Appeal number: TC/2014/05909

INCOME TAX – discovery assessment – s 29 TMA 1970 – assessment of unauthorised payments charge and unauthorised payments surcharge made by reference to a particular alleged unauthorised member payment – Tribunal finding that such payment was not an unauthorised member payment but that another payment was – whether the payment in question was within the scope of the assessment and the scope of the appeal

FIRST-TIER TRIBUNAL
TAX CHAMBER

GARETH CLARK **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
MS GILL HUNTER (Tribunal member)

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 27 April 2017

Michael Jones, instructed by Reynolds Porter Chamberlain LLP, for the Appellant

Jonathan Davey QC and Sam Chandler, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This decision addresses the one outstanding question in this appeal which remains following our decision released on 12 September 2016 ("the Substantive Decision"). It should be read as one with the Substantive Decision.

2. The appeal by Mr Clark is against a notice of assessment for the year ended 5 April 2010 in relation to an unauthorised payments charge and an unauthorised payments surcharge. The assessment, by reference to an alleged unauthorised payment of £2,115,049.68, is in the aggregate sum of £1,163,277.32, comprising an unauthorised payments charge of £846,019.87 and an unauthorised payments surcharge of £317,257.45.

3. As we described at [2] of the Substantive Decision, the assessment arose in relation to certain transactions which resulted in pension funds that had originally been held in Mr Clark's SIPP with Suffolk Life being transferred to a new scheme, the Laversham Marketing Limited Pension Scheme ("the LML Pension"), and from there to Laversham Marketing Limited ("LML") and Cedar Management Limited ("CIM"), out of which sums were lent to Mr Clark and funds were placed with an investment management firm, Quilter & Co.

4. Our conclusions on the substantive issue of whether there had been an unauthorised member payment in respect of Mr Clark, with the result that such payment would be chargeable in principle on Mr Clark as the person in respect of whom the payment was made, were set out at [141] of the Substantive Decision. We considered, and reached conclusions on, a number of alternative cases, but in essence we decided, first, that the transfer of funds by the LML Pension was not a payment by a registered pension scheme and accordingly that that payment was not an unauthorised member payment within the meaning of s 160(2) of the Finance Act 2004, but secondly that, in light of the fact that the LML Pension was constituted under a trust that was void for uncertainty, the transfer of funds by Suffolk Life to LML Pension was a payment by a registered pension scheme in respect of Mr Clark, a member of the Suffolk Life SIPP, and was not authorised by s 164 FA 2004; accordingly, that payment was an unauthorised member payment within s 160(2).

5. That meant that the substantive issue had been determined in favour of HMRC. We had found that there had been an unauthorised member payment in respect of Mr Clark in the tax year 2009-10. Mr Clark was accordingly chargeable to both the unauthorised payments charge and the unauthorised payments surcharge. The only question that remained was whether we should confirm the assessment. That is the question ("the assessment question") now before us.

The assessment

6. The notice of assessment, which was dated 25 March 2014 and issued by HMRC Officer Sarbjit K Sidhu, was in respect of a discovery assessment made under s 29 of the Taxes Management Act 1970 ("TMA").

7. The notice of assessment was addressed to Mr Clark. It was expressed to relate to the year ended 5 April 2010. It set out the amount of the assessment in the sum of £1,163,277.32, and enclosed with it a copy of the calculation of the amount charged by the assessment and a copy of Mr Clark's self assessment statement. We did not see a copy of the calculation, but the parties agreed that the notice of assessment itself contained no reasoned explanation for the assessment. The notice merely recorded:

> "I am sending this assessment to you because we have found that there is additional tax due that was not previously shown on your tax return. It is now too late for us to amend your tax return so this assessment allows us to collect the additional tax. We have made this assessment under Section 29 of the Taxes Management Act 1970."

The usual appeal rights were included within the notice of assessment.

8. By a letter to Mr Clark dated on the same date as the notice of assessment, Officer Sidhu explained the basis on which the assessment had been made. Officer Sidhu said:

> "Our information indicates that a payment made by Laversham Marketing Ltd Pension Scheme to you or in respect of you was not an authorised payment, I am currently liaising with Aston Court Chambers IOM Limited on obtaining further information regarding this matter.
>
> Following a change in legislation brought about by Schedule 39 Finance Act 2008 in relation to HMRC time limits for the issue of assessments and determinations, HMRC has issued an assessment in order to protect its position and ensure that any potential tax due for the year ended 5 April 2010 is not lost. This is in connection with the ongoing enquiry into the transfers into the Laversham Marketing Ltd Pension Scheme, your surrender of benefits under that scheme and the subsequent payment from the scheme to Laversham Marketing Ltd.
>
> The assessment is based on the surplus payment figure that was made to Laversham Marketing Ltd.
>
> …
>
> HMRC will continue with its enquiries in order to establish the correct amount of tax for the year ended 5 April 2010 and you should not, therefore, consider this assessment to signify the closure of HMRC's enquiries."

9. To avoid confusion, we should point out that the reference in Officer Sidhu's letter to an "ongoing enquiry" was to an enquiry into the return filed by the LML Pension, and not any enquiry into any of Mr Clark's tax returns.

The assessment question

10. As we described at [64]-[70] of the Substantive Decision, the principal issue in the appeal was always whether Mr Clark was liable to an unauthorised payments charge and an unauthorised payments surcharge in respect of an unauthorised

payment made by the LML Pension. It was only as the parties' arguments were further developed through the exchange of skeleton arguments shortly prior to the first hearing that it became apparent that Mr Clark's case extended further than the question whether the payment by the LML Pension to LML had been "in respect of" Mr Clark, and that it was argued, amongst other things, that the LML Pension was not a registered pension scheme as it was not established under a valid trust. That then opened up the further question whether the transfer of funds by Suffolk Life out of the SIPP (which was a registered pension scheme) to something that was not a registered pension scheme was itself an unauthorised member payment.

11. It is in that context that the assessment question arises. Put shortly, the question is whether the conclusion reached in the Substantive Decision that the transfer from LML Pension to LML ("the LML Transfer") was not an unauthorised member payment, and that Mr Clark was not subject to an unauthorised payments charge and an unauthorised payments surcharge in that respect has the effect that the discovery assessment was wrongly made and falls to be discharged, or whether, the Tribunal having found that Mr Clark was properly subject to those charges in relation to the transfer from the Suffolk Life SIPP to the LML Pension ("the Suffolk Life Transfer"), the assessment should be confirmed.

The law

12. The assessment on Mr Clark was a discovery assessment made under s 29 TMA. So far as is material for this appeal, s 29 provides:

> "(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) informed the taxpayer that he had completed his enquiries into that return,

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

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

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

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

(c) it is contained in any 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; 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."

13. We should note in this connection, although it is in the event not material to this appeal, that s 29 TMA is applied with certain modifications in relation to certain types of pension-related assessments. By regulation 9 of the Registered Pension Schemes (Accounting and Assessment) Regulations 2005, in those specified cases, s 29(1) is modified so as to include, as well as "any income" which ought to be assessed to income tax, "unauthorised payments under section 208 of the Finance Act 2004 or surchargeable unauthorised payments under section 209 of that Act or relevant lump sum death benefit under s 217(2) of that Act".

14. Although that would appear to be an apt provision in this case, it does not apply as regulation 9 restricts the application of the modified s 29 TMA to particular cases, of which Cases 1 and 2 are relevant, as they relate to assessments in respect of unauthorised payments charges and unauthorised payments surcharges. But those cases apply only where the person liable to the charge is a company (Table 2 in regulation 4 of the 2005 Regulations). They can have no application where, as in this case, the person assessed is an individual.

15. In consequence, the relevant limb of s 29(1) is not s 29(1)(a), but s 29(1)(b). Section 29(1)(a) does not apply because the modification by the 2005 Regulations does not have effect in this case, and there can be no discovery of income as such; by s 208(8) FA 2004, an unauthorised payment "is not to be treated as income for any purpose of the Tax Acts".

16. Once there has been a discovery, the assessment procedure is governed by s 30A TMA, which materially provides:

> "(1) Except as otherwise provided, all assessments to tax which are not self-assessments shall be made by an officer of the Board.
>
> …
>
> (3) Notice of any such assessment shall be served on the person assessed and shall state the date on which it is issued and the time within which any appeal against the assessment may be made.
>
> …"

17. Section 31 TMA makes provision for rights of appeal. Section 31(1) provides:

> "(1) An appeal may be brought against—
>
> (a) any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax),
>
> (b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return),
>
> (c) any amendment of a partnership return under section 30B(1) of this Act (amendment by Revenue where loss of tax discovered), or
>
> (d) any assessment to tax which is not a self-assessment."

18. The only other statutory provisions to which we need refer are those which describe the powers of the Tribunal on an appeal, namely s 50(6) and (7) TMA:

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

Discussion

19. Mr Clark's case in this respect is that the scope of a discovery assessment is limited to the "loss of tax" which the HMRC officer has "discovered" under s 29(1) TMA. It does not extend beyond that. In this case, Mr Jones submitted, the "loss of tax" discovered by Officer Sidhu was the tax that ought to have been charged on the LML Transfer; that he argued was apparent from the letter to Mr Clark which accompanied the notice of assessment and was the basis of HMRC's case up to the hearing.

20. On that basis Mr Jones submitted that the scope of the assessment was the charge to tax on the LML Transfer alone, and the scope and subject matter of the appeal was likewise defined. Both were limited to consideration of the LML Transfer.

21. Accordingly, argued Mr Jones, since this Tribunal had concluded in the Substantive Decision that the LML Transfer was not an unauthorised member payment and that Mr Clark was not subject to income tax on it, it followed that the assessment charging Mr Clark to income tax on the LML Transfer was wrong and the assessment falls to be discharged.

22. In relation to this Tribunal's finding that the Suffolk Life Transfer was an unauthorised member payment chargeable to income tax, Mr Jones submitted that this would qualify as a further discovery by HMRC, as regards Mr Clark and the relevant tax year, that the Suffolk Life Transfer was an unauthorised member payment so chargeable. That, in Mr Jones' submission, is a different loss of tax. This new (and different) discovery is an event that would entitle HMRC to make a separate

assessment under s 29(1), subject to time limits and to the right to make a separate appeal.

23. In support of that analysis, Mr Jones submitted, by way of introduction, that the power of HMRC to make a discovery assessment is an exception to what he described as the "default regime" of self-assessment. It seems to us that such a description is apt to be misleading. Whilst we accept that s 29 TMA empowers HMRC to make an assessment in circumstances where that could otherwise not be done, that is true of every statutory power relating to the charging of tax that is vested in HMRC. Mr Jones did not go so far as to make such a submission, but the characterisation of the discovery assessment provisions as an exception to the general rule might suggest that those provisions should somehow be strictly construed. We do not consider that would be the correct approach.

24. The discovery assessment provisions are not an exception to any general rule. They merely represent a part of the tax charging machinery which applies in particular circumstances where self-assessment, and the ability of HMRC to amend a self-assessment, is no longer applicable. They fall to be construed accordingly.

25. As Mr Jones submitted, the meaning of discovers in s 29(1) has been examined by the courts and tribunals on a number of occasions. We were taken to some of those authorities. Mr Jones referred us to *Hankinson v Revenue and Customs Commissioners* [2012] STC 485 in the Court of Appeal where Lewison LJ (with whom Mummery LJ and Sir Mark Waller agreed) said:

> "[15] Nor, in my judgment, is Mr Mathew's argument borne out by the words of the section itself. I begin with s 29(1). This subsection comes into operation if an officer of the Board 'discovers' an undercharge. The word 'discovers' in this context has a long history. Although the conditions under which a discovery assessment can be made have been tightened in recent years following the introduction of the self-assessment regime, the meaning of the word 'discovers' in this context has not changed. In *R v Comrs for the General Purposes of Income Tax for Kensington* (1913) 6 TC 279 at 283, [1913] 3 KB 870 at 889 Bray J said that it meant 'comes to the conclusion from the examination he makes and from any information he may choose to receive' and Lush J said that it was equivalent to 'finds' or 'satisfies himself' ((1913) 6 TC 279 at 290, [1913] 3 KB 870 at 898). In *Cenlon Finance Co Ltd v Ellwood (Inspector of Taxes)* (1962) 40 TC 176, [1962] AC 782, the House of Lords considered the meaning of the word 'discovers'. They rejected the argument that a discovery entailed the ascertainment of a new fact. Viscount Simonds said ((1962) 40 TC 176 at 204, [1962] AC 782 at 794):
>
> 'I can see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation.'

> [16] Lord Denning said ((1962) 40 TC 176 at 207, [1962] AC 782 at 799):
>
> 'Mr Shelbourne said that "discovery" means finding out something new about the facts. It does not mean a change of mind about the law. He said that everyone is presumed to know the law, even an inspector of taxes. I am afraid I cannot agree with Mr Shelbourne about this. It is a mistake to say that everyone is presumed to know the law. The true proposition is that no one is to be excused from doing his duty by pleading that he did not know the law. Every lawyer who, in his researches in the books, finds out that he was mistaken about the law, makes a discovery. So also does an inspector of taxes.'
>
> [17] In *R (on the application of Pattullo) v Revenue and Customs Comrs* [2010] STC 107, 2009 SLT 993 Lord Bannatyne said of this part of what he called a two-stage process ([2010] STC 107 at [104], 2009 SLT 993 at [104]):
>
> '… the first preliminary part of the test is no more than an assertion by the officer of a newly discovered insufficiency.'
>
> [18] That s 29(1) is dealing with the subjective views of the officer concerned is borne out by the consequence of the making of a discovery viz that he may make an assessment of the amount 'which ought in his … opinion' to be charged to make good the loss of tax. It is true that this power is said to be subject to sub-ss (2) and (3). However, those sub-sections do not refer to the officer's opinion at all."

26. Mr Jones placed emphasis on the observation of Lewison LJ at [18]. He submitted that this showed that the power of the relevant officer to assess was not without limit. It was limited to the assessment of an amount which, in the officer's opinion, makes good the loss of tax discovered by him, according to his subjective view of the matter. The focus therefore, Mr Jones argued, is on the particular loss of tax which the officer in question subjectively identified. That determines the scope of the assessment which is raised in respect of that particular discovery.

27. This, Mr Jones submitted, is borne out by the context in which s 29(1) finds itself. Thus, in relevant circumstances s 29(2) requires consideration of whether the return which is said to have contained an error or mistake to which the loss of tax is attributable has been made on the basis or in accordance with the practice generally prevailing at the material time. That requires the basis for the asserted loss of tax to be ascertained. Likewise s 29(4) requires identification of the particular loss of tax to determine whether it has been brought about carelessly or deliberately. And the same applies to s 29(5) which requires the awareness of a hypothetical HMRC officer to be tested, which can only be done by reference to the loss of tax.

28. Attractively presented as Mr Jones' submissions were, we do not consider that the context of s 29(1) supports his argument in this respect. We agree with him to the extent that it is said that, for the purpose of determining whether a discovery assessment has been validly made, it is necessary to identify the loss of tax that has subjectively been asserted by the actual officer and then to test whether the further conditions in s 29 have been met by reference to that loss of tax. Thus, to use the

instant case as an example, the validity of the discovery assessment in this case would relevantly have fallen to be tested by reference to sections 29(2), (4) and (5) with respect to the asserted charge on the LML Transfer.

29. There is no argument in this case that the discovery assessment was invalid. In our view the provisions of s 29 are confined to the validity question, and absent invalidity do not go further to limit the scope of the assessment for the purposes of an appeal. That scope cannot, in our view, be confined to the subjective view taken by the HMRC officer. The subjective nature of the test for a discovery under s 29(1) is relevant for the purpose of determining whether there has been a discovery. It turns on the opinion of the particular officer (in contrast to the awareness of the hypothetical officer in s 29(5)), albeit that the discovery must be a reasonable conclusion from the evidence available to him, thus introducing an element of objectivity (*Charlton v Revenue and Customs Commissioners* [2013] STC 866, at [24], referring to *R v Commissioners of Taxes for St Giles and St George, Bloomsbury (ex p Hooper)* 7 TC 59. But there is no warrant for confining the scope of the assessment to that subjective view.

30. The reason for this is plain. When making a discovery assessment, an officer will ordinarily have limited information. It is axiomatic that, having regard to s 29(5), prior to the completion of any enquiry into the taxpayer's return, or the expiry of the time for opening an enquiry, that officer will not have had information on which, applying an objective test, it could reasonably have been expected that an officer would be aware of the loss of tax. Nor does s 29(1) require the officer to have considered every possible legal argument or to have resolved every possible dispute; the remarks of the Chancellor (Sir Andrew Morritt) in *Revenue and Customs Commissioners v Lansdowne Partners Ltd Partnership* [2012] STC 544, although directed towards the assumed awareness of the hypothetical officer in s 29(5), are in our view equally apt to describe the opinion of the actual officer for the purpose of s 29(1). In those circumstances, it cannot have been the intention of Parliament, in enacting an enabling provision such as s 29, with the balance it maintains between the taxpayer and HMRC (*Charlton*, at [56]), to confine the scope of the assessment to what is necessarily an imprecise and subjective, though objectively tenable, opinion of a particular officer who is likely to be relying on limited resources.

31. We do not consider that *Charlton* can assist Mr Jones. Mr Jones referred us to [37], where the Upper Tribunal, in considering the meaning of discovery within s 29(1), said:

> "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 might, depending on the

> circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment…"

32. Mr Jones hypothesised a case where, in the terms suggested by *Charlton*, a discovery (Loss of Tax A) had lost its essential newness, but at the time an assessment for it came to be made the officer had newly discovered a different loss of tax (Loss of Tax B) in respect of the same tax year. The officer issued an assessment in respect of both Loss of Tax A and Loss of Tax B. In the circumstances hypothesised, the assessment could validly cover only Loss of Tax B and not Loss of Tax A.

33. That, submitted Mr Jones, showed that the assessment authorised under s 29 is tied to, and limited by, the particular discovery made by the officer. We do not agree. All that the example tends towards is an argument that it is not possible, in that hypothetical case, for a valid assessment to include a loss of tax for which, through the operation of s 29, no valid discovery assessment could be made. The same argument could equally be made, for example, in respect of a single assessment covering a number of matters that had been the subject of discovery, one of which had been returned on the basis of practice prevailing at the relevant time, and so could not be assessed under s 29(2), or one of which failed the condition in s 29(4) or s 29(5). The example says nothing about the scope of a discovery assessment which is not precluded by anything in s 29. That is the position in this case.

34. Nor do we consider that any assistance can be derived from the fact that more than one assessment may be made in respect of any given tax year. In *Cansick (Murphy's Executor) v Hochstrasser (HM Inspector of Taxes)* (1961) 40 TC 151, assessments for the years 1945-46 to 1947-48 had been made on the deceased taxpayer and discharged on appeal. After an investigation additional assessments were made for those years. It was argued for the taxpayer that only one additional assessment could be made and that the further assessments were therefore invalid. That argument was rejected by Buckley J in the High Court. Likewise in *Vickerman (Inspector of Taxes) v Mason's Personal Representatives* [1984] STC 231, it was held that an assessment to recover tax which had been missed out of an earlier assessment by arithmetical error could be recovered by way of additional assessment.

35. Neither of those conclusions can be relied upon, in our view, to support any argument on the scope of the assessment. In each case the scope of each assessment was clear: in *Cansick* the further assessments related to a new discovery of cash banked (*Cansick*, at p 154), and in *Vickerman* it was held that discovery of an insufficiency in an assessment included an insufficiency by reason of arithmetical error. In both cases the original assessments had either been the subject of determination by the special commissioners (*Cansick*) or had been paid and not appealed (*Vickerman*). Without new assessments in those cases, there would have been no outstanding assessment by which the taxpayer could have been charged. It does not follow therefore from either of those cases that the scope of any particular assessment must be confined to the subjective view of the officer making the discovery.

36. Although Mr Davey, for HMRC, sought to rely on *Vickerman* in another respect, namely that the validity of an assessment once made is a matter of law and

that it is irrelevant what justification for it has been given by HMRC in order to justify the assessment, we do not consider that assists the central question of the scope of the assessment. First, there is no question in this case as to the validity of the assessment. Secondly, the issue in *Vickerman* was not the scope of the assessment, but whether the Crown was bound to fail because it had referred to the wrong element of what is now s 29(1) in its correspondence leading up to the making of the further assessment. The scope of the assessment itself was not in doubt.

37. Mr Jones also referred us to *Fidex Ltd v Revenue and Customs Commissioners* [2016] STC 1920, where one of the issues was the scope of an appeal against a closure notice. The relevant provision at issue in that respect was that in paragraph 24 of Schedule 18 to the Finance Act 1998 which provided: "An enquiry is completed when [HMRC] by notice (a 'closure notice') inform the company that they have completed their enquiry and state their conclusions". Applying *Tower MCashback LLP 1 v Revenue and Customs Commissioners* [2011] STC 1143 in the Supreme Court, Kitchen LJ (with whom Sir Stephen Richards and Arden LJ agreed) said, at [45]:

> "[45] In my judgment the principles to be applied are those set out by Henderson J as approved by and elaborated upon by the Supreme Court. So far as material to this appeal, they may be summarised in the following propositions:
>
> (i) The scope and subject matter of an appeal are defined by the conclusions stated in the closure notice and by the amendments required to give effect to those conclusions.
>
> (ii) What matters are the conclusions set out in the closure notice, not the process of reasoning by which HMRC reached those conclusions.
>
> (iii) The closure notice must be read in context in order properly to understand its meaning.
>
> (iv) Subject always to the requirements of fairness and proper case management, HMRC can advance new arguments before the FTT to support the conclusions set out in the closure notice."

38. The argument of Mr Jones in this respect is that, just as the scope and subject matter of an appeal under s 31(1)(b) TMA (appeals against a conclusion stated or amendment made by a closure notice) is limited to the conclusion stated in the closure notice, so too must an appeal under s 31(1)(d) be limited to the scope of the assessment. We agree. But that does not determine what, in the context of a discovery assessment, is the scope of the assessment.

39. We have, however, derived assistance, if by way of analogy, from the judgment of Henderson J in *Tower MCashback* in the High Court [2008] STC 3366, to which Mr Davey referred us. By reference to what the learned judge said at [113], and in common with the closure notice provisions, there is no express requirement in s 29 TMA or elsewhere that the officer must set out or state the reasons for the opinion that has been reached. No such obligation can be implied. Section 31(1)(d) makes no provision for an appeal against the reasons for the assessment. The duty of this

Tribunal is not to review or adjudicate upon the officer's reasons, but simply upon the assessment, and to determine whether the appellant is either undercharged or overcharged, and to increase or reduce the assessment accordingly (s 50(6) and (7) TMA).

40. Mr Justice Henderson continued:

> "[114] A further important principle can in my judgment be deduced from the wording of s 50(6) and (7). Because one of the matters that the commissioners have to consider is whether the taxpayer is undercharged to tax by an assessment or self-assessment, or whether any amounts contained in a partnership statement are insufficient, it would seem to follow that the commissioners are not confined to an examination of the reasons advanced by HMRC in support of the conclusions set out in a closure notice, and that they are not compelled to treat an amendment to a return under s 28A or 28B as fixing the maximum amount of tax which is recoverable. Provided that they act fairly, and on the basis of evidence that is properly before them, the commissioners may take the initiative and apply the law to the facts in the manner that appears to them to be correct, regardless of the arguments advanced by either side.
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> [115] There is nothing surprising in this conclusion, because the wording of s 50(6) and (7), which applies alike to appeals relating to self-assessments and appeals against assessments made by an officer of HMRC, reflects similar wording of very long standing which goes back long before the introduction of self-assessment. There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the commissioners in exercise of their statutory functions to have regard to that public interest. This principle finds expression in cases such as *R v Income Tax Special Comrs, ex p Elmhirst* [1936] 1 KB 487, 20 TC 381, and in the need for special legislation (now contained in s 54 of TMA 1970) to enable tax appeals to be settled by agreement between the parties without the need for a hearing. The precise nature and scope of this principle in the twenty-first century is a controversial topic, having regard in particular to changes which have taken place over the years in the functions of the general and special commissioners, and to the introduction in 1994 of procedural rules regulating appeals to both tribunals. Furthermore, the whole question may become academic when appeals to the commissioners are replaced next year by appeals to the new tax tribunal. For present purposes, however, it is enough to say that the principle still has at least some residual vitality in the context of s 50, and if the commissioners are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the commissioners on their own initiative.
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> [116] That is not to say, however, that an appeal against a closure notice opens the door to a general roving enquiry into the relevant tax

> return. The scope and subject matter of the appeal will be defined by the conclusions stated in the closure notice and by the amendments (if any) made to the return. The legislation does not say this in so many words, but it follows from the fact that the taxpayer's right of appeal under s 31(1)(b) is confined to an appeal against any conclusions stated or amendments made by a closure notice. That is the only appeal which the commissioners have jurisdiction to entertain."

41. Section 29(1) speaks in terms, not of conclusion, but of opinion. That is apt in the context, as we have described, of discovery of what appears to be an insufficiency, or loss of tax, from an incomplete picture, both as regards the facts and with respect to the legal analysis that might be applied in the appeal process. The assessment that results from that process cannot be expected to be definitive in the way Mr Jones has argued that it is.

42. Nor, on the other hand, as Mr Davey accepted, can an assessment be regarded as nothing more than a figure of tax due, without any relevant context, which can apply generally to impose any liability to tax on the taxpayer. In the same way as for a closure notice, an appeal against a discovery assessment does not open a general roving enquiry into the tax position of the appellant.

43. The scope of the assessment, and consequently of the appeal, must therefore have some limitation. We consider that it is consistent with s 29, taken as a whole, for the scope of the assessment to be limited to a charge of the particular nature which is considered to have given rise to the loss of tax for a particular year of assessment, and which arises out of the factual matrix that is found to have been associated with the loss of tax that gave rise to the assessment on the basis of the officer's opinion. That too will be the scope of the appeal. On an appeal, by virtue of s 50(6) and (7), the Tribunal is not confined to the reasons for the opinion of the officer when coming to the opinion that there had been a loss of tax, nor is it confined to examination only of the facts on which that opinion was based, or the legal analysis applied at that time. As Henderson J said, and as equally applicable to a discovery assessment as to a closure notice, the Tribunal, acting fairly, may apply the law to the facts as it finds them, and is not constrained by the arguments put forward by the parties whether before or at any stage in the proceedings. The public interest in taxpayers paying the right amount of tax is as strong as, if not stronger or at least more evident than, it has ever been, and the duty of the Tribunal remains to determine whether the assessment undercharges or overcharges the appellant.

44. There is in our view a further limitation on the scope of a discovery assessment. It cannot extend to, and likewise an appeal against it cannot provide jurisdiction on the Tribunal in relation to, a loss of tax for which no valid assessment was capable of being made by reason of a specific prohibition under s 29, for example because that particular loss of tax was one of which the hypothetical officer in s 29(5) could have been reasonably expected to have been aware. Thus, to adopt the example given by Mr Jones, if Loss of Tax A was precluded from being assessed under s 29, a discovery of Loss of Tax B, even in circumstances where Loss of Tax A could, on the basis we have outlined, fall within the scope of the assessment in relation to Loss of Tax B, it will not do so by virtue of s 29 itself.

45. Applying the principles we have identified as to the scope of the assessment, and thus the scope of this appeal, it is clear that the charges to tax on Mr Clark which, in the Substantive Decision, we have found to have arisen are within that scope. Those charges relate to the unauthorised member payment made by the Suffolk Life Transfer. The charges are of the same nature, being an unauthorised payments charge and an unauthorised payments surcharge, as the charges assessed by reference to the LML Transfer, they arose in respect of the same tax year, and they arose from the same factual matrix as the LML Transfer, on which the opinion of Officer Sidhu had been based. It is also the case that the amount of the charge is identical to that assessed, but that is immaterial given the Tribunal's powers under s 50(6) and (7). Finally, there is no suggestion that an assessment on the basis of the Suffolk Life Transfer would have been specifically precluded under s 29.

46. For these reasons, persuasively as they were advanced by Mr Jones, we reject the submissions put for Mr Clark on the assessment question.

Determination

47. For the reasons we have given in the Substantive Decision and in this decision, we dismiss Mr Clark's appeal, and we confirm the assessment in the sum of £1,163,277.32.

Application for permission to appeal

48. On the making of the Substantive Decision, we directed (at [146] of that decision) that until such time as the Tribunal released its decision on the assessment question, the time for applying for permission to appeal would not begin to run. The time for any such appeal will run only from the date of release of this decision.

49. This document contains full findings of fact and reasons for the decision on the assessment question. Any party dissatisfied with this decision and/or with the Substantive Decision has a right to apply for permission to appeal against either or both 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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 12 MAY 2017