Although that document was addressed to participants in the Bafana arrangements who were professional footballers, the FTT was entitled to regard its contents as applicable to Mr Anderson, whose financing structure was the same. That document states (amongst other things) "… the way this opportunity is structured you will be able to claim tax back on your investment". It also sets out the following with regard to the increased funding of Bafana:

"You will receive an invoice for the £1 million which will allow your accountant to claim tax back on your investment. On £1 million you will claim £400,000 back in tax paid. When you receive your tax back you will pay a further 10% into Bafana, i.e. another £100,000 which will give a total of 20% as a personal contribution. As you will be receiving £400,000 in tax back you will have invested £200,000 of that and the remaining £200,000 is yours to keep."

(b) The second is an unsigned and undated letter of authorisation by Mr Anderson in respect of his tax repayment relating to the Agreement for Services with Bafana and the Term Loan Agreement for the loan of £2.85 million. That authorisation demonstrates the splitting of the tax repayment between a partial loan repayment (with consequent release of that amount of funds to Bafana out of its deposit) and payment to Mr Anderson himself.

102. It is clear from a review of the contractual documentation that was before the FTT that the availability of the tax relief, and the effective sharing of the cash proceeds of that relief between Bafana and an individual participant was an integral, indeed fundamental, element of the arrangements. The larger part of the initial funding of Bafana was to be derived from the tax relief, as demonstrated in Mr Anderson's case by the fact that, according to the completion statement, on completion only £93,000 out of £3 million was received by Bafana (£2.85 million was placed on deposit to secure Mr Anderson's borrowing, and £28,500 was paid to the lender as a fee and part payment of interest), a further £150,000 was receivable by Bafana in March 2009, and £300,000 (the second repayment) was receivable not later than 18 months after completion. E-mail correspondence, in particular emails of 20 and 21 July 2010 from Mr Steptoe, confirms that the trigger for the second repayment was expected to be the receipt by the individual participant of the benefit of the loss relief.

103. The FTT heard the evidence of Mr Anderson as to what his knowledge was of the tax aspects of the arrangements. It recorded, at [108] that Mr Anderson's evidence in this respect was that it had not crossed his mind that the Bafana arrangements were a tax avoidance scheme. The FTT also heard evidence of Mr Lerner, Mr Anderson's accountant, which it recorded at [99], that he would not have allowed Mr Anderson to invest in "wholly tax driven schemes". The FTT clearly considered that evidence. It was entitled in the light of it and in the light of the contemporaneous documentary evidence before it to conclude that a main purpose of

the arrangements made by Mr Anderson was to obtain a reduction in his tax liability by means of sideways relief or capital gains relief, and that the loss accordingly arose directly or indirectly in consequence of, or otherwise in connection with, relevant tax avoidance arrangements for the purpose of s 74B(1)(c) ITA.

5 104. As far as the non-active capacity condition in s 74C ITA is concerned, the FTT's conclusion, expressed at [194], was that Mr Anderson had not demonstrated that he fulfilled the requirement that he spend a minimum of 10 hours a week specifically on a trade relating to the Bafana Scheme for the 2008-09 tax year. Mr Gordon submitted that such a conclusion evidenced an error of law in that the FTT 10 had applied a "wholly and exclusively" test and had accordingly disregarded time spent by Mr Anderson on dual activities, those which involved both Bafana and other business.

105. We do not accept that submission. Although the FTT used, at [194], the word "specifically", we do not accept that this involved the application of any principle of 15 exclusivity. We have described the FTT's findings with respect to Mr Anderson's logs. The FTT did not consider that the evidence demonstrated that the time recorded in the logs was time spent seriously pursuing core profit making activities "relating only to the Bafana Scheme" (FTT, at [177]). Again, we do not accept that the use of the word "only" shows that the FTT was applying any "wholly and exclusively" test. 20 What in our judgment the FTT was doing was to assess, in the relevant period, what portion of time could be regarded as time during which Mr Anderson was personally engaged in the trade.

106. It is evident that, where over a particular period of time an individual is engaged in more than one activity, the relevant proportion of the time personally engaged in 25 any specific activity must be ascertained by evidence. Time cannot be double-counted; nor can time properly attributable to one activity be regarded as time engaged in another activity. The burden of proof that an individual has spent the requisite average time personally engaged in the activities of the particular trade in question for the purpose of s 74C lies on the individual. The FTT did not consider 30 that the evidence supported that contention, and Mr Anderson must be regarded as having failed to satisfy the burden on him. The FTT made no error of law as asserted by Mr Gordon, and there is accordingly no basis for disturbing its finding in this respect.

Decision

35 107. For the reasons we have given, both with respect to the discovery issue and the loss relief issue, we dismiss this appeal.

MR JUSTICE MORGAN
UPPER TRIBUNAL JUDGE ROGER BERNER

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RELEASE DATE: 17 May 2018