



Appeal number: UT/2018/0040

INCOME TAX – discovery assessments – section 29 (1) TMA 1970 – whether a “discovery” – whether carelessness within section 29(4) – whether an officer could reasonably have been expected to be aware of the insufficiency of tax within section 29(5) – information made available under section 29(6)

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS
- and -**

Appellants

JOHN HICKS

Respondent

**TRIBUNAL: MR JUSTICE MORGAN
JUDGE GUY BRANNAN**

Sitting in public at the Royal Courts of Justice, Rolls Building, London from 16-18 October 2019

Akash Nawbatt QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Keith Gordon, Counsel, instructed by Crowe UK LLP, accountants, for the Respondents

DECISION

Introduction

1. This is an appeal against the decision of the First-tier Tribunal (Judge Thomas Scott) (“**FTT**”) released on 12 January 2018 (“**the Decision**”). Essentially, the appeal relates to the question whether “discovery” assessments issued to the taxpayer (“**Mr Hicks**”) under section 29 Taxes Management Act 1970 (“**TMA**”) were valid. The FTT allowed Mr Hicks’ appeal and the appellants (“**HMRC**”) now appeal against that decision, with the permission of Judge Scott.

2. In summary, the FTT allowed Mr Hicks’ appeal against discovery assessments raised in respect of the 2009/10 and 2010/11 income tax years. The assessments concerned alleged insufficiencies in Mr Hicks’ self-assessments resulting from his participation in a tax avoidance scheme (referred to as the Montpelier Section 730 Dividend Strip Scheme – “**the Montpelier Scheme**”) during the 2008/09 income tax year.

3. Although the scheme was entered into (and the losses arose in) the 2008/09 income tax year, the result of the scheme was that losses exceeded Mr Hicks’ income in that year and the surplus losses were carried forward and set off against his trading profits of the 2009/10 and 2010/11 income tax years. The FTT’s decision and this appeal relate to those later two income tax years.

4. HMRC opened an enquiry under section 9A TMA into Mr Hicks’ 2008/09 self-assessment return. However, no enquiry was opened into the returns for the 2009/10 and 2010/11 income tax years. On 30 March 2015, however, HMRC issued discovery assessments in respect of those two income tax years, seeking to deny the loss relief claimed.

5. HMRC closed its enquiry into the income tax return for the year ended 2008/09 on 24 November 2016 and, we understand, the appeal against that closure notice is still to be determined.

6. For the purposes of the present appeal, Mr Hicks did not seek to argue that the losses were in fact available. Instead, the appeal before the FTT and before us related solely to the application of the provisions in section 29 TMA. All references to the provisions of section 29 are to section 29 TMA.

7. The FTT, in summary, concluded:

(1) HMRC had made a valid discovery assessment under section 29(1) and that the discovery was not “stale”; but

(2) HMRC did not show carelessness either by Mr Hicks or a person acting on his behalf for the purposes of section 29(4) in respect of the 2009/10 and 2010/11 income tax years; and

(3) the condition in section 29(5) was not met in respect of the 2010/11 income tax year, because sufficient information within section 29(6) had in fact been supplied to HMRC so as to alert the “hypothetical” officer of the potential insufficiency in the original assessment.

5 8. Accordingly, the FTT allowed Mr Hicks’ appeal.

9. Again, in summary, HMRC appeal against the FTT’s conclusions in paragraph 7(2) and (3) above and Mr Hicks cross-appeals, by a Respondent’s Notice, against the conclusion in paragraph 7(1).

Application to admit evidence

10 10. HMRC applied for the late admission of their record of the oral evidence before the FTT. In particular, having obtained a copy of Judge Scott’s manuscript note of the evidence, HMRC applied to admit their manuscript notes of the oral witness evidence on the basis that Judge Scott’s note of the evidence was incomplete.

11. The issue relating to the record of oral evidence concerned the application of
15 section 29(4). HMRC’s Permission to Appeal on this issue had been given by the FTT, in particular, on the ground that the evidence of Mr Bevis (of Precision Accountancy - Mr Hicks’ accountant) had not been taken into account. It seemed to us, therefore, that it was necessary to establish what evidence was before the FTT. We therefore gave permission for this evidence to be admitted.

20 Factual background

12. The underlying facts were not in dispute and can be summarised as follows. It will be seen later in this decision, however, that HMRC contest certain other findings of fact by the FTT.

13. Mr Hicks was one of a number of participants in the Montpelier Scheme. The
25 Montpelier Scheme was marketed by Montpelier Tax Consultants (IOM) Ltd (“**Montpelier**”) and was disclosed to HMRC on Form AAG 1 under the Disclosure of Tax Avoidance Scheme Rules (“**DOTAS**”) received by HMRC on 24 September 2008. The Form AAG 1 stated that the arrangement was available to self-employed derivative traders who worked at least 10 hours per week on average in the trade. The
30 trader acquired dividend rights with the intention that the cost of such rights was a deductible expense of the trade but the dividend income was not taxable as a result of section 730 Income and Corporation Taxes Act (“**section 730**”).

14. Under the Montpelier Scheme, Mr Hicks entered into a contract to acquire the rights to 5 dividends (all payable on 5 February 2009) of £300,000 each at a total cost
35 of £1,498,035. Entities controlled by Montpelier lent Mr Hicks the funds to acquire the right to acquire the dividends. On 27 February 2009, Mr Hicks paid Montpelier an up-front fee of £75,000 pursuant to a Professional Service Agreement (“**PSA**”). The PSA stated that a further £75,000 was contingent upon agreement of the losses by HMRC. Mr Hicks claimed the deduction in full (i.e. £150,000 in respect of the fees)
40 in his 2008/09 accounts.

15. In his tax returns, Mr Hicks relied on section 730 to exclude the receipt of the £1.5 million dividend income from his trading income during the income tax year ended on 5 April 2009. By excluding the dividend income under section 730 (and deducting the fees paid under the PSA) Mr Hicks' taxable profit of £425,899 was reduced to nil and a loss of £1,221,867 was created. This loss was carried forward under section 83 Income Tax Act 2007 to reduce the taxable profits of his trade (i.e. his pre-existing derivatives trade) in the two subsequent years from £483,696 to nil (2009/10) and £348,594 to nil (2010/11). Therefore, Mr Hicks claimed that his participation in the Montpelier Scheme reduced his taxable profits of £1,258,189 for the three relevant tax years to nil.

16. At [9]-[21] the FTT gave the following chronology:

“9. The key events for the purposes of the appeal in chronological order were as follows.

10. On 17 September 2008 Montpelier Tax Consultants (IOM) Ltd submitted to HMRC a Form AAG1 (headed “Disclosure of Avoidance Scheme (Notification by scheme promoter)”) in respect of the arrangements implemented by Mr Hicks.

11. During January and February 2009 Mr Hicks attended two meetings with Montpelier to discuss the arrangements.

12. In February 2009 Mr Hicks signed documentation with Montpelier and entered into the arrangements.

13. Between signing that documentation and the end of the tax year 2008-09 Mr Hicks carried out the transactions which were claimed to give rise to the trading losses.

14. On 27 January 2010 HMRC received Mr Hicks' self-assessment tax return (“SATR”) for 2008-09.

15. On 3 December 2010 HMRC opened an enquiry into the 2008-09 return.

16. On 28 January 2011 HMRC received Mr Hicks' SATR for 2009-10.

17. On 31 January 2012 HMRC received Mr Hicks' SATR for 2010-11.

18. On 30 March 2015 HMRC issued discovery assessments in respect of Mr Hicks' returns for 2009-10 and 2010-11.

19. Mr Hicks appealed against the 2009-10 assessment on 28 April 2015 and against the 2010-11 assessment on 30 April 2015.

20. On 29 June 2016 HMRC upheld the discovery assessments following a statutory review.

21. On 25 July 2016 Mr Hicks lodged an appeal against the discovery assessments.”

The relevant legislation

17. The relevant provisions of section 29 in force at the material time were as follows:

“29 Assessment where loss of tax discovered

- 5 (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
- (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
- 10 (b) that an assessment to tax is or has become insufficient, or
- (c) that any relief which has been given is or has become excessive,
- the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in
- 15 order to make good to the Crown the loss of tax.
- (2)...
- (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
- 20 (a) in respect of the year of assessment mentioned in that subsection; and
- (b) in the same capacity as that in which he made and delivered the return,
- unless one of the two conditions mentioned below is fulfilled.
- 25 (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
- (5) The second condition is that at the time when an officer of the Board—
- 30 (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
- (b) informed the taxpayer that he had completed his enquiries into that return,
- 35 the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.
- (6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—
- 40 (a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return) or in any accounts, statements or documents accompanying the return;

- (b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;
- 5 (c) it is contained in any document, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or
- 10 (d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—
 - (i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or
 - (ii) are notified in writing by the taxpayer to an officer of the Board.
- (7) In subsection (6) above—
- 15 (a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—
 - (i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods...
 - (ii) ...
- 20 (b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf."

18. Pursuant to section 34 TMA, the usual time limit for issuing an assessment is four years after the end of the year of assessment to which it relates. This time limit is extended in certain circumstances by section 36 TMA, which relevantly provides as follows:

- 25 "36 Loss of tax brought about carelessly or deliberately etc
- (1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates...
- 30 (1B) In subsections (1) and (1A) references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person."

19. Finally, section 118(5) TMA provides as follows:

35 "(5) For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation."

The FTT Decision

20. We summarise below the relevant parts of the Decision. References in square brackets are, unless the context otherwise requires, to the relevant paragraphs of the Decision.

FTT Decision: Was there a valid discovery assessment within section 29(1)?

21. The FTT first considered at [25]-[29] the principles relating to discovery assessments under section 29(1). The FTT noted at [27] that the burden of proof was on HMRC to establish that the discovery assessments were validly made. Secondly,
5 the FTT observed that the discovery assessment rules in section 29(1) were more restrictive than HMRC's powers in earlier provisions: Decision [28].

22. Importantly, the FTT explained at [29], in terms that were common ground, that slightly different considerations applied to the two income tax years under appeal:

10 "In this appeal, HMRC did not issue assessments to Mr Hicks for 2009-10 or 2010-11 within the normal time limits. In seeking to issue discovery assessments for those years, HMRC must establish two issues. First, they must establish that a discovery was made for those years. Secondly, for the year 2009-10, since the discovery assessments were not issued until 30 March 2015, HMRC must establish
15 carelessness within the terms of section 29(4)¹, and for the year 2010-11 must either establish carelessness or that there was an insufficiency of disclosure such as to permit assessment under section 29(5)."

23. Next, the FTT considered whether HMRC had made a "discovery" for the purposes of section 29(1), referring at [30] to Mr Hicks' argument that any discovery
20 made by Mr Boote (the HMRC officer who took over the investigation into the Montpelier Scheme) had lost its essential "newness" and had become "stale". The FTT at [31] summarised the two questions concerned as whether the officer had "crossed the threshold" (see below) and thus made a "discovery", and if so when. The second question was whether the issue of the assessments was sufficiently proximate
25 to the discovery.

24. The FTT gave a short description of the Montpelier Scheme, noting at [33] that it was irrelevant whether, as HMRC insisted, the Montpelier Scheme was a "tax avoidance scheme". The FTT also at [34] indicated that a variation of the Montpelier Scheme was held to be ineffective in *Clavis Liberty 1 LP v HMRC* [2016] UKFTT
30 253(TC) and [2017] UKUT 418 (TCC). It was also recorded at [35] that HMRC's arguments as to why the Montpelier Scheme was ineffective evolved over time.

25. The FTT recorded at [38] that Mr Boote's involvement with the Montpelier Scheme began in January 2014 and involved gathering facts and marshalling arguments. Specialist input was sought from various parts of HMRC and had been
35 drawn together by late August 2013². Mr Boote concluded that some of the arguments, particularly relating to trading, were materially fact-sensitive. By March 2015, Mr Boote had concluded that the Montpelier Scheme was ineffective and he issued the discovery assessments to Mr Hicks [39] which are the subject of this appeal. The FTT did not accept Mr Boote's explanation that his decision to issue the
40 discovery assessments on that date, a few days before the applicable time limit

¹ This is because of the provisions of sections 34 and 36(1) TMA

² Although the FTT referred to August 2013 it is possible that this was a typographical error for 2014.

expired, was uninfluenced by that time limit. Nonetheless, the FTT concluded that the reliability of rest of his evidence was unaffected.

26. Mr Boote's role was considered by the FTT at [40]. It was found that by the summer of 2014 Mr Boote had concluded his technical analysis of the Montpelier Scheme and then turned to its application to the facts of each user of the Scheme. In November 2014, Mr Boote wrote to users of the Montpelier Scheme, including Mr Hicks, setting out his conclusions in seeking a settlement.

27. Next, the FTT considered the authorities in relation to "discovery" assessments, referring at [41] to the decisions of the Upper Tribunal in *HMRC v Charlton* [2012] UKUT 770 (TC) ("**Charlton**") (at [28] "...the word "discovers" does connote change, in the sense of a threshold being crossed."), the Court of Appeal in *Hankinson v HMRC* [2011] EWCA Civ 1566 ("**Hankinson**") and the decision of the Upper Tribunal in *Pattullo v HMRC* [2016] UKUT 270 (TCC) ("**Pattullo**").

28. At [42] the FTT noted that in *Hankinson* the Court of Appeal stated that the threshold for a "discovery" was simply that an officer came to a conclusion, or satisfied himself, as to an insufficiency of tax. It included a case where the officer changed his mind. At [43] the FTT concluded that Mr Boote had "crossed a threshold" in the sense described in *Charlton* and *Hankinson* before he issued the discovery assessments to Mr Hicks on 30 March 2015.

29. The FTT then continued by considering whether, by 30 March 2015, Mr Boote's "discovery" was "stale" in the sense contemplated by *Pattullo*, noting that in that case Lord Glennie indicated that staleness would arise only "in the most exceptional of cases." The FTT at [48] did not accept that HMRC had "crossed the threshold" when Mr Boote took over his role in January 2014 but had done so by 14 November 2014 when he wrote to Mr Hicks stating that he was "now in a position to provide my technical consideration in relation to your participation in [the] disclosed avoidance scheme...."

30. Noting at [51] that in practice the metaphor of "crossing a threshold" can be difficult to apply to a continuing HMRC enquiry, the FTT accepted at [52] Mr Boote's evidence that he regarded himself as having "discovered" the insufficiency of tax at some time in the summer of 2014. The FTT considered at [53] that a delay of at most nine months between discovery and assessment was not the exceptional case envisaged by Lord Glennie in *Pattullo*. The facts established that HMRC had not been "sitting on its hands". The FTT also observed that the decision in *Clavis* to the effect that the basis of the Montpelier Scheme was ineffective did not emerge until 2016.

31. Accordingly, the FTT concluded at [54] that there was clearly a discovery for the purposes of section 29(1).

FTT Decision: Section 29(5)

32. The second issue which the FTT considered was whether HMRC could rely on section 29(5). It noted at [55] that HMRC had to rely on establishing carelessness

within section 29(4) for the year 2009/10 but that for 2010/11 HMRC could, in the alternative, seek to rely on section 29(5).

33. The FTT considered at [56]-[74] an argument put forward on behalf of Mr Hicks that HMRC were prevented from relying on section 29(5) by the outcome of the HMRC statutory review. The FTT rejected this argument at [74] and doubted whether it had jurisdiction to consider the issue. That argument was not advanced before us and it is, therefore, unnecessary for us to consider the FTT's decision on this point.

34. At [75]-[87] the FTT considered the authorities in relation to section 29(5), particularly in relation to the level of awareness of the hypothetical officer, observing at [76] that a number of decisions were not easily reconcilable e.g. *Langham v Veltema* [2004] EWCA Civ 193 ("**Langham**"), *Charlton, Sanderson v HMRC* [2016] EWCA Civ 19 ("**Sanderson**"), and *Patullo*. The FTT was, however, guided in its approach by the summary of Patten LJ in *Sanderson* at [17].

35. The FTT commented at [77] that one of the thorniest issues in relation to section 29(5) was the level of awareness of the insufficiency which the hypothetical officer must reasonably be expected to have at the relevant time. It had to be more than a mere suspicion (at [78]) that there might be an insufficiency and more than a realisation that the assessment raised issues to be followed up by HMRC.

36. The FTT considered at [79] the question of how certain a hypothetical officer had to be for it to be unreasonable for him not to be "aware" of the insufficiency and at [80] did not find the Court of Appeal's analysis in *Sanderson* entirely easy to understand or to apply. After considering at [81] the authorities the FTT concluded that the tests in subsections (1) and (5) were not the same. Secondly, the conclusion in *Langham* that the awareness must be of an actual insufficiency was correct.

37. The issue which the FTT considered at [82] that *Sanderson* left "opaque" was the validity of the pronouncements in the Court of Appeal's decision in *HMRC v Lansdowne Partners Ltd Partnership* [2011] EWCA Civ 1578 ("**Lansdowne**") set out at [19] and [20] in *Sanderson*. The FTT understood at [85] the conclusion of the Court of Appeal in *Sanderson* at [23] as a caution against adopting the formulations at first instance and the Court of Appeal in *Lansdowne* as implying any particular standard of proof. In the view of the FTT, this produced the difficulty that, while there was guidance as to what the necessary level of awareness was, there appeared to be no clear guidance as to what it was. The FTT stated at [86]-[87]:

"86. I have concluded that the practical effect of *Sanderson* is to require the exercise to focus on the level of disclosure in any particular case, and the extent to which that disclosure arms the hypothetical officer with sufficient information to justify the making of an assessment. As is stated in *Sanderson* (at [25]), "[t]he purpose of the condition is to test the adequacy of the taxpayer's disclosure..."

87. Subsection (5) is all about disclosure by the taxpayer (as defined by section 29(6)). The more extensive the taxpayer's disclosure by the closure of the enquiry window, the more difficult it

5 would be for HMRC to establish that the hypothetical officer could not reasonably have been expected to be aware of the insufficiency. The taxpayer is incentivised by the legislation to place HMRC in a position where he can put them to proof at the close of the enquiry window with the question “what more need I have disclosed to have placed the officer in a position to be justified in raising an assessment?””

38. The FTT then considered the “information made available” to the hypothetical officer for the purposes of section 29(6) and (7).

10 39. Mr Hicks’ return for 2008/09 was information made available (section 29(7)(a)(i)) [90]-[91]. That return described Mr Hicks as a “trader” with a trading turnover of approximately £2.7 million and trading expenses of approximately £2.5 million. The return also showed a deduction of £1.5 million, and a non-taxable receipt of £1.5 million. The carried forward loss was shown as approximately £1.2 million.

15 40. The return gave the reference number (“SRN”) for the Montpelier Scheme in accordance with the DOTAS rules [92]. The FTT continued:

20 “93. On the authority of *Charlton*, the information in the Form AAG 1 filed by Montpelier on 17 September 2008 in respect of the Scheme was information made available. On that AAG 1, the Scheme title is stated as “Section 730 TA 1988”. Under “ Summary of proposal or arrangements” it is stated as follows:

25 “The arrangement is available to self-employed derivative traders who work at least 10 hours per week on average in the trade. The trader acquires dividend rights but while the cost of such rights is a deductible expense of the trade the income is not taxable per section 730 TA 1988”

94. Under the heading requiring an explanation of each element in the proposal or arrangement it is stated in the AAG 1:

‘1. An individual is a self-employed trader carrying on business on a commercial basis with a view to profit.

30 2. The trader acquires at a discount the right to receive dividends declared but not yet paid.

3. The income is on the other hand not taxable due to section 730 TA 1988. The result is a net loss for tax purposes to the trader.

35 4. Those traders who meet the condition of working in their trade on average 10 hours per week may be able to offset any loss for sideways loss relief purposes’

95. Mr Hicks’ return for 2009-10 showed in addition to his trading income and expenses a carried forward loss which eliminated taxable profit from that trade. The SRN was not included on the return.

40 96. Mr Hicks’ return for 2010-11 again showed trading income and expenses, and profit eliminated by the carried forward loss. The SRN was included on the return.

5 97. HMRC wrote to Mr Hicks on 3 December 2010 stating that they were checking his 2008-09 return and the loss relief claim, and requesting information. A formal information notice was sent in February 2011. By April 2011 Mr Hicks had engaged his accountant Mr Bevis of Precision Accountancy (“Precision”) to deal with HMRC. In April 2011, following a telephone conversation with HMRC, Mr Bevis supplied some but not all of the information requested by HMRC, including details of the Scheme, how it operated, the dividend trades undertaken by Mr Hicks, and a summary of the nature of Mr Hicks’ existing trade.

10 98. Following a further request for information in June 2011 Mr Bevis supplied considerable further information.

15 99. In January 2012 HMRC wrote to Mr Hicks expressing “concerns” on a number of issues, including whether the dividends were legally paid, the analysis of section 730, *Ramsay* and various arguments relating to trade. HMRC sought more information, and following reminder letters received confirmation only in October 2013, after closure of the enquiry window, that no further information was available or to be supplied.

20 100. The only disagreement at the hearing as to information made available was that Mr Gordon sought to argue that certain marketing material relating to the Scheme which had been referred to in correspondence by HMRC and requested from Mr Hicks, but not supplied by him, should be taken to have been known to the hypothetical officer. I disagree. Section 29(5) and (6) deal with information made available by the taxpayer, and not with information of which certain real HMRC officers might or not have knowledge.

25 101. The enquiry window closed on 31 January 2013, and, for whatever reason, HMRC did not open an enquiry.”

30 41. Next, the FTT considered the sufficiency of the information made available for the purposes of section 29(5).

42. The FTT noted at [102] that Mr Hicks’ return for 2008/09 included his participation in the Montpelier Scheme, referred to by the SRN. It also showed a significant tax loss and a matching non-taxable receipt. The FTT concluded at [103] that the AAG 1 would have shown the hypothetical officer clearly how the Montpelier Scheme was intended to work:

“In particular it made clear the twin planks on which the effectiveness of the Scheme rested, one technical (an interpretation of section 730) and the other fact-specific (the type of trader who qualified).”

40 43. It was noted at [105] that the 2008/09 return³ and Form AAG 1 did not specifically refer to a loss being available to be carried forward, in relation to the

³ This appears to be an incorrect finding and contradicts the finding at [91] (see paragraph 39 above) that the return for 2008/09 showed a carried forward loss of £1.2m. Box 79 of the 2008/09 return, under the heading “Total loss to carry forward after all other set-offs including unused losses brought forward” showed carried forward losses of £1,221,867.

2010/11 return which was in issue as regards section 29 (5) but the FTT concluded that it was clear that any hypothetical officer would readily have understood by 31 January 2013 that any insufficiency for 2010/11 would have arisen from the Montpelier Scheme loss being carried forward. At [106] it was recorded that the information made available before the closure of the enquiry window also included details of the dividend trades claimed to give rise to the loss, reasonably extensive information in relation to the transactions implemented under the Montpelier Scheme and information regarding the trading activities undertaken before the Montpelier Scheme trades by Mr Hicks in his regular financial trade.

44. In relation to the section 29(5) issue a key passage of the FTT's reasoning is to be found at [112]-[114] as follows:

"112. As discussed above (at [55] onwards) the HMRC reviewer did not consider that HMRC should continue to rely on subsection (5). Bearing in mind the caveats I have expressed as to the weight of that view, it is nevertheless interesting to consider his reasons. He referred to the arguments raised by Mr Hicks' agent that no further significant information became available to HMRC between the expiry of the enquiry period and the date of the raising of the assessments: see [64]. Those arguments are set out in a letter from Mr Hicks' then agent to HMRC on 12 April 2016 as follows:

'It appears that Mr Hicks did not provide the information requested in January 2012, as HMRC wrote to him on 27 March 2013 stating that in the absence of further information, it would assume that Mr Hicks has provided everything he can. Mr Boote's letter to Mr Hicks on 7 March 2014 repeated this statement, again implying that no further information had been provided and it appears that this was still the case when Mr Boote wrote again on 14 November 2014, setting out his technical opinion of the scheme. Additionally, it appears that no further information was provided by Mr Hicks before HMRC issued the assessments on 30 March 2015.

Therefore, before the enquiry window closed for each of the 2009/10 and 2010/11 periods, HMRC had not only commenced an enquiry into the 2008/09 return, in which participation in the scheme had been notified, but was also aware that the losses had been utilised in 2009/10 and 2010/11, plus, importantly, had already received the same information from Mr Hicks that led to there being a discovery. It therefore appears inconceivable to assert that at the time it issued assessments for 2009/10 and 2010/11, HMRC had "discovered" something that it was not aware of during the time that it could have commenced valid enquiries. It appears to us that HMRC simply missed the enquiry deadline.'

113. While I have concluded that there was a discovery, the agent's points regarding timing and the information available are in my opinion well made.

114. In my opinion, the existence of an insufficiency sufficient to justify an assessment in this case turned primarily on the section 730 and trading issues. Additional lines of potential argument for HMRC,

5 such as defective implementation (including the legality of the traded dividends) and *Furniss*, were icing on the cake. However the “awareness” threshold is set, I do not consider that subsection (5) allows or is intended to allow HMRC to issue assessments which ignore the normal time limits while they spend further time in polishing a justifiable assessment as at the closure of the enquiry window into a knockout case.”

45. The FTT continued at [115]-[116]:

10 “115. The interpretation of section 730 on which the Scheme succeeded or failed was clear from the AAG1, and had been known to HMRC for many years, lying behind the amendments to section 730 in the Finance (No 2) Act 2005 which formed a significant part of HMRC’s arguments in *Clavis Liberty*.

15 116. Mr Nawbatt is of course correct that the decision in *Clavis Liberty* had not been given by the closure of the enquiry window in this case. That does not, however, mean that a hypothetical officer with the characteristics indicated by *Sanderson* and *Charlton* would not have been in a position by that closure to take the view on the information made available that the Montpellier reading of section 730 was plainly wrong. Mr Nawbatt asserted that by that time there was no internal HMRC guidance on that point, but I was presented with no evidence on that issue, and in any event it is not clear that that is information with which a hypothetical officer would have been imbued.”

25 46. The FTT further addressed the *Clavis Liberty* decision at [117]:

30 “117. What is clear from the FTT decision in *Clavis Liberty* is that the closure notice which denied the section 730 loss in that case was dated 1 February 2013, one day after the closure of the enquiry window in this case: see *Clavis Liberty* at [1]. While it is clear that the hypothetical officer is not to be assumed to have knowledge of what other HMRC officers or departments have or have not done (per *Charlton* and *Lansdowne*), *Clavis Liberty* does show that at least in that case HMRC considered it justifiable to raise an assessment by that time. They were, as it transpires, quite right to do so, as the FTT firmly rejected the taxpayer’s interpretation of section 730 in agreement with the arguments of counsel for HMRC.”

40 47. As regards the hypothetical officer’s awareness of the effectiveness of the Montpellier Scheme and any potential insufficiency, the FTT noted at [118] that the other “primary area” to be considered was whether Mr Hicks satisfied the trading conditions. The FTT concluded that Mr Hicks had disclosed to HMRC before the closure of the enquiry window sufficient information to enable the hypothetical officer to form a reasoned view on that issue. There did not appear to have been any further material information on that topic between then and the issue of the discovery assessments which would have made it unreasonable for the awareness of the insufficiency to have arisen at the earlier date.

48. The FTT concluded at [120]-[121]:

5 “120. Mr Nawbatt is correct to state that HMRC’s process of gathering information in relation to the Scheme was continuing when the enquiry window closed. However, that is not *carte blanche* for HMRC to omit to open an enquiry—whether intentionally or by omission—and then simply rely on subsection (5) in every case to issue assessments which would otherwise be out of time. The statutory time limits for assessments are a critically important safeguard for the taxpayer, just as the onus of disclosure on the taxpayer, and the duty not to act carelessly or deliberately, are a protection for HMRC where those limits are not met.

10
15 121. On the facts in this case, the hypothetical officer had sufficient information available (taking into account section 29(6)) at closure of the enquiry window to make it reasonable for him to have been justified in raising an assessment for the insufficiency. The central issues, relating to section 730 and trading, were not matters of such complexity that the disclosure did not achieve this result. I conclude that HMRC have not established on the balance of probabilities that the condition in subsection (5) was satisfied.”

FTT Decision: Section 29(4)

20 49. As regards section 29(4), the FTT observed at [122] that the 2009/10 and 2010/11 discovery assessments would have been validly issued if “the situation mentioned in subsection (1)” was brought about carelessly by Mr Hicks or a person acting on his behalf. For these purposes HMRC submitted that both Mr Bevis (of Precision Accounting – “Precision”) and Montpelier acted on behalf of Mr Hicks
25 whereas Mr Hicks submitted that only Mr Bevis acted on his behalf.

50. The FTT observed at [125] that Montpelier advised Precision as to the entries to make in Mr Hicks’ returns for the years in question as regards the Montpelier Scheme.

30 51. The FTT noted at [126] that the authorities on this issue were in conflict and referred to decisions of the FTT in *Atherton v HMRC* [2017] UKFTT 831(TC) (“*Atherton*”) – which reached a different conclusion from that of the FTT in *Trustees of the Bessie Taube Trust v Revenue & Customs* [2010] UKFTT 473(TC) (“*Bessie Taube*”).

35 52. After considering those authorities, the FTT made two observations in respect of the purposive construction of the statutory language:

40 132. First, section 29 as a whole is fundamentally concerned with the taxpayer, and not with third parties. It is the taxpayer’s return, the taxpayer’s disclosure, and the taxpayer’s behaviour which are in point. Subsection (4) and (by virtue of subsection (7) (b)) paragraphs (b) to (d) of subsection (6) refer to a person acting on behalf of the taxpayer in that context and only in that context.

133. Secondly, subsection (4) is not expressed in terms of whether a third party is the taxpayer’s agent or adviser. The only question is

whether a third party was “acting on behalf” of the taxpayer in (broadly) bringing about an insufficiency in his assessment.

53. The FTT at [134] disagreed with the FTT’s interpretation in *Atherton* of the FTT’s decision in *Bessie Taube*. The FTT said:

5 “135. Construing the statute purposively in this way leads me to a similar conclusion to that reached in *Bessie Taube*. A third party acts on behalf of the taxpayer in this context if he acts as the taxpayer’s proxy or representative—a role described in *Mariner v HMRC* [2013] UKFTT 657, at [25] as “a mere agent, administrator or functionary”.
10 In that role their carelessness is the taxpayer’s carelessness if it brings about “the situation mentioned in subsection (1)”.

136. I agree with the conclusion in *Bessie Taube*, at [193] as follows:
“...The person must represent, and not merely provide advice to, the taxpayer”.

15 54. It was clear, according to the FTT at [137], that Precision was a representative of Mr Hicks but that Montpelier was not:

20 “Montpelier advised Precision in respect of Precision’s obligations as Mr Hicks’ representative in preparing and submitting his return. Montpelier was the promoter of the Scheme and was not “acting on behalf” of Mr Hicks at all. The issues in relation to subsection (4) are whether there was carelessness of the relevant type by Mr Hicks, or by Precision, being a person acting on his behalf.”

25 55. At [138] the FTT noted that for the purposes of section 29(4) a situation was brought about carelessly by a person if that person fails to take reasonable care to avoid bringing about that situation (section 118(5) TMA). The FTT agreed at [141] with the observations of the FTT in *Anderson v HMRC* [2009] UKFTT 206 (Judge Morgan and Mr Barrett) in relation to “carelessness” at [123]:

30 “Our view is that the correct approach in this context also is to follow that adopted in *Collis* and *Hanson* of assessing what a reasonable hypothetical taxpayer would do in all the applicable circumstances of the actual taxpayer. It seems to us that this follows from the wording of the provision which looks at a failure to take reasonable care by the person in question. The “reasonable care” which should be taken is to be assessed by reference to what a reasonable and prudent taxpayer would do looking at an objective hypothetical standard. But what that reasonable and prudent taxpayer would do is not assessed in a vacuum but by reference to the actual circumstances of the taxpayer in question.”

35 56. The FTT assumed at [143] that there was an insufficiency of tax in the 2008/09 return, and as a consequence in the two subsequent returns in which the loss was shown as being carried forward.

57. In determining the issue of carelessness, the FTT at [144] took account of the evidence of Mr Hicks and of Mr Bevis of Precision and considered that the evidence of HMRC’s witness, Mr Boote, was not material. The FTT at [145] acknowledged

that the evidence of Mr Hicks was not always clear or consistent. With one exception, the FTT found Mr Hicks to be a reliable witness and it rejected HMRC's suggestion that his evidence lacked credibility and reliability.

58. The one exception, in the FTT's view at [146] related to the detailed description of the intended tax treatment of the scheme contained in Mr Hicks' witness statement. The terminology, use of language and degree of technical content made it clear that the description was the work of someone other than Mr Hicks and, accordingly, the FTT did not take that evidence into account. The FTT found at [147] that Mr Bevis' evidence was not always consistent with that of Mr Hicks on points of detail. Nonetheless, the FTT found Mr Bevis to be a credible and reliable witness and rejected HMRC's arguments to the contrary.

59. The FTT made the following findings of fact.

60. The FTT found that Mr Hicks was, from 2006, a self-employed trader in the oil and gas futures market, carrying on his trades⁴ through various platforms (at [149]).

61. From around April 2008, Mr Bevis was Mr Hicks' main point of contact at his then firm of accountants, Chappel Cole, a firm which acted for a number of other traders (who were described as "colleagues" of Mr Hicks). Mr Bevis was a senior manager reporting to a partner called Mr David Cole (at [150]-[152]).

62. Mr Hicks first heard of the Montpelier Scheme in September 2008 from a colleague, Mr Callen. Mr Cole had recommended the Montpelier Scheme to Mr Callen and some of the other traders as a tax efficient trading opportunity (at [153]). Mr Callen and others (but not Mr Hicks) met Montpelier in September 2008 to hear more about the Montpelier Scheme. Mr Cole and Mr Bevis were highly supportive of the Montpelier Scheme, with Mr Cole describing it as a "no-brainer" (at [154]).

63. In January 2009 a meeting was arranged for Mr Hicks and ten other traders to meet Montpelier. In advance of that meeting Mr Cole reassured Mr Hicks that the Montpelier Scheme was "all legal and worked perfect [sic] for us as traders" ([at 155]).

64. At the January 2009 meeting (which Montpelier described as a presentation), Mr Hicks kept no notes. Montpelier described itself as a firm of tax consultants of 20 years' standing. The Montpelier Scheme was outlined and presented as "perfect for derivative traders" (at [156]). At that meeting, Mr Hicks was shown two documents: one entitled "Extracts from Counsel's Opinion in the matter of section 730 Income and Corporation Taxes Act 1988" and another entitled "The UK taxation implications of trading in derivatives and dealing in the right to receive dividends by UK residents" (at [157]).

⁴ We understood from the context that the "trades" in question were transactions in oil and gas futures but that, in the income tax sense, Mr Hicks only carried on one trade.

65. The FTT found at [158] that Mr Hicks did not consider the documents in detail and that he did not fully understand their content. At [159] it was found that Mr Hicks did appreciate three main points in relation to the Montpelier Scheme. First, it had been disclosed under the DOTAS rules to HMRC, and therefore did not involve tax evasion. Secondly, he was precisely the category of financial trader for whom the scheme worked in order to generate a tax loss. Finally, HMRC would likely challenge the Montpelier Scheme, but Montpelier had complete confidence in it and would defend it “up to the High Court”. The FTT also found at [160] that Mr Hicks understood that in commercial terms the Montpelier Scheme would be profitable, bearing in mind the fee payable to Montpelier, only if the tax loss materialised. On a stand-alone basis, the dividend trades produced a small profit, but that was far outweighed by the fee paid to Montpelier.

66. Mr Hicks consulted with his colleagues after the meeting and one of his colleagues was, like Mr Hicks, interested in going ahead with the Montpelier Scheme. They each agreed to speak with their accountants and compare feedback (at [161]).

67. Mr Hicks telephoned Mr Bevis on the day of the meeting (Mr Cole had told him that Mr Bevis could answer any questions regarding the Montpelier Scheme). Mr Bevis’ understanding of the Montpelier Scheme was based almost entirely on what Mr Cole had told him (including that it was a “no-brainer”) Mr Bevis promised to speak to Mr Cole and revert. Three days later, on 23 January, Mr Bevis telephoned Mr Hicks to discuss the proposal and advised him that Mr Cole’s view was that he would be “crazy not to take it up” and that he could not see how it could fail (at [162]).

68. Mr Hicks’ colleague told him that his accountant had also been very bullish (at [163]).

69. Mr Hicks spoke to another colleague who had already used the scheme and he corroborated what Mr Hicks was being told by Montpelier, Mr Bevis and Mr Hicks’ other colleague. He also told Mr Hicks that one of the Montpelier team was a former employee of HMRC, which increased his (it is not clear whether the FTT was referring to the colleague or to Mr Hicks) confidence in the scheme (at [164]).

70. Next, a meeting was arranged with Montpelier and Mr Bevis to discuss the scheme at Mr Hicks’ offices in February 2009. Mr Bevis was shown various documents including the “Counsel’s opinion”, that had previously been shown to Mr Hicks at the January 2009 meeting. Mr Bevis’ view was that the Montpelier Scheme stood “the best possible chance” of being successful and that, if he were in Mr Hicks’ position, he would enter into the scheme. Neither Mr Hicks nor Mr Bevis kept a note of the meeting (at [165]).

71. At or following the February meeting, Mr Hicks was also given a one-page “flyer” prepared by Montpelier outlining the scheme and entitled “Montpelier’s Tax Structure Exclusively for Traders” (at [166]). Also, shortly after the February meeting, Mr Hicks signed documentation with Montpelier to enter into the scheme. Mr Hicks only briefly perused those documents and kept no copies (at [166]).

72. On 11 February 2009 Montpelier emailed potential scheme users, including Mr Hicks, reassuring them that various concerns which had been raised were unfounded, including that the Montpelier Scheme was “high risk”. The email stated “you are taking a position on our interpretation of the legislation, with us backing the interpretation to the High Court at our expense!” (at [168]).

73. Mr Bevis left Chappel Cole in the end of February 2009 and set up an accountancy business, Precision (at [169]).

74. The dividend trades giving rise to the claimed tax loss took place in late February 2009 (at [170]).

10 75. The FTT continued at [171]-[177]:

“171. At the end of April 2009 Montpelier contacted Scheme users including Mr Hicks to inform them that HMRC had started to introduce steps to “close the loophole” in section 730. This was interpreted by Mr Hicks as corroborating the view previously expressed by Montpelier that unless and until the rules were changed, section 730 worked as Montpelier had said it would.

172. Mr Hicks engaged Precision (Mr Bevis) as his accountant in June 2009.

173. In June 2009 Mr Hicks received a statement from Montpelier detailing the dividend trades he had made, which he understood to confirm that the transactions had all taken place as anticipated.

174. Mr Bevis prepared Mr Hicks’ SATR for 2008-09. The information relating to Mr Hicks’ normal trade was prepared on the basis of information and detailed records kept by Mr Hicks. However, as regards information relating to the Scheme Mr Bevis relied entirely on input from Montpelier. Montpelier supplied the figures and information (including the SRN) to be included in the return. A draft of the complete return was then sent by Mr Bevis to Mr Hicks for review and to Montpelier for its sign-off on the entries relating to the Scheme. The return was finalised at a face-to-face meeting between Mr Bevis and Mr Hicks before being submitted by Mr Bevis.

175. Mr Bevis relied on Montpelier for information relating to the Scheme partly because he regarded Montpelier as in possession of the necessary details and figures. However, he also relied on them because he did not have the technical expertise or experience to form an independent opinion on the detailed workings of the Scheme. Prior to his involvement with the Scheme on behalf of Mr Hicks, he had not previously advised any clients on marketed tax avoidance schemes. Until the February 2009 meeting with Montpelier which he attended with Mr Hicks, Mr Bevis was not familiar with section 730 or the area of law relevant to the Scheme.

176. As described above (at [97] to [99]) HMRC raised questions and sought information from Mr Hicks regarding the Scheme between the opening of their enquiry into his 2008-09 return on 3 December 2010 and the submission of his 2010-11 return some 14 months later. Mr

5 Bevis routinely copied any such correspondence from HMRC to Montpelier and in responding to HMRC Mr Bevis would simply “cut and paste” the replies prepared by Montpelier relating to the Scheme into his response. He did not attempt to review or comment on those draft replies before including them.

177. In preparing Mr Hicks’ returns for 2009-10 and 2010-11, Mr Bevis followed a similar procedure to that in relation to the 2008-09 return. In relation to any entries or information regarding the Scheme, Mr Bevis simply included whatever Montpelier provided him with.”

10 76. At [186] the FTT considered what a reasonable and prudent taxpayer in the position of Mr Hicks would have done, and what a reasonable and prudent accountant in the position of Mr Bevis would have done in acting on behalf of Mr Hicks. That test had to take account of all the circumstances, including their characteristics and the relationship between them.

15 77. It was noted at [187] that the issue was not whether Mr Hicks nor Mr Bevis was careless in general or in the abstract, but whether their failure to take reasonable care *brought about* the insufficiency in the return for 2008/09 and the two subsequent returns. In the FTT’s view, bringing about the insufficiency would encompass Mr Hicks’ decision to participate in the Montpelier Scheme; the decision to claim the loss
20 in the 2008/09 return and the decisions to carry forward the losses in the two subsequent returns. The FTT then proceeded to consider these three issues in turn.

78. As regards Mr Hicks’ decision to participate in the Montpelier Scheme, the relevant background to that decision was summarised by the FTT at [189] as follows:

25 “(1) Mr Hicks initially received strong recommendations in respect of the Scheme from Mr Cole and Mr Bevis.

(2) Mr Hicks’ colleague Mr Callen also expressed support for the Scheme following a meeting between Montpelier and various traders not including Mr Hicks.

30 (3) Before meeting with Montpelier for the first time, Mr Hicks spoke with Mr Cole, who said the Scheme was “all legal and worked perfect for us as traders”.

(4) Mr Hicks attended a presentation on the Scheme by Montpelier. It was described as “perfect for derivative traders”.

35 (5) Mr Hicks understood Montpelier to be tax consultants of 20 years standing, and that a former HMRC employee worked for them.

(6) Mr Hicks was shown two documents prepared for Montpelier dealing with the technical tax aspects of the Scheme. He did not fully understand those documents and did not read them thoroughly, but he understood that the Scheme had been disclosed to HMRC and that,
40 although Montpelier were confident it worked, HMRC would be likely to challenge it.

(7) Mr Hicks understood that while the dividend trades would generate a small profit on a standalone basis, in view of the fee payable

to Montpelier the Scheme would be beneficial overall only if the tax loss materialised.

(8) Mr Hicks established from another colleague that his accountant was also supportive of the Scheme.

5 (9) Following the first meeting, Mr Hicks contacted Mr Bevis, who relayed Mr Coles' view that the Scheme was a "no brainer" and that Mr Hicks would be "crazy" not to go ahead.

10 (10) Mr Hicks arranged a final meeting with Montpelier, and made sure that Mr Bevis was in attendance. Mr Bevis was persuaded that the Scheme stood "the best possible chance" of success, and that in Mr Hicks' shoes he would enter into it."

79. The FTT concluded at [190] that Mr Hicks was an experienced trader in oil and gas derivatives but had no specialist tax knowledge and relied on advice – he was "not an academic highflyer or a man of letters". Taking account of all the circumstances,
15 the FTT concluded at [190] that the step summarised above did not amount to a failure by Mr Hicks to take reasonable care in deciding to participate in the Montpelier Scheme.

80. It was not, the FTT concluded at [191], necessarily careless to enter into a packaged tax avoidance scheme even if it was known that HMRC might well
20 challenge the promoter's interpretation of legislation. Secondly, the FTT did not consider at [192] Mr Hicks' failure to negotiate the terms of his participation in the Montpelier Scheme as careless and it could not see the relevance to causative carelessness of deciding to accept the terms offered since those terms were offered on a "take it or leave it" basis. Moreover, such due diligence as was carried out by Mr
25 Hicks did not seem to the FTT to indicate carelessness. On the facts of this appeal, the FTT concluded that Mr Hicks had unearthed nothing which should have alerted him to the possibility that the Montpelier Scheme was a sham and required further due diligence.

81. Furthermore, failing to keep copies of documents did not, in the FTT's view at
30 [193] contribute to "bringing about" the insufficiency in the 2008/09 return. In addition, the FTT did not consider it necessary at [194] for a reasonable taxpayer in the position of Mr Hicks to seek a second or third technical opinion on the Montpelier Scheme to avoid carelessness.

82. The FTT rejected (at [195]) HMRC's argument that Mr Hicks should have
35 realised that his pre-existing trade would not satisfy the requirements for an allowable tax loss, even if Montpelier's interpretation of section 730 prevailed. Although the FTT considered that the point had "some force" it concluded that it was not sufficient to establish carelessness by Mr Hicks:

40 (1) it could not be assumed that HMRC would necessarily succeed on this point. It was fact-specific and the substantive issue was not in point in the current appeal;

(2) the Counsel's opinion referred to the issue as a "risk" and the need to "demonstrate a pattern of dealing which leaves no doubt that [the individual] is

trading in the right to receive dividends.” That language did not, in the FTT’s view, state unambiguously that the Montpelier Scheme would be ineffective without a pre-existing trade which included dividend rights. It was possible that a reasonable taxpayer in the position of Mr Hicks, having heard assurances from Chappel Cole, Montpelier and others, would have interpreted the language as raising an issue which was important but which could be dealt with satisfactorily;

(3) the numerous assurances received by Mr Hicks from Montpelier, Chappel Cole and others could not be ignored, and it was not unreasonable for him to believe that the scheme was ideal for “derivative traders”. It was possible that in that respect the Montpelier Scheme was “oversold” but that did not make Mr Hicks careless; and

(4) it was important not to judge carelessness with the benefit of hindsight. The HMRC attack on the Montpelier Scheme on trading grounds undoubtedly developed and became clearer over time, particularly in the years subsequent to the closure of the enquiry window for Mr Hicks’ 2010/11 return.

83. The FTT considered at [196] whether Mr Hicks or Mr Bevis was careless in submitting the 2008/09 return and claiming the trading loss.

84. The FTT noted at [197] that only two material events took place between February 2009 (the date of Mr Hicks’ participation in the Montpelier Scheme) and 27 January 2010 (the date of the submission of the return). First, in April 2009 Montpelier told Mr Hicks that HMRC were intending to change the section 730 “anomaly”, which they duly did in the Finance Act 2009.

85. The FTT at [199] concluded that a reasonable taxpayer could not be expected to infer from the proposed repeal of section 730 that the Montpelier Scheme had previously been ineffective – indeed such a taxpayer might infer the opposite.

86. The second event to occur was that in July 2009 Mr Hicks received documentation relating to the dividend trades he had made under the Montpelier Scheme. The FTT found at [198] that the documents Mr Hicks received were as he had expected and were likely to have been taken by a reasonable taxpayer in his position as reassurance that transactions had taken place as planned. Nothing in those documents meant that he was taking less care when it came to the submission of the return claiming the loss.

87. The FTT at [200] considered Mr Hicks’ reliance on Mr Bevis. The FTT concluded that Mr Hicks had not failed to take reasonable care in doing so. A taxpayer such as Mr Hicks, with no real tax expertise, was entitled to rely on his advice (the FTT then set out certain caveats which it considered to have been satisfied).

88. Next, the FTT at [201] addressed the question whether Mr Bevis, acting on behalf of Mr Hicks in preparing and submitting his 2008/09 return, was careless in claiming the loss in that return.

89. Mr Bevis had relied on Montpelier in completing the sections of Mr Hicks' 2008/09 return relating to the Montpelier Scheme (at [202]). He regarded Montpelier as having the necessary knowledge and expertise in relation to the scheme and accepted what they suggested should be included.

5 90. The FTT observed at [203] that, in principle, a firm of accountants completing Mr Hicks' return could have done more than Mr Bevis. Mr Bevis was, however, "effectively a one-man band" and lacked the resources or expertise of a large firm of accountants. He had no prior knowledge of the area of tax law on which the Montpelier Scheme and Montpelier's advice relied. He had been advised by the
10 partner in his former firm that the Montpelier Scheme was effective. He had become confident after the February 2009 meeting with Montpelier and sight of the two technical documents that the Montpelier Scheme stood "the best possible chance" of success. In those circumstances, the FTT concluded that HMRC had not discharged the burden of establishing that Mr Bevis was careless in submitting Mr Hicks'
15 2008/09 return.

91. At [204] the FTT considered that Mr Bevis might arguably have determined from Montpelier's Counsel's opinion that Mr Hicks' derivatives trades were not apt for the Montpelier Scheme. In that respect, the FTT concluded, for similar reasons to those set out at [195] (see paragraph 82 above) in relation to Mr Hicks that, on
20 balance, he was not careless in failing to have done so.

92. In this context, the FTT noted at [205] that Montpelier's advice to Mr Bevis was not obviously wrong or untenable. Even though in time it may have been shown to have been wrong, that was not the issue. The length of time which HMRC took to "cross the threshold" of discovering an insufficiency of tax (until summer 2014)
25 suggested that Montpelier's view in January 2010 was not obviously wrong or untenable.

93. The FTT acknowledged at [206] that Montpelier was not an independent source of advice but that did not mean that Mr Bevis was careless to rely upon them.

94. Next, the FTT considered whether Mr Hicks and Mr Bevis were careless in
30 submitting the returns for 2009/10 and 2010/11 which included the Montpelier Scheme loss carried forward. In the light of the FTT's conclusion in relation to the 2008/09 return, this required consideration of whether anything material had changed between 27 January 2010 and the time of submission of those two returns which either alone or taken together with events prior to that date would cause such
35 submission to be careless.

95. The FTT referred to the events summarised at [97] to [99] (see paragraph 40 above).

96. The FTT at [211] rejected the argument that HMRC's queries should have alerted Mr Hicks and Mr Bevis to the insufficiency in the 2008/09 return. The return
40 was received by HMRC on 28 January 2011 and, by that date, HMRC had merely

opened an enquiry into the 2008/09 return the previous month, with an informal information request. This was unsurprising and was anticipated by Mr Hicks.

97. By the date of submission of the 2010/11 return (31 January 2012) the FTT considered at [212] HMRC's enquiry into the 2008/09 return was "comfortably within the parameters of typical HMRC enquiry into a marketed tax scheme." HMRC continued to explore its concerns as regards the Montpelier Scheme which did not result in a discovery of an insufficiency by HMRC until some 2½ years after the 2010/11 return was filed. The FTT considered that this process did not operate to cause Mr Hicks or Mr Bevis to be careless in continuing to claim the loss in the return.

98. As regards the failure by Mr Hicks and Mr Bevis to respond accurately to all of HMRC's questions and requests during the enquiry process, the FTT found at [214] that any such failures did not bring about the insufficiency in the returns – if that was careless then it was not causative carelessness.

99. Accordingly, the FTT, in relation to the section 29(4) issue, decided that HMRC had not discharged the burden of establishing on balance that either Mr Hicks or Mr Bevis acting on his behalf was careless in bringing about the insufficiency in the 2009/10 and 2010/11 returns.

The challenges to the FTT decision

100. HMRC challenge the decision of the FTT in relation to both section 29(5) and section 29(4).

101. If HMRC establish that Mr Hicks, or a person acting on his behalf, was careless in a relevant way, then HMRC will succeed in relation to section 29(4). That will produce the result that the discovery assessments in relation to both 2009/10 and 2010/11 will be valid assessments pursuant to section 29 and will have been made within the six-year time limit provided by section 36.

102. If HMRC fail in relation to section 29(4), then HMRC will be unable to rely on the extension of the time limit provided by section 36 (which only applies where there is relevant carelessness by Mr Hicks or a person acting on his behalf). The assessment in relation to 2009/10 therefore would not comply with the four-year time limit in section 34 and HMRC's reliance on section 29(5) must be limited to the assessment in relation to 2010/11.

103. Mr Hicks has served a Respondent's Notice which challenges the decision of the FTT in relation to section 29(1). Mr Hicks contends that an officer of HMRC had discovered an insufficiency in the assessments by 20 January 2012 so that the discovery by Mr Boote relied upon for the discovery assessments of 30 March 2015 was "stale" with the result that the discovery assessments of 30 March 2015 were of no effect.

104. We consider that the logical order in which to consider the three challenges to the decision of the FTT is first to consider the challenge in relation to section 29(1)

(raised by the Respondent's Notice) and then to consider the two challenges raised by the Appellant's Notice, dealing first with the challenge in relation to section 29(4) and then the challenge in relation to section 29(5).

Section 29(1) TMA- the authorities, submissions and discussion

5 Section 29(1) TMA – the authorities

105. Mr Gordon referred to *Anderson v HMRC* [2018] STC 1210 as to what was involved in a “discovery” for the purposes of section 29(1). In that case, at [11], the Upper Tribunal (Morgan J and Judge Berner) stated that the concept of a discovery by an officer involved a subjective element as to the officer's state of mind and an
10 objective element as to whether it was open to the officer to have that state of mind. Further, in the same case at [28], it was said that the test as to the subjective element is that the officer must believe that the information available to him points in the direction of there being an insufficiency of tax.

106. Mr Gordon also referred to cases which held that a discovery could become
15 “stale” with the result that it could not be relied upon as the basis for a discovery assessment. For example, in *Tooth v HMRC* [2018] STC 824, at paragraph [79](3), the Upper Tribunal (Marcus Smith J and Judge Hellier) held that on making a discovery, HMRC must act expeditiously in issuing a discovery assessment. When that case was considered by the Court of Appeal, reported at [2019] STC 1316, this
20 ruling does not appear to have been challenged. In that case, the Court of Appeal held, following earlier authority, that if an officer of HMRC makes a certain discovery and, later, another officer of HMRC comes to the same conclusion, the later officer is not making a “discovery” within section 29(1) because the belief of the later officer is not new.

25 *Section 29(1) TMA – submissions and discussion*

107. Mr Gordon, for Mr Hicks, submitted that the FTT was wrong to focus solely on the position of Mr Boote. The FTT ought to have held that an officer of HMRC had discovered an insufficiency of tax within section 29(1) by a date which was not later
30 than 20 January 2012 when HMRC wrote to Mr Hicks, as recorded by the FTT at paragraph [99] of its decision, which we have quoted at paragraph 40 above.

108. Mr Gordon next submitted that the authorities establish that the discovery which had occurred not later than 20 January 2012 was “stale” by 30 March 2015 so that it could not be relied upon for the purpose of making discovery assessments on that date. He further submitted that, since an officer of HMRC had made a discovery
35 before 20 January 2012, it was not possible in law to say that Mr Boote's thought processes in 2014 and 2015 could amount to a discovery for the purposes of section 29(1) and so no discovery assessment could be made in reliance on the same. Those thought processes could not be a “new” discovery because the insufficiency of tax had already been discovered prior to 20 January 2012.

109. Mr Gordon's first submission requires a finding that an officer of HMRC made a discovery within section 29(1) not later than 20 January 2012. The FTT made no such finding. In its decision at [48], the FTT recorded a submission by Mr Gordon that HMRC "might" have had sufficient information to amount to a discovery "by the
5 time Officer Boote took over his role". Mr Boote took over his role in January 2014: see the FTT decision at [49]. At [38] and [40], the FTT made findings as to what HMRC had done before January 2014. The FTT held at [48] that Mr Gordon's submission was not supported by the facts.

110. Mr Gordon nonetheless submits that we can make such a finding based on reading the letter of 20 January 2012. That letter was written on behalf of HMRC by a Mr D M Pearsall of Special Investigations. The letter referred to the enquiry which had been opened into the return for 2008/2009 and stated that HMRC had concerns in relation to a number of matters which were listed in the letter. The letter enclosed a schedule of documents and information which were said to be essential to establish
15 that the claimed dividend transactions had taken place. The letter asked for those documents and that information to be made available to HMRC by 5 March 2012. The letter then stated that the writer was reviewing the documents and information previously provided by Mr Hicks and would write to Mr Hicks in due course.

111. At the hearing before the FTT, there was no evidence, nor any investigation, as to the position of Mr Pearsall, the writer of the letter of 20 January 2012. Nor was
20 there any evidence as to the state of mind of any other officer, apart from Mr Boote who became involved in January 2014. As explained in *Anderson* at [11], the concept of a discovery by an officer involves a subjective element as to the officer's state of mind and an objective element as to whether it was open to the officer to have that state of mind. As explained in *Anderson* at [28], the test as to the subjective element is
25 that the officer must believe that the information available to him points in the direction of there being an insufficiency of tax.

112. We consider that we are quite unable to make a finding as to Mr Pearsall's (or any other officer's) state of mind which would allow us to hold that Mr Pearsall (or
30 any other officer) had made a discovery and had formed the belief that the information available to him pointed in the direction of an insufficiency of tax. We simply do not know what Mr Pearsall or any other officer believed as at 20 January 2012.

113. Mr Gordon submitted that we could infer from the letter of 20 January 2012 that
35 Mr Pearsall or some other officer did have the relevant belief. We do not agree. The letter stated that HMRC "has concerns" in relation to six topics and asked for documents and information to be provided. The terms of the letter are insufficient as a basis for the finding of fact which Mr Gordon needs in order to allege that a discovery had taken place prior to 20 January 2012.

40 114. The result of the above reasoning is that the further question as to whether a discovery which had taken place before 20 January 2012 had become "stale" by 30 March 2015 simply does not arise.

115. We record, however, that Mr Nawbatt submitted that there was no legal principle which limited discovery assessments to cases where the discovery relied upon was not “stale”. He submitted that the statutory time limits on assessments, including discovery assessments, were those contained within sections 34 and 36 and that there was no other relevant time limit such as a requirement that the gap in time between a discovery and a discovery assessment should not be too long and that the gap in time would be too long if the discovery were “stale”. Nonetheless, Mr Nawbatt recognised that, as a matter of authority, it was not open to this Tribunal decide these issues in HMRC’s favour but wished to reserve HMRC’s position as the issue is likely to be determined by the higher courts. As this point does not arise in this case, we will say no more about it save to agree with Mr Nawbatt that it would probably not have been open to us to accept Mr Nawbatt’s submission at this level of decision.

116. It follows from the above reasoning that we reject the ground of challenge to the decision of the FTT put forward by Mr Hicks in the Respondent’s Notice. We will therefore turn to consider the grounds of challenge put forward by HMRC in the Appellants’ Notice, starting with the challenge in relation to section 29(4).

Section 29(4) TMA – the authorities, submissions and discussion

Section 29(4) TMA – the authorities

117. Section 29(4) applies where “the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf”.

118. “The situation” referred to in section 29(4) is, in the present case, the fact that an assessment to tax (as contained in the self-assessment tax return) is insufficient.

119. The insufficiency in the assessment must be “brought about”, that is, caused by the relevant carelessness. If the assessment to tax (as contained in the self-assessment tax return) states the wrong figure as to the tax payable and the wrong figure is stated as a result of carelessness, then the insufficiency in the assessment to tax is brought about by that carelessness. The question as to whether something is “brought about” and whether that happened as a result of carelessness is also dealt with in section 118(5) which provides that a relevant situation is brought about carelessly by a person if the person “fails to take reasonable care to avoid bringing about” that situation. This subsection makes the perhaps obvious point that a failure to take care to avoid a situation amounts to carelessly bringing about that situation. In other words, carelessness can take the form of omissions as well as positive acts.

120. Whether acts or omissions are careless involves a factual assessment having regard to all the relevant circumstances of the case. There are many decided cases as to what amounts to carelessness in relation to the completion of a self-assessment tax return. The cases indicate that the conduct of the individual taxpayer is to be assessed by reference to a prudent and reasonable taxpayer in his position: see, for example, *Atherton v HMRC* [2019] STC 575 (Fancourt J and Judge Scott) at [37].

121. The issue as to carelessness must be considered and decided in the relevant context. The context in the present case is the delivery of a self-assessment tax return pursuant to sections 8 and 9 TMA. Under section 8(2), the person making the return is required to declare that to the best of his knowledge, the return is correct and complete. As explained by Moses LJ in *Tower MCashback LLP 1 v HMRC* [2010] STC 809 at [17]-[18], the taxpayer's self-assessment constitutes the final determination of his liability subject to three circumstances (namely, an amendment to the return, an enquiry by HMRC or a discovery assessment). Thus, a taxpayer making a self-assessment must take care to get the assessment right. He must take care to get it right both as to matters of fact and matters of law. Even if he gets it wrong and in his favour, it may turn out that his wrong figure will constitute the final determination of his liability. If the taxpayer gets the assessment wrong and in his favour, he will lose the benefit of that assessment being final and in his favour if there is a discovery assessment. The normal time limit for an assessment imposed by section 34 is extended by section 36 where the insufficiency in the self-assessment is brought about carelessly or deliberately by the taxpayer or a person acting on his behalf. In summary, the question of carelessness arises in the context of a taxpayer being denied the benefit of a wrong self-assessment which is in his favour where the insufficiency in the assessment is brought about by the carelessness of the taxpayer or a person acting on his behalf.

122. There is an issue in the present case as to the application of the phrase "a person acting on his behalf" in section 29. The FTT considered the decisions in *Trustees of the Bessie Taube Trust v Revenue & Customs* [2010] UKFTT 473 (TC) (Judge Berner and Mrs Stalker) and *Atherton v HMRC* [2017] UKFTT 831 (TC) (Judge Mosedale and Mr Barrett). Earlier in our decision, we have described the approach of the FTT in relation to these two cases. We agree with the FTT that the legal test to be applied is the test stated in *Bessie Taube* at [93]:

"... In our view, the expression "person acting on...behalf" is not apt to describe a mere adviser who only provides advice to the taxpayer or to someone who is acting on the taxpayer's behalf. In our judgment the expression connotes a person who takes steps that the taxpayer himself could take, or would otherwise be responsible for taking. Such steps will commonly include steps involving third parties, but will not necessarily do so. Examples would in our view include completing a return, filing a return, entering into correspondence with HMRC, providing documents and information to HMRC and seeking external advice as to the legal and tax position of the taxpayer. The person must represent, and not merely provide advice to, the taxpayer."

123. Mr Gordon cited *Gaspert Ltd v Elliss* [1985] STC 572 (Peter Gibson J) and [1987] STC 362 (Court of Appeal) for the proposition that "on behalf of" is narrower than "for the benefit of" or "in the interest of". We agree with that proposition. A similar conclusion was reached in *R (on the application of S) v Social Security Commissioner* [2010] PTSR 1785, approved by the Court of Appeal in *Rochdale MBC v Dixon* [2012] PTSR 1336. These last two cases were not cited to us but as they are in line with the authority of *Gaspert Ltd v Elliss*, which was cited, it was not necessary to invite submissions in relation to them.

Section 29(4) TMA – submissions and discussion

124. At our request during the hearing, Mr Nawbatt prepared a document headed “HMRC’s Particulars of Carelessness”. This document set out separately the allegations of carelessness in relation to Mr Hicks, Mr Bevis and Montpelier. The position of these three persons is not the same and we must consider them separately. We will consider the position of Mr Bevis first, then we will address the position of Mr Hicks himself and finally we will consider the issues arising in relation to Montpelier.

125. In relation to Mr Bevis, HMRC’s case is as follows:

10 “(1) Failing to inform or tell Mr Hicks that he had no relevant experience and was not qualified to advise him on the tax planning in the Montpelier Scheme (FTT decision at [175])

(2) Advising Mr Hicks that he “was persuaded the Scheme stood “the best possible chance of success” and that “in Mr Hicks’ shoes he would enter into it (FTT decision at [189(10)]) in circumstances where Mr Bevis stated that he was not in a position or qualified to form an independent opinion on the detailed workings of the Scheme (FTT decision at [175])

(3) Failing to check with Mr Hicks whether he had established the necessary pattern of trading when completing his 2009/10 and 2010/11 tax returns

20 (4) Claiming the loss in the 2010/11 return notwithstanding the fact that (a) HMRC had raised in their letter, dated 20 January 2012, the concern as to whether the transactions had taken place as claimed; (b) Montpelier had not provided the documentation evidencing the transaction HMRC had previously requested; and (c) Montpelier had provided Mr Bevis with false answers to give to HMRC.”

126. It is accepted by Mr Hicks that Mr Bevis was a person acting on his behalf within section 29(4). The allegations as to carelessness on the part of Mr Bevis are not confined to the original decision to participate in the scheme but also refer to Mr Bevis’ involvement in preparing the 2009/10 and 2010/11 tax returns in the light of events which had occurred before the submission of those returns.

127. Mr Nawbatt made detailed submissions in relation to Mr Bevis.

128. Mr Nawbatt criticised the reasoning at [203] of the FTT’s decision to which we referred above. Whilst the FTT recognised that Mr Bevis could have done more than he did, it was said that the FTT was wrong to excuse his failure on the grounds which they put forward. The FTT referred to the fact that Mr Bevis was effectively a one-man band and had no prior knowledge of this area of tax law. It was submitted that if Mr Bevis wished to avoid being judged by the standard of care to be expected of a reasonably competent tax adviser he should have explained that he was not qualified to give tax advice. Mr Bevis did not do that. Alternatively, he could have avoided giving tax advice but instead he gave very encouraging advice to Mr Hicks.

129. Mr Nawbatt also criticised the reasoning at [204] of the FTT's decision. That reasoning related to whether it was careless not to realise that Mr Hicks' pre-existing trade would not satisfy the requirements of the Scheme for an allowable tax loss. The FTT had considered that at [195] of its decision when it was considering the position of Mr Hicks. Mr Nawbatt criticised the reasoning at [195] in relation to Mr Hicks and, in addition in relation to Mr Bevis, Mr Nawbatt relied on evidence given by Mr Bevis to the effect that paragraph 11 of Counsel's Opinion was the most important part of the Opinion and Mr Bevis' further evidence that he did not check with Mr Hicks when completing the tax returns whether Mr Hicks had established the necessary pattern of trading in dividends.

130. Mr Nawbatt also made a specific point in relation to the return for 2010/11 which was submitted on 31 January 2012. By that date, it was said that Mr Bevis ought to have received and considered the letter dated 20 January 2012 from HMRC which raised a number of concerns including a concern as to whether the scheme transactions had ever taken place. Mr Nawbatt focussed on this last concern and was minded to accept that the other matters raised in that letter might have been seen as the type of thing raised on a typical enquiry into a marketed scheme.

131. Mr Gordon submitted that the FTT directed itself entirely correctly as to the legal principles to be applied in relation to section 29(4). He took us to the FTT's assessment of the evidence in relation to Mr Bevis (as well as Mr Hicks). He referred to the specific findings of fact made by the FTT. He pointed out that an appeal against the decision of the FTT was confined to an appeal on a point of law. He reminded us of the decisions which make it clear that an appellate tribunal should be cautious about reversing the assessment of a first instance tribunal in relation to its findings of fact. He warned against an appellant relying in a selective way on a specific answer given by a witness. He stressed that the FTT had the opportunity to assess Mr Bevis and had held that he was a credible and reliable witness.

132. The FTT made the following findings in relation to Mr Bevis:

- (1) Mr Bevis was an accountant.
- (2) From April 2008, Mr Bevis (while still at Chappel Cole) became Mr Hicks's main point of contact at that firm.
- (3) Mr Bevis was highly supportive of the scheme.
- (4) Mr Cole of Chappel Cole told Mr Hicks that Mr Bevis would answer any questions about the scheme arising from the meeting on 20 January 2009.
- (5) On 23 January 2009, Mr Bevis told Mr Hicks, and passed on Mr Cole's view, that Mr Hicks would be crazy not to participate in the scheme.
- (6) Mr Bevis attended a meeting in relation to the scheme in February 2009. Mr Bevis was shown Counsel's Opinion at that meeting. Mr Bevis formed the view that the scheme stood "the best possible chance" of being successful. If he had been Mr Hicks, he would have entered into the scheme.
- (7) In February 2009, Mr Bevis set up his own accountancy practice.

- (8) In June 2009, Mr Hicks became a client of Mr Bevis' new practice.
- (9) Mr Bevis prepared Mr Hicks' return for 2008/09. Mr Bevis was aware of Mr Hicks' normal trade. Mr Bevis relied on Montpelier for information relating to the scheme.
- 5 (10) Mr Bevis did not have the technical expertise or experience to form an independent opinion on the detailed workings of the scheme.
- (11) Before this involvement with Mr Hicks, Mr Bevis did not have any previous experience with clients on marketed tax avoidance schemes.
- 10 (12) Until February 2009, Mr Bevis was not familiar with section 730 or the area of law relevant to the scheme.
- (13) When HMRC asked questions of Mr Bevis, he simply cut and pasted answers given to him by Montpelier.
- (14) Mr Hicks received strong recommendations from Mr Bevis (and Mr Cole) in respect of the scheme.
- 15 (15) Mr Bevis prepared the tax returns by accepting the information given to him by Montpelier.
- (16) Mr Bevis could have done more.
- (17) Mr Bevis could have obtained a second opinion in relation to the scheme.
- (18) Mr Bevis was a one-man band.
- 20 (19) Mr Bevis had no prior knowledge of the relevant area of the law.
- (20) Mr Bevis might arguably have determined from the Counsel's Opinion that Mr Hicks' trades were not apt for the scheme.
- (21) Montpelier's advice to Mr Bevis was not obviously wrong or untenable.
- 25 133. In addition to these findings of the FTT, we also take into account two further matters of fact which we derive from the evidence which Mr Bevis gave to the FTT. He said that he had recognised that paragraph 11 of Counsel's Opinion was the most important part of the Opinion. He also gave evidence that he did not check with Mr Hicks, when completing the tax returns, whether Mr Hicks had established the necessary pattern of trading in dividends.
- 30 134. We have reached the following conclusions in relation to the allegation of carelessness on the part of Mr Bevis.
- 35 135. As we have already observed, Mr Gordon did not contend that the losses claimed in the returns for 2009/10 and 2010/11 were available. It is therefore not in dispute, for the purposes of this appeal, that the assessments for 2009/10 and 2010/11 were insufficient. This was because the assessment for 2008/09 failed to disclose the income from the dividends but did disclose the expenditure in relation to the acquisition of the right to those dividends and the fees paid to Montpelier in relation to the scheme. This treatment of the income and the expenditure produced a substantial loss for 2008/09 which was carried forward in the next two years of
- 40 assessment. The reasons why the assessments were said to be insufficient were

primarily attributable to two matters. The first was that Mr Hicks was wrong to contend that the effect of section 730 was that the income he received was not taxable. The second was that even if Mr Hicks' interpretation of section 730 had been correct, he would not have been entitled to deduct the expenditure which he had deducted because that expenditure was not wholly and exclusively incurred for the purposes of his existing trade.

136. We will first consider whether Mr Bevis was negligent to form the view that the effect of section 730 was that the income from the dividends was not taxable in the hands of Mr Hicks. Our own view is that the interpretation of section 730 propounded by Montpelier was an improbable one and unlikely to be accepted by a tribunal or a court. We note that the FTT concluded at [116] that "the Montpelier reading of section 730 was plainly wrong" which goes a little further than we would go. However, we have to acknowledge that Montpelier had obtained Counsel's Opinion which stated that the effect of section 730 was indeed as Montpelier propounded. A copy of that Opinion was provided to Mr Bevis. In the light of that fact, we consider that it would not be right to hold that Mr Bevis was careless in relying upon this Opinion.

137. We will next consider whether Mr Bevis was negligent in forming the view that Mr Hicks was entitled to deduct the expenditure which he did deduct. It was a fairly elementary matter of tax law to ask whether expenditure on the acquisition of dividend rights was wholly and exclusively for the purposes of the taxpayer's existing trade. Mr Bevis knew, or certainly ought to have known, the nature of Mr Hicks' pre-existing trade and therefore knew, or certainly ought to have known, that the expenditure in this case was not wholly and exclusively for the purposes of Mr Hicks' pre-existing trade. In any case, the importance of the point was spelt out in paragraph 11 of Counsel's Opinion which was provided to Mr Bevis. Mr Bevis took the view that it did not matter if the expenditure was not for the purposes of Mr Hicks' pre-existing trade if he went on to establish a relevant trade where it could be said that the expenditure was for the purposes of that trade. However, Mr Bevis took no action to investigate whether Mr Hicks had established the necessary pattern of trading when completing his 2009/10 and 2010/11 tax returns. Mr Bevis therefore included the expenditure without having formed the view that, on the facts as to Mr Hicks' trading, the expenditure was properly deductible.

138. Mr Bevis is not able to say that he reasonably relied on somebody else (for example, Montpelier) when he failed to investigate whether Mr Hicks had established the new trade. Montpelier had not advised that Mr Bevis was entitled to act in that way. Although Montpelier had said that Mr Hicks was "precisely the category of financial trader for whom the Scheme worked to generate a tax loss", there are two reasons why it was not reasonable for Mr Bevis to fail to investigate Mr Hicks' trading position. The first is that the importance of Mr Hicks establishing that he was a dealer in the right to receive dividends was emphasised by paragraph 11 of Counsel's Opinion which had been provided to Mr Bevis. The second reason is that it was not reasonable for Mr Bevis simply to rely on statements made by Montpelier when seeking to sell the scheme to taxpayers without Mr Bevis forming his own view (taking advice if need be) as to such a matter.

139. As to the nature of the role played by Mr Bevis in relation to Mr Hicks' decision to enter into the scheme and the consequential treatment of the income and expenditure in the relevant assessments, Mr Bevis did take on the role of giving tax advice to Mr Hicks. As found by the FTT, he advised Hicks that he was persuaded the Scheme stood "the best possible chance of success" and that "in Mr Hicks' shoes he would enter into it" (FTT decision at [189(10)]). Mr Bevis was not simply in the role of passing on the views of others; he added his own advice and recommendation. It was careless of Mr Bevis to take on that role when the FTT held that he was not in a position to, or qualified to, form an independent opinion on the detailed workings of the Scheme (FTT decision at [175]). If Mr Bevis had made it clear to Mr Hicks that he was not qualified to offer him any advice or recommendation as to his participation in the scheme or as to the completion of the relevant part of the assessments, then Mr Hicks would have known that he could not rely on Mr Bevis, but Mr Bevis did not make that clear but took on the role of giving relevant advice. That advice was clearly wrong in relation to the deductibility of the expenditure.

140. By taking on the role of a tax adviser to Mr Hicks in this respect, Mr Bevis has to be judged by the standard of a reasonably competent tax adviser giving advice to a taxpayer on this matter. The advice which Mr Bevis gave was not advice that could have been given by a tax adviser of reasonable competence. That is particularly so in the light of paragraph 11 of Counsel's Opinion. Mr Bevis' actions in completing the relevant assessments were not actions which ought to have been carried out by a tax adviser of reasonable competence.

141. It follows from the above reasoning that the insufficiency in the relevant assessments was brought about because Mr Bevis gave advice which a reasonably competent tax adviser could not have given as to the deductibility of the expenditure and, similarly, Mr Bevis failed to give the advice which a reasonably competent tax adviser ought to have given to the effect that the expenditure was not deductible. Therefore, the insufficiency in the assessments was brought about by a person acting on behalf of Mr Hicks within section 29(4).

142. In reaching this conclusion in relation to Mr Bevis, we have adopted the findings of primary fact made by the FTT. We have added two further matters of fact which are derived from Mr Bevis' own evidence to the FTT (see paragraph 133 above). There was no dispute before us as to what Mr Bevis' evidence had been. Mr Bevis' evidence on these points was quite clear. We are not being selective in relying upon this evidence. There is no question of us disagreeing with the FTT's assessment of the reliability of Mr Bevis. The FTT itself ought to have made those two further findings of primary fact. We consider that the FTT erred in law in failing to make those findings and/or in failing to recognise that such findings would be critical to the assessment of whether Mr Bevis had been careless. On the FTT's findings of primary fact, together with the two further primary facts derived from Mr Bevis's evidence, we consider that there was only one possible conclusion open to the FTT which was that Mr Bevis' acts and omissions as found by the FTT amounted in law to carelessness. We also consider that the FTT erred in law in failing to identify the standard of care which was required of Mr Bevis and in failing to hold that Mr Bevis' conduct had fallen below that standard of care. We are well aware that an appellate

tribunal should be wary of substituting its own decision for that of a first instance tribunal on an evaluative issue. However, we have concluded that the FTT made errors of law in the course of its evaluation on this issue and it therefore falls to the Upper Tribunal to correct those errors of law and to make its own assessment. For the reasons given earlier, our assessment is that Mr Bevis was careless in relation to the completion of the relevant tax returns on behalf of Mr Hicks.

143. In making this finding in relation to Mr Bevis, we are conscious of the fact that, although Mr Bevis gave evidence before the FTT, he was neither represented before the FTT nor before us. It was not submitted that it would be procedurally unfair to make an adverse finding in relation to Mr Bevis. The allegation that Mr Bevis had been careless was part of HMRC's case before the FTT and again on this appeal. Mr Bevis was cross-examined at the hearing before the FTT and HMRC's criticisms of what he had done, or failed to do, were fairly put to him. In any event, our finding relates solely to section 29(4) and should not be construed more widely.

144. Mr Nawbatt also submitted that Mr Bevis was careless when he claimed the loss in the 2010/11 return notwithstanding the fact that (a) HMRC had raised in their letter, dated 20 January 2012, the concern as to whether the transactions had taken place as claimed; (b) Montpelier had not provided the documentation evidencing the transaction HMRC had previously requested; and (c) Montpelier had provided Mr Bevis with false answers to give to HMRC. This submission referred only to one point in the letter of 20 January 2012, namely, the point as to whether the transactions had taken place. It might have been open to Mr Nawbatt to submit that the other points of concern in that letter ought to have caused Mr Bevis to consider the position and review the advice he had given to Mr Hicks and then to cause Mr Bevis to prepare an assessment which did not contain an insufficiency. If that point had been made then we would have had to consider the case put forward on behalf of Mr Bevis to the effect that because he was very busy in the last days of January 2012, preparing tax assessments for many clients before 31 January 2012, he was not careless in not bothering to read or consider the letter of 20 January 2012. However, as the only point made by Mr Nawbatt on that letter relates to whether the transactions had taken place, it is relevant that the FTT made a finding of fact that the transactions had taken place in late February 2009: see its decision at [170]. There was no appeal against that finding of fact. Accordingly, if Mr Bevis had considered the letter of 20 January 2012 and had investigated whether the transactions had taken place, he would have found that they had taken place. It follows that his omission to deal with that point in the letter was not something which contributed to the insufficiency in the relevant assessments.

145. We will therefore allow HMRC's appeal in relation to section 29(4). It follows that HMRC are also able to rely upon the six-year period for assessments provided by section 36 and, accordingly, HMRC are able to rely on their discovery assessments for 2009/10 and 2010/11.

146. This conclusion makes it unnecessary for us to consider whether, in addition to the carelessness of Mr Bevis, Mr Hicks was also careless within section 29(4). However, as the matter was fully argued, we will deal with this point albeit more

briefly than might otherwise have been appropriate if the issue were to be decisive of the appeal.

147. In relation to Mr Hicks, HMRC's case is as follows:

5 “(1) Mr Hicks’ decision to participate in the Scheme in circumstances where it was clear to him at the hearing [before the FTT] and should have been clear to him in 2009 that his pre-existing trade (as an oil and gas trader who had also traded twice in gold and coffee) would not satisfy the trading requirements for an allowable loss set out in paragraph 11 of Counsel’s Opinion.

(2) Mr Hicks’ decision to participate in the Scheme in circumstances where:

10 (a) He “flicked through” the Counsel’s Opinion and Montpelier Memorandum and did not fully understand their content (FTT decision at [156] and [189(6)])

15 (b) Had he read the Counsel’s Opinion carefully it would have been clear to Mr Hicks from paragraph 11 of Counsel’s Opinion that he did not meet the trading requirements (NB. It was clear to him at the hearing [before the FTT])

(c) He did not take and retain notes of his meetings with Montpelier (FTT decision at [156])

20 (d) After the February 2009 meeting, having received the 11/2/09 Montpelier email which records that one of the traders had raised concerns that the Scheme was “high risk”, he failed to raise with Mr Bevis the fact that someone else had raised that the Scheme was high risk (FTT decision at [168])

25 (e) Having been alerted that someone else had raised the fact that the Scheme was high risk he considered that irrespective of whether the Scheme worked or not it was worth the risk (in circumstances where he had no proper basis of assessing the risk)

30 (f) He failed to seek or obtain independent advice regarding the tax aspects of the Scheme in circumstances where Montpelier was not an independent person (FTT decision at [181(1)])

(g) He did not carry out any due diligence into Montpelier or the entities with whom he was contracting (FTT decision at [181(1)])

35 (h) He only briefly perused the transaction documentation with Montpelier to enter into the Scheme and kept no copies (FTT decision at [167]and [181(3)].”

148. It can be seen that, in relation to Mr Hicks, the allegation that he was careless relates to his decision to participate in the Scheme.

149. We have summarised the findings of the FTT in relation to the allegation of carelessness on the part of Mr Hicks. If Mr Bevis had not been involved and if Mr Hicks had relied upon his own assessment of the scheme and the deductibility of the expenditure in his particular case, then he would clearly have been careless, in many of the ways alleged by HMRC. However, Mr Bevis was involved and took on the role of giving advice and making recommendations to Mr Hicks in the way we have described above. That fact obviously reduced the need for Mr Hicks himself to form his own independent view as to the relevant matters and we consider that it would be wrong to hold that Mr Hicks was careless for failing to do due diligence and pay attention to the detail in the ways alleged by HMRC.

150. It is more arguable that Mr Hicks should have absorbed the key point that the expenditure could only be deducted if he carried on a relevant trade but in view of all of the comments made to Mr Hicks by Montpelier, Mr Cole and Mr Bevis and taking account of the fact that Mr Bevis did not draw attention to this matter and treated it as being of no importance, we consider that we would have been unlikely to have reversed the finding of the FTT as to carelessness on the part of Mr Hicks in these respects.

151. We have also considered Mr Hicks' failure specifically to raise with Mr Bevis the comments made to him to the effect that the scheme was "high risk". This comment would appear to have related to the general features of the scheme (particularly its reliance on section 730 as to income) rather than the deductibility of expenditure in the particular cases of Mr Hicks and of colleagues in a similar position. As against that Mr Hicks knew that the scheme was supported by an Opinion from Counsel and Montpelier would back the scheme in the event of a challenge to it. We take the view that it is not an altogether straightforward matter whether a taxpayer is to be held to be careless within section 29(4) in a case where he makes full disclosure of a tax avoidance scheme but where he knows that there is a risk that the scheme will not work as intended. In those circumstances, we would prefer not to address this point in greater detail in a case where our decision on the point will not affect the outcome.

152. Our conclusion in relation to the carelessness of Mr Bevis also makes it unnecessary for us to consider whether Montpelier was a person acting on behalf of Mr Hicks in relation to the relevant assessments and, if so, whether Montpelier was also careless within section 29(4). However, as the matter was also fully argued, we will deal with this point albeit more briefly than might otherwise have been appropriate if the issue were to be decisive of the appeal.

153. In relation to Montpelier, HMRC's case is as follows:

(1) Informing Mr Hicks that the scheme was "perfect for derivatives traders" and that Mr Hicks was "precisely the category of financial trader for whom the Scheme worked to generate a tax loss" (FTT decision at [156], [159] and [189(4)]) in circumstances where Mr Hicks did not meet the trading conditions in paragraph 11 of Counsel's Opinion.

(2) Providing Mr Bevis with the entries to be cut and pasted into his tax returns when they would have known that the relevant transactions – to which the entries related – had not taken place.”

154. The first question in relation to Montpelier is whether it was a person acting on behalf of Mr Hicks in relation to the relevant assessments. To answer this question, we will apply the test identified above derived from the decision in *Bessie Taube*. As regards the first particular of carelessness put forward by HMRC, the matter complained of relates to Montpelier’s role as the seller of the scheme or, at most, an adviser to Mr Hicks. In that role, Montpelier was not acting on behalf of Mr Hicks for the purposes of section 29(4).

155. The second particular of carelessness on the part of Montpelier relates to its providing entries to Mr Bevis to be inserted into the tax returns. As we understand it, the information provided by Montpelier was of particular relevance in relation to the 2008/09 return which established the loss which was carried forward in the two subsequent years. Although we are not entirely clear as to this, the information provided appeared to relate to the figures for the dividends received by Mr Hicks and, possibly, the dates of those dividends. Although the provision of that information for the purposes of the 2008/09 return, producing a loss which was carried forward for the two subsequent years, brings Montpelier closer to the position of someone acting on behalf of Mr Hicks in relation to the returns for the two subsequent years, we regard the question as to whether Montpelier did cross the line into acting on behalf of Mr Hicks in relation to the relevant assessments as a difficult one. However, if we are right as to the nature of the information provided by Montpelier and in view of the FTT’s finding that the transactions had taken place, it would seem to follow that the information provided by Montpelier was accurate and could not be said to have been carelessly provided. If the question as to the role of Montpelier were to be decisive of this case, we feel that we would need to investigate more thoroughly what precisely Montpelier did in relation to the completion of the tax returns. We might also need to consider whether there could be circumstances in which a third party who carelessly provides inaccurate information to a taxpayer to be used in a return could be regarded as acting on behalf of the taxpayer for the purposes of section 29(4). In view of the fact that these points are not necessary for our decision, in the light of our earlier conclusions, we do not think it appropriate for us to go further.

156. Although it is not relevant to the outcome of this case, we will nonetheless express our view that the comment made by Montpelier that the scheme was perfect for derivatives traders was wrong and carelessly so.

157. The result of the above is that we will allow HMRC’s appeal in relation to section 29(4) (and section 36). This conclusion makes it unnecessary for us to consider whether, if we had formed a different view in relation to section 29(4) we would have allowed HMRC’s appeal in relation to section 29(5) in respect of one year of assessment only, namely, 2010/11. However, as the matter was fully argued, we will deal with the appeal in respect of section 29(5).

Section 29(5) and (6) TMA – the authorities, submissions and discussion

Section 29(5) and (6) TMA – the authorities

158. The leading cases on the scope and application of section 29(5) are *Hankinson*,
5 *Lansdowne*, *Sanderson* and, most recently, *Beagles v HMRC* [2019] STC 54
 (“*Beagles*”). In *Beagles* the Upper Tribunal (Birrs J and Judge Greenbank) at [100]-
 [101] relied particularly on Patten LJ’s summary of the authorities in *Sanderson* at
 [17] to [23] of his judgment:

10 “100. We endeavour to summarise the principles that we derive from
 Patten LJ’s judgment as follows:

(1) The test in s 29(5) is applied by reference to a hypothetical
 HMRC officer not the actual officer in the case. The officer has the
 characteristics of an officer of general competence, knowledge or skill
 which include a reasonable knowledge and understanding of the law.

15 (2) The test requires the court or tribunal to identify the information
 that is treated by s 29(6) as available to the hypothetical officer at the
 relevant time and determine whether on the basis of that information
 the hypothetical officer applying that level of knowledge and skill
 could not have been reasonably expected to be aware of the
 20 insufficiency.

(3) The hypothetical officer is expected to apply his knowledge of
 the law to the facts disclosed to form a view as to whether or not an
 insufficiency exists (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson*
 [23]).

25 We agree therefore with [Counsel for the taxpayer] that the test
 does assume that the hypothetical officer will apply the appropriate
 level of knowledge and skill to the information that is treated as being
 available before the level of awareness is tested. The test does not
 require that the actual insufficiency is identified on the face of the
 30 return.

(4) But the question of the knowledge of the hypothetical officer
 cuts both ways. He or she is not expected to resolve every question of
 law particularly in complex cases (Patten LJ, *Sanderson* [23],
 Lansdowne [69]). In some cases, it may be that the law is so complex
 that the inspector could not reasonably have been expected to be aware
 35 of the insufficiency (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson*
 [17](3)).⁵

⁵ In fact, in *Lansdowne* at [69] Moses LJ stated that where the underlying tax law was complex, adequate *factual* disclosure may not be enough for the hypothetical inspector to be expected to be aware of the insufficiency. Moses LJ did not suggest that where the *legal and factual* disclosures were adequate the mere complexity of the law meant that the hypothetical inspector could not reasonably have been expected to be aware of the insufficiency. The point that Moses LJ was making was that even if the factual details have been fully disclosed, the hypothetical inspector cannot be

5 (5) The hypothetical officer must be aware of the actual insufficiency from the information that is treated as available by s 29(6) (Auld LJ, *Langham v Veltema* [33]–[34]; Patten LJ, *Sanderson* [22]). The information need not be sufficient to enable HMRC to prove its case (Moses LJ, *Lansdowne* [69]) but it must be more than would prompt the hypothetical officer to raise an enquiry (Auld LJ, *Langham v Veltema* [33]; Patten LJ, *Sanderson* [35]).

10 (6) As can be seen from the discussion in *Sanderson* (see [23]), the level of awareness is a question of judgment not a particular standard of proof (see also Moses LJ in *Lansdowne* [70]). The information made available must 'justify' raising the additional assessment (Moses LJ, *Lansdowne* [69]) or be sufficient to enable HMRC to make a decision whether to raise an additional assessment (Lewison J in the High Court in *Lansdowne* [2010] EWHC 2582 (Ch), [2011] STC 372, at [48]).

15 101. Applying those principles to the facts of the present case, the question is whether from the information in and accompanying the return, a hypothetical officer could not reasonably have been expected to be aware of the insufficiency.”

159. The Upper Tribunal in *Beagles* continued:

20 “104. The hypothetical officer is an officer of general competence, knowledge or skill with a reasonable knowledge and understanding of the law. In our view, that would encompass a knowledge of the legislation relating to relevant discounted securities (in Sch 13 to the Finance Act 1996) and even if he or she did not, we would expect the officer to acquire that knowledge, given that the officer is directed to the legislation by the appendix to the return.

25 105. We would expect the hypothetical officer to be reasonably acquainted with the status of the case law on the *Ramsay* approach and to be aware for example of the House of Lords decision in *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL 6, [2001] STC 237, [2003] 1 AC 311 (*MacNiven*), the leading case at the time. We would also expect the officer to have a reasonable degree of commercial awareness (and, for example, to be aware, in broad terms, of the commercial level of interest rates at the time).”

35 160. In relation to section 29(6), the Upper Tribunal (Norris J and Judge Berner) in *Charlton* expressed the following view:

40 “78. The correct construction of s 29(6)(d)(i) is that it is not necessary that the hypothetical officer should be able to infer the information; an inference of the existence and relevance of the information is all that is necessary. However, the apparent breadth of the provision is cut down by the need, firstly, for any inference to be reasonably drawn; secondly that the inference of relevance has to be related to the insufficiency of tax, and cannot be a general inference of something that might, or

expected to “spot the fiscal ball” (ie appreciate which of the myriad of provisions in the UK tax code might apply or how they might apply) where the technical issues are complex. With respect, we consider that view to be unassailable.

might not, shed light upon the taxpayer's affairs; and thirdly, the inference can be drawn only from the return etc provided by the taxpayer.

5 79. As we have described, the balance provided by s 29 depends on protection being provided only to those taxpayers who make honest, complete and timely disclosure. That balance would be upset by construing s 29(6)(d)(i) too widely. Inference is not a substitute for disclosure, and courts and tribunals will have regard to that fundamental purpose of s29 when applying the test of reasonableness."

10 161. *Charlton* also decided at [82] that the Form AAG1 submitted by the promoters of the scheme in that case should be regarded as information made available for the purpose of section 29(5).

162. The Upper Tribunal in *Beagles* said:

15 "113. As we have described, for the purposes of the condition in s29(5), the awareness of the hypothetical officer is tested by reference to information which is treated as available to the officer by s29(6). In summary, the information that is treated as available to the officer is the information that is contained in the return or accompanying documents provided by the taxpayer. This is extended by s29(6)(d) to
20 information the existence of which and the relevance of which as regards the insufficiency of tax could reasonably be expected to be inferred by the officer from the return and any accompanying documents."

25 163. In *Beagles* the Upper Tribunal endorsed the view expressed in *Charlton* cited in paragraph 160 above and said at [122]:

30 "We agree with the point made in *Charlton* that s29(6)(d)(i) should not be construed too widely given the purpose of s29. It should be limited to cases where the hypothetical officer could reasonably be expected to infer from the return or accompanying documents that specific information exists which is directly relevant to the insufficiency in question."

Section 29(5) and (6) TMA – submissions and discussion

164. Mr Nawbatt made three main submissions in relation to section 29(5) and (6), viz that the FTT:

- 35 (1) had failed correctly to identify, and/or erred in its analysis of, the s 29 (6) information available to the hypothetical officer;
- (2) had reached a conclusion on section 29(5) which was inconsistent with:
(a) its finding at [48] in relation to section 29(1) and (b) its findings on section 29(4); and
- 40 (3) had misdirected itself in law and/or had reached a conclusion which was not available on the facts.

165. As regards the first submission, Mr Nawbatt argued that the FTT at [109] wrongly concluded that it was “not unreasonable to assume that the hypothetical officer would be likely to be in a similar position [to the actual officer] by that stage [i.e. the summer of 2014] in terms of his awareness of an insufficiency in the 2010-11 return.” Mr Nawbatt contended that this was an error of law because the actual officer’s awareness of an insufficiency in the summer of 2014 included information other than that falling within section 29(6). For example, as the FTT noted at [119] the actual officer’s awareness was based on “the detailed research and efforts of HMRC” in its investigation into the Montpelier Scheme i.e. information which did not fall within section 29(6). In addition, by the time Mr Boote became involved in January 2014, the FTT at [38] found that, at that stage, “HMRC had spent time gathering facts in relation to the Scheme and marshalling their arguments in respect of three representative scheme users (of whom Mr Hicks was not one). Specialist input had been sought from various HMRC departments, and had been drawn together by late August 2013.”

166. Furthermore, Mr Nawbatt submitted that the FTT’s error was repeated at [112]-[113] where the FTT considered that the points made by Mr Hicks’ agent about timing and information available were “well made”. But those points, Mr Nawbatt argued, included information that the actual officer had available and not information within the confines of section 29(6). That information – i.e. the information available to the actual officer – included Counsel’s opinion, the Information Memorandum, the opinions obtained from the HMRC technical specialists and correspondence and communications with other taxpayers and third parties relating to the scheme and its effectiveness. Mr Hicks had failed to specify what section 29 (6) documentation or information would have made the hypothetical officer aware of an actual insufficiency in his 2010/11 return.

167. There was, according to Mr Nawbatt, a further similar error at [117] where the FTT took into account the fact that the officer dealing with a different scheme (the one considered in *Clavis Liberty*) issued closure notices on 1 February 2013. This was irrelevant to the question whether the hypothetical officer considering Mr Hicks’ participation in the Montpelier Scheme could reasonably have been expected to be aware of an insufficiency based on the section 29(6) information provided by or behalf of Mr Hicks.

168. As regards the first submission in respect of section 29(5) and (6), we see some force in Mr Nawbatt’s point that the actual officer (having the benefit of HMRC’s detailed research into the Montpelier Scheme – information which did not fall within section 29 (6)) would have been in a somewhat different position from the hypothetical officer. Nonetheless, we do not consider that the FTT misdirected itself in a manner which was material to its ultimate decision.

169. It is clear to us that the FTT had firmly in mind the distinction between information that was available to the actual officer and the information made available within section 29(6). Indeed, at [109] the FTT recognised explicitly that the “real officer must not be confused with the hypothetical officer”. Although the FTT incorrectly considered that it was reasonable “to assume that the hypothetical officer

will be likely to be in a similar position [to that of the actual officer] by [the summer of 2014]”, the FTT noted the acknowledgement of the Court of Appeal in *Sanderson* at [25] that “...there would inevitably be points of contact between the real and hypothetical exercises which sub-ss 29(1) and (5) involve [although] the tests are not the same.”

170. That the FTT correctly focused on the information available (within the meaning of section 29(6)) to the hypothetical inspector is clear from the final sentence of [109] where the FTT said:

10 “Given the focus of subsection (5) on disclosure by the taxpayer, what information was the hypothetical officer lacking on 31 January 2013 which would have meant it was unreasonable to expect him at that earlier time to be so aware?”

171. It is clear from this sentence that the FTT was considering the information made available to the hypothetical officer for the purposes of section 29(5). The FTT had summarised this information at [88]-[101] and its summary was not in dispute before us.

172. As regards the FTT’s comment at [113] that the points made by Mr Hicks’ agent about timing and information available were “well made”, we do not think that the FTT’s view contributed to its ultimate decision. In the following paragraph [114], the FTT concluded that:

 “...the existence of an insufficiency sufficient to justify an assessment in this case turned primarily on the section 730 and trading issues.”

173. It is clear from this that the FTT was correctly focusing on the two main relevant issues.

174. In relation to Mr Nawbatt’s submission that the FTT’s reference in [117] to the scheme litigated in *Clavis Liberty* showed that it was taking into account an irrelevant factor, we do not agree with this criticism. The FTT stated explicitly at [117] that the hypothetical officer was not assumed to have knowledge of what other HMRC officers or departments had done. The reference to *Clavis Liberty* was simply a temporal one i.e. that by 1 February 2013 HMRC considered themselves justified in raising an assessment.

175. We therefore reject Mr Nawbatt’s first submission.

176. In relation to his second submission, Mr Nawbatt argued that the FTT had reached a conclusion on section 29(5) which was inconsistent with (a) its finding at [48] in relation to section 29(1); and (b) its findings on section 29(4).

177. At [48] the FTT concluded (in the context of its discussion of section 29(1) and the issue of “staleness” of the discovery):

 “48. While Mr Gordon sought to suggest that HMRC might already have had sufficient information to “cross the threshold” by the time

Officer Boote took over his role [January 2014], that is not supported by the facts.”

178. Mr Nawbatt submitted that if the actual officer did not have sufficient information to make a discovery of an actual insufficiency in January 2014, then the hypothetical officer could not reasonably have been expected to be aware of the actual insufficiency 12 months earlier (i.e. by 31 January 2013), based on the more limited section 29(6) information available at that date.

179. Mr Nawbatt criticised the finding of the FTT at [116] that the hypothetical officer would have been in a position to take a view on the information made available that Montpelier’s reading of section 730 was “plainly wrong”. Mr Nawbatt submitted that the FTT did not identify what “information made available” would have enabled the hypothetical officer to reach that view. Further, Mr Nawbatt argued that the findings at [116] and [121] were inconsistent with the finding at [205] that Montpelier’s interpretation of section 730 was “not obviously wrong or untenable.”

180. The FTT at [116] and [121], Mr Nawbatt submitted, failed to attribute the correct standard of competence, knowledge and skill to the hypothetical officer.

181. It was, as Mr Nawbatt argued, important not to confuse the information available to the real officer with that available to the hypothetical officer. The Form AAG1 did not set out Montpelier’s interpretation of section 730. According to Mr Nawbatt, Mr Hicks did not provide Montpelier’s interpretation to HMRC until after the discovery assessments were issued.

182. As regards the trading conditions issue (i.e. the need to have an established trade in the right to acquire dividends) Mr Nawbatt pointed out that this was not identified in the Form AAG 1 or any of the other section 29(6) information. It was, instead, raised in Counsel’s advice, which Mr Hicks did not provide to HMRC and therefore did not form part of the section 29(6) information available to the hypothetical officer.

183. Furthermore, Mr Nawbatt complained that the FTT did not identify the basis on which the hypothetical officer would have known that it was a requirement that the trader should have an established trade in the right to acquire dividends. This, Mr Nawbatt said, was inconsistent with its finding at [195] that:

“Finally, it is important not to judge carelessness within subsection (4) with the benefit of hindsight. The HMRC attack on the Scheme on trading grounds undoubtedly developed and became clearer over time, particularly in the years subsequent to the closure of the enquiry window for Mr Hicks’ 2010-11 return.”

184. We accept that, on its face, the FTT’s conclusion at [48] appears to be inconsistent with its conclusion that at the closure of the enquiry window, 12 months earlier, the hypothetical officer would have had enough information to be aware of the actual insufficiency. But it seems to us that the two tests are different. The “discovery” test in section 29(1) looks at when an actual officer actually did make a “discovery”. The question asked by section 29(5) is when a hypothetical inspector ought reasonably to be expected to have been aware of the insufficiency not when the

actual inspector did become aware of it. On this point, the FTT came to the conclusion that, by the end of the enquiry window, enough information had been disclosed for the purposes of section 29(6) in relation to the section 730 and trading issue for the hypothetical officer to have been aware of the insufficiency. In our judgment, there was sufficient evidence before the FTT (summarised at [88]-[101]) for it to reach that conclusion. Indeed, we would have reached the same conclusion as the FTT had it been necessary to remake the Decision.

185. As to the submission that the FTT's finding in relation to section 29(5) in respect of the hypothetical officer was inconsistent with its finding in relation to section 29(4), as regards carelessness on the part of Mr Bevis or Mr Hicks, we have already explained that we do not agree with the FTT's conclusions as regards carelessness in relation to Mr Bevis. We consider that the FTT's conclusions in relation to section 29(5) are consistent with our conclusions in relation to section 29(4) and so the FTT's conclusions are supported by the right conclusion in relation to section 29(4).

186. The Form AAG 1 made it clear that a trading deduction was being sought for the cost of acquiring dividend rights and that the taxpayer was a trader. It seems to us an elementary matter of tax law (well within what would be expected of an officer of general competence, knowledge or skill) to ask whether expenditure on the acquisition of the dividend rights was wholly and exclusively for the purposes of the taxpayer's existing trade. The nature of Mr Hicks' trade was made plain in letters from Mr Bevis in April and August 2011 (which included Mr Hicks' trading statements). The question whether Mr Hicks was entitled to a trading deduction for the price he paid for the dividend rights was fairly and squarely in issue and would have been apparent to any competent officer. Secondly, Form AAG 1 made it clear that section 730 was being relied upon to exclude the dividend income from the charge to tax in the hands of the trader. As *Charlton* established, Form AAG 1 is information made available within the meaning of section 29(6). Considerable further information was supplied by Mr Bevis following a request made in June 2011: see [98]. The section 730 issue was not particularly complex (the FTT in *Clavis Liberty* disposed of the point in ten fairly short paragraphs). We earlier expressed the view, when considering the subject of carelessness on the part of Mr Bevis, that the interpretation of section 730 propounded by Montpelier was an improbable one and unlikely to be accepted by a tribunal or a court. There was, therefore, ample evidence upon which the FTT could reach its conclusion that Mr Hicks had supplied sufficient information for the hypothetical inspector to be aware of the insufficiency.

187. Thirdly, and finally, Mr Nawbatt submitted that the FTT had misdirected itself in law and/or reached a conclusion which was not available on the facts.

188. In particular, Mr Nawbatt criticised the FTT's conclusion at [86] that:

“86. I have concluded that the practical effect of *Sanderson* is to require the exercise to focus on the level of disclosure in any particular case, and the extent to which that disclosure arms the hypothetical officer with sufficient information to justify the making of an

assessment. As is stated in *Sanderson* (at [25]), ‘[t]he purpose of the condition is to test the adequacy of the taxpayer’s disclosure....’

5 87. Subsection (5) is all about disclosure by the taxpayer (as defined by section 29(6)). The more extensive the taxpayer’s disclosure by the closure of the enquiry window, the more difficult it would be for HMRC to establish that the hypothetical officer could not reasonably have been expected to be aware of the insufficiency. The taxpayer is incentivised by the legislation to place HMRC in a position where he can put them to proof at the close of the enquiry window with the question “what more need I have disclosed to have placed the officer in a position to be justified in raising an assessment?””

10 189. In reaching these conclusions, Mr Nawbatt submitted that the FTT had failed to give appropriate weight to the judgment of the Court of Appeal in *Sanderson* at [17 (2), (3)] and [23] where Patten LJ said:

15 “(2) that the officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law: see *HMRC v Lansdowne Partners LLP* [2012] STC 544;

20 (3) that where the law is complex even adequate disclosure by the taxpayer may not make it reasonable for the officer to have discovered the insufficiency on the basis of the information disclosed at the time: see *Lansdowne* at [69];

...

25 [23] ...The decision in *Lansdowne* confirmed that the officer was not required to resolve (or even be able to assess) every question of law (particularly in complex cases) but that where, as Moses LJ expressed it, the points were not complex or difficult he was required to apply his knowledge of the law to the facts disclosed and to form a view as to whether an insufficiency existed.”

30 190. In support of his argument, Mr Nawbatt referred to the decision of the Upper Tribunal in *Beagles* at [106] where the Tribunal said that, in order for an officer to be able to be aware of an insufficiency in the return, the officer would need to be able to justify the conclusion that there was an insufficiency. The Upper Tribunal held that section 29(5) was not satisfied because the issue was complex and irrespective of the adequacy of the disclosure, the hypothetical officer could not reasonably have been expected to be aware of the principles which were *subsequently* developed in the case-law. The Upper Tribunal held that the hypothetical officer would have been more likely to conclude that further analysis was required.

35 191. Against this background, Mr Nawbatt submitted that the Montpelier Scheme involved complex points of law which had not previously been tested before the Tribunals and Courts. The resolution of these points was not, Mr Nawbatt argued, within the general competence, knowledge and skill of the hypothetical officer. Thus, the only conclusion open to the FTT was that the hypothetical officer could not reasonably have been expected to be aware of the actual insufficiency at the relevant time based on the section 29(6) information. Essentially, Mr Nawbatt submitted that

45

the FTT's conclusion to the contrary demonstrated that it must have misdirected itself in law and applied too low a standard of awareness of the insufficiency.

192. We do not accept Mr Nawbatt's third submission. We do not consider that the FTT misdirected itself. We consider that the FTT was correct to focus on the two
5 main issues, viz the application of section 730 and the trading condition. As we have said, we do not consider that these two issues were unduly complex and beyond the capacity of an inspector of reasonable experience and competence.

193. The FTT at [86]-[87] emphasised the importance in the application of section 29(5) of the quality of the taxpayer's disclosure. As the FTT said: "Subsection (5) is
10 all about disclosure by the taxpayer (as defined by section 29(6))." We consider this to be a correct statement and it discloses no error of law. If we may respectfully make a criticism of some of the earlier case-law it is that there has been an undue focus on the expertise, the technical knowledge of, the availability of HMRC Manuals to and the availability of specialist advice to the hypothetical inspector. That represents a
15 misunderstanding of the purpose of section 29(5).

194. In our judgment, section 29(5) requires that a taxpayer should make sufficient disclosure in order to enable an officer to make an informed decision whether an insufficiency existed sufficient to justify, in the words of Moses LJ [in *Lansdowne* at [69]], the exercise of the power to make an amendment to the return. We respectfully
20 agree with Moses LJ that the possibility should remain open that mere *factual* disclosure may not, in some cases involving complex issues of law, be sufficient.

195. The purpose of section 29(5) is to strike a balance between the protection of the revenue, on the one hand, and the taxpayer on the other. The taxpayer is protected against a discovery assessment provided adequate disclosure has been made. The
25 disclosure must be from the sources referred to in section 29(6) (as amplified by section 29(7)). HMRC are protected because they can raise a discovery assessment if adequate disclosure has not been made.

196. It seems to us that section 29(5) focuses primarily on the adequacy of the disclosure by the taxpayer. What constitutes adequate disclosure for the purposes of
30 section 29(5) will vary from case to case. It depends on the nature and tax implications of the arrangements concerned and not on the assumed knowledge (or lack of knowledge) of the hypothetical officer. The obligation is on the taxpayer to make the appropriate level of disclosure as befits a self-assessment system.

197. In a relatively simple case, where the legal principles are clear, it would be
35 sufficient for a taxpayer simply to give a full disclosure of the factual position. The return must also make clear what position the taxpayer is adopting in relation to the factual position (e.g. whether a receipt was not taxable or whether a claim for relief was being made).

198. But there may be other cases where the law and the facts (and/or the
40 relationship between the law and the facts) are so complex that adequate disclosure may require more than pure factual disclosure: namely some adequate explanation of

the main tax law issues raised by the facts and the position taken in respect of those issues.

199. Plainly, the greater the level of disclosure, the greater the officer's awareness can reasonably be expected to be. If a disclosure on a tax return includes all material facts and, in complex cases, an adequate explanation of the technical issues raised by those facts and the position taken in relation to those issues, it would be reasonable to expect an officer to be aware of an insufficiency. What constitutes reasonable awareness is linked to the fullness and adequacy of the disclosure – the expertise of the hypothetical officer remains that of general competence, knowledge or skill which includes a reasonable knowledge and understanding of the law.

200. In argument before us Mr Nawbatt came close to suggesting, as we understood it, that a hypothetical officer could not be expected to understand complex or specialist areas of tax law. We disagree. If the disclosure (factual and technical) is adequate in the circumstances of the case, a hypothetical officer can reasonably be expected to be aware of an insufficiency even in a complex case or one involving specialist technical knowledge. If the disclosure is inadequate then it is fair that a hypothetical officer could not reasonably be expected to be aware of an insufficiency in such a case. That is the balance that section 29(5) strikes.

201. In any event, on the facts of this case, it does not seem to us that either the trading issue or the section 730 issue were ones which were beyond the capability of an officer of ordinary competence to understand and deal with.

202. There was, however, one further aspect of the FTT's decision on which we wish to comment. At [121] the FTT concluded that HMRC had not established on the balance of probabilities that the condition in section 29(5) was satisfied. However, as Henderson J pointed out [at 48] in *HMRC v Household Estate Agents Ltd* [2008] STC 2045, that although the burden of proof of establishing that section 29(5) applied⁶ fell on HMRC, it would rarely be relevant in cases involving section 29(5):

“I would add, however, that in relation to para 44 [the equivalent of section 29(5)] the question is unlikely to be of much practical significance, because the nature of the enquiry is an objective one and the return and accompanying documents which have been submitted to HMRC should always be available. So cases where there is no evidence, or where the Commissioners are unable to reach a conclusion without recourse to the burden of proof, should be rare if not non-existent.”

203. With respect, we think it would have been preferable if the FTT had simply considered the evidence in relation to the information made available to the hypothetical officer which it summarised at [93]-[101] and, applying the objective test in section 29(5), reached its conclusion without reference to the burden of proof.

⁶ That case concerned the equivalent corporation tax provisions i.e. paragraphs 43 and 44 of Schedule 18 to the Finance Act 1998.

204. It follows, therefore, that in relation to Mr Hicks' tax year 2010/11, we would not have allowed HMRC's appeal in relation to section 29(5) and (6).

Conclusion

5 205. We will allow HMRC's appeal in relation to section 29(4) with the result that the discovery assessments for 2009/10 and 2010/11 were valid and effective assessments.

Costs

10 206. Any application for costs in relation to this appeal must be made within one month after the date of release of this decision. As any order in respect of costs will be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

15 **MR JUSTICE MORGAN**
JUDGE GUY BRANNAN

UPPER TRIBUNAL JUDGES

20 **RELEASE DATE: 14 January 2020**