OLD SQUARE
TAX CHAMBERS

CHALLENGING ASSESSMENTS

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INTRODUCTION

1. In *Whitney v IRC* [1926] AC 37 Lord Dunedin identified the tripartite nature of the UK tax code in the following terms:

> *'Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay.'*

2. Although many disputes focus on the first stage, liability, the question of assessment can be equally important. In particular, if HMRC are out of time to assess, issues of liability become redundant.

3. There is a public interest in achieving finality in fiscal transactions. This applies to HMRC and taxpayers alike and has led to legislation which limits the rights of either to alter the assessed position unless certain circumstances prevail.

4. In this talk I address the extent of the limits on HMRC's ability to alter or add to the liabilities to which taxpayers are assessed where there is a dispute as to liability. Those limits can provide a defence to a taxpayer, even where there may be an underlying liability. It is therefore important to understand their scope.

5. Philip Simpson QC will address the ways in which the legislation limits the ability of taxpayers to alter their assessed liabilities, principally in terms of making claims.

BASIS OF ASSESSMENT

6. The main ways in which HMRC can assess a taxpayer are as follows:

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(i) **Simple assessments**[1]**:** HMRC can assess via a simple assessment when a person has not delivered a return under section 8 for that year or when they have not required a person to do so. This is an assessment of the amounts in which the person is chargeable to income tax and capital gains tax for the year of assessment to which it relates. It must be based on information relating to the person that is held by HMRC, whether or not supplied by the person to whom the assessment relates. HMRC are not limited to issuing more than one simple assessment to the same person in respect of the same year of assessment (whether or not any earlier simple assessment for that year is withdrawn).

(ii) **Closure notice following an enquiry:** HMRC can assess through a closure notice following an enquiry into a return[2]. A closure notice must state that in the officer's opinion no amendment of the return is required, or it must make the amendments of the return required to give effect to his conclusions.

[1] 28H TMA 1970 for personal assessments (the same provisions in substance apply to trustee returns under section 28I TMA 1970 regarding trustee assessments

[2] Under section 28A TMA 1970 following an enquiry for personal and trustee returns, section 28B TMA 1970 for partnership returns, section 12ZM TMA 1970 for NRCGT returns, paragraph 32 of schedule 18 of the Finance Act 1998 for corporation tax returns and paragraph 23 of schedule 10 of Finance Act 2003 for SDLT returns.

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(iii) **Jeopardy assessments**[3]**:**. A jeopardy assessment is made to a taxpayer's self-assessment during an enquiry if there is reason to believe that the subsequent settlement of the additional liability may be in jeopardy (hence the name).

(iv) **Determination where no return delivered**[4]**:** where a return has not been made after the filing date, HMRC can assess a taxpayer to the best of an officer's information and belief. That stands as a self-assessment until an actual return is delivered.

(v) **Discovery assessment:** HMRC are empowered to issue a discovery assessment where a loss of tax is discovered. This power and the limitations on it are discussed below.

7. In the following I address issues concerning the main types of HMRC investigation and assessment: enquiries followed by a closure notice and discovery assessments.

ENQUIRIES

8. A return made under section 8 TMA 1970 will contain a self-assessment by the taxpayer. Similar provisions govern trustees returns (section 8A TMA 1970), partnership returns

[3] Under section 9C TMA 1970. This type of assessment can also be made during an enquiry into a corporation tax return under paragraph 30 of schedule 18 of the Finance Act 1998 and under paragraph 17 of schedule 10 of Finance Act 2003 for enquiries into SDLT returns.

[4] Under section 28C TMA 1970 for individuals and trustees.

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(section 12AA TMA 1970), non-resident CGT returns (section 12ZB TMA 1970) and corporation tax returns (paragraph 3 of schedule 18 of Finance Act 1998). HMRC are entitled to enquire into these returns[5].

9. This is a wide power which, in view of HMRC's general powers of management and administration of the tax system, is subject to few limitations. In particular, HMRC need not suspect that there is a matter which should be enquired into. A random enquiry will be lawful if undertaken in pursuit of HMRC's management powers.

10. That said, general considerations of public law will apply. It would not be open to HMRC to open an enquiry for an extraneous purpose unrelated to their powers of management, although proving such would not be an easy matter.

11. A more difficult question concerns HMRC's practice of opening enquiries with no apparent intention of advancing that enquiry. In these cases, the purpose of opening an enquiry is less about enquiring into the taxpayer's affairs and more about placing the tax position in stasis until such time as HMRC get around to dealing with it. Given the principle that a power is only exercisable for its true and dominant purpose (see *R v Southwark Crown Court ex p. Bowles* [1998] AC 641 and *Barry Lennon v HMRC* [2018] UKFTT 0220) it is open to question whether it is open to HMRC to use their enquiry powers in this way.

12. Pragmatically, however, a taxpayer in such a position can force HMRC's hand by seeking a closure notice. That topic is addressed by Ross Birkbeck in his talk.

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[5] Section 9A TMA 1970 for personal returns and for trustee returns, section 12AC TMA 1970 for partnership returns, section 12ZM TMA 1970 for non-resident CGT returns, and paragraph 24 of schedule 18 of Finance Act 1998 for corporation tax returns). HMRC can also enquire into a land transaction return if they give notice of their intention to do so to the purchaser within a 9 month period, see paragraph 12, schedule 10 of Finance Act 2003.

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13. Other limitations are that a return which is the subject of one enquiry cannot be the subject of another (unless it has been amended)[6].

Time limits

14. The main limitation, however, is that an enquiry must be opened within a specified time. Until 31 March 2008 the time limit for opening enquiries on returns received on or before the fixed 31 January filing date was the following 31 January. The current position is set out in section 9A(2) TMA 1970:

> *(2) The time allowed is–*
>
> *(a) if the return was delivered on or before the filing date, up to the end of the period of twelve months [after the day on which the return was delivered];*
>
> *(b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered;*
>
> *(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.*

15. See also section 12AC(2) for partnership returns, section 12ZM(2) for NRCGT returns, and paragraph 24(2)-(4) of schedule 18 of Finance Act 1998 for corporation tax returns.

Closure notice

16. There is no right of appeal against a notice opening an enquiry (*Spring Capital Ltd v HMRC* [2013] UKFTT 41 (TC) at [32]). Any such challenge would accordingly have to be by way of judicial review.

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[6] Section (9A(3) TMA 1970 for personal and trustee returns, section 12AC(3) TMA 1970 for partnership returns, and paragraph 24(5) of schedule 18 of Finance Act 1998 for corporation tax returns). There does not appear to be a limitation of this kind in section 12ZM TMA 1970 for NRCGT returns.

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17. The taxpayer's principle redress against an enquiry is to seek a closure notice. There is no limit on how long an enquiry should last or when a closure notice must be made by. The argument that statutory time limits apply to enquiries under the TMA 1970 was rejected by Patten J in *Morris v HMRC*. In that respect, the ability to apply to the Tribunal to direct a closure notice becomes more important.

Opening an enquiry

18. This of course raises a question as to when and how an enquiry is opened. An enquiry is opened by an officer of the Board giving notice of his intention to enquire into a return[7].

Form of notice

19. The burden of showing that an enquiry has been opened is on HMRC. There is, however, no prescribed form for a notice opening an enquiry and it need not be by a single document. It is sufficient that the notice sufficiently makes the taxpayer aware of HMRC's intention to open an enquiry on an objective basis (*Revenue and Customs Commissioners v Mabbutt* - [2017] STC 1873 para 44ff).

20. It need not be in writing (*R (on the application of Spring Salmon and Seafood Ltd) v Inland Revenue Commissioners* - [2004] STC 444 para 23) although in practice it is likely to be so.

21. The notice must be given by HMRC. It is not enough for the taxpayer to learn of HMRC's intention to inquire (*William Tinkler v HMRC* [2018] UKUT 0073 (TCC) para 70).

[7] Section 9A(1) TMA 1970 for personal and trustee returns, section 12AC(1) for partnership returns, section 12ZM(1) TMA 1970 for NRCT returns, and paragraph 24(1) of schedule 18 of Finance Act 1998 for corporation tax returns

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Place of service

22. In practice the issue is likely to revolve around whether the notice was in fact served. In this respect, section 115 TMA 1970 provides that a notice will be validly served if sent to a usual or last known place of residence:

> *(1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence.*
>
> *(2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person by HMRC may be so served addressed to that person—*
>
> *(a) at his usual or last known place of residence, or his place of business or employment, or*
>
> *(b) in the case of a company, at any other prescribed place and, in the case of a liquidator of a company, at his address for the purposes of the liquidation or any other prescribed place.*
>
> *(3) In subsection (2) above "prescribed" means prescribed by regulations made by the Board, and the power of making regulations for the purposes of that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of the House of Commons.*

Notice to an agent

23. In *William Tinkler v HMRC* [2018] UKUT 0073 (TCC) the Upper Tribunal was concerned with a notice of enquiry that had been sent to an address the appellant was no longer living at, with a copy sent to the appellant's agents. The Appellant argued that notice of the enquiry had not been given because his agents did not have authority to receive notice of an enquiry.

24. Judges Berner and Sinfield concluded that this was sufficient notice of an enquiry:

> *36. We agree with the FTT in [107] that there is nothing in section 9A of the TMA that disapplies the normal rules of agency so as to require express authorisation by the taxpayer for the agent to receive a particular kind of notice. As the FTT stated, all that is required is actual or apparent authority for the agent to receive notices on behalf of the taxpayer in order for service of the section 9A notice on the agent to be service on the taxpayer. We do not agree,*

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> *however, with the FTT's conclusion that BDO had neither apparent or actual authority to receive the notice of enquiry.*

25. Authorisation in a form 64-8 was sufficient to give actual and apparent authority.

26. Furthermore, "a copy of the notice of enquiry sent to an agent can be effective notification to the principal even where the copy is sent for information purposes and not explicitly by way of service".

27. The UT did however reject an argument of HMRC based on estoppel by convention. This principle does not operate to preclude a taxpayer from relying on the protection of the notice and limitation period provisions in section 9A.

Date of service

28. The timing of when a notice is delivered turns on when a notice is received or treated as received. Section 7 of the Interpretation Act 1978 treats service as having been effected at the time when the letter would be delivered in the ordinary course of post, but this presumption can be displaced by evidence of actual later receipt with the consequence that a notice is out of time (see *Holly and another v Inspector of Taxes* - [2000] STC (SCD) 50).

Officer of the board

29. As regards the meaning of "officer of the Board," an argument that this requires a degree of seniority was rejected by the Special Commissioner in *Bensoor v Devine* [2005] STC (SCD) 297

> *Clearly he was not an inspector as defined in s 118. However, s 9A does not refer to the expression 'inspector'. Section 39 of the 1890 Act does not define 'officer of the Board'; it simply defines 'Officer' as 'Officer of Inland Revenue'. It makes no reference to inspectors or employees. (As Mr Williams mentioned, at the time of that legislation such officers were in many cases self-employed.) I accept Mr Williams' argument that Parliament could not have*

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> *intended the inconvenient results in relation to self-assessment returns of a requirement that the person issuing the s 9A notice must be a higher-grade officer such as an inspector.*

30. That does not, however, mean that the requirement is meaningless. In the context of a notice to file under section 8(1) TMA 1970 the FTT has stated (*Shaw v HMRC* [2018] UKFTT 381 (TC)) that:

> *The phrase "given to him by an officer of the Board" means what it says. I would expect any such notice to be signed by a named officer and evidence provided which shows that to be the case. The officer giving the notice needs to be identified in the notice because the return must be made and delivered to that officer. In other words there must be evidence that the named officer has signed the notice or it must be otherwise made clear that he is "giving" it.*

Voluntary returns

31. The obligation to file a return is not automatic. It arises when notice to make a return is provided to the taxpayer. A return which is made absent an obligation is strictly voluntary.

32. HMRC successfully argued that a voluntary return is not a return for the purposes of the statute in *Bloomsbury Verlag GmbH v Revenue and Customs Commissioners* - [2016] SFTD 205. That was in the context of a corporation tax return which had been filed without a notice requiring the Appellant company to do so. The Tribunal concluded (paras 91 to 104) that as there was no legal obligation to make the return, it was voluntary and was therefore not to be treated as a return for the purposes of the relevant legislation. This allowed HMRC to disallow a claim.

33. This Tribunal again considered a similar issue in the context of self-assessment return in *Revell v Revenue and Customs Commissioners* - [2016] SFTD 618. It accepted that as there was no legal obligation to file a tax return in that case, the enquiry which HMRC had purported to open had no effect.

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34. These decisions were relied upon by the taxpayer to dispute the validity of a closure notice in *Patel v Revenue and Customs Commissioners* [2018] UKFTT 185 (TC). Judge Guy Brannan accepted that HMRC did not have power to enquire into a tax return where the returns had been submitted by the taxpayers voluntarily without HMRC issuing any notice to do so under section 8(1) TMA 1970. As there was no 'return' for the purposes of section 9A TMA 1970, it followed that there could be no enquiry. As there was no enquiry, there could be no closure notice to conclude it under section 28A (1) TMA 1980.

35. Judge Brannan considered that the statutory language was "perfectly clear" stating that: "It is plain that "a return under section 8 " is a return which the taxpayer has been "required by a notice given to him by an officer of the Board to make and deliver to the officer". There is no arguable alternative interpretation".

36. In a similar vein, an appeal against late filing penalties was allowed in both *DJ Wood v HMRC* [2018] UKFTT 74 and *Shaw v HMRC* [2018] UKFTT 381 (TC) on the grounds that there could be no obligation to file a return absent a notice to do so (para 38).

Deemed notice to make a return

37. On 29th October 2018, HMRC published a policy paper concerning voluntary returns for income tax, capital gains tax and corporation tax, following the announcement of the measure in the 2018 Budget.

> *"Historically HMRC Commissioners have exercised their discretionary collection and management powers to accept and treat Income and Corporation Tax Self-Assessment returns received from customers voluntarily, on the same basis as tax returns received under a statutory notice to file.*
>
> *This has been the case since the start of Self-Assessment in 1996 to 1997 and is well accepted and adopted practice by both HMRC and its customers.*
>
> *In the light of recent legal challenges to the practice and the validity of returns received voluntarily, legislation will be introduced with retrospective effect to put the practice onto a statutory basis.*

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> *This removes any doubt for HMRC taxpayers that voluntary tax returns have and will continue to be accepted as valid returns."*

38. The policy objective was stated to be as follows:

> *"This measure will assure taxpayers who send in tax returns on a voluntary basis that they will be treated in the same way as if the tax return was requested under a statutory notice to file. This will provide certainty and finality for all returns received to date and going forward."*

39. This begs the question as to why HMRC were arguing the contrary in *Bloomsbury Verlag GmbH*.

40. The amendments will be introduced by a new section 12D TMA 1970 (and para 20A Sch.18 FA 1998 for corporation tax) which will treat a voluntary return as having been made in response to a notice where:

> *"HMRC treats the relevant return as a return made and delivered in pursuance of such a notice".*

41. This seemingly preserves HMRC's ability to deny claims in a voluntary return while permitting it to impose requirements on the taxpayer as the result of such a return.

42. The amendments leave open the question of whether a voluntary return can attract a penalty, or whether it remains incumbent on HMRC to show that a notice to file had been served before a penalty can be imposed.

43. The change has been welcomed by the CIOT (Director of Tax Policy John Cullinane) on grounds that:

> *"By putting HMRC's practice onto a statutory footing, this ensures that taxpayers who submit returns voluntarily will continue to benefit from various rights and safeguards that depend upon having submitted a return that has been demanded by the law. Whilst we do not normally support retrospective changes, we agree that it is right in these circumstances to make this change retrospective."*

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44. It is doubtful whether this is correct in view of the nature of the changes. It also seems to give no weight to the rights of taxpayers who will retrospectively be deprived of legal rights.

45. As regards the retrospective nature of the amendments, clause 86(3) and (4) of Finance Bill 2018-19 currently states:

> *(3) The amendments made by this section are treated as always having been in force.*
>
> *(4) However, those amendments do not apply in relation to a purported return delivered by a person if, before 29 October 2018–*
>
> *(a) the person made an appeal under the Taxes Acts, or a claim for judicial review, and*
>
> *(b) the ground (or one of the grounds) for the making of the appeal or claim was that the purported return was not a return under section 8, 8A or 12AA of TMA 1970 or paragraph 3 of Schedule 18 to FA 1998 because no relevant notice was given.*

46. It is open to question whether these amendments are compliant with Article 1 Protocol 1 ECHR. This is not a case where the retrospective legislation is returning the law to the position generally understood, or where it is reversing tax avoidance.

47. Rather, it is allowing HMRC to impose a tax charge where none would otherwise apply by reversing a legal situation which HMRC actively argued for.

48. This raises a question as to whether as a matter of construction the changes can cause what was not previously an enquiry to become one, or whether it is open to HMRC to assess on the basis of such a resurrected enquiry (section 6 HRA 1998).

49. A penalty based on these retrospective changes also raises issues concerning article 7 ECHR.

DISCOVERY ASSESSMENTS

50. The second principal basis by which HMRC can raise an assessment is under section 29 TMA 1970 which allows an assessment where a loss of tax is discovered. Importantly,

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however, there are a number of limitations on how and when HMRC can issue such an assessment:

> *(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment–*
>
> *(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or*
>
> *(b) that an assessment to tax is or has become insufficient, or*
>
> *(c) that any relief which has been given is or has become excessive,*
>
> *the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.*
>
> *(2) Where–*
>
> *(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and*
>
> *(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,*
>
> *the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.*
>
> *(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above–*
>
> *(a) in respect of the year of assessment mentioned in that subsection; and*
>
> *(b) ... in the same capacity as that in which he made and delivered the return,*
>
> *unless one of the two conditions mentioned below is fulfilled.*
>
> *(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.*
>
> *(5) The second condition is that at the time when an officer of the Board–*
>
> *(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or*
>
> *(b) in a case where a notice of enquiry into the return was given–*
>
> *(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or*
>
> *(ii) if no such partial closure notice was issued, issued a final closure notice,*

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the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

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

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

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

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer ...5; or

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

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

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

(7) In subsection (6) above–

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes–

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods;

(ia) a reference to any NRCGT return made and delivered by the taxpayer which contains an advance self-assessment relating to the relevant year of assessment or either of the two immediately preceding chargeable periods; and

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

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

(7A) The requirement to fulfil one of the two conditions mentioned above does not apply so far as regards any income or chargeable gains of the taxpayer in relation to which the taxpayer has been given, after any enquiries have been completed into the taxpayer's return, a notice under section 81(2) of TIOPA 2010 (notice to counteract scheme or arrangement designed to increase double taxation relief.

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> *(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.*
>
> *(9) Any reference in this section to the relevant year of assessment is a reference to–*
>
> *(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and*
>
> *(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made.*

51. The relevant provisions for corporation tax can be found in paragraph 41-46 of schedule 18 of the Finance Act 1998.

52. A number of issues arise from this including

(i) Is there a discovery of a loss of tax within subsection (1)?

(ii) Was the return leading to the loss of tax in accordance with the practice generally prevailing?

(iii) Was there careless or deliberate behaviour by the taxpayer within subsection (4)?

(iv) Could the hypothetical inspector have been aware of the loss of tax when he ceased to be entitled to open an enquiry or when he closed one (subsection (5))?

Discovery

53. In *Revenue and Customs Commissioners v Charlton* [2012] UKFTT 770 (TCC), it was held by Judge Norris and Judge Berner when addressing the meaning of 'discovery' that:

> *"In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself…*
>
> *If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it*

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> *might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment. But that would not, in our view, include a case, such as this, where the delay was merely to accommodate the final determination of another appeal which was material to the liability question. Such a delay did not deprive Mr Cree's conclusions of their essential newness for s 29(1) purposes."*

54. The officer must believe that the available information points in the direction of a discovery and that belief must be a reasonable one for the officer to hold (see *Anderson v HMRC* [2018] STC 1210 between paragraphs 28 to 30).

55. The issue of staleness or essential newness of assessment has been the subject of discussion in a number of subsequent cases.

56. In *Tooth v Revenue and Customs Commissioners* - [2018] STC 824 the Upper Tribunal (Marcus Smith J and Judge Charles Hellier) considered "staleness". They said at [79] after approving what was said at [37] in the Upper Tribunal decision in *Charlton and others v HMRC* [2012] UKUT 770 (TCC) that:

> *"79. Broadly speaking, we agree with this statement of the law [in Charlton]. However, for the purposes of determining this case, it is necessary to consider the question of 'newness' and its corollary 'staleness' in a little greater detail:*
>
> *(1) The 'discovery' in section 29(1) TMA relates to one of the three situations set out in section 29(1)(a), (b) or (c). If it is discovered that such a situation pertains (or may pertain: all that is required is for the officer to act honestly and reasonably), then the officer is at liberty to make an assessment under section 29 TMA.*
>
> *(2) We should say that we see no reason why one officer cannot make the discovery and delegate to another officer the making of the Decision, set out in paragraph 40 above. However, it is important, we consider, to bear in mind that section 29 TMA envisages two stages – (i) the discovery and (ii) the making of the assessment consequent upon the discovery.*
>
> *(3) We entirely agree with the Upper Tribunal in Charlton that on making a discovery, HMRC must act expeditiously in issuing an cannot make a discovery. Indeed, that is confirmed by the reference to the "Board" (a collective) in section 29(1) TMA. If to use the words of Charlton, an officer has made a discovery, then any assessment must be issued while the discovery is new.*
>
> *(4) It follows from this that the same officer (or officers) cannot make the same discovery twice. We see no reason, however, why the same officer cannot, for different reasons, discover that one of the situations set out in section 29(1)(a), (b) or (c) pertains a second time. Suppose an*

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officer discovers that an assessment to tax has become insufficient for a certain reason, but HMRC decides not to issue an assessment because the point is controversial and the amount small. Suppose that officer then – for different reasons – discovers that the assessment has become insufficient. We consider that this, second, discovery could justify the making of an assessment.

(5) The position is, obviously, a fortiori where two different officers are independently involved. Again, provided the basis for the discovery is different, there is a statutory basis under section 29(1) for issuing two assessments.

(6) What, however, if two different officers independently make the same discovery? In our judgment, as a matter of ordinary English, a discovery can only be made once. We accept that section 29(1) TMA is framed by reference to the subjective state of mind of an officer or the board, but what is a "discovery" is an objective term. It seems to us that in this case, the first officer makes the discovery; the second officer simply finds out something that is new to him. In particular if one officer is made aware of, and accepts, the conclusion of another officer it cannot be said that the first officer made a discovery.

(7) We consider that such a construction is necessary for the protection of both the taxpayer and officers of HMRC:

(a) The taxpayer, as we have found, should be protected from stale assessments. It follows that, if the first officer – for whatever reason – having made the discovery and (following the two-stage process we have described in paragraph 79(2) above) having determined not to issue an assessment, that outcome ought to be binding on HMRC. No doubt such an officer would record his discovery, and the reason for not issuing an assessment, in the files.

(b) As to HMRC's position, in their own interests, officers need to have clarity as to what constitutes a "discovery" for the purposes of section 29 TMA. For example, any second officer making a "discovery" in succession to another officer might, should an assessment be issued, be faced with a contention that his "discovery" was in some way an illicit attempt to re-open a stale point. Inevitably, there would have to be questions regarding what the second officer knew of the first officer's work, and whether the second officer's "discovery" was related to that of the first officer and so not his own at all. As can be seen from paragraph 88(7) below, we consider that this is a case where HMRC's officers would have benefited from a clear understanding of the requirements of section 29 TMA."

57. This was applied in *Monaghan v HMRC* [2018] UKFTT 156 (TC) (TC06408) where the Tribunal held that

> *"...the discovery used to justify the making of the assessment in 2017 was made at the latest in 2014, albeit by a different officer. There is no good reason for the failure to make an assessment in 2014".*

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58. In a similar vein the FTT noted in *Gordon v HMRC* [2018] UKFTT 307 (TC) (TC06537) that:

> *(1) First, in our view HMRC's approach pays insufficient attention to the point, made very clearly in Burgess and Brimheath Developments, that the burden is on HMRC to make a positive case that the requirements of s 29 TMA are met. This includes making sure that the evidence needed to support that case is before the Tribunal. In circumstances where it was clear that HMRC had identified an issue with Wenns by 2010, they needed to do something more to explain why no assessments were issued until March 2014, beyond simply saying (in the example of Mr Gordon's case) that there was no evidence before the Tribunal that a discovery was made before August 2013.*
>
> *(2) Secondly, it appeared to us that the reasons for the delay in issuing assessments on all four appellants might be explained not by a delay in concluding that their self assessments were insufficient, but rather by delays in deciding whether, following the Gibson judicial review litigation, HMRC should or should not exercise their collection and management powers to pursue the appellants. In our view that sort of decision-making process is not relevant to s 29(1). In that scenario an officer would have concluded that there is an insufficiency in the assessments, but HMRC have not yet determined whether further assessments should be made.*

59. More recently in *Beagle v HMRC* [2018] UKUT 0380 (TCC) the Upper Tribunal rejected an argument on the part of HMRC that there was no concept of 'staleness' involved in discovery, albeit that it was considered that the issue was a matter best reviewed by the higher courts (paras 60 and 61). It went on to hold that:

> *"The delay of two and a half years in the issue of the assessment was material. If the discovery was to retain its quality of "newness" notwithstanding that delay, it was incumbent upon HMRC to take further steps in order to preserve that quality in the period between the making of the discovery and the issue of the assessment in January 2008. In our view, the discovery had lost its quality of newness by the time of the issue of the assessment and so the assessment was not valid."*

Generally accepted practice

60. What is meant by a "generally accepted practice" was considered in *Boyer Allan Investment Services Ltd (formerly Boyer Allan Investment Management Ltd) v Revenue and Customs Commissioners* - [2013] SFTD 73, where the FTT explained it in the following terms:

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> *As we have described, we have formed the view that, to be a practice for this purpose, it must be something capable of being clearly articulated, and articulated not just by the Revenue, or just by taxpayers' advisers, but by both, and by both in the same terms. An interested enquirer, seeking to establish whether there is a practice on a particular point, must be given the same answer, whomever he might turn to within those who have the relevant knowledge. The answer in each case must be clear and unequivocal, characteristics that follow from the context of providing certainty, for the Revenue and taxpayers alike, in which para 45(b) finds itself.*

61. As regards the need to show such a practice, Henderson J in *HMRC v Household Estate Agents Ltd* 78 TC 705 made clear that the burden is on the taxpayer to show such a practice.

> *"...the burden was on the company to establish both an operative mistake in the return and the practice generally prevailing in August 2000. The company failed to adduce evidence on either of those questions, and relied only on the submissions recorded in para 6 of the case stated. Those submissions refer to what was alleged to be 'the profession's view' that s 43 of the Finance Act 1989 did not apply to contributions to EBTs. However, without any evidence to support that assertion, and without any evidence that the Revenue took the same view, there was no material before the commissioners which could support a conclusion that a settled practice existed, let alone a settled practice which could properly be described as 'the practice generally prevailing at the time'. Without attempting to give an exhaustive definition, it seems to me that a practice may be so described only if it is relatively long-established, readily ascertainable by interested parties, and accepted by HMRC and taxpayers' advisers alike: compare the decision of the Special Commissioners (Dr A N Brice and Mr John Walters QC) in Rafferty v Revenue and Customs Comrs [2005] STC (SCD) 484, para 114".*

Deliberate behaviour

62. The reference to a loss of tax brought about deliberately in section 29(4) TMA 1970 is expanded by section 118(7) TMA 1970 which states:

> *(7) In this Act references to a loss of tax or a situation brought about deliberately by a person include a loss of tax or a situation that arises as a result of a deliberate inaccuracy in a document given to Her Majesty's Revenue and Customs by or on behalf of that person.*

63. The meaning of this was addressed in *Tooth v Revenue and Customs Commissioners* - [2018] STC 824:

> *[64] Self-evidently, the mere completion of a return—whilst a deliberate act, in the sense that the taxpayer deliberately fills it in and submits it—cannot of itself amount to a deliberate*

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> *inaccuracy in a document. The deliberation must relate to the inaccuracy, not merely the completion and submission of the document.*
>
> *[65] In a case said to fall within s 29(1)(b) TMA ('an assessment to tax is or has become insufficient'), we consider that s 118(7) does no more than make clear that an 'insufficiency' within s 29(1)(b) TMA can be brought about by a deliberate inaccuracy in a document given to HMRC.*
>
> *[66] The mere insertion of a figure into a document that is inaccurate may be a deliberate act, but it is not, necessarily, a deliberate inaccuracy. In this case, we do not consider that the inaccuracies alleged by HMRC can be said to be deliberate, because Mr Tooth took steps to draw the (putative) inaccuracies to the attention of HMRC.*
>
> *[67] Accordingly, we find that Mr Tooth did not act deliberately within the meaning of s 29(4) TMA (as elucidated by s 118(7) TMA), and that HMRC's appeal must fail on this ground also. We consider that the FTT did not err in finding that Mr Tooth had not acted deliberately. There is no evidence of any intent on the part of Mr Tooth to bring about an insufficient assessment of tax or give to HMRC a deliberately inaccurate document. (Obviously, Mr Tooth wished to pay as little tax as was legally permissible, but that is not paying an insufficient amount of tax.) HMRC contended that the FTT had wrongly distinguished the decision in Moore v Revenue and Customs Comrs [2011] UKUT 239 (TCC), [2011] STC 1784. We disagree with HMRC's contention and agree with the reasoning of the FTT for, essentially, the reason given by the FTT. Moore was concerned with an alleged negligent insufficiency of tax which, we consider, involves very different considerations to where the insufficiency is said to have been brought about deliberately.*

Careless behaviour

64. Section 118(5) TMA provides that a loss of tax is brought about carelessly if the person "fails to take reasonable care to avoid bringing about that loss".

65. In *Anderson v Revenue and Customs Commissioners* [2017] SFTD 100 it was explained that this is an objective test, in the sense that it is necessary to consider what a reasonable hypothetical taxpayer would do. However, it also allows account to be taken of the actual circumstances of the taxpayer in question: see (in the context of the similar language in s 29(4) TMA) (para 121 to 122).

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Information available to the hypothetical officer

66. Numerous cases have addressed the issue of whether the information provided to HMRC is sufficient that the hypothetical officer would have made that officer aware of an actual insufficiency of tax. The Court of Appeal summarised the principles in *Sanderson v Revenue and Customs Commissioners* [2016] STC 638, where they explained the purpose of this provision as being related to the taxpayer's disclosure:

> *Section 29(5) operates to place a restriction on the exercise of that power by reference to a hypothetical officer who is required to carry out an evaluation of the adequacy of the return at a fixed and different point in time on the basis of a fixed and limited class of information. The purpose of the condition is to test the adequacy of the taxpayer's disclosure, not to prescribe the circumstances which would justify the real officer in exercising the s 29(1) power.*

67. In the same case it summarised the relevant principles:

> *[17] The power of HMRC to make an assessment under s 29(1) following the discovery of what, for convenience, I shall refer to as an insufficiency in the self-assessment depends upon whether an officer 'could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the [insufficiency]'. It is clear as a matter of authority:*
>
> *(1) that the officer is not the actual officer who made the assessment (for example Mr Thackeray in this case) but a hypothetical officer;*
>
> *(2) that the officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law: see Revenue and Customs Comrs v Lansdowne Partners Ltd Partnership [2011] EWCA Civ 1578, [2012] STC 544, 81 TC 318;*
>
> *(3) that where the law is complex even adequate disclosure by the taxpayer may not make it reasonable for the officer to have discovered the insufficiency on the basis of the information disclosed at the time: see Lansdowne at [69];*
>
> *(4) that what the hypothetical officer must have been reasonably expected to be aware of is an actual insufficiency: see Langham (Inspector of Taxes) v Veltema [2004] EWCA Civ 193, [2004] STC 544, 76 TC 259 (per Auld LJ at [33]–[34]):*
>
> > *'[33] More particularly, it is plain from the wording of the statutory test in s 29(5) that it is concerned, not with what an Inspector could reasonably have been expected to do, but with what he could have been reasonably expected to be aware of. It speaks of an Inspector's objective awareness, from the information made available to him by the taxpayer, of "the situation" mentioned in s 29(1), namely an actual insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an*

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insufficiency, as suggested by Park J. If he is uneasy about the sufficiency of the assessment, he can exercise his power of enquiry under s 9A and is given plenty of time in which to complete it before the discovery provisions of s 29 take effect.

[34] In my view, that plain construction of the provision is not overcome by Mr Sherry's argument that it is implicit in the words in s 29(5) "on the basis of the information made available to him" (my emphasis) and also in the provision in s 29(6)(d) for information, the existence and relevance of which could reasonably be inferred from information falling within s 29(6)(a) to (c), that the information itself may fall short of information as to actual insufficiency. Such provision for awareness of insufficiency "on the basis" of the specified information or from information that could reasonably be expected to be inferred therefrom does not, in my view, denote an objective awareness of something less than insufficiency. It is a mark of the way in which the subsection provides an objective test of awareness of insufficiency, expressed as a negative condition in the form that an officer "could not have been reasonably expected ... to be aware of the" insufficiency. It also allows, as s 29(6) expressly does, for constructive awareness of insufficiency, that is, for something less than an awareness of an insufficiency, in the form of an inference of insufficiency.'

(5) that the assessment of whether the officer could reasonably have been expected to be aware of the insufficiency falls to be determined on the basis of the types of available information specified in s 29(6). These are the only sources of information to be taken into account for that purpose: see Langham v Veltema at [36]:

'The answer to the second issue–as to the source of the information for the purpose of s 29(5)–though distinct from, may throw some light on, the answer to the first issue. 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 s 9A enquiry, have clearly alerted him to the insufficiency of the assessment, not where the Inspector may have some other information, not normally part of his checks, that may put the sufficiency of the assessment in question. If that other information when seen by the Inspector does cause him to question the assessment, he has the option of making a s 9A enquiry before the discovery provisions of s 29(5) come into play. That scheme is clearly supported by the express identification in s 29(6) only of categories of information emanating from the taxpayer. It does not help, it seems to me, to consider how else the draftsman might have dealt with the matter. It is true, as Mr Sherry suggested, he might have expressed the relevant passage in s 29(5) as "on the basis only of information made available to him", and the passage in s 29(6) as "For the purposes of subsection (5) above, information is made available to an officer of the Board if, but only if," it fell within the specified categories. However, if he had intended that the categories of information specified in s 29(6) should not be an exhaustive list, he could have expressed its opening words in an inclusive form, for example, "For the purposes of subsection (5) above, information ... made available to an officer of the Board ... includes any of the following".'

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Time limits for issuing a discovery assessment

68. The time limit for HMRC to make an assessment is 4 years for income tax and capital gains tax under section 34 of the TMA 1970. The time limit for assessments is the same for stamp duty land tax under paragraph 31 of schedule 10 of the Finance Act 2003 and corporation tax under paragraph 46 of schedule 18 of the Finance Act 1998.

69. The time limit in section 34 TMA 1970 runs from the date the assessment is made, not from the date it is notified or served, see *Honig v Sarsfield* [1986] STC 246

Extended time limits for careless and deliberate conduct

70. Under section 36(1) TMA 1970, the usual 4-year time limit for assessments extends to 6 years for careless conduct and to 20 years under section 36(1)(A) TMA 1970 for deliberate conduct. These carry the meanings discussed above.

71. This is the same for SDLT under paragraph 31 of Schedule 10 of the Finance Act 2003 and for corporation tax under paragraph 46 of schedule 18 of the Finance Act 1998.

Burden of proof

72. The onus is on HMRC to demonstrate that there has been a valid assessment and that burden extends beyond addressing points positively raised by the taxpayer. As such, HMRC must raise a positive case showing that the requisite elements for a discovery assessment are met (*Burgess and Brimheath Developments v HMRC* [2016] STC 579).

73. Where HMRC are alleging carelessness or deliberate conduct, the burden of proof is on HMRC to demonstrate such. This has been confirmed in a number of cases.

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New legislation extending time limits for non-deliberate behaviour relating to offshore matters and offshore transfers

74. Clauses 79 and 80 of Finance (No.3) Bill issued on the 7th November 2018 is extending the current 4 and 6 year time limits for income tax, CGT and IHT relating to "offshore matters" to 12 years:

> *"(1) This section applies in a case involving a loss of income tax or capital gains tax, where—*
>
> *(a) the lost tax involves an offshore matter, or*
>
> *(b) the lost tax involves an offshore transfer which makes the lost tax significantly harder to identify.*
>
> *(2) An assessment on a person ("the taxpayer") may be made at any time not more than 12 years after the end of the year of assessment to which the lost tax relates."*

75. This is subject to section 36(1)(A) TMA 1970 or any other provision allowing a longer period.

76. The explanatory notes to the new measure state the following at page 236:

> *"It can take longer to establish the facts in cases involving offshore assets and structures. This section has been introduced to give HMRC more time to bring proceedings in these offshore cases.*
>
> *This measure was announced in Autumn Statement 2017 as part of the government's strategic response to offshore tax evasion, avoidance and non-compliance.*
>
> *A consultation on the design principles for the legislation began on 19 February 2018 and closed on 14 May 2018. A response document was published with the draft legislation on 6 July 2018."*

77. These amendments have effect (clause 79(5) Finance Bill):

> *(a) in relation to assessments on a person relating to the 2013-14 year of assessment and subsequent years of assessment, where the loss of tax is brought about carelessly by that person or by a person acting on that person's behalf, and*
>
> *(b) in any other case, in relation to assessments relating to the 2015-16 year of assessment and subsequent years of assessment.*

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21 November 2018