TC06301

Appeal number: TC/2016/04062

INCOME TAX— discovery assessments—whether HMRC made a discovery—yes—whether jurisdiction to consider s29(5) following HMRC review—yes— whether condition in section 29(5) satisfied—no—meaning of person acting on behalf of taxpayer within section 29(4)—test of carelessness—whether taxpayer or person acting on his behalf careless within section 29(4)—no—appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN HICKS **Appellant**

- and -

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

TRIBUNAL: JUDGE THOMAS SCOTT

Sitting in public at Taylor House, Rosebery Avenue, London on 11 to 15 September 2017

Keith Gordon of Counsel for the Appellant

Akash Nawbatt QC of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal concerns the ability of HMRC to make discovery assessments against Mr Hicks for the years 2009-10 and 2010-11.

2. Those assessments relate to trading losses claimed to arise in 2008-9 from certain arrangements devised by Montpelier tax consultants and carried forward to the following two tax years.

3. The substantive issue of the effectiveness of the arrangements to generate the trading losses is not in issue in this appeal. Mr Hicks has not sought to appeal against the assessment raised by HMRC for 2008-09 to deny those losses. The only issue in this appeal is the validity of the discovery assessments for 2009-10 and 2010-11.

Issues

4. The appeal raises four issues, namely:

(1) Whether HMRC made a discovery;

(2) Whether HMRC are prevented by the conclusions of their statutory review from relying for 2010-11 on an insufficiency of disclosure to permit the discovery assessment;

(3) If the answer to (2) is no, whether a discovery assessment is permitted for 2010-11 on the basis of an insufficiency of disclosure, and

(4) Whether Mr Hicks or a person acting on his behalf was careless so as to permit a discovery assessment to be made for either or both of 2009-10 and 2010-11.

5. HMRC do not allege that the insufficiency of tax for the years in question was brought about deliberately by Mr Hicks or a person acting on his behalf.

Evidence

6. In addition to a considerable volume of documentation and correspondence, I heard evidence from four witnesses, namely:

(1) Mr Hicks;

(2) Mr Boote of HMRC, the officer who issued the discovery assessments;

(3) Mr Bevis, Mr Hicks' accountant, and

(4) Mr Callen, a work colleague of Mr Hicks.

7. Since the evidence of each witness has relevance for some but not all of the issues in this appeal, it is helpful to consider their evidence and my related observations and findings in the context of the discussion of each issue below.

8. At the opening of the hearing, I considered an application by Mr Nawbatt pursuant to Rule 32(5) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Rule 32(5) provides that the Tribunal "may give a direction excluding a witness from a hearing until that witness gives evidence." Mr Nawbatt sought such a direction in respect of all the witnesses, on the basis that this would avoid the evidence of each witness being influenced by the evidence of the others or by Counsels' submissions. Having considered all the circumstances, and having particular regard to the overriding objective, I concluded that on balance there was no good reason to grant the direction sought in respect of any or all of the witnesses.

Chronology

9. The key events for the purposes of the appeal in chronological order were as follows.

10. On 17 September 2008 Montpelier Tax Consultants (IOM) Ltd submitted to HMRC a Form AAG1 (headed "Disclosure of Avoidance Scheme (Notification by scheme promoter)") in respect of the arrangements implemented by Mr Hicks.

11. During January and February 2009 Mr Hicks attended two meetings with Montpelier to discuss the arrangements.

12. In February 2009 Mr Hicks signed documentation with Montpelier and entered into the arrangements.

13. Between signing that documentation and the end of the tax year 2008-09 Mr Hicks carried out the transactions which were claimed to give rise to the trading losses.

14. On 27 January 2010 HMRC received Mr Hicks' self-assessment tax return ("SATR") for 2008-09.

15. On 3 December 2010 HMRC opened an enquiry into the 2008-09 return.

16. On 28 January 2011 HMRC received Mr Hicks' SATR for 2009-10.

17. On 31 January 2012 HMRC received Mr Hicks' SATR for 2010-11.

18. On 30 March 2015 HMRC issued discovery assessments in respect of Mr Hicks' returns for 2009-10 and 2010-11.

19. Mr Hicks appealed against the 2009-10 assessment on 28 April 2015 and against the 2010-11 assessment on 30 April 2015.

20. On 29 June 2016 HMRC upheld the discovery assessments following a statutory review.

21. On 25 July 2016 Mr Hicks lodged an appeal against the discovery assessments.

Legislation

22. In so far as applicable, section 29 of the Taxes Management Act 1970 ("TMA") provided at the material time as follows:

> 29 Assessment where loss of tax discovered
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) 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)…
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board—
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
>
> (b) informed the taxpayer that he had completed his enquiries into that return,
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

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

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

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

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

(ii) …

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

23. The normal time limits for issuing an assessment are extended in certain circumstances by section 36 TMA, which, so far as relevant, provides as follows:

36 Loss of tax brought about carelessly or deliberately etc

(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates…

(1B) In subsections (1) and (1A) references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.

24. Section 118(5) TMA states as follows:

(5) For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation.

The discovery rules

25. Two important principles underpin the construction and application of the discovery rules.

26. First, as the Upper Tribunal stated in *Burgess v HMRC* [2015] UKUT 578(TCC), at [59]:

> "It must be recognised… that the assessment system that Parliament has legislated for is designed to provide a balance between HMRC and the taxpayer. Part of that balance is the requirement, in relation to discovery assessments and assessments outside the normal time limits, that HMRC satisfy the FTT that the relevant conditions for those assessments to have been validly made have been met."

27. In this case, since the substantive issue of Mr Hicks' loss relief claim is not in point, the burden of proof is on HMRC to establish on the balance of probabilities that the discovery assessments were validly made.

28. Secondly, the discovery rules now in force were intended to be more restrictive of HMRC's powers than the provisions in force prior to the introduction of self-assessment in 1996-97. In the context of the pre-2008 rules, which referred to fraudulent or negligent conduct, Moses LJ stated in the Court of Appeal's judgment in *Tower McCashback LLP 1 v HMRC* [2010] EWCA Civ 32, at [24]:

> "… apart from a closure notice, and the power to correct obvious errors or omissions, the only other method by which the Revenue can impose additional tax liabilities or recover excessive reliefs is under the new s29. That confers a far more restricted power than that contained in the previous s29."

29. In this appeal, HMRC did not issue assessments to Mr Hicks for 2009-10 or 2010-11 within the normal time limits. In seeking to issue discovery assessments for those years, HMRC must establish two issues. First, they must establish that a discovery was made for those years. Secondly, for the year 2009-10, since the discovery assessments were not issued until 30 March 2015, HMRC must establish carelessness within the terms of section 29(4), and for the year 2010-11 must either establish carelessness or that there was an insufficiency of disclosure such as to permit assessment under section 29(5).

Was there a discovery?

30. Mr Gordon argued that HMRC did not make a discovery of an insufficiency of tax within the meaning of section 29(1) for 2009-10 or 2010-11. His submission was that any discovery by Officer Boote has lost its essential "newness", and had become stale, by the time the discovery assessments were issued.

31. In considering this argument, it is necessary first to determine whether a discovery occurred and if so when. It was not argued that Officer Boote acted unreasonably in a *Wednesbury* sense, so there are two questions which arise. First, did

the officer "cross a threshold" as discussed below, and if so when? Secondly, was the issue of the assessments sufficiently proximate to the discovery?

The Montpelier scheme

32. While the substantive issue of the 2008-09 loss relief claim does not form part of this appeal, it is necessary for the purpose of considering the discovery issue briefly to summarise the arrangements entered into by Mr Hicks and why HMRC considered that they were ineffective, leading to an insufficiency of tax for 2009-10 and 2010-11.

33. It is irrelevant for the purposes of this appeal whether, as HMRC insist, the Montpelier arrangements were a "tax avoidance scheme", but I shall refer to them as "the Scheme". Broadly, the Scheme sought to rely on an interpretation of section 730 of the Income and Corporation Taxes Act 1988 as it then stood. It was intended for self-employed derivatives traders, who would buy dividend rights (in respect of shares in companies purpose-formed by Montpelier) with the intention that while the cost of such rights would be a deductible expense of their trade, by virtue of section 730 the dividend income would not be taxable on receipt.

34. A variation of the Scheme was held to be ineffective in *Clavis Liberty 1 LP v HMRC* [2016] UKFTT 253(TC). See further the dismissal of the taxpayer's appeal by the Upper Tribunal at [2017] UKUT 418 (TCC).

35. HMRC's arguments as to why the Scheme was ineffective developed over time. In due course, their primary arguments related to the interpretation of section 730; sham; *Lupton*; the existence of the necessary trade; *Ramsay*; the legality of the dividends, and whether the transactions had been properly implemented.

The evidence of Officer Boote

36. I heard evidence from Officer Boote, the HMRC officer who took over the HMRC investigation into the Scheme, and who issued the discovery assessments to Mr Hicks.

37. With the exception of one point, referred to at [39], I found Officer Boote to be a credible and reliable witness. I make the following findings of fact.

38. Mr Boote's involvement with the Scheme began in January 2014. At that stage, HMRC had spent time gathering facts in relation to the Scheme and marshalling their arguments in respect of three representative users of the Scheme (of whom Mr Hicks was not one). Specialist input had been sought from various HMRC departments, and had been drawn together by late August 2013. Officer Boote spent time understanding the Scheme and the various HMRC lines of argument. He reached the view that certain of the arguments—particularly relating to trading—were materially fact-sensitive.

39. By 30 March 2015 Officer Boote had concluded that the Scheme was ineffective and he issued the discovery assessments to Mr Hicks. His evidence was

that his decision to issue the assessments on that date, a few days before the applicable time limit expired, was entirely uninfluenced by that time limit. He could offer no other reason for choosing to issue the assessments on that date. In fact, he had written to Mr Hicks on 15 February 2015 seeking any further information by 3 April. Again he stated that the time limit was not a factor he took into account in setting that deadline. In the absence of any other explanation it is in my judgment extraordinarily unlikely that an experienced officer in the position of Officer Boote would not have both been aware of and taken account of the statutory time limits in issuing the assessments. I have concluded that on this one point Officer Boote was not being open in his evidence. I do not, however, find that this affected his credibility or reliability on any other aspect of his evidence.

40. Mr Boote described the role which he took over in January 2014 as "technical lead" in relation to HMRC's investigation of the Scheme. He personally identified the legality of the dividends as a possible line of HMRC challenge and instigated an internal opinion on that point. The specialist internal opinions which had been obtained when he took over his role were generic, and he needed to consider their application to the different fact patterns of the Scheme users, of whom there were 36. By summer 2014 he had concluded his technical analysis, and then turned to its application to the facts of each Scheme user. In November 2014 he wrote to Scheme users, including Mr Hicks, setting out his conclusions and seeking a settlement.

Discovery

41. In *HMRC v Charlton* [2012] UKUT 770 (TC), the Upper Tribunal stated (at [28]):

> "…the word "discovers" does connote change, in the sense of a threshold being crossed. At one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view. That is the only threshold that has to be crossed. We do not agree that the lawyer, in Lord Denning's example, would be regarded as having made a discovery any the less by waking up one morning with a different conclusion from the one he had earlier reached, than if he had changed his mind with the benefit of further research. It is, we think, evident that the relevant threshold for there to be a discovery may be crossed as a result of a "eureka" moment just as much as by painstaking research."

42. It is well established that the threshold at which a discovery arises for the purposes of section 29 is low. That is clear from *Charlton*. In *Hankinson v HMRC* [2011] EWCA Civ 1566, the Court of Appeal stated that it simply meant that the officer came to a conclusion, or satisfied himself, as to an insufficiency of tax. It includes a case where an officer (not acting unreasonably) changes his mind.

43. The relevant officer in this case was Officer Boote. It is in my judgment quite clear that he "crossed a threshold" in the sense described in *Charlton* and *Hankinson* before he issued the discovery assessments to Mr Hicks on 30 March 2015.

44. Mr Gordon's argument was that by 30 March 2015 that "discovery" was stale and had lost its essential newness, thereby ceasing to be a discovery within the terms of section 29(1).

45. The proposition that staleness can rob a discovery of its status is set out in the decision of the Upper Tribunal in *Pattullo v HMRC* [2016] UKUT 270 (TCC), at [52] to [55].

46. The decision in *Pattullo* is binding on this Tribunal, and I agree with the conclusion of Judge Brooks to that effect in *Clive Beagles v HMRC* [2017] UKFTT 462 (TC), at [49].

47. Was the discovery in this case stale? That is clearly dependent on the facts, although in *Pattullo* Lord Glennie agreed (at [53]) that:

> "… it would only be in the most exceptional of cases that inaction on behalf of HMRC would result in the discovery losing its required newness by the time that an assessment was made."

48. While Mr Gordon sought to suggest that HMRC might already have had sufficient information to "cross the threshold" by the time Officer Boote took over his role, that is not supported by the facts. Nor is it the critical issue in relation to staleness, since Officer Boote was the relevant officer within section 29(1), being the officer charged with leading the HMRC investigation into the Scheme and who issued the discovery assessments.

49. Officer Boote took over his role in January 2014 and issued the assessments on 30 March 2015. At what point in that period did he "discover" the insufficiency in this case?

50. He had clearly crossed the threshold by 14 November 2014, that being the date when he wrote to Mr Hicks stating that he was "now in a position to provide my technical consideration in relation to your participation in [the] disclosed avoidance scheme…", and setting out in some detail six grounds on which he considered the scheme to be ineffective.

51. So, at what point between January and November 2014 did Officer Boote make a "discovery"? The process of research and investigation described by Officer Boote as taking place in this case was not untypical of any HMRC investigation into a disclosed scheme with multiple users where the challenges by HMRC were a mixture of technical and factual arguments. In practice, the metaphor of " crossing a threshold" can be difficult to apply to such a process, in that it may well not produce a single" eureka" moment, but rather be a gradual process in which HMRC test their arguments at a technical and factual level, and progressively strengthen their case. I must, nevertheless, determine the point at which a threshold was crossed, but I endorse Lord Glennie's observation in *Pattullo* (at [44]) that "[C]rossing the threshold is not like crossing the Rubicon".

52. Officer Boote's evidence was that he would regard himself as having "discovered" the insufficiency at some time in the summer of 2014. I conclude that this is borne out by the facts, given that in preparation for his letter of 14 November to Mr Hicks he would need to have applied his technical conclusions to the facts of the various Scheme users.

53. A delay of at most 9 months between discovery and assessment is certainly not in my judgment the exceptional case envisaged by Lord Glennie. The facts clearly establish that HMRC was not sitting on its hands. Further, the decision in *Clavis* that the basis of the Scheme was ineffective did not emerge until 2016.

54. I therefore conclude that there was clearly a discovery for the purposes of section 29(1).

Can HMRC seek to rely on section 29(5)?

55. Although HMRC made a discovery, in order for the discovery assessments to be validly issued, either the condition in subsection (4) or the condition in subsection (5) must be satisfied: see section 29(3). For the year 2009-10, because of the time when the assessment was issued HMRC must establish carelessness within subsection (4). For 2010-11, however, HMRC could in the alternative seek to rely on subsection (5).

56. I consider below whether subsection (5) was in fact satisfied. However, it is first necessary to consider the procedural argument raised by Mr Gordon that HMRC were prevented from seeking to rely on subsection (5) by the outcome of the HMRC statutory review.

57. Mr Gordon relies on the fact that in its review decision of 29 June 2016, while upholding the decision to issue the discovery assessments, the reviewer stated as follows:

> "Having considered the position, I do not consider that HMRC should continue to rely on subsection (5) in this case…"

58. Mr Gordon's argument was that since sections 49F and 54 TMA treat the decision of the reviewer as final except "to the extent that the appellant notifies the appeal to the tribunal", HMRC could not subsequently seek to reopen their challenge based on section 29(5). The deemed settlement on the terms of the reviewer's decision had determined that issue against HMRC.

59. Mr Nawbatt argued that this analysis was misconceived. The review "decision" was to uphold the HMRC decision to issue the discovery assessments. The validity of their reasons for doing so was not part of the deemed settlement.

60. Section 49F TMA states as follows:

> " 49F Effect of conclusions of review
>
> (1) This section applies if HMRC give notice of the conclusion of a review (see section 49E (6) and (7)).

> (2) The conclusions are to be treated as if they were an agreement in writing under section 54(1) for the settlement of the matter in question.
>
> (3) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (2) applies.
>
> (4) Subsection (2) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49G."

61. Section 54(1) states as follows:

> "Settling of appeals by agreement
>
> (1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the tribunal, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be."

62. The starting point is the HMRC review letter of 26 June 2016 which is relied on by Mr Gordon. The purpose and scope of the review are set out at the start of the letter as follows:

> "I wrote to you on 25 February 2016 to tell you that I would be carrying out a review of the HMRC decision in this case. That decision was set out in Mr Boote's letter of 16 February 2016. I have now completed my review, and my conclusion is that the decision was correct and should be upheld. I am writing to explain how I reached this conclusion and to tell you what happens next.
>
> Matters under appeal
>
> Discovery assessments for 2009-10 and 2010-11 issued 30 March 2015.
>
> Point at issue
>
> Whether you are entitled to loss relief claimed.
>
> Whether HMRC was entitled to make assessments under the discovery provisions of section 29 Taxes Management Act 1970."

63. The letter from Mr Boote of 16 February 20916 refers to "my decision to raise assessments on 30 March 2015 for the years ended 5 April 2010 and 2011". That is the "decision" referred to in the review letter.

64. The full context of the review letter conclusion relating to section 29(5) is as follows:

> "Mr Boote also argued that sub-section (5) applies. I note your agent's arguments on this point to the effect that no further significant information became available to HMRC between the expiry of the enquiry periods and the date of the raising of the discovery assessments.
>
> Having considered the position I do not consider that HMRC should continue to rely on sub-section (5) in this case. However section 29 requires only that one of the conditions at sub-sections (4) and (5) is satisfied, and as I have concluded that subs-section (4) applies, this is sufficient for the purposes of this review conclusion."

65. This language is somewhat equivocal. The reviewer does not say "I have concluded that subsection (5) does not apply" as in his contrary conclusion in relation to subsection (4). The letter states that the reviewer "considers" that HMRC should not "continue to rely on subsection (5)". The final sentence can also be read as implying that given the conclusion on carelessness the position on subsection (5) is in practice superfluous to the review conclusion.

66. I am not convinced that the language bears the weight afforded it by Mr Gordon. However, for the purposes of giving full consideration to the issue I have assumed that it does.

67. Section 49F has the effect that this Tribunal has no jurisdiction to determine "the matter in question", just as it would have no jurisdiction to determine a matter settled by an actual section 54 agreement. What is "the matter in question" in this appeal? Mr Gordon argues that the matters in question are those set out in the notice of appeal—including reliance by HMRC on section 29(5).

68. Section 49I states that:

> "(1) In sections 49A to 49H—
>
> (a) "matter in question" means the matter to which an appeal relates…"

69. The conclusion of the review in this case, set out above, was that the decision in Mr Boote's letter of 16 February 2016 should be upheld. That decision was the decision to raise the discovery assessments. Consistently with this, the review letter described "Matters under appeal"—tracking the wording of Section 49I—as "Discovery assessments for 2009-10 and 2010-11 issued 30 March 2015."

70. In my judgment, it is clear that the review process, and the machinery of the code, focusses on the resulting decision (the assessment) and not the reasons for that decision. In this case, the matter resolved by the review, the matter under appeal, was the decision to issue the discovery assessments. That is what section 54(1) refers to as "the assessment or decision under appeal."

71. This approach is consistent with the judgment in *Wildin v HMRC* [2012] UKFTT 86(TC). In that case, HMRC were effectively seeking to take the same position as Mr Gordon, in that they sought to argue that the appellant could not amend his grounds of appeal against a closure notice where a previous ground of appeal had

been determined by a review within section 49F. Although the facts and context differ to this appeal, I note Judge Mosedale's conclusions, at [31]:

> "31. I think a distinction must be drawn over the matter under appeal and the grounds of appeal. The matter under appeal is Mr Wilden's tax liability and in particular the increase… in liability to CGT, which was stated in the closure notice and in his notice of appeal. His *ground* of appeal was that HMRC's 1982 valuation was wrong.
>
> 32. In my view, section 49F applies to a matter under appeal and not the grounds of appeal. In my opinion, there is nothing in section 49F which would fetter the Tribunal's discretion in allowing Mr Wilden to raise a new ground of appeal in challenge to a closure notice against which he has already appealed. His appeal has, in accordance with section 49F, meant that the closure notice and in particular its increase in his tax liability by the stated amount is under appeal and not to be treated as a matter settled by a s54 agreement."

72. In *Easinghall v HMRC* [2016] UKUT 105 (TCC) the Upper Tribunal made it clear that in establishing the scope of a section 54 agreement it was critical to identify on the facts "the point at issue" or "particular matter" which was the subject of the agreement. The Upper Tribunal noted that the framework of the discovery rules, review process and section 54 read together were concentrated on the assessment and resultant tax liability as "the matter in question". The decision states, at [46]:

> "The description of the three possible outcomes for the review in section 49E (5) is also carried through to section 54(1) dealing with the agreement that the parties may reach. That agreement to which section 54(1) applies is described in that sub-section as being "an agreement…that the assessment…should be upheld without variation, or as varied in a particular manner or as discharged or cancelled". What is "the assessment" here in relation to the accounting period ending 31 March 2012? …it is that Easinghall must pay an additional [amount] of culpable tax. That is the matter in question which Mr Musgrove was tasked with reviewing in order to decide whether it should be upheld, varied or cancelled. Such an analysis also accords with the effect of section 54(1) which is to treat the agreement like a determination of the tribunal to cancel the assessment. The wording focuses on the result of the deemed tribunal determination and not on its reasoning."

73. *Easinghall* concerned a discovery assessment for understated tax, and the Upper Tribunal rejected the argument that "the matter in question" was whether there was sufficient evidence to establish the understatement. It concluded, at [50]:

> "…it is not right to describe the matter in question as "whether there was enough evidence to show that there had been an understatement of business takings in the period 2011/2012". That confuses the process of arriving at a determination with the determination itself."

74. I therefore conclude that, even if the language in the review letter bears the weight placed on it by Mr Gordon, as to which I am not wholly convinced, the Tribunal clearly has jurisdiction to consider the section 29(5) issue.

Section 29(5)

75. The assessment issued in respect of 2010-2011 would have been validly issued if it satisfied the condition in section 29(5). The condition in subsection (5) requires broadly that at the time when the enquiry window closed, a hypothetical HMRC officer could not reasonably have been expected, on the information made available to him before that time, to be aware of the insufficiency of tax.

76. Section 29(5) has been the subject of a number of important, and not always readily reconcilable, decisions, including in particular *Langham v Veltema* [2004] EWCA Civ 193, *Charlton*, *Sanderson v HMRC* [2016] EWCA Civ 19, and *Patullo*. I have been guided in my consideration in particular by the summary of Patten LJ (who delivered the only judgment) in the Court of Appeal in *Sanderson*, at [17]:

> "The power of HMRC to make an assessment under section 29(1) following the discovery of what, for convenience, I shall refer to as an insufficiency in the self-assessment depends upon whether an officer "could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the [insufficiency]". It is clear as a matter of authority:
>
> (1) that the officer is not the actual officer who made the assessment…but a hypothetical officer;
>
> (2) that the officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law: see *HMRC v Lansdowne Partners Ltd Partnership* [2011] EWCA Civ 1578…;
>
> (3) that where the law is complex even adequate disclosure by the taxpayer may not make it reasonable for the officer to have discovered the insufficiency on the basis of the information disclosed at the time: see *Lansdowne* at [69];
>
> (4) that what the hypothetical officer must have been reasonably expected to be aware of is an actual insufficiency [citing *Langham* at [33] and [34]…;
>
> (5) that the assessment of whether the officer could reasonably have been expected to be aware of the insufficiency falls to be determined on the basis of the types of available information specified in section 29(6). These are the only sources of information to be taken into account for that purpose [citing *Langham* at [36]…"

The level of awareness

77. One of the thorniest issues in relation to section 29(5), which arises in this appeal, is the level of awareness of the insufficiency which the hypothetical officer must reasonably be expected to have at the relevant time.

78. Section 29(5) refers to awareness of the situation mentioned in subsection (1). That situation is an insufficiency of tax for the year of assessment. The necessary awareness is therefore more than a mere suspicion that there might be an

insufficiency, and more than a realisation that the assessment raises issues to be followed up by HMRC.

79. That much is uncontroversial. But how certain does the hypothetical officer have to be for it to be unreasonable for him not to be "aware" of the insufficiency? Is it enough if the hypothetical officer could have concluded on the basis of the information then available that HMRC would have a good case in proving an insufficiency? Does awareness mean that HMRC would be more likely than not to succeed if the matter were contested, or some other level of certainty? Further, is awareness of an insufficiency different from the real HMRC officer crossing the threshold in a discovery and if so how?

80. I confess that I do not find the Court of Appeal's analysis of these issues in *Sanderson*, which is of course binding on me, entirely easy to understand or apply in practice. In particular, I do not find the phrase "actual insufficiency" helpful as a measure of awareness, because the natural reading of those words in my view is that awareness of an actual insufficiency would (save perhaps for a glaring error or omission) be established only when a matter had been tested or settled.

81. I have considered the passages in *Sanderson*, at [18] to [28], which review and comment on the authorities regarding the requisite level of awareness. Those authorities include *Corbally-Stourton v HMRC* [2008] STC (SCD) 907, *Lansdowne,* and *Langham*. Two propositions are clear from the Court's analysis. First, the tests in subsections (1) and (5) are not the same: [25]. Secondly, the conclusion in *Langham* that the awareness must be of an actual insufficiency is correct: [22].

82. In my respectful opinion, the issue which *Sanderson* leaves opaque is the validity of the pronouncements at first instance and in the Court of Appeal in *Lansdowne*, set out at [19] and [20] in *Sanderson*. At first instance in *Lansdowne*, Lewison J formulated the level of awareness as "whether HMRC had sufficient information to make a decision whether to raise an additional assessment." In the Court of Appeal, Sir Andrew Morrit C stated, at [56]:

> "…I do not suggest that the hypothetical inspector is required to resolve points of law. Nor need he forecast and discount what the response of the taxpayer may be. It is enough that the information made available to him justifies the amendment to the tax return he then seeks to make. Any disputes of fact or law can then be resolved by the usual processes…"

83. Moses LJ in *Lansdowne* expressed a more nuanced view. He drew a distinction between perceiving or understanding a situation and drawing a conclusion that it is more probable than not. He stated, at [70]:

> "…Awareness is a matter of perception and understanding, not of conclusion…The statutory context of the condition is the grant of a power to raise an assessment. In that context, the question is whether the taxpayer has provided sufficient information to an officer, with such understanding as he might reasonably be expected to have, to

> justify the exercise of the power to raise the assessment to make good the insufficiency."

84. The Court of Appeal in *Sanderson* sets these comments in *Lansdowne* in the context of the dispute in that case about what was required of the hypothetical officer in terms of drawing inferences or resolving points of law. It states (at [23]):

> "…The decision in *Lansdowne* confirmed that the officer was not required to resolve (or even be able to assess) every question of law (particularly in complex cases) but that where, as Moses LJ expressed it, the points were not complex or difficult he was required to apply his knowledge of the law to the facts disclosed and to form a view as to whether an insufficiency existed. That is a matter of judgment rather than the application of any particular standard of proof. And the reference to the officer needing to reach a conclusion which justified the making of a discovery assessment has to be read in that context."

85. One merit of the formulations proposed by Lewison J and Sir Andrew Morrit C is that they can be readily understood, and applied to the facts in any particular case. However, I read the conclusion at [23] of *Sanderson* as a caution against adopting these formulations as implying any particular standard of proof. The difficulty which that produces in my judgment is that while there is guidance as to what the necessary level of awareness is not there appears to be no clear guidance as to what it is.

86. I have concluded that the practical effect of *Sanderson* is to require the exercise to focus on the level of disclosure in any particular case, and the extent to which that disclosure arms the hypothetical officer with sufficient information to justify the making of an assessment. As is stated in *Sanderson* (at [25]), "[t]he purpose of the condition is to test the adequacy of the taxpayer's disclosure…"

87. Subsection (5) is all about disclosure by the taxpayer (as defined by section 29(6)). The more extensive the taxpayer's disclosure by the closure of the enquiry window, the more difficult it would be for HMRC to establish that the hypothetical officer could not reasonably have been expected to be aware of the insufficiency. The taxpayer is incentivised by the legislation to place HMRC in a position where he can put them to proof at the close of the enquiry window with the question "what more need I have disclosed to have placed the officer in a position to be justified in raising an assessment?"

Information available by the relevant time

88. The enquiry window in respect of Mr Hicks' 2010-11 return closed on 31 January 2013. I have therefore considered in detail what the "information made available" to the hypothetical officer was before that time, in light of subsections (6) and (7) of section 29.

89. There was no dispute between the parties on this issue (save for one point referred to at [100]), which I determined by a review of the correspondence and documents.

90. The starting point is not Mr Hicks' tax return for 2010-11 but his return for 2008-09. That is because section 29(7) (a) (i) has the effect that the returns for 2008-09 and 2009-10 are treated as included in his return for 2010-11.

91. Mr Hicks' return for 2008-09 was therefore information made available within section 29(6) (a). In that return, his occupation is described as "trader", with trading turnover of approximately £2.7 million and trading expenses of approximately £2.5 million. The return also shows a further deduction of £1.5 million, and a non-taxable receipt of £1.5 million. The carried forward loss is shown as approximately £1.2 million.

92. Under the box headed "Tax avoidance schemes" the return states the reference number ("SRN") for the Scheme and states the year in which the expected tax advantage arises as 2008-09. There was no "white space" disclosure.

93. On the authority of *Charlton*, the information in the Form AAG 1 filed by Montpelier on 17 September 2008 in respect of the Scheme was information made available. On that AAG 1, the Scheme title is stated as "Section 730 TA 1988". Under " Summary of proposal or arrangements" it is stated as follows:

> "The arrangement is available to self employed derivative traders who work at least 10 hours per week on average in the trade. The trader acquires dividend rights but while the cost of such rights is a deductible expense of the trade the income is not taxable per section 730 TA 1988"

94. Under the heading requiring an explanation of each element in the proposal or arrangement it is stated in the AAG 1:

> "1. An individual is a self employed trader carrying on business on a commercial basis with a view to profit.
>
> 2. The trader acquires at a discount the right to receive dividends declared but not yet paid.
>
> 3. The income is on the other hand not taxable due to section 730 TA 1988. The result is a net loss for tax purposes to the trader.
>
> 4. Those traders who meet the condition of working in their trade on average 10 hours per week may be able to offset any loss for sideways loss relief purposes"

95. Mr Hicks' return for 2009-10 showed in addition to his trading income and expenses a carried forward loss which eliminated taxable profit from that trade. The SRN was not included on the return.

96. Mr Hicks' return for 2010-11 again showed trading income and expenses, and profit eliminated by the carried forward loss. The SRN was included on the return.

97. HMRC wrote to Mr Hicks on 3 December 2010 stating that they were checking his 2008-09 return and the loss relief claim, and requesting information. A formal information notice was sent in February 2011. By April 2011 Mr Hicks had engaged

his accountant Mr Bevis of Precision Accountancy ("Precision") to deal with HMRC. In April 2011, following a telephone conversation with HMRC, Mr Bevis supplied some but not all of the information requested by HMRC, including details of the Scheme, how it operated, the dividend trades undertaken by Mr Hicks, and a summary of the nature of Mr Hicks' existing trade.

98. Following a further request for information in June 2011 Mr Bevis supplied considerable further information.

99. In January 2012 HMRC wrote to Mr Hicks expressing "concerns" on a number of issues, including whether the dividends were legally paid, the analysis of section 730, *Ramsay* and various arguments relating to trade. HMRC sought more information, and following reminder letters received confirmation only in October 2013, after closure of the enquiry window, that no further information was available or to be supplied.

100. The only disagreement at the hearing as to information made available was that Mr Gordon sought to argue that certain marketing material relating to the Scheme which had been referred to in correspondence by HMRC and requested from Mr Hicks, but not supplied by him, should be taken to have been known to the hypothetical officer. I disagree. Section 29(5) and (6) deal with information made available by the taxpayer, and not with information of which certain real HMRC officers might or not have knowledge.

101. The enquiry window closed on 31 January 2013, and, for whatever reason, HMRC did not open an enquiry.

Sufficiency of information

102. The information in Mr Hicks' return for 2008-09 included his participation in the Scheme, referred to by the SRN. It also showed a significant tax loss and a matching non-taxable receipt.

103. In my opinion, the AAG 1 would have shown the hypothetical officer clearly how the Scheme was intended to work. In particular it made clear the twin planks on which the effectiveness of the Scheme rested, one technical (an interpretation of section 730) and the other fact-specific (the type of trader who qualified).

104. It is entirely unsurprising in my view that HMRC opened an enquiry into the 2008-09 return on 3 December 2010. The correspondence confirms that this was done specifically to address the loss claimed under the Scheme. By January 2012, Mr Hicks was receiving correspondence under the enquiry from HMRC's Specialist Investigations Team, so they had clearly become involved in the investigation by that time.

105. While the 2008-09 return and AAG 1 did not refer specifically to a loss being available to be carried forward, in relation to the 2010-11 return which is in issue as regards section 29(5) it is clear that any hypothetical officer would readily have

understood by 31 January 2013 that any insufficiency for 2010-11 would have arisen from the Scheme loss being carried forward.

106. The information made available before the closure of the enquiry window also included details of the dividend trades claimed to give rise to the loss, reasonably extensive information in relation to the transactions implemented under the Scheme, and information regarding the trading activities undertaken before the Scheme trades by Mr Hicks in his regular financial trade.

107. Was that information, in aggregate and taking account of section 29(6), sufficient for the hypothetical officer reasonably to have been expected to be aware of the insufficiency?

108. Mr Nawbatt submitted that it was not. While acknowledging that the AAG 1 was information made available, he argued that, given the content of the AAG 1, the situation was similar to that described by Newey J in *David Stephen Sanderson v HMRC* [2013] UKUT 0623 (TCC) (which I observe did not on its facts include an AAG 1 disclosure) at [50]:

> "…It seems to me that the tax return might have alerted the hypothetical officer to the fact that Mr Sanderson was seeking to take advantage of a tax scheme, but it did not contain enough information to make the officer aware of an "actual insufficiency" or to justify the making of an assessment."

109. We know that by summer of 2014 the evidence of the real officer—relevant to subsection (1) but not subsection (5)—was that he had crossed the threshold for a discovery. While the real officer must not be confused with the hypothetical officer, it is in my opinion not unreasonable to assume that the hypothetical officer would be likely to be in a similar position by that stage in terms of his awareness of an insufficiency in the 2010-11 return. As the Court of Appeal acknowledged in *Sanderson*, at [25], "… there will inevitably be points of contact between the real and hypothetical exercises which sub-ss 29(1) and (5) involve [although] the tests are not the same." Given the focus of subsection (5) on disclosure by the taxpayer, what information was the hypothetical officer lacking on 31 January 2013 which would have meant it was unreasonable to expect him at that earlier time to be so aware?

110. Mr Nawbatt argued that at that time there was an insufficiency of information regarding the HMRC contention that the dividends might not have been lawfully declared, and also as regards Mr Hick's trade before he entered into the Scheme. Mr Nawbatt asserted that at the time when the enquiry window closed there was no internal HMRC guidance or decided case determining the section 730 interpretation. Finally, he emphasised that confirmation was not received from Mr Hicks that no further information was to be provided until after the window closed. It was therefore the case, he argued, that HMRC's information gathering process was continuing when the window closed.

111. Mr Nawbatt's submissions have some merit. I have, however, concluded that HMRC have not discharged the burden of proof in establishing on a balance of probabilities that the condition in subsection (5) was satisfied.

112. As discussed above (at [55] onwards) the HMRC reviewer did not consider that HMRC should continue to rely on subsection (5). Bearing in mind the caveats I have expressed as to the weight of that view, it is nevertheless interesting to consider his reasons. He referred to the arguments raised by Mr Hicks' agent that no further significant information became available to HMRC between the expiry of the enquiry period and the date of the raising of the assessments: see [64]. Those arguments are set out in a letter from Mr Hicks' then agent to HMRC on 12 April 2016 as follows:

> "It appears that Mr Hicks did not provide the information requested in January 2012, as HMRC wrote to him on 27 March 2013 stating that in the absence of further information, it would assume that Mr Hicks has provided everything he can. Mr Boote's letter to Mr Hicks on 7 March 2014 repeated this statement, again implying that no further information had been provided and it appears that this was still the case when Mr Boote wrote again on 14 November 2014, setting out his technical opinion of the scheme. Additionally, it appears that no further information was provided by Mr Hicks before HMRC issued the assessments on 30 March 2015.
>
> Therefore, before the enquiry window closed for each of the 2009/10 and 2010/11 periods, HMRC had not only commenced an enquiry into the 2008/09 return, in which participation in the scheme had been notified, but was also aware that the losses had been utilised in 2009/10 and 2010/2011, plus, importantly, had already received the same information from Mr Hicks that led to there being a discovery. It therefore appears inconceivable to assert that at the time it issued assessments for 2009/10 and 2010/11, HMRC had "discovered" something that it was not aware of during the time that it could have commenced valid enquiries. It appears to us that HMRC simply missed the enquiry deadline."

113. While I have concluded that there was a discovery, the agent's points regarding timing and the information available are in my opinion well made.

114. In my opinion, the existence of an insufficiency sufficient to justify an assessment in this case turned primarily on the section 730 and trading issues. Additional lines of potential argument for HMRC, such as defective implementation (including the legality of the traded dividends) and *Furniss*, were icing on the cake. However the "awareness" threshold is set, I do not consider that subsection (5) allows or is intended to allow HMRC to issue assessments which ignore the normal time limits while they spend further time in polishing a justifiable assessment as at the closure of the enquiry window into a knockout case.

115. The interpretation of section 730 on which the Scheme succeeded or failed was clear from the AAG1, and had been known to HMRC for many years, lying behind the amendments to section 730 in the Finance (No 2) Act 2005 which formed a significant part of HMRC's arguments in *Clavis Liberty*.

116. Mr Nawbatt is of course correct that the decision in *Clavis Liberty* had not been given by the closure of the enquiry window in this case. That does not, however, mean that a hypothetical officer with the characteristics indicated by *Sanderson* and *Charlton* would not have been in a position by that closure to take the view on the information made available that the Montpelier reading of section 730 was plainly wrong. Mr Nawbatt asserted that by that time there was no internal HMRC guidance on that point, but I was presented with no evidence on that issue, and in any event it is not clear that that is information with which a hypothetical officer would have been imbued.

117. What is clear from the FTT decision in *Clavis Liberty* is that the closure notice which denied the section 730 loss in that case was dated 1 February 2013, one day after the closure of the enquiry window in this case: see *Clavis Liberty* at [1]. While it is clear that the hypothetical officer is not to be assumed to have knowledge of what other HMRC officers or departments have or have not done (per *Charlton* and *Lansdowne*), *Clavis Liberty* does show that at least in that case HMRC considered it justifiable to raise an assessment by that time. They were, as it transpires, quite right to do so, as the FTT firmly rejected the taxpayer's interpretation of section 730 in agreement with the arguments of counsel for HMRC.

118. The other primary area to be considered by a hypothetical officer in relation to the effectiveness of the Scheme, and any potential insufficiency, was whether the taxpayer did or did not satisfy the trading conditions. Mr Hicks had disclosed to HMRC before closure of the enquiry window sufficient information in my judgment to enable the hypothetical officer to form a reasoned view on that area. There does not appear to have been any further material information on that topic between then and the issue of the discovery assessments which would have made it unreasonable for awareness of the insufficiency to have arisen at the earlier date.

119. It is scarcely surprising that HMRC's confidence that the Scheme did not work increased over time. However, in this case that was largely attributable not to additional material information, but to the detailed research and efforts of HMRC which were co-ordinated by Officer Boote.

120. Mr Nawbatt is correct to state that HMRC's process of gathering information in relation to the Scheme was continuing when the enquiry window closed. However, that is not *carte blanche* for HMRC to omit to open an enquiry—whether intentionally or by omission—and then simply rely on subsection (5) in every case to issue assessments which would otherwise be out of time. The statutory time limits for assessments are a critically important safeguard for the taxpayer, just as the onus of disclosure on the taxpayer, and the duty not to act carelessly or deliberately, are a protection for HMRC where those limits are not met.

121. On the facts in this case, the hypothetical officer had sufficient information available (taking into account section 29(6)) at closure of the enquiry window to make it reasonable for him to have been justified in raising an assessment for the insufficiency. The central issues, relating to section 730 and trading, were not matters of such complexity that the disclosure did not achieve this result. I conclude that

HMRC have not established on the balance of probabilities that the condition in subsection (5) was satisfied.

Section 29(4)

122. For both 2009-10 and 2010-22 the discovery assessments will have been validly issued if "the situation mentioned in subsection (1)" was brought about carelessly by Mr Hicks or a person acting on his behalf.

Acting on behalf of the taxpayer: whose carelessness matters?

123. HMRC submitted that both Precision and the Scheme promoters Montpelier acted on behalf of Mr Hicks for the purposes of subsection (4) and the extended time limit in section 36. Mr Gordon submitted that only Precision acted on behalf of Mr Hicks.

124. Mr Gordon argued that procedurally HMRC had raised the issue regarding Montpelier too late in the day. I have no hesitation in rejecting that argument: it is clear from HMRC's statement of case and skeleton argument that they had not ruled out taking the point.

125. Montpelier advised Precision as to the entries to make in Mr Hicks's returns for the years in question as regards the Scheme. Were they, as HMRC argued, a person acting on behalf of Mr Hicks within subsection (4)?

126. The authorities on this issue are in conflict. In particular, the FTT in *Atherton v HMRC* [2017] UKFTT 831(TC) recently reached a different conclusion to that reached by the FTT in *Trustees of the Bessie Taube Trust v Revenue & Customs* [2010] UKFTT 473(TC).

127. In *Bessie Taube*, Judge Berner considered the issue in the context of what was then a test of negligence. He stated, at [93]:

> "… In our view, the expression "person acting on…behalf" is not apt to describe a mere adviser who only provides advice to the taxpayer or to someone who is acting on the taxpayer's behalf. In our judgment the expression connotes a person who takes steps that the taxpayer himself could take, or would otherwise be responsible for taking. Such steps will commonly include steps involving third parties, but will not necessarily do so. Examples would in our view include completing a return, filing a return, entering into correspondence with HMRC, providing documents and information to HMRC and seeking external advice as to the legal and tax position of the taxpayer. The person must represent, and not merely provide advice to, the taxpayer."

128. In *Atherton*, Judge Mosedale rejected that approach. The issue is considered in that judgment at [193] onwards. Referring to the passage in *Bessie Taube* set out above, Judge Mosedale states as follows, at [195]:

> "We struggle with the views expressed in *Bessie Taube*. Our view is that, unless expressly stated otherwise by Parliament, a person cannot pass on to someone else an obligation which Parliament has imposed on that person. It is contrary to good governance and sense for a person, with a statutory obligation, to be able to avoid liability for its improper performance simply by having passed it on to someone else, who owes no obligation to the government to carry out that duty."

129. Having concluded that the carelessness of the taxpayer's agent is the taxpayer's carelessness, Judge Mosedale states, at [201]:

> "201. We also struggle with *Bessie Taube* as taken to its logical conclusion, it suggests that the taxpayer is liable for the carelessness of an agent employed to complete his tax return, but not for the carelessness of an agent employed to advise him on how to complete his return. The logic of such a distinction escapes us.
>
> 202. If it mattered in order to resolve this case, which it does not, we would consider s29(4) should be read broadly to encompass all advisers to Mr Atherton, including those who, like NTA, gave general advice on completion of the tax return."

130. Mr Nawbatt also referred me to a statement in *Paul Daniel v HMRC* [2014] UKFTT 173(TC). I do not find that case of material assistance, since it concerned a third party (Arthur Anderson) who was acting both as tax adviser to the taxpayer and as agent in submitting his tax return.

131. Did Montpelier act on behalf of Mr Hicks? The starting point, as ever, is a purposive construction of the statutory language. I make two observations in that respect.

132. First, section 29 as a whole is fundamentally concerned with the taxpayer, and not with third parties. It is the taxpayer's return, the taxpayer's disclosure, and the taxpayer's behaviour which are in point. Subsection (4) and (by virtue of subsection (7) (b)) paragraphs (b) to (d) of subsection (6) refer to a person acting on behalf of the taxpayer in that context and only in that context.

133. Secondly, subsection (4) is not expressed in terms of whether a third party is the taxpayer's agent or adviser. The only question is whether a third party was "acting on behalf" of the taxpayer in (broadly) bringing about an insufficiency in his assessment.

134. In my respectful opinion, the tribunal in *Atherton* misinterprets the quoted passage in *Bessie Taube*. It appears to consider the consequence of Judge Berner's approach to be that a taxpayer can escape his statutory duties and avoid the consequences of being careless by " passing on" his statutory liabilities to a third party who, the taxpayer alleges, is not acting on his behalf. I do not read anything in section 29, or the passage from *Bessie Taube*, as having this effect. The consequence of the taxpayer's carelessness (in this case, an extension of the normal time limit) cannot be side-stepped in this way. The question of the extent to which a taxpayer may resist or rebut an allegation of carelessness by asserting that he relied on his adviser is a difficult question, which I consider below. But it is not in my view the

question which arises in determining whether a third party was "acting on behalf" of the taxpayer. The consequence for the taxpayer of carelessly submitting a return with an insufficiency is not narrowed by these words but potentially widened, to (in effect) treat the carelessness of the person acting on the taxpayer's behalf as the taxpayer's carelessness. Where a taxpayer seeks to rely as a defence on the advice of a third party who did not act on his behalf, the issue then is the taxpayer's carelessness.

135. Construing the statute purposively in this way leads me to a similar conclusion to that reached in *Bessie Taube*. A third party acts on behalf of the taxpayer in this context if he acts as the taxpayer's proxy or representative—a role described in *Mariner v HMRC* [2013] UKFTT 657, at [25] as " a mere agent, administrator or functionary". In that role their carelessness is the taxpayer's carelessness if it brings about "the situation mentioned in subsection (1)".

136. I agree with the conclusion in *Bessie Taube*, at [193] as follows:

> "…The person must represent, and not merely provide advice to, the taxpayer".

137. It is clear that Precision was a representative of Mr Hicks. Montpelier, however, was not. Montpelier advised Precision in respect of Precision's obligations as Mr Hicks' representative in preparing and submitting his return. Montpelier was the promoter of the Scheme and was not "acting on behalf" of Mr Hicks at all. The issues in relation to subsection (4) are whether there was carelessness of the relevant type by Mr Hicks, or by Precision, being a person acting on his behalf.

Carelessness within subsection (4)

138. A situation is brought about carelessly by a person if that person fails to take reasonable care to avoid bringing about that situation: see section 118(5) TMA.

139. I was referred by Counsel to numerous authorities. While some are of assistance, in my judgment reasonable care must be assessed in all the facts and circumstances. Caution must be exercised in "reading across" from other decisions (particularly penalty cases or decisions on the prior test of negligence) in an attempt to delineate some immutable standard of reasonable care.

140. A number of authorities indicated that the prior test of negligence was objective in nature: see, in particular, *Anderson v HMRC* [2009] UKFTT 206 and *Colin Moore v HMRC* [2011] UKUT 239 (TC). While some decisions have assumed that carelessness is simply the same test under a different name, I have found assistance in the analysis of this question by Judge Morgan in *Alan Anderson v HMRC* [2016] UKFTT 335 (TC), at [114] onwards.

141. I respectfully agree with and adopt the following observations of Judge Morgan in *Alan Anderson*, at [120]:

> "… Although there are indications that the change in terminology was not intended to give materially different results (at any rate as regards

> penalties), Parliament has chosen to use different words and it is those words which must be interpreted. The starting point must be that the term "careless" as further defined as "a failure to take reasonable care" has to be interpreted according to the usual principles of statutory interpretation.
>
> 121. In the context of the penalty provisions, the careless test has been held by the tribunal to require consideration of the conduct which could be expected of a prudent and reasonable taxpayer in the position of the taxpayer in question. For example, in the case of *David Collis v Revenue & Customs* [2011] UKFTT 588 (TC), Judge Berner noted the following at [29]:
>
> > "That penalty applies if the inaccuracy in the relevant document is due to a failure on the part of the taxpayer (or other person giving the document) to take reasonable care. We consider that the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question."
>
> 122. Similarly in *Hanson v HMRC* [2012] UKFTT 314 (TC) Judge Cannan said at [21]:
>
> > "What is reasonable care in any particular case will depend on all the circumstances. In my view this will include the nature of the matters being dealt with in the return, the identity and experience of the agent, the experience of the taxpayer and the nature of the professional relationship between the taxpayer and the agent."
>
> 123. Our view is that the correct approach in this context also is to follow that adopted in *Collis* and *Hanson* of assessing what a reasonable hypothetical taxpayer would do in all the applicable circumstances of the actual taxpayer. It seems to us that this follows from the wording of the provision which looks at a failure to take reasonable care by the person in question. The "reasonable care" which should be taken is to be assessed by reference to what a reasonable and prudent taxpayer would do looking at an objective hypothetical standard. But what that reasonable and prudent taxpayer would do is not assessed in a vacuum but by reference to the actual circumstances of the taxpayer in question. We see no reason why any different interpretation should apply as regards the use of this term in the discovery assessment provisions. That Parliament chose to use the same term, in each case as further defined as "a failure to take reasonable care", indicates that the same approach is to be taken in both contexts."

142. I deal further below with the need to identify and assess the carelessness which is relevant for the purpose of subsection (4). That is carelessness which brings about the situation mentioned in subsection (1).

Evidence

143. For the years in question in this appeal, and for the year giving rise to the claimed tax loss (2008-09), Mr Hicks' returns were submitted on time. The information disclosed in relation to those returns has been discussed in the context of

section 29(5). Given that the substantive issue of the availability of the tax loss is not disputed in this appeal, I have assumed that there was an insufficiency of tax in the 2008-09 return, and as a consequence in the two subsequent returns in which the loss was shown carried forward.

144. In determining whether Mr Hicks or Precision (being a person acting on his behalf) was carless in bringing about the insufficiency in the returns for 2009-10 and 2010-11, I have made findings of fact on the basis of the written evidence and the evidence of Mr Hicks and Mr Bevis of Precision. The evidence of the only HMRC witness, Officer Boote, is not material to this issue—even though in his evidence he offered a number of observations or speculations as to Mr Hicks' actions—since his involvement began some two years after submission of the 2010-11 return. The evidence of Mr Hicks' colleague Mr Callen is of considerably less significance.

145. The evidence of Mr Hicks was not always clear or consistent. Mr Nawbatt suggested that this raised issues of credibility and reliability. With one exception, I found Mr Hicks to be a reliable witness, when proper account was taken of his clear nervousness and his lack of any tax knowledge. Confusion and inconsistency in the recollection of points of detail do not always indicate a lack of credibility, and in Mr Hicks' case I reject Mr Nawbatt's suggestion.

146. The one exception relates to the detailed description of the intended tax treatment of the Scheme contained in Mr Hicks' witness statement. Mr Hicks thought that he had drafted that description "with some help" but could not identify who had helped him. The terminology, use of language and degree of technical content made it clear to me that the description was the work of someone other than Mr Hicks, and I did not take it into account as evidence. However, not unlike Officer Boote's "blank spot" regarding the timing of his discovery assessments, I did not find this to be indicative of any wider problem regarding credibility.

147. Mr Bevis was Mr Hicks' accountant. His evidence was not always entirely consistent with that of Mr Hicks on points of detail. Mr Nawbatt argued that this and other factors raised questions regarding the credibility of his evidence. I disagree, and found Mr Bevis to be a credible and reliable witness.

Findings of fact

148. I make the following findings of fact, set out in broadly chronological order.

149. Mr Hicks began his working life in 1998 as a clerk, becoming a trader on the oil and gas futures market, initially as a phone broker. From 2006 he became self-employed, carrying on his trades through various platforms.

150. In July 2006 Mr Hicks appointed Chappel Cole as his accountants. The firm had a reputation for acting for financial traders. It was recommended to Mr Hicks by the trader who helped to set him up as a self-employed trader, on the basis that "everyone from the office" used that firm, and "they had always dealt with traders and knew how to deal with their accounts."

151. Initially, Mr Hicks' main point of contact at Chappel Cole was the partner David Cole. At a meeting in July 2006 Mr Cole explained to Mr Hicks his responsibilities in relation to the completion of his tax returns.

152. From around April 2008 Mr Bevis, a senior manager reporting to Mr Cole, became Mr Hicks' main point of contact at Chappel Cole.

153. Mr Hicks first heard of the Scheme in September 2008, from his colleague Mr Callen. Mr Cole had recommended the Scheme to Mr Callen and some of the other traders as a tax efficient trading opportunity specifically for traders in their position.

154. Mr Callen and others, but not Mr Hicks, met with Montpelier in September 2008 to hear more about the Scheme. Mr Callen's evidence, which I find to be credible on this point and accept, was that both Mr Cole and Mr Bevis were highly supportive of the Scheme. Mr Cole described it as a "no-brainer".

155. A meeting was arranged for January 2009 for Mr Hicks and other traders to meet Montpelier. In advance of that meeting Mr Hicks spoke to Mr Cole, who reassured him that the Scheme was "all legal and worked perfect for us as traders".

156. Mr Hicks and 10 other traders met with Montpelier on 20 January 2009. Mr Hicks kept no note of the meeting, which was described by Montpelier as a presentation. Montpelier described itself as a firm of tax consultants of 20 years' standing. The Scheme was outlined, and presented as "perfect for derivative traders".

157. At that meeting Mr Hicks and the other traders were shown two documents. One was titled "Extracts from Counsel's Opinion in the matter of section 730 Income and Corporation Taxes Act 1988". The other was titled "The UK taxation implications of trading in derivatives and dealing in the right to receive dividends by UK residents."

158. Although Mr Hicks claimed in his witness statement that he considered these documents to be accurate, my finding based on his cross-examination and my questioning is that he did not consider the documents in detail (he stated that he "flicked through" them, and did not read them line by line) and that he did not fully understand their content.

159. I find that Mr Hicks did appreciate, and was led to believe, three main points in relation to the Scheme. First, it had been disclosed to HMRC, so did not involve tax evasion. Secondly, he was precisely the category of financial trader for whom the Scheme worked to generate a tax loss. Finally, HMRC would likely challenge the Scheme, but Montpelier had complete confidence in it and would defend it "up to the High Court".

160. I also find on the basis of his responses to my questions that Mr Hicks understood that in commercial terms the Scheme would be profitable, bearing in mind the fee payable to Montpelier, only if the tax loss materialised. On a standalone basis, the dividend trades produced a small profit, but that was far outweighed by the fee.

161. Following that meeting, Mr Hicks consulted with his colleagues. One of those colleagues was, like Mr Hicks, interested in going ahead with the scheme. They each agreed to speak with their accountants and compare feedback.

162. Mr Hicks telephoned Mr Bevis on the day of the meeting, 20 January. Mr Coles had told Mr Hicks that Mr Bevis could answer any questions regarding the Scheme arising from the meeting. At that stage, Mr Bevis' understanding of the scheme was based almost entirely on what Mr Coles had told him (including that it was a "no-brainer"). Mr Bevis explained that to Mr Hicks, and said he would speak with Mr Coles and revert. On 23 January Mr Bevis telephoned Mr Hicks to discuss the proposal, and advised him that Mr Coles' view was that he would be "crazy not to take it up" and that he could not see how it could fail.

163. Mr Hicks spoke with his colleague who said that his accountant had also been very bullish.

164. Mr Hicks consulted another colleague, who had already used the Scheme. That colleague corroborated what Mr Hicks was being told by Montpelier, Mr Bevis, and the colleague who had also consulted his accountant. He also told Mr Hicks that one of the Montpelier team was a former employee of HMRC, which had increased his confidence in the scheme.

165. Mr Hicks then arranged a final meeting with Montpelier to discuss the Scheme at his trading offices in February 2009. Mr Bevis attended the meeting. Mr Bevis was shown various documents including the "Counsel's opinion" referred to at [157]. Mr Bevis formed the view that the Scheme stood "the best possible chance" of being successful, and that if he personally was in Mr Hicks' position, he would enter into the Scheme. Neither Mr Hicks nor Mr Bevis kept any note of the meeting.

166. At or following the February meeting Mr Hicks was also given a one page "flyer" prepared by Montpelier outlining the Scheme and tilted "Montpelier's Tax Structure Exclusively for Traders".

167. Shortly after the February meeting Mr Hicks signed documentation with Montpelier to enter into the Scheme. I find that Mr Hicks only briefly perused those documents, and kept no copies.

168. On 11 February 2009 Montpelier emailed a number of potential Scheme users, including Mr Hicks, reassuring them that various concerns which had been raised were unfounded, including that the Scheme was "high risk". The email stated "you are taking a position on our interpretation of the legislation, with us backing the interpretation to the high court at our expense!"

169. Mr Bevis left Chappel Cole at the end of February 2009 and set up an accountancy business, Precision.

170. The dividend trades giving rise to the claimed tax loss took place in late February 2009.

171. At the end of April 2009 Montpelier contacted Scheme users including Mr Hicks to inform them that HMRC had started to introduce steps to " close the loophole" in section 730. This was interpreted by Mr Hicks as corroborating the view previously expressed by Montpelier that unless and until the rules were changed, section 730 worked as Montpelier had said it would.

172. Mr Hicks engaged Precision (Mr Bevis) as his accountant in June 2009.

173. In June 2009 Mr Hicks received a statement from Montpelier detailing the dividend trades he had made, which he understood to confirm that the transactions had all taken place as anticipated.

174. Mr Bevis prepared Mr Hicks' SATR for 2008-09. The information relating to Mr Hicks' normal trade was prepared on the basis of information and detailed records kept by Mr Hicks. However, as regards information relating to the Scheme Mr Bevis relied entirely on input from Montpelier. Montpelier supplied the figures and information (including the SRN) to be included in the return. A draft of the complete return was then sent by Mr Bevis to Mr Hicks for review and to Montpelier for its sign-off on the entries relating to the Scheme. The return was finalised at a face-to-face meeting between Mr Bevis and Mr Hicks before being submitted by Mr Bevis.

175. Mr Bevis relied on Montpelier for information relating to the Scheme partly because he regarded Montpelier as in possession of the necessary details and figures. However, he also relied on them because he did not have the technical expertise or experience to form an independent opinion on the detailed workings of the Scheme. Prior to his involvement with the Scheme on behalf of Mr Hicks, he had not previously advised any clients on marketed tax avoidance schemes. Until the February 2009 meeting with Montpelier which he attended with Mr Hicks, Mr Bevis was not familiar with section 730 or the area of law relevant to the Scheme.

176. As described above (at [97] to [99]) HMRC raised questions and sought information from Mr Hicks regarding the Scheme between the opening of their enquiry into his 2008-09 return on 3 December 2010 and the submission of his 2010-11 return some 14 months later. Mr Bevis routinely copied any such correspondence from HMRC to Montpelier and in responding to HMRC Mr Bevis would simply "cut and paste" the replies prepared by Montpelier relating to the Scheme into his response. He did not attempt to review or comment on those draft replies before including them.

177. In preparing Mr Hicks' returns for 2009-10 and 2010-11, Mr Bevis followed a similar procedure to that in relation to the 2008-09 return. In relation to any entries or information regarding the Scheme, Mr Bevis simply included whatever Montpelier provided him with.

HMRC's arguments

178. Mr Nawbatt argued that both Mr Hicks and Precision had clearly been careless within subsection (4).

179. HMRC relied in particular on similarities to the decision in *Litman & Newall* v *HMRC* [2014] UKFTT 089 (TC).

180. In relation to the appropriate test of carelessness, Mr Nawbatt urged me to adopt the approach in *Atherton*.

181. The following factors were identified by Mr Nawbatt as evidencing carelessness (in no particular order):

(1) Mr Hicks undertook no due diligence in relation to Montpelier or the entities which declared the dividends under the Scheme.

(2) Mr Hicks did not seek to negotiate any of the terms of the transactions under the Scheme.

(3) Mr Hicks kept no copies of critical documents such as the transaction documents, or the Counsel's opinion and technical note shown to him by Montpelier.

(4) Mt Hicks did not "engage with" Mr Bevis in relation to the entries regarding the Scheme in his returns.

(5) Mr Hicks failed to seek or obtain independent advice regarding the tax aspects of the Scheme. Montpelier was not an independent person, so reliance on its advice alone by Mr Hicks or Mr Bevis was careless.

(6) Mr Hicks failed to produce evidence that the transactions under the Scheme had in fact taken place and/or been implemented in a legally effective manner.

(7) Mr Hicks failed to enquire into the commercial reality of the Scheme, relying solely on the tax benefits to justify his participation.

(8) Mr Hicks and Mr Bevis were both careless in failing to identify that Mr Hicks did not have the "right" trade for the Scheme potentially to be effective, and this should have been clear to them from Montpelier's Counsel's opinion which they saw.

(9) Once HMRC had opened its enquiry into the 2008-09 return, the questions raised and points made by HMRC should have caused alarm bells to ring, and in particular Mr Hicks and Mr Bevis should have realised that the loss was not going to be available to be carried forward.

(10) The failure of Mr Bevis honestly to respond to part of HMRC's information request justified an inference that there was a pattern of careless behaviour on his part.

Appellant's arguments

182. Mr Gordon submitted that both Mr Hicks and Mr Bevis had clearly exercised reasonable care for the purposes of subsection (4), and any carelessness that did arise did not "bring about" the situation in subsection (1).

183. Mr Gordon pointed out that *Litman & Newall* was not followed in *Bayliss v HMRC* [2016] UKFTT 500 (TC). Further, the scheme in question in *Litman* had been the subject of two contrary penalty decisions.

184. Mr Gordon also made the following submissions:

(1) HMRC's arguments confused carelessness *per se* with carelessness leading to an insufficiency in the return.

(2) A taxpayer was clearly entitled to rely on professional advice in preparing and submitting his tax return, and Mr Hicks' reliance on Mr Bevis was perfectly reasonable in all the circumstances.

(3) The supposed requirement in the Counsel's opinion for a type of trade which Mr Hicks did not satisfy was far from clear.

(4) The legislative change to section 730 was not unreasonably taken by Mr Hicks and Mr Bevis as corroborating the Montpelier interpretation of the previous legislation.

(5) In terms of documentation and proper implementation of the Scheme transactions, Mr Hicks saw what he was expecting to see, and had no cause to probe further.

(6) Admittedly Mr Hicks did not keep copies of various documents, but if he had that would not have made any difference to the point in dispute in the appeal.

(7) Mr Bevis' reliance on Montpelier was reasonable in all the circumstances.

(8) In relation to the "alarm bells" suggested by Mr Nawbatt as an appropriate response to HMRC's enquiry, it was a normal enquiry and nothing more, to be expected given the DOTAS position.

(9) Mr Bevis had not been shown to have knowingly provided false information in response to HMRC's information request.

Discussion

185. In terms of the correct approach to determining carelessness, as set out at [138] to [141] I adopt the analysis and conclusions of Judge Morgan in *Alan Anderson* to which I refer. That approach is in my opinion preferable to that set out in [130] to [135] of *Atherton* cited by Mr Nawbatt.

186. I have therefore considered what a reasonable and prudent taxpayer in the position of Mr Hicks would have done, and what a reasonable and prudent accountant in the position of Mr Bevis would have done in acting on behalf of Mr Hicks. That test must take account of all the circumstances, including their characteristics and the relationship between them.

187. The issue is not whether Mr Hicks or Mr Bevis was careless in general or in the abstract, but whether their failure to take reasonable care *brought about* the insufficiency in the return for 2008-09 (because even though the substantive issue is

not in point in this appeal that is the year in which the loss which was carried forward was claimed), or the two subsequent returns. In my view, bringing about the insufficiency in this case would encompass Mr Hicks' decision to participate in the Scheme; the decision to claim the loss in the 2008-09 return, and the decisions to carry forward the loss in the two subsequent returns. I consider each in turn.

188. First, was Mr Hicks careless in deciding whether to participate in the Scheme which generated the claimed loss?

189. In summary, the relevant background to that decision was as follows:

(1) Mr Hicks initially received strong recommendations in respect of the Scheme from Mr Cole and Mr Bevis.

(2) Mr Hicks' colleague Mr Callen also expressed support for the Scheme following a meeting between Montpelier and various traders not including Mr Hicks.

(3) Before meeting with Montpelier for the first time, Mr Hicks spoke with Mr Cole, who said the Scheme was "all legal and worked perfect for us as traders".

(4) Mr Hicks attended a presentation on the Scheme by Montpelier. It was described as "perfect for derivative traders".

(5) Mr Hicks understood Montpelier to be tax consultants of 20 years standing, and that a former HMRC employee worked for them.

(6) Mr Hicks was shown two documents prepared for Montpelier dealing with the technical tax aspects of the Scheme. He did not fully understand those documents and did not read them thoroughly, but he understood that the Scheme had been disclosed to HMRC and that, although Montpelier were confident it worked, HMRC would be likely to challenge it.

(7) Mr Hicks understood that while the dividend trades would generate a small profit on a standalone basis, in view of the fee payable to Montpelier the Scheme would be beneficial overall only if the tax loss materialised.

(8) Mr Hicks established from another colleague that his accountant was also supportive of the Scheme.

(9) Following the first meeting, Mr Hicks contacted Mr Bevis, who relayed Mr Coles' view that the Scheme was a "no brainer" and that Mr Hicks would be "crazy" not to go ahead.

(10) Mr Hicks arranged a final meeting with Montpelier, and made sure that Mr Bevis was in attendance. Mr Bevis was persuaded that the Scheme stood "the best possible chance" of success, and that in Mr Hicks' shoes he would enter into it.

190. Mr Hicks was an experienced trader in oil and gas derivatives but he had no specialist tax knowledge and relied on advice. I agree with Mr Gordon's description that Mr Hicks was "not an academic high flyer or man of letters". Taking account of all the circumstances in my judgment the steps summarised above do not amount to a failure by Mr Hicks to take reasonable care in deciding to participate in the Scheme.

191. It is not necessarily careless to enter into a packaged tax avoidance scheme, even in the knowledge that HMRC might well challenge the promoter's interpretation of the legislation.

192. Mr Nawbatt made much of Mr Hicks' lack of "due diligence" in relation to the commercial aspects of the Scheme, and his failure to seek to negotiate its terms. Given that such a packaged scheme is presented in practice on a "take it or leave it" basis, I fail to see the relevance to causative carelessness of deciding to accept the terms offered. As regards due diligence, I reject Mr Nawbatt's suggestion that *Litman & Newall* is authority that a lack of commercial due diligence is necessarily a clear indicator of carelessness within subsection (4). In fact, the view expressed in that case was that the requisite level of commercial due diligence in respect of a packaged tax avoidance scheme was in general low: see [38] of the judgment. In any event, if confirmation were needed that the issue is critically dependent on the facts, one need only compare the conflicting penalty decisions on the same Montpelier scheme in *Litman*, *Gardiner v HMRC* [2014] UKFTT 421 (TC) and *Herefordshire Property Company v HMRC* [2015] UKFTT 79(TC). Unlike the taxpayer in *Litman*, on the facts in this appeal Mr Hicks unearthed nothing which should have alerted him to the possibility that the Scheme was a sham and required further due diligence.

193. Failing to keep copies of documents may have been slapdash, and careless in an abstract sense, but it did not contribute to "bringing about" the insufficiency in the 2008-09 return.

194. In my judgment, it would not be necessary for a reasonable taxpayer in the position of Mr Hicks and given all the factors described above to seek second or third technical opinions on the Scheme to avoid carelessness.

195. Mr Nawbatt argued that Mr Hicks should have realised that his pre-existing trade would not satisfy the requirements for an allowable tax loss, even if Montpelier's interpretation of section 730 prevailed. That should, he submitted, have been clear to Mr Hicks and others from the Counsel's opinion provided by Montpelier. This point has some force, but for a number of reasons I have concluded that on balance it is not sufficient to establish carelessness by Mr Hicks. First, it cannot be assumed that HMRC would necessarily succeed on this point; it is fact-specific and the substantive issue is not in point in this appeal. Secondly, the Counsel's opinion refers to the issue as a "risk", and the need to "demonstrate a pattern of dealing which leaves no doubt that [the individual] is trading in the right to receive dividends". That language is not in my judgment stating unambiguously (as Mr Nawbatt suggested) that the Scheme would be ineffective without a pre-existing trade which includes dividend rights. It is possible that a reasonable taxpayer in the position of Mr Hicks, having heard assurances from Chappel Cole, Montpelier and others, would have interpreted that language as raising an issue which was important but which could be dealt with satisfactorily. Thirdly, one cannot ignore the numerous assurances received by Mr Hicks, not only from Montpelier but from Chappel Cole, who it was not unreasonable for him to trust, that the Scheme was ideal for "derivative traders". It may be that in that respect the Scheme was "oversold", but that does not make Mr Hicks careless. Finally, it is important not to judge carelessness

within subsection (4) with the benefit of hindsight. The HMRC attack on the Scheme on trading grounds undoubtedly developed and became clearer over time, particularly in the years subsequent to the closure of the enquiry window for Mr Hicks' 2010-11 return.

196. I turn now to whether Mr Hicks or Mr Bevis was careless in submitting the 2008-09 return and claiming the loss. At that point, two further questions fall to be considered. First, had anything material changed between Mr Hicks's participation in the Scheme in February 2009 and submission of the return (on 27 January 2010) which would, either alone or taken together with events prior to that date, cause that submission to be careless? Secondly, was Mr Bevis careless within subsection (4)?

197. Only two events took place between February 2009 and 27 January 2010 which were in my judgment potentially material to carelessness. In April 2009 Montpelier told Mr Hicks that HMRC were moving to change the section 730 "anomaly", which they duly did in the Finance Act 2009. In July 2009 Mr Hicks received documentation relating to the dividend trades he had made under the Scheme.

198. The documents which Mr Hicks received were as he had expected, and were likely to have been taken by a reasonable taxpayer in his position as reassurance that the transactions had taken place as planned. Nothing in them meant that he was taking less care when it came to the submission of the return claiming the loss.

199. In relation to the repeal of section 730, in my judgment a reasonable taxpayer could not be expected to infer from that that the Scheme had previously been ineffective, though he might conceivably choose to infer the opposite (as did Montpelier in communicating the change to Scheme users). As I said in *Marathon Oil UK v HMRC* [2017] UKFTT 822 (TC), at [179]:

> "…As with many provisions which prospectively deal with deficiencies or loopholes in legislation, those who have relied on the deficiency in their tax planning seek to argue that the change proves their reading of the prior legislation, while HMRC seek to argue that the change is merely clarificatory."

200. In preparing and submitting his return, Mr Hicks relied on Mr Bevis. In all the circumstances I do not consider that he failed to take reasonable care in doing so. A taxpayer, particularly one such as Mr Hicks who lacked any real tax expertise, is entitled to rely on his adviser, with some caveats. The taxpayer should reasonably believe that the adviser is competent in the field in question, if necessary with the assistance of third parties for information, technical input or expert advice; he should ensure that he supplies the adviser with the information the adviser needs to prepare and complete the return; he should check the adviser's work to the extent he is able to do so, and he should not rely blindly on the adviser's advice if it is obviously wrong or adopts a clearly untenable position. In this case, I find that those caveats were adequately met.

201. Mr Bevis acted on behalf of Mr Hicks in preparing and submitting his 2008-09 return. Was he careless in claiming the loss in that return?

202. Mr Bevis relied on Montpelier in completing the sections of Mr Hicks' 2008-09 return relating to the Scheme. He regarded Montpelier as having the necessary knowledge and expertise in relation to the Scheme and accepted what they suggested should be included.

203. In principle, a firm of accountants completing Mr Hicks' return could have done more than Mr Bevis. They could have conducted a thorough review of Montpelier's advice, if necessary obtaining a second opinion. Mr Bevis was, however, effectively a one man band with none of the resources or expertise of a large firm of accountants. He had no prior knowledge of the area of tax law on which the Scheme and Montpelier's advice relied. He had been advised by the partner at his former firm to whom he then reported that the Scheme was effective on numerous occasions and in no uncertain terms. He had become confident after the February 2009 meeting with Montpelier and sight of the two technical documents that the Scheme stood "the best possible chance" of success. In all those circumstances, I find that HMRC have not discharged the burden of establishing that Mr Bevis was careless in submitting Mr Hicks' 2008-09 return.

204. Mr Bevis might arguably have determined from Montpelier's Counsel's opinion that Mr Hicks' derivatives trades was not apt for the Scheme. In that respect, I conclude for similar reasons to those set out at [195] in relation to Mr Hicks that on balance he was not careless in failing to have done so.

205. Montpelier's advice to Mr Bevis was not obviously wrong or untenable. In time it may have been shown to be wrong, but that is not the issue. Indeed, the length of time which HMRC themselves took to cross the threshold of discovering an insufficiency (until summer 2014) in my opinion suggests that Montpelier's view in January 2010 was not obviously wrong or untenable.

206. Montpelier was clearly not an independent source of advice in respect of the Scheme. However, that does not mean that Mr Bevis was careless to rely on their advice. Whether or not reliance by the taxpayer's accountant on advice from a scheme promoter is careless depends on all the facts. For example, in *Sanderson* the Upper Tribunal observed in relation to the then test of negligent conduct that the taxpayer's accountant in that case was entitled to regard the scheme promoters as having particular expertise in relation to matters relating to that scheme; see [36] of the judgment at point (v). All be it in the context of a penalty decision see also *Bayliss*, in which the taxpayer's accountant relied on advice from Montpelier.

207. Finally, were Mr Hicks or Mr Bevis careless in submitting the returns for 2009-10 and 2010-11 which included the Scheme loss carried forward? In view of my conclusions in relation to the 2008-09 return, this entails consideration of whether anything material had changed between 27 January 2010 and the time of submission of those returns which would, either alone or taken together with events prior to that date, cause such submission to be careless.

208. For both years, Mr Bevis followed the same procedure as for 2008-09, in that he obtained and included without amendment advice from Montpelier as to what if anything to include in those returns in relation to the Scheme.

209. The salient events are summarised at [97] to [99]. On 3 December 2010 HMRC opened an enquiry into the 2008-09 return. In February 2011 HMRC sent Mr Hicks a formal information request. In April 2011 Mr Bevis, acting on behalf of Mr Hicks, supplied some but not all of the information requested. Following a further request in June 2011 additional information was supplied. On 20 January 2012 HMRC wrote to Mr Hicks stating that on the basis of the documents and information provided HMRC had "concerns" in relation to various specified issues, and seeking further information and documents.

210. Mr Nawbatt submitted that the points raised by HMRC, and the Montpelier responses provided to Mr Bevis to relay to HMRC, should have alerted Mr Hicks and Mr Bevis to the insufficiency in the 2008-09 return, and that as a result they were careless in claiming the carried forward loss in the two subsequent returns. As Mr Nawbatt expressed it, the HMRC queries should have raised "alarm bells".

211. As regards the 2009-10 return this argument is weak. That return was received by HMRC on 28 January 2011. By that date, all that HMRC had done was to open an enquiry into the 2008-09 return the previous month, with an informal information request. As I have observed above, that was entirely unsurprising, and anticipated by Mr Hicks.

212. As regards the 2010-11 return, as might have been expected HMRC's concerns and requests by that date had developed and become more granular. However, by the time that return was submitted on 31 January 2012 in my judgment the process of the enquiry into the 2008-09 return was comfortably within the parameters of a typical HMRC enquiry into a marketed tax scheme. Both Mr Hicks and Mr Bevis stated in cross-examination that the correspondence did not "set off alarm bells". HMRC continued to explore "concerns" regarding the Scheme, a process which did not result in a discovery of an insufficiency by HMRC until some two and a half years after the 2010-11 return was filed. This process did not in my judgment operate to cause the taxpayer or Mr Bevis acting on his behalf to be careless in continuing to claim the loss in the return, either alone or taken together with other events to that point.

213. Mr Nawbatt made much of the failure by Mr Hicks and Mr Bevis to respond accurately to all of HMRC's questions and requests during the enquiry process. As regards the technical documents relating to the Scheme prepared by Montpelier and seen by Mr Hicks and Mr Bevis, those documents were not in their possession, but the replies given by Mr Bevis (on the advice of Montpelier) did not disclose that they had each seen the documents. Whether or not this was a deliberate attempt to mislead HMRC, I accept the evidence of both Mr Bevis and Mr Hicks that they did not fully appreciate at the time that their replies were either misleading or at least incomplete.

214. However, this was not an appeal concerned with the enquiry process, or penalties, but with whether any failure to take reasonable care by either Mr Hicks or

Mr Bevis *brought about* the insufficiency in the returns. An incidence of carelessness in replying to a particular HMRC enquiry is clearly undesirable, and may have other consequences, but if it was not causative carelessness, as it was not here, it is not relevant for subsection (4).

215. I conclude that HMRC have not discharged the burden of establishing on balance that either Mr Hicks or Mr Bevis acting on his behalf was careless in bringing about the insufficiency in the 2009-10 or 210-11 returns.

Decision

216. For the reasons given, the appeal is allowed.

217. 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.

THOMAS SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 12 JANUARY 2018