[2019] UKFTT 312 (TC)

TC07140

Appeal number: TC/2018/00356

INCOME TAX – Discovery Assessment – Section 29 Taxes Management Act 1970 - whether HMRC subjectively and objectively made a discovery – whether it was stale – whether it was made within the extended time limit – Appellant's carelessness – failure to keep records – tax loss – large credit and small credit said to be loan and payment of expenses - undeclared income from trade or self-employment – lawfulness of 'informal compliance check' rather than formal enquiry or investigation – whether HMRC used coercion or false pretences to obtain information – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

KEITH HUNTER **Appellant**

- and -

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

TRIBUNAL: JUDGE RUPERT JONES
DAVID BATTEN

Sitting in public at Taylor House, London on 17 January 2019 with written submissions served by the parties on 28 January 2019 and 14 February 2019

Neil Staff, Raffingers Chartered Certified Accountants, for the Appellant

Paul Harbottle and Brian Horton, Litigators and Presenting Officers of HM Revenue and Customs, for the Respondents

DECISION

1. Keith Hunter ("Mr Hunter" or "The Appellant") appeals against a discovery assessment ("the Discovery Assessment") issued by HMRC on 27 September 2017. It was made against him pursuant to section 29(1) of the Taxes Management Act 1970 ("TMA 1970") for the tax year ended 5 April 2012 (the "Tax Year").

2. The Discovery Assessment charged the Appellant income tax in the amount of £42,565.30, albeit that HMRC now invite the Tribunal to reduce the sum to £36,225.62.

3. HMRC submit that the Appellant received undeclared and untaxed income amounting to £66,866.54 during the Tax Year. This was made up of two sums credited to his bank account, £8,056.10 on 17 October 2011 ("the small credit") and £58,810.44 on 7 December 2011 ("the large credit").

4. At the time of the decision to make an assessment in 2017, HMRC suggested that both credits were taxable as unspecified gains or income. HMRC believed the payments to the Appellant were from miscellaneous sources and did not seek to identify the type of income that the credits may represent.

5. Prior to the hearing and in defending the appeal, HMRC submitted that the small and large credits are likely to have been derived from the Appellant's taxable trading income or self-employment such as the provision of 'Consultancy Services'. HMRC say that the two credits are chargeable to tax under Part 2 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") as 'Trading Income.'

Issues in the appeal

6. The first issue the Tribunal must decide is whether HMRC have proved the Discovery Assessment is valid. This involves determination as to whether HMRC Officer Booth made a 'discovery' pursuant to section 29(1) of the TMA 1970 of income which ought to have been assessed but was not so assessed, thus leading to a tax loss.

7. This requires deciding whether Officer Booth subjectively believed that he was making such a discovery and that the information or evidence was objectively discoverable. In addition, HMRC must prove that the Discovery Assessment was raised within a reasonable time period of the discovery having been made so that it was 'fresh' or 'not stale'. The Appellant submits there was no 'subjective' nor 'objective' discovery of any income which ought to have been assessed nor any tax loss during the enquiry into his tax affairs.

8. The second issue the Tribunal must decide is whether HMRC have proved any loss of income tax was brought about by the carelessness of the Appellant. If so, this empowers HMRC to raise the Discovery Assessment pursuant to sections 29(3) and 29(4) TMA 1970. It also determines whether the Discovery Assessment was made within the time period limited by law. If the Appellant acted carelessly in bringing

about a tax loss, it empowers HMRC to extend the time limits in which to make an assessment up to six years after the end of the Tax Year by virtue of section 36(1) TMA 1970. HMRC submit that the Appellant acted carelessly for a number of reasons including that he did not retain records, documents or receipts to evidence his income as required by law.

9. HMRC's assessment was raised in September 2017 some five and a half years after the end of the Tax Year in April 2012. The Appellant argues that he did not act carelessly and was under no duty to retain records relating to non-taxable receipts. If HMRC do not prove that the Appellant acted carelessly, then the Discovery Assessment must be cancelled as it would have been made outside the standard or default four-year time limit provided under section 34 TMA.

10. The third issue the Tribunal must decide, if HMRC prove that the Discovery Assessment is valid and made in time, is whether the Appellant has proved that either of the two credits are not taxable receipts. The Appellant bears the burden of proving the amount charged under the Discovery Assessment should be reduced and/or set aside.

11. In support of his argument that the Discovery Assessment should be cancelled, the Appellant submits that the large credit of £58,810.44 represents a loan and is not taxable income and the smaller credit was the repayment of expenses and is likewise not taxable.

12. The burden or 'onus' of proof is upon HMRC in relation to the first two issues but upon the Appellant in respect of the third issue. The standard of proof is the ordinary civil standard, being the balance of probabilities.

13. The Appellant raised two further issues in the appeal which were not identified in his grounds of appeal but which the Tribunal permitted him to pursue.

14. The fourth issue is whether HMRC acted lawfully in undertaking an informal (ie. non-statutory) enquiry or 'compliance check' of the Appellant's tax position. HMRC say they sought his voluntary cooperation, outside the formal or statutory enquiry mechanisms such as those provided under section 9A of the TMA 1970 for enquiring into returns or by obtaining material through the issue of Taxpayer or Information Notices under Schedule 36 to the Finance Act 2008.

15. The Appellant submits that HMRC's enquiry or check was not lawfully opened or conducted and he was the subject of an unlawful investigation. He therefore submits that the material and information that he provided to HMRC, such as the bank statements revealing the two credits, were obtained unlawfully and cannot be relied upon in making the Discovery Assessment against him.

16. The fifth issue is whether HMRC placed the Appellant under any undue pressure or coercion to cooperate with the 'voluntary enquiry' or 'informal compliance check' and produce information to them in relation to his tax position for the Tax Year.

17. The Appellant submits that HMRC obtained material from him under false pretences and not as a result of truly voluntary cooperation. He suggests HMRC misled him when asking him to provide information to them and he did so under threat of penalties or other serious action such that his compliance was not voluntary.

The Facts

18. The Tribunal received a bundle of evidence from the parties including witness statements and documentary exhibits from the two witnesses, the Appellant and HMRC Officer Steven Booth. Both witnesses were cross examined during the hearing.

19. The Tribunal makes all findings of fact on the balance of probabilities. It has assessed the reliability and credibility of the contents of the written evidence. The documents in the case include witness statements and exhibits. Likewise, the Tribunal has considered the oral evidence of the witnesses, its consistency with the other evidence and its inherent probability in determining whether it is reliable or credible.

The informal 'compliance check' or investigation into the Appellant's tax return

20. Officer Booth of HMRC provided a witness statement dated 2 August 2018 and was cross examined during the hearing. The Tribunal found his evidence to be reliable and credible, relying upon it to make factual findings on the balance of probabilities. The Tribunal accepts Officer Booth's oral evidence and relies upon the documentary material he produced.

21. Officer Booth gave oral evidence and produced documents which established the following.

22. The Appellant, Keith Lindsay Hunter, is a former Metropolitan Police Detective. He had retired from the police well before he was arrested, on 23 May 2012, on suspicion of making corrupt payments to a serving police officer. Criminal charges were not pursued against him following the conclusion of the investigation.

23. Thereafter HMRC received, via what they submit was a legal gateway, information from the police regarding the suspicion of potential tax loss involving Mr Hunter through his company Risc Management Ltd. Risc Management Ltd was a private investigation company controlled and run by Mr Hunter until it was placed into administration on 3 February 2014. The information from the police was that Mr Hunter may have diverted (and retained) confidential cash payments from his company Risc Management Ltd which were to be made to human sources. If so, no tax would have been paid on the diverted cash receipts.

24. On 31 August 2012 HMRC received the Appellant's Self-assessment tax return for the Tax Year ending 5 April 2012. The Appellant declared £35,055 (excluding benefits & expenses) in Employment Income from Risc Management Limited, £74,098 (excluding 10% tax credit) in UK Dividends and £13,421 in Private Pensions.

25. On 13 February 2015 HMRC Officer Steven Booth wrote to the Appellant in terms he described as HMRC opening an investigation into the Appellant's tax affairs. Officer Booth emphasised in oral evidence that it was 'a compliance check' conducted with the aim of achieving a civil settlement.

February 2015 letter opening the check or investigation

26. The letter was addressed as being from HMRC's Criminal Taxes Unit ("CTU").

27. The precise terms of the letter included the following:

"I am writing to inform you that I am commencing an investigation into your taxation affairs.

Information held by HMRC suggests the tax returns and accounts you have submitted are incorrect. Although this position is subject to change eg. should you be capable of providing a satisfactory explanation, it is my duty to pursue the matter further.

The investigation will cover all businesses which you are or ever have been connected with and any dealing with companies that may have an effect on your personal tax liability. It will include all sources of income and gains giving rise to any taxes, both direct and indirect. These taxes include Income tax, NIC, capital Gains Tax, corporation Tax and PAYE.

We welcome your cooperation with our investigation and in establishing your correct liabilities. The extent to which you cooperate with us and provide us with information is entirely a matter for you.

My investigation is being conducted with the aim of achieving a civil financial settlement of any unpaid tax together with any interest and penalties arising. The penalty is a percentage of the tax unpaid, understated or under assessed…..Full cooperation will ensure that any penalties are reduced to their minimum levels and you may be able to avoid having your details published.

…….

I would like to arrange a meeting with you (and your agent) to discuss your tax affairs and I would be grateful if you (or your agent) would contact me within the next 10 working days to arrange a mutually convenient time and location……

I have enclosed the following HMRC Factsheets which provide further information:

CC/FS7a: Penalties for errors in returns or documents

CC/FS9: Human Rights Act

CC/FS13: Publishing details of deliberate defaulters

CC/FS15: Self Assessment and old penalty rules

Please note: A copy of this letter has been forwarded to your agent…"

[Emphasis Added]

28. Crowe Clarke Whitehill (the "Appellant's former agent") was authorised to act for the Appellant at that time. On 23 February 2015 the Appellant's former agent contacted HMRC and arranged an open meeting to assist in resolving the matters.

April 2015 meeting with HMRC

29. On 29 April 2015 a meeting took place between HMRC officers Steven Booth and Roy Stoddart and the Appellant and his representatives, Sean Wakeman and David Ford, at the offices of Crowe Clarke Whitehill. A note of the meeting was taken.

30. Officer Booth explained to the Appellant towards the outset of the meeting that HMRC had a duty of confidentiality to taxpayers and that the meeting would be wide ranging, covering both his business and private affairs. Certain safeguards were given and the factsheets about Human Rights and penalties were discussed. Officer Booth pointed out to the Appellant that his attendance was on a voluntary basis and that he did not have to cooperate, was free to leave at any stage and could seek an adjournment at any stage. Officer Booth told the Appellant that any information he provided could be used by HMRC in assessing his liability to tax or to a penalty and may also be given as evidence in any appeal proceedings.

31. Officer Booth explained that the meeting was being conducted on a civil basis. He said that the meeting was being held because HMRC had received information suggesting the Appellant had submitted incorrect tax returns by failing to account for all of his worldwide taxable income. Officer Booth explained that the information held could be incorrect or capable of a satisfactory explanation but that it was his duty to fully investigate the matter. Officer Booth told the Appellant the meeting represented an opportunity for him to secure the maximum benefit from making a full and complete disclosure of all irregularities in his tax affairs.

32. Later in the meeting Officer Booth explained to the Appellant how the CTU received information from a number of sources and having received information regarding Mr Hunter's tax affairs, an opening letter was issued inviting him to attend an opening meeting. He went on to explain how the enquiry had been opened under the discovery provisions but, rather than issue assessments at the outset, an opening meeting had been sought.

33. In the middle of the meeting they discussed Mr Hunter's involvement in Risc Mangement Ltd. Officer Booth referred Mr Hunter to the information in the public domain that suggested Risc Management had made cash payments to confidential sources. Officer Booth asked Mr Hunter for details.

34. Mr Hunter said cash was either withdrawn directly from ATM machines or ordered and delivered by TNT couriers to the company's bookkeeper who would keep a record. The cash was then handed over to the person responsible for meeting the

confidential source and it would subsequently be handed over in exchange for information. Mr Hunter admitted that there were no records to confirm the cash was actually handed over to the confidential sources. Mr Hunter suggested his clients, who were seeking the information would have been invoiced for the cash used to pay the confidential sources. Officer Booth told Mr Hunter he was concerned the cash may have been retained in its entirety or in part by the Risc Management employees and there were no records to suggest otherwise.

35. Towards the end of the meeting Officer Booth said that HMRC calculation of the quantum of his undeclared income would not be possible until after a full review of Mr Hunter's financial affairs had been undertaken. Officer Booth asked Mr Hunter if he felt he had been treated fairly to which Mr Hunter agreed. He asked Mr Hunter if he had any complaints about the way the meeting had been conducted to which Mr Hunter said no. He asked Mr Hunter if he wished to add or clarify anything and Mr Hunter stated he had concerns there was a malicious campaign against him being pursued by the police and / or journalists.

36. The notes of the meeting were typed on 5 May 2015 and sent to Crowe Clark Whitehill on 15 May 2015.

37. The following other salient points were recorded in the discussions at the meeting:

a) The Appellant was a Director of Risc Management Limited ("Risc Management") from 2005-2014. This was a 'multi-service' company providing services such as Corporate and Anti-money Laundering Investigations.

b) As set out above, confidential sources were paid in cash in exchange for information. However, there were no records kept by the company evidencing the cash payments being received by the source.

c) The Appellant was also a Director of Risc Mena, a Dubai based subsidiary of Risc Management which was described as a Financial Investment Company with one permanent employee in Dubai. Mr Hunter stated that he had never taken a salary or any monies from Risc Mena.

d) The Appellant formed a new company named Maddox Advisors (UK) Limited ("Maddox") following the dissolution of Risc Management in 2014. Maddox traded for only 3 months and was loss making. Maddox was in effect, a smaller version of Risc Management.

e) After loss making for 3 months, the Appellant became a Consultant for Animus Associates in October 2014 and director in early 2015, receiving Employment Income subject to PAYE of £7,500 per month.

f) The Appellant had interests in Night Clubs (Chinawhites, Filthy McNastys) and stated he had received no income from property at any point in time.

g) The Appellant also confirmed his interest in Risc Solutions Limited, Risc Management Limited, Risc Global Limited, foreign companies and property. The Appellant further confirmed he had domestic and foreign bank accounts.

h) Officer Booth stated to the Appellant he would examine his bank accounts to establish if lodgements, deposits and credits were commensurate with the income Mr Hunter had declared to HMRC. At the request of the Appellant's former agent, Officer Booth agreed to restrict his review to a couple of sample periods so as to avoid Mr Hunter incurring unnecessary costs. The parties agreed the sample periods would cover the 2008-09 and 2011-12 tax years.

38. On 12 June 2015 the Appellant's former agent wrote to Officer Booth and provided him with their comments in respect of the notes of the April 2015 meeting he had issued on 15 May 2015. At no stage during or after the meeting did the Appellant nor Crowe Clark Whitehill make any representations that the Appellant was feeling under pressure or duress to cooperate with the investigation.

39. On 15 May 2015 HMRC Officer Booth wrote to the Appellant requesting additional information including bank and credit card statements for worldwide bank accounts, including those for the Tax Year.

40. A sample period was agreed in order to reduce the cost burden in collating the documents. HMRC also stated a chargeable gain (50% ownership) was due on the Appellant's disposal of 26 Wellfield Gardens in the tax year ended 5 April 2013.

41. On 14 August 2015 the Appellant's former agent confirmed that the documents requested were still being collated and attached a Statement of Assets and Liabilities. The chargeable gain accrued on the disposal of 26 Wellfield Gardens was agreed and subsequently paid by the Appellant via cheque.

42. On 12 April 2016 HMRC collected a bundle of documentation from the offices of the Appellant's former agent, consisting of bank and credit card statements. During the collection, the Appellant's former agent stated he had queried a number of credits that he suspected HMRC may be interested in, including a sum of approximately £58,000.

43. Following a review of the bank statements for the Appellant's Clydesdale Bank account and a Santander Bank account, HMRC Officer Booth identified transactions he thought were worthy of further investigation because of the description which, in his opinion, suggested the credits could have come from a taxable source. He restricted the transactions he wanted to test to limit any burden placed on the taxpayer (and/or his advisors).

44. In the sample period for the 2008/09 tax year he identified 10 transactions.

45. In the sample period for the 2011/12 tax year he identified 11 transactions.

46. The reference to a sum of £58,000 was reasonably taken to be a reference to a credit to be found on the Appellant's Clydesdale Bank Account statement dated 7 December 2011 in the sum of £58,810.44.

47. On 1 July 2016 Officer Booth e-mailed the Appellant's former agent and asked for an explanation to be provided to HMRC for 21 credits found within the bank statements provided, covering the tax years 2008-2009 and 2011-2012.

48. Relevant to this appeal, evidence of the following two credits was requested:

Payment on 17 October 2011 with reference "0021" and amounting to £8,056.10. No further reference was included on the statement (the small credit);

Payment on 7 December 2011 with reference "Upside Management, USD 93,985.19, Rate 1.5811" and amounting to £58,810.44 (the large credit);

49. Officer Booth was seeking to establish whether or not the particular transactions were taxable in nature and, if so, whether or not they had been accounted for tax purposes.

50. On 2 August 2016 the Appellant changed agents, appointing and authorising Messrs Raffingers ("Raffingers") to act on his behalf.

51. On 3 October 2016 Mr Staff of Raffingers called HMRC asking for a month to respond in full. Further, Mr Staff drew attention to a sum of approximately £50,000 that stood out and that the Appellant was able to provide an immediate explanation for. Mr Staff stated it represented something the Appellant was "supposed to do but had not got round to doing so" and that he (i.e. the Appellant) was adamant it was not from a taxable source. Officer Booth responded by stating HMRC held information to suggest Mr Hunter may have sold property in the USA. The information Officer Booth referred to had been obtained via internet search engines.

52. Officer Booth's analysis of Mr Hunter's relevant bank account identified the large credit of £58,810.44 that had been received on 7 December 2011. The description for this credit reads:

"S06134103A7501 Upside Management – Usd92985.19 Rate 1,5811"

53. The description referred to above shows the GBP £58,810.44 received has been converted from US dollars. Officer Booth used an internet search engine to conduct a search of 'Upside Management'. The 'first' result returned revealed a property management company called Upside Management based in Florida, USA.

54. On 31 October 2016 Mr Staff of Raffingers called HMRC stating he had information for approximately 30% of the credits and that a more substantive response was to follow.

55. On 7 November 2016 Raffingers e-mailed HMRC providing comments on the credits forwarding their initial comments and observations on the transactions Officer

Booth had identified following his bank analysis. Out of the 21 transactions Officer Booth had identified across both sample periods there were 12 deposits in which no background information had been found.

56. Specifically, Raffingers suggested the Appellant's 'initial recollection' was that the large credit of £58,810.44 represented a loan from a company in Beirut called Upside Management ("Upside"). To date no supporting documentation was provided to HMRC, i.e. no loan agreement, has been provided despite being requested. Officer Booth was not able to identify any business and/or financial institution in Lebanon by the name of Upside Management.

57. In respect of the deposit of £8,056.10 on 17 October 2011, Raffingers advised they could not find any details as to the nature of the deposit and, to date, no further information has been provided. Therefore there was no explanation of the small credit of £8,056.10 provided to HMRC aside from "Cannot find details."

58. In their email of 7 November 2016 Raffingers also made reference to a previous telephone conversation during which Officer Booth had commented on information in HMRC's possession regarding a possible property transaction in the USA. Raffingers stated that 'their client has no knowledge of owning, purchasing, disposing of, or being connected to, any property in the USA." Concerns were also shared around the source of information received by HMRC, their investigations and requests for historical documentation. A further meeting to discuss the matters was proposed.

59. On 25 November 2016 Officer Booth e-mailed Raffingers asking for evidence of the loan from Upside, specifically the originating bank and a copy of the Loan Agreement in respect of the large credit. This was therefore the range of further documentation requested by HMRC regarding the sum of £58,810.44 said to be a loan from Upside Management.

60. Officer Booth went on to confirm that the enquiry into the Appellant's tax affairs had commenced in February 2015 and pointed out it was the former agent (Crowe Clark Whitehill) who had agreed the 2008-09 and 2011-12 tax years could be used as sample periods. He referred to the opening meeting with the Appellant in which he had answered questions about cash being withdrawn from the business and for some reason monies had ended up being paid into his personal bank account. Mr Hunter had suggested Raffingers would have kept full records of all these transactions. In the absence of any further information and/or documentation Officer Booth did not consider it unreasonable to assume the unexplained cash deposits represented untaxed income.

61. On 20 February 2017 Mr Staff called Officer Booth to provide an update on the position regarding the additional information required. He stated that at the time it had not been possible to obtain any supporting documentation regarding the loan of £58,810.44.

62. On 24 February 2017 Mr Staff called Officer Booth again. Officer Booth confirmed HMRC's investigation was being conducted on a civil basis. Mr Staff

highlighted the problem was obtaining any documentation in respect of the loan. During their conversation, Officer Booth informed Mr Staff he had contacted the American tax authorities as Mr Hunter had not provided any documentation in respect of the £58,810.44 deposit and Officer Booth had reason to suspect the origin of the monies was not a loan from a company in Beirut called Upside Management. They provisionally agreed to arrange a meeting for 30 March 2017 with the proviso that its go-ahead would depend on whether or not Officer Booth had received a response from the USA.

63. On 4 July 2017 Officer Booth emailed Raffingers to confirm he had received a response from the USA and that he would like to arrange a meeting with a view to resolving the outstanding issues. In correspondence that followed it was agreed that a meeting would be held on 19 July 2017 at the premises of Raffingers.

64. On 27 September 2017 HMRC Officer Booth issued the Discovery Assessment against the Appellant under section 29 of the Taxes Management Act 1970 ("TMA 1970") for the Tax Year ending 5 April 2012, in the amount of £42,565.30 in tax. With regards to the amounts to be assessed Officer Booth stated that the additional amount of income to be assessed in the 2011-12 was £86,866.58.

65. On 27 September 2017 HMRC issued a Penalty Explanation Letter for the Tax Year pursuant to Schedule 24 of the Finance Act 2007 ("FA 2007"). The penalty was suspended. Further comments were requested from the Appellant. Thereafter, no Penalty Assessment was issued and thus this appeal does not concern penalties.

66. On 3 October 2017 Raffingers appealed to HMRC against the Discovery Assessment by virtue of section 31(1)(d) of the TMA 1970, also requesting a Statutory Review pursuant to section 49B(1).

67. On 31 October 2017 HMRC Officer Booth issued his View of the Matter letter under section 49B(2) of the TMA 1970, referring to the letter of 27 September 2017 as HMRC's 'View.'

68. On 15 December 2017 HMRC issued their Statutory Review Conclusion Letter upholding the Discovery Assessment.

69. The Appellant appealed to the Tribunal by Notice of Appeal dated 15 January 2018.

70. On 4 January 2018 Raffingers provided HMRC with an extract from a Directors Loan Account ("DLA") to evidence further credits. On the same date Raffingers advised they had been able to locate an old audit file and that there was evidence to suggest the deposits of £5,000.00 on 10 November 2011 and £15,000.04 on 1 July 2011 related to director's loan account drawings. Officer Booth decided to take a pragmatic view and agreed to reduce the additional taxable income by these amounts because he considered the evidence provided was sufficient to determine the source was not taxable.

71. To the extent that the Discovery Assessment relates to these credits, HMRC invited the Tribunal to reduce the quantum of the Discovery Assessment accordingly. HMRC now seek to assess £66,866.54 worth of income to additional income tax in the 2011-12 tax year. The £66,866.54 is comprised of the £8,056.10 bank deposit on 17 October 2011 plus the £58,810.44 bank deposit on 7 December 2011.

72. Officer Booth was of the opinion that both credits are taxable in nature and the Appellant had not provided any evidence to show him that they were not.

Officer Booth's evidence regarding Discovery

73. Officer Booth believed that HMRC received, via the legal gateway, information from the police regarding the potential tax evasion of Mr Hunter through the diversion of confidential source payments from Risc Management Ltd.

74. He stated that a civil tax investigation was opened and a meeting took place between HMRC and Mr Hunter who was accompanied by professional advisors.

75. During this meeting Mr Hunter agreed to provide HMRC with copies of his bank and credit card statements to inspect. This documentation was reviewed and a number of transactions were identified (21 in total) whereby the description field on the bank statement suggested the credit was worthy of further investigation, i.e. it could have represented diverted source payments or an alternatively different source of taxable income.

76. Mr Hunter was asked to explain the nature and source of each of the 21 transactions identified. He had not been able to provide any evidence or a satisfactory explanation for two credits, i.e. the £8,056.10 bank deposit on 17 October 2011 and the £58,810.44 bank deposit on 7 December 2011.

77. Officer Booth stated there is a requirement to keep records for at least 5 years after the 31 January submission deadline for the relevant tax year. For example, if Mr Hunter submitted his 2011-12 tax return by 31 January 2013, he should have kept his records until at least the end of January 2018.

78. HMRC's assessments were issued on 27 September 2017. Therefore, Officer Booth believed it was reasonable to expect Mr Hunter to have been in a position to produce records to enable HMRC to verify the source of the two credits identified and check his tax position.

79. Officer Booth believed the onus was on Mr Hunter to discharge the burden of proof and demonstrate on the balance of probabilities that the two transactions identified were not of a taxable nature. Officer Booth did not believe Mr Hunter had done so. He believed both of the transactions - the small credit and large credit - are taxable in nature and he originally described the source(s) of this income as unspecified chargeable gains, income, profits or gains.

80. Officer Booth stated that the Appellant was clearly aware of his tax obligations. He had already agreed with HMRC that he omitted a chargeable gain from his 2012-13 tax return following the disposal of the former martial home.

81. Officer Booth was of the opinion Mr Hunter had failed to take reasonable care in accounting for all taxable receipts in the 2011-12 tax year and he believed the resulting tax loss has been caused by his 'careless' behaviour.

82. Following reductions for disclosure in respect of "telling", "helping" and "giving", Officer Booth proposed to charge a tax geared penalty of 18% of the Potential Lost Revenue ("PLR"). The penalty chargeable for 2011-12 was £7,661.75. However, on further consideration Officer Booth had decided to suspend the careless penalty so long as the following conditions were complied with:

- Mr Hunter must meet all notification and filing obligations, and
- Mr Hunter must consider the tax consequences of all future (worldwide) property disposals to identify whether he needed to account for a chargeable gain or not.

Supplementary evidence in chief of Officer Booth

83. Officer Booth also gave oral evidence which is relevant to the issue of whether the discovery was fresh or stale. Officer Booth stated he formed the opinion that the credits were taxable in nature after Mr Staff provided him with information into the test transactions enquired into around 21 November 2016. This was forwarded to him with responses from the agent around early February 2017. On 24 February 2017 Officer Booth spoke to Mr Staff on the phone and explained that following his review of bank statements, he was of the opinion he had made a discovery that there was a loss of tax. He raised the Discovery Assessment in September 2017 after other attempts to resolve the issue were unsuccessful.

84. Officer Booth also accepted in oral evidence that when he issued the Discovery Assessment against the Appellant, he was relying upon the Appellant receiving trading income under Part 2 of ITTOIA. He accepted he was under some confusion when he referred to miscellaneous income (ie. Part 5 of ITTOIA) in that assessment. That was a mistake on his part and he would say that the tax computations were assessed as on the basis the Appellant received self-employed trading income.

Evidence of Officer Booth under cross examination

85. In cross examination HMRC Officer Booth stated as follows.

86. He worked as a civil investigator although at the time he was working for the criminal taxes unit ('CTU'). The unit was set up to deal with civil and criminal cases. Essentially, they received information from law enforcement agencies. It was received through legal gateways to risk intelligence services who then allocated work across HMRC.

87. He received the relevant information regarding the Appellant in December 2014 – and opened the enquiry or check in February 2015. Officer Booth would have

received the information personally in January 2015. He received general information that the Appellant's recording of source of cash payments was not accurate and that there was diversion of confidential source payments. After investigating the matter, he came to the conclusion that this information was not accurate.

88. Officer Booth was only concerned with the Appellant's tax position and not with any previous criminal investigation into the Appellant. The Officer was aware of the criminal investigation into the Appellant from the press and public information and hence the general nature of the allegation but not specific details.

89. Officer Booth stated his letter of 15 February 2015 to the Appellant was opening a compliance check and asking him to cooperate voluntarily. This was a standard template letter for HMRC. It contained the phrase 'Full cooperation will ensure that any penalties are reduced to their minimum levels and you may be able to avoid having your details published'. The letter also referred to managing serial defaulters – who by their nature have to be responsible for deliberate evasion. Officer Booth did not consider the wording of this letter to be threatening, coercive, over onerous or disproportionate to the check he was conducting although he accepted it might be seen that way.

90. Officer Booth did not accept that there had been any threatening or coercive behaviour on the part of HMRC during the April 2015 meeting. There were no complaints about HMRC's treatment of the Appellant at the time nor subsequently. The Appellant was represented and a former police officer. The Appellant could have refused to cooperate but voluntarily did. The atmosphere of the meeting was courteous and pleasant.

91. At the meeting Officer Booth had said that an enquiry had been opened under discovery provisions, but he accepted he had not and could not open an enquiry under discovery assessment provisions. There was no such thing as opening a discovery enquiry. This was a poor choice of words – he meant to say he had information from police that the Appellant had been involved in the diversion of source payments. He also accepted that the notes of the meeting were accurate when he referred to the Appellant having a 'quantum of undeclared income'. On a natural interpretation of his statement this suggested he had made up his mind by April 2015, but this was a mistake. Officer Booth meant that he would have to investigate whether it was right that there was a quantum of undeclared income.

92. Officer Booth had opened the compliance check by letter and had invited the Appellant to have a meeting to discuss his tax affairs. He could have sought information under formal powers such as Information Notices under Schedule 36 of the Finance Act 2008. He had chosen not to do so at that stage as the Appellant may have had a plausible explanation for his tax affairs. However, if the Appellant had not responded to his letter – as the Appellant would have been entitled not to – then Officer Booth could have gone down that formal route. If so the Appellant, like any taxpayer, would have been entitled to appeal any Information Notices to the Tribunal. Officer Booth was seeking a voluntary and cooperative avenue rather than a formal

method of investigation. He was not aware of the lawful basis for using this method which he described as an 'informal compliance check'.

93. Officer Booth accepted that a taxpayer is not under any obligation to keep records of any non-taxable income. He accepted that the first time the Appellant and Mr Staff were made aware that the disclosure to HMRC of the specific information which prompted their enquiry was made by the police was when Officer Booth set it out in his witness statement. However, the allegation regarding misuse of confidential source payments was raised at the meeting between HMRC and the Appellant in 2015. He accepted that the allegation had subsequently investigated and rejected by HMRC, and not relied upon to raise the discovery assessment. Ultimately, Officer Booth was of the view that even if the police had provided information to exonerate the Appellant of the allegation regarding source payments it would not have been relevant to the check and assessment in relation to the Appellant's tax affairs which HMRC made.

94. The Tribunal accepts Officer Booth's evidence as set out above on the balance of probabilities. It is both reliable and credible. However, the Tribunal will address some of the implications of this evidence when considering the fourth and fifth issues.

Evidence of the Appellant

95. Mr Hunter, the Appellant, provided a witness statement dated 24 December 2018 and was cross examined.

96. Mr Hunter stated he was previously a Detective Sergeant working for the Metropolitan Police between 1977 and 1997. Between the periods 1989 to 1993 he was attached to the Regional Crime Squad at New Scotland Yard.

97. He stated he was a director and shareholder of Risc Management Limited until the company was placed in administration in February 2014. This was a company specialising in private investigation and risk management solution work primarily in the corporate sector.

98. He formed Animus Associates Limited on 22 January 2014. This was a company which specialised in private investigation work in the private and corporate sector.

99. In February 2015 he stated he received the letter from HMRC Criminal Taxes Unit notifying him of the intention to investigate his tax affairs. The letter said HMRC had information which suggested the accounts and tax returns he had submitted to HMRC were incorrect. The letter went on to say that if he cooperated fully with the HMRC enquiry then he may be able to avoid having his details published.

100. Mr Hunter stated he was extremely concerned to receive a letter of this nature particularly as it had been issued from the Criminal Taxes Unit rather than a standard local tax office. He was also concerned that HMRC had referred to having his details published in the opening letter. It seemed to him HMRC had already assumed some form of tax evasion that had taken place.

101. The opening letter did not specify under which section of the Taxes Acts the enquiry was being opened or which years were the subject of enquiry. Nor did the letter indicate what information was held by HMRC to suggest that his tax affairs were incorrect.

102. Mr Hunter appointed Sean Wakeman at Crowe Clarke Whitehill to be his accountant and representative. Mr Wakeman confirmed to him that he would be happy to meet with HMRC's Inspector to try and clear up any matters involving his tax position.

103. Mr Hunter stated he attended the meeting with HMRC Officers Steven Booth and Roy Stoddart on 29 April 2015 together with his representatives, Sean Wakeman and David Ford from Crowe Clarke Whitehill.

104. At the start of the meeting, following confirmation of Mr Hunter's personal details, Mr Hunter stated that Officer Steven Booth began talking about penalties and his rights under the Human Rights Act. At this stage in the meeting they had not discussed any matters affecting his tax affairs. However, Officer Booth said that he believed Mr Hunter could be liable to penalties, which is why it was necessary to discuss the Human Rights Act. Mr Hunter also stated that Officer Booth also told him that the meeting represented an opportunity for him to secure the maximum benefit of making a full and complete disclosure of irregularities in my tax affairs.

105. At this stage in the meeting Mr Hunter stated he felt as if HMRC had already decided that he was guilty of tax evasion. He stated he had not been asked any questions about his tax affairs, yet he was being advised as to possible penalty action and encouraged to make a disclosure of irregularities to assist in penalty mitigation.

106. When he was asked if he had anything to disclose, Mr Hunter advised that he did not. He stated that his tax affairs were in order and he had not committed any form of tax evasion.

107. Mr Hunter's representative Sean Wakeman then questioned Officer Booth about the opening letter, explaining that whilst Mr Hunter was happy to cooperate with HMRC, the opening letter had not specified the years under enquiry.

108. Officer Booth advised Sean Wakeman that the Criminal Taxes Unit receive information from a number of sources. Officer Booth had stated that the enquiry had been issued under the discovery provisions of the Taxes Acts. Officer Booth went on to explain that rather than issuing assessments at the outset, he had sought a meeting with Mr Hunter. At no stage did Officer Booth disclose what the information was despite Mr Hunter's requests at the meeting.

109. The meeting lasted just under two hours and Mr Hunter answered questions about his personal circumstances, his business activities, his income and assets, his bank accounts and credit cards together with detailed questions about the companies of which he had been a director and shareholder.

110. Towards the end of the meeting Mr Hunter also made it clear that he believed there had been a malicious accusation made against him by the police and possibly some journalists. Officer Booth did not make any comment about this.

111. Mr Hunter stated that Officer Booth closed the meeting by saying it would not be possible to quantify the exact amount of undeclared income until a review of Mr Hunter's personal affairs had been completed.

112. Mr Hunter spoke to his representative Sean Wakeman after the meeting and asked him to explain why he was being asked to provide his personal bank statements. Mr Hunter told his representative that he had not committed any form of tax fraud and that he felt that the HMRC officers were assuming he had committed tax evasion because of the way they spoke about penalties and told him it was in his interests to make a disclosure.

113. Mr Hunter also asked Sean Wakeman why Officer Booth had referred to quantifying the undeclared income at the end of the meeting. Mr Hunter stated that nothing had transpired during the meeting to suggest that his tax affairs were incorrect and it seemed to Mr Hunter that the HMRC officers were convinced that he had failed to disclose taxable income which was not the case.

114. Mr Wakeman said to Mr Hunter that HMRC clearly believed they had information to show that his tax affairs were incorrect. Mr Wakeman stated that, in these circumstances, it would be cost efficient to agree to provide some sample years from his personal bank statements. Mr Hunter reiterated that he had not committed any form of tax evasion, but he took Mr Wakeman's professional advice and agreed to provide his personal bank statements to HMRC.

115. Mr Hunter made the following comments on the witness statement prepared by Officer Steven Booth.

116. By way of background Mr Hunter stated he served as a Detective Sergeant in the Metropolitan Police for over 20 years. The majority of this time was spent working in high profile locations including the regional crime squad targeting the UK's top criminals and gangs. He retired from the police in 1997 with an exemplary record.

117. Mr Hunter stated that in Officer Booth's statement, he refers to Mr Hunter being arrested on 23 May 2012 on suspicion of making corrupt payments to a serving police officer. Although details of the arrest were correct, Mr Hunter wished to make clear the police investigation concluded the accusations were false and malicious. No evidence was found of any wrongdoing on my part and accordingly no charges were ever brought.

118. Mr Hunter stated that the lawyer who made the allegations of corruption against him had earlier been convicted of a multi-million pound fraud and money laundering offences for which he had been sentenced to 10 years imprisonment. He went on to be charged and prosecuted for perverting the course of justice in relation to the allegations he had made against Mr Hunter, although he was not convicted.

119. Mr Hunter stated that Officer Booth referred to HMRC receiving information from the police regarding potential tax evasion through the diversion of confidential source payments from Risc Management Limited. He stated that Officer Booth's statement was the first occasion he had been made aware of the source of the information or what the information was. It was Mr Hunter's understanding it was this information which triggered the enquiry into his personal tax affairs.

120. Mr Hunter stated that Officer Booth's statement also refers to criminal charges not being pursued against him following his arrest. Although criminal charges were not pursued, because the allegations were malicious and untrue, the fact that Officer Booth had referred to this matter at all in his witness statement suggested, in Mr Hunter's opinion, that Officer Booth believed there was impropriety on Mr Hunter's part which was not the case.

121. Mr Hunter stated that as this matter has been introduced as part of HMRC's case against him, he wanted to be clear that he did not make any corrupt payments to any police officer or any other individual. He had never even met the police officer to whom he was accused of making corrupt payments. There was no offence and no case to answer. He was surprised the subject of his arrest has been mentioned by Officer Booth and he believed the mention of it appears to be an attempt to prejudice Mr Hunter's character, integrity and credibility as a witness of truth.

122. Mr Hunter stated that the information provided to HMRC by the police was incorrect and misinformed. In Mr Hunter's opinion, the information was most likely provided to HMRC by officers from the Professional Standards Unit, and he believed the information was supplied maliciously because certain officers believed he was guilty, despite the lawyer who made the accusations having been arrested, charged and prosecuted for these serious criminal offences.

123. Mr Hunter stated he had never diverted confidential source payments for his own benefit and it follows that at the point when HMRC opened the tax enquiry, no actual discovery of tax loss existed.

124. Mr Hunter did not understand, nor had it ever been fully explained to him by HMRC, why the tax enquiry into his personal affairs was dealt with by the Criminal Taxes Unit rather than a normal tax office. In his opinion, HMRC had decided he was guilty of tax evasion at the outset and the reason that the case was worked by the Criminal Tax Unit, along with the wording of the opening letter, was designed to intimidate him.

125. Mr Hunter stated he did not understand, nor had it ever been fully explained to him by HMRC, why the enquiry case against him was not opened under the normal investigation provisions and sections of the Taxes Management Act. He did not understand, nor had it ever been fully explained to him by HMRC, how the case could be opened under the discovery provisions when no discovery existed. Mr Hunter stated he did not understand, nor had it ever been fully explained to him by HMRC, why the Inspector told him and his representative at the opening meeting, that HMRC was able to raise discovery assessments when no discovery existed.

126. Mr Hunter stated that he believed that he was asked to provide his personal bank statements under false pretences. The fact that the case was being dealt with by the Criminal Taxes Unit rather than a regular HMRC office, the tone of HMRC's opening letter, together with the clear assumption from Officer Booth throughout the opening meeting that there was something wrong with his tax affairs, led his representative to agree to provide his bank statements when Mr Hunter knew that he had not committed any form of tax evasion.

127. Mr Hunter agreed to provide his statements on the advice of his representative and because he knew there were no tax irregularities in his affairs nor any of the companies which he was connected with.

128. Mr Hunter stated that Officer Booth asked him to provide details of deposits in his private bank account for the years 2008-09 and 2011-12.

129. Mr Hunter appointed Raffingers as his new representatives in September 2016 as they were not only his personal tax advisors but were also his company accountants.

130. Raffingers emailed Steven Booth on 7 November 2016 with a schedule of the bank deposits that Mr Hunter was able to identify for the sample years 2008-09 and 2011-12.

131. In the email to HMRC, Raffingers explained that the source of approximately half of the deposits could be verified. Most of these related to the reimbursement of travel expenses from Risc Management Limited and Risc Solutions. There were however some deposits which, despite Mr Hunter's best efforts, he could not identify the source of, mainly as a result of the deposits being banked so long ago and, in some cases, up to 8 years and earlier.

132. Raffingers also specifically raised the question of the problems Mr Hunter had been experienced in verifying some of the deposits because of their age. They stated the following in their email to HMRC on 7 November 2016:

"We are keen to resolve the outstanding issues and intend cooperating with HMRC as best we can however, and we trust you will appreciate that establishing the source of private bank deposits, nearly half of which are over 8 years old, present tremendous difficulty in terms of both recollection and supporting documentation. On the subject of the information being requested for earlier years, we would appreciate you clarifying the basis on which the information is being requested. We are naturally aware that the case is being worked by HMRC Criminal Taxes Unit however the opening letter dated 13 February 2015 indicates that the case is being worked with a view to achieving a civil financial settlement of any unpaid tax. This was confirmed in the notes of meeting held on 29th April 2015 (paragraph 17). Our concern here is that our client is being required to provide information over six years old based on specific information received by HMRC which we are unaware of, which our client has not had the opportunity to respond to, and which our client believes will prove to be inaccurate. We should stress, again, that we are keen to work with HMRC to progress

matters however we also have a duty to protect our client with regards to requests for information dating back many years.

Explanation for the two credits

133. In subsequent correspondence Raffingers identified two further payments in 2011/12 as being director's loan account drawings which was accepted by HMRC Officer Booth.

134. Mr Hunter stated that there were, however, two deposits into his bank account for which he had not been able to provide any documentary evidenc.

135. The first was an amount of £8,056.10 dated 17 October 2011 and the second was an amount of £58,810.44 from Upside Management – converted from US Dollars (US$92,985.19; Rate 1.5811) - dated 7 December 2011.

136. Mr Hunter stated he could not substantiate the deposit for £8,056.10. He believed it most likely that this was a refund of business travel expenses from Risc Management or Risc Solutions Limited, but he had not been able to find supporting documentation to substantiate this. Officer Booth had now sought to assess this deposit as taxable income.

137. Mr Hunter stated that the deposit of £58,810.44 related to a loan he received from Mr Mazen Houssami who was the owner of Upside Management, which is a business based in Beirut. Mr Hunter stated that Mazen Houssami had been a personal friend and business associate for many years. He loaned Mr Hunter the money in light of his financial circumstances at the time. Mr Hunter was estranged from his wife and had made a financial commitment to her and had incurred a number of personal debts at this time.

138. At paragraph 46 of his statement Mr Hunter said the following: "The loan was interest free and no written agreement was ever drawn up. To date no part of the loan has ever been repaid although it was still my intention to do so."

139. Mr Hunter stated that the money received was not in respect of any services provided to Mazen Houssami nor his business Upside Management by either Mr Hunter personally nor any of the companies he was connected with. Mr Hunter reiterated that the money he received was a personal loan.

140. He was aware that Steven Booth contacted the US tax authorities in relation to the loan from Mazen Houssami and Upside Management. Mr Hunter believed this was because the entry on his personal bank statement referred to the conversion of U.S. dollars. He also understood that Officer Booth had located a company called Upside Management in the U.S. and wished to see if Mr Hunter had any involvement with the U.S. company.

141. Officer Booth spoke to Mr Hunter's tax representative, Neill Staff from Raffingers, and referred to information in HMRC's possession regarding a property transaction in the U.S.

142. Mr Hunter stated that he did not have any business interests or personal assets in the U.S. and that he was not the director or shareholder of any business named or trading as Upside Management. He does and did not own any property in the U.S. nor had he ever disposed of any property in the U.S.

143. In the email sent to Steven Booth by Raffingers on 7 November 2016 Mr Hunter's agent also said:

"We now refer to a telephone conversation that we had several weeks ago in which you suggested our client may wish to consider information in HMRC's possession regarding a possible property transaction in the USA. Whilst we are grateful for this information, and your attempts to progress the enquiry, we can confirm that our client has no knowledge of owning, purchasing, disposing of, or being connected to, any property in the USA. Our client also wishes to reiterate that full details of his business activities, taxable income and assets were disclosed to you at the opening meeting. Our client believes that HMRC have been provided with information with regards to his personal affairs which is inaccurate and misleading and is quite probably as a result of the industry that he works in and cases he has been involved in.

144. It was Mr Hunter's understanding that the U.S. tax authorities had subsequently confirmed that he was not connected to any business in the US and that these details have been accepted by Officer Booth.

145. Mr Hunter was unsure what information Officer Booth believed he held to suggest to his agent that HMRC held information to suggest Mr Hunter was involved in a property transaction in the U.S. This had never been explained to him.

Tax Assessment

146. Mr Hunter stated he received an assessment for the year 2011-12 dated 27 September 2017 assessing additional taxable income of £86,866. This was comprised of the deposits for £8,056.10 and £58,810, together with two further deposits of £15,000.04 and £5,000 that were subsequently identified as being payments from his director's loan account. Officer Booth agreed that the loan account receipts were not taxable and withdrew these latter two figures from the assessment.

147. Mr Hunter stated he was aware that his agents Raffingers appealed against the assessment and asked for the case to be independently reviewed by an officer not connected with the case. Mr Hunter was also aware the grounds for appeal were (a) the receipts were not taxable and (b) to raise an assessment for the year 2011-12 in September 2017, HMRC would need to demonstrate that any additional tax had arisen because he had been careless.

148. It was Mr Hunter's understanding that Officer Booth was suggesting he had been careless by not keeping a record of monies paid into his personal bank account in the 2011-12 tax year. He did not keep detailed records of his personal bank deposits for the reason that any monies paid into his bank account would only be PAYE or dividend income, pension income, reimbursement of expenses, or non- taxable

income. Mr Hunter believed he would not be required to keep a record of taxable PAYE dividend or pension income because he would be provided with tax vouchers to confirm this taxable income.

149. Mr Hunter did not understand how he could be considered to be careless for not keeping records or supporting evidence of payments paid into his personal bank account that he knew were not taxable.

150. In his witness statement, Officer Booth had referred to the obligation for a taxpayer to keep records. Mr Hunter was unsure how this would relate to a person receiving non-taxable reimbursements, loans or gifts. It was Mr Hunter's understanding that there is no obligation to keep a record of non-taxable items.

Summary of his evidence

151. Mr Hunter stated that the enquiry into his tax affairs was opened by HMRC based on incorrect and misleading information provided to HMRC by the Metropolitan Police.

152. Mr Hunter stated that it had been alleged by the police that Mr Hunter diverted confidential source funds from Risc Management Limited to bribe a police officer, however this was completely untrue. He had never even met the Officer in question and the allegation was made by a lawyer who was convicted and sentenced to 10 years imprisonment for fraud and money laundering offences. The lawyer was later charged and prosecuted for fabricating the allegations of bribery against Mr Hunter, though he did not go on to be convicted.

153. The police provided information to HMRC stating Mr Hunter misappropriated funds from Risc Management Limited for his own personal benefit and did not disclose the full amount of his taxable income. Mr Hunter completely refuted this allegation and pointed out that, despite a long running enquiry, Officer Booth had not provided any evidence to suggest any of the companies; accounts with which he was involved were incorrect in any way.

154. The only issue to arise out of the investigation is that there were some deposits in his bank account of which, after a period of some five years, Mr Hunter was unable to establish the source.

155. Mr Hunter believed that an assessment had been raised for the year 2011-12 on the basis that he could not substantiate only two deposits in his private bank account in October and December 2011. The assessment had been made on the basis that he had been careless in his tax affairs for not keeping a record or documentary evidence of personal bank deposits which he knew to be non-taxable.

156. Mr Hunter did not see how he could be accused of being careless for not keeping records which he was not under any duty or obligation to keep. The deposits were not taxable, he stated he did not keep records of my non-taxable deposits and he did not agree he had been careless in his tax affairs.

157. Mr Hunter stated that Officer Booth started the enquiry on the basis there was a discovery position with regard to his personal tax affairs. The enquiry was not opened under the usual provisions of section 9 of the TMA 1970. As the information provided to HMRC was false and misleading Mr Hunter believed no discovery ever existed when the enquiry was opened and the request for his personal bank statements in the opening meeting was incorrect and under false pretences.

158. Mr Hunter believed he was able to demonstrate that, on the balance of probabilities, the assessed deposits in his bank account did not represent taxable income.

159. Mr Hunter believed that the HMRC's enquiry was opened incorrectly and that it was incorrect for Officer Booth to claim there was a tax discovery position when no such discovery existed. Mr Hunter believed it was incorrect for HMRC to ask for his bank statements at the opening meeting and he believed these were requested under false pretences. He also believed it was incorrect for Officer Booth to raise an assessment for 2011-12 on the conclusion that he had been careless in his behaviour.

160. It was Mr Hunter's understanding that if it was found that his behaviour was not careless then HMRC would not be able to assess any sums for tax year 2011-12 as the assessment would be out of time.

Mr Hunter's oral evidence

161. Mr Hunter gave oral evidence.

162. He stated in supplementary evidence in chief that he left the police with 20 years' service and a certificate of good conduct – he had an unblemished record. He stated that when he retired from the police in the early 2000s, he employed Chris Morgan as an investigator who stayed with him for 18 months and moved on to other work.

163. Mr Morgan introduced him to Mr Mazen Houssami who was a lawyer with offices in Beirut, Egypt and Dubai. It was Mr Houssami who gave Mr Hunter the loan of £58,000 – the large credit. The large credit of £58,000 was not from self-employed consultancy as HMRC alleged. Mr Hunter did not and does not conduct self-employed consultancy and always had a limited company in operation. He would have professional indemnity to cover the corporate work he did and it would make no sense for him to work on a self-employed basis without this insurance.

164. Mr Hunter wished to correct his witness statement which suggested there was no loan agreement between him and Mr Houssami for the provision of the large credit. There was such an agreement, but he had not been able to be provide a copy to HMRC. He stated that the loan was interest free and there was a written agreement drawn up but he did not have a copy as he could not find it. Mr Houssami drew up the loan agreement for them in the back end of 201. It was a page and a half and signed by both parties. Mr Hunter stated his offices were raided in 2012 when he was arrested and all documents were seized. He had not been able to obtain a copy of the loan agreement since.

165. He was cross examined.

166. He stated that Mr Mazen Houssami and he had formed a good relationship. Mr Houssami helped him build up his office in Dubai. In 2011 Mr Hunter was going through a rough patch and Mr Houssami offered support with a number of debts. Mr Houssami was very rich and a lawyer but also entrepreneurial and active in businesses in the UK and property interests so was able to help him.

167. Mr Hunter said to Mr Houssami that £50,000 would get him out of trouble so Mr Houssami paid in excess of that. They signed the loan agreement in his office in Conduit Street in London. The loan was open ended and did not have a payback date nor any interest. The loan agreement was a page and a half or two-page document – Mr Hunter put his copy in his filing system.

168. There were no discussions about repayment of the loan during that time. The loan was from Mr Housami personally, but he used Upside Management in Lebanon to send the money.

169. Mr Hunter stated that he and Mr Houssami had a relationship up to 2014. The last time Mr Hunter saw him was in Dubai. He had had no contact with Mr Houssami since that time but Mr Morgan had. Mr Morgan told Mr Hunter that Mr Houssami was now in West Africa dealing with assets.

170. He was unable to get hold of a copy of the loan agreement. Since 2014 Mr Hunter had tried to contact Houssami directly through his Beirut office in order to get hold of a copy of the loan agreement. There were two copies of the agreement. Mr Hunter had also tried many times to get hold of Mr Houssami through Chris Morgan. Mr Hunter stated he saw Mr Morgan two or three times a year and last saw him before Christmas.

171. Mr Hunter stated that his witness statement, which suggested there was no loan agreement, was incorrect. When he was reading through the statement, he noticed it shortly before the hearing. This evidence went against everything he had told his advisers at that point. Mr Hunter accepted he did read the witness statement through when he signed it. He accepted it was a significant change of evidence but denied that he was changing his evidence to match an email which had been disclosed on his behalf of 17 January 2017.

172. This email was from Chris Morgan of Upside Management to him and had stated 'I finally got hold of Mazzen last week and have chased him again this morning to dig out the historical loan agreement in respect to these historic payment(s). I am awaiting his response accordingly after explaining the urgency of the matter once again.'

173. Mr Hunter accepted that Mr Morgan is a director of Upside Management (UK) Ltd and majority shareholder. The nature of the business is management consultancy activities other than financial management. Mr Hunter now works for Animus who have previously provided services to Upside Management (UK). Risc Management was a consultancy service.

174. Mr Hunter stated that the large credit for £58,000 was not for consultancy services and not from a company providing the same services as Upside Management (UK). The description in the bank statement says the sum was converted from US Dollars – this is not unusual for a payment from Lebanon. It was not an unusual amount to receive as a loan even though it was not a rounded amount.

175. Mr Hunter stated he did feel pressured to provide the bank statement to HMRC although he did say to HMRC he was happy to provide the bank statements. He wanted the enquiry to stop so it was a means to an end.

176. Regarding the smaller credit, Mr Hunter stated he received a smaller salary from Risc Management in 2011-2012. It was approximately £5,335 a month. He also received dividends from Risc Management in this time of approximately £8,462.93 £8,000 and drawings from the directors' loan accounts. All of the payments of all types state 'Risc Management' on the bank statement.

177. Mr Hunter accepted that had the small credit of £8,056.10 been from Risc Management for reimbursement of expenses, it would have potentially said it was from 'Risc Management'. He also accepted that all reimbursement of his expenses went to a different Spanish bank account of his. All of these reimbursement payments in this account were described in Spanish as being transferred from Risc Management.

178. The small credit did not go to his Spanish bank account nor say reimbursement of business expenses. He maintained however that the payment was not for the provision of consultancy services. He did not really know the source or nature of the £8,056 small credit. He would only be guessing if he said what the amount was for.

179. Mr Hunter stated there was no record keeping in place for consultancy services as he did not have any self-employed business. He kept no contracts or receipts as there was no such consultancy work. All his receipts and expenses were retained through his company's finance department in the proper way.

180. He could not substantiate the small or large credits with any documents as he could not produce any records.

Assessment of Mr Hunter's evidence

181. The Tribunal starts from the position that the Appellant is a man of impeccable character with a long unblemished career as a police officer. The Tribunal disregards the allegations against him regarding confidential source payments for which he was never charged or prosecuted. These allegations have been decided to be without foundation. Likewise, any allegations of tax evasion, avoidance or loss in relation to these payments have been found by HMRC to have no substance. These were unsubstantiated allegations which have no relevance to this decision.

182. Nonetheless, on the balance of probabilities, the Tribunal does not accept Mr Hunter's evidence on a number of matters, although much of his narrative was not in dispute.

183. The Tribunal finds that Mr Hunter's evidence was unsatisfactory and unreliable in so far as it addresses the five issues in dispute in the appeal. The Tribunal gives brief reasons below for coming to its conclusions on the factual issues in dispute. It will expand upon these in the discussion section of this decision.

The first issue

184. The Tribunal has already made a finding that it is satisfied that Officer Booth did not believe he had discovered a tax loss at the time of receipt of the information from the police in late 2014 nor by the time he opened his investigation in February 2015 nor by the time of the April 2015 meeting.

185. It accepts he had reason to investigate the Appellant's tax affairs at these times, but the Officer had not formed a concluded view. For the reasons he gave, the Tribunal is satisfied that the Officer only believed he had discovered income which ought to be assessed which had not been ie. a tax loss, between November 2016 and February 2017. This was after Officer Booth had received an inadequate or unsatisfactory explanation for the large and small credits and no documentation in support on behalf of the Appellant. The existence of these credits Officer Booth had identified in 2016 and sought to investigate in further detail. The Tribunal places no weight on Mr Hunter's opinion evidence that he believed that Officer Booth had not made a discovery.

186. Likewise, whether or not the discovery relied on by Officer Booth was of material regarding unassessed income (a tax loss) that could objectively and reasonably be discovered is a matter to be considered by the Tribunal in light of all the evidence. The Tribunal places little weight on Mr Hunter's evidence which was to the effect that he believed that the discovery had already been made in 2014 or 2015. The credits were only discovered in 2016 and an explanation for them provided in 2017.

The second issue

187. The Tribunal finds that the Appellant acted carelessly in not declaring his income from the large and small credits. He should have kept records and documents as required in support of any taxable income or deductible expenses for the requisite period of time (at least six years). Mr Hunter had no such records which would could assist in proving the source and reason for the payments of both credits. This failure to take reasonable care was a failure to observe his statutory duties to keep records and make accurate declarations on his tax return.

188. Mr Hunter's argument on this issue was circular. He stated he was under not duty to keep the records as the receipts were not taxable income. This is true but he would only be under no duty to keep the records if the payments were not taxable receipts. However, the Tribunal finds that both credits were taxable receipts for the reasons set out below. Likewise, Mr Hunter provided no explanation for his failure to declare the taxable receipts other than that they were not taxable. In light of the

finding that they were taxable, the failure to declare them was careless and led to a tax loss.

The third Issue

189. In relation to the third issue, the Tribunal finds both credits were taxable receipts.

190. It rejects Mr Hunter's explanation that the large credit was a loan from Mr Hassoumi for a number of reasons.

191. The Appellant gave different and contradictory explanations regarding the loan. Mr Hunter stated he read and signed his witness statement stating there was no loan agreement. However, he attempted to explain in oral evidence that in fact there was a loan agreement. Mr Hunter is an experienced businessman and former police officer.

192. There was no satisfactory explanation provided why he would sign a witness statement with such an important inaccuracy and would change his account regarding such a fundamental part of his evidence. As HMRC suggested, the change of evidence appeared to be an attempt to make his evidence more consistent with the email of Chris Morgan of 17 January 2017 set out above.

193. The terms of the purported loan were not credible. It is very unlikely that Mr Houssami would agree to a loan of such a large sum of money and sign an agreement without any repayment date or interest payable. It is unlikely he would not chase Mr Hunter for repayment in the intervening seven years when no repayment or attempt at repayment has been made.

194. It is unlikely that the sum of money would be loaned in such a specific and irregular amount both in dollars and sterling - £58,810.44 converted to US Dollars (Usd92,985.19 Rate 1.5811). These sums were also rather different than the £50,000 Mr Hunter he claimed he requested. It is further unlikely that Mr Houssami would make a personal loan through a business account, Upside Management, in a foreign currency and in the name of a company which would be likely to have justify such a payment to Mr Hunter.

195. It is very unlikely that Mr Hunter would not be able to obtain a copy of the loan agreement from Mr Houssami in the supervening seven years if it existed and he needed to obtain it, given they were still in contact directly or through an intermediary, Mr Mason.

196. It is more likely than not that the large credit was not a loan but was payment for some form of work Mr Hunter had conducted. After all, Mr Hunter accepts that Upside Management in the UK is a business which his associate has worked for. The name of the company appears more than coincidental. It is likely that the payment of the large credit from a company called Upside Management, wherever it was situated or incorporated, was income from self-employed trade or some other form of undeclared taxable income.

197. Mr Hunter's explanation for the small credit was equally unsatisfactory.

198. Initially, he had suggested it was for the repayment or reimbursement of expenses from Risc Management. Mr Hunter accepted that all other credits from Risc Management were named as such in the credits in his bank statements and this sum of £8,056.10 had no such reference. Further, it was paid to a different bank account from all other reimbursement payments. Mr Hunter was unable to provide any receipts or explain what the expenses in question could be. If it had been from Risc Management there would or should be an available receipt or evidence from the company of the reimburses payment even if Mr Hunter had no evidence to hand personally.

199. Ultimately, Mr Hunter accepted in evidence that he could not really explain the nature or source of the payment. The burden of proof was upon him to prove it was not a taxable credit. The Tribunal finds that it is likely that this was also income from his self-employed trade or some other form of undeclared taxable income.

The fourth issue

200. The Tribunal does not accept Mr Hunter's account that he was coerced to provide information or that he provided information under false pretences to HMRC either at the meeting on April 2015 or subsequently. No threats or inducements were made by HMRC. At no point prior to the appeal did Mr Hunter nor his representatives make any complaint to HMRC nor the Tribunal regarding HMRC's conduct. Further, Mr Hunter was a former police officer and businessman, experienced at dealing with law enforcement. He was represented throughout his dealings with HMRC.

The fifth issue

201. The Appellant's argument that the material upon which HMRC based its assessment was obtained from him unlawfully is primarily a legal issue which is dealt with below.

202. The Tribunal returns to the factual findings on each of these issues below in further detail. It will give further reasons within the discussion section for the conclusions it has reached.

The Law

Law regarding record keeping, enquiries and burden of proof

203. Section 9A of the TMA 1970, in so far as relevant provides as follows:

9A Notice of enquiry

(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry")—

(a) to the person whose return it is ("the taxpayer"),

(b) within the time allowed.

(2) The time allowed is—

(a) if the return was delivered on or before the filing date, up to the end of the period of twelve months [after the day on which the return was delivered];

(b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered;

…….

204. Section 12B(1) of the TMA 1970 provides as follows:

12B Records to be kept for purposes of returns
(1) Any person who may be required by a notice under section 8, 8A. . . or 12AA of this Act . . . to make and deliver a return for a year of assessment or other period shall—
(a) keep all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period; and
[(b) preserve those records until the end of the relevant day, that is to say, the day mentioned in subsection (2) below or, where a return is required by a notice given on or before that day, whichever of that day and the following is the latest, namely—
(i) where enquiries into the return . . . are made by an officer of the Board, the day on which, by virtue of section [28A(1B) or 28B(1B)] of this Act, those enquiries are . . . completed; and
(ii) where no enquiries into the return . . . are so made, the day on which such an officer no longer has power to make such enquiries.

205. Section 50 of the TMA 1970, in so far as relevant, provides as follows:

50 Procedure
(1)–(5) . . .
(6) If, on an appeal notified to the tribunal, the tribunal decides—
(a) that, . . ., the appellant is overcharged by a self-assessment;
(b) that, . . ., any amounts contained in a partnership statement are excessive; or
(c) that the appellant is overcharged by an assessment other than a self-assessment,
the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.
(7) If, on an appeal notified to the tribunal, the tribunal decides—
(a) that the appellant is undercharged to tax by a self-assessment . . .;
(b) that any amounts contained in a partnership statement . . . are insufficient; or
(c) that the appellant is undercharged by an assessment other than a self-assessment,
the assessment or amounts shall be increased accordingly.

206. Part 2 of the Income Tax (Trading & Other Income) Act 2005 ("ITTOIA 2005") contains sections 5, 7 and 8 which provide relevantly as follows:

5 Charge to tax on trade profits
Income tax is charged on the profits of a trade, profession or vocation.

7 Income charged
(1) Tax is charged under this Chapter on the full amount of the profits of the tax year.

8 Person liable
The person liable for any tax charged under this Chapter is the person receiving or entitled to the profits.

207. Part 5 of ITTOIA 2005 on Miscellaneous Income contains sections 687(1) and 688(1) which provide relevantly as follows:

687 Charge to tax on income not otherwise charged
(1) Income tax is charged under this Chapter on income from any source that is not charged to income tax under or as a result of any other provision of this Act or any other Act.

688 Income charged
(1) Tax is charged under this Chapter on the . . . amount of the income arising in the tax year.

The Law regarding discovery assessments

208. In so far as applicable, section 29 TMA 1970 provided at the relevant 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 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.

209. The normal four-year time limits for issuing an assessment under section 34 TMA 1970 are extended to six years in certain circumstances by section 36(1), which, so far as relevant, provide as follows:

34 Ordinary time limit of 4 years
(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, [an assessment to income tax or capital gains tax may be made at any time [not more than 4 years after the end of] the year of assessment to which it relates.

……..

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.

210. 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.

Case law on discovery assessments

211. At paragraphs 10-15 of *Atherton v HMRC* [2019] UKUT 41 (TCC) the Upper Tribunal summarised the principles on discovery assessments as follows:

'10. Two important principles underpin the construction and application of the discovery assessment provisions.

11. First, as this 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."

12. In this case, the burden of proof is on HMRC to establish on the balance of probabilities that the discovery assessment was validly made.

13. Secondly, the discovery provisions 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 MCashback 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."

Meaning of discovery

14. In *HMRC v Charlton* [2012] UKUT 770 (TC), this 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."

15. It is well established that the threshold at which a discovery arises for the purposes of section 29 is low. 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. No new information, of fact or law, is required in order for there to be a discovery. It includes a case where an officer (acting honestly and reasonably) changes his mind, changes his opinion or corrects an oversight: *Charlton* at [37].

Staleness

…….

17. The answer lies in the supposed concept of staleness. This asserts that, in order for a discovery assessment to be valid, it must be issued by HMRC without undue delay after they have discovered an insufficiency.

18. Ms Balmer argued forcefully that the concept of staleness has no place in the legislation. We acknowledge the cogency of the argument. However, in *Pattullo v Revenue & Customs Commissioners* [2016] STC 2043, this Tribunal decided that on the natural meaning of section 29 there was a requirement for HMRC to act upon a discovery while it remained fresh. This was part of the ratio of the decision in *Pattullo*. Although for the reasons given below it is unnecessary for us to decide the point, we would record our agreement with the recent conclusions and comments of this Tribunal in *Clive Beagles v Revenue & Customs Commissioners* [2018] UKUT 0380 (TCC), as follows:

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

quality until the assessment is made. The only requirement on the face of the legislation is that an assessment under s29(1) can only be made following a discovery.

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

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

212. The Tribunal takes into account the principles set out in the authorities above in relation to the requirements for a discovery assessment to be raised, including the requirement that a discovery must be fresh or not stale.

213. In addition to the principles, above the Tribunal considered the subjective and objective thresholds necessary to raise a discovery assessment.

214. An officer of HMRC's subjective discovery pursuant to section 29(1) of the TMA 1970 must be proven on the balance of probabilities and positively advanced on appeal (*Burgess & Brimheath v HMRC* [2015] UKUT 578 (TCC) per Judge Berner at [49]).

215. A discovery under section 29(1) of the TMA 1970 requires an Officer to have reason to believe a loss of tax exists (*Aramayo* per Mr Justice Avory at p 289). The loss of tax must newly appear to the Officer (*Cenlon Finance* per Viscount Simonds at p 204).

216. No new fact or law is required for there to be a discovery. The loss of tax, newly appearing to the Officer, can be for any reason, including a mere change of view, change of subjective opinion and indeed the correction of an oversight (*Charlton* per Judge Norris [37]).

217. In this regard, the threshold for an Officer's discovery is low. At one point the Officer may not be of the view that a tax loss exists and at another, he concludes a loss of tax exists, such that an assessment ought to be raised. This is the subjective 'threshold' which exists under section 29(1) (*Charlton* [28]).

218. Put in another way, an Officer making the discovery must believe that the information available to him points in the direction of there being an insufficiency of tax (*Anderson* [28]). An Officer's conclusion is subjective, as is the test under section 29(1) (*Sanderson* per Lord Justice Patten sitting in the Court of Appeal [25]).

219. However, the conclusion must be a reasonable conclusion based upon the evidence available to him or her (*Charlton* [24]). As such, the Officer's belief must be one which a reasonable Officer could form (*Anderson* [30]).

220. Consequently, a second stage and element of objectivity is introduced into section 29(1). Additionally, there need only be a progression in the Officer's knowledge rather than a 'eureka moment' that leads to the subjective conclusion and discovery (*Hicks* per Judge Scott [51]-[54]).

221. The fact that the Officer could have reached the conclusion earlier on the basis of the evidence available, does not preclude a discovery at a later date (*Sanderson* per Mr Justice Newey sitting in the Upper Tribunal [24]).

Appellant's submissions

222. Mr Staff, on behalf of the Appellant raised four grounds of appeal in a skeleton argument served shortly before the hearing and in opening the appeal at the outset of the hearing. These submissions were not all included as grounds of appeal within the Appellant's notice of appeal. Nonetheless the Tribunal permitted them to be pursued but allowed HMRC to file further written submissions in reply following the end of the hearing.

223. Firstly, Mr Staff submitted that the enquiry into Mr Hunter's affairs was not lawfully opened. HMRC received information from the police about Mr Hunter, a former police officer with an unblemished record, and that information turned out to be incorrect. Notwithstanding that the information was incorrect, HMRC did allege that Mr Hunter might have inaccuracies or failures in connection with his tax affairs. HMRC suggested that cash that was used to pay confidential source payments (from his Private Investigations business) was not accounted for.

224. Mr Staff submitted that although the allegation of cash misappropriation has never been reviewed by HMRC, and there is no suggestion that any cash has been misappropriated or banked, the fact is there was an allegation and it is accepted that HMRC has a duty to review allegations of this nature.

225. Mr Staff submitted that Officer Booth was well within his rights as an officer of HMRC to open a formal enquiry under the statutory provisions of the Taxes Management Act 1970. At the point the investigation into the Appellant was opened, December 2014, Officer Booth would have been in time to raise an enquiry under section 9A TMA 1970 into returns for the following tax years: 2013-14 received on 1 October 2014; and 2012-13 received on 28 January 2014 (but not the tax year in question, 2011-2012).

226. Therefore, Mr Staff submitted that section 9A enquiries could have been opened – potentially – into two years tax returns. Instead Officer Booth purported to open an enquiry under "Discovery provisions". Mr Staff sought to demonstrate that at the point when the enquiry was opened, there was no discovery. There was nothing more than a misinformed, misdirected and ultimately malicious allegation made against the Appellant.

227. Mr Staff submitted that even HMRC's skeleton argument had stated that Officer Booth made a discovery in late 2016 or early 2017. He submitted that HMRC's enquiry was opened at the latest in February 2015. In the original skeleton argument HMRC stated that "The respondents made a discovery when they identified the credits on the appellant's bank statements".

228. Mr Staff submitted that by definition there was no discovery when the whole enquiry process was started. He sought to demonstrate that when Mr Hunter's bank statements were requested in the opening meeting, there was no discovery. When Officer Booth told Mr Hunter and his representative that the enquiry had been opened under discovery provisions, there was no discovery. When Mr Booth told Mr Hunter and his representative that HMRC could raise discovery assessments, there was no discovery. When Mr Hunter received the opening letter from the Criminal Taxes Unit talking about having his details published, HMRC had no grounds to send that letter in those terms.

229. Mr Staff submitted that the second ground of appeal follows on from the lack of a discovery by HMRC. He submitted that Mr Hunter's bank statements were requested by HMRC and provided to HMRC under false pretences, and under duress. He submitted that officers from the Criminal Taxes Unit should not have opened an enquiry and sent an opening letter which refers to Mr Hunter having his details published if he did not cooperate. Officer Booth had stated quite clearly at the opening meeting in April 2015, as recorded in the notes of meeting that he prepared, that HMRC could raise assessments but it would be quicker and cheaper if Mr Hunter provided his bank statements. All of this was done without HMRC having made a discovery. HMRC suggest that this was an informal request. Mr Staff submitted that the private bank statements were provided under duress and under false pretences.

230. The third ground of appeal was that the Appellant had not acted carelessly so that the assessment raised by Officer Booth on 27 September 2017 could not be raised under section 29(3) and (4) TMA 1970 and was out of time pursuant to section 34 TMA 1970. For Officer Booth to be empowered to assess tax for the year 2011-12 in September 2017, he would need to demonstrate careless behaviour by Mr Hunter led to a tax loss.

231. Mr Staff submitted that despite an enquiry being opened by the Criminal Taxes Unit as far back as February 2015, the sum total of the enquiry was the allegation that Mr Hunter had not been able to verify – to Officer Booth's satisfaction – the source of certain tax deposits in his bank account dating back to 2011. There were no errors or omissions established for any of the companies with which Mr Hunter was connected. HMRC had made no assessments for later years. There was no suggestion of

impropriety on cash handling, there were only two deposits which HMRC were seeking to tax as consultancy income.

232. Officer Booth had suggested that the assessment was raised because there had been careless behaviour. Mr Staff rejected the submission there had been any careless behaviour on the Appellant's part, the allegation was only raised because Officer Booth deemed the deposits to be taxable in nature.

233. Officer Booth had also contended – as it stated in his witness statement – that Mr Hunter was aware of his tax obligations and was required to keep records in respect of his tax position. The Appellant's evidence was that the credits were non-taxable income – they were private loans or reimbursement of expenses. Therefore, Mr Hunter was not required to keep records of non-taxable income. Mr Hunter could not be guilty of careless behaviour by not keeping a record of something that he was not required to keep.

234. Officer Booth had argued that the two deposits into Mr Hunter's bank account related to consultancy income. Mr Staff was not exactly sure when Officer Booth arrived at the conclusion that this was consultancy income, as opposed to say the misappropriation of cash funds. In any event, there were a number of reasons why Mr Hunter could not provide consultancy services outside the business of his limited company (such as not holding insurance to do so).

235. The fourth and final ground of appeal was that the deposits which Officer Booth was seeking to assess as consultancy payments were not consultancy payments or indeed any form of taxable income. Mr Staff accepted that Mr Hunter had not been able to provide proof to satisfy Officer Booth. However, he submitted the deposits in question were over six years old and there were additional circumstances to consider. These were the reason for the loan, how the loan was actually used, Mr Hunter's non-business relationship with the person who provided the loan, and the long term illness of the person making the loan which is the reason the Appellant had not been able to secure a copy of the loan document.

236. Mr Staff submitted that, on balance of probabilities, the enquiry that was opened by HMRC into Mr Hunter was invalid and that the request for Mr Hunter's private bank statements was incorrect made under false pretences. He submitted that the Appellant provided information to HMRC under duress – bearing in mind that this was enquiry by the Criminal Taxes Unit who were alleging that they knew something was wrong.

237. Mr Staff submitted that, on balance of probabilities, the assessment that was raised against Mr Hunter on 27 September 2017 was invalid because there was no careless behaviour. There was no obligation for anyone to keep records of non-taxable income or deposits into a bank account. The fact that Mr Hunter did not keep records of non-taxable income did not mean he has been careless. In the absence of careless behaviour – the assessment was invalid and out of time.

238. Mr Staff also submitted that the deposits in question, which form the basis of the assessment are non-taxable in nature and should not have been assessed.

Appellant's supplementary submissions

239. As set out above, the Appellant raised new issues at the hearing which were not included within the grounds of appeal. There were that the investigation or check made by HMRC into the Appellant's tax affairs was not lawful, that the material provided by the Appellant was unlawfully obtained and that the Discovery Assessment was therefore invalid.

240. At the invitation of the Tribunal, the parties provided supplementary written submissions following the conclusion of the hearing. Mr Staff filed submissions in reply to HMRC's supplementary submissions as follows.

241. Mr Staff submitted that the issue in question is whether HMRC's enquiry into the Appellant's tax affairs was unlawful and whether any actions arising from that enquiry could be prejudicial to the Discovery Assessment which was raised on 27 September 2017.

242. He argued that at the time that Officer Booth sent the Appellant the opening letter dated 13 February 2015, HMRC did not have information that could reasonably have led to the making of any discovery assessment.

243. Mr Staff submitted that Officer Booth did not open the investigation in a lawful manner under the correct provision in the statute, section 9A of the Taxes Management Act 1970, or within Code of Practice 9, if indeed HMRC had suspicion that there was a possible tax fraud. He submitted that HMRC's request for private bank statements was not lawful because a formal enquiry had not been opened.

Essential Background

244. Mr Staff rehearsed the background to the opening of the enquiry. The Appellant had received a letter from the Criminal Taxes Unit ("CTU") dated 13 February 2015. Officer Booth, HMRC's investigator, informed the Appellant that he had commenced an investigation into his tax affairs. Officer Booth's letter did not refer to any relevant statute under which he commenced the investigation. Officer Booth did not specify the tax years which were under investigation.

245. The letter contained four HMRC Factsheets which Mr Staff argued should not have been issued with HMRC's letter. He submitted as follows:

Factsheet CC/FS13: Publishing details of deliberate defaulters. This factsheet concerns individuals who deliberately evade tax and in such cases their details are published by HMRC. It is only appropriate to issue this leaflet in cases where HMRC suspect tax has been lost as a result of a taxpayer's deliberate behaviour.

Factsheet CC/FS9: Human Rights Act. This factsheet explains a taxpayer's rights under Article 6 of the Human Rights act in cases where HMRC are considering

charging penalties. It is only appropriate to issue this leaflet when HMRC have an evidence-based reason to believe that a penalty may be due.

Factsheet CC/FS7a: Penalties for inaccuracies in returns and documents. This factsheet explains HMRC's approach when considering penalties for inaccuracies in returns and documents.

246. On 29 April 2015, the meeting took place between the Appellant and HMRC. During the meeting, Officer Booth explained that CTU received information from a number of sources about the Appellant's tax affairs. Based on this information, Officer Booth informed the Appellant that he opened the enquiry under the discovery provisions. Officer Booth also informed the Appellant that instead of issuing assessments, he had sought the meeting. Officer Booth handed the Appellant a Certificate of Bank Accounts Operated and Credit Cards operated and requested them to be completed.

247. Officer Booth admitted that it was not possible to quantify undeclared income until he conducted a full review of the Appellant's bank statements.

Appellant's Response to HMRC's Supplementary Submissions

248. Mr Staff submitted that HMRC, in their final submission, had argued that Officer Booth's enquiry into the Appellant's tax affairs was a Compliance Check. HMRC had argued the requests for information were informal, therefore, they were operating outside the statutory regime which falls under the Tribunal's supervisory jurisdiction.

249. Mr Staff submitted that although informal discussions between HMRC and taxpayers can be helpful, if an inspector has questions to ask, they must open a formal enquiry.

250. During the initial meeting between the Appellant and HMRC, Officer Booth stated that he had opened a discovery enquiry. This is shown in the notes of meeting that Officer Booth subsequently prepared. HMRC, during the hearing as well as in their supplementary submissions, continued to refer to the enquiry as an informal check. Mr Staff submitted that HMRC do not have statutory powers to ask speculative questions or request information because they are bound to find something once the information has been supplied.

251. Mr Staff argued that because HMRC did not open a proper enquiry under the TMA 1970, the Appellant was not awarded protection against HMRC's request for information. The Appellant deemed the request unreasonable. Had HMRC issued a formal Information Notice under Schedule 36 to the Finance Act 2008 ('FA 2008'), the Appellant would have had an opportunity and a legal avenue to appeal against the request for information.

252. Paragraph 1of Schedule 36 states that HMRC may issue a notice requiring a taxpayer to provide information or produce a document if that information or

document is reasonably required to assess the taxpayer's position. The taxpayer must comply with this request within the time specified in the notice.

253. If a taxpayer has made a return for the relevant period, HMRC may not issue the notice unless any of the four conditions (A-D) are satisfied (para 21, Sch. 36, FA 2008):

· A: a notice of enquiry has been given under section 9A TMA 1970 in respect of the return, or a claim or election made by the person in relation to the chargeable period in respect of tax;
· B: an officer of HMRC has reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed;
· C: the notice is given for the purpose of obtaining any information or document for the purpose of checking that person's VAT position;
· D: the notice is given for the purpose of obtaining any information or document that is required for the purpose of checking the person's position as regards any deduction or repayments referred to in para 64(2).

254. Mr Staff submitted that based on the above, had HMRC issued a Schedule 36 notice and the Appellant had an opportunity to appeal, condition A would not have been met because the tax enquiry had not been validly opened.

255. He submitted that at the time of the opening letter or at the initial meeting, HMRC could not satisfy condition B because Officer Booth did not present any evidence of a tax loss to the Revenue.

256. The Tribunal's decisions in several tax cases: *R (on the application of Derrin Brother Properties Ltd) v R&C Commrs* [2014] BTC 21, *Matthews* [2015] TC04342, *Betts* [2013] UKFTT 430, and also *Newton* [2018] TC06682 illustrate the circumstances where Schedule 36 information requests had been set aside.

257. Mr Staff submitted that the Appellant's case bears significant similarities to the cases below where HMRC requested all possible information in the belief that they would find something if they had looked at enough material but not having validly open an enquiry and having not met condition B as set out above.

258. Mr Staff relied on the judgment in *R (on the application of Derrin Brother Properties Ltd) v R&C Commrs* [2014] BTC 21, regarding third party information requests, where the Court had stated: "HMRC may not use their Sch.36 powers for a fishing expedition… A broadly-drafted request will not be valid if in reality HMRC are saying 'can we have all available documents because they form so large class of documents that we are bound to find something useful'". Mr Staff also relied on the First Tier Tribunal ('FTT') decision in *Matthews v HMRC* [2015] TC04342, where the FTT also noted that "HMRC are not permitted to use the Sch. 36 powers to fish for possible issues".

259. Mr Staff submitted that the FTT judge in *Newton* [2018] TC06682 set aside HMRC's Schedule 36 notice because there was no evidence the relevant officer had

reasonable grounds to suspect an understatement of tax. The FTT noted that Condition B of paragraph 21(6) of Schedule 36 was similar in nature to the discovery test in S29(1) TMA 1970. Both "discover" and "has reason to suspect" set a low hurdle for HMRC. However, the authorities on the latter test all stressed the importance of examining evidence from an officer of HMRC as to why they had reasonable grounds to suspect an understatement of tax. Despite the test of "has reason to suspect" representing a low bar, the FTT will not make inferences of fact based upon a series of clues with no concrete explanation of origin, relevance or deemed consequences.

260. Mr Staff also relied on the decision in *Betts* [2013] UKFTT 430, where HMRC issued Mr Betts with a Schedule 36 notice because they believed that Mr Betts' dividend from his UK company would be chargeable at a higher rate of tax if he was a UK-resident. The facts of the case were that Mr Betts' tax return for 2008-09 showed he was non-resident in the UK for tax purposes. Mr Betts emigrated from the UK in March 2008. HMRC, in order to verify Mr Betts tax position, requested bank, building society and credit card statements. Mr Betts refused to comply and appealed against the Schedule 36 notice.

261. At the hearing, it transpired that the tax enquiry had not been validly opened and HMRC abandoned their reliance on Condition A. HMRC relied on condition B and argued that the bank statements were needed as HMRC had reason to suspect that amount that ought to have been assessed may not have been assessed. The FTT rejected this argument and allowed the appeal on the basis that condition B was not satisfied.

262. The FTT was influenced by HMRC's proposal that they required the bank statements in order to discover whether Mr Betts was indeed resident in the UK for the relevant period. The FTT held that this approach was wrong and that the position is rather that Condition B must be satisfied in order for the documents to be validly sought from Mr Betts. The FTT concluded 'condition B was in our judgement clearly not met. HMRC's case was that they sought additional information on the basis that the additional information may, when added to the information already held by HMRC, give the "reason to suspect"'.

263. Mr Staff submitted that the facts of the Appellant's case were similar to the cases set out above in the following ways:

· HMRC did not open a valid enquiry into the Appellant's tax return and position;
· Officer Booth made a request for information and documents in the hope that he may find something useful – 'a fishing expedition';
· HMRC did not meet condition B of paragraph 21, Schedule 36 to the FA 2008 because Officer Booth sought additional information on the basis that this additional information may provide "the reason to suspect";
· HMRC did not provide evidence that Officer Booth had reasonable grounds to suspect an understatement of tax.

264. Mr Staff argued that based on the above similarities to the cited cases, Officer Booth's "informal" check was not lawful and his request for information was not valid.

265. Mr Staff submitted that the Appellant's bank statements had been obtained under duress and false pretences, because of Mr Booth's assertion at the opening meeting that this was a discovery enquiry and that HMRC had the power to raise discovery assessments. But for HMRC's duress, use of false pretences and unlawful investigation, Officer Booth would not have been in a position to issue a Discovery Assessment.

266. At the time of the requests for information from the Appellant, HMRC had not made a discovery of a tax loss (for the tax year in question or any other tax year), such as undeclared or understated tax, or income which should have been assessed which had not been. Neither did they have grounds to suspect the same. This was the case when HMRC's opening letter was sent on 13 February 2015 and after the meeting in April 2015.

The Validity of the Discovery Assessment

267. Mr Staff relied on HMRC's 'Self-Assessment: the legal framework internal manual' which states that it is not possible for HMRC to commence an enquiry under section 9A after the time limit elapsed. HMRC's internal manual states that enquiries opened outside the time limits are to be referred to as "investigations".

268. The manual also states "… in such cases HMRC have to rely on the information powers in FA08/Sch36 to support the investigation". Based on this, Mr Staff submitted that the HMRC manual brought Officer's Booth's compliance check into the Appellant within the statutory regime which falls under the Tribunals supervisory jurisdiction.

269. In order for Officer Booth's information request to be valid, Mr Staff submitted that it must meet the previously outlined conditions within Para 21, Sch. 36, of the FA 2008. The conditions required to be satisfied were:

· Condition A: a valid enquiry has been opened under S. 9A TMA 1970, or
· Condition B: an officer of HMRC has reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed

270. Mr Staff submitted that Condition A has not been satisfied because HMRC did not open a valid enquiry under section 9A TMA 1970. Officer Booth could have opened an enquiry under section 9A TMA 1970 into the Appellant's 2013-14 tax return which had been received by HMRC on 1 October 2014 however he chose not to do so.

271. Condition B has not been met because HMRC did not produce any evidence that the Officer had reason to suspect that an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed.

272. Mr Staff submitted that during the course of the hearing Officer Booth confirmed that before he issued the opening letter dated 13 February 2015, he reviewed the Appellant's tax returns as well of those the company, Risc Management Ltd. Officer Booth had stated tax he did not discover any irregularities or evidence that there had been a tax understatement on either returns.

273. Mr Staff submitted that section 29(1) TMA 1970 permitted Officer Booth to raise a Discovery Assessment if he had discovered a tax loss. However, at the point when Officer Booth issued an opening letter and after the initial meeting, Officer Booth did not make a discovery. HMRC did not present evidence that Officer Booth had any satisfactory or reliable information that could enable him to issue an assessment except an untrue malicious accusation.

274. Mr Staff submitted that Officer Booth engaged in a fishing expedition requesting as much information as possible because he hoped he was bound to find something.

Conclusion of the Appellant's supplementary submissions

275. Mr Staff submitted that HMRC's actions in opening the enquiry, in wording the opening letter and providing factsheets attached, and in conveying the information Officer Booth did to the Appellant at the opening meeting, were not procedurally correct or lawful.

276. It was the Appellant's submission that these factors were prejudicial and that he was misled as to the lawfulness of HMRC's legal position and what records Officer Booth could reasonably ask to be provided. Mr Staff argued that the Appellant provided personal bank statements to Officer Booth under false pretences and as a direct result of having been misled by Officer Booth.

277. The Appellant submitted that at no time was it suggested to him that this was an informal request for information. There was nothing in the meeting notes or correspondence to suggest this was the case. The meeting notes show that Officer Booth had told the Appellant the enquiry was being opened under discovery provisions. The meeting notes also show that Mr Booth had referred to HMRC being able to issue discovery assessments, but that he would instead look at the private bank statements. This information was incorrect.

278. There was no reason to suggest that the Appellant would not have believed Officer Booth, an experienced Inspector of Taxes with the Criminal Taxes Unit. The Appellant believed he had been deliberately prejudiced by Officer Booth's incorrect statements and assertions.

279. The Appellant also contended that the opening letter of February 2015 did not suggest Officer Booth was undertaking an informal compliance check. The letter was

issued on the headed paper of the Criminal Taxes Unit and the letter refers to the possibility of the Appellant having his details published which is a term used in cases where HMRC suspect evasion through deliberate behaviour.

280. Leaflets were also sent with the opening letter which would be inappropriate to enclose if this were a compliance check. Factsheet CC/FS13 (Publishing details of deliberate defaulters) should only be provided once HMRC have an evidence-based reason to believe that there is a deliberate inaccuracy, failure to notify or VAT or Excise wrongdoing and the potential lost revenue may exceed £25,000. A copy of the HMRC instruction on the issue of factsheet CC/FS13 was enclosed. In respect of the Appellant, no reason existed based on any evidence when the opening letter was issued.

281. Factsheet CC/FS9 (Human Rights Act) should only be provided in cases where HMRC are considering charging penalties. A copy of the HMRC instruction on the issue of factsheet CC/FS9 was enclosed. Mr Staff submitted HMRC had no reason to believe that a penalty should be charged yet Officer Booth chose to issue the leaflet.

282. Mr Staff submitted that the issuing of the above leaflets with the opening letter was a further indication that this was not a compliance check. The leaflets were not issued in line with HMRC's published guidance. The Appellant also contends that if this had had been a compliance check then Officer Booth should have issued factsheets CC/FS1a, CC/FS1b, CC/FS1c or CC/FS1d in line with HMRC's internal instructions. As Officer Booth did not enclose one of these factsheets the Appellant submitted that this was further evidence that this was not a compliance check.

283. The Appellant argued that Officer Booth's choice of leaflets sent with the opening letter created an oppressive and stressful situation for him which was further increased at the opening meeting in April 2015 with the Officer's comments about discovery and assessments. Mr Staff submitted that Officer Booth's actions were unfair, unjustified, and incorrect in law.

284. Mr Staff submitted that if HMRC wished to enquire into the Appellant's affairs then he should have been afforded the protection of an enquiry opened under section 9A TMA 1970. An enquiry under this provision would have limited HMRC to ask for information and records for a specific period. The Appellant would have also had the right to apply to the FTT to have the enquiry closed together with the right of appeal against any notice issued under Schedule 36 of the Finance Act 2008.

285. Mr Staff invited the Tribunal to accept this additional ground of appeal and to allow the Appellant's appeal against Officer Booth's Discovery Assessment issued on 27 September 2017.

286. The Appellant invited the Tribunal to find that the enquiry into the Appellant's tax affairs was unlawful, that the actions taken by Officer Booth were prejudicial to the Appellant when requesting him to provide the personal bank statements and issuing him with the Discovery Assessment. The Appellant invited the Tribunal to cancel the Discovery Assessment.

HMRC's submissions

287. Mr Horton and Harbottle provided oral and written submissions on behalf of HMRC before and during the hearing. The Tribunal also permitted HMRC to lodge written supplementary submissions because the Appellant had raised new issues during the hearing which were not contained within his grounds of appeal.

288. The Tribunal accepts the majority of HMRC's submissions (indicating when it rejects them) in giving its reasons for its conclusions set out below.

Discussion and Decision

The First Issue – The Validity of the Discovery Assessment

Officer Booth's Subjective and Objective Discovery of Unassessed Income

289. Officer Booth concluded to a reasonable degree of certainty, based upon the evidence available and his knowledge of the investigation, that there was a loss of income tax under section 29(1) TMA 1970.

290. The Tribunal has accepted Officer Booth's evidence that he believed he had discovered the Appellant received unassessed and undeclared income which had led to a tax loss for the Tax Year 2011-2012. The Tribunal is satisfied that Officer Booth made a discovery of trading income which ought to have been assessed in the Tax Year but which was not assessed. The taxable trading income which had not been declared or assessed was the small and large credits. Officer Booth made such a discovery by February 2017.

291. Between January 2015 and November 2016, the Officer was not of the clear view or belief that a tax loss existed. By February 2017, on receipt of the inadequate explanation for the two credits provided in November 2016 and the lack of supporting documentation provided despite requests, Officer Booth had concluded that a loss of tax existed and an assessment ought to be raised. Thus, the subjective 'threshold' is satisfied.

292. The Tribunal is also satisfied that the discovery was objectively justified by the information provided below. Officer Booth's conclusion was a reasonable conclusion based upon the evidence available to him. The Officer's belief was one which a reasonable Officer could hold.

293. Officer Booth discovered the two credits had been paid during the Tax Year, which he determined were taxable in nature. Officer Booth's discovery crossed the 'threshold' as a change in view occurred, which led to him to arrive at his conclusion. The following evidence was available and supported Officer Booth's conclusion, making his conclusion objectively justifiable.

294. The Appellant initially stated through his agent that the large credit from Upside Management, represented something the Appellant was supposed to do, but had not

got round to doing. At face value, this suggested the sum represented a payment for a service, whether undertaken or otherwise.

295. The later explanation for the large credit put forward during the investigation in correspondence was that it was a loan. The Tribunal has rejected this for the reasons set out in its factual findings. The payment reference for the large credit from Upside Management suggested that the sum had been converted from US dollars in the sum of $92,985.19. This is an abnormal amount to receive by way of a loan which would one might expect to be for a round number.

296. The conversion from US dollars, in the absence of an explanation, was inconsistent with the Appellant's explanation in correspondence that the credit was received from a company based in Beirut.

297. Officer Booth's independent research into financial institutions and money lenders based in Lebanon by the name of Upside Management did not corroborate such a business existing, suggesting that the explanation may be incorrect. The uncommercial nature of such a loan was further considered by Officer Booth.

298. During the investigation, the Appellant was unable to provide a copy of a loan agreement, evidence of any payments made towards the loan and had not provided an explanation as to why a loan was paid by a company in Beirut.

299. In relation to the small credit, during the investigation the Appellant was unable to provide an explanation beyond a statement to the effect that no details could be found and the Appellant regularly received expenses reimbursed from Risc Management.

300. A significant number of regular payments from Risc Management included on the Clydesdale Current Account Statements, indicated each payment's source by specifically referencing the company name. This was in contrast to the small credit which simply referenced a number, as is demonstrated on the following credits:

i) Monthly Salary of approximately £5,335 per month with reference "Risc Management Ltd" indicates the source of the payment;

ii) Regular drawings from the Appellant's Directors Loan Account with reference "Risc Management Lt Directors Loan Ac" indicates the source of the payment;

iii) Dividends from Risc Management with the reference "Risc Management Lt Dividend" indicates the source of the payment;

iv) Further payments from Risc Management with the reference "Risc Management Lt" indicate the source of the payment.

301. Of the 20 payments for which Mr Booth requested evidence, all expenses payments from Risc Management were paid to the Appellant's Spanish Santander Account and further referenced Risc Management as the source in the description.

302. The Tribunal accepts HMRC's submission that the information arising during the course of his investigation regarding both credits permitted Officer Booth to form a reasonable conclusion that he had discovered a tax loss. His conclusion was objectively justifiable and hence the conditions in section 29(1) TMA for the making of the Discovery Assessment are satisfied.

303. The only two conditions required within subsection 29(1) were satisfied for Officer Booth to have raised his assessment. Nothing in Section 29(1) prohibits Officer Booth from raising the Discovery Assessment in circumstances where an enquiry could have been opened into specific tax years.

304. The Tribunal accepts that Officer Booth had not formed a settled view that there was a loss of tax as of April 2015. His suggestion that he had at the meeting of April 2015 was a mistake. The Tribunal is also satisfied that Officer Booth was incorrect to refer to a 'discovery enquiry' at the April 2015 – no such enquiry exists as a matter of law.

305. In whichever manner the Tribunal seeks to define Officer Booth's requests for information by letter in February 2015 and at the meeting in April 2015, which is dealt with below in the fifth issue, this led to: the Appellant voluntarily providing private bank statements in April 2016; the Officer identifying the relevant credits in July 2016 and asking for explanations for unexplained credits; the Officer asking for loan documentation in November 2016 in relation to the large credit; the lack of documentation and inadequate explanation being supplied by the Appellant's agent in February 2017 which meant the Officer believed he had discovered a tax loss; and the making of the Discovery Assessment in September 2017 under section 29(1) of the TMA 1970.

306. The Tribunal is satisfied that the Discovery Assessment was not stale. Seven months passed between the Officer discovering the tax loss in February 2017, on the Appellant's agent providing the final and inadequate explanation for the credits, and the Assessment being raised in September 2017. However, these seven months were not such as to render the assessment stale. This was a reasonable passage of time – HMRC did not simply sit on the discovery without taking further action. During these seven months HMRC and the Appellant made attempts to settle matters before the Discovery Assessment was raised.

The Second Issue - carelessness

307. HMRC must prove that the tax loss was brought about by the carelessness of the Appellant in order for the Discovery Assessment to satisfy the requirements of section 29(3) & (4) TMA 1970. As the Appellant made and delivered a self-assessment tax return for the Tax Year, HMRC are required to prove on the balance of probabilities that the loss of income tax was 'brought about' carelessly by the Appellant in order to raise the Discovery Assessment.

308. In addition, the Discovery Assessment was issued on 27 September 2017, more than four, but less than six years after the end of the Tax Year ended 5 April 2012.

Thus, HMRC are required to prove carelessness to extend the ordinary four-year time limit for making an assessment pursuant to section 34(1) of the TMA 1970 to the six-year limit provided under section 36(1).

309. Carelessness is defined under section 118(5) of the TMA 1970 as the failure to take reasonable care. What amounts to carelessness will depend on all the circumstances of the case, including an examination of the nature of matters being dealt with on the return, the identity and experience of an agent, the experience of the taxpayer and the relationship between the agent and taxpayer.

310. An Officer making a subjective discovery and raising a discovery assessment is not required to satisfy himself that section 29(4) is met in advance of raising the assessment, as section 29 prima facie, does not impose such an obligation (*Hankinson v HMRC* [2011] EWCA Civ 1566 per Lord Justice Lewison [24]). Care must be taken in 'reading across' from other decisions regarding carelessness (*Hankinson* [139]). Nevertheless, the applicable test or 'benchmark' is one of objectivity, drawing a comparison to a reasonable and prudent tax payer, as the standard of reasonableness (*Collis* [29]; *Hankinson* [123]).

311. The Tribunal is satisfied that the Appellant's carelessness brought about the loss of income tax in the Tax Year, validating the assessment and permitting the extension of time limits for the Discovery Assessment. When tested against a reasonable, hypothetical and prudent tax payer, the actions and/or inactions of the Appellant amount to a failure to take reasonable care.

312. This is primarily evidenced by the fact that a reasonable tax payer would have taken active steps to record significant receipts of trading income, such that they were not omitted or forgotten and could be declared on a self-assessment tax return. The Appellant did not take such steps to record and declare the income and thus, reasonable care was not taken.

313. The Tribunal also relies on further reasons evidencing that the Appellant was careless. The Appellant has not provided any evidence of a record keeping system, used to record the irregular payments received outside of his employment with Risc Management. This is evidenced by the fact that details for a number of credits could not be found and an explanation could not be offered.

314. The Appellant failed to recognise that a significant sum of over £58,000, representing ten times his monthly employment income, had been received. The Appellant failed to take immediate action to record or advise Raffingers that the sum was taxable in nature, such that it could be declared on his self-assessment return.

315. The Appellant had been a Director of Risc Management for a significant number of years, such that he would be expected to hold greater awareness of the tax implications of credits received outside of his employment with Risc Management.

316. The Appellant kept no 'critical documents' relating to both credits; such as a receipt for the consultancy services provided, a contract, correspondence regarding

the negotiation of price or instruction to undertake the work, such that he was unable to identify the credits as taxable and requiring declaration on his return.

317. The large size of the credits, in comparison to the Appellant's income from Risc Management, should have set 'alarm bells' ringing that action needed to be taken to declare them as taxable receipts to HMRC.

318. The Appellant failed to discuss and/or take advice from his agents as to properly recording and declaring income from consultancy services. A prudent and reasonable tax payer would ensure a system was in place in advance of doing so.

Third Issue – the liability to tax of the small and large credits

319. The Tribunal is satisfied, for the reasons set out below, that the income discovered and assessed by Officer Booth is derived from a 'taxable source,' this being the Appellant's trading income. Officer Booth relied upon the Miscellaneous Income Provisions of ITTOIA in making the Discovery Assessment and in correspondence. He did not advance the trading income source he had discovered, nor the correct assessing provision, being Part 2 of ITTOIA.

320. Nonetheless the Tribunal is satisfied that HMRC are able, upon an appeal to the Tribunal, to advance the correct assessing provision and source of income discovered, as supported by the following authorities:

i) *Fidex Limited v HMRC* [2016] EWCA Civ 385 concerned an appeal against a Closure Notice, but the principles can be applied by way of analogy. Lord Justice Kitchin, at paragraphs 51 and 52 of the judgement, stated the Tribunal is not deprived of jurisdiction where a new issue raised on appeal represents an alternative or additional ground for supporting the Closure Notice.

ii) Lord Justice Kitchin, drawing a comparison to *MCashback* at paragraph 52 and 60 of the judgment, emphasised that the Tribunal has jurisdiction where the 'essential subject matter' and 'conclusion' remain the same, but a different legal ground/ argument is advanced to support of the conclusions.

iii) Judge Berner in *Gareth Clark v HMRC* [2017] UKFTT 392 (TC) applied the principles advanced in *Fidex Limited* and *MCashback* to the issuance of a discovery assessment by way of analogy (*Clark* 38]-[41]). The Judge concluded that an appeal is limited to a charge of the particular nature which is considered to have given rise to the tax loss for the tax year in question, which arises out of the factual matrix associated with the loss of tax (*Clark* [43]).

iv) Upon appeal to the Tribunal pursuant to sections 50(6)(a) and 50(7)(a) of the TMA 1970, the Tribunal is not confined to the reasons given or facts relied upon by the Discovering Officer. Similarly, the legal analysis relied upon at the time does not limit or constrain the Tribunal (*Clark* [43]).

v) Section 114(1) of the TMA 1970 supports the aforementioned authorities, by providing that an assessment to tax will not be voided due to mistake or defect if the substance and effect is in conformity with the intent and meaning of the Taxes Acts.

321. The Appellant provided private bank statements for a number of private bank accounts during the course of HMRC's investigation, including the Appellant's Clydesdale Current Account. The statements for this current account showed two credits, amongst others no longer challenged, which form the subject of this appeal.

322. The first credit was paid into the account on 17 October 2011 and amounts to £8,056.10 (the "small credit"). The description merely states "000211." The Appellant was unable in correspondence to offer an explanation of this small credit aside from "cannot find details".

323. Likewise, the Appellant was unable to give any sensible explanation in evidence accepting that he did not know and that he could not be satisfied his earlier explanation of reimbursement of expenses from Risc Management was correct. The Tribunal has rejected the Appellant's evidence that this small credit was the reimbursement or repayment of expenses. It has found it is more likely than not that it is undeclared trading income liable to income tax. This is for the reasons set out at paragraphs 197-199 above.

324. The second credit was paid into the account on 7 December 2011 and amounts to £58,810.44 (the "large credit"). The description of the large credit states "Upside Management, Usd 92985.19, Rate 1.5811." As is evident, this description suggests, prima facie, that the payment came from a company called Upside Management and was converted from US dollars into sterling upon being credited to the Appellant's current account. The Appellant offered an initial explanation for the credit, through his first agent, who initially stated it was something the Appellant meant to do but did not get round to doing.

325. The Appellant later in correspondence advanced the proposition that the large credit was a loan from a company in Beirut called Upside Management. After the Appellant's appeal was lodged, an e-mail chain was provided between the Appellant's second agent, Raffingers, and third parties, Chris Morgan of Upside Management and Mazen Houssami. The e-mail address of Mr Morgan is "cmorgan@upsidmanagement.co.uk." A UK based company exists on Companies House with a Director by the name of Chris Morgan, with the name Upside Management (UK) Limited ("Upside UK").

326. The Tribunal has rejected the Appellant's evidence and explanation that the large credit was a loan for the reasons set out at paragraphs 190-196 above. In addition, the Tribunal relies on the further inconsistency in explanations put forward in correspondence as set out above. The Tribunal finds that the large credit was trading income which was undeclared and liable to income tax.

Consultancy Services & Trade Income

327. The Tribunal is satisfied on the balance or probabilities that the evidence demonstrates that the income received from both credits is assessable under Part 2 of ITTOIA as trading income from Consultancy Services.

328. In addition to the reasons set out above the Tribunal relies on the following further matters.

329. The Appellant engaged in the provision of consultancy services with Animus Associates following his Directorship with Risc Management, making consultancy services an inherently likely explanation for the credits.

330. Risc Management, in part, provided consultancy services to private paying clients, leading to the likelihood that the Appellant knew a number of Risc Management clients and was easily able to engage in such services.

331. The Appellant provided copies of an e-mail exchange in or around late 2016. These e-mails consist of attempts by the Appellant and Raffingers to get Chris Morgan to contact the further party, Mazzen Houssami, for a copy of the purported loan agreement. Notably, Mr Morgan's e-mail address suggests he is part of a company called Upside Management. The large credit is identified as being from 'Upside Management'.

332. Companies House holds information for a UK based company called Upside Management (UK) Limited with a director by the name of Chris Morgan. The company was incorporated on 30 October 2012. The Appellant does not suggest that the large credit came from this company or a previous / related company. However, the Nature of Business for Upside UK is described as "Management Consultancy Activities…" As such, it is likely that the large credit from Upside is a payment for consultancy services, in the absence of reliable evidence to the contrary.

333. To the extent that the Appellant relies upon the e-mail chain from Chris Morgan, the Tribunal also notes that Mr Morgan did not respond when asked to provide a witness statement or give evidence in support of the Appellant's explanation.

334. In light of Mr Houssami and Mr Morgan not being called as witnesses, the Tribunal is satisfied that it should place little evidential weight upon the email chain relied upon by the Appellant in respect of the loan. In these emails, Mr Morgan was vague in his responses, for instance merely stating: "I have managed to get hold of Mazen and am awaiting the historical document."

335. Further, Mr Morgan did not state that the large credit from Upside was a loan and makes no specific reference to the large credit. The identity, relevance and association of Mr Houssami to Upside Management (UK) Limited is unknown and has not been advanced by the Appellant.

336. The Appellant's bank statements for his Clydesdale current account identify a significant number of credits with a number as a description / reference. A number of these credits were queried by Officer Booth as part of his investigation. The regularity of these payments and their quantum, alongside the lack of contradictory evidence, suggests these are likely to be payments for a service. Indeed, all payments including expenses from Risc Management, indicate the payment source as Risc Management.

337. Officer Booth relied upon the Miscellaneous Income Provisions of ITTOIA within his decision letter accompanying the Notice of Assessment. The Tribunal is satisfied that Officer Booth was not required to state the underlying reasons for his conclusion of tax loss, as section 29 TMA 1970 does not impose such an obligation. An appeal against the Discovery Assessment is not against Officer Booth's reasoning, but the Discovery Assessment itself. Officer Booth mistakenly relied upon the Miscellaneous Income Provisions, in circumstances where it may be arguable on appeal that the credits were attributable to any one of a number of sources.

338. However, Officer Booth considered and concluded to a reasonable degree of likelihood that the source of income, at the time and before issuing the Discovery Assessment, was trading income from self-employment despite not advancing this. Notably, the assessment computations attached to the Notices of Assessment allocated the credits to profits from self-employment.

339. The Tribunal is satisfied that the absence of Officer Booth's conclusion in writing as to the credits being trading income source does not invalidate the Discovery Assessment. Further, the Appellant has been given the opportunity to demonstrate that the credits are not taxable income or trading income during the appeal.

340. Even though the Tribunal has found that the credits represent taxable income from trade received in the Tax Year by the Appellant, the subject matter, conclusion and nature of the charge to tax would be the same irrespective of the type of income received by the Appellant. In any event, HMRC has advanced before the Tribunal a different and correct 'assessing provision' and the Tribunal is satisfied that the two credits are from trading income from the provision of consultancy services by the Appellant. The Appellant has failed to discharge the burden of proof upon him to establish these credits were not taxable income.

Fourth Issue – allegation of coercion or provision of material by the Appellant under false pretences

341. The Tribunal is satisfied that the Appellant was not coerced into providing information or material to HMRC. As set out at paragraph 200 above, the Tribunal has found that he was not subject to any undue pressure or threats from HMRC to provide information. The Appellant made no complaints at the meeting, specifically saying so at the meeting. He made no complaints subsequently during the investigation. He was represented throughout and is an experienced former police officer and businessman.

342. The Tribunal is also satisfied that the Appellant was not misled or induced into providing material to HMRC under false pretences. Both in the letter of February 2015 and at the meeting in April 2015 it was emphasised that cooperation with HMRC was voluntary and he was under no obligation to provide information or material that was requested by HMRC.

343. In any event, a statutory appeal to the Tribunal is not the correct forum to challenge the lawfulness of HMRC's conduct of an investigation or any complaint as to the behaviour of HMRC. The Tribunal has no jurisdiction to determine these arguments.

344. Nonetheless, the Tribunal should record that there is some merit in the Appellant's complaint about the nature of the letter sent to him in February 2015 asking him to provide information.

345. This letter was from the Criminal Taxes Unit (CTU), which may suggest a serious criminal investigation is being conducted, albeit that the letter makes clear HMRC are seeking a civil settlement. The letter describes HMRC as conducting an 'investigation' so does not suggest it either 'informal' nor simply 'a compliance check'. Therefore, the Tribunal does not accept Officer Booth's description of the investigation as a 'compliance check'. It was an HMRC investigation, albeit one in which HMRC initially sought the Appellant's voluntary cooperation rather than using formal statutory investigatory powers.

346. Further, the letter referred to penalties and was written in terms that may have led the recipient to believe the consequences of not cooperating would be very serious ie. that penalties might well follow if he did not cooperate. Therefore, there is some merit to the argument that HMRC requested voluntary cooperation as an alternative to more serious action. In those circumstances it is fair to question the extent to which the cooperation of the taxpayer was freely or voluntarily given thereafter.

347. It has not been proved that HMRC had sufficient evidence available to make assessments or even suspect or allege the Appellant had deliberately caused tax losses and raise penalties against him in February 2015 when they commenced their investigation. Therefore, HMRC may not have been able to do so at the time.

348. At that time HMRC may have been able to initiate section 9A enquiries into later tax years and they may have been able to obtain information under compulsory powers, such as Schedule 36 to the Finance Act 2008 but the letter did not state this. Even though this letter was said to be a standard template for HMRC, the Tribunal is not satisfied that it was appropriately worded.

349. HMRC's letter of February 2015 did not refer to any specific tax years under investigation. Further, the letter did not refer to any reasonable grounds to suspect or any nature of information that may have led HMRC to suspect there had been a tax loss in relation to any of the Appellant's tax returns.

350. While this letter was said to be a standard template, the Tribunal is of the view that more careful thought should be given to the terms of such letters identifying

material that gives rise to HMRC opening an investigation (if it can be revealed without disclosing anything sensitive) or the nature of the allegation, the specific years under investigation and emphasising that the investigation is on a voluntary basis and not pursued under any statutory power at that stage (although such powers may be available if the taxpayer does not cooperate).

351. Nonetheless, the letter did not cause the Appellant to provide HMRC with any information that they eventually relied upon to raise the Discovery Assessment. This information, the bank statements evidencing the receipt of credits, was only provided in 2016. In the intervening period, it is recorded at the meeting in April 2015 that it was made clear by HMRC that the Appellant's cooperation was voluntary and proper safeguards were explained to him.

352. In the Tribunal's view, any of the inadequacies in HMRC's letter were cured by the meeting in April 2015. At this meeting, the information which led HMRC to start the investigation – the allegation regarding the non-declaration or diversion of cash payments to sources – was disclosed to the Appellant by HMRC.

353. Further, at the meeting HMRC emphasised the voluntary nature of any cooperation. It was only in the eighteen months following this meeting and after further correspondence, that the Appellant provided the information that HMRC now rely upon. The Appellant was represented throughout this process.

Fifth Issue – the lawfulness of HMRC's investigation / compliance check / enquiry

354. In response to the Tribunal's invitation, HMRC made supplementary submissions in relation to the fifth issue. This was the Appellant's additional and new ground of appeal which was not previously advanced in the Appellant's Notice of Appeal dated 15 January 2018 but only raised during the hearing.

355. The fifth issue is the lawfulness of HMRC's 'Compliance Check' conducted by the Criminal Taxes Unit (now Fraud Investigation Service - Proceeds of Crime). The Tribunal must also consider whether the lawfulness of the investigation and the method in which HMRC obtained information from the Appellant has any bearing on the validity of Officer Booth's Discovery Assessment for the Tax Year ended 5 April 2012.

356. The Appellant has argued that HMRC unlawfully opened an investigation and unlawfully obtained his private bank statements, in that they were provided outside of a 'formal enquiry' pursuant to section 9A of the Taxes Management Act 1970 ("TMA 1970") or any Information Notice pursuant to Schedule 36 of the FA 2008.

357. The Tribunal accepts much, but not all of, HMRC's submissions on this issue.

358. HMRC submitted in the first instance that Officer Booth was not required to open an enquiry under section 9A of the TMA. Nothing in this provision required Officer Booth to have taken this course of action. Indeed, section 9A(1) provides for a discretion "An Officer *may* enquire into a return…" if within the respective time limits. Likewise, HMRC have powers to request and require taxpayers to provide

information formally through taxpayer and Information Notices under Schedule 36 to the Finance Act 2008. They used neither of these two statutory avenues of investigation which may have been available in this case.

359. The Tribunal's jurisdiction on an appeal against an assessment is to determine the lawfulness or validity of HMRC's Discovery Assessment – not the lawfulness of their enquiry or investigation nor the manner in which they obtained the information they rely upon to make an assessment. The appropriate route to challenge the lawfulness of this may be in a claim for judicial review.

360. Nonetheless, even if the question were within the Tribunal's jurisdiction, the Tribunal is satisfied that HMRC may invite voluntary cooperation from taxpayers, outside the scope of their statutory powers, and taxpayers may choose to volunteer information and cooperate with HMRC. The Tribunal is satisfied there is nothing unlawful in HMRC taking such an approach so long as it is made clear to taxpayers that they are under no legal obligation to provide that information. HMRC may then rely on that information if it is volunteered.

361. If the information they seek is not volunteered by taxpayers, then HMRC may have to consider whether they wish or are able to obtain the same material through statutory powers if they can satisfy the criteria to do so. HMRC have powers such as opening a section 9A enquiry or Code of Practice 9 investigation or obtaining information under compulsion through the issue of Information Notices under Schedule 36 to the FA 2008.

362. It is right to note that in February 2015, as HMRC accept, Officer Booth could not have opened a section 9A enquiry into the Appellant's return for the Tax Year ended 5 April 2012. He would have been out of time at the time he commenced his investigation and made his request for information to be volunteered (which HMRC describe as an 'Informal Compliance Check). The enquiry window running from one year after the return was due in January 2013 had expired at the end of January 2014. Officer Booth might have been able to open an enquiry into later tax years (not Tax Year 2011-2012) under section 9A, which then may in turn have led to a discovery in relation to earlier years but that did not occur.

363. The fact that section 9A TMA 1970 afforded Officer Booth the ability to enquire into some specific tax years of the Appellant does not mean he could not ask questions outside the remit of this provision. The Tribunal has already addressed the fact that HMRC is entitled to seek voluntary cooperation from taxpayers so long as it is truly voluntary and sufficient safeguards are given.

364. The Appellant has erred in his interpretation of the various statutory provisions by arguing that Officer Booth lacked the power to commence an investigation and ask for information and documents to be provided. He could do so outside of these powers.

365. Section 9A does not limit non-statutory enquiries, referred to by HMRC as investigations. Specifically, in circumstances where the 12-month 'enquiry window'

has expired, it does not expressly or impliedly prevent investigations. Similarly, where the enquiry window is still open, the same position applies. Section 9A is worded in discretionary rather than mandatory terms. Officer Booth had the option of opening an enquiry if he was within the 12-month enquiry window for later tax years, but by no means was he required to do so.

366. The provisions of section 29 TMA 1970 apply to the making of assessments, not the manner of the enquiry. So long as an Officer has made a discovery and all the other requirements of the section are satisfied, an assessment may be raised. The provision does not curtail the manner of the investigation or enquiry which leads to the discovery.

367. HMRC submit they are not required and indeed it would be overly burdensome if they were positively required to rely on section 9A TMA in every tax investigation. It follows that Officer Booth's subjective discovery and the subsequent Discovery Assessment were valid, in accordance with section 29 TMA even if the discovery was made outside of an enquiry under section 9A TMA. The Tribunal accepts this submission.

368. HMRC further submitted that they may request information and/ or documents by issuing an Information Notice under Schedule 36 of the Finance Act 2008 but they are not compelled to do so. In the majority of cases, an informal request will be made initially, which will then, if not complied with, be followed by a formal Information Notice under Schedule 36 (if the statutory conditions are satisfied). Not only can documents be requested informally, such requests often create an atmosphere of co-operation and collaboration. The Tribunal accepts this submission.

369. Indeed, HMRC submitted that the Appellant's professional representative at the time of Officer Booth's request could have advised the Appellant against the provision of private bank statements, in which case an Information Notice may have been issued. Such a Notice carries appeal rights to the Tribunal, which would have jurisdiction under paragraph 32(3)(a)-(c) of Schedule 36 to the FA 2008.

370. It is a moot point whether in fact HMRC would have been able to obtain Information Notices had the Appellant failed or refused to volunteer information in this case. It is arguable that HMRC may have been able to comply with paragraph 21 of Schedule 36 and satisfy Condition B in this case. It is arguable they may have had reason to suspect, at the time of opening the investigation, a tax loss based on the allegation passed to them of the diversion of cash payments to confidential sources. However, HMRC would have had to specify the tax year in which they alleged this had taken place and their investigation appeared open-ended at that stage. In any event, it is unnecessary to resolve the availability of Information Notices as HMRC never used Schedule 36 powers.

371. On 13 February 2015, Officer Booth had commenced an 'investigation' into the Appellant's tax affairs by letter of this date. The investigation did not constitute an 'enquiry' under section 9A of the TMA 1970 as a Notice of Enquiry pursuant to section 9A(1) was not served on the Appellant within the requisite enquiry window.

This letter highlighted that the investigation was being conducted with the view to reaching a civil settlement of any tax liabilities. In addition, it requested the co-operation of the Appellant.

372. On 29 April 2015, a meeting took place between HMRC and Appellant. It was agreed collectively that the Appellant would provide a sample period of private bank statements, which would subsequently be reviewed by Officer Booth.

373. Having received such bank statements on 12 April 2016, Officer Booth requested evidence or an explanation of 21 credits on the bank statement which he considered required further investigation. A response to this request was afforded on 7 November 2016, from which Officer Booth later discovered a tax loss, specifically trading income which ought to have been assessed in the Tax Year ended 5 April 2012 and was not so assessed.

The Law as Regards the Tribunal's Supervisory Powers

374. For the reasons set out above the Tribunal has rejected the substance of the Appellant's arguments.

375. In any event, it is by no means clear that the Tribunal has jurisdiction to entertain them. As set out above, the Tribunal's jurisdiction is to determine the lawfulness of the Discovery Assessment not the lawfulness of the investigation and obtaining of information outside the powers contained in section 9A TMA 1970 or Schedule 36 FA 2008. Such claims, and any relief, are more likely to be available in judicial review because there does not appear to be jurisdiction to determine them within a statutory appeal to the Tribunal.

376. When considering the First-tier Tribunal's ("FTT") jurisdiction in supervising Officer Booth's investigation and associated requests for information and documents, the decision of Judge Redston in *Gold Nuts & Others* [2016] UKFTT 82 (TC) is informative.

377. In *Gold Nuts*, Judge Redston, in considering the FTT's power to direct HMRC to close a COP9 enquiry (Code of Practice 9) where serious fraud is apparent, stated that the FTT's powers must have their source in statute [62]-[65]. Unless an explicit power has been afforded in statute, the FTT does not hold a general power to supervise the exercise of HMRC's other 'intrusive powers' [69]. The Tribunal is satisfied that this extends by way of analogy to Officer Booth's investigation and request for private bank statements outside a formal enquiry.

378. As the investigation and request were made outside of a statutory regime which falls under the Tribunal's supervisory jurisdiction, such as an Information Notice pursuant to Schedule 36 of the Finance Act 2008 ("FA 2008"), the Tribunal is not the correct forum for any challenge.

The lawfulness of Officer Booth's investigation

379. HMRC submitted that Officer Booth commenced a compliance check and informally requested private bank statements as this promotes co-operation, collaboration and often progresses a tax investigation expeditiously. Indeed, the Appellant's representative was content to agree a period for which bank statements would be provided. In addition, the Appellant stated in his evidence before the Tribunal that he was happy to provide such statements.

380. The Tribunal accepts this submission in part. In this case it is apparent from the face of the documents that Officer Booth considered he was conducting an 'investigation' rather than 'an informal compliance check'. Use of the term 'informal' has the potential to mislead.

381. The fact that it is a request for voluntary cooperation made outside of statutory powers does not mean that the request is not serious – the implications, such as an assessment and penalties, are potentially as grave as any request made under statutory powers. HMRC should always apply appropriate safeguards when requesting voluntary cooperation and be careful not to misrepresent their position and availability of alternative methods of investigation should a taxpayer choose not to comply.

382. HMRC's request for private bank statements was not made under Schedule 36 to the FA 2008 nor within the remit of an enquiry under section 9A of the TMA 1970. However, it was made pursuant to HMRC's general responsibility for the collection and management of revenue.

383. Pursuant to section 5 of the Commissioners for Revenue and Customs Act 2005 ("CRCA"), HMRC are vested with the powers afforded under the Inland Revenue Act 1890, which is now repealed by virtue of section 52. Consequently, HMRC are responsible for:

"(a) the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section, [and]

(b) the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section, and

(c) the payment and management of tax credits for which the Commissioners of Inland Revenue were responsible before the commencement of this section."

384. Moreover, HMRC are responsible for the collection and management of the taxes listed under section 1 of the TMA 1970:

"The Commissioners for Her Majesty's Revenue and Customs shall be responsible for the collection and management of—

(a) income tax,

(b) corporation tax, and

(c) capital gains tax."

385. HMRC submitted that Officer Booth's compliance check and request for private bank statements were made by virtue of these legislative provisions which afford HMRC responsibility for the collection of taxes. They submit that Officer Booth was not acting ultra vires even though he was not acting pursuant to section 9A of the TMA 1970 nor Schedule 36 of the FA 2008.

386. As set out above, the Tribunal is of the view that HMRC are empowered to make requests for voluntary cooperation from taxpayers even if not using statutory powers to obtain material under compulsion. Section 1 TMA 1970 and section 5 CRCA simply explain the extent of HMRC's powers and responsibilities, they do not address the question specifically.

387. Ultimately, for the reasons set out above, it is not within the Tribunal's jurisdiction to determine the lawfulness of non-statutory enquiries or investigations.

388. Furthermore, HMRC submitted that the Tribunal must also consider HMRC's guidance for Officers requesting information and documents from taxpayers. In the context of an enquiry under section 9A of TMA 1970, the guidance is for an Officer to make an informal request in advance of issuing an Information Notice. This is explicit in HMRC's guidance at EM1580:

"You should normally ask informally for information you need at every stage of the enquiry before you consider the use of information powers…Normally you should not issue a notice under FA08/Sch36/Para1 unless the taxpayer has refused to co-operate with an informal request for information…"

389. A taxpayer would then have the option of refusing the informal request and appealing any subsequent Information Notice. The issuing of Schedule 36 Information Notices was recently considered by Lord Justice Patten in *R (on the Application of Jiminez) v First-tier Tribunal (Tax Chamber) and Anor* [2019] EWCA Civ 51. Lord Justice Patten at paragraph 29 of the judgment in *Jimenez*, relied upon the Supreme Court's decision in *Perry v SOCA* [2012] 4 All ER 795, which considered the scope of a disclosure notice under the Proceeds of Crime Act 2002. The Supreme Court remarked that "no authority is required under English Law for a person to request information from another person anywhere in the world" [94].

390. The Tribunal is of the view that this general principle applies to Officer Booth's requests for information from the Appellant, further fortified by the fact he was acting in his capacity as an Officer under HMRC's aforementioned responsibilities.

Conclusion

391. The Tribunal dismisses the Appellant's appeal against Officer Booth's Discovery Assessment issued on 27 September 2017. The Discovery Assessment, in the reduced amount of £36,225.62, is affirmed and upheld.

392. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 14 MAY 2019