TC02885

Appeal number: TC/2010/08914

Income Tax – Discovery Assessment – whether assessment validly made – whether sufficient information provided for assessment to be made earlier by hypothetical officer – s.29 (5) TMA 1970 – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MICHAEL FREEMAN **Appellant**

- and -

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

TRIBUNAL: JUDGE DR K KHAN
DAVID E WILLIAMS CTA

Sitting in public at Bedford Square, London on 17 and 18 June 2013

Stephen Brandon QC and Harriet Brown, Counsel for the Appellant

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

DECISION

Introduction

1. This appeal concerns whether it is open to the Commissioners of Her Majesty's Revenue & Customs ("the Commissioners") to raise a discovery assessment dated 21 June 2007 in relation to the Appellant's 2002/03 tax year. If the Commissioners are entitled to raise a discovery assessment there is no dispute that the Appellant owes capital gains tax of £404,702.80 plus interest.

2. The capital gains tax liability is assessed because the Appellant believed he was entitled to taper relief on the redemption of £2,606,462 BriTel Floating Rate Guaranteed Unlisted Unsecured £1 loan notes ("the Loan Notes") in the belief that they were non-qualifying corporate bonds. It is accepted that the Loan Notes were in fact qualifying corporate bonds ("QCBs") within the meaning of section 117 of the Taxation of Chargeable Gains Act 1992, and so the Appellant was not entitled to taper relief.

3. The appeal concerns whether the Commissioners are time-barred by failing to have opened an enquiry into the Appellant's 2002/03 Return. The relevant time limit for doing so is 31 October 2005.

4. The appeal concerns whether the Commissioners are permitted to raise a discovery assessment under s.29 Taxes Management Act ("TMA") 1970 and in particular whether s.29 (2) and (5) are satisfied. There is no question of negligent or fraudulent conduct under s.29 (4) TMA 1970.

Background Facts

5. The facts in this case are largely agreed and those listed below are drawn from the Statement of Agreed Facts.

(1) The Appellant is a commercial property developer and founded, with his brother, a company which became Argent Group plc ("AG"). In August 1997 he was the registered holder of 969,990 shares in AG ("AG Shares"). These were exchanged for 3,637,462 Loan Notes.

(2) The swopping of the AG Shares for Loan Notes was the subject of a clearance with the Inland Revenue pursuant to s.138 TCGA on 10 July 1997 and the clearance was given on 12 August 1997.

(3) The acquisition of the Loan Notes was mentioned in the "additional information" section of the tax return (the "1997/1998 White Space Disclosure") which stated:

> "On 1 August 1997, I sold [the AG Shares]. The consideration received consisted of [the Loan Notes]. S.135 TCGA 1992 applies to this transaction and therefore it has not been reported on the CGT pages of this tax return."

(4) In 1998/99 the Appellant redeemed £235,000 of the Loan Notes at par. He redeemed a further £800,000 worth of Loan Notes at par in 1999/2000.

The redemptions were included on the Appellant's tax returns for the relevant years. Taper relief was not claimed in respect of the 1998/99 and 1999/2000 redemptions because the Loan Notes did not, at that point, qualify for taper relief.

(5) In December 2002, the Appellant redeemed at par the remaining Loan Notes, worth £2,602,462. Taper relief was claimed in relation to the December 2002 redemption of Loan Notes because, if they had not been qualifying corporate bonds, they would have at that point qualified for taper relief on the grounds that they would have become business assets with effect from 6 April 2000.

6. On 5 January 2000 the Appellant and his accountants, Arthur Andersen, were informed that the Inland Revenue were opening an enquiry into his 1997/1998 return under s.9A TMA ("First Enquiry"). Arthur Andersen wrote to the Inland Revenue on 3 April 2000 including information requested on 5 January 2000 ("Enquiry Letter").

7. The information requested was set out in detail in the Enquiry Letter and stated:

> "We enclose the letter from the Chairman of BriTel Property Acquisitions Limited relating to the share options reported in Mr Freeman's tax return. We also enclose guidance notes for completing the form of instruction in respect of the option, which sets out the option prices used in the calculation of the sums received … We also enclose a schedule detailing the options granted and the option prices payable … we have enclosed copies of the following:
>
> the offering document for AG
>
> the letter from the Company Secretary of [AG]
>
> the letter from the Chairman of BriTel Property Acquisitions Limited in which loan notes are offered as an alternative to cash; and
>
> a copy of the loan note issued"

Copies of the documents listed in the Enquiry Letter were enclosed with that letter. HMRC were, therefore, provided with an unexecuted copy of the "… *loan note issued* …" (the "Loan Note Instrument") on 3 April 2000.

8. There was a discussion whether or not the Loan Notes were qualifying corporate bonds under s.117 (1) TCGA. The Appellant's advisers stated:

> "… It is our opinion that the [Loan Notes] are non-qualifying corporate bonds. The loan note instrument provides for "altering the currency of denomination" by way of Extraordinary Resolution. As s.117(1)(b) [TCGA] provides that a qualifying corporate bond cannot be capable of being denominated in a currency other than sterling, we would conclude that the [Loan Notes] are not qualifying corporate bonds …"

9. On 7 June 2000 Mr D G Pepler, a "Technical Inspector" of the Inland Revenue stated:

> "I agree that the facts point to this being a non-qualifying corporate bond".

10. The Loan Note in para.22 contained the following:

> "A meeting of the Noteholders may by Extraordinary Resolution sanction any modification, abrogation, compromise or release previously approved in writing by the Company in respect of any provisions of the [Loan Note Instrument] … and in particular (but without limiting in any way the general power conferred hereby) shall have the power to sanction any agreement or waiver for or having the effect of … altering the currency of denomination [of the Loan Notes] …"

11. In the Tax Return for 2002/03 ("Tax Return") under "additional information" the following White Space Disclosure was made:

> "[Loan Notes] 2602462. On 31 December 2002 I redeemed my entire holding of 2602462 [Loan Notes] at par. The [Loan Notes] were non-qualifying corporate bonds. The [Loan Notes] were acquired as consideration for the disposal of shares in [AG] on 1 August 1997. S.135 TCGA 1992 applied to this transaction."

12. On 8 February 2006, HMRC wrote to the Appellant and the Appellant's advisers, now Deloitte & Touche Private Clients Ltd ("Deloitte") and stated:

> "In addition I intend making enquiries into your tax return for the year ended 5 April 2003 under what is known as the discovery provisions …"

The letter also stated:

> "As regards the return for the year ended 5 April 2003 you will note that my enquiry is being conducted under the discovery provisions. The reason for this is because [the Loan Notes] are in fact QCBs which is at odds with the statement on the capital gains pages to your client's 2002-03 return.
>
> It is my understanding that your client acquired these loan notes in exchange for his shares in [AG] in which case the gain arising on their redemption should be calculated by reference to the market value of the [AG] Shares in July 1997 which means that no taper relief is due …"

13. An assessment was issued on 21 June 2007 which was appealed on 13 July 2007.

14. An internal review was undertaken by HMRC in October 2010 which varied the amount of tax due to £404,702.80. In all other respects the internal review upheld the assessment.

15. The Appellant gave the Tribunal notice of the Appeal on 19 November 2010.

Legal provisions

LEGISLATION AND CASES	
As at 31 October 2005	
1.	Taxes Management Act 1970, section 9A
2.	Taxes Management Act 1970, section 29
As at 7 June 2000	
3.	Taxation of Chargeable Gains Act 1992, section 2A
4.	Taxation of Chargeable Gains Act 1992, section 116
5.	Taxation of Chargeable Gains Act 1992, section 117
6.	Taxation of Chargeable Gains Act 1992, section 126
7.	Taxation of Chargeable Gains Act 1992, section 127
8.	Taxation of Chargeable Gains Act 1992, section 135
As at 31 December 2002	
9	Taxation of Chargeable Gains Act 1992, section 2A
10.	Taxation of Chargeable Gains Act 1992, section 116
11.	Taxation of Chargeable Gains Act 1992, section 117
CASES	
12.	*Langham v Veltema* 76 TC 259
13.	*Corbally-Stourton v HMRC* [2008] STC (SCD) 907
14.	*Swift v HMRC* [2010] SFTD 553
15.	*R (on the application of Pattullo) v Revenue and Customs Comrs* [2010] STC 107
16.	*Lansdowne Partners Limited Partnership v HMRC* [2010] EWHC 2582 (Ch), [2011] STC 372
17.	*While v HMRC* [2012] UKFT 58 (TC)
18.	*HMRC v Lansdowne Partners Limited Partnership* [2012] STC 544
19.	*HMRC v Charlton* [2013] STC 866
HMRC MATERIALS	
20.	Statement of practice SP 1/06
21.	Section 29 TMA 1970

Section 29 TMA 1970

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 sufficient, 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) Whereas -

(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 is attributable to fraudulent or negligent conduct on the part of 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, or be aware of the situation mentioned in subsection (1) above.

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

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

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

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

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

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

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

(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 chargeable periods; 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 804ZA of the principal Act].

(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 (a) 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.

Witness Statements

(1) Witness statement of Michael Freeman

The witness statement of Michael Freeman comprises 12 pages and was signed on 10 February 2012.

He made the following points:

(1) He is a solicitor who never practised law but was involved in commercial property development.

(2) He gave an extensive background of his business which he started with his brother and which grew into a significant property development firm. The firm was later sold to the BriTel Group.

(3) He received BriTel Loan Notes for his shares in the business and over a period of time redeemed those Loan Notes in tranches for shares.

(4) He hired two of the Big Four accounting practices to complete his person tax returns and received tax advice from them. In July 2002, Deloittes were his advisers and December 2002 he redeemed all of his remaining Loan Notes.

(5) He was surprised when a discovery assessment was made into his 2002/3 returns as he understood that the legal status of the Loan Notes had been agreed with HMRC.

(6) By 8 February 2006, HMRC were contending that the Loan Notes were not non-qualifying corporate bonds contrary to the view expressed in 2000. In reviewing the correspondence between Deloittes and HMRC he said that he could see "no reference as to why HMRC had changed its mind as to the status of the Loan Notes,

save that HMRC say they believe they had discovered information which they did not previously have."

(7) At all times he made full disclosure of all his tax affairs to HMRC.

(2) Witness statement of Allison Claire Webster

The witness statement comprises approximately 6 pages and is dated 16 February 2012. She makes the following points:

(1) She is presently a tax partner at Deloittes and had commenced working on the Appellant's personal tax affairs in October/ November 2002.

(2) She was involved in the preparation of his returns for 2002/03 and made the relevant disclosures regarding the Loan Notes which was stated in the tax return.

(3) The reference to the Loan Notes being non-qualifying corporate bonds was made because it was crucial to the claim for taper relief which was being made by the Appellant. If the Loan Notes had been qualifying corporate bonds no taper relief would have been available on redemption in 2002/03.

(4) She said that at the time of the 2002/03 returns it was not the prevailing practice to send supporting documents to HMRC with tax returns.

(5) She confirmed that she had no first hand knowledge of the First Enquiry in 1997/8 but was aware that the Loan Note instrument had already been supplied to HMRC and had been subject to a technical review as to its status by HMRC during the course of the First Enquiry. She was under the impression that the tax treatment of the Loan Notes as non-QCBs had already been agreed.

(3) Witness Statement of Jane *Wright*

The witness statement comprises approximately 7 pages and is dated 10 January 2012. She makes the following points:

(1) She is part of the Specialist Investigations Team at HMRC in Salford whose job in 2005 was that of an enquiry caseworker in the Complex Personal Returns Team.

(2) During the course of an enquiry under Section 9A TMA 1970 into the affairs of another holder of Britel Loan Notes ("Taxpayer A"), the previous enquiry case-owner, Dorothy Richardson, had to consider the status of the Britel Property Acquisition Ltd Loan

Notes 2002. The question is whether or not these Loan Notes were Qualifying Corporate Bonds (QCBs). If the notes were QCBs then taper relief claimed of over £600K would not be due to the taxpayer.

(3) The adviser to that taxpayer, Deloitte, said that the Loan Notes were not QCBs which was at odds with HMRC's reference material, i.e. the listings in the "Exemptions from Capital Gains Tax – Qualifying Corporate Bonds" and "Capital Gains Tax Service" as produced by the Financial Times. These publications, entitled Interactive Data (formerly Extel), are used by HMRC as a primary source of reference material on shares and securities which are quoted on the London Stock Exchange. Ms Richardson sought advice from a Technical Inspector on 6 June 2005.

(4) That Inspector, Carol Martin, responded to an advice request on 10 June 2005 and suggested the form of the reply to the specific points raised by Deloitte with regard to the QCB legislation, the anti-avoidance clearance procedure and the fact that non QCB status had already been agreed for other, unnamed, taxpayers for whom they also acted. Ms Richardson had, however, been aware of one other individual whose liability might be affected by this issue and had advised the person dealing with that taxpayer. It is at this point- about the middle of 2005- that Ms Wright assumed responsibility for the enquiry into Taxpayer A, (following the retirement of Dorothy Richardson).

(5) On 29 June 2005 following the advice given by Carol Martin, Ms Wright wrote to Deloitte in relation to Taxpayer A setting out HMRC's views on the status of the Loan Notes.

(6) Deloitte, in response to HMRC's letter, wrote on 18 July 2005 that they disagreed with their view of the Loan Notes, which they believed were non-QCB Loan Notes.

(7) Ms Wright informed Carol Martin on 8 August 2005 of the view of Deloitte.

(8) On 16 August 2005, Ms Wright telephoned Mr David Cass at Head Office (Capital Taxes, Capital Gains Technical Group in Solihull) and after she had made a submission report on 17 August 2005, Mr Cass responded on 7 November 2005 and agreed with the view of Carol Martin. He suggested that Ms Wright contact other holders of the Loan Notes who may have returned their gains on the basis that the notes were not QCBs.

(9) On 14 March 2006, Deloitte conceded in respect of Taxpayer A that the Loan Notes were QCBs. His affairs were settled accordingly.

(10) Following Mr Cass's advice to locate other Loan Note holders (see paragraph 8 above), Ms Wright located and reviewed the tax return for 2002/03 of Mr M Freeman but did not feel that she had cause to refer to the first enquiry papers in 1997/98. She felt that enquiry related to a matter involving capital losses and was not relevant to the present enquiry. Indeed, in her oral evidence she said that that enquiry had been taken over by another specialist HMTC team and that the relevant papers were not even in her file when she took over from Ms Richardson.

(11) On 30 November 2005 she wrote to Carol Martin advising her that she had located the file of Mr M Freeman and his 2002/03 return. She explained to Ms Martin that Deloitte had stated that the Loan Notes had been reviewed and agreed by one of their colleagues. The enquiry window had just closed on 31 October 2005 so she asked Ms Martin for her view on the discovery position given the information provided by Mr Freeman in his 2002/03 return in respect of the Loan Note redemption.

(12) Carol Martin, on 1 December 2005 considered that they had a discovery position for 2002/03 returns pursuant to s.29 (5) TMA 1970.

(13) A discovery letter was issued on 8 February 2006 to Mr Freeman advising him that, under the discovery provisions, there was to be a review of the capital gains reported on the redemption of his Loan Notes. HMRC challenged the statement he made on his return that the Loan Notes were non-QCBs when in fact they were QCBs.

(14) Deloitte replied to HMRC on 30 March 2006 in which they disputed that a discovery could be made.

(15) On 5 April 2006 Carol Martin was asked to advise and she referred to their Team Leader, Duncan Cameron, on 20 April 2006 asking for his opinion on the discovery position. He confirmed that they did have a discovery position which could be pursued.

(16) Letters were exchanged between Carol Martin and Deloittes on 28 April 2006 to 1 March 2007 where each side put forward technical arguments and counter-arguments on the discovery position. The parties could not agree and an assessment was issued on 21 June 2007.

16. One point which is made by Ms Wright is that Mr Pepler in a letter dated 7 June 2000 stated that he had agreed "the facts point to this being a non-Qualifying Corporate Bond". This is stated in paragraph 19 of the witness statement.

17. It was explained during her oral examination that Extel is an information guide published by the Financial Times dealing financial information on certain corporate

transactions including Qualifying Corporate Bonds, which is distributed to tax offices which identifies the status of listed bonds and which would state whether a security is or is not a QCB.

Appellant's Submissions

18. The Appellant makes two main submissions. The first is that s.29 (5) TMA 1970 was satisfied in that the hypothetical officer mentioned in that sub-section would have had the Tax Return made available to him, and on the basis of information in that Tax Return, and of what a reasonable officer could be expected to know, he could reasonably be expected to have been aware of an insufficiency of tax in the Tax Return. The officer who made the original assessment (Ms Wright) and several other key members of the Complex Personal Return Team at Salford were very well aware of the tax status of the Loan Notes before 31 August 2005.

19. The team at Salford would have had before them the Tax Return of the Appellant in which he referred to the Loan Notes and notified HMRC that the Loan Notes were not QCBs. Taken together with his assumed knowledge that HMRC had changed its position on the status of the Loan Notes, an ordinarily competent officer would have spotted that the Appellant had been under-assessed to tax well before 31 October 2005. The hypothetical officer can reasonably be expected to know that HMRC had changed their mind on the tax status of the Loan Notes.

20. The Appellant draws reference to several cases and explains that all the information HMRC needed to identify the insufficiency of tax was the Loan Note and knowledge of their change of view from that expressed in the correspondence with Mr Pepler. In the Appellant's view, HMRC simply needed to read the Tax Return, which was both honest and accurate at the time it was submitted and they would have realised that the Appellant's position was that the Loan Notes were not QCBs. The disclosure in the Tax Return of 2002/3 notified HMRC of this position. The Tax Return was simply informing the Respondents of a matter already agreed between them (i.e. that the Loan Notes were not QCBs) and therefore it was difficult to see what else was needed.

21. The Appellant says that s.29 (5) and (6) are relevant in respect of what the hypothetical officer should have been aware of and he should have been aware that there was an underpayment of tax by the Appellant well before 31 October 2005.

22. The Appellant accepts that the only other document needed to form a view on the insufficiency of tax is the document governing the Loan Notes and the relevant wording of the currency provisions therein, but the HMRC had already taken a view on those provisions and they had changed their mind on the technical position. They had simply failed to look at the Tax Return in time.

23. Where a discovery is simply a new interpretation of the law by the Respondents, in respect of a document already provided to them by the Appellant, the Officer (in s.29 (5)) could reasonably be expected to be aware of such a change and taking into account the information provided and the change of the Respondents' view, a

hypothetical officer ought to have been aware of the insufficiency of tax from looking at the Tax Return. Further, the officers in that particular tax office at Salford did know of the change of mind regarding the QCBs.

24. The Appellant's second argument focuses on s.29 (6) (d) (ii), and while recognising that both this and the earlier argument are stand-alone arguments they can also be taken together. The Appellants provided the Respondents with a copy of the Loan Notes in 2000 which satisfied s.29 (6) (d) (ii). The Loan Note agreement was provided and HMRC knew both of the existence and relevance of that document. The information was provided to persons who might reasonably be expected to be in some way responsible for the Appellant's affairs and who were in fact so responsible, the Salford office.

25. Section 29(6) (d) (ii) is concerned with any information provided before 31 October 2005 provided it is within the scope of s.29 (6) (a) to (c) TMA.

26. The information contemplated by s.29 (6) TMA is the Tax Return including the 2002/3 disclosures, stating that the Loan Notes were not qualifying corporate bonds; the foreign currency provisions in the Loan Notes which were notified to the Respondents in writing in relation to the First Enquiry and the letter of 3 April 2000 from Arthur Andersen explaining why in their view the Loan Notes were not a qualifying corporate bond, a view based on the foreign currency provisions.

27. For this reason, the letter to HMRC of 3 April 2000 becomes quite important, though the Appellant says that the existence of the Loan Notes and the foreign currency provisions, could, in any event, be reasonably inferred from Tax Return. In any event, the letter of 3 April 2000 and the Loan Notes were provided prior to the Tax Return and it is not necessary for the information provided to HMRC to be provided in any particular year so long as it was provided before 31 October 2005.

28. The Appellant says that from the information provided before 31 October 2005 an ordinarily competent officer might reasonably have been expected to raise an assessment to make good an insufficiency of tax. The providing of sufficient information is all that is required and it is then incumbent on the officer to use their own powers of inference, understanding and judgment in reviewing the information made available in arriving at the conclusion that there was an insufficiency of tax.

Respondents' submissions

29. The Respondents say that the assessment is valid. Looking first at s.29 (5) TMA, they say that the hypothetical officer in that subsection is not to be regarded as having knowledge of the contents of the Loan Notes instrument attributable to him. This is because the copy of the Loan Notes instrument were sent to HMRC several years before the taxable transaction occurred, so it was not made available to the hypothetical officer in s.29(5) within the meaning of that term as defined in s.29(6) TMA. Without knowing the terms of the document, the hypothetical officer could not have been reasonably expected to be aware of the insufficiency. In the Respondents' view, the officer, Mrs Wright (or anyone else in HMRC) would not have been

consciously aware that HMRC were changing their view on the status of the Loan Notes in June 2005. Section 29(5) TMA does not involve a test whether *in all the circumstances* HMRC could have detected an insufficiency prior to the expiry of the time limit for opening an assessment. The information which informs the Inspector's awareness for the purposes of the statutory test is only that information set out in s.29 (6). It is irrelevant if information is available to the Inspector from other sources.

30. The Respondents say that Section 29(6) TMA is exclusive and exhaustive in defining what information is "made available" to the hypothetical Inspector. The only relevant information for the purpose of s.29 (5) TMA (leaving aside any argument on s.29 (6) (d) (ii)) was a brief statement in the Appellant's return for 2002/3. There is nothing in that statement which would lead the hypothetical officer to become aware of an insufficiency such as to justify the making of an assessment. There is nothing in the statement which would lead the hypothetical officer to be aware that relevant Loan Notes were in fact QCBs.

31. The Respondents' second point concerns s.29 (6) (d) (ii). They say that the enclosing of the Loan Notes instrument under cover of Arthur Anderson's letter dated 3 April 2000 does not give any notification of its relevance to the insufficiency in respect of 2002/3. The Appellant places great emphasis on the notification of relevance and says that the Arthur Anderson letter of 3 April 2000 is silent on the point of relevance and therefore the Appellant relies on the wording of his Tax Return in 2002/3 as constituting a notification of relevance for the Loan Notes instruments supplied several years earlier. The information supplied in the White Space of that year's return makes no reference to the Loan Notes instrument previously supplied. If the Loan Note had been supplied with the 2002/3 Return the situation might have been different.

Discussion

32. The issues in this case both centre on s.29 (5) TMA. This section provides a condition which must be met in order for the Respondents to make an assessment under s.29 TMA. Unless the conditions in s.29 (5) TMA are met the Respondents cannot make a discovery assessment.

33. The Appellant relies on two core arguments which are not strictly alternative arguments; each argument stands either alone or together. The Respondents agree that these are the two core arguments on which the case depends.

34. The two arguments of the Appellant are:

(1) That s.29(5) TMA 1970 was satisfied, which is to say that at the conclusion of the enquiry window for the Appellant's 2002/03 Return (31 October 2005), an officer of HMRC could reasonably have been expected, on the basis of information made available to him, to be aware of an insufficiency in the Appellant's tax return; and

(2) That the supply of a copy of the Loan Notes under cover of the Arthur Andersen's letter dated 3 April 2000 falls within s.29(6)(d)(ii) for the purposes of HMRC's assessment in respect of the year 2002/03.

35. The arguments can be referred to in shorthand as the (s.29 (5) point) and the ((d) (ii) point).

36. Before we start a word about Discovery Assessment.

37. Where a taxpayer has submitted a Tax Return, HMRC have 12 months within which to notify the taxpayer of its intention to enquire into the Return (s.9A, TMA 1970). Outside of this period, HMRC may issue a discovery assessment to recover any under-assessment of tax unless prohibited from doing (s.29 (3) TMA 1970). HMRC may be prohibited from issuing a discovery assessment where a hypothetical officer could reasonably have been expected, on the basis of information provided by the taxpayer, to have been aware of the under-assessment (s.29 (5) TMA 1970). The information contemplated by that section is provided if it is any of the following:

(i) Information in the taxpayer's return for the relevant year, or in any accounts, statements or documents accompanying the Return (s.29 (6) (a) TMA 1970).

(ii) Information contained in any claim for the relevant tax year by the taxpayer acting in the same capacity as that in which he made the Return, or in any accounts, statements or documents accompanying such claim (s.29(6)(b) TMA 1970).

(iii) Information contained in any documents, accounts or particulars that, for the purposes of any enquiry into the return or any such claim by HMRC officer, the taxpayer produces or provides to the officer (s.29 (6) TMA 1970).

(iv) Information, the existence and relevance of which the taxpayer notifies in writing (s.29 (6) (d) (ii) TMA 1970).

38. While the term "discovery" is not defined in the legislation, it is taken to mean coming to a conclusion or having reason to believe which in turn gives rise to an assessment of tax. In *Langham v Veltema* [2004] ECWA Civ 193 ("Veltema"), the Court offered the more simplistic meaning of "for any reason, it newly appears that the taxpayer has been undercharged".

39. In the recent decision of *Charlton & Others v HMRC* [2011] UKFTT 467 (TC) ("Charlton") the Tribunal introduced the additional requirement of *newness* which includes a situation where the original Inspector changed his mind, or a new Inspector took a different view. In the same case, the Upper Tribunal in *HMRC v Charlton Corfield & Corfield* [2012] UKUT 770 (TCC) ("Charlton Upper Tribunal") the Tribunal confirmed that 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" which can be for any reason, including a change of view, change of opinion, or correction of an oversight.

40. HMRC can make a discovery assessment if a hypothetical officer could not have been reasonably expected, on the basis of information made available to him before the expiry of the enquiry window or closure of the enquiry, to be aware of the

relevant situation, which justifies the making of the assessment. This raises an interesting condition for the issuing of a discovery assessment. In *Charlton Upper Tribunal* the Tribunal, while recognising that the hypothetical officer may have no particular knowledge or experience, held that he must satisfy the test of "reasonable awareness". The Tribunal said that the officer "must be assumed to have such level of knowledge and understanding that would reasonably be expected in an officer considering the particular information provided by the taxpayer". It is possible in certain cases, given the complexity of the law or the transactions involved, that a particular officer could not reasonably be expected to be aware of an insufficiency on the face of the documents. The officer who has to be "aware" is not the particular officer who was in fact involved in the case, but a hypothetical officer.

41. A taxpayer must therefore make an adequate disclosure to HMRC in that the information given in the taxpayer's return must be sufficient to indicate an insufficiency of tax. In *Charlton Upper Tribunal* it was held (at p 890f-g) that the information which is to be made available should allow the hypothetical officer to be able to infer its existence and its relevance, without the need to consult more specialist colleagues. The particular officer should be aware of an insufficiency in the self-assessment; it is not enough that he should merely become aware that he has to do something to check whether there is an insufficiency.

42. There are cases which are complex and the standard expected of the hypothetical officer may be different. In particularly complex tax cases, it is possible that the taxpayer may disclose factual information but an officer may not reasonably be expected to be aware of an insufficiency of tax due to the complexity of the relevant law. In *Charlton*, the scheme was very complex and required the attention of one of a small group of tax specialists within the Revenue. Such a situation may be the exception rather than the rule.

43. In *Charlton Upper Tribunal* the Court in considering the qualities of the hypothetical officer commented as follows:

> "Nor is there any single benchmark of the knowledge and experience the hypothetical officer should be expected to have. The test of reasonable awareness must be applied to the circumstances of each case. The necessity to assume an officer of reasonable knowledge and understanding … does not suggest that such reasonable knowledge and understanding must be confined to an assumed average, to be applied in all cases. How would such an average be determined? The test of reasonable awareness must in our view be applied to the particular context in which the question arises, and without regard to any perceived lack of expertise or specialisation of individual officers. The officer must be assumed to have such level of knowledge and understanding that would reasonably be expected in an officer considering the particular information provided by the taxpayer."

44. There is no single benchmark of the knowledge and experience the hypothetical officer should be expected to have. The officer therefore cannot be taken to know every fact known to HMRC nor is he expected to carry the entire corpus of knowledge relevant to his job in his head. An officer should know when he has to

look things up and where to look, and when he needs to consult colleagues. The officer should be equipped to do the job and to perform the role within HMRC for which he has been appointed. An officer in a specialist unit would inevitably have more specialist knowledge.

45. In a regional office,an officer in a specialist unit dealing with particular taxpayers who receives a White Space Disclosure would be able to understand what is being explained and claimed and the basis on which the entry was made. With such understanding, he might reasonably be expected to be aware of a possible insufficiency of tax. This means that the particular officer's knowledge should not be confined to tax law and case law. It will include HMRC practice and statements of their views as well as guidance given in their internal manuals for dealing with relevant points.

46. Against this backdrop let us look at the two main issues.

The Section 29(5) point

47. The Tribunal's task is to look at what was notified by the Appellant on his Return for 2002/03.

48. The Complex Personal Returns Team at Salford (Jane Wright) had a copy of the Tax Return of the Appellant. The Return made the following disclosure.

> "BriTel Floating Rate Guaranteed Loan Notes 2602462: On 31 December 2002, I redeemed my entire holding of 2602462 BriTel Property Acquisitions Limited Loan Notes at par. **The Loan Notes were non-qualifying corporate bonds** [emphasis added]. The Loan Notes were acquired as consideration for the disposal of shares in Argent Group plc on 1 August 1997. S.135 TCGA 1992 applied to this transaction."

49. The emphasised words were of course mistaken but the disclosure did make clear to any hypothetical officer that the Loan Notes were acquired in exchange for shares and not subscribed *de novo* for cash. To that extent the officer should have been on notice that issues relating to CGT taper relief might be relevant.

50. The Appellant says that the staff at Salford were well aware that the Loan Notes were QCBs and had before them a copy of the Tax Return and therefore had information showing that there was an insufficiency of tax.

51. It is the Appellant's task to show that s.29 (5) is satisfied. This would require two things, which are:

(i) The hypothetical officer would have had the Tax Return; and

(ii) On the basis of information in the Tax Return, and what a reasonable officer could be expected to know, he could reasonably be expected to have been aware of an insufficiency of tax in the Tax Return.

52. Section 29(6) (a) TMA deems the hypothetical officer to be aware of what is contained in a Tax Return. The officer would also have such information which a reasonably competent officer would know, not in relation to the taxpayer, but generally. The hypothetical officer is not a hypothetical officer in a vacuum but rather one who is standing in the shoes of the actual officer or in this case, a reasonable officer at Salford.

53. In the Appellant's view such an officer would have a reasonable understanding of what constitutes a QCB as a matter of law and be aware of the Extel information on the Loan Notes. Extel is a publication which allows HMRC to check the status of qualifying corporate bonds (one officer considered Extel to be "gospel" on the point) and therefore would know that the Loan Notes were stated in Extel to be QCBs

54. While recognising that the officer is not assumed to have in his head all relevant knowledge on all taxation matters, it would be assumed that he would update himself and look at the relevant material as his work requires. The assumed knowledge, which is different from the actual knowledge, based on the information provided by the taxpayer would mean that a particular officer has a general knowledge of the matter, the securities identified and their implications. In looking at the Return the officer would be aware from the disclosure that there had been an insufficiency of tax.

55. The Respondents disagree. They say that this situation is similar to that arising in *Veltema*, i.e. it justified enquiry but did not on its own alert the officer to the insufficiency, or at any rate not without further investigation. This point is explored in the *Charlton Upper Tribunal* case where the Tribunal said (para. 890F-G):

> "There is a clear distinction between cases where the information made available to the officer merely raises questions, which can only be resolved by obtaining further information and those where the available information provides awareness of an insufficiency that is sufficient to justify the making of an assessment. *Langham v Veltema* is an example of the former case, *Lansdowne* an example of the latter."

56. The passage above refers to an awareness of an insufficiency, even if it cannot be quantified at that stage, not of circumstances that might on investigation reveal an insufficiency. This point was made by Auld LJ in *Veltema* (at page 294C-D), he said:

> "If, as here, the taxpayer has made an inaccurate self-assessment, but without any fraud or negligence on his part, it seems to me that it would frustrate the [Self Assessment] scheme's aim of simplicity and early finality of assessment to tax, to interpret s.29(5) so as to introduce an obligation on tax inspectors to conduct an immediate and possible time-consuming scrutiny, whether or not in the form of an enquiry under s.9A of self-assessment returns when they do not disclose insufficiency, but only circumstances further investigation of which might not show it."

57. The awareness spoken of is of an actual insufficiency in the self-assessment in question. It does not mean a mere awareness that the officer should do something to check whether there is an insufficiency.

58. In her evidence, Mrs Wright, the officer dealing with the Return at Salford stated [paragraph 19 of her statement] the first time when she became aware of any correspondence relating to the 1997/1998 assessment was on receipt of Deloitte's letter on 30 March 2006-the relevant papers not having been in her file, as explained above, when she took over from Ms Richardson around the middle of 2005 (see paragraph 3(10) above summarising her evidence) In the circumstances, she would not have been aware of HMRC changing their view on the status of the Loan Notes in June 2005 from the view taken by Mr Pepler in his letter dated 7 June 2000, where he stated "the facts point to (the Loan Notes) being a non-qualifying corporate bond". Such a change of view may well give rise to public law remedies but the Tribunal accepts that the officer in charge, Mrs Wright, knew nothing of the correspondence relating to the First Enquiry until 2006.

59. Mr Brandon, in his submissions, attributed to the hypothetical officer a reasonable knowledge of HMRC's practice relevant to the return being examined. This is correct. From Mrs Wright's evidence, the statement by Ms Richardson (her predecessor) that Extel was regarded as "gospel", and the relevant HMRC manuals (especially paragraph CG53811 which was handed up to the Tribunal) Mr Brandon suggested it is routine that the officer would consult Extel, which if done here would have revealed that the Loan Notes were QCBs. That in turn would have revealed the insufficiency of tax at once. Mr Brandon said in closing that the need to refer to Extel could be regarded as incorporated by reference into HMRC manuals, and was therefore part of the knowledge of relevant practice which can properly be attributed to the hypothetical officer.

60. It is clear that if we are to assume that the hypothetical officer would have taken this further step, the insufficiency would have been revealed without anything resembling the time-consuming enquiries mentioned by Auld LJ in *Veltema*. Can we therefore take the view that Extel's contents are part of the "information made available" within s.29 (5)? There is no mention of Extel in the Return. The proper question therefore is can we deem reference to Extel and its contents to be information whose existence and relevance to the possible inefficiency could reasonably be expected to be inferred by the hypothetical officer from the information in the Tax Return as per s.29(6)(d)(i). Both Counsel towards the end of the hearing disavowed any reliance on s.29 (6) (d) (i) but did agree that there was a question based on s.29 (6) (d) (ii).

61. Rather, Mr Brandon made a simple point. He based his argument on s.29(5) on the view that the knowledge brought to bear on the return entry by the hypothetical officer included the practice of checking the status of corporate bonds and whether they are QCBs or non-QCBs against Extel records. In his view, an officer faced with the disposal involving a non-QCB would inevitably go to Extel and immediately spot the insufficiency, which would bring s.29(5) into play.

62. Mr Brandon in his submissions appeared to go further to say that the officer would have known that HMRC had changed its view on the status of these Loan Notes some time before autumn 2005, and should therefore have immediately detected the insufficiency from the assertion that the Loan Notes were non-QCBs.

63. The question is should the reference in Tax Return to QCB be sufficient to have alerted the officer to check Extel or indeed to know that there was an insufficiency of tax.

64. Mr Yates drew reference to the case of *Swift v Revenue & Customs* [2010] UKFTT 88 (TC) where Judge Avery Jones discussed the information on the Return which, in that case, had not been put in the right place but rather scattered throughout the Return. The question was whether the hypothetical officer would have spotted the reference to a "LLC" (a Delaware Limited Liability Company) and from that jumped to awareness that there was an insufficiency based on his knowledge that HMRC regarded the relief in question in that case as not due in respect of income from such an entity. Similarly, in the course of the argument before us in this case we asked Mr Yates to comment on the fact that the acronym QCB was used in the Return here, suggesting that this might also trigger an immediate reference to Extel and thus a discovery of the insufficiency in a very short time. Mr Yates pointed out that in *Swift*, the taxpayer made a correct reference to LLC, although in the wrong place, whereas here the disclosure was incorrect in the first place and would have led the officer away from the truth rather than towards it. The Tribunal accepts that distinction.

65. It is clear to the Tribunal that the officer, based on her own evidence, and looking at what the hypothetical officer would do, would not have spotted the insufficiency of tax based on the disclosure made by the Appellant on the return. The disclosure must point to an actual insufficiency by the disclosure in the return.

66. Mr Yates quite correctly points out that s.29 (5) does not involve a test of whether *in all the circumstances* HMRC could have detected an insufficiency prior to the expiry of the time limit for opening an enquiry.

67. A further point made by the Respondents concerns the source of information. They point out that the sources of information referred to in s.29 (6) TMA are the only sources of information to be taken into account in deciding whether an officer ought reasonably to have been aware of the actual insufficiency of tax. The particular information must clearly alert the officer to the insufficiency of the assessment.

68. The Respondents say that the Appellant is wrong to suggest that s.29 (5) TMA refers to both actual information provided to HMRC, though not necessarily by the taxpayer himself, and information deemed to have been made available to an Inspector by virtue of s.29 (6) TMA. The assertion is that only information deemed to have been made available to the Inspector under s.29 (6) TMA is relevant. They draw reference to the Court of Appeal decision in *Veltema* where Auld LJ, with whom Chadwick & Arden LJJ agreed, held that the test in s.29(5) must be understood as follows:

(1) The statutory test is concerned with what an Inspector could reasonably have been aware of, not what he could reasonably have been expected to do (paras.33-35);

(2) The information which informs the Inspector's awareness for the purposes of the statutory test is only that information set out in s.29 (6). It is irrelevant if information is available to the Inspector from other sources (paras.34-37).

69. The *Veltema* decision was concerned with the discovery assessment in respect of a transfer of house from a company to its director. The director's personal return merely stated that an asset had been transferred to the value of £100,000. The company's P11D (a return of benefits provided to employees) stated the asset in question was a house valued at £100,000 and that the director had made no payment for the transfer. The company's corporation tax return, sent to a different Inspector over a year later, included the relevant accounts with a note which recorded that the house had been occupied by the taxpayer who was the sole director, without payment and with an estimated value of £100,000. It later transpired after reference to the District Valuer that the house was in fact worth an agreed figure of £145,000. This meant HMRC had "corporate knowledge" of the undervaluation prior to the expiry of the time limit for an enquiry. The Court of Appeal found this not to be relevant. This was because s.29 (6) provided an "exhaustive list" of information "made available to" the hypothetical officer. Information within the corporate knowledge of the Revenue, but not falling within any of the categories in that exhaustive list, fell to be ignored and therefore not available to the hypothetical officer.

70. This view of s.29(6) found support in the decision of Lewison J in *Lansdowne Partners LP v HMRC* [2011] STC 372 ("Lansdowne") at [46]:

> "[46] In *Langham (Inspector of Taxes v Veltema* [2004] EWCA Civ 193, …the Court of Appeal considered s.29 and discovery assessments. In my judgment the case establishes the following propositions:
>
> i) "Awareness" is the officer's awareness of an actual insufficiency in the self-assessment in question, rather than awareness that he should do something to check whether there is an insufficiency (Para.[33]);
>
> ii) The test whether an officer could reasonably have been expected to be aware of an actual insufficiency is an objective test (Para.[33]);
>
> iii) The source of information referred to in s.29(6) are the only sources of information to be taken into account in deciding whether an officer ought reasonably to have been aware of the actual insufficiency (Para.[35], [51]); and
>
> iv) The information in question must clearly alert officers to the insufficiency of the assessment (Para. [36]) …"

71. This position is supported by the Upper Tribunal decision in *Charlton.*

72. This leads us to the disclosure which was made by the Appellant. For the purposes of s.29 (5) the only relevant information was the disclosure in the Appellant's return for 2002/03 and there is nothing in that disclosure which would lead the hypothetical officer to become aware of an insufficiency which would justify the making of an assessment. He would not know that the Loan Notes were in fact QCBs. This position was accepted by the Appellant's advisers, Deloittes, in their letter on 23 February 2007 where they said:

> "We can accept that the statement contained in our client's 2002/03 Tax Return "the BriTel Loan Notes were non-QCBs" was not sufficient information for the Inspector to be aware of any doubt and open an enquiry under s.9A TMA 1970 to review the basis of the tax treatment."

73. In the Tribunal's view, even though the additional step of consulting Extel would have been a short one, the test must be whether the information disclosed in the Return alerted the officer to an insufficiency of tax. The answer to that is "no". The question is not whether the officer should have taken further steps to check disclosed information or been aware of a piece of internal information regarding the status of the QCB. The disclosure on the return should be sufficiently complete and comprehensive and this was not the level of disclosure which was made. We cannot accept Mr Brandon's argument that, based on the disclosure, the hypothetical officer would have checked the status of the QCBs against the Extel records.

The (d) (ii) point

74. The Respondents do not dispute that enclosing the Loan Notes under cover of the Arthur Andersen's letter dated 3 April 2000 satisfies all the requirements of s.29(6)(d)(ii) other than the notification of its relevance to the insufficiency in respect of the particular tax year in question, i.e. 2002/03. They accept that there is no time requirement for notification in writing in s.29 (6) (d) (ii).

75. Their point relates to the requirement of notification as to relevance of an insufficiency of an assessment in a particular year. They draw reference to Lewison J in *Lansdowne* at para.52 where he said:

> "However, the information relied on under s.29(6)(d)(ii) must communicate not only the existence of the information but also its relevance to the situation mentioned in sub.s(1) namely the insufficiency <u>in the particular year of assessment</u> [emphasis added]."

76. They say that the Arthur Andersen letter of 3 April 2000 is the only communication on behalf of the Appellant (prior to the closure of the enquiry window on 31 October 2005) which could constitute notification in writing for the purposes of s.29(6)(d)(ii). While the letter states Arthur Anderson's view of the Loan Notes as not being QCBs, it is silent on the relevance of the Loan Notes to 2002/03 or indeed the significance of the status of the Loan Notes to the application of taper relief. Further, the information in the White Space in the Appellant's return of 2002/03 makes no reference to the Loan Notes which had been previously supplied. For this reason, s.29 (6) (d) (ii) is not satisfied.

77. The Respondents say that although the Loan Notes were made available to HMRC several years before, they were not "made available to" the hypothetical officer in s.29(5) within the meaning of that term as it is defined by s.29(6) TMA. The simple question therefore is whether the relevant provisions are satisfied. In other words whether the submission of the Loan Notes together with the other contents of the letter from Claire Webster to the Salford Tax Office of 3 April 2000 satisfies the terms of s.29 (6), i.e. that they contained "… information, the existence of which, and the relevance of which as regards to situation mentioned in subsection (1) … are notified in writing by the taxpayer to an officer of the Board …".

78. There no dispute that the information disclosed in the First Enquiry into the 1997/8 Return informed HMRC of the existence of Loan Notes and included a copy of the instrument itself and of its relevance to the Appellant's liability *for that year* (1997/98). The disclosure being in writing to an officer of HMRC, by the Appellant's accountants on his behalf, did satisfy s.29 (7) (b) TMA. There is therefore no dispute that the Loan Notes instrument, which contained the relevant information needed to decide if it was a QCB, was information the existence of which, and the relevance of which was notified for the particular year of enquiry-1997/8- as required by s.29(6)(d)(ii) TMA.

79. The question is, was that information deemed "information available" within s.29 (5) TMA in relation to the 2002/3 year of assessment. Mr Brandon's argument is that the Respondents have added a "gloss" to the requirement that it must contain "… notification as to relevance to and insufficiency of an assessment … in a particular tax year ." The effects of such a requirement would be to impose a condition of an express mention of the liability in the later year (2002/3).

80. Mr Yates said that this would have required the Appellant's advisers, in the First Enquiry, to have demonstrated the relevance of the terms of the Loan Notes to 2002/3 as well as 1997/1998, and that the letter from Arthur Andersen of 3 April 2000 being "entirely silent" on the relevance to 2002/3 therefore does not satisfy the requirement of the legislation.

81. In the Tribunal's view subsection (d) (ii) has no such temporal restriction. The Loan Notes instrument which was supplied in 2000 would have alerted an officer, without more, that its terms would have affected liability 2002/3 because that was the year in which the final redemption would occur.

82. In the *Lansdowne* case the Court of Appeal stated that the hypothetical Inspector should be taken as having before him the partnership return and statement, the letter from the partnership to the Inspector of March 2006 and a note of a meeting in February 2006, all of which would have alerted the Inspector of an actual insufficiency of tax. The Court went on to point out that the hypothetical Inspector does not have to resolve points of law but it is enough that the information made available to him makes clear the need for an amendment to the Tax Return. This is a simple requirement.

83. Mr Brandon made the point that the Loan Notes instrument was "immutable". He accepted that changes could be made to the Loan Notes but it did not affect its status as a QCB. Mr Yates in reply pointed to paragraph 22 of the Loan Notes instrument which allowed the passing of a resolution of note-holders to change the currency; this was the provision which, in the Appellant's view, made the security a non- QCB. The provision also allowed other changes to be made. In particular, the redemption date could be altered if a resolution to that effect was passed. He explained that this created an element of uncertainty about the future and how the security would operate and drew a parallel with the *Lansdowne* case where there were similar uncertainties with regard to the future payment of rebates.

84. While the Tribunal accepts that the Loan Notes instrument, as drafted, does give wide powers of alteration under paragraph 22 the Tribunal draws reference to Mr Cass, a senior technical specialist at HMRC's Capital and Saving section, advising Mrs Wright in November 2005 who pointed out that:

> "I do not see that paragraph 22 … should be construed as a provision made for the conversion of the principle of debt evidenced by Loan Notes into a currency other than sterling. Rather, it is simply a clause that allows the holders of the Loan Notes to sanction, by way of an extraordinary resolution, changes to the terms of the Loan Notes that have been approved …
>
> It is entirely normal for a debt instrument such as this to contain a clause that allows the issuing company to change, subject to the consent of the holders of the Loan Notes, the terms and conditions on which the Loan Notes were issued."

85. Mr Cass considered that paragraph 22 is a normal commercial provision arising in this form of security.

86. When the Loan Notes instrument was supplied in 2000, could it be said that an officer would not have been aware of the implications for the year 2002/3? The officer would have been aware if nothing had changed, that there would have been a final occasion of redemption in 2002/3 and that an incorrect disclosure regarding the status of the Loan Notes as QCBs or otherwise, as indicated in the Tax Return for 2002/3, would have resulted in an insufficiency of tax.

87. In short, if an officer had the Loan Notes instrument, he would have known that, in respect of later years of assessment in which a disposal occurred, if a Tax Return claimed non-QCB status, there would be an insufficiency of tax. The Tax Return taken with the Loan Note instrument would certainly have alerted HMRC as to the insufficiency of tax. In fact Mr Pepler, the Inspector who conducted the First Enquiry, noted that the gains, "on the disposal would come into charge in 2002/3 at the latest. Other events might trigger an earlier charge". The position in 2002/3 would have been clear.

88. In the Tribunal's view, it cannot be said, as was been argued by Mr Yates, that the range of changes envisaged by paragraph 22 was so wide that an officer could not have been aware of any *definite* implications for the year 2002/3. If Mr Pepler

recognised as early as the First Enquiry that "other events", presumably the possibility of early redemption by resolution or by the taxpayer's option under the terms of the Loan Note instrument, would have triggered a tax charge then certainly there is no reason why an officer in 2002/3 would not equally have realised the same thing. To that extent a distinction can be drawn with the *Lansdowne* case since the uncertainty as to the future in this case is narrower than the uncertainty contemplated by Lewison J in *Lansdowne*. In that case the exchange of correspondence in 2000 dealt only with rebates in one year, to 31 March 1999. Lewison J held that this cannot have alerted an officer to an insufficiency in 2004/5 because there is nothing to indicate that this state of affairs would continue. He did say, rather pointedly, that "it might have been different" if the officer had been told that it would so continue (at page 391(b)).

89. We know that the relevance of the information to the insufficiency of tax need not be notified in a single document. This is provided in s.29 (6) (d) (ii) which provides mainly that the existence of, and relevance to the insufficiency of information "are notified in writing". It does not specify that it must be in one document.

90. The Loan Note instrument prescribes the rights of the note-holders in detail and provides for all relevant future years, subject to any changes made pursuant to paragraph 22. An officer looking at the returns in 2002/3 would have been alerted to the fact that the Loan Note had been reported as not being a QCB, and also to the terms of the instrument itself and the fact that the final redemption date fell in 2002/3. Armed with the knowledge that HMRC regarded the Loan Notes as, in fact, QCBs, he would know that such redemption by the taxpayer occurring in that year was likely to give rise to an insufficiency of capital gains tax if the taxpayer continued to regard them as non-QCBs and therefore claimed taper relief. He would, no doubt, also prudently have checked whether any relevant changes had occurred, but at that point the focus of the enquiry would be on quantifying the insufficiency rather than establishing whether there was one.

91. There is no question that the Loan Note and letter of 3 April 2000 were made available to the Respondents within the meaning of s.29 (6). The information provided in 2000 was information provided in writing to the Board on behalf of the taxpayer and had the hypothetical officer considered it, he could reasonably have been expected to become aware of the insufficiency to which it pointed before 31 October 2005.

92. An officer looking at the return in 2002/3 would know that the statement in the return that the Loan Notes was not a QCB was at odds with the instrument itself and that since the final redemption date fell in 2002/3 and that such an event had occurred in that year, there was likely to be an insufficiency of tax.

93. For this reason the appeal is allowed and the Amended Assessment is discharged.

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

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

DR K KHAN
TRIBUNAL JUDGE

RELEASE DATE: 19 September 2013