



TC06851

Appeal number: TC/2016/07105

INCOME TAX – adoption of revenue functions by the NCA – Discovery Assessments - is knowledge that there is undeclared income, without more, sufficient to point an officer in the direction of there being an insufficiency of tax? - no - whether assessments valid - yes - whether satisfactory evidence to displace assessments - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

IAN DAISLEY

Appellant

- and -

THE NATIONAL CRIME AGENCY

Respondents

**TRIBUNAL: JUDGE NIGEL POPPLEWELL
MR SIMON BIRD**

Sitting in public at Bristol on 22 and 23 October 2018

Mr Michael Martin, legal representative, for the Appellant

Mr Christopher Stone, Counsel, instructed by the National Crime Agency for the Respondents

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Introduction

1. This is an income tax case. The appellant appeals against discovery assessments to income tax (the “**discovery assessments**” or the “**assessments**”) visited on him under section 29 Taxes Management Act 1970 (“**TMA 1970**”) for the tax years 1999/2000 to 2011/2012 (the “**adopted years**”). He also appeals against penalty determinations based on the assessments (the “**Penalties**”).
2. The respondents (or the “**NCA**”) have adopted the revenue functions of HM Revenue & Customs (“**HMRC**”) for the adopted years.
3. The respondents allege that the appellant has not declared any income to HMRC for the adopted years. They say that the assessments have been validly made and that the appellant has put forward no credible evidence to displace them.
4. The appellant accepts that he had income which he failed to notify to HMRC for the adopted years. But the assessments are flawed since they were neither new nor made reasonably by the assessing officer. And even if they were new and made reasonably, the appellant’s taxable income for the adopted years was considerably less than the amount assessed.

Issues

5. This appeal raises the following issues:
 - (1) The validity of the assessments and in particular:
 - (a) The newness of the reviewing officer’s discovery at the time of the discovery in July 2013.
 - (b) The reasonableness of the reviewing officer’s discovery.
 - (c) Whether the assessments based on a valid discovery had become stale when they were issued in September 2014.
 - (2) The amount of the assessments.
 - (3) The amount of the penalties visited on the appellant under section 7 TMA 1970 (for the tax years 1999/2000 to 2006/2007) and under Schedule 41 Finance Act 2008 (for the tax years 2009/2010 to 2011/2012).

NCA adoption

6. The NCA (which in this case includes its predecessor the Serious Organised Crime Agency) may assume the general revenue functions of HMRC where it has a reasonable suspicion that income chargeable to tax has arisen (wholly or partly) as a result (directly or indirectly) of criminal conduct.
7. By notice dated 19 July 2013 the NCA sought to adopt the revenue functions of HMRC for the adopted years. This was acknowledged by HMRC on 7 August 2013.

8. The appellant accepts that the NCA adoption has been validly and rightfully made and takes no point to the contrary. He accepts that the NCA is the competent respondent in this appeal.

Evidence

9. In addition to the considerable volume of documents and correspondence with which we were provided, we also had oral evidence from four witnesses namely:

- (1) Mr Daisley the appellant.
- (2) The assessing officer Mr Tommaso Lisi (“**Officer Lisi**”).
- (3) Mr Robert Gregory, an employee of the company which ran the car auction centre in Westbury (“**Mr Gregory**”).
- (4) Mr Mark Kent a former tenant of the appellant (“**Mr Kent**”).

10. We were also provided with transcripts of the evidence given by Mr Michael Giblin (“**Mr Giblin**”) (the appellant’s mortgage broker) in the criminal case of *R v Davies and others* held at Bristol Crown Court in February 2013 (the “**Giblin transcripts**”).

11. Since the evidence of each witness, and the Giblin transcripts, has relevance to some but not all of the issues in this appeal, we consider it helpful to consider the evidence in the context of the discussion of each of these issues below.

Chronology

12. The chronology set out below is based on the evidence provided to us and accordingly we find the facts set out in the chronology.

- (1) On 24 March 2000 the appellant purchased 55 Rutland Crescent, Trowbridge for £65,000.
- (2) On 31 August 2004 the appellant purchased 56 Rutland Crescent Trowbridge for £100,000.
- (3) In 2005 to 2006 the appellant was investigated for the supply of controlled drugs. A search warrant was executed at his home address on 17 November 2005. A quantity of drugs was found at that address as, too, was the sum of £44,963.60 in cash.
- (4) The appellant was arrested and interviewed at Melksham police station.
- (5) He was convicted in 2005 for possession of drugs and firearms and received a custodial sentence of two years nine months which he served between 5 October 2007 and 18 February 2009.

(6) In July/August 2013 the NCA adopted the revenue functions of HMRC. This was as a result of an investigation into the appellant's affairs by Officer Lisi at the end of which he concluded that he had reasonable grounds to suspect that the appellant had been involved in criminal conduct.

(7) Officer Lisi made his discovery (i.e. he concluded that the appellant had received income which ought to have been taxed) in July 2013.

(8) The discovery assessments were issued by the NCA on 25 September 2014.

(9) An interim freezing order was obtained by the NCA on 29 September 2014 and this, together with Officer Lisi's opening letter and the discovery assessments was served on the appellant shortly thereafter at his home address.

(10) The amount of tax and class 4 National Insurance Contributions ("NIC's") due and payable under the assessments was tax of £261,689.46, and NICs of £28,317.60, a total of £290,007.06.

(11) The appellant instructed Bark & Co to represent him and appeals were lodged against the assessments on 24 October 2014.

(12) Bark & Co requested a postponement of 100% of the tax and NIC's which was rejected by the NCA. But on 8 January 2015 an agreement was reached to postpone all the tax and NIC's except for £60,000 which was paid by the appellant to the NCA on 21 January 2015.

(13) Meetings took place between Bark & Co and Officer Lisi on 6 February 2015 and 22 April 2015. At these meetings information was exchanged and following the February meeting, business records for the appellant were sent by Bark & Co to Officer Lisi for the latter's analysis.

(14) On 1 July 2016 Officer Lisi issued penalty determinations in the total sum of £165,177.93. An appeal against the penalty determinations was received by the NCA on 9 July 2016.

(15) On 9 September 2016 Officer Lisi issued his view of the matter letter under section 49C TMA 1970 (the "view of the matter letter"). The view of the matter letter reduced the tax and NICs due and payable, as well as the penalties.

(16) The revised figures following those reductions was income tax of £174,730.75, NICs of £25,269.94, penalties of £117,184.99, and interest of £91,164.09. This totals £408,349.77, and is the amount against which the appellant appeals.

(17) In September October and November 2016 there was an exchange of correspondence between the appellant and Officer Lisi. On 30 September 2016 (in a letter incorrectly dated 30 October 2016) the appellant appealed against the view of the matter letter.

(18) In that letter the appellant mentioned that he was in possession of the Giblin transcripts and that he had signed the 2004 mortgage application in blank. Officer Lisi responded by offering a review. The appellant did not take up that offer.

(19) The appellant appealed to the FTT on 26 November 2016.

Legislation

13. The legislation which is relevant to notifying chargeability, the discovery assessments, and the amount of the assessments, can be found in the TMA 1970 and is set out in the Appendix to this Decision. The legislation which is relevant to the Penalties is set out in the Appendix and in [180] below.

Burden of proof

14. The burden of proving that the assessments and the penalty determinations are valid rests with the NCA. The standard of proof is the balance of probabilities.

15. If the NCA can establish that validity, the burden then shifts and it is up to the appellant to show that he has been overcharged by the tax assessments and the penalty determinations. The standard of proof is the balance of probabilities.

Discovery

16. The main issues of principle concerning the discovery assessments are:

(1) The test for a valid discovery requires only that it has “newly appeared” to an officer that there is an insufficiency. In this case had the insufficiency already newly appeared to another HMRC officer before Officer Lisi made the discovery so that Officer Lisi’s discovery in 2013 was not new.

(2) Did Officer Lisi act honestly and reasonably when coming to the conclusion that there was an amount which should have been assessed to income tax that had not been so assessed.

(3) When should that honesty and reasonableness be tested? Should it, in this case, be the date on which the discovery was made (July 2013) or when the assessments were made (29 September 2014) or should it have been later, on 9 September 2016 when Officer Lisi issued his view of the matter letter?

(4) Does “newly appeared” apply not just to the conclusion reached by the officer, but also to any assessment that is based on that conclusion? Or indeed an assessment which is amended by Officer Lisi’s view of the matter letter?

The 2000 mortgage application

17. As has been said in [12(1)] in March 2000 the appellant purchased 55 Rutland Crescent. He did so with the help of a mortgage. His mortgage broker was Mr Giblin. In his mortgage application (the “**2000 mortgage application**”) dated 15 February 2000 the appellant’s gross basic annual income was expressed to be £18,000 per year. The appellant accepts that this is correct.

18. This figure is significant for two reasons.

(1) Firstly it is used by Officer Lisi in his view of the matter letter as the basis for amending the assessments for the tax years 1999/2000 – 2002/2003.

(2) Secondly it is the basis for the positive case put forward by the appellant as to why he has been overcharged by the assessments and what the correct amount of income is on which he should be charged income tax.

The 2004 mortgage application

19. As has been said in [12(2)], in August 2004 the appellant purchased 56 Rutland Crescent. He did so with the aid of a mortgage. His mortgage broker was again Mr Giblin. In the mortgage application dated 10 February 2004 (the “**2004 mortgage application**”) the appellant’s taxable income was expressed to be £75,000 for the then current year and £70,000 for the then previous year.

20. The significance of these figures and this application are again two-fold.

(1) Firstly Officer Lisi uses them as the basis for the assessments;

(2) Secondly the appellant says that he completed the form in blank and that the income figures were wrong and were inserted by Mr Giblin without his knowledge and without asking the appellant what his income actually was. On the basis of this he says that Officer Lisi should have taken into account the appellant’s assertion that he completed a blank application form and so Officer Lisi has acted unreasonably in failing to take that into account in the assessment or in his view of the matter letter.

The Giblin transcripts

21. Mr Giblin gave evidence in the criminal trial of *R V Davies & others*. The Giblin transcripts are transcripts of his evidence given in that trial on 19 February 2013 and 21 December 2013.

22. The appellant says that Mr Giblin’s evidence in that case showed that it was common practice for borrowers to send blank but signed mortgage application forms to brokers. It was also common practice for such brokers to include details of the borrowers’ income without recourse to the borrower. This supports the appellant’s testimony that he had completed the 2004 mortgage application form in blank and it was Mr Giblin who made up an inserted the income figure into that form.

23. Mr Stone says, to the extent that any weight should be attached to the Giblin transcripts, they show, to the contrary, that Mr Giblin and other brokers would always base a borrower's income figures on information given by the borrower. And in any event, none of the evidence given by Mr Giblin, in the Giblin transcripts relates to the appellant.

24. The significance of the Giblin's transcripts is that the appellant claims that they should have been taken into account by Officer Lisi when making the assessments or in his view of the matter later and by failing to do so Officer Lisi acted unreasonably.

Relevant case law

25. There are four cases which are highly relevant to the discovery issues raised in this case. They are *HMRC v Charlton* [2012] UKUT 770 (TC) ("**Charlton**"), *Jerome Anderson v HMRC* [2018] STC 1210 ("**Anderson**"), *Neil Pattullo v HMRC* [2016] UKUT 270 ("**Pattullo**") and *HMRC v Raymond Tooth* [2018] UKUT 38 ("**Tooth**"). All three decisions are decisions of the Upper Tribunal and are therefore binding upon us.

26. The relevant extracts from each decision are set out below:

Charlton

"37. In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment. But that would not, in our view, include a case, such as this, where the delay was merely to accommodate the final determination of another appeal which was material to the liability question. Such a delay did not deprive Mr Cree's conclusions of their essential newness for s 29(1) purposes."

Anderson

"24. Since the introduction of self-assessment, there have been comparatively few decisions on the meaning of s 29(1) TMA but there have been rather more as to the meaning and effect of s 29(5) and 29(6) TMA. The principal authorities on s 29(5) and (6) are, now, *Hankinson v Revenue and Customs Commissioners* [2012] 1 WLR 2322, *Revenue and Customs Commissioners v Lansdowne Partners Ltd Partnership* [2012] STC 544 and *Sanderson v Revenue and Customs Commissioners* [2016] STC 638. Although a detailed discussion of the decisions on s 29(5) and 29(6) is not necessary for present purposes, it is helpful to refer to some of the propositions established by those authorities, taken together with the decision in *Charlton* on s

29(1). As will be seen, the decisions identify differences between what is involved under s 29(1) and what is relevant for s29(5) and 29(6). We consider that the following propositions are now established by the various authorities:

- (1) S 29(1) refers to an officer (or the Board) discovering an insufficiency of tax;
- (2) The concept of an officer discovering something involves, in the first place, an actual officer having a particular state of mind in relation to the relevant matter; this involves the application of a subjective test;
- (3) The concept of an officer discovering something involves, in the second place, the officer's state of mind satisfying some objective criterion; this involves the application of an objective test;
- (4) If the officer's state of mind does not satisfy the relevant subjective test and the relevant objective test, then the officer's state of mind is insufficient for there to be a discovery for the purposes of subsection (1);
- (5) S 29(1) also refers to the opinion of the officer as to what ought to be charged to make good the loss of tax; accordingly, the officer has to form a relevant opinion and such an opinion has to satisfy some objective criterion;
- (6) Although s 29(1) directs attention to the position of the actual officer, s 29(5) refers to the position of a hypothetical officer: *Sanderson v Revenue and Customs Commissioners* [2016] STC 638 at [25];
- (7) Although there might be some points of contact between the real and the hypothetical exercises required by subsection (1) and subsection (5) respectively, the tests for the two exercises are different: *Sanderson* at [25];
- (8) The actual officer referred to in s 29(1) is not required to consider whether the test required for s 29(5) is satisfied: *Hankinson v Revenue and Customs Commissioners* [2012] 1 WLR 2322;
- (9) For the purposes of s 29(5), one question is what a hypothetical officer would have been "aware of";
- (10) For the purpose of s 29(5), the meaning of "awareness" does not require the hypothetical officer to resolve points of law nor to forecast and discount what the response of the taxpayer might be; it is enough that the information made available to the hypothetical officer would justify an amendment to the tax return: *Revenue and Customs Commissioners v Lansdowne Partners Ltd Partnership* [2012] STC 544 at [56]; "awareness" is a matter of perception and understanding, not of conclusion; in order to be "aware" of something, it is not necessary to form a conclusion that the thing is more probable than not: *Lansdowne Partners* at [70]; and

(11) The purpose of s 29(5) is to provide for a cut-off point beyond which an actual officer is not able to raise a discovery assessment; an actual officer is not entitled to raise a discovery assessment under subsection (1) if a hypothetical officer could have been reasonably expected at an earlier defined point in time, on the basis of the information made available to him before that time, to be aware of the matter which the actual officer claims to have discovered under subsection (1); this cut-off point is not reached if before the defined point in time a hypothetical officer would only have had “a mere whim” that there was an insufficiency of tax or could only have “speculated” as to that possibility: the Upper Tribunal in *Sanderson* [2014] STC 915 at [50], upheld on appeal, [2016] STC 638 at [35].

The subjective test

25. It is clear that before an officer makes a discovery assessment, he must have formed a certain state of mind. The question raised on this appeal is: what must the officer think or believe? The three judges in the Divisional Court in *R v Kensington Income Tax Commissioners* all agreed that it was not necessary for the officer to reach a conclusion which was justified by sufficient legal evidence. However, when describing what was required for this purpose, the three judges expressed themselves in different terms which do not appear to us to describe the same test.

26. Any test which is devised as to the necessary subjective belief on the part of the officer must be a practical and workable test. The expression of the test has to recognise that at the time when an officer thinks that it is desirable to make a discovery assessment, the officer may appreciate that in certain respects he may not be in possession of all of the relevant facts. Further, the officer may foresee that a discovery assessment might give rise to questions of law some of which might not be straightforward.

27. In *Revenue and Customs Commissioners v Lansdowne Partners Ltd Partnership*, when considering the meaning of “be aware of” for the purposes of s 29(5), it was said that “awareness” was a matter of perception not conclusion and that it was possible to say that an officer was “aware of” something even when he could not at that stage resolve points of law and even though he was not then aware of all of the facts which might turn out to be relevant. Although the word “discover” and the phrase “be aware of” cannot be treated as synonyms, we consider that if it is possible to be aware of something when one does not know all of the relevant facts and one cannot foretell how relevant points of law will be resolved, it cannot be said to be premature for an officer to “discover” that same something even when he knows he is not in possession of all of the relevant facts and does not know how relevant points of law will be resolved.

28. In *Sanderson*, Patten LJ described the power under section 29(1) in this way:

“The exercise of the section 29(1) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on all the available information at the time when the discovery assessment is made.”

We consider, with respect, that this test is in accordance with the earlier authorities. This passage describes the test somewhat briefly because, of course, that case concerned s 29(5) rather than s 29(1). Having reviewed the authorities, we consider that it is helpful to elaborate the test as to the required subjective element for a discovery assessment as follows:

“The officer must believe that the information available to him points in the direction of there being an insufficiency of tax.”

That formulation, in our judgment, acknowledges both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not.

The objective test

29. The authorities establish that there is also an objective test which must be satisfied before a discovery assessment can be made. In *R v Bloomsbury Income Tax Commissioners*, the judges described the objective controls on the power to make a discovery assessment. Those controls were expressed by reference to the principles of public law. In *Charlton* at [35], the Upper Tribunal referred to the need for the officer to act “honestly and reasonably”.

30. The officer’s decision to make a discovery assessment is an administrative decision. We consider that the objective controls on the decision making of the officer should be expressed by reference to public law concepts. Accordingly, as regards the requirement for the action to be “reasonable”, this should be expressed as a requirement that the officer’s belief is one which a reasonable officer could form. It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer’s belief was not reasonable.”

Pattullo

“52. So far as concerns the question of law, namely whether any discovery under s 29(1) has to be acted upon while it remains fresh (or before it becomes stale), I prefer the submissions for the taxpayer. Quite apart from the support given to this submission by the passages in *Charlton* and *Corbally-Stourton* to which I have referred, which are highly persuasive, the requirement for the discovery to be acted upon while it remains fresh appears to me to arise on the natural meaning of s 29(1) itself. That sub-section provides that “if” HMRC discover certain matters then they may, subject to what follows later in the section, make an assessment in the amount needed to make good the loss of tax. The word “if”, like many words in the English language, has a variety of shades of meaning. It may be purely conditional. But it may equally have a temporal aspect, as in the expression “if and when” (e.g. if the sun comes out we shall go to the beach). I do not regard this as stretching the meaning of “if”. The context makes it clear that an assessment may be made if and when it is discovered that the assessment to tax is insufficient. It would, to my mind, be absurd to contemplate that, having made a discovery of the sort specified in s 29(1), HMRC

could in effect just sit on it and do nothing for a number of years before making an assessment just before the end of the limitation period specified in s 34(1).

53. However, the word “if”, as used in this way in the sub-section, does not mean “immediately”. Mr Gordon was right, in my view, to accept that the discovery could be kept fresh for the purposes of being acted upon later. As he accepted, each case would turn on its particular facts. He gave the example of notification being given to the taxpayer of the discovery in the expectation that matters could be resolved without the need for a formal assessment to be made. No doubt there are many other examples which could be given. The UT in *Charlton* at para 37 recognise that the decision in each case will be fact sensitive. I do not think it would be helpful to try to define the possible circumstances in which a discovery would lose its freshness and be incapable of being used to justify making an assessment. But I consider that Mr Gordon was right to accept that it would only be in the most exceptional of cases that inaction on the part of HMRC would result in the discovery losing its required newness by the time that an assessment was made."

Tooth

“78. “Newness”, it was held in *Charlton v. Revenue and Customs Commissioners* [2012] UKUT 770 (TCC) at [37], relates not to the reason for the conclusion reached by the officer, but to the conclusion itself:

“The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment. But that would not, in our view, include a case such as this, where the delay was merely to accommodate the final determination of another appeal which was material to the liability question. Such a delay did not deprive Mr. Cree’s conclusions [Mr. Cree was the relevant officer] of their essential newness for section 29(1) purposes.”

79. Broadly speaking, we agree with this statement of the law. However, for the purposes of determining this case, it is necessary to consider the question of “newness” and its corollary “staleness” in a little greater detail:

(1) The “discovery” in section 29(1) TMA relates to one of the three situations set out in section 29(1)(a), (b) or (c). If it is discovered that such a situation pertains (or may pertain: all that is required is for the officer to act honestly and reasonably), then the officer is at liberty to make an assessment under section 29 TMA.

(2) We should say that we see no reason why one officer cannot make the discovery and delegate to another officer the making of the assessment. That is what occurred in this case: see [32] to [35] of the Decision, set out in paragraph

40 above. However, it is important, we consider, to bear in mind that section 29 TMA envisages two stages – (i) the discovery and (ii) the making of the assessment consequent upon the discovery.

(3) We entirely agree with the Upper Tribunal in *Charlton* that on making a discovery, HMRC must act expeditiously in issuing an assessment. If, to use the words of *Charlton*, an officer has made a discovery, then any assessment must be issued whilst the discovery is “new”.

(4) It follows from this that the same officer (or officers) cannot make the same discovery twice. We see no reason, however, why the same officer cannot, for different reasons, discover that one of the situations set out in section 29(1)(a), (b) or (c) pertains a second time. Suppose an officer discovers that an assessment to tax has become insufficient for a certain reason, but HMRC decides not to issue an assessment because the point is controversial and the amount small. Suppose that officer then – for different reasons – discovers that the assessment has become insufficient. We consider that this, second, discovery could justify the making of an assessment.

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

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

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

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

(b) As to HMRC’s position, in their own interests, officers need to have clarity as to what constitutes a “discovery” for the purposes of section 29 TMA. For example, any second officer making a “discovery” in succession to another officer might, should an assessment be issued, be faced with a contention that his “discovery” was in some way an illicit

attempt to re-open a stale point. Inevitably, there would have to be questions regarding what the second officer knew of the first officer's work, and whether the second officer's "discovery" was related to that of the first officer and so not his own at all. As can be seen from paragraph 88(7) below, we consider that this is a case where HMRC's officers would have benefited from a clear understanding of the requirements of section 29 TreMA."

Discussion on discovery

27. We now turn to consider the application of the legal principles set out above to the four discovery issues set out at [16].

The preliminary application on the newness of Officer Lisi's conclusion

28. At the start of the hearing Mr Martin applied for leave to deal with the newness of the discovery point as a preliminary issue. This point was whether the conclusion reached by Officer Lisi was new, rather than whether it had become stale between the discovery and the issue of the assessments (which were based on that discovery). It was clear from his skeleton argument that this was a point that he was taking although it had not been taken earlier in the proceedings. But notwithstanding that his skeleton had been delivered late in the day, Mr Stone had no objection either with taking the point itself or for dealing with it as a preliminary issue.

29. We heard arguments on this point following which we came to a decision which we gave to the parties. Our decision was that it was Officer Lisi who newly made the relevant discovery. We gave reasons for that conclusion on the day and told the parties that we would give fuller reasons for reaching that conclusion in this decision. So we now turn to that.

Appellant's submissions

30. Mr Martin took us to Section 29 TMA 1970 and the case of *Charlton*. He submitted that the discovery must be new. On the basis of *Burgess & Brimheath Developments Ltd v HMRC* [2015] UKUT 0578 ("**Burgess**"), it is up to the NCA to establish that the relevant conditions for the issue of the discovery assessments were met. One of these is that it must "newly appear" to an officer that there is an insufficiency. In this case it was inconceivable that having been investigated by the police and the criminal taxes unit of HMRC, another officer, either within the police or (more likely) HMRC would not have concluded that income which ought to have been assessed on the appellant had not been so assessed. The discovery must be new, not just to the assessing officer but also to the authority on whose behalf that officer is operating. So when Officer Lisi came to make his discovery it was already stale, since someone else either in the police or (more importantly) HMRC had already made the relevant discovery. The respondents have not established that this was not the case and have so failed to establish that the material conditions for the issue of the discovery assessments have been met. The submission that the police and HMRC Criminal Taxes Unit must have known of taxable income that had not been declared

by the appellant is clear from a statement by Police Officer Bawden in 2007, a statement by Police Officer Glasgow in 2012 and a note from Linda Davidson of HMRC's Criminal Taxes Unit indicating that they had been undertaking a criminal taxes investigation since 14 July 2011. These showed that both the police and HMRC were aware that the appellant had not filed any return or paid any tax in relation to the adopted years; the fact that the Serious Organised Crime Agency was, in 2012, attempting civil recovery of assets from the appellant; and (most damning in Mr Martin's eyes) that HMRC Criminal Taxes Unit carried out an investigation into the appellant's affairs in 2011 (Mr Martin is not clear how long that investigation continued but it must have been, in his view, at least 6 months and could have been up to 2 years). Whilst Mr Martin has no specifics about the nature of this investigation, in his view it is inconceivable that HMRC did not conclude that the appellant had undeclared income on which tax was due. In his view that is a discovery for the purposes of section 29 TMA 1970. Newness cannot be refreshed simply by passing the file from one officer to another. And once one officer has made the discovery and not acted upon it, its newness becomes extinguished. That is what has happened in this case.

31. If the NCA adopts the revenue functions of HMRC then both are subject to Section 29 even if they are different organisations.

32. The subjective element of the discovery test is not intended to apply to newness. The test is whether objectively the officer has reached a conclusion. Where there is evidence that some investigation has been undertaken that is prima facie evidence that a conclusion has been arrived at (i.e. a discovery has been made). It is up to the NCA to show that no conclusion had been reached by another NCA or HMRC officer before the conclusion reached by Officer Lisi in 2014.

Respondents submissions

33. Mr Stone's position was that there was no evidence that the investigation conducted by HMRC Criminal Taxes Unit and, separately and independently, Officer Lisi considered the same evidence. He accepted that the police and HMRC Criminal Taxes Unit knew as facts that the appellant has not declared income and had paid no tax for the adopted years. But there is no evidence that someone competent to raise an assessment knew of those facts (before Officer Lisi). The knowledge that the appellant had paid no tax was a clerical issue and is not the same as the conclusion reached by Officer Lisi in 2014. The assessments made then were made on the basis of an investigation to the appellant's financial position which reviewed the mortgage application forms, the appellant's bank accounts and his lifestyle. It is clear that no similar forensic analysis had been undertaken into the appellant's position before then. The appellant has not been able to show, even prima facie, that another officer had reached a conclusion which is the same as that reached by Officer Lisi before the latter did so. It is not possible for the NCA to prove a negative (i.e. that no officer had previously reached the same conclusion). It is not correct as a matter of law that a discovery made by one officer in an organisation is deemed to have been made by all other officers. You need, too, to treat HMRC and the NCA as separate bodies for the purposes of section 29 TMA 1970 even though the NCA had assumed the general

revenue functions of HMRC. So even if an HMRC officer had made a relevant discovery, an NCA officer is not “bound” by that to come to a valid new discovery. This is borne out by *Tooth* (paragraph 79(5) of that decision) even though Mr Stone declared that the NCA’s position to be that there was no such thing as staleness and the extracts from *Tooth* are obiter. All we know is that in 2011 HMRC Criminal Taxes Unit were interested in the appellant but we know nothing about what they did or what investigation they undertook. Discovery that the appellant owed tax is not the same as a discovery reached by Officer Lisi. There is simply no evidence that Officer Lisi’s discovery was not new to him.

Officer Lisi’s evidence

34. Officer Lisi gave oral evidence in relation to this point. He said that he was not aware of what the HMRC Criminal Taxes Unit investigation or review involved. He had never worked for the Criminal Taxes Unit and was not aware of the information they had available to them to allow them to carry out a review of the appellant’s affairs. He had no idea what, if any, conclusion had been reached by the Criminal Taxes Unit. He simply knew that they were happy for the NCA to carry out an investigation into the appellant. The only information he had received from the Criminal Taxes Unit was, to his recollection, an email from Stephen Morton of the Criminal Taxes Unit on 8 July 2014 which indicated that the Criminal Taxes Unit no longer had an interest in the appellant and had no objection to the NCA carrying out an investigation. He said that the assessments were based on the information available to him at the time he raised those assessments and were not based on anybody else’s work. He also said that he made the discovery in “roughly July 2013”.

35. This evidence was not challenged by Mr Martin. We find the foregoing evidence of Officer Lisi as facts.

Decision on this preliminary issue

36. The question of what constitutes a discovery has been considered in cases which are binding on us, most importantly *Charlton* and *Anderson*.

37. *Charlton* shows that a discovery can be made if it newly appears to an officer of the Board, acting honestly and reasonably, that there is insufficiency.

38. *Anderson* makes it clear that the concept of an officer discovering something involves the application of both a subjective and an objective test. 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.

39. The objective test which is that the officer’s action must be “reasonable”, i.e. that the officer’s subjective belief is one which a reasonable officer could form.

40. It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer’s belief was not reasonable.

41. We consider the reasonableness of Officer Lisi's discovery below.
42. It is clear that the issue of newness goes to the conclusion (i.e. the decision by the officer that there is an insufficiency) rather than the reasons for it.
43. In his application Mr Martin considers that it is up to the NCA to show that the discovery assessment is valid. We agree with that as, too, does Mr Stone.
44. We also agree with Mr Martin that in taking over the functions of HMRC, the NCA are subject to the same statutory provisions notwithstanding their different statutory footings.
45. But we do not think that any police officer or HMRC officer had made a discovery before Officer Lisi as a result of the police or HMRC Criminal Taxes Unit's investigation into the appellant's affairs. All we know about the investigations into the appellant's affairs prior to the issue of the assessments in 2014 is that the police and the HMRC Criminal Taxes Unit knew that there was undeclared income. They do not appear to have had any idea as to the amount of that undeclared income. We think this is crucial. We agree with Mr Stone that had one of those investigating bodies been asked whether the appellant had undeclared income, they would have replied yes. But they would not have been able to indicate the amount of that undeclared income.
46. If an officer wishing to make a discovery assessment does not know of the amount of undeclared income he cannot make any sort of best judgment assessment about the under declared tax.
47. The process by which the assessing officer comes to the conclusion that there is an insufficiency must involve an analysis of the amount of income that has been under declared. He must subject it to a process as a result of which he is pointed in the direction of there being an insufficiency.
48. The assessments must be made honestly and reasonably. An officer can only comply with these parameters if he has a view of the tax which is payable. And so he must have some information to go on as regards the amount of undeclared income.
49. In our view an officer who simply knew that there was undeclared income and took no steps to ascertain the amount nor the tax implications, and simply raised an assessment, would be acting capriciously and unreasonably.
50. In this case, it is clear that both the police and HMRC Criminal Taxes Unit knew that there was income which had not been declared by the appellant. But there is no evidence that they came to view, or conducted any form of analysis as a result of which they were pointed in the direction of the being an insufficiency of tax.
51. So in our view it was open to Officer Lisi to make a valid discovery on the basis of the investigation that he had carried out using the mortgage, lifestyle and bank statement information.

52. It is clear from Officer Lisi's evidence that he had no idea whether any officer had made a discovery before him; or if they had on what it was based.

53. He came to his conclusion based on his own review. It newly appeared to him that there was an insufficiency and that enabled him to issue the assessments.

54. It is true that Officer Lisi had been investigating the appellant's affairs prior to 2013 when the NCA assumed HMRC's revenue functions. It was on the basis of that investigation that he was able to say that he had reasonable grounds to suspect that the appellant had been involved in criminal conduct. But there is nothing in his evidence which suggests that that investigation provided him with sufficient information as to the amount of undeclared income as to enable him to come to a conclusion that there was an insufficiency of tax.

55. Mr Martin urged us to conclude that because there had been both a police investigation and an investigation by HMRC Criminal Taxes Unit which the evidence clearly shows resulted in a conclusion that the appellant had undeclared income, it is inconceivable that an HMRC officer would not have reached the conclusion that there was, correspondingly, tax which should have been assessed on the appellant.

56. But as we have said above, there is no evidence that either the police or HMRC Criminal Taxes Unit knew the amount of undeclared income. Without that, we cannot draw the inference sought by Mr Martin. We do not think that, before Officer Lisi's discovery, any other HMRC officer had, in his possession, sufficient information to point him in the direction of there being an insufficiency of tax. There was no raw material on which the officer could base any form of assessment as to the amount of that insufficiency.

57. It is our decision that Officer Lisi's discovery was newly made in July 2013 and when he made his discovery.

The reasonableness of Officer Lisi's discovery

58. There are two issues concerning the reasonableness of Officer Lisi's discovery. Firstly, when do you apply the test of reasonableness; and secondly, on that date (or dates) was Officer Lisi's discovery a reasonable one.

59. The legal tests are set out in *Charlton* and *Anderson*. The test of discovery has both a subjective and objective element. We are considering here the objective element.

60. This is set out at paragraph 29 and 30 of *Anderson*.

“The objective test

29. The authorities establish that there is also an objective test which must be satisfied before a discovery assessment can be made. In *R v Bloomsbury Income Tax Commissioners*, the judges described the objective controls on the power to make a discovery assessment. Those controls were expressed by

reference to the principles of public law. In *Charlton* at [35], the Upper Tribunal referred to the need for the officer to act “honestly and reasonably”.

30. The officer’s decision to make a discovery assessment is an administrative decision. We consider that the objective controls on the decision making of the officer should be expressed by reference to public law concepts. Accordingly, as regards the requirement for the action to be “reasonable”, this should be expressed as a requirement that the officer’s belief is one which a reasonable officer could form. It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer’s belief was not reasonable.”

61. In this case, a great deal of Mr Martin’s energy was aimed at showing Officer Lisi’s conclusions in both the assessments and his view of the matter letter were unreasonable.

When do you test reasonableness?

62. It is his view that not only must the assessing officer act reasonably at the time that he makes the discovery (in this case in July 2013) but he must also do so when he issues the assessments in September 2014 and furthermore, must do so when coming to any form of conclusion or decision as regards a taxpayer. And this includes the review to the numbers and the reasons for that review set out in Officer Lisi’s view of the matter letter in September 2016.

63. It is Mr Stone’s view that reasonableness is tested only once and that is at the time of making the discovery. This tribunal has no ongoing monitoring role as regards the reasonableness of any HMRC officer’s behaviour. If Officer Lisi acted reasonably in making the discovery but then unreasonably (which Mr Stone denies is the case in any event) subsequently (and in this case at the time of issuing the assessments or the view of the matter letter) then this tribunal has no jurisdiction to strike down the assessments or the view of the matter letter on the basis of that unreasonable behaviour. This could only be done by way of judicial review.

64. As was held in the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363, the First-Tier Tribunal is a creature of statute and can only exercise such jurisdiction as Parliament has chosen to confer on it. The jurisdiction imposed on us in respect of this aspect of this appeal does include an assessment as to whether the assessing officer has acted honestly and reasonably. But we take the view that unless it is made expressly clear to us either in legislation or in binding case law that we have a supervisory jurisdiction, we should be very slow to take one on ourselves.

65. The reasonableness test set out in *Charlton* and elaborated upon in *Anderson* is a judge made test. There is no such requirement imposed on the assessing officer by section 29 TMA 1970. We are bound by those cases.

66. The dicta in both *Charlton* and *Anderson* make it clear that the time at which you consider whether the assessing officer has acted reasonably is at the time of and

in connection with the discovery. *Charlton* makes clear that it is at the time that it newly appears to the assessing officer that tax which ought to have been assessed has not been so assessed.

67. *Anderson* equally makes it clear that the objective test must be satisfied “before a discovery assessment can be made”.

68. So there is nothing here to suggest that the reasonableness of the officer’s behaviour is tested at any time other than the time that he makes the discovery. We therefore conclude that as far as our jurisdiction is concerned, we can consider the reasonableness of the reviewing officer’s decision to make a discovery assessment at that time. But we cannot consider it in regards to any further decision or conclusion that that officer comes to following the making of assessment.

69. And whilst we recognise that judicial review might not be an ideal strategy for an appellant, he has a more conventional route; namely to appeal against the assessment and then adduce evidence to displace it.

70. Furthermore, the view of the matter letter issued in September 2016 was issued pursuant to section 49C TMA 1970. Following that the appellant had a right to independent review. Officer Lisi made this clear to the appellant in his letter of 26 October 2016 but the appellant chose not to ask for a review. Had he done so, it would have been reviewed pursuant to section 49E TMA 1970 which requires the reviewing officer to take account of any representations made by the appellant. The matters on which the appellant bases his criticisms of the reasonableness of Officer Lisi’s decision could have been raised then. But they were not. We will see later that the information contained in the Giblin transcripts and the 2004 mortgage application was raised by the appellant on 30 September 2016 i.e. after the view of the matter letter but before any review under section 49E might have taken place. That review would have been the opportunity for the appellant to raise that evidence and have it considered by HMRC, without the need for a direction to that effect via judicial review.

71. So, in the circumstances of this case, we test the reasonableness of Officer Lisi’s discovery at the date on which he made his discovery in July, and not at the date of the issue of the assessment or on the date of the view of the matter letter.

Honestly and reasonably

72. We now need to consider whether Officer Lisi has acted honestly and reasonably when making the discovery. Although Mr Martin’s written submissions took issue with the honesty of the decision, no oral attack was made (wisely in our view) on Officer Lisi’s integrity. So we are concerned only with the reasonableness of his decision.

73. The objective test is set out in *Anderson*. An officer will act reasonably in making a discovery if his belief that there is untaxed income is one which a reasonable officer could form on the information available to him. *Anderson* also makes it clear that this

objective control on the decision making of the officer should be expressed by reference to public law concepts.

74. Although this is not spelt out, we think that this is a reference to the public law concepts set out, originally, in the case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223.

75. This is the test which Mr Martin submitted we should adopt when considering Officer Lisi's reasonableness. Lord Green MR said (at 229):

“It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said and often is said, to be acting "unreasonably"”.

76. In the context of the application to this Tribunal when it exercises its supervisory jurisdiction, the judgement of Farquharson J in *Mr Wishmore Limited v Customs & Excise Commissioners* [1988] STC 723 is highly relevant. In that decision, at (726):

The Tribunal..... should restrict itself, on the hearing of an appeal, to deciding whether the taxpayer company had established that the decision arrived at by the Commissioners was unreasonable, or (as the chairman of the Tribunal did in this case) whether the decision had been arrived at by taking into account matters which are not relevant, or by ignoring matters which were relevant”.

77. So to assess whether Office Lisi's acted reasonably we need to consider the information available to him in July 2013 and the matters which he took into account when making his discovery at that time.

78. The appellant's attack on the evidential basis on which both the discovery was made and the assessments were issued concerns matters which, as can be seen below, were not available to Officer Lisi until 30 September 2016, well after either the discovery was made or the assessments were issued.

The Giblin transcripts and the 2004 mortgage application disregarded

79. We cannot consider information available to the officer after the date on which he made the discovery.

80. In his evidence, the appellant was asked about the dates on which he had sent information about the 2004 mortgage application and the Giblin transcripts to Officer Lisi (more of which below).

81. He said that he could not remember the precise date, but it was in 2016.

82. In his letter to Officer Lisi (incorrectly dated 30 October 2016 but which should have been dated 30 September 2016) he told Officer Lisi that he had completed the 2004 mortgage application in blank and that he was then in possession of the Giblin transcripts. But of course this post dates both the discovery and the assessments based on it by several years. We find this as a fact. There is no evidence that Officer Lisi knew of either matters in either 2013 or 2014. And so they cannot be used to test the reasonableness of Officer Lisi's discovery or his decision to issue the assessments based on that discovery.

The basis of Officer Lisi's discovery

83. The assessments were contained in (and notified to the appellant by) a letter dated 29 September 2014 sent by Officer Lisi to the appellant.

84. In that letter Officer Lisi says as follows:

“Concerns

I have reviewed the records of your criminal convictions and information held by the NCA and I am of the view that the qualifying condition within Section 317 POCA has been met.

HMRC have advised me that you have not declared any income for the years 1999/00 to 2011/12.

I have carried out a comprehensive review of the information available to me which includes bank statements and property purchase documents. I am therefore of the opinion that there has been a significant loss of tax to the Crown due to your failure to notify HMRC that you have been in receipt of taxable income. I also consider that your failure to make returns was deliberate. I have detailed below both the amounts of the assessments that I have raised and the liabilities arising from them. Tax assessments for all the years are enclosed for your attention. Please note that I have not assessed the years 2007/08 to 2008/09 as my records show that you were incarcerated.

Tax Year	Estimated Income	Tax Loss	Class 4 NIC Loss	Total Tax/NIC Loss
1999/00	£68,699.00	£20,790.60	£1,108.20	£21,898.80
2000/01	£69,911.00	£20,916.06	£1,640.45	£22,556.51
2001/02	£70,961.00	£22,052.80	£1,775.55	£22,828.35
2002/03	£73,182.00	£21,814.40	£1,806.00	£23,620.40
2003/04	£75,000.00	£22,428.80	£2,546.60	£24,975.40
2004/05	£77,382.00	£23,160.40	£2,614.62	£25,775.02
2005/06	£79,361.00	£23,703.60	£2,695.21	£26,398.81
2006/07	£82,956.00	£24,916.40	£2,774.56	£27,690.96

2009/10	£89,983.00	£25,923.20	£3,513.88	£29,437.08
2010/11	£94,668.00	£27,797.20	£3,560.73	£31,357.93
2011/12	£97,940.00	£29,186.00	£4,281.80	£33,467.80
Totals		£261,689.46	£28,317.60	£290,007.06

Basis of calculation

In order to arrive at the estimated figures shown on the assessments, I have used the mortgage application you submitted to the Cheltenham & Gloucester dated the 10 February 2004 to purchase 56 Rutland Crescent, Trowbridge, Wiltshire, BA14 0NY. You stated on your mortgage application that your earnings during the year 2003/04 were £75,000. Under the presumption of continuity I have used the Retail Price Index to extrapolate your earnings of £75,000 declared on the mortgage application back to 1999/00 when you purchased 55 Rutland Crescent, Trowbridge, Wiltshire, BA14 0NY0 and forwards to 2011/12.

Should you dispute these assessments I would like to give you this opportunity to make a full and frank disclosure of your financial affairs during this period including:

- all financial accounts operated by you
- all business activities conducted by you
- what income you believe you owe tax on
- all assets owned by you including those in which you have or had beneficial interest”

85. As can be seen from the foregoing extract, Officer Lisi explains the basis on which he has estimated the undeclared income and the corresponding tax loss. It is based on the appellants 2004 mortgage application in which he declared that his income for 2004 was £75,000, and for 2003 was £70,000.

86. In his witness statement, and in his affidavit made in 2014 in connection with the application for the freezing order, Officer Lisi fleshes out the bases on which he made his discovery and issued the assessments, and we find as a fact that the bases were as follows:

- (1) In the 2004 mortgage application the appellant declared income of £75,000 for 2004, and £70,000 for 2003. The assessments were based on these figures.
- (2) The appellant had sufficient means to pay off the mortgage on 55 Rutland Crescent within 13 years of its acquisition.
- (3) He owned land on the north side of Rudge Lane, Wilts.
- (4) Significant cash deposits had been paid into the appellant’s bank accounts

between 2004/2005, and 2010/2011.

(5) Shortly before the NCA obtained the freezing order on 29 September 2014, the appellant had a balance of £137,000 in his known bank accounts.

(6) The sum of £45,000 was withdrawn from those accounts on 24 September 2014.

(7) The appellant funds his lifestyle and pays for outgoings in cash.

87. It is also clear from the aforesaid affidavit of Officer Lisi that prior to issuing the assessments, he had been through the bank statements of the appellant (including the appellant's Lloyds TSB account). This was for the period for January 2004 to 27 May 2009. It would have been apparent to him that there was no significant activity on that account after November 2005, which is consistent with the appellant's assertion that his bank account was frozen following his arrest on 17 November 2005. We find as a fact that Officer Lisi knew that there was no significant activity on that account after November 2005.

Officer Lisi's evidence relevant to the reasonableness point

88. Officer Lisi's further evidence relevant to the reasonableness point can be summarised as follows.

(1) He made the assessments to best judgment. He carried out no investigation into the veracity of the figures in the 2004 mortgage application.

(2) He used the bank accounts to verify the income declared in that mortgage application. He extrapolated forwards and backwards on the basis that things had not changed "using" the presumption of continuity.

(3) In September 2014 he had seen the 2000 mortgage application. In that application the appellant declared his income to be £18,000 per annum and that he was finding £13,000 for that purchase from his own funds.

(4) He did not use the £18,000 figure for his assessments. His judgment was that the figures in the 2004 mortgage application should be used. However, he subsequently used the £18,000 figures in his view of the matter letter for some of the adopted years.

(5) The deposits into the appellant's bank accounts in 2005/2006 supported the figures in the 2004 mortgage application.

(6) The reason why it took some 14 months after making the discovery to raise and serve the assessments was due to bureaucratic issues typical in substantial public sector organisations, and the fact that the freezing order had to be lined up, issued, and served at the same time as the assessment. The NCA were concerned that once the assessments were served, the appellant might attempt to dissipate his assets or otherwise frustrate enforcement of the tax debt.

89. In cross-examination Mr Martin put a number of matters to Officer Lisi which related to information which was only made available to Officer Lisi after 2014. For example the Giblin transcripts; emails relating to the appellant's car dealings; the Bark & Co analysis.

90. We have disregarded these for the reasons given at [82] above.

91. But Mr Martin has cogently submitted that knowing that the appellant's bank accounts had been frozen in November 2005, it was not reasonable for Officer Lisi to use the principle of continuity to extrapolate the £75,000 forward after that date since Mr Daisley had stopped trading. The presumption of continuity was rebutted by this cessation of trade.

92. In his evidence, Officer Lisi initially said that it was justifiable to use the presumption of continuity since he believed that not all of the appellant's bank accounts had been frozen. However, when pressed, he admitted that he had failed to remember, or that he was unaware at the time of making the assessments, that the bank accounts had been frozen.

93. Officer Lisi also explained that although he had treated deposits into the appellant's bank accounts as cash deposits, it would have made no difference to his analysis if they had been made by cheque. It was still undeclared income.

Discussion

94. It is clear that Officer Lisi had a prima facie reasonable basis for concluding that income which ought to have been assessed had not been and that there was an insufficiency of tax paid by the appellant and so for making his discovery and subsequently the assessments.

95. We have disregarded the appellant's challenge to the reasonableness which is based on information which was not available to Officer Lisi at the relevant time. Most importantly this includes the fact that Mr Daisley asserts that he completed the 2004 mortgage application in blank and the information contained in the Giblin transcripts.

96. We have taken into account the observations relating to estimated assessment set out in the extract from *Johnson v Scott* at [126] below. The assessments cannot be accurate in the circumstances of this case. We shall never know the precise income under declared by the appellant. But what we are concerned with here is whether the numbers in the assessments are reasonable and have a rational basis.

97. The use of the £75,000 in the 2004 mortgage application and its extrapolation forwards and backwards is (subject to what we say below) a reasonable thing to do.

98. There is nothing wrong with having a policy of using this methodology in circumstances where income has been undeclared, provided the assessing officer is not fettered by that policy.

99. Officer Lisi tested the figure of £75,000 against other factors (bank accounts, cash assets, lifestyle issues) and concluded not only that it was a reasonable starting point, but there was nothing that displaced the presumption of continuity, hence the justification for extrapolating forwards and backwards.

100. However, his criticism concerning the freezing of the bank accounts and the fact that Officer Lisi overlooked this when extrapolating forwards, is a better one.

101. Although we believe that this criticism is being made of Officer Lisi's conclusions in the view of the matter letter, it is equally relevant to the reasonableness of the assessments.

102. However, we do not believe that it renders the assessments for years after November 2005 invalid. We say this for the following reasons.

(1) Officer Lisi did not use the bank account figures as the basis for the assessments (as he did in his view of the matter letter of September 2016). Officer Lisi based the assessments on the figures in the 2004 mortgage application. This was a wholly reasonable thing to do. He then tested these against other factors. One of these was the bank account situation. But he tested them against the bank account position both before and after the 2005 freezing. His unchallenged evidence was that the bank account deposits of £32,395.19 in tax year 2009/10 and of £34,932 in 2010/11 also provided corroboration. So although the freezing of the bank account in 2005 might have rebutted any principle of continuity, that presumption is "reinstated" by reliance on real deposits made in those later years.

(2) The income he derived from his activities of selling cars, tarmacking and supplying security staff was not all banked. He received cash and paid for things in cash, such receipts not being recorded in his bank accounts.

(3) He lived a lifestyle consistent with someone earning the amounts in the assessments, even after he came out of prison in February 2009.

(4) He paid a deposit of £13,000 to purchase 55 Rutland Terrace.

(5) He owned a Mercedes sports car valued at £20,000 (the price of which did not appear to have come from the Imoun bank accounts).

103. Officer Lisi therefore had, in his view, corroboration for the figures in the 2004 mortgage application. We are not testing Officer Lisi's behaviour against a counsel of perfection.

104. It is not for us to form our own belief on reasonableness and conclude, if our belief is different, but Officer Lisi's belief was unreasonable. To us, Officer Lisi has made an honest genuine and objectively reasonable attempt to assess the appellant's income based on information available to him in July 2013 through to September 2014.

105. And so we conclude that Officer Lisi’s discovery satisfies both the subjective and objective tests set out in *Anderson*. The assessments are therefore valid on these grounds.

Staleness of the discovery

106. The next point taken by the appellant regarding discovery is that the assessments had become stale by virtue of the time taken between the date that Officer Lisi said that he had made his discovery (July 2013) and the date of issue of the assessments (25 September 2014).

107. Mr Stone submitted that there is no legal concept of staleness which could invalidate the assessments. He made a number of forceful and persuasive submissions on this point.

108. But we are bound by *Pattullo* and so must accept that an assessment can become stale if the assessing officer, having made an otherwise valid discovery, fails to act on it whilst it is still fresh.

109. Equally, however, *Pattullo* makes clear that it is only in the most exceptional of circumstances that inaction on the part of HMRC would result in a discovery losing its required newness by the time that an assessment was made.

110. Mr Stone submitted that even if there was a legal test of staleness, there were no exceptional circumstances in this case. We agree. The time period of 13 or 14 months or so is significant, but it is not exceptional in the circumstances of this case.

111. Officer Lisi has explained that as a large public sector organisation the NCA takes time to action administrative decisions.

112. But the significant reason why this is not an exceptional case is that the NCA was concerned that the appellant might dissipate his assets on receipt of the assessments, and so needed to line up an application for a freezing order in parallel to the assessments.

113. No real enquiry as to what precisely took place within the NCA was made by Mr Martin, of Officer Lisi, during the hearing. This is no criticism of him. So we do not know precisely what (bureaucratically) the making of the assessments and the preparation for application for a freezing order entails.

114. However, it is clear that real activity was being undertaken by the NCA in respect of this case during that 13\14 month period. This is not a case where there was “inaction”. It is not an exceptional case. The assessments were not stale when issued.

Beagles

115. In between our final draft of this Decision, and its release, the case of *Clive Beagles v HMRC* [2018] UKUT 380 (“**Beagles**”) was released. This is an Upper Tribunal Decision and therefore binding upon us. It considered the question of

staleness. Gratifyingly, it confirmed that the Upper Tribunal Decision *Pattullo* is not obiter and binds us. We had come to that conclusion too.

116. It also indicated that:

"Given the state of the authorities at the Upper Tribunal level, the question of whether a discovery is capable of becoming "stale" is a matter best reviewed by the Higher Courts".

117. The Upper Tribunal also rejected HMRC's submission that there is no concept of "staleness" involved in a discovery.

118. Given that we had already come to the same conclusion, we decided not to seek representations on the application of *Beagles* to the issue of staleness in this case.

119. Our view, as set out above, is that we are bound by *Pattullo* and that staleness is a concept involved in a discovery. But in the circumstances of this particular appellant, the delay between the making of the discovery in July 2013 and the date of issue of the assessments in September 2014 did not bring it within the exceptional case safe harbour set out in *Pattullo*.

Time limits

120. The final point on the discovery assessments is whether they were issued within the time limits set out in section 34 and section 36 TMA 1970. The appellant has accepted that they have been. We agree. The ordinary time limit in section 34 is four years from the end of the year of assessment. This covers the assessments for 2010\11 and 2011\12.

121. For earlier years the NCA relies upon section 36(1A)(b) TMA 1970. This provision extends the time limit to 20 years of the appellant having failed to notify HMRC of his chargeability under section 7 TMA 1970. This is a strict liability issue, and the appellant has clearly failed to so notify. But the transitional provisions which introduce section 36(1A) mean that in order to assess the appellant for the tax years up to and including 2008/2009, the NCA must show that the loss of tax is attributable to the appellant's negligence.

122. At the start of his evidence, the appellant said that he was ignorant of any obligation on him to pay tax to the government, one reason being his lack of education. We do not accept this. We find it incredible that anyone brought up in this country who has some source of income does not countenance the fact that he might have to pay tax on it. Certainly such a person would at least have been aware of the concept of a tax on income which should put him on notice to enquire further as to whether the tax might apply to him.

123. As we say, Mr Martin has conceded any point on time limits and accepts that the assessments were made in time. We have tested whether he is right to do so. Even if he had not accepted the point, our finding is that the assessments were made within the time limits set out in sections 34 and 36 TMA 1970.

The assessments

124. We have found that the discovery assessments were valid in-time assessments. The focus of the enquiry now switches to the appellant to establish that, on the probabilities, he has been overcharged.

125. The basis for this lies in section 50(6) TMA 1970 which provides that the assessments shall "stand good" unless the taxpayer establishes that they are wrong.

126. The way that this tribunal should approach the issue has been set out in a number of cases extracts from which are set out below. *Mohamed Abdour Rouf v HMRC* 79 TC 736 ("**Rouf**") is a Court of Session (inner house) decision which, although not binding upon us, includes statements of principle with which we agree and also relies on two English cases, *Haythornthwaite & Sons Limited v Kelly* and *Nicholson v Maurice* which are binding upon us.

Mohamed Abdour Rouf v HMRC 79 TC 736

“[9] Turning to the Commissioners' decision, no issue was taken with the finding of negligence. Paragraph 11.2 of the Stated Case was the only paragraph in which there was any finding made regarding the assessments. There the Commissioners had fallen into error. It was not necessary for the Appellant to prove alternative income figures; it was sufficient for the appellant to succeed to show that the respondents' figures were demonstrably unreliable. The primary position of the appellant was that there had been no under-declaration of income. Most of his contentions had been designed to show that the respondents' contentions were unsound, rather than addressing the question of whether, if there had been an under-declaration, what the amount of such under-declaration was. It was not therefore a matter for criticism that alternative figures for undeclared income were not offered. The Commissioners' duty, when hearing an appeal, was set forth in section 50(6) of the Taxes Management Act 1970, which provided that, if it appeared to them that the appellant had been overcharged by a self-assessment, the assessment had to be reduced accordingly. It followed that if, on the basis of evidence before them, the Commissioners were so satisfied, it was their duty to reduce the assessment, regardless of whether alternative figures had been suggested by the appellant. In that connection the appellant placed reliance on *Bookey v Edwards* [1981] 55 T.C.486 at page 491. The Commissioners are required to make their own judgement, however difficult that might be. Senior counsel also relied on *Khawaja v Ety* [2004] S.T.C.669, at page 681, paragraph 26. If this submission were correct, the result should be that the case should be remitted to the Commissioners to make findings of their own concerning income figures. Paragraphs 11.1 to 11.3 of the Stated Case was the only reasoning available from the Commissioners. They had failed to discharge their duty under section 50(6) of the 1970 Act. They had failed to exercise their own judgement when there was material available to them to enable that to be done.

[10] Senior counsel next advanced his second main submission to the effect that, even if the Commissioners had not made the error of law contended for in the first submission, the facts found by them were such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. Putting the matter in another way, the evidence accepted by them was inconsistent with and contradictory of the determination. In these circumstances their decision should be quashed. In this connection senior counsel relied on *Edwards v Bairstow* [1956] A.C.14, particularly what was said by Lord Radcliffe at pages 35 and 36. Senior counsel adopted the third test there set forth. The true and only reasonable conclusion on the evidence before the Commissioners contradicted their determination. The respondents might say that even if the information derived from credit and debit card transactions were discarded, there was still in being the information from the surveillance operation conducted by them. However, if one looked at the letter dated 23 August 2002, document Tab 5X, page 290 of the Appendix, it was evident that the figures in the assessments under challenge were in fact based upon the credit and debit card transaction figures. Thus those assessments were based upon unreliable information. In this connection, senior counsel relied upon the contents of the minutes of a meeting on 19 November 2002, at which the basis of the respondents' assessment had been discussed. Reference was also made to the letter from the respondents, dated 5 May 2004, document Tab 5AG page 314. It followed from the foregoing material that, by the time of the hearing before the Commissioners, the foundation upon which the assessments for all of the years in question had been calculated had been removed and that the Commissioners had been well aware of this. Indeed, the state of affairs was acknowledged in paragraph 9.1 of the Stated Case.”

Submissions of the respondents

[22] Even if there had been a material flaw in the respondents' calculations, or method of estimating turnover and profit, there was nonetheless no evidence allowing the Commissioners to conclude that the assessments were excessive. The assessments were based upon estimates, as they had to be, which was different from a calculation. The only way in which the Commissioners could have concluded that the assessments made actually were excessive in such circumstances, would have been if the appellant had led evidence to that effect. In other words, in order to discharge the onus upon him, it was incumbent upon him to give evidence as to the true extent of his under-declaration of income. In any event, it was submitted that there was no error in the formulation of the estimates involved. In that connection reliance was placed upon *Hamilton v The Commissioners of Inland Revenue* (1930) 16 T.C.28. The position was that, while an appellant might criticise an assessment made by the respondents, he nevertheless had to undermine the assessment itself; the onus was on him to do so. It was possible to do that, in practice, only by the appellant saying what the assessment should have been. The law was that the taxpayer had to "come clean". In this connection reference was made to *Nicholson v Morris and Haythornthwaite & Sons Ltd v Kelly*. An exception to that submission would be where an assessment had been made upon a specific calculation, which might

require to be corrected, if it were shown to be erroneous. That was not the nature of the basis of the assessments made here.

The decision

[29] In understanding the effect of those provisions, in our opinion, it is helpful to recall the observations made by Lord Hanworth, M.R., in *Haythornthwaite & Sons Ltd v Kelly* at page 667. There he said: "Now it is to be remembered that under the law as it stands the duty of the Commissioners who hear the appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to the majority of the Commissioners by examination of the appellant on oath or affirmation, or by other lawful evidence, that the appellant is overcharged by any assessment, the Commissioners shall abate or reduce the assessment accordingly; but otherwise every such assessment or surcharge shall stand good. Hence it is quite plain that the Commissioners are to hold the assessment standing good unless the subject - the appellant - establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside". Thus the general onus to show an overcharge lay upon the appellant. If the appellant had succeeded in showing that he had been over-charged, then, it would have been the responsibility of the Commissioners to make their own judgment, upon the evidence before them, as to the proper level of the assessment, to which the assessments would have required to have been reduced accordingly. As was recognised by Walton J. in *Bookey v Edwards* at page 491, that might have required Commissioners to make the best estimate that they could in the face of an unsatisfactory evidential position. However, before the Commissioners in this case came under an obligation to make the best judgement that they could of the appellant's liability, on the basis of the evidence, plainly they had to be satisfied that the appellant had been overcharged in the assessments made.

[31] Against the background of that profoundly unsatisfactory state of affairs, the respondents had made the assessments complained of. Yet the appellant and his advisers, at the hearing before the Commissioners, did not think fit to place before them any figures of their own to show that the assessments involved were excessive. In these circumstances, we consider that the Commissioners were quite entitled to conclude that they were not satisfied that the assessments made by the respondents were excessive. In reaching their conclusion they did not, in our opinion, focus exclusively upon the fact that no alternative income figures had been produced by the appellant. Plainly they examined the whole background to which we have referred, as appears from their findings in fact. But, in this connection it is also appropriate to recall the observations of Sargant, L.J. in *Haythornthwaite & Sons Ltd v Kelly* at page 672. There he stated: "Silence, or the absence of evidence of that kind, was in my judgment evidence - very cogent evidence too, to show that the assessment made by the Inspector could not be displaced on the part of the company". The significance of silence on the part of the taxpayer was also emphasised by Walton J. in *Nicholson v Morris* at page 110. It is worth quoting what he said: "It is the duty of every individual taxpayer to make his own return and, if challenged, to

support the return he has made, or, if that return cannot be supported, to come completely clean, and if he gives no evidence whatsoever he cannot be surprised if he is finally lumbered with more than he has in fact received. It is his own fault that he is so lumbered".

[32] In our opinion, the observations of the Commissioners in the second sentence of paragraph 11.2 of the case is no more than a quite justified observation along the same lines based upon the fact that the appellant did not give evidence, nor supply the Commissioners with alternative income figures. The tactic adopted on behalf of the appellant before the Commissioners was simply to raise certain criticisms of the basis of the assessments made, but that approach did not satisfy the Commissioners that the assessments were excessive. In short, nothing done by the Commissioners in this case suggests to us that they misunderstood their statutory duty in any way. Accordingly we reject the appellant's first main submission.

[36] It may be that, had the appellant taken a different approach before the Commissioners, with the production of alternative figures to those founded upon by the respondents, the outcome of the case might have been different. As Walton J. put it in *Nicholson v Morris*, at page 109, referring to the Revenue figures: "I do not think that anybody pretends that those figures are anything other than estimates or guesses. They are the best that the Revenue can do on the materials in front of them and they may very well, for ought I know, be a very poor approximation to the truth indeed. But the situation here is that once leave has been given to make the additional assessments and the additional assessments have been made, the onus is on the taxpayer to show that they represent over-assessments". As was observed at page 110 in the same case, if a taxpayer does not "come completely clean, and if he gives no evidence whatsoever he cannot be surprised if he is finally lumbered with more than he has in fact received". In our view there is nothing irrational about the Commissioners having followed such an approach, as they have done. In all of these circumstances we have come to the conclusion that the second main submission of the appellant is without merit and must be rejected. It follows that the appeal must be refused. In the light of the conclusion which we have reached, it is unnecessary to enter upon a consideration of how the appeal might have been disposed of if we had reached a different conclusion. Accordingly we shall answer both of the questions posed in the case in the affirmative.

Johnson v Scott (HM Inspector of Taxes) 1978 52 TC 383

With regard to assessments, as Walton J said, in *Johnson v Scott (HM Inspector of Taxes)* (1978) 52 TC 383 at 394, in a passage approved by the Court of Appeal (at 403) in that case:

"Of course all estimates are unsatisfactory; of course they will always be open to challenge in points of detail; and of course they may well be under-estimates rather than over-estimates as well. But what the Crown has to do in such a situation is, on the known facts, to make reasonable inferences. ... The fact that

the onus is on the taxpayer to displace the assessment is not intended to give the Crown carte blanche to make wild or extravagant claims. Where an inference of whatever nature falls to be made, one invariably speaks of a 'fair' inference. Where, as is the case in this matter, figures have to be inferred, what has to be made is a 'fair' inference as to what such figures may have been. The figures themselves must be fair.”

127. Mr Stone also took us to the decision in *Higgins* (*Higgins v National Crime Agency* [2018] UKUT 14 (TCC)) in connection with the suggestion of double jeopardy raised by the appellant.

“[38] I consider that this is a correct approach and the one which all FTTs should in general follow. The assessment is made. The taxpayer is free to appeal the assessment and to adduce evidence to demonstrate that it is incorrect by providing evidence of his taxable profits, whether lawful or unlawful. If no evidence is produced at the assessment stage, then when HMRC (or NCA) seeks to collect the tax at the enforcement stage any issue of double recovery on foot of the payment of any confiscation order can be determined by investigating and assessing what element of the money which has been paid by the taxpayer on foot of the confiscation order represented tax which was due by the taxpayer in respect of his business during the relevant period.”

Quantum

128. We now come to consider quantum. In essence, it is up to the appellant to show that he has been overcharged and, on the balance of probabilities, the extent of that overcharge. In other words he has to put forward a positive case of the amount of undeclared income.

129. We can of course take into account all the evidence before us. This obviously includes the Giblin transcripts and the 2004 mortgage application.

130. In essence the appellant’s case is that the £18,000 figure used in the 2000 mortgage application should be used as the basis of the assessments for all the adopted years.

131. Consequently, the appellant’s positive case does not require us to come to a conclusion on whether Mr Daisley completed the 2004 mortgage application in blank nor on the veracity of the Giblin transcripts. Those matters were relevant only to the reasonableness of Officer Lisi’s discovery.

132. However the evidence of Mr Daisley, Mr Gregory, and Mr Kent are all relevant to the appellant’s positive case and we now turn to that evidence.

Mr Daisley’s evidence

133. Mr Daisley was raised in a travelling community and only learned to read and write as part of a prison initiative. He does not have an email account and is not

computer literate. He acknowledges that he may have been an error in not filing tax returns but this was an honest mistake made in good faith.

134. During the adopted years, he was earning small sums of money trading cars, working as a security guard on the doors of clubs and supplying other doormen, tarmacking and dealing in scrap metal.

135. Before 2012 when payments for scrap metal had to be made by cheque, he was paid in cash. He did not pay cash into his bank accounts but would use the cash to fund living expenses and his lifestyle. Any remaining cash would be saved and used for trading (for example in scrap metal).

136. In November 2005 his cash savings amounted to approximately £45,000 which was seized by the police and later forfeited. He did keep records of his business transactions comprising receipts and invoices until they were seized by Wiltshire police in 2005. He had been unable, notwithstanding that he tried, to recover these records.

137. In cross examination Mr Daisley's evidence was that he kept records between 1999 and 2005 and those were the records seized by Wiltshire police. Between 2005 and 2009 he was not undertaking much work and so kept no records. And this was of course true for the period whilst he was in prison. For the period after he left prison until 2012 he kept records but he doesn't know where they are. For the periods 2012/2014 he did keep records which he had provided to Bark & Co.

138. During the 1999/2000 tax year the appellant was in partnership with Robert Owen as a joint proprietor of Marsh Road Garage, a motor dealership. It was Mr Owen who kept all the financial records for this business. The appellant does not have copies of those records.

139. Payments for vehicles purchase by Marsh Road Garage were purchased using cheques. The appellant considered that a profit margin of about 10% would be typical on the car dealing undertaken by that dealership.

140. The income declared of £18,000 in the 2000 mortgage application was an accurate figure. He stopped trading vehicles in 2005 when his bank account was frozen (this appears to have been contradicted by the evidence of Mr Gregory, more of which below)

141. When dealing in scrap metal, the profit margin is approximately 30 to 40%. In 2012 he had to register with the local authority that he was collecting scrap metal, and then in 2013 a licence was needed to operate a scrap metal business. But before those dates, there were no registration requirements to deal in scrap.

142. The appellant had a friend in Bangkok whom he saw six or so times. He would book on last minute flights and stopover flights to make things cheaper. He stayed with his friend to reduce costs further.

143. In years when scrap metal was paid for in cash, the appellant paid for his outgoings in cash.

144. The appellant said the following:

(1) The fact that he did not understand that businesses had to pay tax stemmed from his ignorance arising from his lack of education.

(2) He cannot remember what amounts of cash he received from his business ventures.

(3) There are periods in which he traded where his bank accounts show no cash or cheque deposits.

(4) He has no idea of the profit made by Marsh Road Garages.

(5) He still worked after 2005 when his bank accounts were frozen but this was on the doors, buying and selling cheap cars, and all were done on a cash basis.

145. The appellant was pretty sure that the bank account deposits into the Trade Fleets Deposit account (the only personal account that he operated between 1999 and 2005) were cheques. No cash was paid in. He never used ATMs for cash withdrawals. All normal trading expenses would have been settled using cash.

146. His business activities described above were different from those which he was undertaking in 2013/2014.

147. By the time of the 2005 freezing order, the appellant had accumulated approximately £137,000 in his bank account. When he came out of prison in 2009 he started with approximately £68,000 in his account. And so had accumulated a further (approximately) £70,000 or so in the years between leaving prison in 2009 and the freezing order in September 2014.

148. He paid off the mortgage on 55 Rutland Terrace in approximately 13 years.

Mr Gregory's evidence

149. Mr Gregory worked for the car auction centre at Brook Lane, Westbury, Wiltshire, which has traded under a number of names, formerly as Westbury Motor Auction Ltd and subsequently as Aston Barclay Ltd. He is, commercial manager at Aston Barclay. He has known the appellant since 1991 and gave evidence that the appellant regularly attended auctions and bought cars from the auction centre. Most were bought in his own name and that of Marsh Road Garage. His evidence was that he cannot remember a deal where the appellant bought or sold in cash. Cheques were always used to settle accounts.

150. However, he did say that Mr Daisley mixed with other motor dealers and traders doing “car park deals” outside the auction and he was not able to say how those deals settled.

151. He also said that Mr Daisley was regularly buying vehicles before he went to prison.

152. He was not able to provide any records dealing with the trades undertaken either by Mr Daisley personally or by Marsh Road Garage.

Mr Kent’s evidence

153. Mr Kent had worked for many years as a doorman. Mr Daisley was his manager.

154. In October 2004 he moved into 56 Rutland Crescent which he shared with another gentleman, but in September 2005 he took over the renting of the property. He paid £650 per month and did so by paying it into Mr Daisley’s mortgage account. He was given a payment book and if he ran out of paying in slips he had the account number, and used slips which are freely available in a bank. When the appellant’s bank account was frozen he continued to pay the rent/mortgage but did so to a company which he thought was an asset company located in Bath.

155. Although he moved out of 56 Rutland Crescent in August 2008 he continued to pay the rent every month and indeed continued to do so when he moved back into the property in January 2010 until he left, finally, in September 2016.

The view of the matter letter

156. Officer Lisi has amended the amounts of income originally assessed in the assessments in his view of the matter letter.

157. These revised amounts and the reasons for those revisions are set out below:

1999/2000	£31,000 based on the £18,000 in the 2000 mortgage application and the additional £13,000 put down as a deposit.
2000/2001	£70,000 used in the 2004 mortgage application as the income for 2003 (for 2003/2004). This was then reduced by RPI for the years 2000/2001 - 2002/2003.
2001/2002	
2002/2003	
2003/2004	
2004/2005	£75,000 as used in the 2004 mortgage application.
2005/2006	£78,992 to reflect bank account deposits.

2006/2007	The £78,992 for 2005/2006 increased by RPI.
2007/2008	Nil assessment.
2008/2009	Nil assessment.
2009/2010	£37,595 comprising £32,395 bank deposit and a further amount of £5,200 reflecting cash paid for outgoings for which there is no record of receipts.
2010/2011	£40,132 comprising £34,932 bank deposits and a further amount of £5,200 reflecting cash paid for outgoings for which there is no record of receipts.
2011/2012	£41,518 being the £40,132 from 2010/2011 increased by RPI

The appellant's positive case

158. As we have said on a number of occasions, the main focus of Mr Martin's case was the unreasonableness of the amount assessed by Officer Lisi in both the assessments and in the view of the matter letter.

159. We have already held that reasonableness must be tested at the time of the original discovery. And we have found Officer Lisi's discovery to have been reasonable.

160. Stripped of the criticisms of Officer Lisi, Mr Martin's positive case on the income which the appellant received in the adopted years is:

1999/2000	£18,000. This is what was declared in the 2000 mortgage application. The appellant had no motive for under declaring this. The deposit of £13,000 was a gift from the appellant's sister.
2000/2001 - 2004/2005	£18,000 increased by RPI.
2005/2006 - 2006/2007	£18,000 increased by RPI.
2009/2010 - 2011/2012	£18,000 increased by RPI.

Bark & Co

161. As can be seen from the foregoing paragraphs, the appellant's positive case is not based on the forensic analysis carried out by Bark & Co. However it is of peripheral relevance. Bark & Co, you will recall, were instructed by Mr Daisley to represent him following the issue of the assessments.

162. They lodged appeals against those assessments, but also sought to build a positive case for the income received by the appellant during the adopted years. They provided Officer Lisi with records for Mr Daisley for his scrap metal business for the period 2013/2014.

163. When Officer Lisi analysed these figures (and the initial figure was a profit of £24,910.67 for the tax year 2013/2014) he found no records to substantiate them. When such business records as the appellant had were provided to Officer Lisi, it became apparent to him that the calculations used by Bark & Co were flawed. For example the sales invoices provided amounted to £49,295. Using the information provided by Bark & Co, Officer Lisi prepared a schedule showing a net profit for the 2013/2014 tax year of £51,295. He subsequently had a meeting with Bark and Co who provided a second set of accounts, which reduced Officer Lisi's turnover figure and the sales amounts for scrap metal, whilst increasing allowable business expenditure. They undertook these adjustments without any supporting material, and such adjustments were rejected by Officer Lisi.

The respondents submissions on quantum

164. The positive case put forward by Bark & Co was fundamentally flawed and in any event relates only to 2013/2014. The evidence is that the business activities of the appellant were very different in 2013/2014 to those undertaken in the adopted years.

165. It is clear that the appellant dealt in cash. He paid outgoings in cash. He received cash for the supply of goods and services (his scrap business, dealing in cars, tarmacking and supplying doormen. He has no idea how much cash this was.

166. The appellant has no records to give us any indication of the amounts of cash he received.

167. Unless he can provide a credible figure of his income, he has not discharged his burden of establishing that it is more likely than not that the assessments overcharge him.

168. The appellant had accumulated some £90,000 additional savings between 2009 and 2014. He paid off his mortgage on 55 Rutland Terrace in 13 years. He made considerable deposits into his bank accounts. These are all inconsistent with his assertion of receiving income of only £18,000 per year.

169. Between 2005 and 2007, according to Mr Gregory, the appellant traded in cars. He had no bank account so must have used cash. We cannot know the scale of the

trading during that period nor, indeed (in the absence of any records) the scale of any cash trading in previous or subsequent years.

170. The profit margin figures are irrelevant if you don't know the costs to which you apply them. And there is no record of those costs.

171. Given the state of the evidence, the only thing we can be sure of is that the appellant had substantial income. There is no evidence of what that was and so no evidential basis for disturbing either the assessments or the income in those assessments as adjusted in the view of the matter letter.

Discussion on quantum

172. This is not a case like *Rouf* and the cases referred to in it in which the appellant has adduced no evidence of the income which he claims should form the basis of the assessments. In this case the appellant's position is that the £18,000 used in the 2000 mortgage application adjusted by RPI should form the basis of the assessments.

173. The £18,000 in the 2000 mortgage application is the "gross basic annual income". This is top line income without any deductible business expenses.

174. The appellant accepts that it is up to him to show that he has been overcharged. But in our view he must do more than that. If we are to reduce the assessments we must have an amount to which to reduce them. This can only come from the evidence before us. So the appellant needs to show that it is more likely than not that his income for each of the adopted years was £18,000 (as adjusted for RPI).

175. Regrettably for the appellant we do not think that he has established this.

176. We say this for the following reasons:

(1) It is clear from the evidence that during the adopted years (leaving aside the period when he was imprisoned) that the appellant was actively undertaking a variety of business ventures. It is our view that this included the 2005/07 period when his bank accounts were frozen. During that period the scale of his activities of buying and selling cars might have reduced but he was still dealing. There is no evidence before us of any reduction in the other activities such as tarmacking, providing doormen, or dealing in scrap. There is no evidence before us of the frequency of transactions/engagements.

(2) We agree with the submission made by Mr Stone that the level of savings, the level of bank deposits, and the fact that the appellant paid off his mortgage in 13 years are inconsistent with an income of only £18,000 per year

(3) The appellant dealt in cash. His evidence was that he bought both goods and services in cash and received cash from the sale and supply of goods and services. He paid domestic outgoings with cash. This is borne out by the documentary evidence.

(4) The deposits into his bank accounts were cheques and not deposits of cash. He did not use an ATM. So the goods and services that he paid for in cash would have come from cash sales. He has said that he has no idea of the amount of cash that he received from those sales, or indeed paid out. He has given us no documentary evidence to quantify any such cash in or cash out. If he cannot quantify the cash in or out, then it is impossible for us to guess how it might affect the £18,000. We do not know if the appellant contends that the £18,000 figure is cash or a mixture of cash and cheques. It is our view however that payments of cash to the appellant is likely to affect the £18,000 gross annual income figure.

(5) We accept that it might be difficult for the appellant to establish his level of income for the years before 2005 if he is correct that the police confiscated as business records when they searched his house. The police deny they have his records. But in any event, since 2005 the appellant has clearly traded and yet apart from 2012-2014 (not adopted years) he has provided no business records either to us or to Officer Lisi. And indeed, as mentioned above, the analysis of Officer Lisi's "Bark & Co's positive case" shows that the income in that period was a great deal higher than £18,000.

(6) The appellant has said that he used a markup of 10% for cars and 40% for scrap. Let us say that this £18,000 was not meant as turnover, but as taxable income net of deductible expenses. It would have been open to the appellant to come before us to say that the £18,000 was, for example, £100,000 of car purchases and £40,000 of scrap dealings, marked up at the relevant rates. But he has not done this. This illustrates the position that it is not for us to speculate, but to decide on an alternative figure based on evidence supplied to us during the course of the hearing.

177. It is our conclusion that there is no credible evidence on which we can base a finding that it is more likely than not that the appellant's income (or even profit) was £18,000 (as adjusted for RPI) during the adopted years. To the contrary, we find that it is more likely than not that the appellant had an income or profit greater than the £18,000 for which he now contends.

Penalties

178. For the adopted years up to and including 2006/2007, HMRC have visited the Penalties on the appellant under section 7(8) TMA 1970. For the remaining adopted years the Penalties have been determined under Schedule 41 Finance Act 2008 ("**Schedule 41**"). This is on the basis that the appellant deliberately failed to notify HMRC about his business income, and that he concealed that income from them.

179. Under Schedule 41 a penalty is payable if a taxpayer fails to comply with his obligation to notify chargeability under section 7 TMA 1970. There is no dispute in this case that the appellant has failed to comply with that obligation.

180. Under paragraph 6(2) of Schedule 41:

“6(2) If the failure is in category 1, the penalty is-

- (a) for a deliberate and concealed failure, 100% of the potential lost revenue,
- (b) for a deliberate but not concealed failure, 70% of the potential lost revenue, and
- (c) for any other case, 30% of the potential lost revenue.”

181. The appellant’s failure falls within category 1. The potential lost revenue is the amount in the assessments as amended in the view of the matter letter.

182. Mr Martin does not contest the Penalties under section 7(8) TMA 1970 nor does he contest deliberate failure to notify. He submits, however, that the starting point for the Penalties under Schedule 41 should be deliberate and unconcealed, rather than deliberate and concealed.

183. We disagree. We do not accept the appellant’s evidence that his lack of education meant that he was ignorant of an obligation to both declare his income, and pay tax on it. Our view is that this was a conscious decision and that in not informing HMRC of his income, he concealed that income from them. He did so deliberately. We uphold the penalty determinations set out in the view of the matter letter.

Double jeopardy

184. In his skeleton argument, Mr Martin notes that the appellant has already been divested of the cash savings that he had been able to accumulate up to 2007 (of approximately £47,000) via a forfeiture order. The NCA should have taken account of this. As it stands the NCA assessment is double charging – claiming tax on what has already been taken.

185. We have cited, at [127] above an extract from the case of *Higgins*. This explains the approach which this tribunal should adopt in these circumstances. We are bound by *Higgins*. Any double jeopardy should be dealt with at the stage of collection and not at the stage of challenging the assessment.

Decision

186. We dismiss the appeal and confirm the assessments to income tax and national insurance contributions, and the Penalties, in the amounts set out in the view of the matter letter.

Appeal rights

187. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to

“Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)”
which accompanies and forms part of this decision notice.

**NIGEL POPPLEWELL
TRIBUNAL JUDGE**

RELEASE DATE: 07 DECEMBER 2018

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APPENDIX

The relevant legislation

1. Section 7 TMA 1970 (including section 7(8) which is relevant to the earlier year penalties).
2. Section 29 TMA 1970.
3. Section 34 TMA 1970.
4. Section 36 TMA 1970.
5. Sections 50(6) and 50(7) TMA 1970.

1.— 7. Notice of liability to income tax and capital gains tax.

(1) Every person who—

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

(b) has not received a notice under section 8 of this Act requiring a return for that year of his total income and chargeable gains,

shall, subject to subsection (3) below, within six months from the end of that year, give notice to an officer of the Board that he is so chargeable.

(2) In the case of persons who are chargeable as mentioned in subsection (1) above as the relevant trustees of a settlement, that subsection shall have effect as if the reference to a notice under section 8 of this Act were a reference to a notice under section 8A of this Act.

(3) A person shall not be required to give notice under subsection (1) above in respect of a year of assessment if for that year his total income consists of income from sources falling within subsections (4) to (7) below and he has no chargeable gains.

(4) A source of income falls within this subsection in relation to a year of assessment if—

(a) all payments of, or on account of, income from it during that year, and

(b) all income from it for that year which does not consist of payments,

have or has been taken into account in the making of deductions or repayments of tax under PAYE regulations.

(5) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year has been or will be taken into account—

(a) in determining that person's liability to tax, or

(b) in the making of deductions or repayments of tax under PAYE regulations.

(6) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year is—

(a) income from which income tax has been deducted;

(b) income from or on which income tax is treated as having been deducted or paid; or

(c) income chargeable under Chapter 3 of Part 4 of ITTOIA 2005 (dividends etc. from UK resident companies etc.), and that person is not for that year liable to tax at a rate other than the basic rate, the dividend ordinary rate or the starting rate for savings.

(7) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year is income on which he could not become liable to tax under a self-assessment made under section 9 of this Act in respect of that year.

(8) If any person, for any year of assessment, fails to comply with subsection (1) above, he shall be liable to a penalty not exceeding the amount of the tax –

(a) in which he is assessed under section (9) or (29) of this Act in respect of that year, and

(b) which is not paid on or before the 31 January next following that year.

(9) For the purposes of this Act the relevant trustees of a settlement are—

(a) in relation to income (other than gains treated as arising under Chapter 9 of Part 4 of ITTOIA 2005, the persons who are trustees when the income arises and any persons who subsequently become trustees; and

(aa) in relation to gains treated as arising under Chapter 9 of Part 4 of ITTOIA 2005, the persons who are trustees in the year of assessment in which the gains arise and any persons who subsequently become trustees; and

(b) in relation to chargeable gains, the persons who are trustees in the year of assessment in which the chargeable gains accrue and any persons who subsequently become trustees.

2.— 29. Assessment where loss of tax discovered.

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

(a) that any income, unauthorised payments under section 208 of the Finance Act 2004 or surchargeable unauthorised payments under section 209 of that Act or relevant lump sum death benefit under section 217(2) of that Act which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed, the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(3)

(4)

(5)

(6)

(7)

(8)

(9) Any reference in the section to the relevant year of assessment is a reference to:-

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made.

3.— 34. Ordinary time limit of 4 years

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax, capital gains tax or to tax chargeable under section 394(2) of the Income Tax (Earnings and Pensions) Act 2003 may be made at any time not more than 4 years after the end of the year of assessment to which it relates.

(2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.

4. — 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 (subject to subsection (1A) and any other provision of the Taxes Act allowing a longer period).

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax –

- (a) brought about deliberately by the person,
- (b) attributable to a failure by the person to comply with an obligation under section 7,
- (c) attributable to arrangements in respect of which the person has failed to comply with an obligation under section 309, 310 or 313 of the Finance Act 2004 (obligation of parties to tax avoidance schemes to provide information to Her Majesty's Revenue and Customs) or
- (d) attributable to arrangements which were expected to give rise to a tax advantage in respect of which the person was under an obligation to notify the Commissioners for Her Majesty's Revenue and Customs under section 253 of the Finance Act 2014 (duty to notify Commissioners of promoter reference number) but failed to do so,

May be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

5.— 50. Procedure.

(6) If, on an appeal notified to the tribunal, the tribunal decides—

- (a) that the appellant is overcharged by a self-assessment;
- (b) that any amounts contained in a partnership statement are excessive; or
- (c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

(7) if, on an appeal notified to the tribunal, the tribunal decides:-

- (a) That the appellant is undercharged to tax by a self-assessment;
- (b) That any amounts contained in a partnership statement are insufficient; or

(c) That the appellant is undercharged by an assessment other than a self-assessment

the assessment or amounts shall be increased accordingly.