[2020] UKFTT 0490 (TC)

TC07962

CAPITAL GAINS TAX – Allowable capital losses – Mansworth v Jelley - Section 9A enquiry or standalone claim and enquiry under Schedule 1A of the TMA 1970 – Cotter v HMRC – Discovery Assessment – section 29 TMA 1970 – whether the discovery had lost its essential newness or become stale by the time of assessment – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/06492 V

BETWEEN

EDWARD CUMMING-BRUCE **Appellant**

-and-

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

TRIBUNAL: JUDGE RUPERT JONES
IAN MENZIES-CONACHER

The hearing took place on 12-13 November 2020. With the consent of the parties, the form of the hearing was remote by V (video) through the internet enable video-conferencing platform Kinly CVP. A face to face hearing was not held because it was not in the interests of justice to do so in light of public health concerns during the pandemic. The documents to which the tribunal was referred consisted of an e-bundle of 1052 pages.

The Judge was satisfied the hearing was held in public on the basis that it was listed on a published list of hearings and the public could apply to observe the hearing. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. One member of the Bar, unconnected to proceedings, joined the hearing as an observer. It was not in the public interest during the pandemic to hold a physical face to face hearing given the risk to health and the parties' consent, therefore it was in the public interest for the hearing to go ahead remotely through video technology. The hearing was recorded – a transcript of that recording may be available on application to the Tribunal.

Michael Sherry, Counsel instructed by Michael Sherry Limited at Temple Tax Chambers, for the Appellant

Alan Hall, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

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DECISION

INTRODUCTION

1. The Appellant appeals the following decisions of HMRC charging him capital gains tax or disallowing capital losses that he claimed. The decisions consist of six Closure Notices under s. 28A Taxes Management Act ("TMA 1970") issued on 3 March 2015 and a discovery assessment under s. 29 TMA 1970 issued on 4 December 2013 in respect of tax years from 2000-2001 to 2012-2013. They are as follows:

Tax Year	£ Additional Tax	Authority	Date issued
2000-01	Nil - losses disallowed	s. 28A TMA 1970	3 March 2015
2001-02	Nil - losses disallowed	s. 28A TMA 1970	""
2004-05	16,005.60	s. 28A TMA 1970	""
2006-07	56,954.00	s. 28A TMA 1970	""
2009-10	25,330.68	s. 29 TMA 1970	4 December 2013
2011-12	3,236.52	s. 28A TMA 1970	3 March 2015
2012-13	18,810.96	s. 28A TMA 1970	""

2. The figures for additional tax under appeal set out above appeared to have been agreed by the parties by the conclusion of the hearing. In any event, they seek a decision in principle on the two issues in dispute which are set out below.

3. The Appellant wrote to the Inland Revenue in 2003 further to his tax returns filed for each of the years 2000-01 and 2001-02 and claimed additional allowable costs or losses, augmenting the existing losses claimed in his returns. These losses were set-off against capital gains in various subsequent years. The basis of much of the capital losses that were claimed for the purpose of calculating capital gains tax followed the decision in *Mansworth v. Jelley* [2002] EWCA Civ 1829. ("MvJ"). The MvJ losses were initially accepted by the Revenue in correspondence in 2003 but were then disallowed later that year and this was confirmed in the closure notices issued in 2015.

THE ISSUES IN THE APPEAL

4. There are two issues that fall to be determined within the appeal.

5. The first issue is:

Has the Appellant proved that his notification in 2003 of MvJ losses for each of the 2000-01 and 2001-02 tax years were standalone claims and not amendments to the returns so that they could not be validly enquired into by the Revenue under s. 9A TMA 1970? If so, this would have the effect that the closure notices for those years (disallowing losses) could not be validly issued by HMRC under section 28A.

Does the law, as interpreted in *Cotter v HMRC*, require the Revenue to have enquired into the notified losses as standalone claims under Schedule 1A TMA 1970? If so, the mechanism for disallowing losses would be to have issued closure notices issued under paragraph 7 of Schedule1A.

If the claims for MvJ losses by the Appellant for the two tax years were not validly enquired into and disallowed, then they would be allowable losses available to be carried forward for use in subsequent periods tax years 2004 onwards. Therefore, are the section 28A closure notices and amendments to the returns charging additional tax for the later years, 2005 onwards, valid or invalid?

6. This issue was a development of the Appellant's first four grounds of appeal contained in his notice of appeal:

1. The notification 'claim' for "*Mansworth v Jelley'* losses for 2000/01 and 2001/02, although made by way of amendment to the return forms for those years did not form part of the self assessments for those years and were 'stand alone' notification "claims".

2. Although enquiries were opened under TMA 1970, s.9A into the self assessments for those years no separate enquiries were opened into the loss notification claims under TMA 1970 Schedule 1A.

3. The Revenue wrote to the taxpayer agreeing the losses notified.

4. Accordingly the losses notified stand and the assessments for the subsequent years (including in particular years 2004/5. 2006/07. 2009/10. 2011/12, 2012/13) should take account of those losses being losses previously accrued in earlier years.

7. The second issue in this appeal is:

Has HMRC proved that the 2009-10 discovery assessment was valid, in that the discovery conditions of s. 29(5) TMA 1970 were satisfied and that the assessment was not stale. When did HMRC make the discovery of an insufficiency in tax in relation to period 09-10, was it in January to March 2012? If the discovery was made in this period, did the assessment lose its essential newness by the time it was made in December 2013?

8. This issue was developed from the fifth ground of appeal in the notice of appeal:

5.The assessment for 2009/10 was not validly raised - there was no "discovery" after the expiry of the "enquiry window", and the preconditions in TMA 1970. s.29(4)(5) was not satisfied.

9. In determining these two issues, the burden of proof lies upon the Appellant to prove that each of the s. 28A TMA 1970 closure notices were not validly issued and that therefore the conclusion to disallow losses or make amendments charging additional tax were not lawful. The burden is upon HMRC to establish that the discovery assessment made under the s. 29 TMA 1970 was validly issued.

10. The Appellant raised an additional sixth ground of appeal subsequent to his notice of appeal as follows:

6. The losses notified by the taxpayer in respect of 2000/01 and 2001/02 were sustained allowable losses computed in accordance with the Revenue's published practice as to the correct way to calculate gains/losses on employee share options (in the light of the decision in *Mansworth v Jelley*) which practice was correct as a matter of law and the so the losses are in any event allowable losses.

11. The Appellant's counsel abandoned this sixth ground of appeal during the hearing, having initially suggested he wished to preserve it as a matter to take on onward appeal (such as at the Upper Tribunal). The Tribunal made clear that if a party wishes to argue a point, it must be raised and argued at first instance for it to be raised as a ground of appeal at any further appeal. Parties cannot make tactical choices as to which points

to argue at first instance and cherry pick those which they wish to leave for any onward appeal.

12. This final ground of appeal is, in any event, a variation on the 'legitimate expectation' argument – that the Appellant should be able to rely upon HMRC's initial acceptance of *Mansworth v Jelley* losses in 2003 before later changing its mind. The Appellant had not sought to pursue any legitimate expectation argument before any court having raised it in correspondence in 2012-2013 and HMRC having rejected it at that time. Any claim for breach of legitimate expectation would not fall within the jurisdiction of the tribunal but would have to be brought in judicial review – see for example the authority of *HMRC v Abdul Noor* [2013] UKUT 071 (TCC). A similar basis for a judicial review claim was dismissed by the Court of Appeal in *R (on the application of Hely-Hutchinson) v HMRC* [2017] EWCA Civ 1075. The Court found that HMRC had been entitled to change its policy in relation to *Mansworth v Jelley* losses such that there was no abuse of power nor breach of the legitimate expectation principle.

Facts in relation to the first issue

13. The facts in relation to the first issue were not in dispute. The parties agreed a statement of agreed facts and the Tribunal has incorporated this within its finding of facts set out below. These facts are found on the balance of probabilities making reasonable inferences from the contemporaneous documents where necessary. No witness statements were served nor oral evidence given in relation to this issue.

2000-01

14. The Appellant's 2000-01 self-assessment tax return ("SATR" or "return") was received on 10 January 2002.

15. The Inland Revenue (which later became HMRC in 2005) opened an enquiry into that return, under section 9A TMA 1970 on 12 December 2002 within the enquiry window.

16. The return as submitted showed capital gains of £39,113, capital losses of £39,172, no capital losses brought forward and a capital loss of £59.16 carried forward. A disposal of 1,500 Oakdene Limited £0.01 shares on 16 February 2001, sold for £1.5 million but with a nil gain was listed within the gains on the assets schedule in the breakdown of capital gains contained in the return. The Oakdene shares formed part of the Appellant's adjustable share option scheme of his employer (Dresdner Kleinwort Wasserstein).

17. Disposal of the Oakdene shares was but one of the seven disposals listed within the return, the other six giving rise to gains. There were also capital losses listed in the losses schedule whose total exceeded the gains.

18. In a subsequent letter to the Inland Revenue from Richard Hallas and Partner tax consultants on behalf of the Appellant dated 24 January 2003, revised calculations were submitted in respect of capital losses arising out of the Oakdene shares. This was as a result of the decision in *Mansworth v. Jelley* [2002] EWCA Civ 1829 ("MvJ" losses). The letter stated the following:

"We refer to the recent Tax Case of Mansworth v Jelley and the Inland Revenue press release issued on 8th January 2003.

We enclose revised calculations of the capital losses realised on the disposal of the Oakdene Limited shares acquired by way of exercise of options under an unapproved share option scheme

in 2000/2001 and 2001/2002. We also enclose details of the amendments to be made to the appropriate boxes of the 2000/2001 and 2001/2002 Capital Gains Pages 3 and 8."

19. The revised calculations were contained in schedule enclosed with the letter headed 'Amended capital losses following Mansworth v Jelley 2000/2001':

'1,500 Oakdene Ltd Sale proceeds	£1,5000,000
Taxable Income on exercise	(1,499,985)
Market value of shares on option exercise	(1,500,000)
Net capital losses	£(1,499,985)

Capital Gains Page 3

Box 8.2 £39,172.23 increases to £1,539,157.23

Capital Gains Page 8

Box 8.10 £39,172.23 increases to £1,539,157.23

Box 8.14 £59.16 increases to £1,500,044.16

Box 8.20 £59.15 increases to £1,500,044.16'

20. These amendments to the SATR were made within the time permitted for amending the return under section 9ZA TMA 1970. The effect of the revised calculations was to increase the capital loss carried forward at Box 8.14 on the return from £59.16 to £1,500,044.l6 for the 2000-01 SATR.

21. We are satisfied that the intention and purpose of the letter and schedule thereto was to amend the 2000-01 return as submitted rather than to make a fresh or independent claim to standalone losses. This is the reasonable, objective and natural reading of the language of the letter and schedule. The letter and schedule refer to revisions, amended capital losses and make references to the boxes on the return as already completed. While Mr Sherry submitted that the letter and schedule represented a standalone 'claim' to these losses, he called no evidence from the Appellant nor his accountant who prepared the letter to suggest the subjective intention was to file a standalone claim. Ultimately the effect of this letter and schedule is a question of law which we consider below.

22. On 26 March 2003 the Revenue wrote to the Appellant's accountant, Richard Hallas & Partners, as follows:

"As you are aware the 2001 Return is still under enquiry regarding the income received in respect of the Dresdner A S O scheme and may continue to be for some time.

Any amendment to the Return can only be made at the end of the enquiry.

I would, however, confirm that the Capital Gain losses of £1,499.985 are agreed and may be carried forward.

I will be processing the 2002 amendment shortly."

23. We accept that this letter constituted an initial agreement of these revised losses on the part of the Revenue, which at that time was only enquiring into the Appellant's income and not losses. However, the Revenue later disavowed the acceptance of the revised losses in October 2003 as described below and continued to do so following its change of policy on MvJ losses in 2009 and in the closure notice issued in March 2015.

24. Mr Sherry submits that the sentence 'I will be processing the 2002 amendment shortly' constituted an implicit acceptance that the 2001-2002 revised losses would also be accepted because no enquiry had yet been opened into that year and the amendment would only be processed if the losses were to be allowed.

25. We are satisfied that an objective and natural reading of the language does not support the inference that the revised loss claimed would be agreed for tax year 2001-02. It was simply a statement by the Revenue that the amendment for the following year would be processed. In any event nothing turns on the point and the Revenue subsequently opened an enquiry into the 2001-2002 return on 8 August 2003 such that it was not 'processed'.

26. On 8 August 2003 the Revenue also wrote to the Appellant's accountant to state that their enquiry into the Appellant's participation in the scheme mentioned for year 2000-01 had in effect broadened and was looking at both:

- Whether the income was assessable as employment Income and subject to National Insurance.
- The claims arising from the Mansworth v Jelley case. The Revenue did not accept for this scheme, that the additional losses claimed under that case were due. One consequence was that any repayment claimed would not be made.

27. The claim for additional losses in 2000-01 was made outside of the Return but as an enquiry was already open at the time of the claim, the claim was included as part of the enquiry. This also applies to 2001-02.

28. On 9 October 2003 the Revenue wrote to the Appellant's accountant in the following terms concerning the 2000-01 SATR:

> "I wrote to you on 12 December 2002 to advise you that I intended to make some enquiries into your client's tax return for the year ended 5 April 2001.
>
> Although the enquiry into the return is still ongoing, my colleague wrote to you on 26th March 2003 to agree the contents of your letter dated 24th January 2003, regarding the loss claim as a result of the decision in the case of Mansworth v Jelley.
>
> The Revenue has now received further advice and considers that the Mansworth v Jelley decision will not apply where the shares were from an adjustable share option, such as the Dresdner adjustable share option scheme.
>
> In view of the further advice received by the Revenue, I regret that I am no longer able to agree the losses claimed in your letter dated "24 January 2003."

"MvJ" Background

29. In December 2002, the Court of Appeal decided *Mansworth v Jelley* [2002] EWCA Civ 1829 in favour of the taxpayer. In January 2003, the Inland Revenue (which later became part of HMRC in 2005) issued a Technical Note setting out their view of the tax treatment of share options following *Mansworth v Jelley* ("the 2003 Guidance"). The Revenue stated that the gain or loss on the disposal of shares acquired by the exercise of such options should be calculated by deducting from the disposal proceeds both the market value of the shares at the time the option was exercised and any amount chargeable to income tax on the exercise of the option. The 2003 Guidance potentially gave rise to capital losses, which had not previously been claimed, in many cases. Subsequently, that view was reversed by section 158 Finance Act 2003 but only in respect of options exercised after 9 April 2003.

30. During 2008, HMRC received legal advice that the 2003 Guidance was incorrect and the correct position was that, where the shares are treated as having been acquired at market value, that value is the full measure of their deemed cost of acquisition. Accordingly, any income tax liability that arose on exercising the option is not to be taken into account when computing any chargeable gain or allowable loss accruing on a disposal of the shares.

31. On 12 May 2009, HMRC published Revenue & Customs Brief 30/09, later supplemented by Revenue & Customs Brief 60/09 published on 11 September 2009, (together the "2009 Guidance") which explained their new understanding of the law and in what circumstances they would be bound by the 2003 Guidance. HMRC stated in the 2009 Guidance that they would only apply their new view of the law to taxpayers where there was an open enquiry.

The closure notice and disallowance of losses for 2000-2001

32. A closure notice was issued by HMRC under section 28A TMA 1970 on 3 March 2015 in respect of the Appellant's return for the tax year 2000-2001 following the completion of the section 9A enquiry. The conclusion expressed in the closure notice was that:

"My decision is that the Self Assessment stated in the tax return for the year should remain unaltered.

I have taken into account the amendment made by you during the course of the enquiry and my conclusion is that the amendment is incorrect and so shall not take effect. The capital losses of £1,499,985 claimed in your amendment are not allowable.

………The understanding now is that, for options exercised before 10 April 2003, where section 17 Taxation of Chargeable Gains Act 1992 (TCGJA92) applies, both the consideration actually given for the shares and the amount charged to income tax is replaced by the market value of the shares on exercise in line with the judgment in the tax case of Mansworth v Jelley.

On this basis, the capital gains /losses is Nil as the share were redeemed on the same day so the proceeds and the market vale are the same.

…………..

Applying HMRC's understanding of the above legislation, no loss arises……..

Capital losses to be carried forward as at 5 April 2001 are £59.

……..

In the circumstances, the facts do not support a proposition that you should be allowed your losses on the basis of a legitimate expectation.

…..

Where HMRC decided that you do not have a legitimate expectation….

….

I have amended your Self Assessment return to reflect my conclusion. The amount of tax you self assessed for the year has not changed.

….

There is no additional tax to pay for the year…."

33. In summary, for 2000-01:

The 2000-01 SATR was received on 10 January 2002 and an enquiry under s. 9A TMA 1970 was opened on 12 December 2002. The return as submitted showed capital gains of

£39,113, capital losses of £39,172, no capital losses brought forward and consequently a capital loss of £59.16 was carried forward.

Revised computations of the losses for 2000-01 were made on 24 January 2003 by the Appellant's accountant, the amendment stating that these losses were MvJ amendments. This claim was within the window for amending the return under s. 9ZA TMA 1970.

The 2000-01 enquiry closure notice under s. 28A TMA 1970 was issued on 3 March 2015, with the conclusion that the "MvJ losses" were not allowable and restricting the loss to carry forward to £59.

2001-02

34. The Appellant's SATR for 2001-02 was received by the Revenue on 11 October 2002.

35. The return as initially submitted showed capital gains of £101,601, and capital losses of £104,835, with in-year capital losses of £3,234 to be carried forward along with the £59 from 2000-01: a total of £3,293.

36. This return was subject to the Appellant's accountant's letter of 24 January 2003 addressed above. The revised calculations were contained in an enclosed schedule headed 'Amended capital losses following Mansworth v Jelley 2001/2002':

'1,5000 Oakdene Ltd Sale proceeds 18.2.2002	£1,5000,000
Taxable Income on exercise	(1,499,985)
Market value of shares on option exercise	(1,500,000)
Net capital losses	£(1,499,985)

Capital Gains Page 3

Box 8.2 £104,835.86 increases to £1,604,820.85

Capital Gains Page 8

Box 8.10 £104,835.86 increases to £1,604,820.85

Box 8.14 £3,234.66 increases to £1,503,219.66

Box 8.15 – see 2000/01 amendments £1,5000,044.16 (sic)

Box 8.17 £1,500,044.16

Box 8.20 £3,293.84 increases to £3,003,263.84'

37. The amendments in the schedule to the 24 January 2003 letter had the effect of increasing the capital losses carried forward as of 5 April 2002 from £3,293.84 to £3,003,263.84.

38. The Revenue replied to the letter of 24 January 2003 in the letter of 26 March 2003 described above.

39. A section 9A enquiry was opened in respect of this return on 8 August 2003 within the enquiry window in the circumstances described above. The revised losses, or amended claim, were therefore considered from the outset of the enquiry.

40. A closure notice in respect of the enquiry into the SATR for 2001-02 was issued by HMRC on 3 March 2015. The closure notice was issued under Section 28A(1) and (2) of the TMA 1970. The conclusion expressed in the closure notice was that:

> "My decision is that the capital losses claimed of £1, 499, 985 in respect of the sale of Oakdene shares and by reference to the decision in the tax case of Mansworth v Jelley are not due.
>
> The other in year net capital losses amount to £3,234.
>
> ……….
>
> Capital losses to be carried forward as at 5 April 2002 are £3,293.
>
> ……………………

I have amended your Self Assessment return to reflect my conclusion. The amount of tax you self-assessed for the year has not changed……….. "

41. In summary, for 2001-02:

The 2001-02 SATR was received on 11 October 2002, and a s. 9A TMA 1970 enquiry opened on 8 August 2003. The return as submitted showed gains of £101,601, and losses of £104,835, with in-year losses of £3,234 to be carried forward along with the £59 from 2000-01: a total of £3,293.

Revised computations of the losses for 2001-02 were claimed on 24 January 2003, within the s. 9ZA TMA 1970 window, and this claim was considered in the s. 9A TMA 1970 enquiry from the outset.

As for 2000-01, a closure notice under s. 28A TMA 1970 was issued on 3 March 2015 for the 2001-02 return, with the conclusion that the *MvJ* losses were not due.

Subsequent tax years: 2004-2013

42. Each of the Appellant's returns for the years 2004-05, 2006-07, 2011-12 and 2012-13 was also the subject of a section 9A TMA 1970 enquiry as follows. In respect of these years, enquiries under s. 9A TMA 1970 were opened within the relevant windows, and closed under s. 28A. The closure notices restricted the losses utilised in each of these years to take into account the consequences of the disallowances in the 2000-01 and 2001-02 enquiries.

Year	Opened
2004-05	22/6/06
2006-07	14/11/08
2011-12	9/12/13
2012-13	6/8/14

43. In the closure notices for these later years, all dated 3 March 2015, HMRC disallowed the MvJ losses and gave reasons for those decisions. Those closure notices disallowed capital losses brought forward from earlier years and amended the returns, calculating that additional tax was due from the Appellant. The sums involved for each year were approximately those set out above at the beginning of this decision, although the precise figures now agreed may be slightly different from those in the closure notices.

The Facts on the second issue

44. The second issue concerns the essential newness of the 2009-2010 discovery assessment under section 29 TMA 1970 – whether the discovery was fresh or stale when the assessment was made. The facts were in some dispute. In addition to the documentary evidence from correspondence, we considered two witness statements of HMRC Officer Jackson, who was cross examined by Mr Sherry. We make findings of fact on the balance of probabilities as set out below.

45. We begin by observing the obvious. The burden of proof is upon HMRC to establish its case on this issue. HMRC did not provide any written statement or oral evidence from HMRC Officer Terry Freer who is alleged by the Appellant to have made the discovery in March 2012, nor was any evidence served from HMRC Officer Moran who issued the assessment in December 2013. Officer Jackson only took over the conduct of the case in 2016 after the assessments were issued. His evidence largely emanated from his review of the correspondence and documents in the case and hearsay evidence of handover conversations from Officer Moran.

2009-10 Discovery Assessment

46. The Appellant's SATR for the tax year 2009-10 was submitted on 14 December 2010. The enquiry window closed on 14 December 2011 without an enquiry being opened. The return showed gains of £198,684 less losses of £47,858, with losses carried forward of £140,726 being utilised against the capital gains of the year.

47. On 24 January 2012, the Appellant's newly appointed agents and accountants, Randall Greene, alerted the enquiry caseworker to a potential insufficiency for the return for the year 09-10 in the following terms:

'We enclose on behalf of our client two cheques as follows:

In respect of the year to 5 April 2010 £25,330.68

In respect of the year to 5 April 2011 £41,210.74

Our client's tax return for the year ended 5 April 2009 showed capital losses of £3,794,057 available to be carried forward. Our client's tax return for the year to 5 April 2010, as prepared by the previous agents, Frank Hirth plc, showed brought forward capital losses of £140,726 used against gains in that year. Our client's tax return for the year to 5 April 2011 shows brought forward capital losses of £219,423 used against gains in that year.

The brought forward capital losses arose from a Dresdner Kleinwort Wasserstein share scheme in the years 1998/99 to 2001/02. The share scheme and our client's capital losses remain under enquiry by HM Revenue & Customs and we understand that a court case is to be heard which is expected to determine the outcome of those enquiries. The enclosed cheques represent the capital gains tax which would be payable by our client for 2009/10 and 2010/11 should the court's findings be in favour of HM Revenue & Customs. Please ensure that the enclosed tax payments are held by you pending closure of your enquiries and not credited to our client's self assessment account.'

48. On an objective reading of this letter it alerted HMRC to a potential insufficiency of tax in respect of the return submitted for year 09-10, the basis for it (disallowance of losses claimed in relation to the share scheme) and a calculation of the loss (£140,726) and additional tax to be paid (£25,330.68 – CGT at 18%).

49. On 10 February 2012 HMRC Officer Sanderson wrote in reply to inform the Appellant of its change of policy from 2003 to that adopted from 2009 in respect of MvJ losses (as set out above) and to inform them that:

'..............

Background

HMRC had previously published guidance relating to the exercise of unapproved employee share options before 10 April 2003. As Revenue & Customs Brief 30/09 explains, HMRC considered that the gain or loss on the disposal of shares acquired by such options should be calculated by deducting from the disposal proceeds both of the following:

- the market value of the shares at the time the option was exercised

- any amount chargeable to income tax on the exercise of that option.

However, HMRC has received legal advice that our guidance was incorrect. Where the shares are treated as having been acquired at market value, that value is the full measure of their deemed cost of acquisition. The cost is not augmented by any amount chargeable to income tax on the exercise of the option. Thus in computing any capital gain or loss accruing on a disposal of the shares no deduction falls to be made of, or in respect of, any amount that is chargeable to income tax on exercising the option HMRC now intends to finalise the enquiries in cases where Mansworth v Jelley losses have been claimed.

…………………………………

In the first instance HMRC invites you to withdraw your claim to losses in the period covered by the enquiry into your tax return or claim to losses. The enquiries will then be closed with an adjustment to the return, where appropriate, to remove the losses & make any other adjustments agreed.

If you are not prepared to withdraw your claim to losses; please explain why you consider it is not appropriate to withdraw your claim and the basis on "which you believe your claim is valid". Please provide all documentary evidence on which you rely to support your claim.

Please let me have your response within 40 days of the date of this letter.

If you do not wish to withdraw your claim. HMRC will review your case on an individual basis and decide how best to take your case forward.'

50. This letter, while indicating HMRC's general approach to MvJ losses does not express any concluded view on any individual claim of the Appellant and expressly reserves the position which is to be reviewed after the receipt of further evidence.

51. On 1 March 2012 Claire Walliker of Randall Greene, the Appellant's new advisers, replied on behalf of the Appellant in the following terms:

'We are aware that capital losses were claimed by Mr Cumming-Bruce in the years 1998/99 to 2001/02, totalling £4,086,235, In respect of a share option implemented by Dresdner Kleinwort Wasserstein during that period (also referred to as the Oakdene option). We understand that the Inland Revenue subsequently commenced enquiries into this option and, following failed negotiations between them and Dresdner Kleinwort Wasserstein, a court case was scheduled to be heard, the outcome of which would affect our client's personal tax position. We do not have details as to the particulars of this case but believe that it remains to be heard?.......

Capital losses were also used in 2009/10 and 2010/11 and capital gains tax was paid in January 2012 in respect of those years. We understand that the capital gains tax payments for: 2004/05, 2005/06 and 2006/07 were not credited to our client's self assessment account but have presumably been placed in a suspense account.

To enable us to respond fully to your letter of 10 February 2012 please would you provide us with a complete history of our client's capital loss position, to include confirmation of:

1. our client's tax returns which remain open under enquiry;

2. the capital losses used against capital gains each tax year since the capital loss claims were made;

3. the amounts and dates of all capital gains tax payments which have been made by our client in respect of the capital losses so used;

4. the status of the tax case referred to above concerning the Dresdner Kleinwort Wasserstein (Oakdene) share option and its implications for our client;

5. any other information relevant to our client's capital loss claims.'

52. On 22 March 2012, HMRC Officer Terry Freer replied by letter in the following terms:

'Thank you for your letter dated 1 March 2012 regarding capital losses.

All of the claims for losses as detailed in your letter and totalling £4,086,235 are currently under enquiry. The claims for 1998-99 and 1999-00 were made outside of the Returns for those years.

The claim for 2000-01 was also made outside of the Return but as an enquiry was already open at the time of the claim, the claim was included as part of the enquiry. This also applies to 2001-02.

As regards losses used in all years since claims were made I attach a schedule showing the position as I see it. You will see from this that I calculate that Mansworth v Jelley losses totalling £832,437 have been utilised so far.

My records show that your client currently has a total of £172.963.01 held in a suspense account pending the conclusion of the enquiries.

As regards the Dresdner Kleinwort Wasserstein case to which you refer I have no knowledge of any case being heard. HM Revenue & Customs were looking at whether income received should be liable as Employment Income and liable to National Insurance— any additional National Insurance would be settled between HMRC and the employer. I do not think therefore that it has any bearing on the capital losses claimed.

I look forward to receiving details of your client's intentions in respect of the capital losses claimed as soon as possible'

53. Officer Freer enclosed a schedule of *Mansworth v Jelley* losses including for the relevant year:

MvJ loss in year	B/F & C/F	Gain in year	Loss in year	MvJ used	Loss C/f	Assessable	Exempt
2009-10		198,684	47,858	140,726		10,100	10,100

54. While Officer Freer quantifies the same extent of MvJ losses that are being enquired to, he does not at this stage express any conclusion or belief that the losses will be disallowed nor that there is or is likely to be an insufficiency of tax. He invites the Appellant to state his intentions in respect of the losses claimed.

55. Even if the letter of 22 March 2012 is read in light of Officer Sanderson's letter of 10 February 2012 inviting the Appellant to withdraw the MvJ losses, it does not express a subjective view on the part of Officer Freer that he has discovered an insufficiency of tax on the balance of probabilities, merely that this is a possibility and that an enquiry is ongoing and he would like further information. Nor can Officer Freer's letter of 22 March 2012 be read objectively as expressing a concluded view that he had discovered an insufficiency of tax.

56. Officer Jackson summarised this correspondence in his witness statement as follows:

An unannounced letter from Randall Greene was received dated 24 January 2012 addressed to our processing office enclosing a payment on account for year 2009/10. A new enquiry officer

wrote to the Appellant on 10 February 2012 asking him to withdraw his capital loss claims. That officer was not aware of the new agents unannounced letter of 24 January 2012 at that time. A response from the new agent, Randall Greene was received on 1 March 2012 which made mention of the previous payment on account made with their unannounced letter. The new enquiry officer responded on 22 March 2012 linking the earlier correspondence and capital loss claim for 2009/10 having found out about the earlier capital loss claims being utilised.

57. We accept this as a fair and accurate summary of the correspondence.

58. In its Statement of Case and skeleton argument HMRC accepted that as of 22 March 2012 the HMRC enquiry caseworker had the issue of the losses brought to his attention on 1 March 2012 (although this was well outside the 12 month enquiry window for 2009-2010. The extent of the losses was quantified in Officer Freer's schedule. In its Statement of Case at paragraph 8.18 HMRC stated 'thus any hypothetical officer would have been alerted to the existence of the MvJ losses at that time'.

59. This is undoubtedly right, but it cannot, despite Mr Sherry's submission, equate to the Officer Freer reaching any conclusion that the losses are likely to be disallowed such that there is an insufficiency of tax on the balance of probabilities. While Officer Freer subjectively made a discovery of the existence of MvJ losses and objectively, any officer would reasonably have done so, that does not equate to a discovery of an insufficiency of tax at this stage. I agree with Mr Hall's submission that while Officer Freer's letter indicates he was at the threshold of making a discovery of an insufficiency of tax he had not crossed that threshold to becoming of that concluded view at this stage. Further information was sought and there was reasonable justification for the enquiry to be ongoing.

60. Mr Sherry relied upon this passage of HMRC's review conclusion of 18 September 2018:

> In a letter of 24 January 2012, your accountants explained that the losses utilised in 2009/10 and 2010/11 resulted from the MvJ c1aims which were under enquiry. Similar information, albeit less specific, was provided in a letter of 1 March 2012.
>
> It is my view that these letters notified an officer of HMRC of the existence of information and its relevance to the insufficiencies that were subsequently addressed by the assessments. From those letters, the notional officer would have been aware of the origin of the losses brought forward, the fact that they were under enquiry and that, if HMRC's view prevailed, additional tax would be payable for 2009/10 and 2010/11.

61. For the same reasons as above, we are satisfied that this opinion of the Review Officer does not prove that Officer Freer believed he had made a discovery of an insufficiency of tax. It only proves that a discovery had been made of additional losses that would need to be enquired into and, if HMRC's view prevailed, additional tax would be payable. This did not cross the threshold from being a discovery of a potential for insufficiency to becoming a discovery of an actual insufficiency.

62. Therefore, we are satisfied that HMRC have proved Officer Freer did not make the discovery of an insufficiency of tax in March 2012. For the reasons set out below, we are satisfied the discovery was only later made by Officer Moran some 20 months later in November 2003 who then went on to issue the discovery assessment shortly afterwards December 2013.

63. Further or alternatively, we are satisfied that even if Officer Freer made the discovery of an insufficiency of tax in March 2012, it did not become stale or lose its essential newness by the time assessment was raised in December 2013.

64. We come to these conclusions based upon the findings we set out below.

65. It is necessary to examine the passage of time between the discovery of MvJ losses claimed for the relevant tax year in March 2012 and the issuing of the assessment in December 2013.

66. There was lengthy and detailed correspondence between HMRC and the Appellant's accountant from April 2012 to December 2013. It began with the Appellant's accountant letter of 11 April 2012 stating that he would not be withdrawing the claim to MvJ losses because he had a legitimate expectation that the losses would be allowed.

67. The protracted correspondence between the parties concerned the issue of whether the Appellant had a legitimate expectation that his losses would be allowed based on the previous guidance on MvJ issued by the Revenue in 2003 and the initial acceptance of the losses for 2000-2001 in correspondence in 2003. HMRC was seeking that the Appellant provide evidence that he reasonably relied upon the previous guidance to his detriment in order to allow the losses based on legitimate expectation. The Appellant's accountant throughout this period provided further submissions that the legitimate expectation argument should succeed, setting out the background and detail in full but did not provide any further evidence.

68. For example, within a two-page letter of 4 May 2012 Randall Greene submitted:

'You have asked for evidence that our client would suffer detriment from the correct application of the statute. It must be self-evident from the above [the background to the case] that the payment of unexpected capital gains tax liabilities represents a significant detriment to our client. Our client is clear that in the years between 32003 and 2009 disposals were made to realise capital gains which he believed would not give rise to capital gains tax charges due to the available capital losses. He would have instructed his investment advisers differently had he had reason to believe that HMRC would reverse their published guidance. Unexpected tax liabilities would therefore be suffered by our client if the statue is applied in accordance with HMRC's current view.'

69. HMRC were slow to respond but Officer Mitchell provided counter arguments in a three-page letter dated 24 October 2012 included requests such as: 'You have said that your client realised gains between 2003 and 2009 which he believed would not give rise to capital gains tax due to the available losses, but did your client act to produce those gains in reliance on HMRC's guidance as suggested earlier in your letter? If so, please me have full particulars………..I am now inviting you to provide me with all of the information and evidence to support such a [legitimate expectation claim]…..I appreciate that you have to contact your client's fund managers for copies or correspondence or telephone notes in support of your client's claim and I will put my papers aside until 30/11/2012…..'

70. After further clarifying correspondence in November and December 2012, Randall Greene wrote on 9 April 2013 with the benefit of counsel's opinion and additional information from the Appellant's previous accountants. The two–page letter set out arguments including the specific point about the Revenue's agreed acceptance of losses in their letter of 26 March 2003 and that therefore legitimate expectation was not in point but stating, 'We would be happy to assemble supporting information to demonstrate this but od not believe this is necessary in view of HMRC's agreement of the losses for 2000/01 and 2001/02 which cannot now be withdrawn and the closure of the 2005/06 enquiry.'

71. HMRC Officer Mitchell requested this evidence by letter dated 30 April 2013. In a letter dated 30 June 2003 Randall Greene provided further legal submissions not relating to legitimate expectation as to why the capital losses of 2000-01 and 2001-2002 should be accepted and carried forward. These arguments are subsumed within our consideration of the first issue or the sixth ground of appeal and are not repeated. The letter concluded that therefore the Appellant had nothing to add on the question of legitimate expectation. HMRC addressed these legal arguments in its reply letter of 4 September 2013 and invited any further representation on legitimate expectation.

72. In a letter dated 28 October 2013 Randall Greene replied to HMRC's counter arguments contained in the letter of 4 September 2013 and submitted the capital losses should be allowed but for separate legal reasons which did not relate to legitimate expectation (relying, in part, on arguments raised as the sixth ground of appeal which is now abandoned). Officer Moran informed them he had taken over the case as the relevant HMRC officer by letter 30 October 2013.

73. On 8 November 2013 Officer Moran stated he would consider Randall Greene's letter of 28 October 2013 and review all the papers before replying. On 3 December 2013 he wrote to Randall Greene stating:

> 'From my review of the enquiry papers there seems to have been a full exchange of views between you firm and my predecessor, Mr Mitchell over the technical points relating to the delivery of tax returns and claims as well as the handling of any consequential enquires.
>
> I do not wish to add anything to what has gone before but I note that you do not agree with my colleague's interpretation of how the statue should be implemented. When the appropriate closure notices are issued, in due course, you client will have the right of appeal.
>
> ….
>
> In order to bring all related issues up to date, Revenue Assessments for 2009-10 & 2010-11 will be issued on 4 December 2013 to account for the Mansworth v Jelley Losses' that have been brought forward into those years to offset capital gains.
>
> …………………
>
> Legitimate expectation
>
> As a separate issue, in limited circumstances, to apply the statue may be so unfair as to amount to an abuse of power by HMRC and in these circumstances HMRC may be bound by previous guidance…
>
> ………………
>
> As noted above, in order to demonstrate a legitimate expectation your client must be able to show that he has done or refrained from doing something as a direct consequence of the advice.
>
> The subject of legitimate expectation has been raised earlier in the correspondence. In particular I refer to Mr Michell's letter dated 24/10/2012 and also the letter sent to you your client on 13/04/2012 by Mrs Sanderson.
>
> I am not aware that any comments or corroborative documentation in response to the points made in both colleagues' letters has been received from you or your client….
>
> The contents of HMRC's letters will be considered fully once you have considered matter with you client and let me have any further explanations, significant fact and contemporaneous documentary evidence that you would like to be considered. Once this information and documentation are hold you client's case well then be reviewed and a decision made on the information and evidence provided. My request takes into account your statement that your client is able to demonstrate "reliance".
>
> Please let me have your reply by 31 December 2013.'

74. Despite this invitation to the Appellant to provide further information on legitimate expectation, and as Officer Moran indicated would happen in his letter, HMRC issued to the Appellant a discovery assessment under s. 29 TMA 1970 in respect of the year 2009-2010 on 4 December 2013. Officer Moran disallowed the MvJ losses in the sum of £140,726 and charged capital Gains Tax in the sum of 18% - totalling £25,330.68.

75. Officer Jackson summarised the correspondence between March 2012 and December 2013 in his witness statement as follows:

'Letters were exchanged on 11 April 2012, 13 April 2012, 19 April 2012, 4 May 2012, 14 May 2012, 4 October 2012, 22 November 2012, 6 December 2012, 9 April 2013, 30 April 2013, 8 May 2013, 7 June 2013, 12 June 2013, 14 June 2013, 20 August 2013, 4 September 2013, 30 September 2013, 28 October 2013, 30 October 2013, 8 November 2013 and 3 December 2013. Having failed to reach an informal agreement an Assessment was therefore correctly raised under the provisions of section 29 Taxes Management Act 1970 on 4 December 2013.'

76. We are satisfied that this is a fair summary of the correspondence.

77. We are satisfied that HMRC have proved the discovery of an insufficiency of tax was only made by Officer Moran between November and December 2013 after he reviewed all the papers in the case and came to the view that none of the Appellant's arguments should succeed and capital losses claimed should not be allowed. We have based this finding on an objective reading of the contemporaneous documents without taking into account Officer Jackson's oral evidence which was only hearsay as to what Mr Moran's views or beliefs were and what his view was of the correspondence.

78. We accept Mr Hall's submission that it was only at this time that the threshold was crossed and an HMRC Officer (Mr Moran) was of the view that on the balance of probabilities there was an insufficiency of tax. Mr Moran made this discovery afresh in November 2013 – as above, Officer Freer had discovered MvJ losses but not crossed the threshold to decide that they should be disallowed such that he believed that there was an insufficiency of tax.

79. Officer Moran's discovery in November 2013 was not simply based on the material previously provided in January to March 2012 that there were £140,000 of MvJ losses claimed and that HMRC's general and revised policy from 2009 was to disallow such claims. Officer Moran's belief he had made a discovery only arose after considering the arguments raised on behalf of the Appellant and when he reached the view on the specific facts of the Appellant's case that the losses claimed should be disallowed. He considered both the factual and legal submissions provided between March 2012 and December 2013.

80. There were no new facts regarding the MvJ losses and their extent that came to light during this time. However, there were new facts contained in the correspondence regarding the question of whether Appellant relied to his detriment on HMRC letter of 26 March 2003 accepting losses or its general policy of January 2003 on allowing MvJ losses. These new facts, as asserted in correspondence were relevant to the question of legitimate expectation so the new material provided after March 2012 was not simply confined to new legal arguments. In any event, a change of view of the same facts can amount to a discovery and new facts do not need to arise.

81. We are satisfied that during the course of correspondence between March 2012 and December 2013, HMRC was not simply delaying for the sake of appearance having made a decision to disallow the losses back in March 2012. Even if HMRC's preliminary but not concluded view in March 2012 was to disallow MvJ losses,

thereafter it was engaged in a genuine attempt to consider the specific facts of the Appellant's case. Mr Sherry did not suggest the subsequent correspondence was in any way a sham.

82. Officer Moran considered not only new legal submissions made after March 2012 but new factual submissions provided by the Appellant's accountants that were not contained either in his return or the letters of January 2012 to March 2012. The correspondence on legitimate expectation was generic to all assessments including 09-10 and whether there was an insufficiency of tax or whether losses claimed could be allowed on basis of legitimate expectation. HMRC was entitled to take a reasonable amount of time to form a view upon whether there was to be a tax consequence as a result of the losses claimed.

83. As above, we have therefore disregarded Officer Jackson's oral evidence as to what may have been in Officer Moran's mind or what the general approach of HMRC's team dealing with the MvJ issue may or may not have been. We have relied on the contemporaneous correspondence.

84. Further or alternatively, even if we were satisfied that Officer Freer had made the discovery of an insufficiency of tax in March 2012 and the assessment was only raised in December 2013, we would not be satisfied that the assessment had become stale or lost its essential newness over that time. There was activity over this 21-month period with HMRC genuinely attempting to engage with consideration of whether the MvJ losses should be allowed – it was not inevitable that they would be disallowed – it was not a process only conducted for show.

85. The activity between March 2012 and December 2013 demonstrated a genuine attempt on the part of both parties to see if they could settle the liability to tax and whether losses could be agreed or not. This required consideration of legal and factual issues. While HMRC were slow to reach a concluded view, and could have acted more quickly in reaching a final conclusion, they were not unreasonable in taking the time they did.

86. We accept the evidence of Officer Hall that there were 1,100 outstanding cases involving MvJ losses that a team of HMRC officers were working through to make individual decisions upon. HMRC gave the Appellant a genuine opportunity to argue to demonstrate why the losses should be allowed, engaged with the arguments and gave reasons for rejecting them. Given, the complex and long history, they are likely to have been criticised if they had proceeded to assess immediately in March 2012 without giving the Appellant this opportunity.

Procedural History

87. The discovery assessment of 4 December 2013 was appealed to HMRC on 20 December 2013.

88. Appeals against the s.28A closure notices of 3 March 2015 were made to HMRC on 30 March 2015. HMRC's review conclusions under s. 49E TMA 1970 were delayed pending the decision in the judicial review application of *Hely-Hutchinson*[1] which became final on 26 July 2018 following the Court of Appeal judgment in 2017.

89. HMRC issued a Review Conclusions letter on 18 September 2018.

90. The Appellant's appeals were notified to the Tribunal on 17 October 2018, with an additional ground (the sixth ground) being added a day later.

91. HMRC were notified on 13 November 2018, and served their Statement of Case on 18 January 2018.

The Law

Statute Law on first issue

92. Section 1 of the Taxation of Chargeable Gains Act 1992 (as relevant to the years in question provided):

1 The charge to tax

(1) Tax shall be charged in accordance with this Act in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets.

……..

93. Section 2 of the TCGA provides (as far as relevant):

2 Persons and gains chargeable to capital gains tax, and allowable losses

(1) Subject to any exceptions provided by this Act, and without prejudice to sections 10 and 276, a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment during any part of which he is resident in the United Kingdom, or during which he is ordinarily resident in the United Kingdom.

(2) Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting—

(a) any allowable losses accruing to that person in that year of assessment, and

(b) so far as they have not been allowed as a deduction from chargeable gains accruing in any previous year of assessment, any allowable losses accruing to that person in any previous year of assessment (not earlier than the year 1965–66).

…………………..

94. Section 16 of the TCGA provides (in so far as relevant):

16 Computation of losses

(1) Subject to section 72 of the Finance Act 1991 and except as otherwise expressly provided, the amount of a loss accruing on a disposal of an asset shall be computed in the same way as the amount of a gain accruing on a disposal is computed.

(2) Except as otherwise expressly provided, all the provisions of this Act which distinguish gains which are chargeable gains from those which are not, or which make part of a gain a chargeable gain, and part not, shall apply also to distinguish losses which are allowable losses from those which are not, and to make part of a loss an allowable loss, and part not; and references in this Act to an allowable loss shall be construed accordingly.

(2A) A loss accruing to a person in a year of assessment shall not be an allowable loss for the purposes of this Act unless, in relation to that year, he gives a notice to an officer of the Board quantifying the amount of that loss; and sections 42 and 43 of the Management Act shall apply in relation to such a notice as if it were a claim for relief.

……………….

95. Sections 8, 9, and 9ZA of the Taxes Management Act 1970 ('TMA 1970') provide as relevant:

8 Personal return

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board—

(a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is—

(a) the 31st January next following the year of assessment, or

(b) where the notice under this section is given after the 31st October next following the year, the last day of the period of three months beginning with the day on which the notice is given………..

9 Returns to include self-assessment

(1) Subject to [subsections (1A) and (2)], every return under section 8 or 8A of this Act shall include a self-assessment, that is to say—

(a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and

(b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source and any tax credits to which section 231 of the principal Act applies but nothing in this subsection shall enable a self-assessment to show as repayable any income tax treated as deducted or paid by virtue of section 233(1), 246D(1), 249(4), 421(1), 547(5) or 599A(5) of the principal Act……………………………..

9ZA Amendment of personal or trustee return by taxpayer

(1) A person may amend his return under section 8 or 8A of this Act by notice to an officer of the Board.

(2) An amendment may not be made more than twelve months after the filing date.

(3) In this section "the filing date" means the day mentioned in section 8(1A) or, as the case may be, section 8A(1A) of this Act.

…………………

96. Section 9A TMA 1970 provides for enquiries into self assessment returns filed under section 8:

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 filing date;

(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;

(c) if the return is amended under section 9ZA of this Act, up to and including the quarter day next following the first anniversary of the day on which the amendment was made.

For this purpose the quarter days are 31st January, 30th April, 31st July and 31st October.

(3) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under section 9ZA of this Act.

(4) An enquiry extends to anything contained in the return, or required to be contained in the return, including any claim or election included in the return, subject to the following limitation.

……………….

97. Section 9B TMA 1970 (in so far as relevant)provides for enquiries into amendments to returns:

9B Amendment of return by taxpayer during enquiry

(1)This section applies if a return is amended under section 9ZA of this Act (amendment of personal or trustee return by taxpayer)[, or in accordance with Chapter 2 of Part 4 of the Finance Act 2014 (amendment of return after follower notice),] at a time when an enquiry [into the return is in progress in relation to any matter to which the amendment relates or which is affected by the amendment].

(2)The amendment does not restrict the scope of the enquiry but may be taken into account (together with any matters arising) in the enquiry.

(3)So far as the amendment affects the amount stated in the self-assessment included in the return as the amount of tax payable, it does not take effect while the enquiry is in progress [in relation to any matter to which the amendment relates or which is affected by the amendment] and—

(a)if the officer states in [a partial or final closure notice] that he has taken the amendment into account and that—

(i)the amendment has been taken into account in formulating the amendments contained in the notice, or

(ii)his conclusion is that the amendment is incorrect,

the amendment shall not take effect;

(b)otherwise, the amendment takes effect when [a partial closure notice is issued in relation to the matters to which the amendment relates or which are affected by the amendment or, if no such notice is issued, a final closure notice is issued] ……………..

98. Sections 28A of the TMA 1970 provides, in so far as relevant, for closure notices and amendments to return following completion of enquiries under section 9A:

28A Completion of enquiry into personal or trustee return

(1) An enquiry under section 9A (1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.

In this section “the taxpayer” means the person to whom notice of enquiry was given.

(2) A closure notice must either—

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions.

…………………..

99. Section 42 of the TMA 1970 provides for the mechanism by which claims for relief should be made (and claims under section 16(2A) of the TCGA 1992):

42 Procedure for making claims etc

(1) Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a claim, this section shall, unless otherwise provided, have effect in relation to the claim.

(1A) Subject to subsection (3) below, a claim for a relief, an allowance or a repayment of tax shall be for an amount which is quantified at the time when the claim is made.

(2) Subject to [subsections (3) and (3A)] below, where notice has been given under section 8, 8A ...5 or 12AA of this Act, a claim shall not at any time be made otherwise than by being included in a return under that section if it could, at that or any subsequent time, be made by being so included.

….

(5) The references in [this section] to a claim being included in a return include references to a claim being so included by virtue of an amendment of the return;

....

(11) Schedule 1A to this Act shall apply as respects any claim [or election]13 which—

(a) is made otherwise than by being included in a return under section 8, 8A, ...5 or 12AA of this Act, ...

…………………

100. Paragraphs 2, 4, 5 and 7 of Schedule 1A to the TMA 1970 provide for the form of claims to be made for relief which are made outside of a return (pursuant to section 42(11)), for enquiries into those claims and closure notices as follows:

2—(1) Subject to any provision in the Taxes Acts for a claim to be made to the Board, every claim shall be made to an officer of the Board.

(2) No claim requiring the repayment of tax shall be made unless the claimant has documentary proof that the tax has been paid by deduction or otherwise.

(3) A claim shall be made in such form as the Board may determine.

(4) The form of claim shall provide for a declaration to the effect that all the particulars given in the form are correctly stated to the best of the information and belief of the person making the claim.

(5) The form of claim may require—

(a) a statement of the amount of tax which will be required to be discharged or repaid in order to give effect to the claim;

(b) such information as is reasonably required for the purpose of determining whether and, if so, the extent to which the claim is correct;

(bb) the delivery with the claim of such accounts, statements and documents, relating to information contained in the claim, as are reasonably required for the purpose mentioned in paragraph (b) above;] and

(c) any such particulars of assets acquired as may be required in a return by virtue of section 12 of this Act [or paragraph 13 of Schedule 18 to the Finance Act 1998…………………………….

4—(1) [Subject to sub-paragraphs [(1A), (3) and (4)] below and to any other provision in the Taxes Acts which otherwise provides,]2 An officer of the Board or the Board shall, as soon as practicable after a claim other than a partnership claim is made, or such a claim is amended under paragraph 3 above, give effect to the claim or amendment by discharge or repayment of tax.

…………….

5—(1) An officer of the Board may enquire into—

(a) a claim made by any person, or

(b) any amendment made by any person of a claim made by him,

if, before the end of the period mentioned in sub-paragraph (2) below, he gives notice in writing of his intention to do so to that person or, in the case of a partnership claim, any successor of that person.

(2) The period referred to in sub-paragraph (1) above is whichever of the following ends the latest, namely—

(a) the period ending with the quarter day next following the first anniversary of the day on which the claim or amendment was made;

(b) where the claim or amendment relates to a year of assessment, the period ending with the first anniversary of the 31st January next following that year; and

(c) where the claim or amendment relates to a period other than a year of assessment, the period ending with the first anniversary of the end of that period;

and the quarter days for the purposes of this sub-paragraph are 31st January, 30th April, 31st July and 31st October…………………………….

7—(1) An enquiry under paragraph 5 above is completed when an officer of the Board by notice (a "closure notice") informs the claimant that he has completed his enquiries and states his conclusions.

(2) In the case of a claim for discharge or repayment of tax, the closure notice must either—

(a) state that in the officer's opinion no amendment of the claim is required, or

(b) if in the officer's opinion the claim is insufficient or excessive, amend the claim so as to make good or eliminate the deficiency or excess.

In the case of an enquiry falling within paragraph 5(1)(b) above, paragraph (b) above only applies so far as the deficiency or excess is attributable to the claimant's amendment.

(3) In the case of a claim that is not a claim for discharge or repayment of tax, the closure notice must either—

(a) allow the claim, or

(b) disallow the claim, wholly or to such extent as appears to the officer appropriate.

(4) A closure notice takes effect when it is issued…………………….

Case law on the first issue

101. The Supreme Court, in *Cotter v HMRC* [2013] UKSC 69 considered the mechanism by which a taxpayer could claim certain relief in respect of losses and by which the HMRC could enquires into those claims.

102. The taxpayer filed his return in 2007/08 and he allowed HMRC to calculate his income and capital gains tax liability of £211,000. The next tax year he entered into a tax avoidance scheme which created an employment income loss. His advisers wrote to HMRC to amend the 2007/08 return to carry back the loss and reduce the 2007/08 tax bill in respect of income tax under section 128 and 130 of the Income Tax Act 2007.

103. HMRC opened an enquiry under Schedule 1A to TMA (allowing postponement of relief until completion of the enquiry) and then issued court proceedings to recover the 2007/08 tax due. Mr Cotter's advisers claimed that HMRC's enquiry ought to have been made under section 9A (also allowing effect given to the loss claim) as section 9A allows an officer to enquire into "anything contained in the return, or required to be contained in the return, including any claim or election included in the return". Part of the appeal therefore involved a consideration of the meaning of a "return" in the relevant legislation.

104. The Supreme Court decided that the claim for relief against the loss incurred in 2008/09 and carried back to 2007/08 was not covered by section 9A, therefore HMRC was right to use Schedule 1A and so it did not have any obligation to repay the loss until its enquiry was complete.

105. Lord Hodge noted that whilst treating everything on the tax return form as the "tax return" is attractive in its simplicity, it would expose the Revenue to irrelevant claims made in the form which have no merit and which serve only to postpone the payment of tax due. Having concluded, correctly, that the claim in respect of losses incurred in 2008/09 did not alter the tax chargeable or payable in relation to 2007/08, the Revenue was entitled – indeed obliged – to use Schedule 1A as the vehicle for its enquiry (section 42(11)(a) TMA).

106. Lord Hodge, giving the judgment for the Court stated at [22]-[28]:

22. The Revenue's argument was that a claim was included in a "return" for the purposes of sections 8(1), 9, 9A and 42 of TMA only if it affected or as Ms Simler put it, could "feed into", the calculation of tax payable in respect of the particular year of assessment.

23. In judging the rival contentions, it is in my view important to recall the sequence of events which I set out in paragraphs 2 – 7 above. First, Mr Cotter gave information relating to his tax affairs in his initial return form. But he did not carry out the calculation of the tax which he was due to pay for 2007/08. Secondly, the Revenue made that calculation. Thirdly, Mr Cotter then provided the information about his provisional loss relief claim in his amendment of the tax return. Fourthly, the Revenue reviewed the return and confirmed its assessment of the tax due for 2007/08, treating the claimed relief as irrelevant to that assessment. Finally, Mr Cotter's advisers disagreed with the Revenue's view but did not seek to amend the tax return (under section 9ZA of TMA) by carrying out their own calculation of tax. In particular, I do not construe the letter of 30 January 2009 from Mr Cotter's accountants as an amendment of his tax return. The accountants did not purport to produce a self assessment calculation. Their amendment of the return was confined to the intimation of the claim. The statement in the

letter of 30 January 2009 that no further 2007/08 taxes would be payable was merely an assertion in a covering letter.

24. Where, as in this case, the taxpayer has included information in his tax return but has left it to the Revenue to calculate the tax which he is due to pay, I think that the Revenue is entitled to treat as irrelevant to that calculation information and claims, which clearly do not as a matter of law affect the tax chargeable and payable in the relevant year of assessment. It is clear from sections 8(1) and 8(1AA) of TMA that the purpose of a tax return is to establish the amounts of income tax and capital gains tax chargeable for a year of assessment and the amount of income tax payable for that year. The Revenue's calculation of the tax due is made on behalf of the taxpayer and is treated as the taxpayer's self assessment (section 9(3) and (3A) of TMA).

25. The tax return form contains other requests, such as information about student loan repayments (page TR2), the transfer of the unused part of a taxpayer's blind person's allowance (page TR3) or claims for losses in the following tax year (box 3 on page Ai3) which do not affect the income tax chargeable in the tax year which the return form addresses. The word "return" may have a wider meaning in other contexts within TMA. But, in my view, in the context of sections 8(1), 9, 9A and 42(11)(a) of the TMA, a "return" refers to the information in the tax return form which is submitted for "the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax" for the relevant year of assessment and "the amount payable by him by way of income tax for that year" (section 8(1) TMA).

26. In this case, the figures in box 14 on page CG1 and in box 3 on page Ai3 were supplemented by the explanations which Mr Cotter gave of his claim in the boxes requesting "any other information" and "additional information" in the tax return. Those explanations alerted the Revenue to the nature of the claim for relief. It concluded, correctly, that the claim under section 128 of ITA in respect of losses incurred in 2008/09 did not alter the tax chargeable or payable in relation to 2007/08. The Revenue was accordingly entitled and indeed obliged to use Schedule 1A of TMA as the vehicle for its enquiry into the claim (section 42(11)(a)).

27. Matters would have been different if the taxpayer had calculated his liability to income and capital gains tax by requesting and completing the tax calculation summary pages of the tax return. In such circumstances the Revenue would have his assessment that, as a result of the claim, specific sums or no sums were due as the tax chargeable and payable for 2007/08. Such information and self assessment would in my view fall within a "return" under section 9A of TMA as it would be the taxpayer's assessment of his liability in respect of the relevant tax year. The Revenue could not go behind the taxpayer's self assessment without either amending the tax return (section 9ZB of TMA) or instituting an enquiry under section 9A of TMA.

28. It follows that a taxpayer may be able to delay the payment of tax by claims which turn out to be unfounded if he completes the assessment by calculating the tax which he is due to pay. Accordingly, the Revenue's interpretation of the expression "return" may not save it from tax avoidance schemes. But what persuades me that the Revenue is right in its interpretation of "return" is that income tax is an annual tax and that disputes about matters which are not relevant to a taxpayer's liability in a particular year should not postpone the finality of that year's assessment.'

107. Lord Carnwath for the majority of the Supreme Court in *R (on the application of Derry) v HMRC* [2019] UKSC 19 approved the judgment in *Cotter* and stated at [50]-[52]:

> 50. It was held that by virtue of Schedule 1B his claim, though referred to in his amended 2007/08 tax return, must be treated as relating to

the following tax year, and not therefore as part of the "return" in the relevant sense, that being limited to the information required to establish his liability for the year in question. More directly relevant to the present case, however, is a passage in Lord Hodge's judgment commenting (obiter) on the position if Mr Cotter had made the calculation of liability himself, rather than leaving it to HMRC to do so.

51. In order to set this passage in the context of Lord Hodge's discussion of the interaction of the relevant provisions and the tax return form, it is appropriate to quote the relevant paragraphs in full:

[[24]-[28] of the judgment in *Cotter*]

52. While recognising that the last two paragraphs were not binding, Henderson LJ regarded them as following logically from Lord Hodge's earlier analysis. He saw a clear distinction between the inclusion in the return of information which is irrelevant in law to the taxpayer's liability for that year (even if included by implicit invitation of the Revenue), and the taxpayer's self-assessment of the tax which he is due to pay:

"… a taxpayer's self-assessment is a different matter. Plainly, errors of many different kinds may be made in such an assessment, and they may include errors about the availability of a relief. If the Revenue is dissatisfied with the taxpayer's self-assessment, its remedy is either to amend the return or to open an enquiry into it under section 9A of TMA 1970. …, such an enquiry may extend to anything contained (or required to be contained) in the return. The boxes on page TC2 for 'adjustments to tax due' must in my view be regarded as containing information required to be contained in the return, where the taxpayer elects to perform his own self-assessment, because such adjustments form an integral part of the calculation of the tax due to be paid by him for the year in accordance with sections 23 and 24 of ITA 2007. It follows that the information contained in those boxes cannot be regarded as extraneous to the return. As I understand it, this is the essential point which Lord Hodge was making in Cotter at para 27, and if I may respectfully say so, I agree with it." (para 57)

The Revenue's difficulty in the present case arose simply from their failure to take "the obvious step" of opening an enquiry into the 2010 return within the statutory time limit.

Statute law and case law on discovery

108. Section 29 TMA 1970 (at the applicable time and in so far as relevant) provided for discovery assessments in the following terms:

29 Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a [year of assessment]—

(a) that any [income 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.

………..

(3) Where the taxpayer has made and delivered a return under [section 8 or 8A]2 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.

……...

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

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

(b) informed the taxpayer that he had completed his enquiries into that return, the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

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

(a) it is contained in the taxpayer's return under [section 8 or 8A]2 of this Act in respect of the relevant [year of assessment] (the return), or in any accounts, statements or documents accompanying the return;

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

109. At [10]-[60] 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."'

110. As noted in *Atherton*, the requirement for a discovery not to lose its essential newness by the time an assessment is made (the 'staleness' of an assessment) has been recognised by the Upper Tribunal in a number of cases including *Beagles v HMRC* (2018) UKUT 380 (TCC) and *Patullo v HMRC* [2016] UKUT 270 (TCC) at [53].

111. The requirement for a discovery assessment to have been newly made has now also been recognised by the Court of Appeal in *Tooth v HMRC* [2019] EWCA 826 (which is currently the subject of an appeal to the Supreme Court) at [60]-[61] in the following terms:

61.I agree with the UT's approach in both passages. The requirement for the conclusion to have "newly appeared" is implicit in the statutory language "discover". The discovery must be of one of the matters set out in (a) to (c) of section 29(1). In the present case the officer must have newly discovered that an assessment to tax is insufficient. It is his or her new conclusion that the assessment is insufficient which can trigger a discovery assessment. A discovery assessment is not validly triggered because the officer has found a new reason for contending that an assessment is insufficient, or because he or she has decided to invoke a different mechanism for addressing an insufficiency in an assessment which he or she has previously concluded is present.

112. A useful recent discussion of 'staleness' is in *Marano v HMRC* [2020] UKFTT 199 (TC), where Judge Redston states [84-[85]:

'84. In our respectful opinion, the case law on TMA s 29 has taken a wrong turning, introducing a new restriction which is not present in the statute. That turning was indicated in *Corbally-Stourton* and *Charlton*, confirmed in *Pattullo* and upheld in *Tooth*. We note that in *Tooth* both parties had accepted that staleness invalidated an assessment, so the correctness of the proposition was not argued.
85. We nevertheless recognise and fully acknowledge that we are bound by *Pattullo* and by *Tooth* to set aside our views and proceed on the basis that an assessment is invalid if it was made when the discovery was "stale", as that term has been interpreted by the case law. As we confirmed to the parties at the hearing, we have taken that approach in coming to a decision on the First Issue.'

113. While some have expressed scepticism as to whether staleness invalidates assessments, there are many decisions of the Upper Tribunal and Court of Appeal which are authority for the proposition. These are binding on us unless and until such time as

the Supreme Court in *Tooth* may decide otherwise. Accordingly, the concept of 'staleness' in discovery assessments exists and needs to be applied.

114. The Tribunal will apply the principles set out in the authorities above in relation to the requirements for, a) HMRC to prove that a discovery has been made, b) what constitutes 'a discovery', and c) the requirement that a discovery must be fresh and not stale.

115. In addition to the principles set out above there are also subjective and objective thresholds which are required to be met to raise a discovery assessment.

116. 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).

117. 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 Norris J. [37]).

118. 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, they conclude 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]).

119. 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]).

120. Put in another way, an Officer making the discovery must believe that the information available to them points in the direction of there being an insufficiency of tax (*Anderson v HMRC* [2018] UKUT 0159 (TCC) at [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]).

121. 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 - see *Anderson* at [28]-[30]:

> **"[28]** In Sanderson, Patten LJ described the power under s 29(1) in this way (at [25]):
> 'The exercise of the s 29(1) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on all the available information at the time when the discovery assessment is made.'
> We consider, with respect, that this test is in accordance with the earlier authorities. This passage describes the test somewhat briefly because, of course, that case concerned s 29(5) rather than s 29(1). Having reviewed the authorities, we consider that it is helpful to elaborate the test as to the required subjective element for a discovery assessment as follows:
> 'The officer must believe that the information available to him points in the direction of there being an insufficiency of tax.'
> That formulation, in our judgment, acknowledges both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not.
> **The objective test**
> **[29]** The authorities establish that there is also an objective test which must be satisfied before a discovery assessment can be made. In *R v Bloomsbury Income Tax Comrs*, the judges described

the objective controls on the power to make a discovery assessment. Those controls were expressed by reference to the principles of public law. In Charlton at [37], the Upper Tribunal referred to the need for the officer to act 'honestly and reasonably'.
[30] The officer's decision to make a discovery assessment is an administrative decision. We consider that the objective controls on the decision making of the officer should be expressed by reference to public law concepts. Accordingly, as regards the requirement for the action to be 'reasonable', this should be expressed as a requirement that the officer's belief is one which a reasonable officer could form. It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer's belief was not reasonable."

122. 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]).

123. 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]).

HMRC's submissions

124. Mr Hall, on behalf of HMRC, submitted as follows.

Principles

125. Firstly, capital gains tax losses are computed in the same way as gains chargeable to capital gains tax: s.16(1) Taxation of Chargeable Gains Act 1992 ("TCGA92"), subject to a few specified exceptions.

126. Secondly, capital gains tax is charged on the total gains of the year less any allowable losses of the year, less earlier losses brought forward: section 2(2) TCGA92.

127. Any capital loss must be notified and quantified before it can be allowed: s. 16 TCGA92.

128. Sections 42 and 43 TMA 1970 apply by virtue of section 16(2A) TCGA92.

129. By way of s. 42(2) TMA 1970, any capital loss must be made on a return where one has been issued under section 8 TMA 1970.

130. If no section 8 return is issued, then s.42(11) TMA 1970 directs that Schedule 1A TMA 1970 applies.

131. Where a return is made under section 8 TMA 1970, an enquiry under s. 9A TMA 1970 may be opened.

132. Any enquiry under s. 9A TMA 1970 may extend to considering *"anything contained in the return, or required to be contained in the return, including any claim or election included in the return*" by way of s. 9A(4) TMA 1970.

133. A section 9A TMA 1970 enquiry may also extend to considering any amendment made under section 9ZA TMA 1970.

134. A return under section 8 may be amended with the window allowed by s. 9ZA TMA 1970, however if there is already an open section 9A TMA 1970 enquiry into a return, section 9B TMA 1970 operates to allow the s. 9ZA amendment to be taken into account in the relevant open s. 9A enquiry.

135. Where the enquiry window given by s. 9A(2)(a) TMA 1970 has passed, HMRC are precluded from opening an enquiry.

136. An assessment under s. 29 TMA 1970 may be made, subject to conditions laid down by s. 29(1), and s. 29(3) where a return under s. 8 TMA 1970 has been issued.

137. For any assessment to be valid, the assessing officer must believe that the information available to him points in the direction of there being an insufficiency of tax, and that it is one which a reasonable officer could form: see Jerome *Anderson v HMRC* [2018] UKUT 0159 (TCC) [28] - [30].

138. Additionally, s. 29(3) TMA 1970 sets out that at least one of two alternative conditions should be met, including that in s. 29(5), which requires the officer to not have been reasonably expected on the basis of the information available to him before that time, to be aware of the insufficiency of tax.

139. In *Langham v. Veltema*, (76TC259) Auld LJ stated at [36]:

"It seems to me that the key to the scheme is that the Inspector is to be shut out from making a discovery assessment under the section only when the taxpayer or his representatives, in making an honest and accurate return or in responding to a section 9A enquiry, have clearly alerted him to the insufficiency of the assessment in question."

140. Sections 29(6) and (7) TMA 1970 explain what is meant by "information being available", and what is assumed to be in front of the hypothetical HMRC officer.

141. Section 34 TMA 1970 allows an assessment to be made within a certain time period, without HMRC having the burden of proof to show that there was carelessness on the part of the taxpayer.

142. "Staleness" is a concept which HMRC submit is not within s. 29(1) TMA 1970, nevertheless HMRC accept that the Tribunal is currently bound by decisions of higher courts.

Applying the principles - 2000-01, 2001-02

143. For 2000-01, the Appellant submitted his SATR (being in response to a s.8 TMA 1970 Notice) on 10 January 2002, and an enquiry was opened on 12 December 2002 under s. 9A TMA 1970.

144. For 2001-02 the Appellant submitted his SATR on 1 October 2002, and a s. 9A TMA 1970 enquiry was opened on 8 August 2003.

145. By way of a letter of 24 January 2003, amendments were submitted which were to be made to the appropriate boxes of the 2000-01 and 2001-02 capital gains pages of the SATRs. These were within time for any amendments to be made under s. 9ZA TMA 1970.

146. These amendments were for additional costs to be included in the computations of the capital gains tax liability arising on transactions that had already been reported on the returns and created losses.

147. Mr Hall contended that the correct regime to enquire into these additional costs was by way of s. 9A TMA 1970, as they fed into the computation of the capital gains tax position for the year under s. 2(2) TCGA92.

148. These additional costs were not stand-alone gains, to which Schedule 1A TMA 1970 applied, the legislation is clear, as was the letter of 24 January 2003.

149. Mr Hall submitted that the correct procedure had been followed, culminating in the closure notices issued under s 28A TMA 1970 in respect of these two years.

150. Reliance on *Cotter* v. *HMRC* [2013] UKSC 69 and *Derry* v. *HMRC* [2019] UKSC 19 is misplaced as the applicable capital gains tax legislation is different to the income tax claims legislation interpreted in those cases. The facts are clearly distinguishable.

151. Mr Hall submitted is not precisely clear as to why the Appellant is arguing that Schedule 1A TMA should be followed: taken to an extreme, any amendment resulting in a loss of one year being used in another would depend on an element of hindsight validation

2004-05, 2006-07, 2011-12, and 2012-13

152. For each of these later years, the capital gains tax computation for each year involved determining the net figure of the chargeable gains of the year, and deducting the losses brought forward from earlier years.

153. Therefore, Mr Hall submitted that as these figures were part of the computation of the liability of the Appellant, and were part of the return, the correct procedure was to enquire by way of s. 9A TMA 1970, which was done.

154. This view is reinforced by the way in which the legislation allows the losses to be preserved by reference to the annual exempt amount for capital gains tax, under s. 3 TCGA92.

2009-10 Assessment

155. Mr Hall submitted that it was useful to consider each of the years 2009-10 and 2010-11 together to illustrate why HMRC contend that there is a discovery assessment for 2009-10, but not for 2010-11.

156. As noted in the background, the enquiry caseworker had the issue of the losses brought to his attention on 1 March 2012, well outside the 12-month enquiry window for 2009-10 which expired in December 2011 but within the enquiry window for 2010-2011.

157. This letter of 1 March 2012 then impinged on the validity of the 2010-11 assessment, under s. 29(6)(d)(ii) TMA 1970, and so the condition in s. 29(5) TMA 1970 was not satisfied for that year: the hypothetical officer would have been alerted to the existence of the MvJ losses at that time. The hypothetical officer could have been reasonably expected, on the basis of the information made available to him before that time, to be aware of them. That was why HMRC's Review concluded that the 2010-11 assessment was invalid and should be cancelled.

158. However, for the 2009-10 assessment, neither the SATR for that year, nor for the two preceding years, contained a reference regarding the nature of the capital losses brought forward, and so reliance on s. 29(5) TMA 1970 was satisfied: the hypothetical officer was not alerted to the MvJ losses by December 2011 - by the time he ceased to be permitted to open an enquiry. An officer could only reasonable have been aware of the losses from 1 March 2012.

159. The assessment was also made within the time allowed by s.34 TMA 1970.

160. As to staleness, Mr Hall submitted that it may be seen that the enquiries into the underlying events that created the losses to be brought forward were ongoing, and so this is not a "*most exceptional*" case where HMRC had done nothing as envisaged in *Patullo*: see *Marano* [72-3]:

'72. Lord Glennie agreed with Mr Gordon. He said...
"…But I consider that Mr Gordon was right to accept that it would only be in the most exceptional of cases that inaction on the part of HMRC would result in the discovery losing its required newness by the time that an assessment was made."
73. However, Lord Glennie did not interfere with the FTT's finding of fact that the discovery had been made sometime between July and November 2009, with the assessment having been made in January 2010, and thus was not stale.'

161. In view of *Tooth* being heard by the Supreme Court in spring 2021, Mr Hall respectfully submitted that if the Tribunal found that there was "staleness" in respect of the 2009-10 assessment, then the decision in this case on that point could be held over for submissions on that point alone, once the decision in *Tooth* had been published.

162. Concerning any argument about legitimate expectation, which was not in issue in the appeal, it was accepted that this is not within the jurisdiction of the First-tier Tax Tribunal, following the Upper Tribunal decision in *HMRC v. Abdul Noor.* Further, in *Hely-Hutchinson,* the Court of Appeal addressed MvJ issues of legitimate expectation and abuse of power. It was held in those judicial review proceedings that HMRC could resile from their previously expressed guidance in 2003 and follow their revised guidance of 2009 without that constituting an abuse of power.

Appellant's submissions

163. Mr Sherry, on behalf of the Appellant, submitted as follows.

The Law on the first issue
164. The relevant provisions are to be found in the Taxation of Chargeable Gains Act 1992:

a. s.1 which levies the charge of the tax*;*
b. s.2 which provides for the amount to be charged to the tax to be chargeable gains less allowable losses;
c. s.16 which deals with the computation of losses and in particular subsection (2A) which provides that a loss is not an allowable loss unless notified and that sections 42 and 43 Taxes Management Act 1970 apply to such a notice as if it were a claim for relief. Section 43 deals with time limits and is of no further assistance;

The relevant provisions are also found in the Taxes Management Act 1970:
d. Section 42(2) requires a claim to be made on a return if it can be, where a notice to file a return has been given in respect of the year in question.
Section 42 goes on to provide that:
e. Schedule 1A is to apply to claims and elections made otherwise than in a return; and
f. Schedule 1B is to apply to claims for relief involving two or more years of assessments;
g. Returns are generally to include a self-assessment of tax under Taxes Management Act 1970 s.9*;*
h. The Revenue can enquire into such returns under Taxes Management Act s.9A.

165. Mr Sherry submitted that the decisions in *Cotter v. R&CC* ("Cotter") and *Derry v R&CC* ("Derry") are concerned with the mechanics of making enquiries. Section 9A enquiries are confined to the taxpayer's self-assessment - matters which "feed into" the self assessment of tax due - see *Cotter* at [22] –[26] and *Derry* at [50] – [52].

166. Mr Sherry submitted that the first issue comes to this: do the notifications of losses in issue "feed into" the self assessments for years to 5 April 2001 and 5 April 2002? If not, then any enquiry under section 9A does not extend to other matters for example "stand alone" claims even where they are made on the return form. Enquiries in those cases must be made pursuant to Schedule 1A to the TMA 1970.

The Law: Issue 2

167. Mr Sherry submitted that the assessment for the year to 5th April 2010 was raised on the basis that the Officer making it had made a "discovery" and so was permitted to make an assessment under section 29 of the TMA 1970. Section 29 provides that where the officer "discovers" new facts which lead him to believe that the assessment is insufficient, he may make an assessment.

Submissions

Issue 1

168. Mr Sherry submitted that, as noted above, at the time of the notifications under consideration, on 24 January 2003:

a. For the year ended 5 April 2001, there was an open enquiry into the return (opened in December 2002); and
b. For the year ended 5 April 2002, there was no enquiry on foot but subsequently an enquiry was opened into the self-assessment in August 2003.

169. HMRC in a letter in March 2003 accepted the claim for losses in respect of the first year and stated that the claim in respect of the second would be processed.

170. Issue One: was such notification (treated as closed for the purposes of ss. 42 and 43 of the Taxes Management Act 1970) within the scope of the s.9A enquiry?

171. Mr Sherry submitted the answer must be "no". This is because the notification or claim to have the losses treated as allowable losses does not feed into the computation of assessment of income and gains for the year in question. All it does is to determine whether the losses in question are "allowable". If the losses are allowable then maybe some or all or none of them will fall to be included in the computation of the gains for the year in question. Those amounts feed in to the self-assessment and may properly be the subject of a s.9A enquiry - see the passages in *Cotter* at [22]-[28].

172. However, a notification which is treated as a claim in respect of losses to be treated as allowable losses, it is submitted, is a stand-alone claim and may only be enquired into under Schedule 1A, not section 9A of the TMA 1970.

173. In any event, the losses claimed did not in fact feature in the computations for the years to 5 April 2001 and 5 April 2002. So as a matter of fact, there was no "feeding in" to the self-assessment of capital gains tax payable for either year. Mr Sherry submitted that the decision in *Cotter* establishes that for a matter to be under enquiry it must in fact "feed into" self-assessments. The Appellant relied upon the decision in *Derry* to assist in understanding *Cotter.*

174. The "amendments" to the Return made by the notifications being treated as claims do not alter or affect in any way the tax payable in respect of the year to 5 April 2001 nor in respect of the year to 5 April 2002.

175. Accordingly, the appeal in respect of the allowable loss claims for the years to 5 April 2001 and 5 April 2002 should be allowed.

176. So far as the subsequent years under appeal are concerned, it is common ground that the capital gains tax computation for each of those years involved determining the net figure of chargeable gains for each year and deducting the available allowable losses brought forward from earlier years and not previously utilised. If the Appellant succeeds in respect of the notifications of losses, to be treated as allowable losses for the years to 5 April 2001 and 5 April 2002, then it follows that they will be allowable losses for each of the subsequent years. Therefore, if the taxpayer succeeds in relation to the validity of the notification and as to the absence of any enquiry into them, the result is the losses stand for all subsequent periods and the appeals succeed for all periods.

Submissions: Issue 2

177. Further and alternatively, Mr Sherry submitted that if the Appellant's arguments on the first issue failed, then the discovery assessment for the year 2009-2010 was nonetheless invalid because:

a. it is for the Revenue to establish that they have made a valid assessment in the circumstances authorised by TMA 1970, s.29*;*

b. so far as the taxpayer is concerned, on the basis of *Tooth* (see [60] – [61]), the Revenue must establish that the "discovery" of facts led to the assessment and that there was no delay between the information coming to their attention and the assessment being made so as to render the discovery "stale" by the time of the assessment.

178. Mr Sherry submitted that the background to this matter generally includes the ongoing discussions between the Revenue and the Appellant's agents so that when the notification was made in January 2012 as to the nature of the losses claimed in the return for the year to 5 April 2010, HMRC were in that context on full and immediate notice as to the nature of the losses being claimed.

179. The HMRC officer would have been immediately alive to the absence of an assessment in relation to that year and also of an ongoing enquiry enabling them to adjust the self assessment for the year 2009-10.

180. Therefore, Mr Sherry submitted, it would have been obvious that the self-assessed tax was, in the Revenue's view, under assessed. This goes to the question as to whether or not in the circumstances there was delay. Mr Sherry submits that there was unreasonable delay between January or March 2012 when the discovery was made and the assessment being issued in December 2013 so that the discovery became stale and lost its essential newness.

181. Accordingly, Mr Sherry submitted the appeals should be allowed in respect of tax years 2001 and 2002 and the conclusions in respect of the notification of the losses reversed. Therefore, the appeals against all the conclusion notices in respect of all subsequent years and against the assessment for the year to 5th April 2010 should also be allowed.

Discussion and Decision

The First issue

Conclusion

182. We are satisfied that the Appellant's claims in 2003 for MvJ losses for each of the 2000-01 and 2001-02 tax years were amendments to the returns and validly enquired into by the Revenue under section 9A TMA 1970 such that the later closure notices (and disallowance of losses) were validly issued by HMRC under section 28A. The Appellant has not discharged his burden of proof to establish otherwise.

183. As a matter of fact, the Appellant's accountant's letter of 24 January 2003 presented the claim for the losses as amendments to the returns as filed rather than standalone claims. As a matter of law, for the reasons set out below, these were not standalone claims that required to be enquired into under Schedule 1A of the TMA 1970. On the facts of this case, the law, as interpreted in *Cotter v HMRC*, did not require the Revenue to have enquired into the losses as standalone claims under paragraph 5 of Schedule 1A TMA 1970 (with the mechanism for disallowing losses being closure notices issued under paragraph 7).

184. Further, the letter of 24 January 2003 did not conform to the requirements for a standalone claim under paragraph 2 of Schedule 1A to the TMA 1970 – for example paragraph 2(4) requires a standalone claim to contain a declaration of truth.

185. As the notifications of MvJ losses by the Appellant for the two tax years were validly enquired into and disallowed, then they were not allowable losses available to be carried forward for use in subsequent periods tax years 2004 onwards. Therefore, the section 28A closure notices and amendments to the returns charging additional tax for the later years, 2005 onwards, were valid.

186. We have arrived at these conclusions largely for the reasons that HMRC submitted.

Reasons

187. Firstly, capital gains tax losses are computed in the same way as gains chargeable to capital gains tax: s.16(1) Taxation of Chargeable Gains Act 1992 ("TCGA92"), subject to a few specified exceptions.

188. Secondly, capital gains tax is charged on the total gains of the year less any allowable losses of the year, less earlier losses brought forward: see section 2(2) TCGA92.

189. Any capital loss must be notified and quantified before it can be allowed: see section 16 TCGA92.

190. Sections 42 and 43 TMA 1970 apply by virtue of section 16(2A) TCGA92.

191. By way of section 42(2) TMA 1970, any capital loss must be made on a return where one has been issued under section 8 TMA 1970. Section 42(5) extends this to include claims to capital losses to be made on amendments to returns, as in the current case.

192. These provisions apply to the Appellant's returns for the years 2001 and 2002. For each year, he was issued with a return which gave him notice to file for the years 2000-2001 and 2001-2002 and he duly filed such returns.

193. Section 42(11) TMA 1970 provides that Schedule 1A TMA 1970 only applies where a claim is made outside a section 8 return being issued. It does not apply to the facts of this case because the letter of 24 January 2003 was an amendment to two returns filed pursuant to section 8 TMA 1970.

194. Where, as in this case, a return was made under section 8 TMA 1970, an enquiry under section 9A TMA 1970 may be opened. The enquires were opened under section 9A in December 2002 in respect of 2000-01 and August 2003 in respect of 2001-2002.

195. Any enquiry under s. 9A TMA 1970 may extend to considering *"anything contained in the return, or required to be contained in the return, including any claim or election included in the return*" by way of section 9A(4) TMA 1970.

196. A section 9A TMA 1970 enquiry may also extend to considering any amendment made under s. 9ZA TMA 1970. The amendments to both returns were included within the letter of 24 January 2003 and the schedule thereto.

197. Even if the claims in that letter did not constitute amendments to the return and were standalone claims, they would have been required to be contained in the Appellant's returns because section 42(2) and (5) TMA 1970 required the capital losses to have been included in a return or amendment where section 8 notices to file had been issued as they had to the Appellant in this case.

198. A return under section 8 may be amended with the window allowed by s. 9ZA TMA 1970, however if there is already an open s. 9A TMA 1970 enquiry into a return, section 9B TMA 1970 operates to allow the s. 9ZA amendment to be taken into account in the relevant open section 9A enquiry.

199. The Appellant filed his returns for the two years pursuant to a section 8 TMA 1970 notice 'for the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment'. He did not qualify for exemption under 8C and accordingly every disposal was in scope. His return was prepared accordingly, including a calculation of amounts chargeable to income tax and capital gains tax for the year of assessment under section 9 TMA 1970.

200. As Mr Sherry noted under s16(2)(A) TCGA a loss does not become an allowable loss unless notice is filed, however the inclusion in the return is treated by HMRC as being notice and this is specifically stated in the notes accompanying the tax return. Whilst of course a separate claim could be made later, the clear intent is as far as possible to encompass capital gains within the annual self-assessment regime; including any previously notified directly. The structure being to aggregate all gains and losses within the tax year and either have a chargeable gain or a loss to carry forward. As Mr Hall noted at that stage, any losses lose all trace of any individual components and are simply a balancing figure carried forward.

201. This is made clear by section 1 of the TGCA gains on disposals in the tax year are offset by allowable losses in the year (and subject to the annual exemption) then by any losses brought forward from previous years. It is necessary therefore to challenge any losses claimed in the tax year of disposal otherwise they simply become 'baked into' a merged total and not separately identifiable in subsequent years.

202. Consider this hypothetical situation with brought forward losses of £2,000 from a previous year, with gains and losses in the current year leading to a net loss of £10,000 and a loss of £12,000 carried forward to a future year:

B/F	Current year	C/F
	10,000	
	70,000	
	4,000	
	6,000	
	(2,000)	
	(8,000)	
	(60,000)	
	(15,000)	
	(15,000)	
(2,000)	(10,000)	(12,000)

203. There is no identity to the £10,000 in-year loss and if there were gains to absorb of £2,000, there would similarly be no way of determining whether these were the £2,000 previously brought forward or the £2,000 loss that might be said to make up part of the £10,000 loss. The only way that any of the losses in the 'current year' could be challenged or enquired into would be in respect of that year of assessment.

204. Mr Sherry's solution to this would be to use schedule 1A TMA 1970, on the basis that 16(2)(A) TGCA provides that sections 42 and 43 of the TMA 1970 shall apply in relation to such a notice as if it were a claim for relief.

205. However, section 42(2) TMA 1970 provides that where notice has been given under 'section 8 of this Act, a claim shall not at any time be made otherwise than by being included in a return under that section if it could, at that or any subsequent time, be made by being so included'. Section 42(5) extends this to include amendments to returns, as in the current case. The claims that were made on 24 January 2003 had to be included in returns, or amendment to returns, because notices to file had been issued under section 8 to the Appellant and returns had been filed in response and the claims could, at the time of filing or subsequently have been included. Pursuant to section 9ZA TMA 1970 the Appellant had until 31 January 2003 to make an amendment to his 2000-01 return filed in January 2002 and until 31 January 2004 to amend his 2001-02 filed in October 2002.

206. We are further satisfied that the Appellant's reliance on *Cotter* as approved in *Derry* to suggest HMRC should have enquired under Schedule 1A TMA 1970 is misplaced. Mr Sherry relies upon paragraphs 23-25 in particular and in particular Lord Hodge's judgment at paragraph 25:

'The tax return form contains other requests, such as information about student loan repayments (page TR2), the transfer of the unused part of a taxpayer's blind person's allowance (page TR3) or claims for losses in the following tax year (box 3 on page Ai3) which do not affect the income tax chargeable in the tax year which the return form addresses. The word "return" may have a wider meaning in other contexts within TMA. But, in my view, in the context of sections 8(1), 9, 9A and 42(11)(a) of the TMA, a "return" refers to the information in the tax return form which is submitted for "the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax" for the relevant year of assessment and "the amount payable.'

207. Mr Sherry argues that a section 9A enquiry was not available because the enquiry was not in relation to the relevant returns as understood in *Cotter*. This was because the MvJ capital losses for 2001 and 2002 were not information which affected

the establishment of the amounts in which the Appellant was chargeable to income tax and capital gains tax for each of the two individual years of assessment.

208. He submits that the Appellant was liable to pay zero capital gains tax on the basis of the original return and also on the basis of the amendments claimed. Therefore, the Appellant was not due to pay any capital gains tax for the year of assessment even when the claimed losses were disallowed – the claims had no effect on the amount of tax the Appellant was to pay, only the extent of capital losses. The capital losses did not affect the amount of capital gains tax to pay for the years of assessment which was always going to be zero as there were losses exceeding gains – they only affected the extent of losses to be carried forward to future years. Therefore, the losses claimed were not information for "the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax", they were not therefore returns and section 9A was not available as the power under which HMRC could make enquiries.

209. However, we are satisfied that calculating the extent of the losses claimed by the letter of 24 January 2003 did affect the amounts of loss to be carried forward for future years and the amount of tax that was to be paid in the later years of assessment even though allowance of the losses claimed would not affect the capital gains tax to pay for the specific years of assessment to which the return related. Determining the extent of losses was relevant to the computation of capital gains tax that a taxpayer would ultimately have to pay in specific tax years. In principle, although not on the facts of this case, a claim to further losses could also have affected the tax to be paid in the specific year of assessment.

210. The one paragraph in *Cotter* should not be read out of context to limit the information that can be enquired into under section 9A when the information is directly relevant to the future amounts of capital gains tax payable for a taxpayer in later years of assessment. If the amendment had decreased the losses, hence creating or increasing any net gains, it would have created capital gains tax for the Appellant to pay for the year of assessment contained in the returns. It would be perverse if HMRC could not enquire under section 9A into amendments leading to increases in losses but could only enquire into amendments leading to increases in gains. Both ultimately will affect the amount of capital gains tax a taxpayer will be required to pay.

211. Even more perversely, one can imagine a situation where losses are claimed or notified (which are to be taken as an amendment to a return), which might, when enquired into and depending on the extent they are allowed, lead to either a total net gain (in which case capital gains tax would become payable for the year of assessment) or to a total net loss (in which case no tax would be payable for the year of assessment and the losses simply carried forward).

212. On the Appellant's interpretation of *Cotter*, how would HMRC know whether to make enquiries under section 9A TMA 1970 or schedule 1A until the enquiry was concluded and a determination made as to how much, if any, of the losses were to be allowed?

213. Only in coming to conclusions at the end of the enquiry as to what losses would be allowed, could HMRC know whether any part of any losses claimed affected the tax to be paid in the specific year of assessment (ie. whether the amendment was part of a return). If the tax to be paid was affected, HMRC would only know that the claim should have been enquired into under section 9A after it had concluded the enquiry. Conversely, only once they had decided whether to allow losses which would not affect the amount of capital gains tax to be paid for that year (but might only affect the tax

payable for later years) could HMRC know that the claims should have been enquired into under schedule 1A as standalone claims. That would be a perverse interpretation of the legislation.

214. We are satisfied that [25] of *Cotter* does not apply to this case. *Cotter* was decided on its own (very different) facts which are distinguishable from this appeal. *Cotter* concerned that taxpayer's ability to bring back losses for the two previous years to set off against income tax for the purposes of sections 128 to 130 of the Income Tax Act 2007. This was provided for under a special regime under Schedule 1B TMA 1970. That is a wholly different set of facts to this case, which concerns the ability to carry forward capital losses for the purposes of capital gains tax in subsequent years.

215. In *Cotter* the information supplied by the taxpayer was found not to constitute an amendment to a return but a standalone claim – it could not affect the in-year return but an earlier one. In *Cotter* there was no possibility of any return yet having been issued or filed for period 08-09 in which relief for the previous two years would have to be considered. The claims were made in January 2009 before the end of the tax year in April 2009. No notice to file had been issued for that year for the purposes of section 8 TMA 1970 and hence standalone claims had to be made and enquired into under Schedule 1A as there was no return to enquire into. The information for 07-08 was outside the scope of the return.

216. In the Appellant's case, notices to file were issued under section 8 TMA 1970 for both years and returns were filed and section 9A could and had to be used.

217. In the Appellant's case, the letter of 24 January 2003 provided information which was intended and did amend the returns already filed as we have found.

218. Another important distinction between the current case and *Cotter* is that set out by Lord Hodge at [27] of the judgment, which we are satisfied applies to the Appellant's case:

> 27.Matters would have been different if the taxpayer had calculated his liability to income and capital gains tax by requesting and completing the tax calculation summary pages of the tax return. In such circumstances the Revenue would have his assessment that, as a result of the claim, specific sums or no sums were due as the tax chargeable and payable for 2007/08. Such information and self assessment would in my view fall within a "return" under section 9A of TMA as it would be the taxpayer's assessment of his liability in respect of the relevant tax year. The Revenue could not go behind the taxpayer's self assessment without either amending the tax return (section 9ZB of TMA) or instituting an enquiry under section 9A of TMA.

219. In the Appellant's case, he had calculated his liability to income and capital gains tax with his returns for 2000-2001 and 2001-02 by completing the tax calculation summary pages of each return. There was a computation – and the net gains or loss calculation was crucial to the charge of capital gains tax in the year in question and future years. HMRC had received the Appellant's self assessment of the sums due in each year as the tax chargeable and the losses to be carried forward which would affect tax charged in future years.

220. Paragraph 27 of *Cotter* applies to the Appellant's returns. HMRC initially opened their section 9A enquiry for 2000-01 for Income tax and National Insurance Contributions but on receipt of the amendments to the returns validly extended their enquiries into the extent of the MvJ losses. HMRC opened their section 9A enquiry for

2001-02 in relation to the return and amendment on the basis of enquiring into the MvJ losses.

221. For the sake of completeness, we also address the argument raised in the Appellant's accountant's correspondence with HMRC in 2013 and as the sixth ground of appeal which is now abandoned. It was submitted as follows:

'Section 16 of the Taxation of Chargeable Gains Act 1992 was amended by the insertion of subsection (2A) which provides as follows:

"A loss accruing to a person in a year of assessment shalt not be an allowable loss for the purposes of this Act unless, in relation to that year, he gives a notice to an officer of the Board quantifying the amount of that loss; and sections 42 and 43 of the Management Act shall apply. In relation to such a notice as if it were a claim for relief."

Thus under the self assessment regime taxpayers have to, at some stage, notify HMRC of losses, quantifying them. The notice takes effect as a claim, and sections 42 and 43 of the Taxes Management Act 1970 apply to that claim in the ordinary way.

Consequently if the amount notified is agreed, that takes effect as though it were the allowance of a claim. Having been allowed, those losses, in the amount claimed, are thereafter allowable losses.

Section 2(2) of the 1992 Act deals with the treatment of allowable losses which are to be offset against gains arising on the year in which the loss arises and to the extent not so offset, they are to be offset in subsequent years.

It is true that the amount of such allowable losses carried forward and available for offset in a given year may be the subject of verification upon an enquiry onto the self assessment for that subsequent year. However, what Is not open to dispute is that allowable losses which have been the subject matter of a notice under section 16(2A) and which has been allowed, are allowable losses.

We thought this much was trite law. Indeed, we find that it as recognised in HMRC's interna1 guidance manual at CG15813 where it is stated:

"The amount of a loss .... will become final If the claim is not enquired into within the enquiry time limit." The position must be a fortiori where the claim is explicitly agreed. We conclude therefore that the loss claim made on 24 January 2003 has been allowed in full. CG15813 goes on

"The deduction of an allowable loss from chargeable gains does not require a claim and does not extend the time limit for enquiring into the original loss claim, "

So 'It is not open to HMRC to dispute the allowability of our client's losses in the course of an enquiry into a self assessment return. Since the notification of the amount of the losses is treated as a claim, the only basis upon which they can be enquired into is, as C615813 states, if the claim itself is enquired into. Even then if the claim is explicitly (or implicitly) agreed it is "allowed", and it cannot thereafter be rejected or denied by an enquiry into a subsequent return. As CG15813 states, the claim process gives finality.'

222. Even though we are not required to decide this issue, the sixth ground of appeal has been abandoned and it is not determinative of nor material to the outcome of this appeal, we are satisfied that this argument has no merit.

223. Sections 42 and 43 of TMA apply to the notice under section 16(2A) TCGA 1992 as if it were a claim to relief.

224. We do not agree that even if the amount notified is agreed, it takes effect as though it were the allowance of a claim. There is no statutory provision for this.

225. Section 42 (2) TMA 1970 provides:

"Subject to sections (3) and (3A) below, where notice has been given under section 8. 8A or 12AA of this Act, a claim shall not at any time be made otherwise than by being included in a return under that section if it could, at that or any subsequent time. be made by being so included.

226. Section 42 (5) provides:

"The references in this section to a claim being included in a return include references to a claim being so included by virtue of an amendment to a return"

227. The Appellant's 2001 return was received on 10 January 2002. The time limit for amending the return pursuant to section 9ZA TMA 1970 was 31 January 2003. The Appellant's 2002 return was received on 11 October 2002, and the time limit for amending the return was 31 January 2004. Both returns were filed in response to notices to file under section 8 TMA 1970.

228. The Appellant's loss claims were made on 24 January 2003 and received by HMRC on 27 January 2003. The covering letter requested amendment to the returns.

229. The claims were therefore capable of being included m the returns by amendment and must be treated so by virtue of section 42 (2).

230. An enquiry was opened into the Appellant's 2001 return on 12 December 2002 and into his 2002 return on 8 August 2003.

231. The enquiries were opened under the provisions of Section 9A TMA 1970. Section 9A (4) (a) states that the enquiry extends to "anything contained in the return. or required to be contained in the return, including any claim or election included in the return".

232. The enquiry into the 2001 return was opened before the claim to loss relief for that year.

233. Section 9B (1) applies if a return is amended at a time when an enquiry into the return is in progress, and Section 9B (2) enables the amendment to be taken into account in the enquiry.

234. The returns for 2001 and 2002 were still under enquiry when HMRC sent its letter of 26 March 2003 purporting to accept the losses for the earlier year and therefore nothing in the return or amendment to the return became final until the enquiries were closed by the closure notices of March 2015.

235. This is supported by HMRC's guidance: "The amount of loss ...... win become final if the claim is not enquired into within the enquiry time limit" But since the returns (including the claims) were enquired into within the time limits, the amount of loss did not become final until the enquiries were completed and closure notices issued.

Second issue – validity of discovery assessment for tax year 2009-2010

236. There is no dispute between the parties that the statutory conditions under sections 29 and 34 of the TMA 1970 were fulfilled for Officer Moran to make a valid discovery assessment for tax year 2009-2010 as he did on 4 December 2013.

237. It was an assessment under section 29(1)(b) that he had discovered the self assessment to capital gains tax for the relevant year had become insufficient.

238. An assessment under s. 29 TMA 1970 may be made, subject to conditions laid down by s. 29(1), and s. 29(3) where a return under section 8 TMA 1970 has been issued.

239. Additionally, section 29(3) TMA 1970 requires that at least one of two alternative conditions should be met, including that in section 29(5), which requires that at the time when an officer of the Board—

> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under [section 8 or 8A] of this Act in respect of the relevant [year of assessment]; or
>
> (b) informed the taxpayer that he had completed his enquiries into that return, the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

240. As we have set out in the factual findings, Officer Freer had the issue of the MvJ losses brought to his attention on 1 March 2012, well outside the 12-month enquiry window for 2009-10 which expired in December 2011.

241. For the 2009-10 tax year, neither the SATR for that year, nor for the two preceding years, contained a reference regarding the nature of the capital losses brought forwards, and so section 29(5) TMA 1970 is satisfied: the hypothetical officer was not alerted to the MvJ tax losses nor could they have reasonably been expected to be. Any HMRC officer could not have been reasonably expected on the basis of the information available to them by December 2011, to be aware of the MvJ losses, let alone any insufficiency of tax.

242. The assessment was also made within the four-year time-limit from the end of the tax period 2009-2010 allowed by section 34 TMA 1970.

243. The statutory conditions under sections 29 and 34 of the TMA 1970 have been satisfied in respect of the assessment.

244. The remaining questions for us to decide are: whether HMRC have proved that an officer made a discovery of insufficiency of tax (as opposed to making a discovery of MvJ losses claimed for the year); which officer did so; and when they did so.

245. The further question for us to decide is whether HMRC have proved that, if HMRC made a discovery of an insufficiency of tax, that discovery did not become stale before the assessment was made – that the discovery did not lose its essential newness and become stale.

246. We have made a series of factual findings above: a) that it was Officer Moran who made the relevant discovery of an insufficiency of tax in November 2013 rather than Officer Freer in March 2012; b) that even if it the discovery was made in March 2012 by Officer Freer, it did not become stale by the time it was issued in December 2013. The full chronology and reasons are set out above in our factual findings. However, we repeat the conclusions below as they are a result of applying our factual findings to the law as we have interpreted it.

247. For any assessment to be valid, the assessing officer must believe that they have discovered an insufficiency of tax (the subjective test), and that belief is one which a reasonable officer could form (the objective test): see Jerome *Anderson v HMRC* [2018] UKUT 0159 (TCC) [28] - [30].

248. For the reasons we have set out above, we are not satisfied that HMRC Officer Freer subjectively believed he had made a discovery of an insufficiency of tax in March 2012 based upon a fair reading of his letters, even if objectively it might have been

reasonable for an officer to believe so. There was nothing in HMRC's correspondence in January to March 2012 from which we reasonably infer that Officer Freer did anything more than believe he had discovered MvJ losses claimed for the tax year 2009-2010. HMRC's letter of February 2012 invited the Appellant to withdraw his claim. Officer Freer in March 2012 then wished to ask the Appellant and his advisers to state their intentions regarding the claimed losses – to provide further information.

249. Officer Freer knew that there were now MvJ losses claimed for the relevant year and that HMRC had a general policy in respect of such losses. However, he had not come to a clear conclusion at this time that the losses were being continuing to be claimed, was asking for more information from the Appellant, and had not decided that specific claim. We are not satisfied that in March 2012 Officer Freer had crossed the threshold and come to believe that there was an insufficiency of tax in respect of the specific losses that the Appellant claimed.

250. In contrast, Officer Moran's subjective belief he had discovered an insufficiency of tax is obvious from his pre-assessment letter of 3 December 2013 in which he states that an assessment will be issued the following day. He had clearly come to a view by this time at the latest, that the MvJ losses should be disallowed. The Officer did this despite, inviting the Appellant to provide any further evidence on legitimate expectation by 31 December 2013 and accepting that HMRC might not proceed with the assessment if there had been an abuse of power due to breach of a legitimate expectation.

251. Officer Moran's belief he had made a discovery of an insufficiency of tax was objectively reasonable by this point of time in light of all the material he had before him when he took over conduct of the case.

252. We are satisfied that HMRC have proved the discovery of an insufficiency of tax was only made by Officer Moran between November and December 2013 after he took over and reviewed all the papers in the case and came to the view that none of the Appellant's arguments should succeed and capital losses claimed should not be allowed. We have based this finding on an objective reading of the contemporaneous documents without taking into account Officer Jackson's oral evidence which was only hearsay as to what Mr Moran's views or beliefs were and what his view was of the correspondence.

253. We accept Mr Hall's submission that it was only at this time that the threshold was crossed and an HMRC Officer (Mr Moran) was of the view that on the balance of probabilities there was an insufficiency of tax. Officer Moran made this discovery freshly in November to December 2013 – as above, Officer Freer had discovered MvJ losses but not previously crossed the threshold to decide that they should be disallowed such that he had discovered there was an insufficiency of tax.

254. Officer Moran's discovery in November 2013 was not simply based on the material previously provided in January to March 2012 that there were £140,000 of MvJ losses claimed and that HMRC's general and revised policy from 2009 was to disallow such claims. It was only after considering the arguments raised on behalf of the Appellant that he reached the view on the specific facts of the Appellant's case the losses claimed should be disallowed. He considered both the factual and legal submissions provided between March 2012 and December 2013.

255. Even if there were no new facts regarding the MvJ losses and their extent that came to light during this time, there were new facts contained in the correspondence regarding the question of whether Appellant relied to his detriment on HMRC letter of 26 March 2003 accepting losses or its general policy of January 2003 on allowing MvJ losses. These new facts, as asserted in correspondence were relevant to the question of

legitimate expectation and the other legal arguments then relied upon so the new material provided after March 2012 was not simply confined to new legal arguments. In any event, a change of view of the same facts can amount to a discovery without any new facts emerging.

256. We are satisfied that HMRC's correspondence between March 2012 and December 2013 was not simply them delaying and appearing to offer a taxpayer a fair process and reasonable opportunity to be heard, when they had already made a decision to disallow the losses back in March 2012. Even if that had been HMRC's preliminary view in March 2012 it was not a concluded view. We are satisfied HMRC did engage in a genuine attempt to consider the specific facts of the Appellant's case before deciding whether to disallow losses and charge additional tax. Officer Moran considered not only new legal submissions made after March 2012 but new factual submissions provided by the Appellant's accountants that were not contained either in his return or the letters of January 2012 to March 2012.

257. The correspondence on legitimate expectation and other legal arguments raised by the Appellant and his advisers applied to all assessments including 09-10. HMRC had to consider these arguments to conclude whether there was an insufficiency of tax or whether losses claimed could be allowed on basis of legitimate expectation or some other legal basis. HMRC was entitled to take a reasonable amount of time to form a view upon whether there was to be a tax consequence as a result of the losses claimed.

258. As above, we have disregarded Officer Jackson's oral evidence as to what may have been in Officer Moran's mind or what the general approach of HMRC's team dealing with the MvJ issue may or may not have been.

259. Further or alternatively, even if we had been satisfied that Officer Freer had made the discovery of an insufficiency of tax in March 2012 and the assessment was only raised in December 2013, we would not be satisfied that the assessment had become stale or lost its essential newness over that time.

260. There was activity over this 21 month period with HMRC genuinely attempting to engage with consideration of whether the MvJ losses should be allowed – it was not inevitable that they would be disallowed if to do so might constitute an abuse of process or was not permitted by the statute – it was not a process only conducted for show. The correspondence and activity demonstrated a genuine attempt on the part of both parties to see if they could settle the liability to tax and agree the losses. This required consideration of legal and factual issues.

261. While HMRC were slow to reach a concluded view, and could have acted more quickly in reaching a final conclusion, they were not unreasonable in taking the time they did. We accept the evidence of Officer Hall that there were 1,100 outstanding cases involving MvJ losses that a team of HMRC officers had to consider and make individual decisions upon. HMRC gave the Appellant a genuine opportunity to argue to demonstrate why the losses should be allowed, engaged with the arguments and gave reasons for rejecting them.

262. We are therefore satisfied that the discovery assessment in relation to the period 2009-2010 was valid.

Conclusion

263. For the reasons set out above, we reject the Appellant's arguments in respect of both the first and second issues. We are satisfied that the appeal should be dismissed.

264. We are satisfied that the enquiries, closure notices and discovery assessment were all validly made under sections 9A, 28A and 29 of the TMA 1970. We confirm HMRC's decisions disallowing the losses claimed and charging the additional tax set out in the assessments for all the years in question.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

265. 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 RUPERT JONES

RELEASE DATE: 4 DECEMBER 2020