# TC06908

5

**Appeal number: TC/2018/03266**

***CAPITAL GAINS TAX – disposals of (a) a piece of land with dwelling to connected person and (b) another contiguous piece to developer – Code of Practice 9***
10 ***investigation into returns for 2006-07 and 2007-08 on basis that (a) land disposal not returned and t(b) hat business assets taper relief may have been wrongly claimed – Schedule 36 notice issued and reissued – HMRC withdrawing case before appeal hearing – further notice with fewer requirements issued three months after withdrawal – whether* res judicata *applies – whether abuse of process –whether***
15 ***Condition B in paragraph 21 Schedule 36 (officer had reason to suspect loss of tax) met where no evidence from officer – whether decisions about s 20 TMA that there must be a sensible or reasonable prospect of HMRC making a valid discovery assessment applicable to Schedule 36 notices.***

20 **FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**MICHAEL HEGARTY & FLORA HEGARTY** **Appellants**

**- and -**

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

**TRIBUNAL: JUDGE RICHARD THOMAS**
**PATRICIA GORDON**

25 **Sitting in public at the Royal Courts of Justice, Belfast on 28 August 2018**

**Mr Keith Gordon (instructed by Rodgers Weir & Co) for the Appellant**

**Mr Paul Marks, litigator, Solicitor's Office and Legal Services, HMRC, for the**
30 **Respondents**

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DECISION

1. This was the hearing of appeals by Mr Michael and Mrs Flora Hegarty "(the appellants") against the issue of notices for information and documents under paragraph 1 Schedule 36 Finance Act ("FA") 2008. The information and document relate to the disposal in two tranches by the appellants of land at 22 Station Rd, Moneymore, Co Londonderry.

2. Assiduous readers with good memories of published decisions of this Tribunal might have a bell rung in their heads by this address. That is because there is a decision published in May 2017 *William and Hazel Ritchie v HMRC* [2017] UKFTT 449 (TC) ("*Ritchie*") which relates to land at 28 Station Rd, Moneymore which is contiguous with the land at 22, and which involved, among others who are involved in this case, Judge Richard Thomas (though then sitting with a different member), Keith Gordon (as counsel for the appellants in both cases), Seamus O'Neill, Clifford Rodgers (for the appellants in both cases) and Suzanne McIvor (an officer of HMRC involved in both cases). It also seems from the evidence in this case that Mr Hegarty provided a statement in support of the Ritchies in ADR proceedings, and that a reference in *Ritchie* to the landlords of the Ritchies while their house at 28 Station Road was being built was in fact to the appellants.

3. Judge Thomas disclosed this similar line up of people to Mr Marks, who was not the HMRC litigator in *Ritchie*, as well as the fact that he had produced the decision in *Ritchie* and was familiar with the maps and layout of the land from *Ritchie* and was also aware that the purchaser of the land in this case, Thompson Lennox Ltd, was also the purchaser at about the same time of adjoining land in *Ritchie*. In coming to this decision we have not taken into account any knowledge that Judge Thomas possesses about the *Ritchie* case, save where it was mentioned in evidence in this case, and it is clear to us that Mr Gordon did not seek to take advantage of his knowledge of the facts in *Ritchie*. Mr O'Neill's evidence was that the investigation into the appellants' tax affairs was prompted by, in part, Mr Hegarty's assistance to the Ritchies in their ADR discussions. That part of his evidence, going to the motive of HMRC, and Mrs McIvor in particular, in opening the investigation, is irrelevant to the matters we have to decide and we ignore it. Mr Gordon rightly did not make any point about it.

## Evidence

4. We had witness statements from Mr Michael Hegarty and Mr Seamus O'Neill, and both were cross-examined by Mr Marks. We found them both to be credible and truthful witnesses. But to the extent theirs was opinion evidence we discount it, and we recognise that Mr Hegarty, who is in his 70s, as is Mrs Hegarty who was unwell, was emotionally affected by the investigation and in particular HMRC's apparent dropping of and then resuming it. And it is inevitable that when the events in question were more than ten years ago, recollections of details and in particular chronology may be faulty and there is a natural tendency for witnesses in such a situation to believe that what they

think must have happened or did happen at a particular time or in a particular manner was what actually happened and when. In this situation a tribunal will naturally look to whatever documentation exists to see if it corroborates the evidence. But because of the nature of this case there is little documentation: indeed the case is about HMRC trying to obtain documentation and other information.

5. We should also say that we greatly sympathise with the appellants about the way their expectation of finality was, to their minds, dashed by HMRC in the first few months of 2018, and we say more about it later, but our only concern in this decision is whether that treatment meant that HMRC were prevented in law from resuming the investigation.

6. There was no evidence from HMRC. When the lack of any witness statements was raised by the appellant before the hearing, in the light of the notice of appeal saying that the appellants put HMRC to strict proof of certain matters, HMRC said that the officers involved in the case would be present and able to assist the Tribunal. This was apparently on the basis that an appeal against a Schedule 36 notice is classified initially as a Basic Case within Rule 24 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (by Practice Statement "First-Tier Tribunal Categorisation of Tax Cases in the Tax Chamber" issued by the President, Judge Colin Bishopp, on 29 April 2013). In basic cases the practice is that "parties turn up and talk" and that there are few if any formalities and no exchange of documents or witness statements.

7. In this case Mr Gordon had produced a skeleton argument and the appellant had produced their witness statements, and Mr Marks had produced an HMRC skeleton. It was clear to us from reading the material we were sent before the hearing that it was very unlikely that the case would be completed within the half a day (in the afternoon) allotted as is the maximum in basic cases. Purely through luck, the appeal that the tribunal was due to hear in the morning was cancelled and it was suggested by us that the hearing start at 10.30 instead, which was done, and we credit Mr Gordon and Mr Marks for their efforts to ensure that the bulk of the appeals were dealt with on the day, leaving only closing submissions on the evidence to be supplied later (which it duly was).

8. We suggested that if it is clear that a Schedule 36 appeal was likely to raise difficult points of law the remedy was for both parties was to apply to the Tribunal for a reclassification of the case as a standard one so that appropriate directions can be made. Mr Gordon also said that if we were against him on the validity of the notice, he would wish to make submissions about the requirements of the notice.

9. With that preamble we now turn to the evidence we heard and read.

*The land and its disposal*

10. The documents described in bold type were exhibited to the witness statement of Mr Michael Hegarty.

11. **The tax return for the tax year 2005-06 made by Mr Michael Hegarty**, which includes the following entries in respect of chargeable gains:

(1) Under the heading “Gains on assets which are either wholly business or wholly non-business” in a column headed:

(a) “Brief description of the asset” is “22 Station Road”.

(b) “Type of disposal” is “L” for ‘land and property.

5 (c) “Later of date of acquisition and 18 March 1998: is “16/03/1998”.

(d) “Date of disposal” is “07/04/05”.

(e) “Disposal proceeds” is £50,000”.

(f) “Details of elections made or reliefs claimed and amount” is “See 8.22 Reference S2614 £12,897”. Box 8.22 shows the relief claimed as
10 “private residence relief”.

(g) “Chargeable gains after reliefs but before losses and taper” is “£24,184.25”.

(h) “Taper rate” is “70%”.

(i) “Gains after losses” is “£24,184.25”.

15 (j) “Tapered gains” is “£16,928.98”.

(2) “Total taxable gains” is £16,928.98.

(3) In a box for further information about the land is the address 22, Station Rd, Moneymore, Magherafelt, BT45 7RA.

(4) In answer to the question whether an estimate or valuation was used, and if
20 so what the date of the calculation was, the amount and the reason is “07/04/05” and “no consideration”.

(5) Later pages show the total taxable gains minus the exempt amount of £8,500 as £8,428.98.

While we did not see the return made by Mrs Flora Hegarty, we understand that the
25 entries were the same.

12. **The tax return for the tax year 2007-08 made by Mr Michael Hegarty**, which includes the following entries in respect of chargeable gains on pages CG1 and 2 (Capital Gains Summary):

(1) Total gains in the year before losses and taper relief: £409,052.

30 (2) Total gains after losses and taper relief: £102,263.

(3) Net chargeable gains after annual exempt amount: £93,063.

13. In a box headed “listed shares and securities” rather than the correct one for “Property and others assets and gains” are the entries:

(1) Number of disposals: 1.

35 (2) Disposal proceeds £412,500.

(3) Allowable costs £3,447.

(4) Gains in the year before losses and taper relief: £409,052.

14. In a box headed "Any other information" is "Car Yard at Station Road, total relief of £0.00 has been included in respec (*sic*)"

15. In the tax calculation summary (ie the self assessment) the CGT due is
5 £34,488.80.

16. While we did not see the return made by Mrs Flora Hegarty, we understand that the entries were the same.

17. **A Memorandum of Sale** relating to lands in Folios 188L and LY9231 County Londonderry showing:

10 (1) The Hegartys are shown as selling as beneficial owners for an agreed price of £825,000.

(2) The purchaser is Thompson Lennox Ltd and the memorandum was signed on behalf of the purchaser on the $28^{th}$ of a month in 2007 which looks like "2". The Hegartys signed the memorandum on 23 April 2007. The Date for
15 completion is said to be "$27^{th}$", triple underlined but with no month.

(3) A special condition that "the sale price does not include the shed located on the lands and used in connection with the storage of vehicles and parts".

(4) A map of the land showing the boundaries of Folio LY9231.

18. Mr Hegarty's witness statement gives further information about the land at 22
20 Station Rd, Moneymore which he confirmed in evidence as follows.

19. He purchased the property in 1982 and lived in it for five or six years before moving back to the family homestead to care for this father.

20. After this move they rented the property out. Once they moved out it lay dormant and Mr Hegarty says:

25 > "I would have left a few old cars from the garage [*he ran a garage business in Moneymore*] and would strip parts out to create a sense of occupation to prevent vandalism".

21. He and his wife wished to give their son Niall a temporary place of his own, and at the start of 2005-06 they gifted the house at 22 Station Rd to him.

30 22. They retained the lands surrounding the house for continued use in the business, but unknown to them a property developer had been accumulating a series of adjacent sites, and they decided to sell out having got an offer that was too good to refuse. The site was conveyed on 27 April 2007.

*The investigation*

35 23. The following account of the chronology and subject matters of the investigation is from, primarily, the documents exhibited to the witness statement of Mr Seamus

O'Neill, who as sole practitioner under the name of Weir & Co, was the appellant's accountant.

24. On 2 December 2015 Mrs Suzanne McIvor of HMRC Local Compliance wrote to each of the appellants in identical terms. She said that she was checking their tax position for 2006-07 and 2007-08 and in particular the transfer by them of the title of certain registered parcels of land at 22 Station Rd, Moneymore, the transfer being registered on 2 March 2007, and also their entitlement to business asset taper relief ("BATR") on the disposal of what they claimed was a "car yard". Mrs McIvor said that "information suggests that the land disposed of …was a green field site and not a car yard".

25. She sought information from the appellants about the land and the disposal of it. That information would be used to calculate the amount of any additional tax. Failure to produce the information could lead to either discovery assessments or a legally binding notice to provide it.

26. On 31 March 2016 Mrs Fiona McVitty of the Fraud Investigation Service of HMRC wrote to each of the appellants. It is not clear from the papers I have whether Mrs McVitty was already acquainted with the appellants even though she wrote on "Dear Mr/Mrs Hegarty" and "yours sincerely" terms, but pleasantries were quickly put aside because she said in her first paragraph that she had reason to suspect that the appellants had each committed tax fraud and enclosed a copy of Code of Practice 9, which explained how HMRC investigated suspected fraud, how the appellants could cooperate with the investigation, and how failure to sign up to a "Contractual Disposal Facility" could lead to criminal prosecution, a point that could not escape the appellants' attention as they were told it three times.

27. The only thing not explained in the letter was what grounds HMRC had for suspecting them of fraud or what the fraud consisted of.

28. The next significant event was a "Code of Practice 9: Opening Meeting" on 25 October 2016 at which Mr Hegarty was present with his accountant, Seamus O'Neill, and a tax adviser Clifford Rodgers who worked closely with Mr O'Neill. HMRC were represented by Miss McKinney, Mrs Murphy and Miss Imrie, none of whom had been involved in previous correspondence on the matters.

29. The notes of the meeting, which lasted 4 hours with a one hour break for lunch, cover 28 pages. Over 8 pages were devoted to preliminary matters and general information about COP 9 enquiries and the answers by Mr Hegarty to questions about the correctness of his tax returns and accounts. Mr Hegarty denied fraud.

30. 12 pages are devoted to questions and answers about Mr Hegarty's garage and car dealing business from its early days to date. Special attention was paid to the purchase and sale of cars from and to the Republic of Ireland. That side of the business was, HMRC were told by Mr Hegarty, operated by the appellants' son Declan. Of particular interest to HMRC was Mr Hegarty's admission that cash is often lodged into a joint personal account (with his wife) and then a cheque is drawn payable to the

business account with the same bank. HMRC said that this was what their information related to.

31. Something over 5 pages were devoted to questions and answers about the land. HMRC disclosed that their information was that the transfer from the appellants to their son Niall was in March 2007 just before the sale by Niall to Lennox Thompson Ltd, the developers, and just before they sold the remaining land to those developers. This transfer to Niall was not, said HMRC, shown on the Hegartys' 2006-07 tax return. Mr O'Neill informed HMRC that it had been disclosed on their 2005-06 returns (see §11 above) and that there was a backlog at the Land Registry at the time, but he agreed the "differential" needed to be investigated.

32. The other issue that HMRC asked questions on was the claim that there was business use of the yard to justify BATR. Mrs Murphy produced an aerial photograph of the land to Mr Hegarty which showed no cars. Mr Rodgers pointed out that the photo was dated 2008, after the sale. Mrs Murphy then produced one from 2005 also, she said, with no cars. HMRC said they had plenty of others.

33. On 17 November 2016 Miss McKinney wrote to Weir & Co to give more detail about the areas of concern she had outlined at the meeting, namely cash lodgements in private accounts, failure to return a capital gain in 2006-07 and the claim to BATR. She attached a schedule of "information and documents" she needed to carry out her check and asked them to be supplied by 16 December 2016.

34. On 16 January 2017 Weir & Co replied. They explained why they were not supplying the information requested in relation to all three matters, and pointed out that the 2005 photograph had shown cars on the land.

35. On 1 February 2017 Miss McKinney sent a notice under paragraph 1 Schedule 36 FA 2008 to each of the appellants in precisely the same terms as the schedule attached to her letter of 17 November 2016.

36. On 28 February 2017 Weir & Co appealed against the notices on their clients' behalf and asked for a review. In this letter they explained that the land was not the principal trading site of the business but was used for storing car parts from cars that were about to be scrapped and was retained to be or a used car showroom.

37. On 31 March 2017 Miss McKinney sent her view of the matter under s 49B(2) Taxes Management Act 1970 ("TMA") and also enclosed revised information notices (the change was to the information requested about the disposal to Thompson Lennox Ltd). The deadline for these was 30 April 2017. It seems the review was never carried out and the appeals against the notices were notified directly to the Tribunal.

38. On 14 February 2018 Mr Paul Harbottle, an officer in the Reviews and Litigation section of HMRC's Solicitor's Office, wrote to the appellants to say that:

> "HMRC will no longer be defending the above appeal at the First-tier Tax Tribunal and are withdrawing from the case. The Schedule 36

> Information Notice which forms the subject of the appeal is hereby withdrawn.
>
> On this basis, may I invite you to withdraw your appeal. Please notify myself and the Tribunal when this action has been taken. Please note that the withdrawal from the case by HMRC does not affect their right to issue further Information Notices"

39. With the letter was enclosed an email of earlier the same day which HMRC sent to the Tribunal to say that they were:

> "no longer defending the case at the Tribunal and are withdrawing the Schedule 36 Information Notice which forms the subject of the appeal. This is the respondents written notice of withdrawal."

40. On 20 February 2018 a Tribunal clerk wrote to Weir & Co to say that the Tribunal had been informed by HMRC that they were no longer defending the decision which was the subject of appeal and:

> "The Tribunal therefore allows your appeal and any hearing date is cancelled. If you have any further application with regards to this appeal it should be made within 28 days from the date of this letter, in the absence of which the file will be closed."

41. On 1 May 2018 HMRC issued another pair of Schedule 36 notices seeking the same information, though by comparison with the previous notices, they contained drafting amendments and the removal of the previous requests for bank statements in connection with the cash lodgements in the private accounts.

42. On 9 May 2018 Weir & Co appealed against these notices to HMRC and on 17 May the appeal was notified to the Tribunal, and it is this appeal with which we are dealing.

43. On 29 May 2018 Miss McKinney gave her fresh view of the matter. This included her response to requests for clarification of the notice by Weir & Co.

## Law

44. Schedule 36 FA 2008 contains the law relating to information notices (among other compliance tools). The paragraphs relevant to this case are set out below.

> "*Power to obtain information and documents from taxpayer*
>
> 1(1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")—
>
> (a) to provide information, or
>
> (b) to produce a document,
>
> if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.
>
> (2) In this Schedule, "taxpayer notice" means a notice under this paragraph.

RESTRICTIONS ON POWERS

*Documents not in person's possession or power*

18 An information notice only requires a person to produce a document if it is in the person's possession or power.

*Old documents*

20 An information notice may not require a person to produce a document if the whole of the document originates more than 6 years before the date of the notice, unless the notice is given by, or with the agreement of, an authorised officer.

*Taxpayer notices*

21 (1) Where a person has made a tax return in respect of a chargeable period under section 8, 8A or 12AA of TMA 1970 (returns for purpose of income tax and capital gains tax), a taxpayer notice may not be given for the purpose of checking that person's income tax position or capital gains tax position in relation to the chargeable period.

…

(3) Sub-paragraph[ ] (1) … [does] not apply where, or to the extent that, any of conditions A to D is met.

(4) Condition A is that a notice of enquiry has been given in respect of—

(a) the return, or

(b) a claim or election (or an amendment of a claim or election) made by the person in relation to the chargeable period in respect of the tax (or one of the taxes) to which the return relates ("relevant tax"),

and the enquiry has not been completed.

(5) In sub-paragraph (4),"notice of enquiry" means a notice under—

(a) section 9A or 12AC of, or paragraph 5 of Schedule 1A to, TMA 1970, or

(b) paragraph 24 of Schedule 18 to FA 1998.

(6) Condition B is that an officer of Revenue and Customs has reason to suspect that—

(a) an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed,

(b) an assessment to relevant tax for the chargeable period may be or have become insufficient, or

(c) relief from relevant tax given for the chargeable period may be or have become excessive.

(7) Condition C is that the notice is given for the purpose of obtaining any information or document that is also required for the purpose of checking that person's VAT position.

(8) Condition D is that the notice is given for the purpose of obtaining any information or document that is required (or also required) for the

purpose of checking the person's position as regards any deductions or repayments referred to in paragraph 64(2) (PAYE etc).

APPEALS AGAINST INFORMATION NOTICES

*Right to appeal against taxpayer notice*

29(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal to the First-tier Tribunal against the notice or any requirement in the notice.

(2) Sub-paragraph (1) does not apply to a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records.

(3) Sub-paragraph (1) does not apply if the First-tier Tribunal approved the giving of the notice in accordance with paragraph 3.

*Procedure*

32(1) Notice of an appeal under this Part of this Schedule must be given—

(a) in writing,

(b) before the end of the period of 30 days beginning with the date on which the information notice is given, and

(c) to the officer of Revenue and Customs by whom the information notice was given.

(2) Notice of an appeal under this Part of this Schedule must state the grounds of appeal.

(3) On an appeal the First-tier Tribunal may—

(a) confirm the information notice or a requirement in the information notice,

(b) vary the information notice or such a requirement, or

(c) set aside the information notice or such a requirement.

(4) Where the First-tier Tribunal confirms or varies the information notice or a requirement, the person to whom the information notice was given must comply with the notice or requirement—

(a) within such period as is specified by the Tribunal, or

(b) if the Tribunal does not specify a period, within such period as is reasonably specified in writing by an officer of Revenue and Customs following the Tribunal's decision.

(5) A decision by the First-tier Tribunal on an appeal under this Part of this Schedule is final.

(6) Subject to this paragraph, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax."

## Findings of fact

45. For the purposes of this decision we do not need to make findings of fact about whether the returns of each of the appellants is correct, or, if there were inaccuracies, whether they were brought about deliberately (ie fraudulently). What we find as fact is that the documents referred to in the section "Evidence" say or show what we say they do or, in some cases, what Mr O'Neill's and Mr Hegarty's evidence said they show.

46. But we do draw some inferences from what those documents say:

(1) We find that the entry in the 2007-08 return £0.00 about BATR at §14 must be an error, as the figure for the amount of gains subject to tax is 25% of the gains after losses, meaning that the BATR at 75% was claimed.

(2) We find that that same entry when it talks about a "car yard" is not intending to imply any particular type of use, but is shorthand for a place where activities related to the appellants' business (sale of cars) were carried on.

## The issues

47. The issues for our decision are:

(1) Whether HMRC are estopped from issuing or enforcing the notices on the grounds of *res judicata*[1] or because of abuse of process by HMRC.

(2) Whether Condition B in paragraph 21(6) Schedule 36 is met.

(3) Whether the Tribunal is permitted to determine if there is no sensible or reasonable possibility of HMRC being able to raise a discovery assessment, given that they need to prove deliberate conduct, and if it is permissible, whether there is such a possibility.

(4) If necessary, whether the information and document sought by the notice were reasonably required to check the appellants' tax position.

48. Other issues were canvassed by the appellants include whether the officer of HMRC giving the notice had obtained clearance from an authorised officer to issue a notice for old documents. In the event this point as not mentioned in oral submissions, but we nevertheless deal with it.

49. The appellants also said that that the notices were inherently uncertain and unenforceable.

50. An appeal under paragraph 29 Schedule 36 FA 2008 can be against the notice or any requirement in the notice. The appeal here is both against the notice and the requirements; the latter in the sense that the appellants say that there can be or should be no requirements, but if they are wrong about that they would wish to address the Tribunal on the requirements in the notice with a view to clarifying them and asking the Tribunal to vary them.

[1] We refer to *res judicata* rather than the more up to date "issue estoppel" as that is what Mr Gordon and Mr Marks called it in their skeletons.

**Discussion -** ***res judicata*** **& abuse of process**

51. We think it is sensible to deal with these issues first, as they go to the fundamental question of whether HMRC were entitled to issue the notices at all[2].

*The parties' submissions on res judicata*

5 52. Mr Gordon acknowledged that the doctrine of *res judicata* does not normally apply in tax matters. He says that classically a decision on an issue in one year cannot bind a court in another year on the identical point. That is because the *res*, the thing being appealed against is different because the year is different.

53. But he said that the concept does have a place in tax litigation. He referred to
10 *Easinghall Ltd v HMRC* [2016] UKUT 105 (TCC) (Mrs Justice Rose P) ("*Easinghall*").

54. Mr Marks for HMRC points for a definition of *res judicata* to *Crown Estates Commissioners v Dorset County Council* [1990] Ch 297 ("*Dorset CC*") where Millett J (as he then was) said:

> "*Res judicata* is a special form of estoppel which gives effect to the
> 15 policy of the law that the parties to a judicial decision should not afterwards be allowed to re-litigate the same question, even though the decision may be wrong. If it is wrong, it must be challenged by appeal or not at all. As between themselves, the parties are bound by the decision, and may neither re-litigate the same cause of action nor re-
> 20 open any issue which was an essential part of the decision."

55. In this case say HMRC there was no litigation on the "matter" in the sense that no tribunal had decided a question having been made aware of all the facts and issues. Instead HMRC had accepted the appellants' point that the notices were insufficiently specific and withdrew them from the Tribunal's jurisdiction. The doctrine of *res*
25 *judicata* cannot apply here.

*Our decision on res judicata*

56. We consider that Mr Gordon is clearly right to say that estoppel on grounds of *res judicata* cannot arise from one tax year to the next, even where the factual situation is identical. Authority for this proposition can be found in *Mohamed Falil Abdul*
30 *Caffoor and others The Trustees of Abdul Gaffoor Trust v The Commissioner of Income Tax, Columbo (Ceylon)* [1961] UKPC 15 ("*Caffoor*") and in numerous domestic cases which refer to the *Caffoor* principle.

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[2] We note that in *Littlewoods* (see §58 for citation) Henderson J considered the substantive point (in Part V of his judgment) before the estoppel and abuse of process arguments (in Part VI). At [151] he referred to this seemingly paradoxical approach as having been agreed by the parties. Among his reasons were that "in relation to some of the arguments on issue estoppel and abuse of process, it is material for the court to consider the strength of HMRC's case on the underlying issue." It has not proved easy for us to determine where in Part VI of his judgment Henderson J does take into account the merits – that is undoubtedly our fault rather than his. But it seems only to be in the discussion about "the Arnold exception" which is not relevant in this case (see§74), and so we have not taken into account our views on the merits when arriving at our decision on the estoppel and abuse issues.

57. HMRC do not seek to rely on the *Caffoor* principle. They argue that the there was nothing adjudicated on in relation to the second notices. It is not clear to us whether they accept that *Caffoor* does not apply to Schedule 36 notices (or any similar types of notice).

5 58. The two cases cited (*Dorset CC* and *Easinghall*), while they are binding on us, are we think inadequate material on which to come to a decision. Fortunately there is a recent decision of the High Court, *Littlewoods Retail Ltd & others v Commissioners for Her Majesty's Revenue and Customs* [2014] EWHC 868 (Ch) (Henderson J as he then was) ("*Littlewoods*"), in which the judge, in a typically learned and lucid
10 examination of the field, deals with both *res judicata* and abuse of process and in the course of that examination covers in depth the application of the *Caffoor* principle and its possible limitations.

59. As it covers these issues over 102 paragraphs, we will not burden this decision with lengthy quotations but will attempt to summarise the relevant points made as:

15 (1) The *Caffoor* principle is undoubtedly good law "at least in relation to income tax, corporation tax, capital gains tax and other annually assessed (or, nowadays, self-assessed) taxes, where the basic question for determination is the correct amount of tax payable for the relevant year or period of assessment". [175]

(2) *Caffoor* extends to disputes on other issues where there is purported
20 reliance on the conclusiveness of a determination by a Tribunal or a s 54 deemed determination, eg interest or tax geared penalties. [177]

(3) There is no good reason why the *Caffoor* principle, with suitable modifications, should not apply to VAT, at least where the dispute relates to the amount of VAT chargeable on supplies of goods or services in one or more
25 (usually quarterly) periods, or to assessments (whether of VAT, interest, penalties or surcharges) made for particular periods, or to claims for the repayment of VAT originally paid in respect of particular periods. The significant point is that VAT is in essence a transaction-based tax which is returned and accounted for on a periodic basis. [190]

30 (4) The principle applies to customs duty. [198]

(5) The principle is justified by reference to fiscal neutrality (not just in the EU and in relation to VAT) and to the fact that there is a public interest in people paying the right amount of tax and wider considerations of fairness [202].

60. In relation to this case we hold that the *Caffoor* principle does not apply. That is
35 because a Schedule 36 notice does not determine the amount of tax payable by a person and in any event this is not a case where HMRC seek to argue in respect of one period a point which has been determined against them in an earlier one.

61. We are fortified in our opinion by a case mentioned by Henderson J in *Littlewoods*. The question whether *res judicata* applied to a previous decision by the
40 General Commissioners of Income Tax (one of the predecessor bodies of this tribunal) in exercise of their powers in s 561(9) Income and Corporation Taxes Act 1970 to deny a sub-contractor a certificate for gross payment was considered by the Special

Commissioners (another predecessor body) in *Carter Lauren Construction Ltd v HMRC* [2006] SpC 603 ("*Carter Lauren*") in relation to a second appeal against the refusal. In a typically thorough and learned decision, the Special Commissioner, Charles Hellier (now a judge of this Tribunal), considered whether *res judicata* applied outside the "one year to the next" context in *Caffoor*. At [60] and [61] Mr Hellier held that:

> "Lord Radcliffe thought that it was not in the public interest that tax and rate *assessments* should not [*sic* – we think this "not" is superfluous] be artificially encumbered with estoppels. In relation to section 561(9) appeals it seems to me to be in the public interest that neither HMRC nor the taxpayer should be able to re-litigate the same issue again and again.
>
> It seems to me therefore that the broad principle of and public interest in finality in litigation should not be subject to an exception for section 561(9) appeals."

62. In other words there could be estoppel *per rem judicatam* in some tax matters. In the event Mr Hellier was unable to decide whether the issues in the two appeals were the same as there was insufficient detail and reasoning in the General Commissioners' first decision to enable him to tell if the issues were identical. In the present case there was, we have held, no determination by this Tribunal.

63. In *Littlewoods* Henderson J said of this case:

> "Although Mr Hellier's decision contains a thoughtful discussion of the question, the statutory context is so far removed from that of the present case, and other cases where the *Caffoor* principle has been held to apply, that I am unable to derive much assistance from it."

64. The one case, *Easinghall*, cited by Mr Gordon is not however a *Caffoor* case as it involves maters entirely within one period. It is but one of many cases where a second "bite of the cherry" was attempted for the same period. The cases on discovery, including older (pre self-assessment) cases such as *Cenlon Finance Co Ltd v Ellwood (HM Inspector of Taxes)* (1962) 40 TC 176 and *Scorer (HM Inspector of Taxes)* v *Olin Energy Systems Ltd* [1985] UKHL 3 are concerned with the power of HMRC, or the Inland Revenue before it, to make or amend an assessment where a matter had already been agreed in the context of an enquiry into a return and self-assessment or of the pre-self assessment version of an enquiry into a return.

65. Those cases make it clear that the matters determined by a decision of a tribunal or by a deemed decision of a Tribunal arising as a result of an agreement between the parties under s 54 Taxes Management Act 1970 ("TMA") cannot be relitigated by HMRC in another form ("the *Cenlon* principle"). In *Easinghall*, unusually, the subsequent form was an enquiry and closure notice into the same matters, which followed a discovery assessment subject to a s 54 agreement, but the *Cenlon* principle applied. Normally the case is of a discovery assessment following, in periods before self-assessment, a first estimated assessment settled under s 54 TMA and in self-assessment periods following an enquiry into a return and closure notice, also settled under s 54 TMA. A s 54 agreement or a decision of a tribunal following a closure

notice will set up an estoppel in relation to the actual matters decided by the tribunal or deemed decided by it in the s 54 agreement.

66. For completeness we should mention that the *Cenlon* principle only applies where it is precisely the same issue that is sought to be argued again. In *Easinghall* the Upper Tribunal differed from the Fist-tier Tribunal on the question of what exactly the s 54 agreement did determine and whether it was the same point as was sought to be raised again. For an example of a case where a s 54 agreement did not estop the Inspector of Taxes see *Cansick (Murphy's Executor) v Hochstrasser (HM Inspector of Taxes)* (1961) 40 TC 151.

67. The appellants say that there has been a determination of the dispute between the parties so that HMRC are estopped by the *Cenlon* principle. They say that in this case the First-tier Tribunal *has* determined the matter and that the letter of 20 February 2018 shows that. We do not agree. What the correspondence shows is that HMRC withdrew their case under Rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) ("FTT Rules"). That does not decide the matter. The letter of 20 February is not from a judge of the Tribunal nor does it say it is written on the instructions of a judge who has determined the matter. Only a judge in chambers, not a Tribunal clerk, is able to determine an appeal otherwise than after a hearing of the appeal. No judge has considered the opposing arguments on the validity of the notice, whether there are grounds for saying that the notice should not have been given or whether any or all of the requirements of the notice are invalid for any reason. Nor can it be said that there was, after the withdrawal, any s 54 TMA agreement that had the effect of deciding the matter in question, or at least the appellants have not suggested that there was. While HMRC did suggest that the appellants should withdraw their appeal they do not appear to have done so, and withdrawal of an appeal does not of itself constitute a s 54 agreement. What seems to have happened is that HMRC became convinced by the appellants' arguments about the vagueness and lack of precision in the information required and also came to the view that certain requests were no longer necessary, though why they had formed that view is not apparent.

68. This having been done, then the question whether the notices of 1 May 2018 were valid does not depend on the application of the doctrine of *res judicata*.

*The parties' submissions on abuse of process*

69. The second arrow in the appellants' quiver is abuse of process. In his skeleton Mr Gordon merely says that even if *res judicata* is not applicable in this case it does not prevent the Tribunal from striking out the revised notices as an abuse of process. He cites Lord Keith in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 ("*Arnold*") who said that "estoppel *per rem judicatam* … is essentially concerned with abuse of process". He argues that the evidence of Mr Hegarty shows the emotional rollercoaster that HMRC withdrawal of the notices and their replacement several months later put the appellants on, and that behaviour is a classic example of abuse of process.

70. HMRC say that for the abuse of process argument to "exist" the appellants need to demonstrate that HMRC were using the legislation in a way which was manifestly

unfair so as to bring the very nature of the legislation into dispute. They cite *Hunter v Chief Constable of West Midlands* [1981] 1 All ER 1727 ("*Hunter*") per Lord Diplock:

> "… [abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way, which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

71. HMRC say the when they withdrew the second notices having accepted the appellants' argument that the previous notice was "too broad to be complied with" they said in the same letter that the withdrawal did not preclude the right of the Respondents to issue a further notice. The appellants were not therefore told, as they allege, that the investigation of HMRC's enquiries were at an end. HMRC have a duty to the general public to collect the right amount of tax.

72. In response Mr Gordon says that at the time HMRC gave no reasons for withdrawing the notices. What they should have done was either to seek an amendment to the notices (sc from the Tribunal) or issued replacement notices immediately. HMRC's conduct was manifestly unfair and brought the administration of justice into disrepute among right-thinking people.

*Our decision on abuse of process*

73. We have to say that we do not find Mr Gordon's very skeletal argument on abuse of process, and in particular his quotation of a few words of Lord Keith, very illuminating, except to point up that, as is said by Henderson J in *Littlewoods* at [220]:

> "… the modern tendency, exemplified by *Johnson v Gore Wood*, is to treat res judicata as an aspect of the law of abuse of process,"

74. The real question is whether an abuse of process argument is open to the appellants. Again we have been much helped and guided by Part VI of Henderson J's judgment in *Littlewoods*. Although he deals with *Arnold* it was not in the context of the passage cited by Mr Gordon. Rather it was because HMRC argued in Littlewoods that they were not estopped both because the *Caffoor* principle applied but also because of an exception to issue stopple identified in *Arnold*. That exception can only apply if there are circumstances which are not present here (or at least we had no argument they were) and it was in the course of identifying what those (exceptional) circumstances might be that Lord Keith said what Mr Gordon cites. The exceptional circumstances had essentially to be ones where there was a form of abuse of process that meant it was unjust for estoppel to operate. What Mr Gordon did not cite was Lord Keith's next sentence:

> "In the present case I consider that abuse of process would be favoured rather than prevented by refusing the plaintiffs permission to re-open the disputed issue."

75. What Henderson J did have to say about abuse of process was this (at [191 where he was considering the *Caffoor* principle in relation to VAT):

> "This conclusion [*that the* Caffoor *principle was capable of operating in VAT*] is in line with two decisions of the Tribunal to which Mr Swift referred me: *SITA*, [2002] UKVAT V17991, [2003] V & D R 131, and *Durwin Banks*, [2008] UKVAT V20695, released on 29 May 2008. The issue in both cases was whether a particular supply of goods or services (telecommunication services to the aviation industry in *SITA*,, unrefined linseed oil in *Durwin Banks*) should be zero-rated. In *SITA*, the Tribunal, chaired by Mr Stephen Oliver QC, concluded at [70] that "issue estoppel has no place in VAT litigation of this nature". The Tribunal was influenced by the principle of public policy that the tax should operate uniformly ([68]), as well as by the fact that the earlier decision in favour of zero-rating had been made by consent 30 years earlier, without argument or reasoning, when VAT in the UK was still in its infancy. In *Durwin Banks*, the earlier decision had been more recent (2005), but the appellant had been unrepresented at the hearing. The Tribunal, chaired by Mr Theodore Wallace, reviewed the *Caffoor* principle and reached the same conclusion as in *SITA*. It was influenced, rightly in my view, by the EU law principle of fiscal neutrality, pointing out at [48]:
>
> > 'Since we have concluded that another trader not fettered by *res judicata* would succeed on the material before us in establishing that similar bottled linseed oil is food, a decision against this Appellant based on *res judicata* would conflict with the principle of fiscal neutrality.'
>
> *The Tribunal also observed that repeated attempts to re-litigate the same issue without good reason could be controlled by the principle of abuse of process, which was much less inflexible than issue estoppel. Again, I respectfully agree*. [Our emphasis]

76. And at [207(3)] Henderson J said that issue estoppel and abuse of process are analytically different issues.

77. When at [243] he turned to the abuse of process arguments in *Littlewoods*, he first quoted from Lord Bingham's speech in *Johnson v Gore Wood & Co* [2002] AC 1 in which he said, among other things:

> "The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole."

See also a longer quotation from [243] at §79.

78. At [244] Henderson J said:

> "Lord Bingham went on (at 32H-33A) to reject a subsidiary argument that the rule in *Henderson v Henderson* did not apply to Mr Johnson since the first action against his company had culminated in a compromise and not a judgment:

> ‘An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing.’
>
> Thus it is no obstacle to the potential application of the rule in the present case that the 10% Commission Appeal and the GMAC Appeal were resolved by the 2004 and 2008 section 85 Agreements. See too the observations of Lord Millett, to similar effect, at 59C.”

79. Abuse of process is a matter which has also come before this Tribunal on a number of occasions. We have found very helpful the decision of Judge John Brooks in *Spring Capital Ltd v HMRC* [2017] UKFTT 465 (TC) as it brings together previous cases where there has been a difference of opinion in this tribunal. We should quote from it at some length:

> “3. Although it is accepted that the Company did not raise the paragraph 92 argument it now seeks to advance, HM Revenue and Customs (“HMRC”) say that as it had the opportunity to do so before Judge Brannan, it could and should have done so then and contend that it would be an abuse of process if the Company was permitted to advance the paragraph 92 argument in relation to its 2010, 2011 and 2012 appeals. HMRC have therefore applied to strike out that part of those appeals to which the paragraph 92 argument relates.
>
> 4. In support of the application Ms Harry Jones, for HMRC, relies on the decision of the Tribunal in *Foneshops Limited v HMRC* [2015] UKFTT 410 (TC) in which Judge Mosedale observed:
>
> > ‘30. HMRC relied on *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 for a statement of what abuse of process was:
> >
> > > “…[abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way, which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people” page 536C per Lord Diplock.
> >
> > 31. The statement in *Hunter* is very general and there might be room for doubt whether it extends to the circumstances in this case. However, the authorities of *Littlewoods* at §250 and *SCF Finance Co Ltd v Masri* [1987] 1 QB 1028 are more specific. Abuse of process appears to be very like issue estoppel save perhaps for flexibility where there are special circumstances:
> >
> > > “a litigant who has had an opportunity of proving a fact in support of his claim or defence and has chosen not to rely on it is not permitted afterwards to put it before another tribunal…..
> > >
> > > …it would be an abuse of process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings…”

page 1049C-F, per Ralph Gibson LJ delivering the unanimous judgment of the Court of Appeal, also citing Lord Kilbrandon in the Privy Council that abuse of process

> "is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule."

And unlike issue estoppel, abuse of process applies to tax cases. So I find that abuse of process does prevent previously litigated issues being re-tried between the same parties in tax cases unless there are special circumstances.'

5. In relation to whether an abuse of process arises where, as in the present case it is contended that an argument or claim "should" have been made in earlier proceedings between the same parties, Henderson J (as he then was) in *Littlewoods Retail Limited and Others v HMRC* [2014] EWHC 868 (Ch) said, at [243]:

> 'I come finally to the question whether the Revenue should be prevented from re-litigating the underlying tax issue on the ground of abuse of process. It was common ground that this question falls to be answered with primary reference to the well-known principles stated by Lord Bingham, after a review of the authorities, in *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 at 498–499, [2002] 2 AC 1 at 31:
>
>> "*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private

interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not ... While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."'

6. In *Hackett v HMRC* [2016] UKFTT 781 (TC) ("*Hackett*"), a case that was not brought to my attention by either party, Judge Berner noted, at [38], that:

> 'With respect to the judge in *Foneshops*, I do not consider that to be a correct description of the relevant principle. The judge does not appear to have had *Johnson v Gore Wood & Co* cited to her, but it is clear from the speech of Lord Bingham in that case that one does not start with the premise that the fact that issues could have been litigated in earlier proceedings means that to litigate them in the proceedings in question is an abuse of process, and only excluded from that conclusion if there are special circumstances. What is required is a broad, merits-based judgment, taking account of all the facts and circumstances. The proper approach is to ask whether in all the circumstances a party's conduct is an abuse. Although that will often give the same result as asking whether the conduct is an abuse and then, if it is, asking whether the abuse is excused or justified by special circumstances, it will not invariably do so, and it is always necessary for the question of abuse to be considered by reference to all the circumstances of the individual case.'

7. Mr Michael Upton, who appears for the Company, emphasised the high threshold necessary to establish an abuse of process. Not only is this apparent from the observation of Lord Bingham in *Johnson v Gore Wood & Co* (cited by Henderson J in *Littlewoods*, see above) but also the comment of Lord Diplock in *Hunter*, to which Judge Mosedale referred in *Foneshops*, that abuse of process:

> '... concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way, which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it.'

8. Mr Upton also took me to a passage of the decision of the Court of Appeal in *SCF Finance & Co Ltd v Masri (no 3)* [1987] QB 1028, also cited by Judge Mosedale in *Foneshops*, which referred, at 1049, to the decision of the *Privy Council in Yat Tung Investments Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 where Lord Kilbrandon had warned that:

> '... the shutting out of a 'subject of litigation' [was] a power that no court should exercise but after a scrupulous examination of all the circumstances.'"

80. Although this decision is not binding on me, the decisions in the cases cited by Judge Brooks and by Judge Mosedale in *Foneshops* are, and in any event we see absolutely no reason not to follow the decision of Judge Brooks.

81. Thus, like Judge Brooks, we adopt the approach of Judge Berner in *Hackett* and take into account all the facts and circumstances of the case, and in particular:

(1) There had already been one occasion on which notices were revised and replaced, but this was not in the context of existing appeal proceedings

(2) It was open to HMRC, as the appellant points out, to ask the Tribunal, or seek the appellants' agreement, to vary the notices in accordance with HMRC's changed requirements and refinement of the wording.

(3) There has been no determination or deemed determination of the appeal against the notices, merely a withdrawal by one party of its case. That withdrawal was made, HMRC said, to give the appellant a more focussed and better worded notice.

(4) HMRC did seek to reserve the right to issue further notices in its letter to the appellants, but did not inform the Tribunal of this. In *SCF Finance & Co Ltd v Masri (No 3)* (cited by Judges Mosedale and Brooks) the claimant had withdrawn a summons for the determination of a claim to ownership of a bank account – it was held that the claim had thereby been determined against her, but the Court raised the possibility that an express reservation of position to a Court might make a difference to whether there is an abuse of process.

(5) The evidence of Mr Hegarty, supported by that of Mr O'Neill, was that when he received the letter from HMRC of 14 February he assumed that the whole case was at an end, and that the resumption many weeks later caused him and his wife great anxiety. It was open to HMRC to take another approach, by seeking a variation of the notice from the Tribunal, action which would not have had the effect on the appellants that HMRC's actions did.

(6) A Schedule 36 notice is not an assessment to tax or an amendment to a return giving rise to additional tax. It is an ancillary step towards determining if such a tax liability arises.

82. Having taken all these circumstances into account, we do not consider that there was an abuse of process when HMRC issued the further notices in May 2018.

83. We add this about HMRC's conduct. The letters of 14 February 2018 do not say why HMRC were withdrawing the notices, but do say that withdrawal does not affect their right to issue further notices. Thus the appellants were not told by HMRC that their enquiries into the land disposals were at an end.

84. But in our view this letter was insufficient, and it is not in the least surprising to us that the appellants took the letters as signalling that their ordeal, as they saw it, was

over. We agree with Mr Gordon that it would have been right and proper for HMRC to explain why they were withdrawing the notices (on the basis that they were not properly drafted) and to say clearly that they were at that time or in the very near future to be reissued. But any complaints about this conduct must be directed elsewhere, not to this tribunal.

## Discussion - the appeals against the notices and the requirements of them

85. Mr Gordon's skeleton argument for the appellants challenged the notices issued on 1 May 2018 on the basis that:

(1) The information was not reasonably required for the purposes of checking the appellants' tax returns.

(2) HMRC did not have reason to suspect any under-assessment.

(3) There is no sensible or reasonable possibility of HMRC being able to raise a discovery assessment, given that they need to prove deliberate conduct.

86. HMRC deny the first two contentions. As to the third they say that the case law on which the appellants base it is not applicable to Schedule 36.

87. We deal with the second and third of the points first as if either applies there is no need to consider whether the information was reasonably required.

*Reason to suspect loss of tax – Condition B in paragraph 21 Schedule 36*

88. Mr Gordon's second argument in §85(2) derives from paragraph 21 Schedule 36, which paragraph prevents Schedule 36 from applying where a return has been made by the appellant for the tax year to which the tax position being checked relates. This blanket prohibition is removed where any of four conditions is met. In this case the only[3] relevant condition is Condition B in paragraph 21(6) which in the circumstances of these appeals provides that a Schedule 36 notice may be given if an officer of Revenue and Customs has reason to suspect that an amount that ought to have been assessed to capital gains tax for the relevant tax years may not have been assessed.

89. We note that this paragraph, like all of the rest of Schedule 36 FA 2008, is couched in terms of what an officer, here Miss McKinney, does or possesses, not HMRC as whole or as a collective entity. We think it can only be sensibly construed by holding that the officer who must show reason to suspect is the officer who gives the notice because they are the officer carrying out the check.

90. There was no mention in the skeleton of where the burden of proof lies in relation to paragraph 21. This is I assume because it is obviously the case that it is on HMRC as they it is who are asserting that, notwithstanding the ban in paragraph 21(1) on issuing a notice in the circumstances of this case where returns had been made and

[3] We were not told in specific terms that a return had been made by the appellants for 2006-07, but as HMRC did not suggest that there was an open enquiry into a return for those years, Condition A cannot be relevant.

where no incomplete enquiries were in train, Condition B is met so as to provide an exception to the ban.

91. What is required where a statute requires a person to show that they have reason to suspect a state of affairs was considered by this Tribunal in *Newton v HMRC* [2018] UKFTT 513 (TC) (Judge Richard Thomas, the judge in this case, and Derek Robertson) ("*Newton*"), so we will repeat what the Tribunal said there:

> "50. Paragraph 21(6) Schedule 36 containing Condition B is closely related in its wording to s 29(1) TMA, which used the word "discover" rather than "has reason to suspect". To make a "discovery" is to surmount a relatively low bar and we consider that "reason to suspect" sets the bar at around the same height. There is ample authority that the similar phrase "has reasonable grounds for suspicion" sets a low hurdle – see eg *Michael Parker (aka Michael Barrymore) v Chief Constable of Essex Police* [2017] EWHC 2140 (QB) (Stuart Smith J) at [33] citing inter alia the House of Lords decision in *O'Hara v Chief Constable of the RUC* [1996] AC 286 ("*O'Hara*").
>
> 51. "Has reasonable grounds to suspect" is the term used in s 317 Proceeds of Crime Act 2002 where the National Crime Agency ("NCA") wish to take over functions of HMRC. That which the NCA has to show they have reasonable grounds to suspect is that:
>
> > 'income arising or a gain accruing to a person in respect of a chargeable period is chargeable to income tax or is a chargeable gain (as the case may be) and arises or accrues as a result of the person's or another's criminal conduct (whether wholly or partly and whether directly or indirectly)'
>
> 52. In *Khan v Assets Recovery Agency* [2006] UKSpC 523, the Special Commissioners, Judge Stephen Oliver QC and Mr Theodore Wallace, said in their conclusions of s 317:
>
> > 'The qualifying condition under section 317(1) of 'reasonable grounds to suspect' does not involve proof of criminal conduct but a genuine suspicion which is reasonable viewed objectively, see O'Hara … (paras 36 to 39).'
>
> 53. Earlier they had referred to the skeleton argument of counsel for the appellant in that case. They then said:
>
> > 'Whether the qualifying condition has been satisfied in the present circumstances *will ultimately depend on the evidence from Mr Archer* [of the ARA]. But *if his evidence were to embody the matters set out in the above extract*, our provisional reaction is that the qualifying condition would be more than satisfied.' [our emphasis]
>
> 54. What is important about this extract is the stress on the evidence and that can also be seen in *Barrymore* and *O'Hara*.
>
> 55. As to cases on Condition B in paragraph 21 Schedule 36 we note *Kevin Betts v HMRC* [2013] UKFTT 430 (TC) (Judge Rachel Perez and Lesley Stalker). In that case it was accepted by both parties that HMRC had the burden of showing that any of the conditions in paragraph 21 were met. It was only Condition B that was in issue, and it is clear that

> a great deal of evidence was given by the HMRC investigator to seek to explain why he had reason to suspect omission of income.
>
> 56. Other cases where Condition B was in point and where evidence was given by an officer of HMRC include *Nijjar v HMRC* [2017] UKFTT 726 (TC) at [15] (Judge Jonathan Richards) and *Spring Capital Ltd v HMRC* [2016] UKFTT 246 (TC) at [49] to [54] (Judge Barbara Mosedale)."

92. But in this case Miss McKinney, the relevant officer of HMRC, did not give evidence, either by a witness statement or orally. She was in attendance, but was not called despite the appellants having said they put HMRC to strict proof that Condition B had been met and also queried her absence and explained what their submissions would be if she did not give evidence. HMRC's position, as explained by Mr Marks, was that the facts speak for themselves.

93. Those facts he said were:

(1) The land transferred to Niall at a valuation of £100,000 was sold in April 2007 for £400,000 and the transfer to Niall was submitted to the Land Registry on 7 February 2007. The gain was returned for the tax year 2005-06 so on the face of it there was a transfer for undervalue returned in the wrong year.

(2) The land retained by the appellants and sold to the developers was claimed to be a business asset so as to qualify for a higher taper amount but there is evidence that the land was not used as a "car yard" and the appellant has admitted as much in correspondence.

94. In fact these were what HMRC put forward to show, were it needed (they said that it wasn't), that they were able to make discovery assessments on the basis that both appellants deliberately made incorrect returns, but there was nothing else said by Mr Marks in writing or orally that amounted to a case that Condition B was met.

95. It is, as Judge Thomas in *Newton* suggested, not a high bar for HMRC to surmount. On reflection Judge Thomas thinks that the bar here may be somewhat higher than that in s 29(1) TMA where a discovery is concerned. But if a statutory provision requires a particular person to show their reasons for suspicion, the Tribunal must be in a position to decide whether the officer did in fact genuinely hold that suspicion, and whether the suspicion was objectively justified by reference to the facts put forward. It may be that in a very straightforward matter the facts do speak for themselves, but if an officer is relying on evidence they have that enabled them to form their suspicion, it seems to us to be an irreducible necessity to expose it to the scrutiny of the tribunal and to enable the officer giving their reasons for suspicion to be cross-examined by the appellant and to answer any questions the tribunal might have.

96. In relation to the 2007-08 disposal Mr Marks says that there is evidence that the land was not used as a car yard. But we were not shown it. We presume (because we do not know) that it is the aerial photographs shown to the appellants in the meeting of 26 October 2016 as well possibly as the "plenty" of other photos which have not been shown to the appellants. Taken as a whole the photographs might well have given Miss McKinney reason to suspect that the BATR was incorrectly made. But she did not

explain to us, by reference to the provisions of Schedule A1 TCGA 1992, why the fact that an aerial photo on a particular day showed no cars on the land could affect the claim to BATR.

97. As to the "admission" Mr Marks did not show us the documents in which it was made, or where the appellants say that "in fact it was proposed to be used as a car yard" and in what context. Nor did he show whether this admission was made before the issue of the first, second or third notices, or whether Miss McKinney had it in mind when issuing the May 2018 notices, and of course she did not give evidence as to her state of mind or knowledge of the facts at the time she formed her reasons to suspect or even whether she reassessed her grounds to suspect when issuing the second and third notices.

98. We go back to what was said in *Khan* at §82 (and in [52] and [53] in *Newton*). We might well have been able to agree that Miss McKinney's suspicions were genuine and objectively justified had we heard her telling us exactly what they were and why she held them, and had we heard her answers to any questions Mr Gordon asked her. But we didn't have that opportunity.

99. We therefore hold that the notices insofar as they related to the BATR claim for 2007-08 do not meet Condition B and we therefore uphold the appeal in relation to 2007-08.

100. As to the other years we are satisfied that the Land Registry document showing the date of application to register the transfer from the appellants to Niall Hegarty was capable of giving Miss McKinney reason to suspect that the date of disposal of the land by the appellants was in 2006-07. We do not think that Miss McKinney's subsequent admission that the Land Registry documents might be wrong affects the question we have to answer here, but we have not been shown that document so we cannot tell if Miss McKinney has misinterpreted it.

101. Miss McKinney also expressed her reservations about the valuation of the land given to Niall, given the close proximity of the date of the land registry application and the sale to Lennox Thompson for an amount four times greater. We note that these reservations surfaced in the "view of the matter" letter of 31 March 2017, that is in response to the appeals against the first notice, so we are unaware whether she had grounds to suspect an undervaluation at the time she would have expressed those grounds eg to her manager. Nor do we know whether she made reference to her grounds for suspecting an undervaluation and hence a loss of CGT when issuing the second notices.

102. We do have in our bundle Miss McKinney's application to her manager for the issue of the third set of notices, those under appeal. But there is no reference in that to describe what grounds for suspicion Miss McKinney had, merely that

> "I have reason to suspect that there has been an underassessment of capital gains tax due to deliberate behaviour"

without any more detail. This application was in fact put forward by HMRC to show to the appellants and the Tribunal that the notices had been specifically approved by an authorised person under paragraph 20 (old documents).

103. The application for paragraph 20 authorisation illustrates the points we are making here: this document does speak for itself for its particular purpose because it states on its face that it is a request for an authorisation to ask for documents over 6 years old. It is a matter of verifiable fact whether such authorisation was applied for or not. But in relation to the grounds for reasonable suspicion, no documents or submissions by a presenting officer can explain what was in a person's mind better than that person giving evidence. If they could the Special Commissioners would not have said what they did in *Khan*.

104. We do not know why there was no evidence given to the Tribunal by Miss McKinney about the transfer to Niall, but the fact is that it wasn't and we do not think the facts on this issue such as we have speak for themselves. We therefore hold that Condition B is not met in relation to the transfer to Niall.

**Discussion - no sensible or reasonable possibility**

105. Strictly we do not need to consider the appellants' discovery assessment point. Our decision is not appealable, so could only be overturned, if at all, on judicial review. But as it was fully argued we set out our views in case they may be of assistance in future cases.

*The appellants' submissions*

106. Mr Gordon relied on three cases, two of which are strictly binding on us, and the other one, a decision of the Outer House of the Court of Session, is effectively binding on us. But these cases, *R (oao Johnson & others) v Dr Nicholas Branigan (HM Inspector of Taxes)* [2006] EWHC 885 (Admin) (Stanley Burnton J) ("*Johnson*"), *R (on the petition of Pattullo) v HMRC* [2009] CSOH 137 (Lord Bannatyne) ("*Pattullo*") and *Hankinson v HMRC* [2011] EWCA Civ 1566 ("*Hankinson*") were all considering s 20 TMA, a provision that was repealed by Schedule 36 FA 2008 which replaced it and other information notice provisions.

107. Although the appellants recognise that *Johnson* and *Pattullo* concern s 20 TMA and not Schedule 36 FA 2008 there is, they say, no reason why the restriction imposed on HMRC's powers ceased to be applicable following the enactment of Schedule 36. We consider whether the decisions in *Johnson* and *Pattullo* can be read across to Schedule 36 notices later, after we consider what those decisions actually decided.

108. Mr Gordon also mentions in support that HMRC's team concerned with the Review of Powers were "keen to confirm" that they considered *Johnson* to be good law and this is reflected in HMRC Manuals at paragraph 23526 of the HMRC Compliance Handbook:

> "A 'taxpayer notice' is a written notice to a person requiring them to provide information or produce documents reasonably required to check their tax position. For the use of first and third party information powers

to check the tax position of one or more partners at the same time, see CH225600.

If a person has made a Self Assessment return, claim or election for a chargeable period, CH23540, you can only issue a taxpayer notice to check a person's income tax, capital gains tax or corporation tax position for that period if one or more of the following conditions apply.

- There is an open enquiry, see CH23540, into the SA or CTSA return, the claim or the election concerning the matters to which the taxpayer notice relates, or
- you have reason to suspect, see CH23560, that

  tax may not have been assessed, or

  tax may have been under-assessed, or

  tax relief given may be excessive

*and*

*you could, if necessary, make an assessment or determination to correct the position, see CH23540.*" [The appellants' emphasis]

109. The appellants also say the application of *Johnson* and *Pattullo* to Schedule 36 can be seen to be implicitly recognised by this tribunal in *The Barty Party Company Ltd v HMRC* [2017] UKFTT 697 (TC) (Judge Rachel Short and William Haarer).

110. The appellants say therefore that these cases demonstrate that in addition to showing that condition B is met, the officer must show that there is a sensible or reasonable possibility of a s 29 TMA assessment, and that that requires the tribunal to consider more than just s 29(1) which is they say replicated in paragraph 21(6).

*The respondents' submissions*

111. HMRC respond by arguing that there are crucial differences between s 20 TMA and Schedule 36 FA 2008 such that the cases about s 20 cannot be applicable to Schedule 36. In particular, s 20 allows an officer to request:

"information relevant to -

(i) any tax liability to which the person is or may be subject, or

(ii) the amount of any such liability,"

and the courts have established that:

"the link between the information requested and of (*sic*) a liability that the person 'is or may be subject to' meant that the information could only be asked (*sic*) in the immediate anticipation of an assessment being made".

112. The Schedule 36 regime, they say, makes no such link, as the link was removed by Parliament, so that there is no such requirement as is stated in *Johnson* and *Pattullo* that there must be a "sensible or reasonable possibility" of a s 29 discovery assessment.

113. They cite an article by no less than Keith Gordon (counsel for the appellants) that the link was broken by Schedule 36 and say that Parliament had an opportunity to maintain the link but did not do so.

114. They also cite two cases of this Tribunal with neutral citations [2016] UKFTT 361 (TC) (Judge Roger Berner) and [2017] UKFTT 148 TC (Judge Jonathan Cannan) as support for their view of Schedule 36. The cases are without notice (*ex parte* as was) applications for a Schedule 36 notice to be approved by the Tribunal.

115. As to CH23526 they say firstly that it merely refers to the technical requirements for issuing a discovery assessment and secondly the argument of the appellant is one that they had a legitimate expectation that the guidance in the Handbook would be followed, and that is not justiciable before this Tribunal.

*The appellants' reply*

116. In reply Mr Gordon refers to the concerns of the professional bodies that Schedule 36 was diluting the safeguards given by *Johnson* and *Pattullo* and HMRC's confirmation in "roadshows" that HMRC would continue to abide by the decisions so that there was no need for Schedule 36 to contain express protections and that the guidance reflected those confirmations.

117. He also says that the decisions of Judges Berner and Cannan are not binding on us and that they did not have the benefit of oral submissions by the taxpayers, and as they did not refer to *Johnson* and *Pattullo* it is unlikely that were brought to the judges' attention.

*Our decision*

118. We start by considering *Johnson*.

119. In that case notices under s 20 TMA were issued to three participants in a tax avoidance scheme devised by the notorious peddler of such schemes, T P D Taylor. The notices were issued by Dr Nicholas Branigan, an Inspector of Taxes and the respondent to the application for judicial review.

120. Dr Branigan had,, as he was obliged to do by s 20(7) TMA, obtained the leave of a General or Special Commissioner of Income Tax to issue the notice, so it followed that the Commissioner was "satisfied that in all the circumstances the inspector is justified in proceeding under this section". It is only where the Commissioners of Inland Revenue issued the notice (by their delegate, a very senior Inspector) that leave was not required.

121. The appellants were given a written summary of the Inspector's reasons for his application for consent (s 20(8E) TMA).

122. The case involved an application for judicial review of the decision to issue the notice because there was no right of appeal against a s 20 TMA notice. At [14] to [15] Stanley Burnton J said:

"14. In my judgment it is necessary to read section 20 together with the provisions of section 29 of the Taxes Management Act 1970. Section 29 confers the substantive power on the Inland Revenue to make an assessment to be served on the taxpayer requiring him to pay tax in addition to any which has been previously paid. It is headed 'Assessment where loss of tax discovered'. Section 20 itself confers no right to call for the payment of tax and of itself imposes no liability to pay tax. That right and that liability are the subject of section 29. An assessment made pursuant to section 29 may be the subject of appeal. It is perhaps not surprising that section 20 does not confer any right of appeal against a notice served under it, given that the notice is, in a sense, an interlocutory step, a step taken in order to obtain information with a view to deciding whether or not the power conferred by section 29 should be exercised.

15. *The practical constraint on section 20 is that it can only be used when there is a sensible or reasonable possibility of an assessment under section 29.* The power conferred by section 29 is very substantially qualified. It is so qualified no doubt because Parliament considered that generally a taxpayer who has honestly provided a tax return under the self assessment scheme should not be indefinitely liable to a demand for the payment of an amount of taxes beyond that which, by his return, he has disclosed as payable by him. [Our emphasis]"

123. At [19] and [20], having considered the law in s 29 TMA, Stanley Burnton J said:

"19. It is accepted by Mr Jones on behalf of HMRC, and in my judgment rightly, that HMRC, or rather an inspector, could not properly serve a notice under section 20 in circumstances where there was no prospect of the conditions imposed on an assessment under section 29 being fulfilled, that is to say where there was no question of fraud or negligence, or where there was no question of an officer of HMRC being able to say that he could not have been reasonably expected on the basis of the information provided by the taxpayer, here Mr Collins, in his tax return, to be aware of the matters giving rise to be tax liability which could be the subject of an assessment under section 29. In practice, therefore, there is a significant limitation on the power to serve a notice under section 20. In the present case, HMRC do not suggest that on the information presently available to them there has been fraud or negligence. What they do say is that they have reason to believe that there is information which they could not reasonably have been expected to be aware of as a result of the receipt of Mr Collins' tax return which does affect his liability for tax during the year in question.

20. The first question which arises is: what is the test to be applied in determining the availability of the power under section 20 in circumstances where the time allowed by section 9A is expired? As I have already indicated, I accept as a correct statement of the legal position that the power under section 20 is exercisable where what is called for is information which may sensibly lead to a lawful assessment being made under section 29. It is not, therefore, the case, as I understood Mr Price to suggest, that in the absence of fraud or an allegation of negligence the power under section 20 is unavailable. In

> my judgment, it is also available in circumstances where it may be that information acquired as a result of the service of a notice under section 20 may lead to a valid assessment under section 29."

124. In order to answer the question in the case under consideration the judge said "it is sufficient to look at the summary of reasons given by the defendant for the service of the notice". Having done so the judge said, at [25]:

> "In my judgment, this is not a case which comes anywhere close to its being shown that there is no real or reasonable prospect of the power under section 29 being exercised. In my judgment it follows that the power to serve a notice under section 20 was available, notwithstanding the expiration of the time allowed by section 9A."

125. As to the requirement to obtain leave of a Commissioner, the judge said at [27] that:

> "There is a significant safeguard in section 20 on the power of the Revenue to serve a notice under it. The principal safeguard is the requirement of the consent of a General or Special Commissioner."

And later in that paragraph:

> "The requirement under section 20(7) is that the Commissioner must be satisfied that in all the circumstances the Inspector is justified in proceeding under that section. Clearly, under that section the inspector must produce sufficient evidence to satisfy the Commissioner that it is appropriate to proceed under that section. As I have already said, it would not be appropriate to proceed under that section absent the possibility, which must be a reasonable possibility, of an assessment being made under section 29 under the conditions it imposes."

126. *Pattullo* was also a judicial review case involving a similar tax avoidance scheme and also involving Dr Branigan. At [6] in his opinion Lord Bannatyne set out what, according to the petitioner's senior counsel, Mr David Johnston QC, was the issue:

> "whether HMRC were legally entitled, having regard to the information provided in the petitioners' said tax return (the white space), to make a discovery assessment in terms of Section 29 of TMA 1970 and, in order to do so, were entitled to serve a discovery notice."

127. In this case the court had an affidavit from Dr Branigan and at [16] to [24] the judge recites the petitioner's counsel's analysis and criticism of that affidavit, and at [25] to [43] counsel's analysis of the law on discovery assessments.

128. At [49] and [51] Lord Bannatyne recites what senior counsel quoted from *Johnson* as being particularly important. The paragraphs in *Johnson* are [14], [15], [20], [22] and [24].

129. At [73} it was stated to be the position of HMRC's counsel, Mr Artis, that Stanley Burnton J had correctly expressed the test in paragraph 20 of *Johnson*.

130. At [90] and [91] Lord Bannatyne started his discussion of the issues and said:

"[90] The first point at issue before me is this: in what circumstances is an officer of the respondents entitled to issue a discovery notice in terms of Section 20 of the TMA 1970

[91] This power in my judgement is available to an officer in the circumstances identified by Stanley Burnton J in *R* (*Johnson et al) v Branigan supra*. [at [20]]"

131. At [107] Lord Bannatyne turned to the question whether there was a reasonable or sensible possibility of a s 29 discovery. He said:

"Having regard to the relationship between Section 20 and 29 of the Act as I have explained it and having regard to the proper construction of these two sections the first question I require to ask myself is this: have HMRC newly come to the conclusion that it is probable that there was an insufficiency? The respondents are at an early stage in their investigations and are not able to say there probably is an insufficiency. That is what they wish to investigate. They however say they have newly discovered that the petitioner was probably a participant in the CRC Mark II scheme as a result of expert examination of the return and they believe that this may lead there to be an insufficiency. Applying Auld LJ's test that is properly understood a discovery,(a new fact has come to light: the petitioner's membership of the scheme) that in my view at this stage in the process fulfils that part of the test. *The critical question in the case before me then becomes: should the information contained in the white space in the taxpayers return have clearly alerted an officer having regard to the general knowledge and skill that might reasonably be attributed to him, of an insufficiency of tax? If it should have there could be no reasonable or sensible possibility of an assessment in terms of Section 29 accordingly the respondents would not be entitled to a discovery notice in terms of Section 20.*" [my emphasis]

132. Lord Bannatyne then referred at [110] and [111] to Dr Branigan's affidavit and said, at [111] to [113]:

"111. Dr Branigan's position on a fair reading of his affidavit as a whole is: that (1) he was only able to reach this belief as a result of his specialist knowledge arising from his being the head of the team investigating the CRC Mark II scheme; (2) he is not at this stage able to say that he is aware of an actual insufficiency as he cannot say definitely that the petitioner was a participant. Further, if he was a participant, in the absence of the details of the scheme he is unable to say that he is aware of an actual insufficiency. Thus he is unable at this stage to proceed to a s 29 assessment and requires to proceed to a s 20 notice in order to discover documentation. The situation is accordingly very much on all fours with that in *R* (*on the application of Johnston*) *v Branigan* (*Inspector of Taxes*) where a s 20 assessment was held to be competent.

112. Given the position of Dr Branigan therefore the question for the court becomes: is there a clear alerting of an officer within the white space--that officer being one of ordinary knowledge and skill--of the participation by Mr Pattullo in such a scheme of tax avoidance and of an insufficiency in tax arising therefrom?

> 113 The answer to the above question is that I have not been satisfied by Mr Johnston's submissions that there was such a clear alerting within the white space."

133. The judge decided at [114] "as is pointed out in his affidavit by Dr Branigan" that the white space information in the return about the avoidance scheme entered into would not have sufficiently alerted the hypothetical inspector to an actual insufficiency of tax. He then concluded at [116] and [117]:

> [116] Accordingly in my opinion this is a case in which I cannot be satisfied that it has been shown there is no real or sensible prospect of a power under Section 29 being competently exercised. Accordingly in my judgment the right to serve a notice in terms of Section 20 was available.
>
> [117] Turning to the question: for what purposes may a section 20 notice be used I preferred the submissions made on behalf of the respondents. In my view a section 20 notice, where there is a reasonable prospect of a section 29 assessment being exercised, can be used to obtain information in order to decide whether the section 29 power should be exercised. That in my view on a proper reading of section 20 is its purpose. I agree with the submission for the respondents that to hold otherwise would be to misread the section. I would agree with what is said by Stanley Burnton J at paragraph 14 in *R (Johnson) (et al)* v *Branigan* that section 20 is:
>
> > 'a step taken in order to obtain information with a view to deciding whether or not the power conferred by section 29 could be exercised'.
>
> That is precisely the use to which it is being put in the instant case. I do not believe that such a use defeats the underlying purpose of early finality of assessment. Its use is of course constrained, as I have said above, by it only being exerciseable where there is a real or reasonable prospect of the power under section 29 being exercised. Thus a section 20 notice can properly be used in the circumstances of this case."

134. Finally as to *Hankinson* the only reasoned decision was given by Lewison LJ. At [4] he said:

> "Section 20 of the Taxes Management Act 1970 (and now Schedule 36 to the Finance Act 2008) also gives powers to call for information. These powers may be exercised after the enquiry window has closed. Notice under section 20(1) and 20(3) may be given by an inspector authorised by HMRC, but it can only be given with the consent of the tribunal. If the inspector gives notice in exercise of these powers he must give the taxpayer a written summary of his reasons for applying for consent: section 20(8E). The giving of a notice under section 20 is a precursor to the making of a discovery assessment; and it can only be done where there is a sensible or practical possibility of a discovery assessment being made under section 29: *R (oao Johnston) v Branigan* [2006] EWHC 885 (Admin) §§14, 15; *R (oao Pattullo) v HMRC* [2009] CSOH 137 [2010] STC 107 §91."

135. But as Lewison LJ says at [6] that paragraph and the others before it are undisputed background to the case which was entirely about discovery assessments.

136. We acknowledge that all the cases where the "sensible or practical possibility" test has been considered and applied are avoidance cases where it is s 29(5) TMA that is the condition to be met, not as here where it is s 29(4), but we do not consider that that makes any difference to the approach we should take, save only that we should take into account when judging whether there was a reasonable or sensible possibility of a s 29 assessment being competently made (if we consider that that test applies to Schedule 36) the fact that here there is an allegation of conduct which is tantamount to fraud which would require to be specifically pleaded in support of the right to make the assessment.

137. It is clear from a reading of *Pattullo* that Lord Bannatyne approached the "sensible or practical possibility" test by not only examining the facts, ie the entries on Mr Pattullo's return but by closely considering Dr Branigan's evidence in his affidavit (there was no oral evidence in the case as it was one for judicial review) and by considering the opposing submissions by counsel on that affidavit, it being notable that counsel for Mr Pattullo went into great detail on the matter.

138. But the question remains: is there the same requirement for the showing of a "sensible or practical possibility" of a discovery assessment in Schedule 36? And what are the differences between s 20 and paragraph 1 Schedule 36 and are they significant and relevant?

139. There is no right of appeal against a s 20 notice (which is why there had to be judicial review), whereas for a paragraph 1 Schedule 36 case, ie where paragraph 3 Schedule 36 (leave of the Tribunal obtained to the issuing of a notice) is not used, there is an appeal right.

140. A s 20 notice requires the leave of a tribunal, but a paragraph 1 Schedule 36 notice does not.

141. A s 20 notice is limited to documents which in the inspector's "reasonable opinion" contain information relevant to a tax liability to which the person is or may be subject (or to the amount) and to such particulars as the inspector may reasonably require as being relevant to such a liability or its amount: a paragraph 1 Schedule 36 notice is limited to information or documents reasonably required by the officer for the purpose of checking the taxpayer's tax position.

142. A s 20 notice seeking documents more than 6 years old can only be given if the Commissioner specifically approves its being given and is satisfied, on the inspector's application, that there is reasonable ground for believing that tax has, or may have been, lost to the Crown owing to the fraud of the taxpayer. Under Schedule 36 a notice under paragraph 1 must be consented to by an authorised officer, and a notice for both documents and information that relate to periods for which an enquiry is not open can only be given if Condition B is met, ie that an officer of Revenue and Customs has

reason to suspect that, as regards the person, an amount that ought to have been assessed to tax for the chargeable period may not have been assessed.

143. From this comparison it can be seen that in relation to a paragraph 1 Schedule 36 notice the safeguards have been significantly relaxed. No consent is required from an independent tribunal either for the notice at all or for old documents, but the corollary is that there is oversight by the Tribunal on appeal against the notice, whereas under s 20 TMA a person seeking to object to the notice had to apply for judicial review.

144. We do not see any significant difference between the condition in s 20 that notice is valid only if in the reasonable opinion of an inspector the document contains information relevant to a tax liability to which the person may be subject and the condition in Schedule 36 that a document must be "reasonably required" for the purposes of checking a person's tax position. And as to information the position is even more finely nuanced: in s 20 TMA the test for particulars ((ie information) is, like the test in Schedule 36, that the documents be reasonably required, the sole difference being that in s 20 the information must be reasonably required as being relevant to a tax liability to which a person is or may be subject but in Schedule 36 must be reasonable required for checking a tax position, which means checking their "past, present and future liability to pay any tax" (paragraph 64 Schedule 36).

145. Given this we are slightly unclear about what HMRC is arguing here. They refer to the what the "courts established" without saying which courts. We assume, because they refer to *Johnson* and *Pattullo* two paragraphs later in their skeleton, that they mean that it is in those cases that the courts established what HMRC say they did. What HMRC say is that the "no possibility" safeguard arose because of "the link between information requested and a liability to which a person is or may be subject to", and that Schedule 36 makes no such link.

146. We have reread *Johnson* and *Pattullo* but can find no evidence in those decisions of any mention of a link such as HMRC say there must be. What we take HMRC to mean then is that the words "is or may be subject to" impose the requirement that there must be a real possibility of a discovery assessment being made. By contrast Schedule 36 does not refer to whether a person is or may be subject to a liability that can be assessed and so enforced. The only test they say is in paragraph 21(6) which replicates s 29(1) and that all HMRC have to show is that an amount that ought to have been assessed had not been or that relief from tax may be excessive.

147. We are not persuaded by HMRC's arguments that there is any material difference between s 20 TMA as it applies to a first party notice by an inspector and a paragraph 1 Schedule 36 notice issued without seeking leave of the tribunal.

148. We make clear that neither HMRC guidance, nor any confirmations they may have given about their approach to Schedule 36 in roadshows is relevant to our decision. But we are fortified in our view by what the Compliance Handbook says, while recognising that any complaint that in this case HMRC officers have not followed guidance published to all the world is not within our jurisdiction.

149. Nor do we think that the decisions of Judges Berner and Cannan assist HMRC, as, apart from not being binding on us, they were without notice to the appellant and the judges did not appear to have been referred to *Johnson* and *Pattullo*. What we have to decide is whether what *Johnson* and *Pattullo* decided binds us in interpreting Schedule 36. We do not think *Hankinson*, even though it refers to Schedule 36, binds us as the reference to Schedule 36 is wholly general and simply confirms that it is a provision about requiring information. The references in it to *Johnson* and *Pattullo* are confined to their applicability to s 20.

150. Thus the only question for us is whether the decisions in *Johnson* and *Pattullo* have the effect that the safeguards they held to be present in s 20 are also in Schedule 36. The first difficulty we have in deciding this question is a certain lack of clarity we perceive about what those cases actually provided for as a matter of law. *Johnson* says that the need to show that there is a sensible or reasonable possibility of a discovery assessment being issued is a "practical constraint" on HMRC. We are not clear whether this means that whatever s 20 TMA might say HMRC are somehow estopped from issuing a s 20 notice in "no possibility" circumstances (which would perhaps only be enforceable by judicial review proceedings – which both *Johnson* and *Pattullo* were) or whether it means that s 20 must be interpreted as incorporating the "no possibility" test.

151. It seems to us that a close reading of *Johnson* shows that Stanley Burnton J was intending to give his interpretation of s 20 TMA. This is apparent from [36]:

> "I have reached clear conclusions as to the requirements of the statute and the lawfulness of the notice served in each of the cases before me. There are serious matters of construction which have been raised. I have considered whether it would be appropriate to refuse permission to apply for judicial review or to grant permission and deal with the matter substantively. Neither party has objected to my taking the latter course, having regard to the fact that the notices and their lawfulness must stand or fall on the documents presently before me. The principal questions before me have been questions of construction and the application of the true construction of the statute to the notices and tax returns in these cases. It seems to me, in those circumstances, the appropriate course is to grant permission in each case but to dismiss each claim for judicial review for the reasons I have given. That will enable any challenge to my decision to be made more appropriately."

152. It also seems to me that this is a construction of s 20 which is designed to avoid absurdity in the more general sense of that term as used in *Bennion on Statutory Interpretation*, and in particular the absurdity of a process that would be futile as nothing could be done with the information the supply of which is compelled by the notice. Stanley Burnton J's construction of s 20(1) seems to involve taking a view of what tax liability a person may be subject to at the time when the notice is sought and that a person is not subject to a liability if the there is no sensible or reasonable way of enforcing the liability. Another possible construction is that in the circumstances where there is no such possibility the opinion of the officer about documents cannot be a reasonable one, as required by the opening words of s 20(1) TMA, nor can any particulars be reasonably required.

153. We add, because it a point reflected in the arguments, that it is obvious from *Johnson* that the question was not whether there was a reasonable possibility of the officer showing that s 29(1) TMA applied, but that there had to be a reasonable possibility that, in a case where it was relevant as it was in *Johnson*, that one of conditions in s 29(4) or (5) was met, and in both *Johnson* and *Pattullo* it was s 29(5) as they were avoidance cases with no suggestion of any culpability or negligence.

154. In interpreting Schedule 36 it has to be borne in mind that it is applicable to a large range of taxes including VAT and that the same precision in relation to chargeability, liability and enforcement that might be found in a provision limited to income tax, CGT and corporation tax will not necessarily be replicated in a provision of much wider scope. Nonetheless in our view the wording of paragraph 1, read with paragraphs 58 and 64 (and sub-paragraph (1)(a) in particular), makes a sufficient link between the information and the liability to tax to enable the *Johnson* and *Pattullo* test to be read in, and for absurdity in the sense of futility to be avoided. We would say that a person's tax position is not being legitimately checked or enquired into if the position is one which cannot be corrected by an enforceable assessment.

155. In the alternative we would construe the phrase "reasonably required" in paragraph 1 as importing the same test. It cannot be reasonable to make a futile enquiry.

156. We do not think that paragraph 21(6) affects this interpretation. That paragraph simply delineates in a very wide way the possible scope of an information notice in a case where a tax return is not being enquired into. It too may be of wider import than the three direct taxes to which s 20 applied.

157. Our conclusion then is that the *Johnson* test is part of Schedule 36.

158. This conclusion means that we would have needed to consider whether, in this case, s 29(4) TMA would permit HMRC to make discovery assessments for 2006-07 and 2007-08. We have noted that HMRC do not anywhere indicate that they were enquiring into 2005-06, but given the width of "tax position" in paragraph 64(1) and (4) Schedule 36 we think they could at any time check into the position for that year. They would it seems have wished to do that if their position in relation to 2006-07 was found to be wrong, because they queried the private residence relief claimed in the returns for 2005-06 once they belatedly realised that the gain on the transfer to Niall had in fact been returned.

159. It is agreed that it would avail HMRC nothing to have demonstrated that the appellants behaviour in delivering returns containing inaccurate claims and for the wrong year and the wrong amounts of gain was careless, as any assessments made in 2018-19 or later would be substantially out of time in accordance with s 36(1) TMA. They would have to rely on showing that the tax losses as a result of the inaccuracies and omissions were brought about deliberately by each of the appellants. That requires HMRC to show that each of the appellants knew that they were making false or falsely inflated claims in their returns to PRR and BATR.

160. HMRC said in their skeleton (in the event that we agreed with the appellants on *Johnson* and *Pattullo*) that there was a sensible or reasonable possibility of being able to make an assessment under s 29 that met the relevant condition in s 29(4). They make two points (we are rewriting them to some extent):

5 (1) The difference between the valuation of the land transferred to Niall and the sale price is so large that, if the valuation was incorrect and particularly if the return of the gain was made for the wrong year, the entries in the returns are ones which the appellants must have known were incorrect. If that is so HMRC infer that that indicates a deliberate error.

10 (2) If it was to be found that there was no "car yard" nor any real possibility of it becoming a car yard the claim for BATR was deliberately incorrect.

161. After the evidence of Mr Hegarty and Mr O'Neill had been given there was insufficient time left to enable submissions to be made on that evidence and so we requested written submissions which we received.

15 162. In his post-hearing submissions Mr Marks no longer suggested that any errors in the 2005-06 return, either as to the claim for PRR or the valuation, were brought about deliberately, or that a failure to return the disposal in 2006-07 was deliberate.

163. But he argued that the evidence of Mr Hegarty as to the land showed that he must have deliberately allowed a false claim to BATR because he knew that the partnership
20 was not using all of the land all of the time for business purposes.

164. We should say something about the standard of proof in relation to the "no possibility" point. We are clear that we do not have to decide whether it is more likely than not that there was deliberate conduct by the appellants: nor is the bar as low as it is for paragraph 21(6). It seems to us that there must be an arguable case shown by
25 HMRC that there was deliberate conduct, ie one that is sensible and reasonable and with some prospect of success.

165. We do not need to express a view about 2006-07 (or 2005-06) as no case is put forward. As to 2007-08 in our view HMRC have come nowhere showing that it was more likely than not that there was deliberate conduct leading to a loss of tax by the
30 appellants. This is mainly because we have had no evidence by way of witness statement or orally from Miss McKinney or any other HMRC officer on this question. Mr Gordon referred us to the case of *Gardiner & others v HMRC* [2014] UKFTT 421 (TC) (Judge Jonathan Cannan) where the judge allowed the appeal because HMRC adduced no evidence to establish a prima facie case of negligence. We think this applies
35 all the more strongly where the allegation is tantamount to fraud. Nor do the undisputed facts left to speak for themselves go anywhere near establishing fraud, any more than they did in *Munford v HMRC* [2017] UKFTT 19 (TC) (referred to by Mr Gordon in oral argument).

166. HMRC have not adduced any evidence from Miss McKinney to show that there
40 was deliberate, knowing conduct by the appellants or on their behalf (and if so by who) nor do the undisputed facts suggest that there was. It may be that the BATR claim

would not if investigated stand up to scrutiny as meeting the conditions in Schedule A1 TCGA 1992 or would only justify a smaller amount of relief, but that is by no means the same as saying that any loss of tax occasioned by an incorrect claim was brought about knowingly.

167. Thus even if we had accepted that Condition B was met, we would have found for the appellants.

## Decision

168. Under paragraph 33(3)(c) Schedule 36 FA 2008 we set aside both notices.

## Postscript

169. We have to point out to the appellants, that while there is no right of appeal given to HMRC to contest this decision (paragraph 32(5) Schedule 36), nothing in our decision prevents HMRC from issuing another notice under Schedule 36 FA 2008. Speaking for ourselves (and obviously obiter) we would consider that HMRC were estopped from so doing or that it would be an abuse of process.

170. Nor does our decision prevent HMRC issuing discovery assessments. Nor is any Tribunal hearing any appeals against any such notices or assessments bound by anything we say. We can simply suggest to HMRC that on the capital gains questions here that they have missed the boat and should move on.

171. We were also very surprised to be told by Miss McKinney when we asked that HMRC have not stopped investigating the appellants in relation to their car sales business. We recognise from our knowledge of other cases (see *Alan McCord v HMRC* [2018] UKFTT 664) that HMRC have legitimate concerns about VAT fraud in dealings by car dealers in Northern Ireland selling to the Irish Republic. But it is surely time after so long for HMRC to either say now what their grounds are to suspect the appellants of fraud in relation to such dealings or to give them, people in their 70s, some finality and peace of mind.

**RICHARD THOMAS**
**TRIBUNAL JUDGE**

**RELEASE DATE: 27 DECEMBER 2018**