3.3.2 The moment of discovery – crossing a threshold

Inherent in the word "discover" itself is the fact that there must be a change of position in the mind of the HMRC officer. As the Upper Tribunal put it in *Charlton*:

> "… the word 'discovers' does connote change, in the sense of a threshold being crossed. At one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view."

The Supreme Court implicitly endorsed this definition of discovery in *Tooth*.

Cases: *HMRC v Charlton (and others)* [2012] UKUT 770 (TCC); *HMRC v Tooth* [2021] UKSC 17

3.3.3 Facts and laws may be discovered

Under English law, there has traditionally been a distinction between fact and law. Although the distinction has been somewhat eroded, it is still evident in the restrictions on matters that may be the subject of appeal from the FTT to the Upper Tribunal.

With this distinction in mind, it was once argued up to the House of Lords that a discovery had to be of a fact and that learning the true meaning of a law could not form the basis of a discovery assessment. The underlying logic is that people in general (and tax officers in particular) are sometimes thought to be deemed to know the law. However, in *Cenlon*, the House of Lords emphasised that learning the true meaning of a law was as much a discovery as finding out a particular fact.

As Viscount Simonds held (with emphasis added):

> "I can see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include *any* case in which for any reason it newly appears that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation."

As for the argument that everyone is supposed to know the law, Lord Denning set out the correct position:

> "Mr Shelbourne said that 'discovery' means finding out something new about the facts. It does not mean a change of mind about the law. He said that everyone is presumed to know the law, even an inspector of taxes. I am afraid I cannot agree with Mr Shelbourne about this. It is a mistake to say that everyone is presumed to know the law. The true proposition is that no one is to be excused from doing his duty by pleading that he did not know the law. Every lawyer who, in his researches in the books, finds out that he was mistaken about the law, makes a discovery. So also does an inspector of taxes."

For completeness, it should also be noted that Lord Denning's "true proposition" does not preclude taxpayers from claiming reasonable excuse for not knowing their taxing and reporting obligations. That topic, however, is outside the scope of this text.

Case: *Cenlon Finance Co Ltd v Ellwood* (1962) 40 TC 176

Something "new"

The above extract from the speech of Viscount Simonds refers to the essential concept of a discovery being something that "newly appears". It was made clear in *Beagles* that it is not possible to make the same discovery twice:

> "Whilst we accept that it might be possible for an officer to discover the same insufficiency in a return more than once if it is for different reasons, it is not, in our view, possible for an officer to make the same discovery twice for the same reasons. The insufficiency cannot 'newly appear' to the officer for a second time."

This can still create some misunderstanding. The author's view (reinforced by the context of the *Beagles* case) is that a belief that a particular set of arrangements does not give the tax saving hoped for represents a discovery for these purposes. Accordingly, if a further reason for holding that same view emerges at a later date, then that does not represent a separate discovery: the original reason (that the arrangements are not tax-effective) remains unchanged (even if the underlying basis for that conclusion has changed).

Nevertheless, once again, the Supreme Court's decision in *Tooth* makes this point of limited relevance. As the court concluded:

> "[the wording] 'it newly appears …' was a reference to the state of mind of the person said to have made the discovery, to whom it 'newly appears' that an assessment to tax is insufficient. A discovery is a particular event in time, and does not cease to be such with the passage of time."

Cases: *Beagles v HMRC* [2018] UKUT 380 (TCC); *HMRC v Tooth* [2021] UKSC 17

3.3.4 What level of knowledge constitutes a discovery?

The English word "discover" is suggestive of an individual becoming aware of something. However, in life and tax in particular, matters are usually far from black and white.

Indeed, a "fact" cannot be determined with any sense of legal certainty until it constitutes a final finding of a court. Similarly, the correct interpretation of any legal proposition cannot be finally confirmed until it is the subject of a ruling of the Supreme Court (which can, in any event, change its mind in later cases).

If one were to apply this meaning of "discovery", it would be virtually impossible for an HMRC officer to discover anything, as the discovery must inevitably precede the legal process under which the subject matter of the alleged discovery will be tested. Consequently, a different meaning is applied in the tax context.

The leading case is that of *Aramayo*. There the various judges defined "discovers" as follows:

> "… it would seem therefore most unlikely that the legislation should have intended by the word discover that he was to ascertain by legal evidence. It provides for a later trial, if I may call it so, the question when either party appeals. This is not the time for legal evidence, and it seems to me to be quite clear that the word 'discover' cannot mean ascertain by legal evidence; it means, in my opinion, simply 'comes to the conclusion' from the examination he makes, and, if he likes, from any information he receives." (per Bray J)
>
> "I think that word means 'has reason to believe'." (per Avory J)

> "Now if you take the word 'discovers', as I think it clearly was intended to be taken, as merely an alternative to 'find' or 'satisfy himself', the difficulty disappears." (per Lush J)

This is an extremely wide definition (although not unreasonably so).

It should be noted that the subsequent case of *Hooper* added a small restriction to the definition: that is simply that the officer reaching the conclusion must be acting reasonably and honestly. In other words, the conclusion reached must be a reasonable one from the evidence before the officer.

In short, a discovery requires more than mere speculation. It must not be based on a mere whim.

The key ingredients were summarised by the Upper Tribunal in *Anderson*. In particular:

> "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;
>
> 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;
>
> 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);
>
> 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."

In *Daisley*, the tribunal concluded that the test of reasonableness should be applied at the time of the alleged discovery and not (if significantly later) at the time the consequential assessment is made. That case was decided before the Supreme Court's decision in *Tooth* and the point might therefore be academic now. Alternatively, one possible consequence of the *Tooth* decision is that an officer making a reasonable discovery on day 1 may not actually be permitted to

make the assessment if, in the meantime, there is no longer any reasonable belief in the under-assessment.

Indeed, in *Kamran*, a case which also preceded *Tooth*, the tribunal noted that once a discovery is made (which requires the officer's reasonable view), the amount of the assessment must continue to be reasonable and not be "capricious or arbitrary".

Cases: *R v Kensington Income Tax Commissioners (ex parte Aramayo)* (1913) 6 TC 279; *R v Commissioners of Taxes for St Giles and St George Bloomsbury (ex parte Hooper)* (1915) 7 TC 59; *Anderson v HMRC* [2018] UKUT 159 (TCC); *Daisley v National Crime Agency* [2018] UKFTT 708 (TC); *Kamran v HMRC* [2019] UKFTT 257 (TC); *HMRC v Tooth* [2021] UKSC 17

Theoretical difficulties with the meaning of "discover"

In *Corbally-Stourton*, the Special Commissioner described the test as follows:

> "It seems to me clear that both these judges and the legislation do not require the inspector to be certain beyond all doubt that there is an insufficiency; what is required is that he comes to the conclusion on the information available to him and the law as he understands it, that it is more likely than not that there is an insufficiency. I shall call this a conclusion that it is probable that there is an insufficiency."

This effectively suggested a "more than 50% likelihood".

Although largely adopting the approach set out by the Special Commissioner elsewhere in his decision, the Court of Appeal in *Lansdowne* took issue with this "more likely than not" approach to HMRC's powers of discovery. Strictly speaking, the comments in *Lansdowne* were directed at the Special Commissioner's use of the test in the context of s. 29(5). Nevertheless, it is considered that the objection is just as apt (if not more so) in the context of s. 29(1) itself. As Moses LJ said:

> "I think there is a danger in substituting wording appropriate to standards of proof for the statutory condition."

The difficulty (perhaps inherent in Moses LJ's judgment) is that none of the case law to date actually defines with complete accuracy the circumstances in which HMRC can be said to have made a discovery (or, in the alternative, it is possible that HMRC are frequently making

assessments in cases where they have not actually made a proper discovery).

For example, suppose one has a situation in which a statutory provision has two equally possible interpretations. Alternatively, suppose one has a case in which two witnesses (perhaps former spouses) are giving conflicting evidence – it is certain that one is right and that one is wrong, but impossible to determine which. In both cases, assume that the different conclusions will lead to different tax outcomes. These are truly 50-50 decisions and no HMRC officer, acting honestly and reasonably, could believe that one outcome is any more likely than the other.

Accordingly, no officer would be able to say that he or she "has reason to believe" that tax has been underpaid or that he or she can "satisfy himself [or herself]" or "conclude" that there has been an earlier under-assessment. Nevertheless, it would seem unreasonable to deny the officer the right to make an assessment so as to allow the matter to be adjudicated on in the tribunal.

Accordingly, most of the current case law suggests that a discovery assessment would not be strictly permissible in such 50-50 cases. In practice, however, it is likely that the officer will be able to justify making an assessment (or will simply assert a justification) and, therefore, this theoretical problem is unlikely to manifest itself.

However, in *Anderson*, the Upper Tribunal summarised the test and commented on it 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."

As later confirmed by the Court of Appeal in *Clark*, the test as to what constitutes a discovery "must be a practical and workable test".

Cases: *Corbally-Stourton v HMRC* (2008) Sp C 692; *HMRC v Lansdowne Partners LP* [2011] EWCA Civ 1578; *Anderson v HMRC* [2018] UKUT 159 (TCC); *Clark v HMRC* [2020] EWCA Civ 204