[2016] UKFTT 0133 (TC)

TC04921

Appeal numbers: TC/2010/06254
TC/2010/06253

INCOME TAX – self-assessment – discovery assessments – whether relevant conditions met – reference during enquiry window to potential assessability – held on facts that no information available then to enable HMRC officer to quantify loss of tax for relevant tax year – condition in s 29(5) TMA 1970 met – held, assessments valid – whether appellants were settlors for tax purposes in respect of non-UK trust – burden of proof – approach where appellants would have to prove a negative – held, for HMRC to show prima facie case and then for burden of proof to revert to appellants – held on facts that appellants were settlors – quantum of assessments to be adjusted – loss relief claims not within Tribunal's jurisdiction as not finally determined by HMRC – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RODERICK THOMAS

STUART THOMAS **Appellants**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK
NOEL BARRETT

Sitting in public at The Royal Courts of Justice on 9 and 10 December 2015

Roderick Thomas for the Appellants

Dr Barry Williams and Nicola Parslow, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The first Appellant ("Mr Thomas") appeals against a "discovery" assessment issued by the Respondents ("HMRC") for the year 2005-06 covering certain tax liabilities as described below. The second Appellant ("Stuart Thomas") appeals against a similar assessment for 2005-06. (Where appropriate, we refer to both Appellants together as "Messrs Thomas".)

The background facts

2. To a large extent, the facts relating to the assessments on Mr Thomas and Stuart Thomas are similar; where appropriate, we draw attention to differences between their respective circumstances.

3. The evidence consisted of two bundles of documents. There was no witness evidence. An application by HMRC shortly before the hearing to introduce a witness statement given by Mr AW Stewart, the HMRC Inspector who had dealt with the assessments and a range of other matters concerning Messrs Thomas and companies with which they had been involved, had been refused; we set out the reasons for that refusal at a later point in this decision.

4. In addition to the two bundles of agreed documents, Mr Thomas handed up at the hearing a supplementary bundle containing seven further documents. Dr Williams did not object to this additional evidence, which we decided should be admitted.

5. From the evidence, we find the following background facts. (We deal with disputed matters of fact at the appropriate stages below.)

6. There is a long history of disputes between Messrs Thomas and HMRC. (In this decision, we use the initials HMRC to refer both to the present body and to the predecessor body, the Commissioners of Inland Revenue.) At this point we do not need to refer to much of that history other than an agreement reached between Messrs Thomas (together with certain other parties) and HMRC on 24 May 2004.

7. By that agreement, Messrs Thomas agreed to pay a sum of money in consideration of proceedings not being taken by HMRC in respect of tax, interest and penalties—

> (1) for a series of tax years from 1997-98 to 2001-02, the liabilities being to tax on profits including s 660A of the Income and Corporation Taxes Act 1988 ("TA 1988") and gains including s 86 Taxation of Chargeable Gains Act 1992 ("TCGA 1992");
>
> (2) for 2002-03, the liabilities being to tax arising in respect of a company named Bala Ltd or a trust named the Maclennan Trust under ss 660A and 739 TA 1988 and s 86 TCGA 1992;

(3) for the part of 2003-04 up to 31 December 2003, the liabilities being as set out in (2) above;

(4) Inheritance tax on transfers to the Maclennan Trust, the dates and amounts of the transfers being October 1997 (£150,000), and April 1998 (£250,000).

8. As part of the contract settlement, Messrs Thomas undertook to take a series of steps to wind up and distribute the assets of the Maclennan Trust and Bala Ltd by 31 December 2004. These were:

(1) In accordance with powers under the trust deed dated 27 August 1997, Mr Thomas would require the then current trustee to resign and appoint new trustees resident in the UK;

(2) Messrs Thomas would request the new trustees to cause the transfer of all the assets held by Bala Ltd, including its holding in a company named Spring Salmon & Seafood Ltd, to the trust;

(3) Thereafter, Messrs Thomas would request that the new trustees should by 31 December 2004 distribute all the assets to Mr Thomas and Mrs Sarah Thomas, and to Stuart Thomas and Mrs Rebecca Thomas in equal proportions.

On this basis, no liability to UK taxation in respect of any person or company was to arise in executing these three steps, and for capital gains purposes, the beneficiaries would be treated as having acquired any asset distributed to them as at the date of acquisition by the original trustee. A letter dated 24 May 2004 from the Inspector of Taxes then dealing with the matter confirmed agreement with these terms.

9. (Although these steps were intended to take place by 31 December 2004, it is apparent from subsequent events that the process took much longer; the evidence does not disclose the reasons for this.)

10. On 30 January 2007, HMRC received 2005-06 self-assessment returns from both Mr Thomas and Stuart Thomas. The only capital gain which Mr Thomas reported was on the disposal of some quoted shares, against which gain he claimed losses reducing the taxable gain to less than £6,000. He did not complete any supplementary pages relating to income or deemed income from a trust or settlement. In his return, Stuart Thomas showed capital gains on the disposals of quoted shares and shares in an open-ended investment company; against these gains he claimed Enterprise Investment Scheme deferral relief, resulting in taxable gains for the year of £8,500; no other gains were shown in his return. He did not complete any supplementary pages relating to income or deemed income from a trust or settlement.

11. On 3 October 2007, Mr Stewart wrote to Mr Thomas, who was acting for his brother Stuart Thomas; the letter was headed "SJ Thomas: Surcharge 2005/06". The main paragraph included the following statement:

> "The 2005/06 return is under enquiry with my colleague in East Hampshire and I had previously requested that she should not close that enquiry. I have told her that it is probable that I will be assessing

> Sections 660A and 739 as well as Section 86 TCGA liabilities for that year."

12. On 22 January 2008, according to HMRC records, HMRC's East Hampshire office issued enquiry notices under s 9A TMA 1970 to Mr Thomas and Stuart Thomas respectively. (Copies of these letters were included in the evidence.) These notices referred to the contract settlement of 24 May 2004 (see above), and also to the absence from their 2005-06 returns of any reference to income or gains on the basis that they were settlors in the Maclennan Trust, and also beneficiaries of that trust. The notices also referred to the issue of whether each of them was for tax purposes a settlor of the Maclennan Trust, and the writer's understanding that the issue was to be determined by the Special Commissioners. The notices requested copies of the accounts for the Maclennan Trust and Bala Ltd for the year ended 5 April 2006, or (on the basis that the year end for both the trust and the company was 31 December) for the two years to 31 December 2006.

13. On 10 March 2008, HMRC wrote respectively to Mr Thomas and Stuart Thomas stating that no reply had been received to the 22 January letter and asking them to forward the documents previously requested.

14. Mr Thomas replied on 14 March 2008 in the following terms:

> "I refer to your letters dated 10/2/08 addressed to myself and my brother Stuart Thomas. Neither of us received any letter from you in January.
>
> The enquiry window in respect of the year 2005-2006 is closed."

15. On 31 March 2008 HMRC's East Hampshire office wrote both to Mr Thomas and Stuart Thomas enclosing a copy in each case of the 22 January letter. Subsequently, on 15 May 2008, HMRC issued to each of them an information notice under s 19A TMA 1970 requiring production of the documentation previously requested in the 22 January letter.

16. In an undated letter received by HMRC on 6 June 2008, Mr Thomas wrote on behalf of himself and Stuart Thomas to appeal against the s 19A notices on the basis that the enquiry window in respect of the year 2005-06 was closed.

17. On 12 August 2008 the Clerk to the Berkshire General Commissioners wrote respectively to Mr Thomas and Stuart Thomas to state the result of the appeals heard on that day. The Commissioners had decided that on the balance of probabilities there was insufficient evidence that the respective letters dated 22 January addressed to two separate addresses were in fact received; in spite of the precedent offered to them, the Commissioners felt that it was not possible to prove a negative. Accordingly, the respective appeals had been allowed, and the notice under s 19A TMA 1970 should be withdrawn.

18. Following that hearing, HMRC wrote on 2 September 2008 to each of Mr Thomas and Stuart Thomas to inform them that the 2005-06 enquiry was regarded as settled, as notice had not been served in time.

19. In relation to separate appeals by Messrs Thomas to the Special Commissioners against closure notices and assessments for 2002-03 and 2004-05, a Special Commissioner had issued directions.

20. Pursuant to one of those directions, Mr Thomas wrote to HMRC on 1 May 2008 enclosing the final set of accounts for Bala Ltd for the period 1 January 2006 to 31 March 2007; these accounts also showed details for the year ended 31 December 2005. These accounts showed losses for both periods on profit and loss account. In relation to investments, 200,000 £1 ordinary shares in Spring Salmon and Seafood had been transferred at nil consideration to the Maclennan Trust on 13 February 2007 to enable the liquidation of the investment, thus giving rise to a loss of £200,000.

21. Pursuant to another of those directions, Mr Thomas wrote to HMRC on 13 November 2008 with a copy of the financial statements of the Maclennan Trust for the period 27 August 1997 to 31 December 2006. This unaudited document showed that, after allowing for administrative expenses, there had been a deficit on the income account over that period. The amount of income over the period was £22,705.65, shown as "Interest receivable".

22. On the capital account, the initial amount settled had been £100, and the relevant note to the accounts referred to the date on which this sum had been provided as 1 January 2003. Additional settled funds were shown as having been provided; the first addition was shown as having been made on 6 June 1997, the amount being £300,000, and the second on 29 April 1998, the amount being £500,000. The name appearing under the headings "Initial settled funds" and "Additional settled funds" was "HG Lindh", without any explicit statement that this person was the settlor.

23. The note under the heading "Investments" showed no cost as at 27 August 1997; additions were £10,783,804.29, and disposals £8,958,991.32. The profit on disposal was £393,984.92. The accounts included an investment schedule showing profits and losses on disposals of investments resulting in that net profit; the schedule did not include any information concerning the dates on which the respective disposals had occurred.

24. In his reply dated 21 November 2008, Mr Stewart acknowledged receipt of the letter and unaudited financial statements of the Maclennan Trust. He commented that the statements did not meet the terms of the direction, as the latter referred to financial statements for the year ending on 31 December 2005, the year under appeal before the Special Commissioners being 2004-05. He continued:

> "I can obviously compare the Financial Statements provided for the period to 31 December 2003 with the Un-audited Financial Statements for the period to 31 December 2006 and determine that in the 3 years to 31 December 2006 interest income increased by £8,760 and more significantly that there were capital gains in the 3 year period of £393,984. However the Financial Statements now submitted do not identify income and capital gains for 2004-/05.
>
> The Appellants are aware that HMRC submits that RC Thomas and SJ Thomas are settlors and beneficiaries of the Maclennan Trust. If RC

> Thomas and SJ Thomas are settlors and beneficiaries there is an argument that the income arising is taxable both under the settlements code and Section 739 ICTA 1988 and in practice the settlements code would take precedence. The income would be taxable under Section 660A ICTA while the capital gains are assessable under Section 86 TCGA."

25. According to HMRC's Statement of Case, on 2 December 2008 Messrs Thomas wrote to HMRC in relation to the 2004-05 appeals, stating that they had that day been informed by the trustees of the Maclennan Trust that the Trust had no gains during the relevant period and total income of £98.29. No copy of that letter was included in the evidence before us, but we note that in a preliminary hearing on 25 February 2013 in the appeal of *Roderick Thomas and Stuart Thomas v Revenue and Customs Commissioners* (Appeals numbers SC/3012/2008 and SC/3013/2008) at [12] Mr Thomas provided the same details. Further, the 2 December 2008 letter was mentioned in the review decision letter referred to below. In addition, in an exchange of correspondence during April to May 2012 included in the evidence before us, Mr Stewart wrote to agree the position in similar terms. On the basis of these two separate sources showing the same information, we find that this statement relating to the income and gains for that period is correct.

26. On 16 January 2009, Mr Stewart wrote to Mr Thomas to notify him that an enquiry was being opened into his personal tax return for 2006-07, and to request the provision of information and documents. On the same date, Mr Stewart sent a letter in almost identical terms to Stuart Thomas.

27. In the absence of such information and documents, Mr Stewart wrote on 9 July 2009 to Newhaven Trust Company (Channel Islands) Ltd in Guernsey ("Newhaven Trust"), enclosing a copy of the unaudited financial statements of the Maclennan Trust for the period from 27 August 1997 to 31 December 2006. [It was not disclosed in the evidence before us in what circumstances Newhaven Trust had replaced the original trustee, Mentor Trustee.] He indicated that HMRC was considering a request to the Administrator of Income Tax under the Double Taxation Agreement with Guernsey in order to obtain further information in relation to those accounts. He asked whether the trust company was in any case prepared to provide the information to HMRC. He referred to the £427,261.55 "profit on disposal of investments" shown in the Capital Account, and asked whether the Trustees were prepared to provide an analysis of that amount as between the periods 1 January 2004 to 5 April 2004, 6 April 2004 to 5 April 2005, 6 April 2005 to 5 April 2006 and 6 April 2006 to 31 December 2006.

28. Following a further letter dated 28 August 2009 from Mr Stewart, Newhaven Trust replied on 22 September 2009, stating:

> "I understand from members of the beneficial class that they are currently involved in a Tax Tribunal, which is due for a hearing in 2010 and which has at [*sic*] its purpose the identification of the economic settlor(s) of the Trust. I am lead [*sic*] to believe that all information requested has been provided to that tribunal and that its outcome will be fundamental to your current enquiry.

> Under these circumstances, I wonder if it would be appropriate to await those findings as this may well negate the need for any further investigation."

29. On 28 September 2009, Mr Stewart wrote again to Newhaven Trust. He referred to the direction which had been issued by the then Special Commissioner, and continued:

> "Whilst not referred to on [*sic*] the Direction, the information requested at 1 of my letter will allow the income, and in particular the gains, in the 3 years to 31 December 2006 to be confirmed for each tax year. HMRC can, in the absence of that information, assess the income in the earlier years and leave the beneficiaries to appeal against those assessments; but I thought that it would save time and trouble for all concerned if the Trustee was able to provide the information. It will certainly avoid the need for use of the DTS referred to in my letter and I hope that you can reconsider my request."

30. Newhaven Trust replied on 1 October 2009, saying:

> "I understand from members of the beneficial class that any liability was settled under terms of a contract settlement dated 24 May 2004."

[We note that this was not an answer to the question which had been put by Mr Stewart, as the contract settlement concerned only gains to 31 December 2003.]

31. As no information had been forthcoming, HMRC carried out internet research in October 2009 to seek to establish when the disposals by the Maclennan Trust had taken place. By reference to the disposal proceeds as shown in the Investment Schedule to the unaudited financial statements and share price movements for those investments, they concluded that the three material disposals reflected in the Investment Schedule had taken place in 2005-06, although one could have occurred in 2006-07. Examples of this research were included in the evidence; we are satisfied that these show the methodology applied by HMRC in arriving at their conclusions as to the timing of the disposals, and that such methodology was reasonable in the circumstances.

32. Mr Stewart wrote to Mr Thomas and Stuart Thomas respectively on 24 November 2009. He referred to the results of HMRC's research, and indicated that he was on the point of writing to them in relation to discovery assessments for 2005-06 and other matters relating to later years of assessment. He agreed that there would be merit in a without prejudice meeting to discuss matters.

33. Meanwhile, on 5 January 2010, Mr Goddard of Newhaven Trust sent an email to Mr Stewart, which included the following paragraph:

> "On 22 December 2009, we retired as trustee in favour of Roderick and Stuart Thomas. The majority of the trust documentation was sent to them on that date and there is some additional documentation (including year end and final accounts) to be sent to them later this week."

34. As evidenced by a letter dated 26 March 2010 from Mr Thomas to Mr Stewart, the suggested meeting between Messrs Thomas and Mr Stewart took place on 23 March 2010. The letter dealt with various matters; in relation to the Maclennan Trust, Mr Thomas commented:

> "With regards [*sic*] to trust income and gains/losses for the final years of the trust, we will get back to you once we have the figures."

35. On 1 April 2010, without having received the latter details, HMRC issued notices of assessment to Mr Thomas and Stuart Thomas respectively. On the same date, Mr Stewart wrote to Messrs Thomas to explain the reasons for the issue of the discovery assessments. (We deal later with the questions concerning the basis for such assessments, so do not refer at this point to Mr Stewart's explanation of HMRC's reasons.)

36. On 16 April 2010, Mr Thomas in his capacity as agent for Messrs Thomas wrote to Mr Stewart to indicate their wish to appeal against the assessments. Mr Thomas set out their reasons for appealing (considered below). He requested a review of HMRC's decision.

37. Mr Stewart replied on 10 May 2010 with detailed comments on the grounds of appeal set out in the 16 April letter.

38. The results of the review were notified to Mr Thomas by HMRC's letter dated 1 July 2010. As various matters considered in the review letter were the subject of the present appeals, we do not set out the details here. The result of the review was that, subject to a minor adjustment that might be required to the assessment of Stuart Thomas, the review officer considered that the decision-maker had made the 2005-06 discovery assessments properly.

39. By Notices of Appeal dated 27 July 2010, received by the Tribunals Service on 29 July 2010, both Mr Thomas and Stuart Thomas gave notice of appeal to the Tribunal.

The law

40. Section 29 TMA 1970 in the form current at 1 April 2010 provides:

> "**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 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.

. . .

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) … in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

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

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

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

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

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

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer …; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant [year of assessment]2 includes—

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; and

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

(7A) . . .

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

. . ."

Arguments for Messrs Thomas

41. Mr Thomas explained that, although he had raised certain specific issues on behalf of himself and Stuart Thomas in a document entitled "Appellants' Further and Better Particulars of Appeal", made following a Direction given by Judge Berner on 27 June 2014, he was not pursuing those particular points. (We refer to the remaining issues in the relevant sections of this decision.)

42. Although Mr Thomas dealt first with the question relating to the settlor of the Maclennan Trust, we find it more convenient to refer initially to his submissions on the issue of discovery.

Discovery

43. He submitted that the conditions for making discovery assessments had not been fulfilled, and referred to s 29(5) TMA 1970. He drew attention to the history of HMRC's investigations into the relationship between Messrs Thomas and the Maclennan Trust and to particular comments in the correspondence implying confusion between two HMRC offices and, in a letter from Mr Stewart, expressing the view that relevant liabilities also arose for 2005-06. That correspondence had pre-dated the expiry of the enquiry window for 2005-06.

44. He argued that on the basis of the contract settlement, HMRC had been aware for a very long time that he and Stuart Thomas were liable. All the liabilities for previous years pre-dated the expiry of the enquiry window for 2006-07 on 31 January 2008. In the letter dated 10 May 2010 referring to earlier correspondence, Mr Stewart had cited his indication in October 2007 or before to a colleague that—

> "it is probable that I will be assessing Sections 660A as well as Section 86 TCGA liabilities."

(The emphasis made by underlining the word "probable" was added by Mr Stewart in his later letter, and did not appear in his letter dated 3 October 2007.)

45. Without going through the authorities, Mr Thomas understood that the test for a discovery assessment was whether it was probable that an assessment would be made. In his view, a later letter indicated that it was certain that an assessment would be made.

46. In the Further and Better Particulars of Appeal, Mr Thomas referred to the case of *MC and LJ Ive Limited and Michael Ive v Revenue and Customs Commissioners* [2014] UKFTT 400 (TC), TC03529 and the Tribunal's reference to the decision of the Upper Tribunal in *Revenue and Customs Commissioners v Charlton and others*, cited as [2012] UKFTT 770 (TCC), FTC/73/2011. Using the language of the Tribunal in *Ive*, Mr Thomas submitted that HMRC had been alert to a potential loss of tax relating to the Maclennan Trust long before the enquiry window for 2005-06 had closed on 31 January 2008. Thus the condition in s 29(5) TMA 1970 TMA 1970 was not satisfied and the appeals must be allowed.

47. The bar to making discovery assessments was not terribly high, but was getting higher. The authorities showed a move away from characterising everything as a discovery. There was a need for finality in relation to any particular year.

48. A cynical view of the matter was that the Inspector had thought that an enquiry was open. HMRC had subsequently accepted that there was no extant enquiry in relation to 2005-06. The Inspector had decided instead to go for discovery assessments. Mr Thomas was not certain that this had been the position, but he considered it likely. The solution had been simply to use the discovery powers. He referred to the implications for the process of assessing tax liabilities, although implicitly accepted that this was not a matter for the Tribunal.

49. We consider below his submissions on discovery, together with those made by HMRC, in the light of the detailed factual background.

The settlor issue

50. Mr Thomas argued that the settlor question was res judicata; the question had already been litigated and determined. He referred to other Tribunal decisions in support of that proposition. He made detailed submissions on the facts, and invited the Tribunal to find that one of the decisions referred to was determinative of the issue, so that neither he nor Stuart Thomas was a settlor; we consider all these matters at a later point in this decision.

Quantum of the assessments

51. Mr Thomas referred to HMRC's Statement of Case, in which HMRC accepted that amendment to the assessments would be necessary if and when the assessment of

trust income and trust gains for each of Mr Thomas and Stuart Thomas were evidenced and determined on appeal.

52. Mr Thomas invited the Tribunal, if its decision were to be that he and Stuart Thomas were liable to tax under the relevant legislation, to find that Mr Thomas Lindh was also a settlor and that liability should fall on him as to one third, so that the assessments on Mr Thomas and Stuart Thomas should be reduced accordingly.

Loss relief

53. Mr Thomas made detailed submissions on the question of loss relief to be set against any potential liabilities to tax for 2005-06. As these matters related largely to questions of fact, as well as raising certain questions of law, we deal with them at a later point below.

Arguments for HMRC

54. Dr Williams apologised for HMRC's attempt to put in the witness statement given by Mr Stewart, which had been prepared on the basis that the Tribunal panel had had no previous involvement with matters concerning Messrs Thomas or companies with which they may have been involved, and had been intended as a convenient means of explaining to the Tribunal the history of the matters in dispute. He commented that it made little difference not to have such a statement, as the factual history could be derived from the documentary evidence.

55. Although Mr Williams made submissions in a different order, we adopt the same order as that used above for those made by Mr Thomas.

Discovery

56. Dr Williams commented that a "discovery" was not valid unless one of two conditions was met. The first was that there had been an insufficiency of tax due to the fraudulent or negligent conduct of the taxpayer, or a person acting on his behalf. The second was that in the period permitted for enquiry (or where any enquiry during that period had been concluded), an officer of the Board could not have been reasonably expected, on the basis of the information available to that officer, to be aware of that insufficiency.

57. He referred to the recent Upper Tribunal decision in *Michael Burgess and Brimheath Developments Limited v Revenue and Customs Commissioners* [2015] UKUT 0578 (TCC), in which the Upper Tribunal had analysed the issues concerning discovery as between "competence" and "time limits". This could be amplified in the present case.

58. He acknowledged that it was for HMRC to prove that a discovery had been made and to satisfy the Tribunal on all the points. "Discover" could mean "uncover". *R v The Kensington Income Tax Commissioners (ex parte Aramayo)* (1913) 6 TC 279 indicated that "discover" did not mean "ascertain by legal evidence", but "come to the

conclusion". He referred to *Williams v Grundy's Trustees* (1933) 18 TC 271, and to *Olin Energy Systems v Scorer* [1982] STC 800, (1982) 58 TC 592. In *Corbally-Stourton v Revenue and Customs Commissioners* [2008] STC (SCD) 907, SpC 692, the Special Commissioner had referred to "a conclusion that it is probable that there is an insufficiency".

59. In *Charlton*, the Upper Tribunal had agreed with the view of the First-tier Tribunal that a discovery did not require something new by way of information or law. A "reasonable change of view" or correction of an oversight were each enough to validate a discovery.

60. In addition to the question whether there had been a discovery within the terms of the legislation, there were three other issues. The first was whether there had been a loss of tax. This in turn depended on whether Messrs Thomas were settlors within the meaning of s 660A TA 1988. The second was whether the assessments had been made within the time limits. Under s 34 TMA 1970 the time limit for the assessments, which had been made on 1 April 2010, was 5 April 2010, so that they had been made within that time limit. The third was the quantum in which the assessments should be determined; we refer to this element of his argument under the relevant heading below.

61. Dr Williams made submissions on the facts, including a reference to the citation by Mr Thomas of the decision in *Ive*; we consider together below the parties' submissions on law and fact relating to discovery.

The settlor issue

62. Messrs Thomas disputed that they were settlors for the year ended 5 April 2005. This meant that they were attempting to prove a negative. Dr Williams commented that the proof of a negative was normally avoided in law, with a preference for proving a positive that was incompatible with the negative, such as issues concerning location. This was not possible in the present case, so the onus should shift to the party that had to prove the positive proposition. Dr Williams referred to the words of Lord Russell of Killowen in *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154 at 177:

> ". . . the proving of a negative, a task always difficult and often impossible, would be a most exceptional burden to impose on a litigant."

63. Dr Williams submitted that there was sufficient evidence from the documents to discharge any evidential burden resting on HMRC in respect of the issue as to whether Messrs Thomas were settlors for the purposes of the relevant tax legislation.

64. He referred to the "presumption of continuity", and cited the description by Walton J in *Jonas v Bamford* [1973] STC 519, (1973) 51 TC 1. He submitted that the burden of proof was on Messrs Thomas to show that the situation in the years 2004-05 and 2006-07 did not appertain in 2005-06. He argued that no such evidence had been produced.

65. He made detailed submissions concerning both law and fact on relation to the settlor issue; we consider these, together with those made by Mr Thomas, in a later section of this decision.

The quantum of the assessments

66. Dr Williams made factual submissions concerning the extent to which information as to the amounts and timing of gains within the Maclennan Trust would have been available to Messrs Thomas. To the extent necessary, we review these issues of fact at the relevant point below.

Availability of loss relief

67. As Dr Williams' submissions on the availability or otherwise of loss relief raised questions both of law and fact, we take these into account below, together with those made by Mr Thomas.

Discussion and conclusions

68. As we explained to the parties at the beginning of the hearing, the question whether the discovery assessments were validly made must be regarded as the primary issue to be determined in relation to these appeals. The reason is that if Messrs Thomas can show that the assessments were not validly raised, this will determine the appeal in their favour, and all the other issues fall away.

69. We also commented on the burden of proof. In relation to the question whether the discovery assessments were validly made, the burden of proof falls on HMRC. Dr Williams referred to *Burgess and Brimheath Developments Limited*, which makes clear that on the "competence issue", it is for HMRC to discharge the burden of proof that discovery assessments have been validly made; see the Upper Tribunal's decision at [53].

70. In the event that HMRC succeed in discharging that burden, it then becomes necessary to consider the substantive issue or issues concerning the relevant assessment. In relation to substantive issues, the burden of proof is placed on the person seeking to challenge an assessment, ie here on Messrs Thomas. This follows from s 50(6) TMA 1970, and a series of well-known authorities which we do not consider necessary to cite in detail here.

71. We therefore consider the matters raised in relation to these appeals in the same order as we have adopted in setting out the above summaries of the parties' arguments.

Discovery

72. As the burden falls on HMRC, we refer first to Dr Williams' submissions, even though these were made after those made by Mr Thomas.

(a) Dr Williams' submissions on discovery

73. Dr Williams acknowledged that the burden of proof as to the validity of the discovery assessments fell on HMRC. He raised a series of questions, to which he subsequently gave answers:

(1) What was discovered?

(2) By whom was it discovered?

(3) When was it discovered?

(4) How was it discovered?

(5) Could any ordinarily competent Inspector of Taxes have known, or be presumed to have known, about the gains?

74. The answer to question (1) was that the Maclennan Trust had gains of £390,000 in the period from 20 July 1997 to 31 December 2006. This sum was the reported gain. The disposals totalled £8,958,991; the net profit was £393,984. The taxable gain could not be computed from these figures, which was why the assessments were estimated. Dr Williams referred to the enquiry notices issued in respect of 2005-06, which had been discharged by the Berkshire General Commissioners for want of good service.

75. The answer to question (2) was that the discovery had been made by the investigating Inspector of Taxes, Mr Stewart.

76. As to question (3), it had been discovered on 13 November 2008.

77. In relation to question (4), it had been discovered by Mr Stewart reading a letter sent to him by Mr Thomas. The evidence of Mr Stewart's discovery was that letter, dated 13 November 2008, and the enclosed unaudited financial statements of the Maclennan Trust for the period 27 August 1997 to 31 December 2006, together with Mr Stewart's letter to Mr Thomas dated 21 November 2008, in which Mr Stewart indicated that he had seen information concerning the transactions.

78. In Dr Williams' submission, the answer to question (5) was "No". There had been no reference to the gains on the respective returns of Mr Thomas and Stuart Thomas; these made no reference whatsoever to settlors, or to trust income, despite the inclusion of capital gains pages and mention of losses in the "white spaces". It was not in dispute that trust returns had not been made. Dr Williams argued that it could be seen clearly from their personal returns for 2005-06 that Messrs Thomas had addressed their minds to capital gains matters and chosen not to inform their Inspector of Taxes about the gains arising from their trust, in circumstances where the total disposals had been almost £9,000,000.

79. In the light of these answers to the above questions, this was the classic case of "discovery".

80. Dr Williams submitted that the assessments had been made within the time limits; under s 34 TMA 1970 as it applied from 1 April 2010 onwards, the time limit

was not more than four years after the end of the relevant year of assessment. This expired on 5 April 2010. As the assessments had been made on 1 April 2010, they were clearly within the time limit.

(b) Submissions by Mr Thomas on discovery

81. As already mentioned in the summary above, the contention on behalf of Messrs Thomas was that the conditions set out in s 29(5) TMA 1970 had not been met. In the Further and Better Particulars of Grounds of Appeal, Messrs Thomas referred to a "Without Prejudice" letter from Mr Stewart dated 21 January 2008, a week before the enquiry window was due to close, stating:

> "The HMRC view is that liabilities under Sections 660A and 739 and Section 86 TCGA also arise for 2005/06."

Messrs Thomas argued that HMRC, on their own view, had been plainly aware that there was a shortfall in respect of trust income and gains for 2005-06 at the time the enquiry window expired on 31 January 2008. The awareness was made clear both by this letter and Mr Stewart's letter dated 3 October 2007.

82. Mr Thomas argued, on the basis of the contract settlement made on 4 May 2004, that HMRC were aware that he and Stuart Thomas were liable. Enquiries had been commenced in 2001 and resolved by that settlement, so that HMRC had been aware of the position for a very long time. All these events had preceded the closure of the enquiry window for 2005-06 on 31 January 2008.

83. He referred to Mr Stewart's letter dated 10 May 2010 in which Mr Stewart had commented on his earlier letters to Mr Thomas dated 3 October 2007 and 21 January 2008; Mr Stewart had acknowledged that it was probable that he would be assessing under ss 660A and 739 TA 1988 as well as liabilities under s 86 TCGA 1992.

84. Mr Thomas understood that the authorities on discovery assessments, which he did not seek to go through, indicated that the test was whether it was probable that there was an insufficiency of tax. He submitted that the 21 January 2008 letter indicated that it was certain.

(c) Our conclusions on the discovery issue

85. We agree with the approach taken by Dr Williams in posing a series of questions. In examining the history, we find it appropriate to address the first four of those five questions together.

86. The first is the identification of what was discovered. When Mr Stewart received and read the letter dated 13 November 2008 from Mr Thomas enclosing the unaudited financial statements of the Maclennan Trust for the period 27 August 1997 to 31 December 2006, he (Mr Stewart) became aware of income and apparent gains in excess of those previously taken into account for previous years, because he was able to compare the information in the financial statements previously provided with the details shown in the unaudited statements. At that point, he did not have information

enabling him to identify which income and gains were attributable to the respective remaining tax years up to and including 2006-07, the year during which the Maclennan Trust was brought to an end.

87. The context in which Mr Stewart was considering this information was the appeals to the Special Commissioners in respect of the year 2004-05. However, the information raised the possibility that part of the income and gains might be attributable to other years, in particular 2005-06. We find that, on its own, the information available to him at that point was not sufficient to establish that there was a "loss of tax" as defined by s 29(1) TMA 1970, referred to in certain cases as an "insufficiency".

88. Mr Thomas argued that by October 2007 Mr Stewart had stated it to be probable that he would be assessing liabilities for 2005-06 under ss 660A and 739 TA 1988 and s 86 TCGA. We do not accept that Mr Stewart was in a position by that stage to arrive at any calculation of any such liabilities; nor do we consider that he was in any better position to do so when he received the unaudited financial statements for the Maclennan Trust in November 2008.

89. In an attempt to obtain information allocating the income and the gains of the Maclennan Trust as between the remaining tax years, Mr Stewart approached Newhaven Trust; that organisation declined to provide the information, on the basis of the pending proceedings before the Special Commissioners. Despite Mr Stewart's further attempt to persuade Newhaven Trust, no information was forthcoming. Instead, HMRC carried out internet research to establish the most likely dates of disposal of the investments.

90. Thus Mr Stewart was not in a position to arrive at any quantification of the probable liability for 2005-06 until late November 2009, and although at that point he referred in correspondence to the possibility of raising discovery assessments, this was delayed until after the meeting with Messrs Thomas in March 2010.

91. What was discovered was that income and gains had been made within the Maclennan Trust in the year 2005-06, in a context in which Messrs Thomas had been shown to be liable to tax for previous years as settlors for tax purposes pursuant to the relevant statutory provisions. (The position for the years subsequent to those covered by the contract settlement is considered below in relation to the "settlor" issue.)

92. We find that the earliest point at which Mr Stewart was in a position to arrive at a reasonable quantification of the amounts assessable was late November 2009. Thus, in relation to the second question, Mr Stewart made the discovery; as to the third question, this was in November 2009 and so after the enquiry window for 2005-06 had closed. The answer to the fourth question, how the discovery was made, was that Mr Stewart read the letter from Mr Thomas and the enclosure, the unaudited accounts, and subsequently established a basis for allocating the income and gains to the year 2005-06.

93. It appears to us that, in order to be in a position to make a discovery assessment, it is necessary for the HMRC officer to establish something more than a suspicion that there may be a loss of tax for the particular tax year. It is not necessary for the officer to arrive at a precise calculation; the information available will frequently be insufficient to achieve anything other than an approximation. However, it is necessary for the officer to be able to arrive at the view that income or gains are attributable to the particular year so that the loss of tax can be sufficiently identified for the purposes of s 29(1) TMA 1970. There is a difference between knowing that a person is potentially assessable and having a sufficient basis to enable the HMRC officer to arrive at a reasonable estimate of the alleged loss of tax for the year in question.

94. The question of identification and calculation of the loss of tax is closely linked to the fifth of the questions posed by Dr Williams, which amounts to a brief summary of s 29(5) and (6) TMA 1970. To put the question in another way, at the time when the enquiry window for 2005 expired, and on the basis of the information available to him at that time, could Mr Stewart reasonably have been expected to be aware of the "loss of tax" or "insufficiency"?

95. In *Corbally-Stourton* at [42]-[43] the Special Commissioner (Charles Hellier) said:

> "[42] . . . 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.
>
> [43] It is clear however that mere suspicion, something short of a conclusion that it is probable that there is an insufficiency, is not enough."

96. In our view, although Mr Stewart had indicated as early as October 2007 the probability that he would be making assessments under the relevant statutory provisions, this did not amount to a conclusion that it was probable that there was an insufficiency; it was not until November 2009 that he had the information enabling him to make a reasonable calculation of the amount of the insufficiency.

97. At [46] the Special Commissioner continued:

> "In my judgment for the reasons which follow, the test in the tailpiece of s 29(5)—the reasonable expectation of the awareness of the situation in sub-s (1)—is to be interpreted thus: that the officer could not reasonably have been expected, on the basis of the information mentioned, to have discovered an insufficiency: ie to have come to the conclusion that it was probable that there was an insufficiency. I come to that conclusion because the language of the section in referring to the 'situation mentioned in subsection (1)' incorporates by reference the idea of a discovery and therefore the concept of a conclusion that it was more probable than not that there was an insufficiency. Thus in my view it is not required that the officer be aware that there was in truth

> an insufficiency or that he be aware that it was beyond all reasonable doubt that there was an insufficiency, but merely that that information should enable him to conclude on balance that there was an insufficiency. Again a mere suspicion would not be enough, but, a conclusion in relation to which he had some residual doubt may well be sufficient. If he could reasonably have been expected to have come to such a conclusion before the later of the times mentioned he is precluded from making a discovery assessment."

98. The Special Commissioner went on to consider *Veltema v Langham* [2004] STC 544 (CA) and *Revenue and Customs Commissioners v Household Estate Agents Ltd* [2008] STC 2045. At [50]-[52] he commented:

> "50. These judgments make plain the information I should treat as being available to the officer at the relevant time but they also raise another issue. Auld LJ's and Henderson J's judgments use the phrase 'actual insufficiency'. Only if the inspector is objectively aware at the relevant time of an actual insufficiency is he to be shut out from a discovery assessment. Mr Barnett asks whether this means that, contrary to the view I have expressed at para 46, above, the inspector is only shut out where he is objectively aware that there truly is a certain insufficiency.
>
> 51. I do not understand the judgment in that way. Auld LJ is considering the contrast between an actual insufficiency and a possible insufficiency ('an awareness that [the assessment] was questionable'): it seems to me that an 'actual insufficiency' is used to describe the complement of 'an awareness that it was questionable', and accordingly embraces a range of conclusions from absolute certainty to on balance probability, but excludes a conclusion that the insufficiency was merely suspected or 'possible' or the sufficiency merely questionable. It does not therefore seem to me that my conclusion at para 46, above, is at variance with the views expressed in those judgments.
>
> 52. Indeed as Mr Barnett submitted, if 'actual insufficiency' required absolute certainty then there would be almost no practical application for the restriction provided by s 29(5)."

99. Thus on the basis of the Special Commissioner's conclusions, the test does not relate to awareness of a certain insufficiency; the question is whether the officer could not have been expected to be aware of a probable insufficiency (as opposed to a possible insufficiency).

100. In a case such as the present, that proposition appears to require further qualification. As we have indicated, Mr Stewart's reference in the relevant correspondence to the probability that he would be making assessments under the relevant statutory provisions did not in our view amount to saying that it was probable that there was an insufficiency in respect of the year 2005-06. There has to be some basis on which the amount of the insufficiency for the relevant year can be calculated, whether or not that process involves a degree of approximation. In the absence of an identifiable insufficiency, an officer is not in a position to make a discovery

assessment; in such circumstances it is not relevant to consider the question whether the condition in s 29(5) TMA 1970 is met.

101. On the basis of our findings as to the discovery assessments, we consider that they meet the condition in s 29(5) TMA 1970. At the time when the enquiry window closed, Mr Stewart could not have been reasonably expected, on the basis of the information available to him before that time, to be aware of the "probable insufficiency".

102. Although the assessments were not issued until 1 April 2010, we find that, allowing for the need to arrange the meeting between Mr Stewart and Messrs Thomas eventually held in March 2010, the assessments were made relatively promptly after Mr Stewart had made the discovery. We further find that the assessments were made within the time limit, as Dr Williams submitted.

103. We find that the discovery assessments were validly made. As a result, the remaining issues raised by Messrs Thomas in relation to these appeals need to be considered.

The settlor issue

104. As we have indicated, the burden of proof in relation to matters other than the validity of the discovery assessments falls upon Messrs Thomas as the persons seeking to challenge those assessments. However, as Dr Williams indicated, for Messrs Thomas to prove that they were not settlors would involve them proving a negative. In order to consider this issue, we therefore examine the submissions made by Dr Williams, and then consider the arguments put by Mr Thomas.

105. Before doing so, we make the following general observation. The question to be considered in the context of the present appeals is whether Messrs Thomas were settlors for tax purposes in respect of the Maclennan Trust. This may well be a different question from that of identifying the person or persons who are to be regarded as settlors for the purposes of the law governing that trust; it does not appear to us that the latter question is one which we need to address in relation to these appeals.

(a) Dr Williams' general submissions on the settlor issue

106. Dr Williams referred to an email dated 30 April 2012 sent by Mr Thomas on behalf of Messrs Thomas in which they agreed for tax purposes that they were the only settlors of the Maclennan Trust. (This agreement was described by Mr Thomas as having been made on specific terms, including, among other matters, the caveat that their other grounds of appeal in respect of the 2005-06 discovery assessments remained in force.) That email was subsequently considered by Judge Berner, who determined that there was no agreement reached between the parties.

107. In an email dated 18 March 2013 to Mr Stewart, Mr Thomas stated:

> ". . . Further, as regards the settlor issue, in his evidence, Mr Williams confirmed HMRC's position that it is open for us to resile from such a position. In the light of the Tribunal's decision, I now advise you that we resile from the view that we are to be treated as settlors of the Maclennan Trust. Accordingly, we will henceforth oppose any extant, relevant appeals on the basis that we were not settlors of the Maclennan Trust."

108. Dr Williams referred to the "presumption of continuity" as described by Walton J in *Jonas v Bamford* [1973] STC 519 at 540:

> "But so far as the discovery point is concerned once the inspector comes to the conclusion that, on the facts which he has discovered, the taxpayer has additional income beyond that which he has so far declared to the inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer."

109. Messrs Thomas might respond that Income Tax was an annual tax and was re-imposed by Parliament each year. Dr Williams agreed that this was the case, although Capital Gains Tax was not an annual tax within that ambit. However, the presumption of continuity was an evidential matter. In *Barnett v Brabyn* [1996] STC 716 at 723, Lightman J referred to the words of Lord Hanworth MR in *IRC v Sneath* [(1932)] 17 TC 149, commenting that the previous determination of a question may be a cogent factor on a subsequent determination of the same question. Here it was admitted that Messrs Thomas were settlors on the years either side of the year under appeal. There must clearly be a heavy onus on them to displace that evidence.

110. Dr Williams referred to the wider question of evidence concerning the settlor issue. Mr Thomas had been company secretary of Spring Salmon Ltd, but not a director, until 27 March 1998. However, it had been on his instruction that £300,000 had been paid to EA Mentors (who ran the Maclennan Trust) on 1 October 1997 and £500,000 was paid on 24 April 1998. The latter sums had been clearly paid while Mr Thomas was a director of the company. A "management charge of £740,000 had been paid to the current accounts of Messrs Thomas with Spring Salmon Ltd.

111. In HMRC's submission, this was sufficient to discharge any evidential burden that might rest on HMRC as to whether Mr Thomas was a settlor or donor to the Maclennan Trust. It had been contended that the monies may have been those of Mr Hans Lindh. If this were the case, then Messrs Thomas must adduce evidence to prove it. Mr Lindh had never presented himself to HMRC, nor was he present at the hearing to give evidence. Any suggestion that he had settled the sums of £300,000 and £500,000 could only be an assertion without Mr Lindh's evidence, which was not available. Dr Williams commented that when the then Inspector of Taxes, Mr Read, had written to Mr Lindh, it had been Mr Thomas who had replied on Mr Lindh's behalf, by fax.

112. The unaudited financial statements for the Maclennan Trust supplied pursuant to the Special Commissioner's Direction implied that Mr Lindh might have put £100

into the Trust. However, that did not displace the evidence that Mr Thomas was clearly a settlor by his action in causing monies belonging to Spring Salmon Ltd to pass into the Trust while he was an officer of that company, notwithstanding the entry in those unaudited financial statements asserting that Mr Lindh had settled two sums of £300,000 and £500,000 respectively.

113. Dr Williams referred to the implication, in the skeleton argument for Messrs Thomas, that a Tribunal has found as a fact that Mr Hans Lindh was a settlor of the Trust. We examine below the arguments for both parties on that question, in the light of the evidence.

(b) General submissions by Mr Thomas on the settlor issue

114. Messrs Thomas contended that HMRC had failed to adduce any evidence that either Mr Thomas or Stuart Thomas had settled any amount on the Maclennan Trust. They argued that in a discovery assessment the onus was on HMRC to prove that any amount was settled by Messrs Thomas. They referred to a recent Tribunal decision in which it had been found as a fact that the settlor of the Trust had been Hans Lindh.

115. Mr Thomas referred to the relevant events and transactions having occurred 20 years previously; he submitted that this caused difficulty for Messrs Thomas as appellants, as it was not reasonable to expect them to give evidence relying on recollections of matters that had occurred so long ago.

116. HMRC had referred to the presumption of continuity in respect of the years either side of the tax year in question. This was not justified; for the years 2004-05 and 2006-07, Messrs Thomas had not challenged the amendments made to their self-assessments because the tax involved was de minimis and would not have warranted the expense involved in mounting a challenge.

117. Contrary to HMRC's arguments, Messrs Thomas had never possessed specific records of individual trust disposals. HMRC had conceded that they were only able to identify two disposals giving rise to possible gains in the year under appeal.

118. Mr Thomas submitted that the settlor issue was res judicata; it had already been litigated and determined. He referred to other Tribunal decisions, which we consider below.

119. He drew attention to various points in the unaudited financial statements of the Maclennan Trust, and emphasised that these statements had been signed by authorised signatories of Newhaven Trust. Those statements also gave evidence of the identity of the settlor. It would be a serious matter for the trustees if the statements were not an accurate account of the transactions. He submitted that they were prima facie evidence, and that it was for HMRC to show that the amounts had not been settled by Mr Lindh. The accounts did not attest to any other funds having been settled by any other party. He argued that the previous financial statements for the Trust, for the period 27 August 1997 to 31 December 2003, prepared by Mentor Trust Ltd on 26

March 2004, attested to Mr Lindh's status as settlor in relation to the original £100, as well as the subsequent amounts of £300,000 and £500,000.

120. He referred to a document on which HMRC relied to show that he and Stuart Thomas settled the sum of £300,000; we consider this below, together with the corresponding document relating to the payment of £500,000.

(c) Our consideration and conclusions concerning the settlor issue

121. Mr Thomas argued in relation to this issue that it was for HMRC to prove that he and Stuart Thomas were settlors. For the reasons which we have already stated, this is not correct. Once it has been established that the conditions for making the discovery assessment have been satisfied, the burden of proof that the assessments should not stand as made falls on Messrs Thomas as the Appellants seeking to resist those assessments. The qualification to that proposition is, as Dr Williams agreed, that it is undesirable for a party to litigation to be put in a position of having to prove a negative.

122. That proposition has to be reconciled with the apparently contradictory principle derived from s 50(6) TMA 1970, namely that as an assessment stands unless the Tribunal is satisfied that it should not, or should be amended, it is for the appellant taxpayer asserting that the assessment should not stand to satisfy the Tribunal on the balance of probabilities that such assertion is proved. It appears to us that the only way of reconciling these opposing factors in such circumstances is to require HMRC to show a prima facie case in respect of the matters which would otherwise require the appellant taxpayer to prove a negative, and then to require the appellant taxpayer to produce evidence to show that HMRC's prima facie case should not be accepted. We regard this approach as consistent with the authorities setting out the principles applicable to discover assessments, such as *Aramayo*.

123. On this basis, it is for HMRC to establish a prima facie case in respect of the relevant issue concerning the identity of the person or persons who were for tax purposes settlors in relation to the Maclennan Trust, thus establishing the basis for the making of the assessments; if HMRC succeed in establishing such a prima facie case, the burden of proof in respect of the settlor issue reverts to Messrs Thomas.

124. We deal first with the "res judicata" question, as this would potentially be determinative of the settlor issue.

125. Mr Thomas referred to various decisions of other Tribunals in relation to tax matters concerning Messrs Thomas or companies with which they had some involvement. We think it necessary to refer to questions of principle before we consider those other decisions.

126. In *Barnett v Brabyn*, the appellant wished to challenge certain additional assessments on the grounds that he had never been an independent contractor. He had agreed other assessments under s 54 TMA 1970 made on the basis that he was self-

employed. Lightman J held that it was open to him to challenge the additional assessments. He said at p 723:

> "Prior to the enactment of the Income Tax Management Act 1964 (the 1964 Act), the function of the tax commissioners was to make assessments and to hear appeals. It was well established during the period of that regime that they were not deciding a 'lis inter partes' and accordingly their decision in respect of one year's assessment could not create any form of res judicata or issue estoppel in respect of a later year's assessment (see *IRC v Sneath* [1932] 2 KB 362, 17 TC 149; *Caffoor and others (Trustees of the Abdul Gaffoor Trust) v Comr of Income Tax, Colombo* [1961] AC 584 at 598–589 and Spencer Bower and Turner *Res Judicata* (2nd edn, 1969) pp 260–266). . . . Accordingly a determination of an appeal by the commissioners or a s 54 agreement cannot any more since 1964 than before 1964 afford scope for application of the doctrine of res judicata or issue estoppel in respect of assessments in succeeding years or additional assessments in the same year. It is, however, to be noted that Lord Hanworth MR in *IRC v Sneath* [1932] 2 KB 362 at 384, 17 TC 149 at 163 underlined the fact that such a previous determination of a question may be a cogent factor on a subsequent determination of the same question."

127. He continued:

> "There is, as Mr Brennan (counsel for the Crown) has submitted, a substantial practical reason why a determination by the commissioners and accordingly a s 54 agreement should not operate as any form of res judicata or estoppel, for, if it did, it would mean that a taxpayer who appealed an assessment and agreed a figure with the inspector would be in a worse position in this regard with respect to any additional or subsequent year's assessment than one who did not appeal and permitted the first assessment to become final. I may add that it may not be worthwhile for the taxpayer or the inspector to raise or pursue an issue in respect of an assessment (eg because of the relatively small sum in question) but it may subsequently become a matter of importance (indeed critical importance) having regard to the sums involved on an additional or subsequent year's assessment. It would be unfortunate that a party should be discouraged from, or penalised for, adopting a responsible attitude towards an assessment by imposition of unforeseen and unintended consequences of this character.
>
> I therefore hold that it is open to Mr Barnett to challenge the additional assessments on the ground that he never was an independent contractor."

128. It is clear from Lightman J's comments that a decision in respect of one year or one assessment on the basis of a particular state of affairs does not preclude the making of an assessment for a later year based on a different view of the circumstances related to that year.

129. It follows that, even if other Tribunals have arrived at determinations of the settlor issue in relation to Messrs Thomas for periods other than 2005-06, HMRC are not prevented by any such determinations from making assessments for 2005-06 on

Messrs Thomas on the basis that they were, for tax purposes, settlors in relation to the Maclennan Trust.

130. In our view, that determines the "res judicata" question. However, in case for any reason our conclusion in the latter paragraph is found not to be correct, we consider the points raised by Mr Thomas concerning the matters mentioned in other Tribunal decisions.

131. He referred to the decision of Judge Brannan in *Spring Capital Limited, Roderick Thomas, Stuart Thomas and Spring Salmon & Seafoods Limited v Revenue and Customs Commissioners* [2015] UKFTT 0066 (TC), TC04273 ("Judge Brannan's Decision").

132. At [20] Judge Brannan had stated that the Maclennan Trust was a Guernsey based discretionary Trust settled by Mr Thomas' brother-in-law. At [40] he referred to a concession made by Mr Thomas in proceedings before the General Commissioners concerning closure notices; this was that both Mr Thomas and Stuart Thomas were beneficiaries under the Maclennan Trust, but they denied that they were settlors of that Trust.

133. Mr Thomas also mentioned to us other paragraphs in Judge Brannan's Decision; these were [175], [176] and [178]. He also referred to a decision of Judge Mosedale in November 2013 preparatory to the hearing before Judge Brannan, in which she had indicated that Messrs Thomas should be joined as second respondents so that, in particular, they would be bound by the findings of fact and would be able to appeal against such findings if they did not agree with them.

134. We do not consider that Judge Brannan was seeking to make a definitive finding at [20] as to the history of the Maclennan Trust; he was seeking to explain the general background to the matter before him, to which the settlor issue was not directly relevant. We note, and endorse, the comments in Judge Brannan's Decision at [13]-[14], referring to the earlier comments of the Edinburgh Tribunal (Judge Reid QC and Dr Heidi Poon) in a decision concerning Spring Salmon & Seafood Limited. (We return later to those comments in a different context.) As to the other paragraphs of Judge Brannan's Decision mentioned by Mr Thomas, we note that these were under the heading "Mr Thomas' Evidence", and therefore do not represent findings made by the Tribunal.

135. Mr Thomas also referred to the decision of the Tribunal (Judge Jennifer Dean and Peter Sheppard) in *Spring Salmon & Seafood Limited v Revenue and Customs Commissioners* [2015] UKFTT 0616 (TC), TC04758. At [6] the Tribunal stated:

> "The Maclennan Trust was a discretionary trust settled by Mr Thomas' brother-in-law and of which Messrs Thomas were beneficiaries."

136. Again, we do not consider that the Tribunal in the latter case was seeking to make a definitive finding as to the identity of the person or persons to be regarded for tax purposes as settlor or settlors of the Maclennan Trust; the statement appears in the introductory section of the decision, under the heading "Background". The settlor

issue which is central to the present appeals did not have any relevance to the matters under consideration in that case, the only appellant in which was Spring Salmon & Seafood Limited. We cannot see any basis for a Tribunal to determine matters in relation to persons other than the party or parties to the appeal before that Tribunal. Further, as Dr Williams contended, the Tribunal did not state that Messrs Thomas were not, for tax purposes, settlors at a later time. (He made the same submission in relation to both those Tribunal decisions.)

137. Thus, even if we had been persuaded that decisions in other Tribunal proceedings as to the settlor issue could be regarded for the purposes of the present appeals as res judicata, we do not consider that the comments in the decisions setting out the outcome of those proceedings amount to definitive findings sufficient to determine the settlor issue.

138. We therefore reject the challenge based on the res judicata principle.

139. Dr Williams referred to the presumption of continuity; we think that it requires some qualification in this case. Although the contract settlement dated 24 May 2004 was arrived at on the basis of liabilities attributed to Mr Thomas and Stuart Thomas as settlors, the tax years covered by the settlement were limited to the period from 1997-98 to 31 December 2003 inclusive, ie only for part of 2003-04. Messrs Thomas subsequently accepted that they were settlors for certain subsequent years, but later withdrew that acceptance.

140. Dr Williams stated that Messrs Thomas admitted that they were settlors for the years either side of 2005-06, ie 2004-05 and 2006-07. Mr Thomas responded to that submission by pointing out that in respect of 2004-05, the amounts finally agreed were nil gains under s 86 TCGA 1992, and trust income liability of £49 each. He submitted that it had been entirely reasonable for Messrs Thomas to "let sleeping dogs lie"; effectively there was no lability at all. A challenge would have involved incurring costs, and there would have been a great "opportunity cost" of which Messrs Thomas had to be aware, given the lengthy time necessary to prepare for proceedings.

141. Mr Thomas commented that the liability in respect of tax on income following the closure notices for 2006-07 had been very low indeed; the trust-related capital gains had been £8,000 each, completely covered by available reliefs. It would have been a complete waste of time to take issue with the closure notices.

142. We approach with some caution the use of the presumption of continuity; we have cited the comments of Lightman J in *Barnett v Brabyn* at p 723. There is previous determination of the settlor issue, given the contract settlement dated 24 May 2004. That related only to the years from 1997-98 to the portion of 2003-04 up to 31 December 2003. The points raised by Mr Thomas concerning 2004-05 and 2006-07 echo Lightman J's comments as to the undesirability of applying res judicata or estoppel principles to agreements under s 54 TMA 1970. However, we consider that the acceptance in the contract settlement of liabilities imposed on the basis that Mr Thomas and Stuart Thomas were settlors may be, as Lightman J acknowledged by

citing Lord Hanworth MR in *IRC v Sneath*, a cogent factor on a subsequent determination of the same question.

143. The agreement of liabilities for 2004-05 and 2006-07 appears to us to be a significantly less cogent factor. We consider this, and the implications of the contract settlement, after reviewing the other evidence concerning the settlor issue.

144. We consider first the evidence to which Dr Williams drew our attention, and then review the points put by Mr Thomas.

145. Dr Williams referred to a fax dated 1 October 1997 from Spring Salmon Ltd, signed by Mr Thomas, to Christiana Bank. This requested the bank to transfer £300,000 to Royal Bank of Scotland International, Guernsey. The name of the destination account holder was "East Asia Mentor Ltd". The reference was stated as "HGL". The transaction was reflected in Christiana Bank's statement of account to Spring Salmon Ltd.

146. A fax in similar form was sent to Christiana Bank on 24 April 1998, using the same account number and reference. Again, this was reflected in the statement of account, although under the Details" heading, the name shown was "East Aisa [*sic*] Mentor Limited".

147. Dr Williams also drew attention to the financial statements of Spring Salmon Ltd for the year ended 30 April 1998. Under the heading "Management charges", a payment to Thomas Maclennan Ltd of £740,000 was recorded. He also referred to the nominal ledger of Spring Salmon Ltd for the period ended 30 April 1998.

148. Our examination of the latter document reveals the following details. It shows, also under the heading "Management charges", a total of £800,000, the narrative being "T5 EAST ASIA". (There is a separate entry showing a sum of £240,000, against which there is an annotation "MAN CHG", giving a total of £1,040,000, from which there is a deduction of £300,000 (an amount credited to the nominal ledger under the same "Management charges" heading). The narrative against this is "X2-5 man. chg, against which there is the annotation "REPOST PROCESSING"; as a result, the management charge for the period is shown as £740,000.

149. Dr Williams argued that this evidence was sufficient to discharge any evidential burden that might rest on HMRC as to whether Mr Thomas was a settlor or donor to the Maclennan Trust. Mr Thomas would have to show that the monies concerned were not his property and that they were held in trust for another. We have already referred to Dr Williams' submissions concerning the absence of Mr Lindh to give evidence.

150. Dr Williams also commented on the unaudited financial statements for the Maclennan Trust. These implied that Mr Lindh might have put £100 into the Trust. However, that did not displace the evidence that Mr Thomas had clearly been a settlor by his action in causing monies from Spring Salmon Ltd to pass into the Trust while he was an officer of that company, notwithstanding the entry on the same page of

those statements asserting that Mr Lindh had settled two sums of £300,000 and £500,000 respectively.

151. Another document referred to by Dr Williams was a Form 41G(Trust) dated 26 February 2004 for the Maclennan Trust. This showed the trustees as Mentor Trustees Limited, and the details of the settlor as "Mr HG Lindh". Under the heading "Assets settled", three sums were mentioned, namely £100, £300,000, and £500,000. Dr Williams commented that there was an assertion that Mr Lindh was the settlor. There had been no contact between Mr Lindh and Spring Salmon Ltd at the time when the sums had been transferred from that company to the Trust; there was no evidence from Mr Lindh to show that he had been involved as settlor in relation to the sums so transferred.

152. In Dr Williams' submission it was reasonable to take the view that these two sums had not been settled by Mr Lindh, either directly or indirectly. In a fax dated 24 October 2003, Mr Thomas had accepted that there was no evidence that these sums had been paid to Mr Lindh by Spring Salmon Ltd. Dr Williams argued that the settlor of these sums could only have been Messrs Thomas, either both, or one of them.

153. In relation to the £300,000 posted in the accounts of Spring Salmon Ltd as a management charge, the Berkshire General Commissioners had found at their meeting on 15 April 2004 that this sum was not a management charge. Their Clerk wrote to Mr Thomas on 15 April 2004 (addressed to him as Company Secretary of Thomas Lindh Ltd) stating that there had been no evidence presented to the Commissioners to substantiate the claim of £300,000 by way of deduction as management costs against the profits of Spring Salmon Ltd for the year ended 30 April 1997. In Dr Williams' submission, this showed that the item had been incorrectly described in the accounts. He further submitted that the issue was res judicata.

154. Thus the evidence was that the sums of £300,000 and £500,000 were paid to EA Mentors for the Maclennan Trust on the instruction of Mr Thomas without any mention of Mr Lindh (save for the inclusion of the initials "HGL") and at Mr Thomas' behest.

155. Dr Williams submitted that HMRC had thus discharged the burden of showing that Mr Thomas was a settlor of the Maclennan Trust in the sums of £300,000 and £500,000.

156. The nest question was that of whether Stuart Thomas was a settlor. Dr Williams argued that Stuart Thomas was, with Mr Thomas, a beneficial owner of the sums of £300,000 and £500,000 as, at the material times, he was a director and Mr Thomas was the company secretary of Spring Salmon Ltd. (This was shown by the company's accounts for the year ended 30 April 1998.) Money passing from the company's account at Mr Thomas' behest in this way indicated that the money passed as a settlement to the Maclennan Trust.

157. Neither Mr Thomas nor Stuart Thomas had been a shareholder at the time when these two payments had been made, although as mentioned they had respectively been

an officer and a director of the company. Stuart Thomas had been a shareholder on 1 May 1995, as to 15,000, but as shown by the company's accounts for the year ended 30 April 1996, he was no longer a shareholder at that later date. A company return form dated 21 August 1996 addressed to Companies House, received on 10 September 1996, showed that Mr Thomas and Stuart Thomas were shareholders as at that date, the shareholdings under the heading "number of shares . . . held by existing members at date of this return" being shown as 15,000 each.

158. Dr Williams referred to s 417 TA 1988, which showed that the company secretary of a company was treated for tax purposes as if he or she was a director.

159. A Return of Allotments form dated 30 November 1995, but recorded as received by Companies House on 7 July 1997, showed that Mr Hans Lindh held 200,000 shares. That form had been signed by Mr Thomas as company secretary.

160. The accounts of Spring Salmon Ltd for the year ended 30 April 1996, which also showed details for the previous year, showed Stuart Thomas and his sister Sandra Thomas as directors. They had been shareholders in the preceding year. Mr Lindh was not mentioned at all.

161. Dr Williams referred to the accounts of Spring Salmon Ltd for the year ended 30 April 1998, and the management charge of £740,000 mentioned above. He submitted that this sum included the £500,000 that had been transferred to the Maclennan Trust. The accounts for the previous year disclosed the £300,000 as a management charge (as already mentioned), which had been considered by the Berkshire General Commissioners.

162. Dr Williams commented that, although it had been asserted in the notes to the financial statements of Spring Salmon Ltd for the year ended 30 April 1998 that ". . . the company was under the ultimate control of the holder of 100% of its ordinary share capital, Mr Hans Lindh", it should be noted and was not in dispute that the monies in the company all came from Messrs Thomas and were all eventually taken out by Messrs Thomas. A form EIS 1 showed the capital put in by Messrs Thomas (£15,000 each for £1 Ordinary Shares issued on 1 October 1994), bringing the total amount of the issued share capital to 50,000 shares. No other return showed Mr Lindh putting capital in. The company return form dated 21 August 1996 showed that Messrs Thomas and their sister Sandra Thomas (subsequently Mrs Lindh), who owned 20,002 shares, owned the company outright. This appeared to indicate that the money belonged to them.

163. It was not at all clear how the Return of Allotments form dated 30 November 1995 could be reconciled with the other reports. In his letter to Mr Lindh dated 8 September 2003, the Inspector, Mr Read, included a request for the following information:

> "Full particulars of all share transactions in which you have engaged involving shares of Spring Salmon Limited including an explanation as to the source of funds for any share purchase. Particulars are to include

> the date of each transaction, the number and class of shares involved and date and amounts of any payment made or received."

164. On behalf of Mr Lindh, Mr Thomas had given the following response:

> "The source of funds for the purchase of any asset by Mr Lindh are [*sic*] a private matter and are not relevant to his UK tax liabilities. Spring Salmon Ltd share transactions: gift to wife 200,000 £1 ordinary shares on 31/3/00."

165. Dr Williams argued that there was no evidence that a sum of £200,000 was ever paid by Mr Lindh to Spring Salmon Ltd; Mr Lindh had been a UK resident at that time.

166. The accounts of Spring Salmon Ltd for the year to 30 April 1996 indicated that there were 200,000 new shares and that the company bought 50,002 of its own shares.

167. Dr Williams submitted that the evidence was sufficient to show that both Mr Thomas and Stuart Thomas were settlors for tax purposes in respect of the sums of £300,000 and £500,000 transferred to the Maclennan Trust.

168. We turn to the matters raised by Mr Thomas. The argument put by him on behalf of himself and Stuart Thomas was that HMRC had failed to adduce any evidence that Messrs Thomas made any settlement on the Maclennan Trust, directly or indirectly, so as to bring them within the charge to tax under s 619 ITTOIA or s 86 TCGA 1992.

169. Mr Thomas referred to the unaudited financial statements of the Maclennan Trust. HMRC had relied on the accuracy of those accounts in order to arrive at the amounts assessed on him and Stuart Thomas. The notes to these statements recorded the party who had settled the funds, their (now) brother-in-law Hans Gustaf Lindh. The notes showed the initial settled funds of £100 and the additional settled funds of £300,000 and £500,000.

170. Mr Thomas emphasised the duties of provenance and probity of trustees; it would be a serious matter for them if the financial statements were not an accurate account of the transactions. He submitted that this was prima facie evidence, so that it now fell to HMRC to show that the funds had not been settled by Mr Lindh. He referred to the corresponding entries in the financial statements of the Maclennan Trust for the period from 27 August 1997 to 31 December 2003.

171. HMRC had relied on the fax sent by him at Spring Salmon Ltd to Christiana Bank requesting the transfer of the £300,000 as evidence that he and Stuart Thomas had settled the funds. Mr Thomas emphasised the reference in that document to "HGL"; this showed that the request was made in relation to Mr Lindh.

172. Mr Thomas referred to Dr Williams' arguments concerning the involvement of Hans Lindh, and submitted that HMRC had failed to displace the documentary evidence which Messrs Thomas had produced. It was simply not credible that two registered Guernsey trust companies would have signed accounts attesting to the

involvement of Mr Lindh if that had not been the correct position. Trustees assumed onerous responsibilities. Mr Thomas submitted that HMRC could not have it both ways.

173. The financial statements for the period from 27 August 1997 to 31 December 2003 stated that Mr Lindh was the "original settlor". Dr Williams had commented that such statement did not say more concerning the argument as to involvement of other persons, the inference being that there were other settlors. He had sought to add gravity by stressing that the document had been provided by parties with no interest in this dispute. The implication of Dr Williams' comment was that these financial statements were accurate and objective, and acknowledged that Mr Lindh was one of several settlors.

174. Mr Thomas submitted that, if HMRC's position was that they accepted that neither he nor Stuart Thomas was a shareholder at the time of the transfers of the funds, and that these sums were not emoluments, it must follow that they were attributable to Mr Lindh as shareholder. Contrary to the case being put by HMRC, these sums were payable to Mr Lindh.

175. We have reviewed the evidence referred to by Dr Williams and find that such evidence supports HMRC's prima facie case for the making of the assessments. We also consider that the acceptance by Messrs Thomas that for the periods from 1997-98 up to 31 December 2003 that they were liable under the relevant settlor provisions is an evidential factor in support of HMRC's prima facie case; we discount the acceptance by Messrs Thomas of the position for 2004-05 and 2006-07 on the basis that the amounts of tax involved were not considered sufficient to justify challenges to the use by HMRC of the settlor provisions for those tax years. As we have already commented, following the establishment by HMRC of a prima facie case in relation to the settlor question, it then falls to Messrs Thomas to satisfy us that the assessments should not stand; this in turn requires them to demonstrate to us that the evidence relied on by HMRC to arrive at the conclusion that they were settlors for tax purposes does not, on the balance of probabilities, support that conclusion.

176. In relation to the question whether Stuart Thomas was for tax purposes a settlor, the linkage between him and the payments is arguably less direct. However, in the fax dated 24 October 2003 to Mr Read, Mr Thomas had stated his acceptance that there was no evidence that the sums of £300,000 and £500,000 had been paid to Mr Lindh by Spring Salmon Ltd. Following that statement, the fax continued:

> "(I know that Spring Salmon Ltd have already provided you with particulars stating that these sums were payable and paid to Thomas Maclennan Ltd and the company's audited accounts attest to this)."

177. The evidence before us contains some information concerning Thomas Maclennan Ltd. According to a letter to HMRC dated 3 December 1998 from that company's accountants (the same firm as that dealing with the accounts for Spring Salmon Ltd), Thomas Maclennan Ltd had commenced trading on 1 April 1996. They enclosed a profit and loss account showing that for the year ended 31 March 1997 the company had received fees of £275,000; after deducting expenses including staffing

costs of £276,923, the loss for the period had been £6,068. In a letter to HMRC dated 25 November 1998, Mr Thomas said:

> ""I refer to the notice of assessment issued 9-9-98 and to our recent telephone conversation. As I explained my sister has resigned as the sole director of the above company: she is heavily pregnant. On reviewing the company's affairs I noted that the matter of the assessment requires to be resolved although the company has never traded profitably. In accordance with our conversation I respectfully request that you allow a late appeal against the assessment and postpone payment of tax.
>
> . . .
>
> Finally, since the company is no longer trading, I am making a formal application to Companies House to have the company struck off in due course."

178. The accounts of Spring Salmon Ltd for the year ended 30 April 1997 contain the following entries under the note headed "Related party disclosures":

> "The company is under the ultimate control of the holder of 100% of its ordinary share capital, Mr Hans Lindh.
>
> During the year the following transactions took place with related parties etc.:
>
> - The company was charged £300,000 (1996 - £nil) for management charges supplied by Thomas Maclennan Ltd. Mr S Thomas, a director of Spring Salmon Ltd, is the owner of 30% of the ordinary shares in Thomas Maclennan Ltd. At 30 April 1997, £300,000 (1996 - £nil) was owed to Thomas Maclennan Ltd in respect of these charges."

179. A profit and loss account in respect of Thomas Maclennan Ltd for the period 1 April 1997 to 5 September 1997 shows that it received fees of £765,000; after charging expenses, including "Staffing costs" of £768,077, it made a loss for the period of £7,380.

180. Neither of the profit and loss accounts for Thomas Maclennan Ltd shows any additional information concerning the staffing costs; it is therefore not possible to identify which individual or individuals concerned with that company received the payments.

181. There is no indication of the reason for the preparation of a profit and loss account for the shortened period to 5 September 1997. This date preceded the transfer of £300,000 from Spring Salmon Ltd on 1 October 1997, and the later transfer from that company on 24 April 1998. No profit and loss account for Thomas Maclennan Ltd in respect of any later period was included in the evidence, and it is therefore not possible for us to establish the precise relationship between the amounts shown in the two profit and loss accounts as "Fees received" and the amounts shown in the accounts of Spring Salmon Ltd as "fees for management services supplied by Thomas Maclennan Ltd".

182. Thus in the absence of any further information to show that the funds belonged to any other person or persons, we are drawn to the conclusion that, given his 30 per cent shareholding in Thomas Maclennan Ltd, Stuart Thomas had at least some interest (directly or indirectly) in the sum of £300,000 transferred to East Asia Mentor Ltd on 1 October 1997. The position is the same for the sum of £500,000 transferred to East Asia Mentor Ltd on 24 April 1998.

183. Mr Thomas relied on the unaudited financial statements of the Maclennan Trust showing Mr Lindh as settlor in respect of the original sum of £100 and the additional sums of £300,000 and £500,000. We do not consider the relevant entries in these statements to be persuasive, as they related only to the question of who was to be regarded for the purposes of the law governing the Trust as the settlor, and took no account of the legislation in the UK treating persons as settlors in defined circumstances involving the provision of funds to a settlement.

184. The question of the 200,000 shares in Spring Salmon Ltd raises a similar issue. Leaving aside the lengthy delay between the date on the Return of Allotments form and the date of receipt of that form by Companies House, there is no evidence to show that Mr Lindh paid £200,000 so as to become beneficial owner of the 200,000 £1 shares, even if he was registered as the legal owner of that number of shares.

185. Although Dr Williams referred to Mr Lindh as having been resident at the time of the Return of Allotments form, the position is not clear because of the delay between the dating of that form and its receipt by Companies House. The address for Mr Lindh given in that form was in Sweden. Mr Thomas made comments in the course of presenting his case to us to the effect that Mr Lindh had been resident in the UK for a period, but those comments did not constitute evidence and in any event did not indicate the periods for which Mr Lindh had been resident in the UK or those for which he had not been so resident. Other than the form, the only documentary evidence showing an address for Mr Lindh was a letter dated 8 September 2003 from the previous Inspector of Taxes, Mr Read, to Mr Lindh at a UK address; subsequently, correspondence in respect of Mr Lindh was exchanged between Mr Thomas (on Mr Lindh's behalf) and Mr Read in October and November 2003.

186. The basis on which Mr Thomas put the case for Messrs Thomas on the settlor issue was in our view misconceived, given the need for them to show on the evidence that, on the balance of probabilities, the prima facie case put by HMRC in support of the "settlor" argument should be rejected by the Tribunal. As a result, neither Mr Thomas nor Stuart Thomas gave evidence to counteract the submissions made on behalf of HMRC, nor did they call on Mr Lindh to give evidence for the purpose of establishing, in support of their case, that for tax purposes he was the one and only settlor of the Maclennan Trust. Mr Thomas did not refer to any documentary evidence in support of the proposition that they were not settlors and that the sums of £300,000 and £500,000 had been additional amounts settled by Mr Lindh, other than the use of the initials "HGL" as the reference in the faxes to Christiana Bank instructing the latter to transfer the sums to the account of East Asia Mentor Ltd at Royal Bank of Scotland International, Guernsey.

187. We do not consider the use of these initials to be a factor of any significant weight in establishing whether Mr Lindh was in any way involved in the transfers. Without further evidence to demonstrate his connection with the transfers, we are not persuaded that these initials show him to have been the settlor in respect of the £300,000 and the £500,000.

188. In the absence of evidence to satisfy us to the contrary, we find that Messrs Thomas have not discharged the burden of proof in respect of the settlor issue, and consequently we conclude that they were for tax purposes settlors of the Maclennan Trust as a consequence of the transfers of £300,000 and £500,000 made on 1 October 1997 and 24 April 1998 respectively.

The quantum issue

189. The additional amount assessed on Mr Thomas by means of the discovery assessment for 2005-06 dated 1 April 2010 was £73,407.80. The additional amount assessed on Stuart Thomas by means of the discovery assessment for 2005-06 dated 1 April 2010 was £83,229.10.

190. Mr Thomas submitted that, if the Tribunal found that Messrs Thomas were liable pursuant to the discovery assessments, the following part of a paragraph in HMRC's Statement of Case should be taken into account:

> "The Respondents accept that the assessment issued to Mr SJ Thomas includes two further amounts of further income of £1,460 while that for Mr RC Thomas includes the 1 amount of £1,460. The trust income (one third of the trust income on a time basis in the 3 year period to 31 December 2006) and capital gains assessed is estimated based on information then available for 2005/06. The assessment of trust income and capital gains for both Appellants is to be amended accordingly if and when the actual trust income and gains for 2005/06 is determined on appeal. The Appellants have, since the issue of the assessments advised that capital gains of £8,084 to 31 December 2006 arose after 6 April 2006 for the purposes of determining the appeals for 2006/07. Those gains are included in the assessment of capital gains for 2005/06 that will be amended on determination of the appeals."

191. As a separate matter, Mr Thomas invited the Tribunal, if it were to find that Messrs Thomas were liable, to find that Mr Lindh was also a settlor and that the assessment should be in relation to thirds of the relevant amounts, so that the assessments on Messrs Thomas should be reduced accordingly.

192. Dr Williams did not make any submissions either in relation to the paragraph in HMRC's Statement of Case or as to partial attribution to Mr Lindh.

193. We are satisfied that it is appropriate to make the adjustments set out in the paragraph of HMRC's Statement of Case which is reproduced above.

194. In relation to the "one-third attribution" argument put by Mr Thomas, we are not persuaded that this course is appropriate; we set out our reasons in the following paragraphs.

195. Although Dr Williams referred throughout to s 660A TA 1988, the applicable provisions for 2005-06 were ss 619 and 624 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA 2005"). The situation where there is more than one settlor is dealt with by s 644 ITTOIA 2005, the relevant parts being sub-sections (1) to (3) inclusive:

> "**644 Application to settlements by two or more settlors**
>
> (1) In the case of a settlement where there is more than one settlor, this Chapter has effect in relation to each settlor as if that settlor were the only settlor.
>
> (2) This works as follows.
>
> (3) In this Chapter, in relation to a settlor—
>
> (a) references to the property comprised in a settlement include only property originating from the settlor, and
>
> (b) references to income arising under the settlement include only income originating from the settlor."

196. Thus, on the basis that the total of £800,000 transferred to the Maclennan Trust falls to be treated as having been jointly provided by Messrs Thomas, a literal construction of s 644 would result in them each being treated as a settlor in respect of £800,000. HMRC have not sought to pursue liability on that basis, and have instead apportioned the liability as to 50 per cent to each of Mr Thomas and Stuart Thomas. This seems to us to be an appropriate basis for applying s 644 in the present circumstances.

197. As the section attributes liabilities to settlors by reference to property originating from the settlor, the "one-third attribution" suggested by Mr Thomas cannot be applied. On the basis that Mr Lindh was a settlor only as to the original sum of £100, on which there is no evidence beyond the entry under the relevant heading in the financial statements provided for the Maclennan Trust, the proportion attributable to Mr Lindh based on £100 out of the total of £800,100 would be negligible.

198. The legislation which we have just considered applies only for the purposes of tax on income. The position for capital gains tax purposes is governed by s 86 TCGA 1992 and related provisions. This contains a similar reference to "the settled property originating from the settlor". No specific attribution rules appear in the version of the legislation applicable for 2005-06; we consider that in practice, the approach taken by HMRC in arriving at the attribution as to 50 per cent each of the gains is a fair and reasonable one, for reasons similar to those referred to above in the context of ss 619 and 624 ITTOIA 2005. Again, the effect of the original £100 shown in the financial statements as having been provided by Mr Lindh is negligible, even allowing for the much more substantial level of the capital gains.

199. As to the total amount of those gains assessed, Messrs Thomas have provided no evidence to us to demonstrate that the figures derived by HMRC from the unaudited financial statements should be adjusted in any way, and therefore there is no basis on which we have any reason to amend the amounts assessed other than by making the adjustments referred to in HMRC's Statement of Case.

200. Subject to the making of those adjustments, we find that the assessments should stand as made.

Loss relief

201. Mr Thomas argued that various loss reliefs had not been taken into account in arriving at the amounts of tax charged on him and on Stuart Thomas as a result of the discovery assessments.

202. In their Notices of Appeal, Mr Thomas and Stuart Thomas included the following as one of their grounds for appeal :

"HMRC have made no allowance for losses brought forward."

203. The parties' submissions on loss relief took up a significant part of the hearing. However, the parties did not raise the question of the jurisdiction of the Tribunal to consider the question of the allowance for losses.

204. For a matter to be considered on appeal by the Tribunal, the fundamental starting point is that the Tribunal, as a statutory body, must have jurisdiction. The Tribunal's jurisdiction is not unlimited; it can only deal with matters in respect of which it is authorised by legislation to do so.

205. Each of these appeals was against a discovery assessment dated 1 April 2010. The tax calculations attached to each of the assessments contained no references to losses. However, as just mentioned, the subject of losses brought forward was raised as a ground of each appeal.

206. The absence from the discovery assessments and supporting tax calculations of any reference to losses brought forward means that, in respect of the decisions dated 1 April 2010 as referred to in the Notice of Appeal forms under the heading "Details of the decision(s) you are appealing", there was no basis for either Mr Thomas or Stuart Thomas to raise the issue of relief for losses as part of their appeals.

207. At the hearing, Mr Thomas explained that HMRC had recently agreed certain loss relief claims in respect of himself and Stuart Thomas; he referred to other loss relief claims which each of them had made. For the reasons given below, we do not consider it necessary or appropriate to set out the details of the respective claims.

208. Dr Williams referred to a number of documents concerning the loss relief claims. On the basis of his submission that the estimated assessments should be confirmed, subject to adjustment as referred to above, he gave an undertaking on behalf of HMRC that HMRC would investigate the loss relief claims.

209. It appears to us from the respective parties' submissions that there is no confirmed decision by HMRC in relation to the loss claims made by Mr Thomas and Stuart Thomas.

210. For there to be an appealable matter in relation to the loss relief claims, it is necessary both that there should be a decision (or a number of decisions) by HMRC to refuse loss relief, and that such refusals should constitute matters in respect of which the applicable legislation provides the taxpayer with a right of appeal to the Tribunal. In the absence of any confirmed decision by HMRC in relation to the loss relief claims (that absence being evidenced by HMRC's undertaking to investigate those claims), the first of these preconditions is not fulfilled, and we therefore consider it unnecessary to address the question whether the relevant legislation referred to by Mr Thomas provides rights of appeal in respect of the various forms of loss relief sought by him and Stuart Thomas.

211. As the loss relief claims fall outside our jurisdiction, we make no further comment on them.

Outcome of the appeals

212. Subject to the adjustments referred to above in relation to the quantum of the assessments, we confirm those assessments and dismiss the appeals of Mr Thomas and Stuart Thomas.

Procedural matters

213. We have made brief reference to the decision of the Edinburgh Tribunal in *Spring Salmon & Seafood Limited v Revenue and Customs Commissioners* [2014] UKFTT 887 (TC), TC04002, as cited in Judge Brannan's Decision. Judge Brannan cited a brief extract from the Edinburgh Tribunal's decision at [26]; it appears to us that the comments in the remainder of that paragraph may equally be applied in relation to the present appeals. It would certainly have been of very considerable assistance to us to have an agreed statement of facts.

214. The reason given by Dr Williams at the hearing for the late tendering of a witness statement given by Mr Stewart was that as the members of this Tribunal panel had had no previous involvement with appeals relating to Messrs Thomas or companies with which they had some involvement, it would be a convenient way of explaining to the Tribunal the background to the matters in dispute in relation to these appeals.

215. Dr Williams apologised on behalf of HMRC for having sought on 18 November 2015 to lodge that witness statement, which the present Judge had refused to admit.

216. The reasons for that refusal were the following. In an email response (dated 24 November 2015) to HMRC's application, Mr Thomas referred to the Directions issued on 2 January 2015, which had required HMRC to submit their witness

statement by 30 January 2015 at the latest. Mr Thomas commented that the witness statement

> ". . . raises a whole raft of issues in relation to which the appellants require to seek advice. It may be that as a consequence of the issues raised the appellants would require to instruct counsel. It may be that the anticipated duration of the hearing will be affected."

He mentioned the recent agreement by HMRC concerning the utilisation of Capital Gains Tax losses, and indicated that this might well have a significant bearing on how Messrs Thomas would wish to proceed. In all the circumstances, he asked for the hearing listed to commence on 9 December 2015 to be cancelled.

217. The present Judge considered the application and the terms of the witness statement. He considered it undesirable for the hearing to be cancelled or postponed, particularly bearing in mind the considerable time since the lodging of the appeals and the longer period since the events in issue, and he also thought that the introduction of the witness statement might well have a significant effect on the way in which the hearing would be conducted. He further took the view that the matters referred to in the witness statement could be dealt with by reference to the documentary evidence, without need for that statement. He therefore refused to allow the application for it to be admitted in evidence.

218. We think that the process of dealing with these appeals would have been far less complex and burdensome for us if, by the times specified in the Directions, it had been agreed that witness statements were to be given both for HMRC and by Mr Thomas and Stuart Thomas. In putting HMRC's case to us, Dr Williams emphasised the difficulties caused by the absence of evidence from those involved in the protracted disputes and negotiations attempting to resolve those disputes.

219. Our experience in considering the documentary evidence has been similar to that of the Edinburgh Tribunal in *Spring Salmon & Seafood Limited* and of Judge Brannan in relation to his Decision. It has proved necessary for us to engage in a complex and detailed review of the documentary evidence to seek to discover matters which might have been much clearer and more easily evident had those involved in the relevant events been prepared to give evidence. We accept that Messrs Thomas may have had their reasons for not doing so, and we do not read anything into their having chosen not to give evidence, but we consider that the respective parties' cases would probably have been much more clearly presented if this had been done with the benefit of witness evidence and a properly agreed statement of facts. Although the hearing was listed for three days, it lasted for somewhat less than half that time, of which a significant proportion was devoted to the loss relief claims; if more time had been devoted to clear analysis of the evidence, our task might well have been rather less onerous.

220. We hope that Messrs Thomas will take these comments into account in relation to any other Tribunal appeals with which they may become involved.

Right to apply for permission to appeals

221. 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.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 25 FEBRUARY 2016