Appeal number: UT/2017/0117

INCOME TAX – discovery assessment – whether discovery "stale" – whether conditions in s29(5) Taxes Management Act 1970 fulfilled – appeal allowed

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

CLIVE BEAGLES	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: MR JUSTICE BIRSS
JUDGE ASHLEY GREENBANK

Sitting in public at the Rolls Building, London on 5 and 6 July 2018

Michael Firth, counsel, instructed by KPMG LLP, for the Appellant

James Henderson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This is an appeal by Mr Clive Beagles from a decision (the "FTT Decision") of the First-tier Tribunal (Judge John Brooks) (the "FTT") dated 5 June 2017. The respondents are the Commissioners for Her Majesty's Revenue & Customs ("HMRC").

2. The appeal relates to an assessment issued by HMRC to Mr Beagles on 15 January 2008 in relation to the 2001-02 tax year. The assessment was in the sum of £437,389.60.

3. The matter giving rise to the assessment related to certain tax avoidance arrangements which Mr Beagles had entered into and which were designed to create a tax loss without a corresponding taxable amount. The arrangements were essentially the same as those considered by the courts and tribunals in *Astall and Edwards v. Revenue and Customs Commissioners* ("*Astall*")[1] and found to be unsuccessful.

4. Mr Beagles was the only participant in those arrangements for the tax year 2001-02 for whom HMRC did not raise an enquiry within the statutory time limit. After the completion of the litigation in *Astall*, HMRC made the assessment on Mr Beagles under s29 of the Taxes Management Act 1970 ("TMA") (referred to as a "discovery assessment").

5. Mr Beagles appealed to the FTT on the grounds that the issue of the discovery assessment was invalid. The FTT decided that the discovery assessment was valid and dismissed his appeal.

6. Mr Beagles now appeals against the FTT Decision.

The legislation

7. At the material time, s29 TMA was, so far as relevant, in the following form:

> **29. Assessment where loss of tax discovered**
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment —
>
> (a) that any income, which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,

[1] The decision of the Special Commissioners is found at [2008] STC (SCD) 142, the High Court at [2008] STC 2920, and the Court of Appeal at [2010] STC 137. Permission to appeal to the Supreme Court was refused.

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.

5 (2) …

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

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

10 (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 is attributable to fraudulent or negligent conduct on the part of the

15 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

20 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

25 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

30 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;

35 (c) it is contained in any documents, accounts or particulars which, for the purposes of any enquires into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer, whether in pursuance of a notice under section 19A of this Act or otherwise; or

40 (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) …

(7A) …

(8) …

(9) …

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

> **34. Ordinary time limit of six years**
>
> (1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax, capital gains tax may be made at any time not later than five years after the 31st January next following the year of assessment to which it relates.

The facts

9. The facts are set out in the FTT Decision at paragraphs [6] to [38]. We have summarised the main facts and set out below some of the more important paragraphs in this part of the FTT Decision.

10. In the tax year 2001-02, Mr Beagles entered into a tax avoidance scheme promoted by KPMG LLP. The scheme was designed to produce a tax deduction with no corresponding taxable amount.

11. The main elements in the scheme were as follows:

(1) Mr Beagles settled a life interest trust for himself on 19 December 2001. The other beneficiaries were members of his family.

(2) On 21 December 2001, Mr Beagles subscribed for a security from the trustees of the trust. The security had a nominal value £1,368,296 (the "principal amount"). Mr Beagles subscribed an amount of £1,159,573 (the "issue price") for the security i.e. at a discount to the principal amount. The trustees were required to issue the security under the terms of the trust deed.

(3) The terms of the security provided that the security could be redeemed on one of four occasions.

(a) The security could be redeemed on the fifteenth anniversary of the issue date for a sum equal to the principal amount ("Option A"). This amounted to a compound rate of interest of 1.1%.

(b) At Mr Beagles's option, the security could be redeemed between one and two months after the issue date at an amount equal to 100.1/118 of the principal amount (i.e. £1,160,732.45 ("Option B")). This amount was 100.1% of the issue price.

(c) If the "market change condition" (see below) was satisfied and Mr Beagles gave notice of an intention to transfer the security to a third party,

the security could be redeemed on the 65th anniversary of the issue date at the principal amount ("Option C").

(d) If the market change condition was satisfied and Mr Beagles gave notice of an intention to transfer to a third party, the third party transferee could redeem the security at the greater of the open market value of the security and 5% of the principal amount ("Option D").

(4) The "market change condition" was that the US dollar/sterling exchange rate remained within a band specified by the terms of the security at the end of a period of one month following the issue date.

(5) The market change condition was satisfied. Mr Beagles gave notice of his intention to transfer the security on 25 February 2002.

(6) Mr Beagles subsequently sold the security to SG Hambros Bank & Trust (Jersey) Limited ("Hambros") for £66,466.

(7) On 12 March 2002, the security was redeemed by Hambros for £68,415 being 5% of the principal amount.

(8) Mr Beagles claimed the difference between the issue price and the sale price (being £1,093,474) as an allowable loss to set against his income on the basis that the security was a "relevant discounted security" for the purposes of Schedule 13 to the Finance Act 1996.

12. On 29 January 2003, Mr Beagles filed his self-assessment tax return for the tax year 2001-02. He included the amount of the loss (£1,093,474) in box 15.8 of his return ("post-cessation expenses, pre-incorporation losses brought forward and losses on relevant discounted securities, etc."). In box 23.5 ("additional information"), he referred to an appendix which was attached to the return and which gave details of the transactions which gave rise to the loss.

13. The appendix set out an explanation of the scheme in the standard form provided by KPMG to users of the scheme. The text of the appendix is set out in the Appendix to this decision.

14. The last date by which HMRC could give notice of intention to enquire into the return was 31 January 2004. HMRC had not given notice of intention to enquire into the return by this date and so an enquiry into the return under s9A TMA was not opened within time. Mr Beagles was the only taxpayer who entered into the KPMG scheme for the 2001-02 period into whose return HMRC did not open an enquiry within the relevant time limit.

15. There was detailed evidence before the FTT describing HMRC's investigation into the return and its conduct of the assessment process. From that evidence, it is clear that, by 30 June 2004, HMRC had become aware that it had failed to open an enquiry into Mr Beagles's return within the statutory time limit. On this date, Mr Baird of HMRC's Complex Personal Return team wrote to Mr Manning, the senior officer within HMRC's Special Investigations Section who was responsible for HMRC enquiries into the KPMG scheme, to inform him that the statutory time limit had been missed in relation to Mr Beagles's return (FTT Decision [17]).

16. Mr Manning initially decided to defer taking any action in relation to Mr Beagles's return until further progress had been made in the challenges against the tax returns of the other participants in the KPMG scheme in relation to which enquiries had been opened (FTT Decision [20]).

5 17. Around this time, there were some material and relevant developments in the case law governing the approach to the interpretation of tax legislation begun by the House of Lords decision in *WT Ramsay Ltd v Inland Revenue Commissioners* [1981] STC 174 (the "*Ramsay* approach"):

(1) Mr Manning himself was responsible for the enquiries into another
10 scheme involving the relevant discounted security legislation. Those enquiries led to the Special Commissioners decision in *Campbell v Inland Revenue Commissioners* [2004] STC (SCD) 396 ("*Campbell*") in July 2004, in which the taxpayer successfully appealed against a decision of HMRC which sought to apply the *Ramsay* approach to disallow a loss on the transfer
15 of a relevant discounted security.

(2) On 25 November 2004, the House of Lords gave judgment in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] STC 1 ("*BMBF*") and *Scottish Provident Institution v Inland Revenue Commissioners* [2005] STC 15 ("*SPI*").

20 18. The next important date in the chronology of events in relation to Mr Beagles's return is 1 August 2005. On that date, Mr Manning wrote to KPMG to notify KPMG that HMRC had received advice from leading counsel that the scheme did not achieve its aims and that HMRC intended to challenge the scheme before the courts. That letter identified the cases of Mr Astall and Mr Edwards, who eventually became the
25 appellants in *Astall*, as potential test cases. The letter also referred to the possibility that a discovery assessment may be issued to Mr Beagles, if the scheme was found not to be successful.

19. This letter and the FTT's findings in relation to it were important in the proceedings before us and so we set out the relevant paragraph of the FTT Decision
30 ([24]) in full:

> [24] As Mr Manning considered that there were differences between Campbell and the KPMG RDS scheme, he continued with the five sample enquiries into the KPMG scheme. On 1 August 2005 he wrote to KPMG as follows:
>
35 > "We [HMRC] have seen leading counsel on this [KPMG RDS] scheme with reference to one of the individuals in the sample (Mr G Edwards). Leading counsel strongly supports HMRC's view that the scheme does not activate the tax loss. I shall refer to the grounds for Counsel's opinion as being the "*Ramsay* approach", although this is essentially the same
40 > purposive approach to statutory construction as found in cases such as *Carreras* and *SPI* where the facts of the case were quite different from *Ramsay*. In this light it is not appropriate even with the risks which any litigation involves to offer your clients any relief by way of compromise.

> It is our intention to use Mr G Edwards as the sample case, although we shall [be] happy to include Mr Astall as well.
>
> It seems to us that Mr G Edwards is a suitable case to bring to the Commissioners and that your client's time to devote to that is not unreasonable in the light of the tax relief he claims. If Mr Edwards RDS claim succeeds in the courts by reason that a *Ramsay* approach does not apply subject to your confirmation below it seems to me that all such KPMG cases for 2001-02 and 2002-03 will succeed even with those facts identical to Mr Astall's scheme."
>
> In evidence, Mr Manning confirmed that it was his view, in addition to HMRC's as stated in the letter, that the KPMG RDS scheme did not activate the loss and therefore did not work. After referring to the question of a litigation timetable, evidence required and listing arrangements, the letter continues:
>
> "… I have compared the [KPMG] lists of clients for each year with my own data which though not complete for 2002-03 indicates that for 2001-02 Mr [named taxpayer] should be added as should Mr C Beagles (an enquiry was not raised on Mr Beagles within the enquiry window but if the whole or part of the scheme is found not to succeed my colleague will consider a discovery assessment).
>
> The letter then considered the decision in *Campbell* before turning to the KPMG RDS scheme. It refers to a letter of 11 March 2005 in which Mr Manning:
>
> "… pointed out that in *SPI* their Lordships did apply *Ramsay* to the "mechanistic" provisions of Ch II Pt IV FA 1994".
>
> Although the letter of 11 March 2005 was not available, Mr Manning confirmed that he did not think that he would have changed his opinion or view as to the application of [*SPI*] or the KPMG RDS scheme between 11 March and 1 August 2005.

20. As can be seen from this paragraph, in his evidence to the FTT, Mr Manning accepted that it was his view, at this stage, that the KPMG scheme did not achieve the objective of creating the loss that Mr Beagles had claimed in his return. The 1 August 2005 letter also referred to a previous letter from Mr Manning to KPMG dated 11 March 2005, which was not before the FTT, but the evidence was that, in that letter, Mr Manning had referred to the possibility that the scheme might be challenged under developing case law principles following the decisions in *BMBF* and *SPI*. Mr Manning confirmed in evidence that he did not think that he would have changed his position as to the application of the case law principles to the KPMG scheme between 11 March and 1 August 2005.

21. There followed an exchange of correspondence between KPMG and Mr Manning in which KPMG, in a letter dated 7 October 2005, questioned HMRC's ability to raise a discovery assessment on Mr Beagles. In a response dated 6 December 2005, Mr Manning suggested that the question of whether a discovery assessment could be raised should be revisited "when KPMG's [relevant discounted security] scheme has been resolved".

22. Following this exchange of correspondence, it is clear that HMRC continued to consider the issue of a discovery assessment. The FTT Decision records at least two occasions on which colleagues requested details of the assessment from Mr Manning for the purpose of raising an assessment. For various reasons, an assessment was not issued. FTT Decision [29] - [30] records:

> [29] In the absence of any response letters were sent to Mr Manning on 8 August 2006 and again on 1 February 2007 which requested details of the assessment "as a matter of urgency." Mr Manning, who in evidence said that he was "embarrassed" by his treatment of his colleagues, explained that he had not replied because of pressure of work saying he was, "in a sense drowning in stuff". He said that although HMRC was challenging the KPMG RDS scheme, he had not been "ready", at the time the emails and letters had been sent to him, to make a discovery assessment. This was because the KPMG RDS scheme was to be challenged before the Special Commissioners and he wanted the tribunal's endorsement of his view that the scheme did not work.
>
> [30] Mr Manning explained that having taken over the *Campbell* case on which HMRC had applied the *Ramsay* approach to the closely articulated RDS legislation and lost, he was not confident that such an approach would succeed in relation to the KPMG RDS scheme which, in his view, unlike many other RDS schemes was very sophisticated. Also, as the House of Lords in *BMBF* had described the Special Commissioners decision in Campbell as "perceptive", and an appeal against that decision had been withdrawn by HMRC, Mr Manning felt he was on the back foot and that although he had taken a view that the scheme did not work he was not confident enough to issue a discovery assessment until the outcome of the *Astall* litigation was known. He said that if the taxpayers had succeeded in *Astall* he "would not have troubled Mr Beagles".

23. On 16 January 2007, closure notices were issued by HMRC in respect of the enquiries opened into each of the taxpayers' returns in *Astall* denying the relief for the losses arising from the KPMG scheme. Mr Astall and Mr Edwards appealed against the amendments made to their self-assessment returns by the closure notices.

24. The appeals of Mr Astall and Mr Edwards were heard between 16 and 18 July 2007. The decision of the Special Commissioner in *Astall* was released on 14 August 2007.

25. Having taken further advice from his colleagues, Mr Manning decided that a discovery assessment could be made on Mr Beagles. The assessment was issued on 15 January 2008.

26. Mr Beagles appealed against the assessment on 8 February 2008. Mr Beagles's case was "placed on hold" until the determination of the litigation in *Astall*.

27. The decision of the Special Commissioner in *Astall* was upheld by the High Court and the Court of Appeal. Permission to appeal to the Supreme Court was refused on 3 February 2010.

28. The issue of the assessment was confirmed by HMRC on 26 September 2014 following a review. Mr Beagles appealed to the FTT on the grounds that the assessment was invalid.

The FTT Decision

5 29. There were three issues before the FTT:

(1) whether a "discovery" within the meaning of s29(1) TMA could become "stale" so that an assessment made under s29(1) would no longer be valid even if it was made within the statutory time limit set out in s34(1) TMA;

(2) if so, whether the discovery on which the assessment on Mr Beagles was 10 based had, on the facts of the case, become stale by the time at which assessment was made;

(3) if not, whether the condition in s29(5) TMA was satisfied, and, in particular, whether at the time at which HMRC ceased to be entitled to enquire into Mr Beagles's self-assessment return, an officer of HMRC could 15 not reasonably have been expected to be aware of the insufficiency of tax in Mr Beagles's self-assessment return.

30. The FTT decided those issues in the following way:

(1) A discovery could become "stale" before the expiry of the statutory time limit for a discovery assessment in s34 TMA (applying the decision of the 20 Upper Tribunal in *Pattullo v Revenue and Customs Commissioners* ("*Pattullo*") [2016] STC 2043) (FTT Decision [49]).

(2) On the facts of the case, the discovery of the insufficiency in the self-assessment return had not become stale. This was on the grounds that Mr Manning did not reach a firm conclusion that the KPMG scheme did not 25 operate to create a loss until it was confirmed by the decision of the Special Commissioners in *Astall* in August 2007. On that basis, the discovery of the insufficiency was not "stale" when the assessment was issued in January 2008. (FTT Decision [59] and [61]).

(3) Even if the discovery had been made earlier, the assessment would not 30 have become "stale" whilst Mr Manning awaited the outcome of the litigation in *Astall* (FTT Decision [63]).

(4) The condition in s29(5) was fulfilled. A hypothetical HMRC officer would not have been aware of the insufficiency of tax in Mr Beagles's self-assessment return from the information provided in the return and the 35 appendix to that return (FTT Decision [80] and [81]). The information treated as available to the officer by virtue of s29(6) TMA would not be extended by s29(6)(d)(i) to the reasons for the inclusion of the market exchange condition in the terms of the security (FTT Decision [95]).

The grounds of appeal

31. Mr Beagles applied for permission to appeal against the FTT Decision. He set out four grounds of appeal in his application:

(1) first, that the FTT's conclusion that the date of discovery was on or around 18 August 2007 was perverse, contrary to the evidence, and based on a misunderstanding of the law (Ground 1);

(2) second, that the FTT's view that even if the discovery was made some time earlier, it was not stale was insufficiently reasoned, failed to deal with Mr Beagles's submissions, perverse and wrong in law (Ground 2);

(3) third, that the FTT erred in its approach to s29(5) TMA, in particular with regards to what the hypothetical officer would have been aware of (Ground 3);

(4) fourth, that the FTT erred in its approach to s29(6) TMA, in particular, whether the existence and relevance of a reason for the market change condition could reasonably be inferred (Ground 4).

32. Permission was granted by the FTT on three of these grounds (Grounds 2, 3 and 4) in a decision dated 10 August 2017. Following an application to the Upper Tribunal, permission was granted in respect of the final ground (Ground 1) by the Upper Tribunal in a decision dated 14 September 2017.

33. Mr Beagles appealed to this Tribunal. In its response to the notice of appeal, HMRC challenged the conclusion of the FTT (at FTT Decision [49]) that it was possible for a discovery assessment to be invalid on the basis that the relevant discovery was sufficiently before the date of assessment that the assessment was stale.

Can a discovery become "stale"?

34. Before we address Mr Beagles's grounds of appeal, we should first address the point raised in HMRC's response to the notice of appeal.

35. Before the FTT, HMRC argued that it was not possible for a discovery assessment to be invalid simply on the basis that the relevant discovery was made sufficiently before the date of the assessment that it had lost its quality of "newness" and had become "stale" by the time that the assessment was made.

36. The FTT held (FTT Decision [49]) that it was bound by the decision of the Upper Tribunal in *Pattullo* to find that, in appropriate circumstances, a discovery once made could lose its quality of "newness" and become "stale" such that the assessment based on that discovery was invalid.

The parties' submissions

37. Mr Henderson renewed HMRC's argument before us. He submitted that there was no justification for importing a concept of "staleness" into the interpretation of the

legislation based on its wording or history. If and to the extent that certain decisions of the courts and tribunals suggest otherwise, they were wrong in law.

38. In support of this submission, Mr Henderson referred us to the treatment of discovery assessments in the period before the introduction of self-assessment in the Finance Act 1994. Notwithstanding the numerous decisions which considered what constituted a "discovery" for the purpose of s29(1) TMA and its predecessor provisions, any requirement for "newness" was limited to the nature of the discovery itself (see, for example, the judgment of Viscount Simmonds in *Cenlon Finance Co. Ltd. v Ellwood* ("*Cenlon*") [1962] AC 782 at page 794 where he refers to the words "discovery of an undercharge" in s41 of the Income Tax Act 1952 being "apt to include any case in which for any reason it *newly appears* that the taxpayer has been undercharged" (our emphasis)). There was no suggestion in the case law that an assessment could be invalid because the relevant discovery had become "stale". The only time limit on the making of the assessment following a discovery was the statutory time limit (now in s34 TMA).

39. Mr Henderson said that this position had not been changed by the introduction of self-assessment. The previous cases on the meaning of "discovery" remained good law despite the changes made to the legislation to restrict the circumstances in which a discovery assessment could be made as part of the introduction of the self-assessment regime (*Hankinson v Revenue and Customs Commissioners* [2012] STC 485 per Lewison LJ at [15]). Mr Henderson also noted that the summary of the features of the regime following the introduction of self-assessment in the judgment of Park J in *Langham v Veltema* [2002] STC 1557 (at [13] to [19]) did not refer to any possibility of a discovery assessment not being valid if it was made at a time when the discovery ceased to be "new". Although Park J's decision in that case was reversed on appeal, his summary in paragraphs [13] to [15] was unaffected by that and was expressly followed by Henderson J in *Revenue and Customs Commissioners v Household Estate Agents Ltd* [2008] STC 2045 (at [28] to [29]).

40. There had, however, been a series of Upper Tribunal cases – *Charlton v Revenue and Customs Commissioners* [2013] STC 866 ("*Charlton*"), *Pattullo*, and *Tooth v Revenue and Customs Commissioners* [2018] STC 824 ("*Tooth*") – in which it had been suggested that a discovery assessment may be invalid where the discovery has lost its "newness" or become "stale". Mr Henderson submitted that all of the references in these cases to a concept of "staleness" were obiter. Even if some of the statements were not obiter, they were clearly wrong in law. Mr Henderson invited us not to follow those decisions.

41. Mr Firth relies on those very decisions in support of his submission that the FTT was correct to find that a discovery once made could lose its quality of "newness" and become "stale" such that any assessment based on such a discovery was invalid.

42. We did not understand Mr Firth to challenge the assertion that there was no express reference in the earlier cases – particularly those relating to the law before the introduction of self-assessment – to the possibility that an assessment might be invalid because of the failure of HMRC to act upon a discovery. However, he did not accept

the conclusion that there was no such principle within the concept of a discovery. It was clear that a discovery included a quality of "newness" (see Viscount Simmonds in *Cenlon*). Given the low threshold that HMRC had to overcome to demonstrate that there had been a discovery – which could extend to a change of mind on the part of an officer of HMRC (see *Charlton* [37]) – the quality of newness, which was an essential part of the concept of a discovery, would have little or no meaning if it did not also imply a requirement on HMRC to act upon a discovery whilst it was still "new".

Discussion

43. We should therefore turn to the cases in which the concept of "staleness" of a discovery is mentioned.

44. The first such decision to which we were referred by the parties is the decision of the Special Commissioners in *Corbally-Stourton v Revenue and Customs Commissioners* [2008] STC (SCD) 907. That case also involved a participant in a tax avoidance scheme where HMRC had failed to open an enquiry within the normal time limit. HMRC sought to raise an assessment under s29(1) TMA. At [44] of that decision, the Special Commissioner (Charles Hellier) said this in relation to the nature of a discovery in s29(1):

> **44** There is one other aspect of the word "discover" to which I should refer. This arises from *Cenlon Finance Co Ltd v Ellwood* [1962] AC 782 to which I was referred by Miss Simler: a "discovery" is something newly arising, not something stale and old. The conclusion that it is probable that there is an insufficiency must be one which newly arises (from fresh facts or a new view of the law or otherwise).

45. This reference to a discovery requiring a quality of "newness" could be read as limited to the nature of the discovery at the time at which it is made. The statement does not add anything to the argument that a discovery must retain that quality at the time that the relevant assessment is made. However, it does not detract from that argument. The case itself did not turn on that point.

46. The first case which expressly raises the prospect that a discovery might lose its quality of newness with the result that an assessment could not be made under s29(1) even though the statutory time limit had not expired is *Charlton*. Once again, the case involved several participants in a tax avoidance scheme where HMRC had failed to open an enquiry within the statutory time limit. It was only when the papers were passed to the senior officer in charge of enquiries into the scheme, a Mr Cree, that HMRC sought to raise assessments on the taxpayers under s29(1) TMA. The evidence was that Mr Cree first became aware of the insufficiency in the taxpayers' returns in March 2009. However, he did not raise the assessments until July 2009 whilst he waited for the decision of the Court of Appeal in the case of *Drummond v Revenue and Customs Commissioners* ("*Drummond*") [2009] STC 2206, a case which related to a similar but not identical scheme.

47. The First-tier Tribunal allowed the taxpayers' appeal on the grounds that the conditions for assessment in s29(5) were not met. The Upper Tribunal (Norris J and

Judge Berner) dismissed HMRC's appeal. One of the issues before the Upper Tribunal was whether or not Mr Cree had made a discovery for the purposes of s29(1). The Tribunal said this at [37] of its decision:

> **37** In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment. But that would not, in our view, include a case, such as this, where the delay was merely to accommodate the final determination of another appeal which was material to the liability question. Such a delay did not deprive Mr Cree's conclusions of their essential newness for s 29(1) purposes.

48. This is the first case in which it is expressly stated that there may be circumstances in which, if an assessment is not made within a reasonable period after the discovery, the discovery might lose its essential newness so that the assessments itself might be invalid. The statement is clearly obiter. For the reasons set out in [37], the Upper Tribunal found that, in any event, the discovery was not "stale" and decided the case on the grounds that the condition in s29(5) was not satisfied.

49. The next case to which we were referred is the Upper Tribunal's decision in *Pattullo*.

50. In this case, the facts are similar to those in *Charlton*. The First-tier Tribunal decided that the "staleness" of a discovery was determined only by reference to the statutory time limit in s34 TMA. The Upper Tribunal (Lord Glennie) found (at [55]) that, in this respect, the First-tier Tribunal had erred in law. The Upper Tribunal said this at [52] and [53].

> **52** So far as concerns the question of law, namely whether any discovery under s 29(1) has to be acted upon while it remains fresh (or before it becomes stale), I prefer the submissions for the taxpayer. Quite apart from the support given to this submission by the passages in *Charlton* and *Corbally-Stourton* to which I have referred, which are highly persuasive, the requirement for the discovery to be acted upon while it remains fresh appears to me to arise on the natural meaning of s 29(1) itself. That sub-section provides that "if" HMRC discover certain matters then they may, subject to what follows later in the section, make an assessment in the amount needed to make good the loss of tax. The word "if", like many words in the English language, has a variety of shades of meaning. It may be purely conditional. But it may equally have a temporal aspect, as in the expression "if and when" (e.g. if the sun comes out we shall go to the beach). I do not regard this as stretching

> the meaning of "if". The context makes it clear that an assessment may be made if and when it is discovered that the assessment to tax is insufficient. It would, to my mind, be absurd to contemplate that, having made a discovery of the sort specified in s 29(1) , HMRC could in effect just sit on it and do nothing for a number of years before making an assessment just before the end of the limitation period specified in s 34(1) .
>
> **53** However, the word "if", as used in this way in the sub-section, does not mean "immediately". Mr Gordon was right, in my view, to accept that the discovery could be kept fresh for the purposes of being acted upon later. As he accepted, each case would turn on its particular facts. He gave the example of notification being given to the taxpayer of the discovery in the expectation that matters could be resolved without the need for a formal assessment to be made. No doubt there are many other examples which could be given. The UT in *Charlton* at para 37 recognise that the decision in each case will be fact sensitive. I do not think it would be helpful to try to define the possible circumstances in which a discovery would lose its freshness and be incapable of being used to justify making an assessment. But I consider that Mr Gordon was right to accept that it would only be in the most exceptional of cases that inaction on the part of HMRC would result in the discovery losing its required newness by the time that an assessment was made.

51. Having reached that conclusion, the Upper Tribunal went on to consider the First-tier Tribunal's findings of fact regarding the timing of the discovery, which were also challenged by the taxpayer. On the facts of the case, the Upper Tribunal accepted that it could not disturb the findings of fact made by the First-tier Tribunal that the discovery was made in November 2009, only a matter of months before the assessment was made. On that basis, the Upper Tribunal decided that discovery was not "stale" at the time at which the assessment was made and so dismissed the appeal ([62] and [65]).

52. In *Pattullo* therefore the question of "staleness" was directly in point before the Upper Tribunal and critical to its line of reasoning. If Lord Glennie had not reached the conclusion that he did on the question of staleness, he would simply have dismissed the appeal.

53. In passing, we note that Lord Glennie expressed the view that a delay of 18 months would have rendered the relevant discovery stale "on any view" (*Pattullo* [57]) and that he expressed this view in the context of a delay arising whilst awaiting a decision of a relevant court or tribunal.

54. The final case to which we were referred on this issue was *Tooth*. The facts are much the same as those in *Charlton* and *Pattullo* in that the case involved the issue of a discovery assessment by HMRC to participants in a tax avoidance scheme where HMRC had failed to open an enquiry within the relevant statutory time limit. The First-tier Tribunal found that the assessment was invalid because the condition in s29(4) TMA was not satisfied. HMRC appealed against this decision. In its response to the notice of appeal, the taxpayer contended that there was no discovery.

55. The Upper Tribunal (Marcus Smith J and Judge Hellier) dismissed HMRC's appeal on the first point, namely that the condition in s29(4) TMA was not satisfied on the facts of the case. The Upper Tribunal went on to express its views on the discovery issue. At [79(3)], the Upper Tribunal said this:

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> (3) We entirely agree with the Upper Tribunal in *Charlton* that on making a discovery, HMRC must act expeditiously in issuing an assessment. If, to use the words of *Charlton*, an officer has made a discovery, then any assessment must be issued whilst the discovery is "new".

10 56. The Upper Tribunal also said this at [83].

> **83** No doubt the facts that triggered the letter of 14 August 2009 could have amounted to a "discovery". However, that would mean that the discovery was made in 2009, whereas the discovery assessment was made some five years later in 2014. If and to the extent that this was the discovery, then (for the reason given in paragraph 79(3) above) the assessment upon which it was based was stale and should never have been made.

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57. These statements therefore support the contention in *Pattullo* that the discovery must remain "new" at the time of the assessment if the assessment is to remain valid. However, the statements in *Tooth* are clearly obiter; the Upper Tribunal had decided the case on the s29(4) issue.

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58. In the absence of the authorities, we can see some force in the submission that the concept of "newness" involved in a discovery relates simply to the nature of the discovery at the time at which it is made. Whilst we accept Mr Firth's arguments that the implication of a requirement for HMRC to act promptly following any discovery promotes efficiency in the administration of tax and that the concept of a discovery must clearly involve something new (as confirmed by the House of Lords in *Cenlon*), on the words of s29(1), there is nothing express which would appear to provide for any requirement that the discovery must retain that quality until the assessment is made. The only requirement on the face of the legislation is that an assessment under s29(1) can only be made following a discovery.

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59. Nevertheless, whatever might be said of the status of the statements of the Upper Tribunal in *Charlton* or in *Tooth* on this issue, in our view, the decision of the Upper Tribunal in *Pattullo* is not obiter. A decision of the Upper Tribunal is not binding on a later Upper Tribunal (see *Raftopoulou v Revenue and Customs Commissioners* [2018] STC 988 at [24]). As a tribunal of coordinate jurisdiction the later tribunal will follow the decision of the earlier one unless it is convinced that the earlier decision is wrong (see *Gilchrist v. Revenue and Customs Commissioners* [2014] STC 1713 at [94] referring back to *Secretary of State for Justice v B* [2010] UKUT 454 (AAC) at [40]). We are not convinced *Pattullo* is wrong, particularly given the existence of the other similar (obiter) statements and so we will follow it.

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60. It seems to us that, given the state of the authorities at the Upper Tribunal level, the question of whether a discovery is capable of becoming "stale" is a matter best

reviewed by the higher courts. We recognise both sides of the argument, particularly, on the one side, the point that it seems wrong not to require HMRC to make an assessment promptly once a discovery has been made, and, on the other, the simple point that the legislation does not make any express provision for any kind of limitation period except that specified by s34 TMA and so in *Pattullo* the Upper Tribunal pressed the word "if" into action to achieve that end.

61. On that basis, we reject Mr Henderson's submission that there is no concept of "staleness" involved in a discovery.

Ground 1: the date of discovery

62. The first two of Mr Beagles's grounds of appeal go to the question of whether or not the discovery was stale by the time of the assessment.

63. By Ground 1, Mr Beagles challenges the FTT's conclusion (FTT Decision [61]) that Mr Manning did not make a discovery until after the decision of the Special Commissioner in *Astall*.

The parties' submissions

64. Mr Firth says that Mr Manning made the relevant discovery on or before 1 August 2005 when he sent the letter to KPMG in which he informed KPMG that HMRC had received advice from leading counsel and was prepared to challenge the scheme in the courts. Mr Firth refers to the transcript of Mr Manning's evidence to the FTT. In that evidence, Mr Manning confirmed under cross-examination by Mr Firth that, when the letter was written, it was his personal view that the scheme did not achieve a tax loss. The FTT found as a fact (FTT Decision [24]) that Mr Manning held the view at the time that the KPMG scheme did not work.

65. There is evidence that Mr Manning made the discovery before 1 August 2005. Mr Firth noted that the 1 August 2005 letter referred to a further letter of 11 March 2005 from Mr Manning to KPMG which was not available to the FTT. In his evidence, Mr Manning had confirmed that it was unlikely that his view would have changed between 11 March 2005 and 1 August 2005. This is recorded as a fact by the FTT (FTT Decision [24]).

66. The letter also referred to Mr Beagles's return. So it is clear that Mr Manning was aware of the insufficiency in Mr Beagles's return at that time. Once again this is recorded in the FTT's findings of fact (FTT Decision [24]).

67. Mr Firth says that the FTT's conclusion (at FTT Decision [61]) that it "newly appeared" to Mr Manning on 18 August 2007 that there was an insufficiency after the decision in *Astall* is therefore completely at odds with its own findings of fact. Mr Manning made the discovery on or before 1 August 2005.

68. Mr Henderson says that this is a challenge to a finding of fact by the FTT. The evidential burden in such cases is high. It was quite open to the FTT on the facts to

find that Mr Manning's confidence in his conclusion fluctuated over time and that it was only following the decision of the Special Commissioner in *Astall* that he came to a firm conclusion that the KPMG scheme did not create a tax loss.

Discussion

69. On this issue, we agree with Mr Firth.

70. There was no material argument between the parties on the meaning of a discovery in s29(1). It is a relatively low threshold. The relevant officer must come to a conclusion or have "found out" from the evidence before him or her that there is an insufficiency in the return (see, for example, Bray J in *R v Commissioners for the General Purposes of Income Tax for Kensington ex parte Aramayo* 6 TC 279 at page 283 or Lord Normand in *Inland Revenue v Mackinlay's Trustees* [1938] SC 765 at page 771). That conclusion must be "new" (per Viscount Simmonds in *Cenlon*). The cases also suggest that a discovery involves both a subjective and an objective element. The officer must believe that the available information points in the direction of a discovery and that belief must be a reasonable one for the officer to hold (*Anderson v Revenue and Customs Commissioners* [2018] STC 1210 ("*Anderson*") [28] – [30]). On receipt of the draft decision, HMRC indicated that it wishes to reserve its position on *Anderson*.

71. Against that background, on the findings of fact made by the FTT, it is clear that Mr Manning had made a discovery of the insufficiency in Mr Beagles's return at the very latest by 1 August 2005 and possibly earlier.

72. By that date, Mr Manning was of the view that the scheme did not operate to create a loss and was aware of the insufficiency in Mr Beagles's return. He had "found out" that there was an amount that was omitted from the return. That was a reasonable belief to hold given the advice that had been received from leading counsel. The subjective and objective tests in *Anderson* were met.

73. The FTT's finding that the "discovery" took place at a later stage following the decision in *Astall* was on the grounds that Mr Manning did not actually reach his conclusion that the KPMG scheme did not operate to create a loss until that time (FTT Decision [59] and [61]) and that, although Mr Manning may have had a "strong suspicion" at an earlier stage that the KPMG scheme did not work it was not until that time that he came to a "firm conclusion" (FTT Decision [60]).

74. That finding was not consistent with the FTT's own findings of fact (at FTT Decision [24]). Those findings must, in our view, amount to a discovery. Whilst we accept that it might be possible for an officer to discover the same insufficiency in a return more than once if it is for different reasons, it is not, in our view, possible for an officer to make the same discovery twice for the same reasons. The insufficiency cannot "newly appear" to the officer for a second time (to use the words of Viscount Simmonds in *Cenlon*).

75. For this reason, in relation to Ground 1, we agree with Mr Firth that the FTT made an error of law in concluding that the discovery was made following the decision of the Special Commissioners in *Astall*.

Ground 2: was the discovery stale when the assessment was made?

5 76. A finding in Mr Beagles's favour on Ground 1 is not enough to dispose of this matter since at [63] the FTT decided, in the alternative, that, even if Mr Manning had made a discovery at an earlier stage (which we have now held he did), the discovery would still not have been "stale" by the time at which the assessment was made because the delay in making the assessment was merely to accommodate the final determination 10 of an appeal which was material to the liability in question (relying upon the decision in *Charlton* at [37]). By Ground 2, Mr Beagles's challenges this conclusion.

The parties' submissions

77. Mr Firth criticises the FTT's reasoning:

(1) He refers to the decision of the Upper Tribunal in *Pattullo* to the effect 15 that a delay of 18 months following a discovery would render an assessment stale "on any view" (*Pattullo* [57]). That comment was made in the context of the ongoing litigation, in that case, the case of *Drummond* in the High Court ([2008] STC 2707) and in the Court of Appeal ([2009] STC 2206).

(2) The possibility of a delay in order to await a material decision was also 20 mentioned in the decision in *Charlton* [37] but in that case the delay was to await the decision of the Court of Appeal in *Drummond* a matter of months later. In *Tooth*, a delay of five years was regarded as capable of rendering a discovery "stale" without any qualification.

(3) Parliament could not have intended that HMRC should be able to delay 25 the issue of an assessment for an inordinate period in order to await the decision in another appeal. That was particularly so in the circumstances of this case. No litigation had commenced when the discovery was made. There could be no certainty that any such decision would arise.

(4) If the FTT was relying upon *Charlton*, it would have been necessary for 30 the FTT to review the evidence. It did not. There was no evidence that Mr Manning was awaiting the decision of another court or tribunal. The opposite was true. Mr Manning took steps to issue the assessment in the period prior to the decision of the Special Commissioner in *Astall*. The only reason that an assessment was not made before the decision in *Astall* was 35 that Mr Manning was "drowning in stuff".

78. Mr Henderson makes the following points:

(1) It is clear from the case law that it was only in "the most exceptional circumstances" (*Pattullo* [53]) that inaction on the part of HMRC would prevent a valid discovery assessment being issued before the statutory time 40 limit.

(2) In particular, the authorities show that an assessment could be deferred to await a determination of an appeal that is material to the liability in question (*Charlton* [37]) or could be kept "fresh" by communication with the taxpayer (*Pattullo* [53]). In this case, HMRC had informed KPMG and Mr Beagles in their letter of 1 April 2005 that a discovery assessment would be made at a later stage if the challenge to the other participants in the KPMG scheme was successful.

Discussion

79. We have accepted that a discovery can lose its quality of "newness" such that a valid assessment cannot be made under s29(1). This leads to the question of when a discovery will lose its character.

80. In *Pattullo*, Lord Glennie suggested that a discovery would become stale "on any view" after a period of 18 months (*Pattullo* [57]). In *Tooth*, the Upper Tribunal expressed the view that a discovery would be stale if the assessment was issued five years later (*Tooth* [83]). These statements are made notwithstanding the observation of Lord Glennie in *Pattullo* that a discovery will only lose its quality of "newness" in "the most exceptional of circumstances" due to inaction on the part of HMRC (*Pattullo* [53]).

81. On the other hand, as we have mentioned above, in *Charlton*, the Upper Tribunal suggested that a delay (in that case of three or four months) "merely to accommodate the final determination of another appeal which was material to the liability question" would not cause a discovery to lose its essential newness (*Charlton* [37]). In *Pattullo*, Lord Glennie accepted that a discovery could be kept fresh for the purposes of being acted upon later, for example, by HMRC notifying the taxpayer of a discovery in "the expectation that matters could be resolved without the need for a formal assessment" (*Pattullo* [53]).

82. In the present case, Mr Manning made the discovery at the latest by 1 August 2005. (Mr Firth argued for the possibility that the discovery might have been made earlier, but, even if that were the case, we do not think that it adds to the case.) There was a delay of nearly two and a half years before the assessment was issued in January 2008. That is a lengthy delay.

83. There was no on-going litigation at the time of the discovery. Mr Manning was not waiting for the decision in *Astall* throughout the whole period between the discovery and the issue of the assessment. The evidence shows that HMRC actively considered the issue of an assessment in Mr Beagles's case in the period before closure notices were issued to the taxpayers who were involved in the *Astall* case in January 2007, but for various reasons the assessments were not issued. This is not a case like *Charlton* where the issue of the assessment was delayed for a few months to await a final determination of a relevant appeal that was on-going at the time of the discovery. At the time of the discovery, Mr Manning could not have known whether there would be any relevant litigation or whether any such litigation would be finally determined before the expiry of the statutory time limit for the issue of an assessment in s34 TMA.

84. The letter of 1 August 2005 referred to Mr Beagles's case. In it, Mr Manning stated that if the KPMG scheme was found to be in whole or in part unsuccessful, HMRC would consider the issue of a discovery assessment. The prospect of a discovery assessment was referred to again in Mr Manning's letter to KPMG in December 2005. This is akin to the circumstance to which Lord Glennie referred in *Pattullo* where HMRC might notify a taxpayer of a discovery in the expectation that matters could be resolved without the need for a formal assessment. However, if a concept of staleness is to have any meaning, HMRC cannot use a notification like that to justify leaving a matter open without taking any action for an unlimited period.

85. The 18 month period referred to by Lord Glennie in *Pattullo* contemplated that, if the discovery had been made following the decision of the High Court in *Drummond* (which it was not), HMRC would have had to issue an assessment well before the end of that period in order to for the discovery to retain its newness, notwithstanding the on-going litigation.

86. We take a similar approach to the notification in Mr Manning's letter of 1 August 2005. The delay of two and a half years in the issue of the assessment was material. If the discovery was to retain its quality of "newness" notwithstanding that delay, it was incumbent upon HMRC to take further steps in order to preserve that quality in the period between the making of the discovery and the issue of the assessment in January 2008. In our view, the discovery had lost its quality of newness by the time of the issue of the assessment and so the assessment was not valid. We therefore disagree with the FTT's alternative conclusion (at FTT Decision [63]).

87. Our conclusion on this point decides this appeal in favour of Mr Beagles. However, we heard full argument on the remaining issues before us and accordingly have set out our conclusions on those issues below.

Ground 3: an officer of HMRC should have been reasonably aware of the insufficiency in the return from the information available

88. Section 29(3) TMA provides that a taxpayer who has made a self-assessment return can only be assessed under a discovery assessment if one of two conditions is met.

89. The first condition (fraudulent or negligent conduct on the part of the taxpayer) is found in s29(4). It is not relevant in this case.

90. The second condition is found in s29(5). In summary, s29(5) requires that a hypothetical HMRC officer could not have been reasonably expected to have been aware of the insufficiency of tax from the information made available to him or her at the relevant cut-off time. In this case, the relevant cut-off time is the time at which the officer ceased to be entitled to enquire into the return.

91. For the purpose of the condition in s29(5), the information that is treated as made available to the hypothetical HMRC officer is set out in s29(6), which, again in summary, is the information that is contained in the return or accompanying documents

provided by the taxpayer or information the existence of which and the relevance of which as regards the insufficiency of tax could reasonably be expected to be inferred by the officer from the return and any accompanying documents.

92. The FTT decided that the condition in s29(5) TMA was met (FTT Decision [83]). By Ground 3, Mr Beagles challenges that conclusion.

The FTT's approach

93. The FTT referred to the decision of the Court of Appeal in *Sanderson v Revenue and Customs Commissioners* [2016] STC 638 ("*Sanderson*") and in particular to the judgment of Patten LJ at ([17] to [22]) where he refers to the principles relevant to the application of s29(5).

94. Having done so, the FTT sought to determine whether it was reasonable to expect that a hypothetical officer would have been able to perform the analysis undertaken by the Special Commissioner in *Astall* so as to reach the conclusion that the security was not a deep gain security. This was done by identifying each occasion on which the security might on its terms be redeemed at a "deep gain" (namely those to which we referred in sub-paragraphs (a) to (c) of [11(3)] above as Option A, Option B and Option C) to determine whether such an officer would have been able, by reference to the information available to the officer in Mr Beagles's return or his or her own knowledge or commercial awareness, to exclude those occasions from the analysis (FTT Decision [72] to [78]).

95. The FTT concluded that it was not reasonable to expect a hypothetical officer to perform that analysis either because there was insufficient information available from the return or that the officer would not have the relevant level of commercial awareness. The FTT noted, in particular, that the return did not disclose that the arrangements were part of an avoidance scheme or that the terms of the security were artificially constructed so that it might be treated as a relevant discounted security (FTT Decision [80]) and contrasted the level of information available to the officer from the return with that available to the Special Commissioner in *Astall* (FTT Decision [81]).

The parties' submissions

96. Mr Firth criticises the FTT's reasoning:

> (1) Mr Firth refers to the decisions of the Court of Appeal in *Sanderson* and *Lansdowne Partners LP v Revenue and Customs Commissioners* [2012] STC 544 ("*Lansdowne*"). He says that the correct test is whether the officer was provided with sufficient information that he or she should reasonably have been aware of the insufficiency to tax from that information. The test assumes that the hypothetical officer will apply his or her knowledge and skill in analysing the return. It does not require that the inspector should be able to determine finally the magnitude of the insufficiency or to answer every legal question in relation to the arrangements.

(2) Mr Firth says that the FTT applied the wrong test. The effect of the FTT's approach - in particular its comparison of the level of information available from the return with that available to the Special Commissioner in *Astall* (FTT Decision [81]) - is to require a taxpayer to make a full disclosure of all the facts and circumstances in his or her return.

(3) The FTT's other criticisms of the level of disclosure in Mr Beagles's return – the failure to disclose that the arrangements are part of an avoidance scheme or that the terms of the security were artificially constructed so that it might be treated as a relevant discounted security (FTT Decision [80]) – were irrelevant. They played no part in the analysis.

(4) In Mr Firth's submission, the information in the return was sufficient to enable the hypothetical inspector to be aware of the insufficiency. He reiterated his arguments before the FTT to demonstrate by reference to each of the occasions on which the security might be redeemed and the analysis undertaken by the Special Commissioner in *Astall* that information was available to enable the hypothetical officer to be aware of an insufficiency in the return.

97. Mr Henderson supports the FTT's analysis:

(1) He too refers to the Court of Appeal decisions in *Sanderson* and *Lansdowne*. He says that the cases do not support Mr Firth's analysis. The disclosure must be sufficient that the hypothetical officer would be aware of the insufficiency. It is not enough that the officer might have alighted upon the conclusion or that the information would have been sufficient to prompt an officer to raise further enquiries (*Sanderson* [35]).

(2) This is a complex, fact specific case; a one page summary could not put an officer in a position where he or she could reasonably have been expected to be aware of the insufficiency. The comparison with the information before the Special Commissioner in *Astall* was used by the FTT simply to illustrate that point. It is accepted in *Sanderson* that in complex cases even adequate disclosure may not protect against a discovery assessment (*Sanderson* [17(3)]).

(3) The test has to be applied at a particular point in time. In this case that was when HMRC ceased to be entitled to enquire into the return on 31 January 2004. At that point in time, the decisions of the House of Lords in *BMBF* and *SPI* had not been released. An officer could not reasonably have been expected to perform the analysis undertaken by the Special Commissioner in *Astall* at that time.

(4) Mr Henderson criticises the use by Mr Firth of the Special Commissioner's reasoning in *Astall* as a benchmark for whether or not a hypothetical officer could have identified the insufficiency. The test in s29(5) has to be applied at the relevant time, in this case, on 31 January 2004. At that time, *BMBF* and *SPI* had not been decided. Nonetheless he says that the analysis of the various occasions on which the security could

be redeemed undertaken by the FTT was correct. The FTT was entitled to reach the conclusions that it did.

Discussion

98. As we have described above, there are two conditions, one of which must be satisfied if a taxpayer is to be assessed under s29(1). Section 29(5) contains one of them.

99. The leading cases on the application of s29(5) are now *Hankinson*, *Lansdowne* and *Sanderson*. We were referred to these cases by the parties. We will refer predominantly to the decision of the Court of Appeal in *Sanderson* and the leading judgment of Patten LJ as in it he set out a summary of the relevant principles which incorporates relevant extracts from the decisions in the other cases. The relevant passage is at [17] to [23] of his judgment. We will not set it out in this decision.

100. We endeavour to summarise the principles that we derive from Patten LJ's judgment as follows:

(1) The test in s29(5) is applied by reference to a hypothetical HMRC officer not the actual officer in the case. The officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law.

(2) The test requires the court or tribunal to identify the information that is treated by s29(6) as available to the hypothetical officer at the relevant time and determine whether on the basis of that information the hypothetical officer applying that level of knowledge and skill could not have been reasonably expected to be aware of the insufficiency.

(3) The hypothetical officer is expected to apply his knowledge of the law to the facts disclosed to form a view as to whether or not an insufficiency exists (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [23]).

We agree therefore with Mr Firth that the test does assume that the hypothetical officer will apply the appropriate level of knowledge and skill to the information that is treated as being available before the level of awareness is tested. The test does not require that the actual insufficiency is identified on the face of the return.

(4) But the question of the knowledge of the hypothetical officer cuts both ways. He or she is not expected to resolve every question of law particularly in complex cases (Patten LJ, *Sanderson* [23], *Lansdowne* [69]). In some cases, it may be that the law is so complex that the inspector could not reasonably have been expected to be aware of the insufficiency (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [17(3)]).

(5) The hypothetical officer must be aware of the actual insufficiency from the information that is treated as available by s29(6) (Auld LJ, *Langham v Veltema* [33] [34]; Patten LJ, *Sanderson* [22]). The information need not be sufficient to enable HMRC to prove its case (Moses LJ, *Lansdowne* [69])

but it must be more than would prompt the hypothetical officer to raise an enquiry (Auld LJ, *Langham v Veltema* [33]; Patten LJ, *Sanderson* [35]).

(6) As can be seen from the discussion in *Sanderson* (see [23]), the level of awareness is a question of judgment not a particular standard of proof (see also Moses LJ in *Lansdowne* [70]). The information made available must "justify" raising the additional assessment (Moses LJ, *Lansdowne* [69]) or be sufficient to enable HMRC to make a decision whether to raise an additional assessment (Lewison J in the High Court in *Lansdowne* [2011] STC 372 at [48]).

101. Applying those principles to the facts of the present case, the question is whether from the information in and accompanying the return, a hypothetical officer could not reasonably have been expected to be aware of the insufficiency.

102. The insufficiency in this case arose because the loss on the sale of the security claimed by Mr Beagles in the tax year 2001-02 was not a loss on the disposal of a relevant discounted security (and so did not qualify for relief).

103. We should apply this test first by reference to the information provided in the return and the appendix to the return. The appendix set out the key terms of the security including the dates for redemption (as we have set them out at [11] above). (We will turn to the separate question as to whether the provisions of s29(6) permitted reference to further information in our discussion of Ground 4 below.)

104. The hypothetical officer is an officer of general competence, knowledge or skill with a reasonable knowledge and understanding of the law. In our view, that would encompass a knowledge of the legislation relating to relevant discounted securities (in Schedule 13 to the Finance Act 1996) and even if he or she did not, we would expect the officer to acquire that knowledge, given that the officer is directed to the legislation by the appendix to the return.

105. We would expect the hypothetical officer to be reasonably acquainted with the status of the case law on the *Ramsay* approach and to be aware for example of the House of Lords decision in *MacNiven v Westmoreland Investments Limited* [2001] STC 237 ("*MacNiven*"), the leading case at the time. We would also expect the officer to have a reasonable degree of commercial awareness (and, for example, to be aware, in broad terms, of the commercial level of interest rates at the time).

106. In order for the officer to be aware of the insufficiency in Mr Beagles's return, he or she would need to be able to justify a conclusion that the security is not a relevant discounted security within the terms of the legislation. That would require the officer to be able to discount the relevance of the occasions of redemption that could possibly give rise to a "deep gain"; those are the occasions of redemption identified as Option A, Option B and Option C.

107. The FTT seeks to adopt this approach at [72] to [78] of the FTT Decision. It does so by comparison with the approach taken by the Special Commissioner in *Astall* and the level of information available to him. On this basis, the FTT concluded that the

hypothetical officer would not have the relevant level of commercial awareness to disregard redemption under Option A (redemption on the 15th anniversary of the date of issue) or under Option C (redemption on the 65th anniversary of the date of issue) as commercially unrealistic (FTT Decision [73] to [78]). The FTT also decided that the hypothetical officer would not have had the sufficient information available to him or her in the return and the appendix to dismiss the possibility of redemption under Option B (early redemption between one and two months after the date of issue) as relevant to the analysis. This was because the officer would not have had access to the confidential memorandum to banks referred to by the Special Commissioner in *Astall* (at [25]), which the FTT regarded as essential to his analysis of the funds flow on a redemption under Option B as essentially circular.

108. We disagree with the FTT about the level of commercial awareness that should be attributed to the hypothetical officer. We would expect an HMRC officer with a reasonable degree of commercial awareness to be able to identify that the rate of return on the occasion of a redemption in Option A was not commercial when compared with rates prevailing at the time and that the prospect of a purchaser holding a security to redemption after 65 years for a premium of 18% (Option C) was not realistic. However, we agree with the FTT that the hypothetical officer could not reasonably have been expected to identify the circular flow of funds implicit within a redemption within Option B without further information regarding the investments that would be made by the trust and so the source of the funds that would have been available to finance that redemption.

109. Even with that information, although the officer may have been able to identify that the terms of the security were in some senses artificial, it would not necessarily have made him or her aware of the insufficiency. Mr Firth's argument and the FTT's analysis follow the reasoning of the Special Commissioner in *Astall*. We do not accept that that analysis could reasonably be expected to be within the contemplation of the hypothetical officer. At the relevant time, the House of Lords had not yet decided the cases of *BMBF* and *SPI*. *BMBF* and *SPI* marked significant developments in the *Ramsay* approach to tax cases: the adoption of a more generally applicable purposive approach (*BMBF*) and the ability to ignore commercially irrelevant contingencies (*SPI*). Those principles are critical to the analysis of the Special Commissioner in *Astall* and could not have been part of the approach adopted by the hypothetical officer.

110. At the relevant time, the leading case in the *Ramsay* line of cases was *MacNiven*. We would expect that a hypothetical officer would have been more likely to conclude that an application of the *Ramsay* approach at the time would need careful analysis and that approach would have had to address concerns that the more tightly worded mechanistic provisions in the relevant legislation (Schedule 13 to the Finance Act 1996) might not be susceptible to the *Ramsay* approach – a concern which was to an extent realized in the decision of the Special Commissioners in *Campbell v Revenue and Customs Commissioners* [2004] STC (SCD) 396.

111. In our view, therefore, this was a complex case. Whether or not it is correct to describe the disclosure in the return as inadequate, in any event it was not such as would have made the hypothetical officer aware of the insufficiency in the return. Although

our reasons are rather different, we therefore agree with the conclusion of the FTT and dismiss this ground of appeal.

Ground 4: the application of s29(6) TMA

112. The final ground is that the FTT erred in its approach to s29(6), in particular whether the existence and relevance of a reason for the market change condition could reasonably be inferred.

113. As we have described, for the purposes of the condition in s29(5), the awareness of the hypothetical officer is tested by reference to information which is treated as available to the officer by s29(6). In summary, the information that is treated as available to the officer is the information that is contained in the return or accompanying documents provided by the taxpayer. This is extended by s29(6)(d) to information the existence of which and the relevance of which as regards the insufficiency of tax could reasonably be expected to be inferred by the officer from the return and any accompanying documents.

The FTT decision

114. At [83] – [97] of the FTT Decision, the FTT considered whether or not there was any information outside the return and the appendix, the relevance and existence of which could reasonably be expected to be inferred by the officer. In particular, the FTT considered an argument which it attributed to Mr Firth that the hypothetical officer could infer from the return and the appendix that the market change condition was inserted in the scheme as an anti-*Ramsay* device in order to provide a degree of uncertainty as to whether or not the transactions would proceed as planned. At FTT Decision [95], the FTT rejected that argument.

The parties' submissions

115. Mr Firth says that the FTT misunderstood the argument. The argument was that the officer could infer from the return and the appendix that reasons for the market change condition existed and the officer should have known that those reasons were crucial to the success or failure of the scheme.

116. Mr Henderson points to the limitations on s29(6)(d) to which the Upper Tribunal referred in *Charlton* ([78] and [79]) and which require the inference to be one which could be reasonably drawn and to be related to the insufficiency of tax

117. As a starting point, Mr Henderson questions whether the reasons for the market change condition can be "information" for the purposes of s29(6). Even if they can, Mr Henderson says the inference for which Mr Firth argues does not meet the requirements identified in *Charlton*.

Discussion

118. Our starting point on this issue is the decision of the Upper Tribunal in *Charlton*. That case involved a participant in a tax avoidance scheme, details of which had been provided to HMRC in a form AAG1 as required by the rules relating to the disclosure of tax avoidance schemes in the Finance Act 2004 and regulations made under those rules. The scheme was given a scheme reference number (SRN). The taxpayer's return gave details of the relevant transactions and gave the SRN. HMRC failed to open enquiries into the taxpayer's return and sought to raise a discovery assessment.

119. One issue before the Upper Tribunal was whether, because the tax returns gave the SRN, the information in the form AAG1 was to be treated by s29(6)(d)(i) as information available to the officer for s29(5) purposes. On this issue, the Upper Tribunal found that the information in the AAG1 was to be treated as available to the officer. It was not necessary that the officer should be able to infer the actual content of the information (the form AAG1) from the return and accompanying documents. All that was necessary was for the officer to be able to infer from the return and accompanying documents that the information existed and that it was relevant to the determination of the insufficiency in the return (*Charlton* [76]).

120. The Upper Tribunal emphasised that there were limits on the application of s29(6)(d)(i). It said this at [78] and [79]:

> **78** The correct construction of s 29(6)(d)(i) is that it is not necessary that the hypothetical officer should be able to infer the information; an inference of the existence and relevance of the information is all that is necessary. However, the apparent breadth of the provision is cut down by the need, firstly, for any inference to be reasonably drawn; secondly that the inference of relevance has to be related to the insufficiency of tax, and cannot be a general inference of something that might, or might not, shed light upon the taxpayer's affairs; and thirdly, the inference can be drawn only from the return etc. provided by the taxpayer.
>
> **79** As we have described, the balance provided by s 29 depends on protection being provided only to those taxpayers who make honest, complete and timely disclosure. That balance would be upset by construing s 29(6)(d)(i) too widely. Inference is not a substitute for disclosure, and courts and tribunals will have regard to that fundamental purpose of s 29 when applying the test of reasonableness.

121. As we have described, Mr Firth argues that the officer could infer from the return and the appendix that reasons for the market change condition existed and that those reasons would be relevant to the insufficiency because they would be crucial to the success or failure of the scheme. As a result, the reasons for the market change condition – its use as an anti-*Ramsay* device – must be treated as being available to the hypothetical officer. He says that the FTT failed to address that point.

122. We agree with the point made in *Charlton* that s29(6)(d)(i) should not be construed too widely given the purpose of s29. It should be limited to cases where the hypothetical officer could reasonably be expected to infer from the return or accompanying documents that specific information exists which is directly relevant to

the insufficiency in question. To our minds, the information to which Mr Firth refers – the reasons for the insertion of the market change condition – is too vague for the relevance of those reasons to be reasonably inferred from the presence of the market change condition in the terms of the security. There is no separate identifiable source for that information the relevance or existence of which can be inferred from the information contained in return or the appendix.

123. In any event, if we are wrong on that point, it does not assist Mr Beagles. Even if the reasons for the market change condition were to be treated as made available to the hypothetical officer for the purposes of s29(5) together with the return and accompanying documents, the hypothetical officer would still not be aware of the insufficiency such as to justify an assessment as at 31 January 2004. As we have described, that date was before the decision of the House of Lords in *SPI* in which the possibility of ignoring commercially irrelevant contingencies was such an important part. An awareness of the reasons for the market change condition as an anti-*Ramsay* device may have led the hypothetical officer to conclude that the transactions in this case were part of a pre-planned scheme, which in turn may have led the officer to raise further enquiries but would not, with the other information available, have made him or her aware of an insufficiency.

124. We therefore dismiss this ground of appeal.

Conclusion

125. For these reasons, we allow the appeal in respect of Ground 1 and Ground 2. We dismiss the appeal in respect of Ground 3 and Ground 4.

126. That decides this appeal in favour of Mr Beagles. In arriving at that conclusion, we have accepted Mr Firth's argument that a discovery must retain its "newness" when an assessment is made. At least as a matter of ordinary English, the HMRC officer in this case, Mr Manning, discovered that Mr Beagles was a member of this tax avoidance scheme, which he believed did not operate to produce the loss that Mr Beagles claimed, no later than 1 August 2005. At that time *Corbally-Stourton* had not been decided and so there was no case law suggesting that a discovery could go stale. Nevertheless the fact remains that it was not until two and a half years after August 2005 that the assessment was raised. The only reason for arguing that the outcome of the *Astall* case gave rise to the discovery is to avoid the consequences of that lengthy delay. In our judgment, if there is a concept of staleness at all, then we believe it arises on the facts of this case.

Costs

127. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Mr Justice Birss **Ashley Greenbank**
Upper Tribunal Judge

RELEASE DATE: 20 November 2018

5

Appendix

Appendix One – Information provided in the 2002 Return as referenced at box 23.5 on page 9 of the 2002 Return.

Clive Beagles (UTR [number provided]).

Tax return for the year ended 5 April 2002

Box 23.5 Additional Information

Clive Beagles (the "Settlor") is the settlor and life tenant of the Clive Beagles 2001 Life Interest Trust established on 19 December 2001 (the "Trust"). The other beneficiaries are members of the Settlor's family. Form 41 G was submitted on 10 January 2003 to Nottingham Trusts and the trustees' tax reference is [reference number provided]. The Trust is UK resident. As a settlor interested trust taxable income and capital gains arising in the Trust have been included in the Settlor's return.

On 21 December 2001 ("the Issue Date") the Settlor subscribed for a security (the "Security") from Office Contracts Limited (the "Issuer") acting on behalf of and as trustee for the Trust for the sum of £1,159,573 (the "Issue Price"). The other trustees are Clive Beagles and [his wife]. The trustees were required to issue the Security under clause 15 of the Trust Deed. The terms of the Security were as follows:

1 The Security was redeemable on the 15th anniversary of the Issue Date at £1,368,296 (the "Principal Amount"). It qualifies as a Relevant Discounted Security under the terms of Schedule 13 Finance Act 1996.

2 The Security could be redeemed at the Settlor's option between one and two months after the Issue Date at a figure equal to 100.1/118 of the Principal Amount.

3 In the event that the US dollar/sterling rate remained within a band specified by the terms of the Security at the end of a period of one month following the Issue Date and a notice was delivered to the Issuer that the Settlor intended to transfer the Security to a third party, the redemption date of the Security became the date 65 years after the Issue Date. (A third party is identified in the Security as a person who is not an associate of the holder of the Security within the meaning of s 435 of the Insolvency Act). In the event that such a transfer took place the new holder of the Security could elect for the note to be redeemed at an amount equal to the greater of the open market value of the Security and 5% of the Principal Amount on a date not more than 28 days after acquiring the Security.

On 25 February 2002 the Settlor delivered the notice referred to in 3 above to the Issuer and subsequently sold the Security to S G Hambros Bank & Trust (Jersey) Limited, an unconnected purchaser for £66,466. SG Hambros Bank & Trust (Jersey) Limited was first approached on 4 February 2002 regarding the possible acquisition of the Security. Legal costs of £367 were incurred in arranging the sale of the Security which are relevant costs under Para 1(4) Schedule 13 Finance Act 1996 .

On 12 March 2002 the Issuer redeemed the Security for £68,415 in accordance with the terms referred to in 3 above.

As a result of the sale mentioned above the Settlor incurred a loss as defined in Para 2 Schedule 13 Finance Act 1996 of £1,093,474 being the sale proceeds received of
5 £66,466 less the issue price of £1,159,573 and less the legal costs of £367. This loss is eligible for offset against income of the Settlor in accordance with Para 2 Schedule 13 Finance Act 1996.