[2016] UKFTT 0356 (TC)

TC05031

Appeal number: TC/2015/02046
TC/2015/02043
TC/2015/02041

PROCEDURE – Respondents' application to amend Statement of Case – supported by evidence – Appellants' unsupported application to amend their Grounds of Appeal – reasons for making application and for any delay – whether permission should be granted in either case – yes and no

DISCOVERY ASSESSMENT – whether the requirements in Sections 29 and 34 Taxes Management Act 1970 were satisfied – yes – whether Respondents prevented from raising assessment if discovery under Subsection 29(5) had grown "stale" – no

FIRST-TIER TRIBUNAL
TAX CHAMBER

TERSAM GAKHAL **Appellant**

- and -

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

AJIT GAKHAL **Appellant**

- and -

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

SOHAN PAWAR **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY
MR WILLIAM SILSBY

Sitting in public in Birmingham on 1 April 2016

Robert Grierson, of counsel, instructed by Spencer Gardner Dickins, for the Appellants

Marika Lemos, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

Introduction

1. By Notices of Appeal filed with the Tribunal on 26 February 2015, Mr Tersam Gakhal (the "First Appellant"), Mr Ajit Gakhal (the "Second Appellant") and Mr Sohan Pawar (the "Third Appellant") each appealed against the Respondents' review decisions, dated 2 February 2015, to uphold the raising of discovery assessments under Section 29 Taxes Management Act 1970 ("TMA 1970"). Those assessments, two dated 22 December 2009 and one dated 21 January 2010, were raised to recover income tax in the sum of approximately £130,000 said to be due from each Appellant for the tax year 2003/04.

Background to this appeal

2. In the tax year 2003/04, the Appellants were all employed by Aeroplas (UK) Limited, and (together with one other person, now deceased) were the sole shareholders and directors of Aeroplas Holdings Limited, the parent company of Aeroplas (UK) Limited. On 15 December 2003, Aeroplas (UK) Limited set up a Funded Unapproved Retirement Benefit Scheme ("FURBS") for each of the Appellants. Once each FURBS had been set up, Aeroplas (UK) Limited made a contribution of £10,000 into each FURBS. This contribution was declared in each of the Appellants' personal tax returns for the year 2003/04.

3. On 30 December 2003, Aeroplas Holdings Limited increased its share capital by the creation of 20 "A" shares at £1 each. These shares ranked behind the ordinary shares held by the Appellants. The trustees of each FURBS successfully applied to buy 5 "A" shares in Aeroplas Holdings Limited for a total cost of £1,000. Also on 30 December 2003, an interim dividend of £100,000 was declared on the "A" shares, resulting in £25,000 being paid to each FURBS. On 16 March 2004 a final dividend of £2million was declared on the "A" shares resulting in £500,000 being paid to each FURBS. No dividend was declared on the ordinary shares held by the Appellants. The dividend income received by each FURBS in the year 2003/04 was accordingly £525,000. This was declared on the Trust and Estate tax return submitted for each FURBS for the year 2003/04. No mention was made of this dividend in the personal tax returns of the Appellants.

4. On 19 January 2006 an enquiry was opened into the Trust and Estate return of the FURBS for each of the First, Second and Third Appellants. Correspondence relating to these enquiries continued between the Respondents and the Appellants' agent for a considerable period with the Respondents requesting, and the agent providing, additional material. (This is set out in more detail in paragraph 77 below.)

5. On 22 December 2009 a discovery assessment for 2003/04 was raised on each of the First and Second Appellants. On 21 January 2010 a discovery assessment for 2003/04 was raised on the Third Appellant.

6. On 18 January 2010 the First and Second Appellants each appealed against the discovery assessments raised. On 3 February 2010 the Third Appellant appealed against the discovery assessment raised against him. The ground of appeal provided for each of these appeals was that the enquiry into the return was not yet concluded, and so liability to tax was not yet established. The grounds of appeal for all three Appellants were extended on 4 February 2010 to argue that there was no liability under the settlements legislation, that the arrangements were treated in the returns in accordance with the practice generally prevailing at the time, and that neither of the conditions in Subsection 29(3) TMA were met.

7. Correspondence continued between the parties. Eventually closure notices, closing the enquiry into each of the Appellants' FURBS' returns, were issued on 20 October 2014. No amendments were made to the Trust and Estate returns. The Appellants sought a review of the Respondents' conclusions. On 2 February 2015 the Respondents issued a review decision to each Appellant, upholding the conclusion that liability lay with the Appellants personally, that no amendments were required to the Trust and Estate returns, and upholding the discovery assessments raised against each of the Appellants.

Chronology of the appeal

8. On 26 February 2015 each Appellant filed a Notice of Appeal against the Respondents' review decision of 2 February 2015.

9. On 1 May 2015 the Respondents served a Statement of Case for each Appellant and sought a direction joining the three appeals. On 16 June 2015 the Respondents served their list of documents for each appeal.

10. On 23 June 2015 the appeals of the First and Second Appellants were joined and Directions issued for the preparation of the appeals for hearing. Witness Statements were directed to be served by 28 August 2015, with simultaneous exchange of skeleton arguments no later than 14 days before the hearing. The Appellants' agent confirmed on 1 August 2015 that the Appellants were content to rely upon the Respondents' list of documents, and would not be providing an additional list.

11. On 17 August 2015 the Respondents applied for consecutive exchange of witness evidence on the basis that they could not respond until they had seen the Appellants' evidence. On 5 October 2015 the Appellants were directed to serve their witness evidence by return, with the Respondents to serve any witness evidence in response within 28 days. Also on 5 October, the appeal of the Third Appellant was joined to the appeals of the First and Second Appellants.

12. On 22 October 2015 the Appellants' agent wrote to the Tribunal to state that the Appellants did not intend to serve any witness evidence but that they would serve their Statement of Case 14 days before the hearing, as originally directed. On 6 November 2015 the Respondents sought a further revision to the Directions, requesting consecutive exchange of skeleton arguments. The Appellants objected.

13. On 27 November 2015 the Tribunal directed that all parties serve their skeleton arguments no later than 28 days before the hearing, with the option to serve an additional skeleton in response no later than 14 days before the hearing. The hearing was then listed to be heard on 1 April 2016, crystallising the dates directed for exchange of skeletons as 4 March and 23 March 2016 respectively.

14. On 11 March 2016 the Appellants served their Outline of Case, and the Respondents served their Skeleton argument.

15. Following receipt of the Appellants' Outline of Case, it became clear to the Respondents that the Appellants wished to challenge the validity of the discovery assessments on the basis that the returns were completed in accordance with a practice generally prevailing and so the condition in Section 29(2) TMA 1970 was satisfied. Although there had been reference in the Appellants' expanded grounds of 4 February 2010 to Subsections 29(2) and (3), there had been no reference to any part of Section 29 in subsequent correspondence or in the Appellants' Grounds of Appeal to the Tribunal.

16. The Respondents had not set out a positive case in respect of the discovery assessments in their Statement of Case. Once they received the Appellants' Outline arguments, and bearing in mind the decision of the Upper Tribunal in *Burgess and Brimheath Developments Limited* [2015] UKUT 578 (TCC), the Respondents took the view that they might need to amend their Statement of Case. The Respondents required permission to make this precautionary amendment so, on 15 March 2016, they filed an application, supported by a witness statement, to amend their Statement of Case to include a positive case in respect of the discovery assessments. The Tribunal directed that this application would be granted unless there was an objection from the Appellants.

17. On 23 March 2016 the Appellants filed a Response to the Respondents Skeleton argument, and also filed a document entitled "Appellants' Skeleton Argument and Response to Respondents Statement of Case and Skeleton Argument" which pulled together the points made in the Outline of Case and their Response. The Appellants also filed their objection to permission being granted to the Respondents' application.

18. In emailed correspondence to the Appellants' agent, the Respondents pointed out that the Appellants would also need to make an application for permission to amend their grounds of appeal if they wished to rely on Subsection 29(2) TMA 1970 to challenge the validity of the assessment.

19. Being concerned that it would not be possible for the necessary applications, issues relating to the discovery assessments and the substantive issues all to be addressed in a one day hearing, on 23 March 2016, the Respondents sought Directions that the substantive hearing listed for 1 April 2016 be confined to a hearing of the applications to amend and the issues raised in relation to the discovery assessments.

20. By Directions released on 24 March 2016, the Tribunal acceded to the Respondents' application. It was directed that the hearing on 1 April 2016 would be confined to the following issues:

a) a hearing of the Respondents' application dated 15 March 2016 to amend their Statement of Case;

b) if the Respondents' application is successful, a hearing on whether the condition in Section 29(5) TMA 1970 has been satisfied in relation to the relevant discovery assessments;

c) a hearing of any application by the Appellants to:

i. amend their grounds of appeal to include the argument that the condition in Section 29(2) TMA 1970 is satisfied, and

ii. be permitted to adduce evidence in support of such argument;

d) if the Appellants' application is successful, a hearing on whether the condition in Section 29(2) TMA 1970 has been satisfied in relation to the relevant discovery assessments; and

e) the determination of case management Directions to be issued in relation to the remainder of the appeal.

The hearing on 1 April 2016

21. We heard submissions from the parties on the issues set out above in more or less the order set out in the Directions of 24 March 2016. In the event the Appellants' application was to amend the grounds of appeal to include arguments on Subsection 29(2) TMA 1970 and also to include three other points relating to the substantive issues. As these points had not been raised in correspondence with the Tribunal, the Directions of 24 March 2016 did not anticipate the possibility of the Appellants seeking to amend their substantive case as well as their case in relation to the discovery assessments. The Appellants' application, insofar as it relates to the proposed new substantive grounds of appeal, is addressed below when we consider the appropriate case management.

Decision in respect of the applications to amend

22. We first address the issues common to the parties' applications to amend and then consider each application, which necessitates a brief consideration of the prospects of success of the proposed new case. After determining the applications, we consider any arguments admitted before us in relation to Section 29 TMA 1970. Finally we address the other points raised in discussing the appropriate case management of this appeal.

23. It will be necessary to make reference to Sections 29 and 34 TMA 1970 as they applied in 2009/10. The relevant parts of that legislation are set out in the Annex to this decision.

Applications for permission to amend a document

24. It is clear that the Tribunal has the power to allow a party to amend its case. This is set out in Rule 5(3)(c) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("Procedure Rules") which provides:

> **5.**—(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
>
> (c) permit or require a party to amend a document;

25. Rule 2(3) of the Procedure Rules requires us to give effect to the over-riding objective when exercising any power under the Rules. The over-riding objective, as set out in Rule 2(1), is as follows:

> **2.**—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.

26. Following the decision of the Court of Appeal in *BPP Holdings v HMRC* [2016] EWCA Civ 121 we consider it acceptable for the Tribunal to have regard to the approach adopted under the Civil Procedure Rules as useful guidance when considering how to proceed in the Tribunal. In the recent decision of this Tribunal in *Moreton Alarm Services (MAS) Limited v HMRC* [2016] UKFTT 192 (TC), concerning an application made on the first day of the substantive hearing to amend the Respondents' Statement of Case, the Tribunal adopted a similar approach.

27. In *Moreton Alarm Services* the Tribunal considered and applied the principles set out in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm). *Quah* concerned an application by the claimant, made three weeks before the first day of the trial, to amend her particulars of claim. At paragraphs 36 to 38 of *Quah*, Mrs Justice Carr set out the relevant principles in determining whether permission to amend should be granted:

> 36. An application to amend will be refused if it is clear that the proposed amendment has no real prospects of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation.
>
> 37. Beyond that, the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities : *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735 (at paras. 69 to 72, 85 and 106); *Worldwide Corporation Ltd v GPT Ltd* [CA Transcript No 1835] 2 December 1988; *Hague Plant Limited v Hague* [2014] EWCA Civ 1609 (at paras. 27 to 33); *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 928 (QB) (at paras. 4 to 7 and 29); *Durley House Ltd v Firmdale Hotels plc* [2014] EWHC 2608 (Ch) (at paras. 31 and 32); *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.
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> 38. Drawing these authorities together, the relevant principles can be stated simply as follows:
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> > a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
> >
> > b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
> >
> > c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial

date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.

28. In her submissions on behalf of the Respondents, Ms Lemos took us to extracts from the White Book on civil procedure, setting out guidance in relation to the Civil Procedure Rules ("CPR") Part 17.3 (concerning amendments to statements of case) and CPR Part 24 (concerning the grounds for summary judgment).

29. Applying the principles set out in *Quah* to the two applications before us, we consider the factors which we should take into account here are:

a) Whether the proposed new ground has real prospects of success (and if it does not then that is determinative of the application);

b) The reasons given as to why the application is made now and the explanation given for any delay in making the application;

c) The prejudice which might be caused to the other party if the application is permitted (recognising that there is a limited costs regime and so it would not ordinarily be possible for an award of costs to be made); and

d) The prejudice which might be caused to the applicant if the application is refused.

30. In weighing those four factors our principle objective is to deal with the case fairly and justly.

31. We do not ignore the comments in *Quah* that a heavy burden lies upon an applicant who comes very late in the day to seek permission to amend, and that any application which causes the substantive hearing date to be lost should be considered as being very late. Here the day which was to have been spent hearing the substantive appeals was spent hearing both parties applications to amend and upon case management. Therefore both parties' applications are brought very late and the loss of the substantive hearing date has inconvenienced the Tribunal and other Tribunal users.

32. However, as both parties wish to amend, we do not consider that either party has caused the other party injustice by the loss of the substantive hearing date; any injustice which might have been done has been outweighed by the opportunity which the loss of the substantive hearing date creates for the other party to make its own application.

The Respondents' application to amend their Statement of Case

33. We look first at the Respondents' application. The proposed amendments to the Respondents' Statements of Case set out Sections 29 and 34 TMA 1970 as they applied in 2009/10, and insert the following paragraph:

> HMRC will say that the requirements for issuing a discovery assessment under section 29 TMA 1970 were met in this case. An officer of HMRC formed the view that there was an insufficiency of tax in the Appellant's tax return for 2003/04. An officer of HMRC could only become aware that there was a probable insufficiency of tax assessed for that year following information received as a result of an enquiry into separate, unlinked Trust and Estate Tax Returns for 2003/04.

34. The Appellants object to the Respondents being granted permission to amend on the basis that they would suffer prejudice if permission were granted. We consider prejudice below.

<u>Is there a real prospect of success?</u>

35. We consider first the prospects of success. We note that the proposed amendment is to enable the Respondents to make a positive case concerning the validity of the assessments. That positive case concerned whether there was an insufficiency in the Appellants' self-assessments, whether the officer of the board could have been expected to be aware of the insufficiency before the time he ceased to be able to enquire into the Appellants' returns, and (implicitly, given the inclusion of Section 34 and reference to the requirements being met) whether the discovery assessments were raised within the time allowed under Section 34 TMA 1970. The

proposed amendment was supported by a witness statement given by Ms Whittam, the officer who handled the enquiry into the Trust and Estate tax returns, and extensive exhibits.

36. Applying the test applicable for summary judgment, we consider not whether it is probable that the Respondents' proposed new case would succeed but whether there is absence of reality to the Respondents' case. The case is not obviously bad in law and whether it will succeed will largely depend on the view taken of the evidence presented. The evidence upon which the Respondents will rely is already available, is apparently coherent and credible, and the Respondents do not rely upon the possibility of further evidence coming forward at a later date. We conclude that the Respondents' case does have a real prospect of success.

The reasons for the application and for any delay

37. We look next at the reasons for the application and any delay in bringing the application. The Respondents' Statements of Case (one for each Appellant) were filed on 1 May 2015. Their application to amend was made on 15 March 2016. The Respondents submitted that their application was made as a result of the Appellants putting arguments concerning the validity of the discovery for the first time in their Outline of Case, filed on 11 March 2016, combined with developing case law, i.e. the Upper Tribunal decision in *Burgess*. In response the Appellants submitted that there had already been substantial delay in relation to this matter as the assessments were raised in 2009/10 and they are in respect of the tax year 2003/04.

38. The decision in *Burgess* was released on 27 October 2015. We note that it would have been possible for the Respondents to have made their application to amend at any point from that date. However, we accept the Respondents' explanation that it took some time for them to digest the decision and, particularly, to understand which appeals would be affected. We consider that the issue came into sharp focus for the Respondents in relation to this appeal upon receipt of the Appellants' Outline of Case on 11 March 2016.

39. We do not consider that an interval of four days between receipt of the Appellants' Outline of Case and the filing of the application can be described as delay. We find that once the Respondents had appreciated that the Statements of Case in this appeal required amendment, they acted promptly in applying to the Tribunal. The Respondents made an attempt to seek the consent of the Appellants to the amendment. The Appellants' consent was not forthcoming; at that point that seemed to be due to the Respondents' lack of consent to the Appellants' own (not at that stage made) application.

40. We conclude that the Respondents have provided a good explanation for why the application could not have been made earlier. We find that the factors which motivated them to make the application were external and outside their control. We find that the Respondents acted promptly once they became aware of the need to make the application.

The prejudice caused to each party

41. We consider the prejudice which would be caused to the Appellants if we permit the Respondents' application, and the prejudice which would be caused to the Respondents if we refuse their application. The Respondents submitted that there would be no prejudice caused to the Appellants as the Appellants wished to make an application of their own. The Appellants submitted that they would be prejudiced because, if permission was not granted, then the long running appeals would be concluded in their favour.

42. In *Burgess* the Upper Tribunal concluded at paragraph 46 that:

> For HMRC to succeed before the FTT, either the competence and time limit issues had to be determined in their favour, or those issues had to have been conceded by the appellants.

43. In this case it appears that until receipt of the Appellants' Outline of Case, the Respondents did take the view that the competence and time issues relating to the discovery assessments had been implicitly conceded. The question of whether the assessments were raised within the time permitted by Section 34 TMA 1970 had never been raised; the questions over whether there was a practice generally prevailing, or if either of the conditions in Subsection 29(3) had been met, had been raised in the 4 February 2010 letter extending the grounds of appeal but both points were then apparently dropped. When the Appellants' Outline of Case was received it became clear that the Appellants wished to put in issue two different grounds relating to Section 29: the first ground concerned the "staleness" of the assessments; the second ground was that there was a practice generally prevailing, within the meaning of Subsection 29(2), an issue upon which the Appellants have the burden of proof.

44. In these circumstances we consider that if neither party's application was to be permitted then it is at least arguable that the implicit concession of the Appellants as to the time and competence issues remains in place. Therefore we do not agree that it is a foregone conclusion that the Appellants would be successful on appeal if neither application to amend was permitted. However, that is certainly a possible outcome.

45. So, if the Respondents application is permitted, the Appellants would lose the possibility of succeeding by default. Judging by the absence of any reference to *Burgess* in the Appellants' Outline of Case, that would appear to be a possibility of which the Appellants were not aware until the Respondents' application was made. Conversely, if the application is refused, the Respondents would have to argue that there was an implicit concession in relation to the validity of the discovery assessments (which would involve more time and expense on the part of both parties) or lose the opportunity for the substantive issues to be aired. Both parties have already expended time and resources in preparing for a hearing of the substantive dispute.

The over-riding objective

46. We balance our conclusions in relation to these four factors and bear in mind the over-riding objective to deal with matters fairly and justly. In particular we bear in mind the need to ensure, so far as practicable, that the parties are able to participate fully in the proceedings. Here we consider that the Respondents' proposed amendment has real prospects and that the application was brought without delay. Although the Appellants would lose the possibility of succeeding by default if permission is granted, we consider that the balance of the factors is in favour of the Respondents in this case.

47. We conclude that the Respondents should be given permission to amend their Statement of Case in the manner sought in their application dated 15 March 2016.

The Appellants' application to amend their grounds of appeal

48. The Appellants' application to amend was made orally before us. The text of the proposed amendment was drafted, at our urging, over the short adjournment in order that we had proposed new grounds of appeal to consider. The application drafted consisted of four additional grounds of appeal, and only the first of these related to Section 29 TMA 1970. Bearing in mind the Directions of 24 March 2016, we consider it appropriate to consider the part of the application which relates to the three proposed new grounds relating to the substantive dispute when we come to consider the appropriate case management for the remainder of this appeal.

49. Therefore at this point we consider only whether we should give the Appellants permission to amend their grounds of appeal so as to include their proposed new ground relating to Subsection 29(2) TMA 1970. The wording of that ground evolved before us over the course of the Appellants' submissions but its eventual form was:

> 2. The Appellants' tax returns for tax year 2003/04 were made in accordance with the generally prevailing practice within s 29(2) TMA 1970 on the grounds that the dividends of £25,000 and £500,000 paid by Aeroplas Holdings Ltd contained no element of bounty as referred to on p. 1014 right hand column under the heading "Where does the legislation not apply?" of Inland Revenue Tax Bulletin 64 of April 2003.

50. The Respondents object to the Appellants being granted permission to amend their grounds of appeal to include this ground on the basis that the application was made late, that there is no reasonable explanation for the delay and that the proposed ground has no prospects of success.

Is there a real prospect of success?

51. As with the Respondents' application, we consider first the prospects of success. The proposed amendment is to enable the Appellants to argue that the condition in Subsection 29(2) TMA applied. The application was not supported with evidence, although the Appellants did refer to the Tax Bulletin from April 2003 (to which

reference is made in the proposed ground) during the course of argument on whether the proposed additional ground had real prospects of success.

52. It was agreed that Paragraph 29(2)(a) TMA 1970 applied here as returns had been submitted by each of the Appellants. Looking at Paragraph 29(2)(b), we asked Mr Grierson to identify the mistake in each of the Appellants' returns upon which they relied in submitting that Subsection 29(2) was relevant. Mr Grierson suggested first that there was no mistake in the Appellants' tax returns, and then that the mistake in the returns was the Appellants' failure to make reference in their personal tax returns to the Trust and Estate returns submitted. We do not consider the failure to make a cross reference to another taxpayer's return can constitute "an error or mistake in the return as to the basis on which his liability ought to have been computed".

53. Looking at the remainder of Paragraph 29(2)(b), we recall that the meaning of "practice generally prevailing" was summarised by Mr Justice Henderson at paragraph 58 of *HMRC v Household Estate Agents Limited* [2007] EWHC 1684 as follows:

> Without attempting to give an exhaustive definition, it seems to me that a practice may be so described only if it is relatively long-established, readily ascertainable by interested parties, and accepted by HMRC and taxpayers' advisers alike.

54. We also asked Mr Grierson to identify the practice generally prevailing upon which the Appellants relied. Mr Grierson referred us to the Tax Bulletin mentioned in the proposed new ground of appeal. The relevant paragraph states:

> **Where does the legislation not apply?**
>
> In most everyday situations involving gifts, dividends, shares, partnerships, etc. the settlements legislation will not apply. If there is no "bounty" or if the gift to a spouse is an outright gift which is not wholly, or substantially, a right to income then the legislation will not apply.

55. The Appellants' case on the substantive dispute is that there is no bounty in the arrangements which are under challenge by the Respondents. Whether or not there was bounty is primarily a factual dispute to be determined at the substantive hearing. If (which is not the case) the parties were agreed that there was no bounty in the arrangements here, but the Respondents still wished to apply the settlements legislation then we would agree that the passage cited demonstrated a practice generally prevailing as to the computation of a tax liability as the passage makes clear the Respondents intention was that the settlements legislation would not apply to non-bounteous arrangements. But we cannot agree that the passage cited by the Appellants can assist them at all where the issue is whether there was bounty in the arrangements. There is no explanation in the passage cited of what does or does not constitute bounty so as to enable the Appellants to have concluded that their opinion that there was no bounty was in accordance with a practice generally prevailing.

56. In any event, it is clear that the passage cited has no relevance to the mistake in the Appellant's returns which was ultimately identified by Mr Grierson, namely the failure to make reference to another taxpayer's return. The passage cited makes no reference at all to cross referencing the returns of other taxpayers.

57. When we addressed our concerns in this regard to Mr Grierson he suggested that the practice generally prevailing which was relevant here might be one which related more specifically to a failure to make cross reference to another tax return. We asked him if he had any evidence to support the suggestion that there was such a practice. Mr Grierson suggested that evidence might be available but accepted that the Appellants did not have any evidence with them before us to support that suggestion.

58. As set out above, when considering an application for permission to amend grounds of appeal we must consider whether the proposed new ground has real prospects of success. Those prospects must not be fanciful. Here the Appellants appear unclear as to the generally prevailing practice upon which they rely, cannot link a practice to the articulated error or mistake in their returns as to the basis on which their liability ought to have been computed, and bring no witness evidence in support of their application. As was stated by the Court of Appeal in *ICI Chemicals & Polymers Limited v TTE Training Ltd* [2007] EWCA Civ 725 in relation to an application for summary judgment:

> It is the responsibility of the respondent to an application of this kind to place before the court, in the form of a witness statement, whatever evidence he thinks necessary to support his case.

59. In these circumstances we conclude that the Appellants' proposed new ground does not have any real prospects of success.

60. That conclusion is determinative of this application. But, in case we are wrong on this point, we consider the other factors we have identified as being relevant.

The reasons for the application and for any delay

61. The Appellants' explanation for the delay in making their application was that throughout the appeal proceedings they had been hoping that they would be able to settle with the Respondents, and so had not wished to incur the additional costs of instructing legal advisors. Mr Grierson proffered the explanation that it was only some days before the hearing on 1 April 2016 that he had been instructed.

62. We do not consider that this is a good explanation for the Appellants' delay in bringing forward the proposed new ground of appeal. The discovery assessments were raised in December 2009 and January 2010. The Appellants appealed to the Respondents in January and February 2010 and mentioned Subsection 29(2); more than six years passed before the Appellants again mentioned Subsection 29(2), this time in their Outline of Case served on 11 March 2016. It is not the case that the new ground proposed on 1 April 2016 arose out of external events or developments of which the Appellants could not have been aware prior to service of its Outline of

Case. We agree with the Respondents that no good reason has been put forward as to why the Appellants could not have put forward their new ground at a much earlier date. It appears that the Appellants simply did not adequately engage with the litigation process until the impending hearing could no longer be ignored.

63. Furthermore, even at the stage when the new ground was re-identified, it seems that there was then little alacrity in making the application. The point was raised in the Appellants' Outline of Case filed on 11 March 2016 (although at that stage it was put on the basis that there was no published guidance). At some point between 11 March and 1 April 2016 the Appellants took the time to instruct Mr Grierson but, despite prompting by the Respondents, they did not apply for permission to amend. Eventually the application was made during the course of the hearing on 1 April 2016. Having identified a potential new ground it was incumbent upon the Appellants to apply as soon as possible for permission to amend their grounds of appeal. There does not seem to be any explanation at all for this final three weeks of delay.

The prejudice caused to each party

64. The Appellants submitted that they would suffer prejudice if they were unable to put their case as fully as they wished, whereas no prejudice would be caused to the Respondents if permission to amend was given as the Respondents had known of the points that they wished to make "for over a week". As the application was not made until the course of the hearing on 1 April 2016, we do not agree that the Respondents were aware of the case to be made for over a week. When the Appellants' skeleton argument was filed, on 23 March 2016, the Appellants case was that there was no published guidance. At best the Respondents had an inkling of the case to be made on 31 March 2016 when a copy of the particular Tax Bulletin mentioned in the proposed new ground was apparently emailed to the Respondents' counsel. We also do not agree that giving a short period of notice to the Respondents results in them suffering no prejudice; in the absence of any specific application the Respondents have already been put to the trouble and expense of preparing to meet the full range of possible arguments which might be put by the Appellants.

65. We agree that the Appellants will not be able to present argument on the application of Subsection 29(2) TMA 1970 if we refuse permission to amend, and that being deprived of the opportunity to argue the point would result in the Appellants suffering some prejudice.

The over-riding objective

66. We consider the over-riding objective to deal with matters fairly and justly when balancing our conclusions. As before we give particular consideration to the need to ensure, so far as practicable, that the parties are able to participate fully in the proceedings. The Appellants' main submission in relation to the application for permission was that it should be granted in the interests of justice.

67. We have stated above our conclusion that the Appellants' proposed amendment does not have any real prospects of success and that is determinative of the

application. But even if we are wrong on that point, we would conclude that the balance in this case weighs against granting permission. We accept that if the Appellants are refused permission to appeal then they will be unable to present argument on the application of Subsection 29(2) and that this may lead them to consider that they are unable to fully participate in the proceedings. However, the only reason provided for the many years of delay in making the application appeared to be the Appellants' failure to engage with the litigation until very shortly before what would have been the substantive hearing. In relation to the Appellants' delay we bear in mind the comment in *BPP Holdings* that there is no justification for a more relaxed approach to compliance in the tribunals than in the higher courts.

68. Therefore on the basis that the proposed amendment has no prospects of success and on the basis of balancing the relevant factors for consideration, we conclude that the Appellants should be refused permission to amend their Statement of Case to include their second ground (relating to Section 29(2) TMA 1970) as set out in the application dated 1 April 2016.

Whether the condition in Subsection 29(5) TMA 1970 has been satisfied

69. As we give the Respondents permission to amend their Statement of Case, we go on to consider the validity of the discovery assessments and in particular whether the condition in Subsection 29(5) has been satisfied and whether the discovery has become "stale".

70. We heard submissions on this point at the hearing on 1 April 2016. The Respondents' case was supported by a witness statement given by Ms Whittam, the officer who handled the enquiry into the Trust and Estate tax returns. Ms Whittam attended the hearing and gave evidence before us. We considered Ms Whittam to be a reliable and honest witness and we accept her evidence.

Respondents' submissions

71. In order to make the Respondents' positive case in relation to the discovery assessments, Ms Lemos took us through Section 29 TMA 1970. The Respondents' case was that the condition in Subsection 29(5) applied and that there had been a discovery of an insufficiency which enabled a discovery assessment to be raised under Subsection 29(1). Ms Lemos took us through *Langham v Veltema* [2004] EWCA Civ 193, *Household Estate Agents* and *HMRC v Charlton* [2012] UKUT 770 (TCC) and submitted that the relevant test in relation to the making of a discovery was what a hypothetical officer could reasonably expect to be aware of in all the circumstances of the case.

72. Ms Lemos then took us through the correspondence in relation to the enquiry opened into the Trust and Estate return submitted by each FURBS. Ms Lemos referred to the evidence of Ms Whittam to submit that there was nothing in the Appellants' tax returns to suggest the insufficiency of tax.

73. The Respondents also submitted, by reference to Section 34 TMA 1970, that the assessments were raised within time. In relation to the Appellants point on staleness,

the Respondents argued that the comments in *Charlton* were *obiter* and there was no clarity around the circumstances in which a discovery might become stale. Ms Lemos submitted that the only relevant time limit was that set out in Section 34 TMA 1970.

Appellants' submissions

74. For the Appellants, Mr Grierson submitted that the Trust and Estate tax returns had been "flagged for enquiry" by the Respondents, as accepted by Ms Whittam, and as the settlements legislation was the most obvious legislation to apply to a settlement, it followed that the Respondents could have opened an enquiry into each of the Appellants' returns within the enquiry period.

75. The Appellants submitted that there had been no discovery as the Respondents should have known the position. It was submitted that the Trust and Estate returns filed by each FURBS constituted information submitted to an officer of the Board under Subparagraph 29(6)(d)(ii). Mr Grierson submitted that there was no obligation for the officer to whom information was submitted under Subparagraph 29(6)(d)(ii) to be the same officer who raised the assessment.

76. Alternatively, the Appellants submitted that if there had been a discovery then, as the Respondents took no action for a year, their discovery had become stale by the time the assessments were raised. Although at one point Mr Grierson invited us to read the equitable principle of *laches* into Subsection 29(1) TMA 1970, our understanding is that the Appellants eventually relied solely upon the comments of the Upper Tribunal in *Charlton* for their submissions that any discovery that was made by the Respondents had become stale by the time the assessments were raised.

Facts found

77. We set out below the facts we find in respect of the First Appellant on the basis of the documents before us and the oral evidence we heard. In relation to the Section 29 TMA 1970 issue, there was no relevant difference between the facts of the First Appellant's case and those of the case for the Second and Third Appellants.

78. We find:

a) The First Appellant filed a personal tax return for 2003/04 on 14 October 2004. No enquiry was opened into this return.

b) The Trustees of the FURBS for the First Appellant filed a Trust and Estate return for 2003/04. This was date stamped as received by the Respondents on 6 October 2004. By letter dated 19 January 2006, the Respondents opened an enquiry into the FURBS' return. The officer dealing with the enquiry was Ms Whittam.

c) On 11 April 2006 the First Appellant's agent responded to the Respondents' initial requests for further information. The agent provided a copy of the relevant trust deed, and the Respondents were informed that the

source of the dividends was Aeroplas Holdings Limited and that the FURBS had received independent advice before purchasing the "A" Shares.

d) On 24 November 2006 the Respondents requested further information relating to the shares and asked who had settled the trust. On 2 January 2007 the First Appellant's agent provided the share information but did not state who had settled the trust.

e) On 2 March 2007 the Respondents wrote again to the First Appellant's agent. More information was sought in relation to the acquisition of the shares, the independent advice given at the time, how the dividend receipts had been dealt with subsequently and whether there were any loans from the FURBS. The Respondents also sought a copy of the Scheme Rules. On 29 May 2007 the agent responded to the Respondents' requests. More information and documentation was provided in relation to the shares, and it was clarified that no independent advice had been provided. Details were provided of two loans made by the FURBS.

f) On 23 October 2007 the Respondents wrote again to the First Appellant's agent, referring for the first time to the possibility that the settlements legislation could apply in respect of the dividend income received by the trustees. This possibility was a new conclusion reached by the Respondents. In this letter, the Respondents sought confirmation that the First Appellant agreed with their analysis. On 18 February 2008 the First Appellant's agent replied to the Respondents stating the First Appellant's view that the arrangements had been wholly commercial and so Section 660A ICTA 1988 did not apply to the income of the trust.

g) On 1 April 2008 the Respondents sought more information about the rights attaching to the "A" shares, how the value for the shares had been arrived at and the amended memorandum and articles of association of Aeroplas Holdings Limited. By letter dated 27 May 2008, the First Appellant's agent provided the Respondents with the memorandum and articles of association. The letter also stated there had been no formal valuation of the "A" shares and provided an explanation of how the value of the shares had been arrived at.

h) On 21 August 2008 the Respondents acknowledged the First Appellant's response and stated that the matter was still under review. This position was repeated in letters dated 28 October 2008 and 29 July 2009.

i) On 19 August 2009 the Respondents requested the minutes of the meeting where the directors of Aeroplas Holdings Limited had agreed to pay dividends on the "A" shares. Under cover of a letter dated 7 October 2009, the First Appellant's agent provided the company minutes sought.

j) On 29 October 2009 the Respondents wrote again, stating their view that the directors' decision to vote dividends on the "A" shares was the indirect settling of income on the FURBS, and that this was taxable on the settlor as part

of his personal income. The Respondents invited the First Appellant to agree this analysis.

k) On 22 December 2009 the Respondents protectively raised discovery assessments on the First and Second Appellants. A discovery assessment was raised on the Third Appellant on 21 January 2010.

Decision on validity of the discovery assessments raised

79. Our understanding of *Burgess* is that in the absence of a concession as to the validity of a discovery assessment, the Respondents must positively make the case that the assessment was validly raised. We discuss first whether the requirements in Section 29 are met, and then go on to consider together whether the requirements in Section 34 are met in and whether the discovery has become stale.

Requirements in Section 29

80. As can be seen from the wording of Section 29 TMA 1970 (set out in the annex) there are a number of conditions which must be satisfied before an assessment can be raised. The first of these is that an officer of the Board discovers an insufficiency of tax. We will go on to consider what is mean by the discovery of an insufficiency of tax but it is relevant at this stage to set out the contents of the First Appellant's tax return for 2003/04 and to consider the information which was available.

81. The majority of the First Appellant's return is blank. The only entry relevant to this dispute is that in the employment pages the First Appellant states in the additional information box:

FURB PAID OF £10000 NIL TAX

What information was made available to the officer?

82. Subsection 29(6) sets out the information which is made available to an officer of the Board. We are concerned with the information which is available at the date when an officer ceased to be entitled to give notice of his intention to enquire into the Appellants' personal tax returns. The evidence before us (in the form of notes on the bottom of the Respondents' copy of the First Appellant's tax return) indicates that the return was submitted to the Respondents on 14 October 2004. Section 9A TMA 1970 (as it applied in 2005/06) provides that the last date on which an enquiry into a return could be opened was up to one year after the deadline for filing that return. Therefore the relevant date, at which it was no longer possible to open an enquiry into the First Appellant's return, was 1 February 2006.

83. As at 1 February 2006, an officer of the Board had available to him all the information contained in the First Appellant's tax return. There were no documents accompanying the return. There was no claim for 2003/04 by the First Appellant acting in his personal capacity and, as there was no enquiry, there were no documents provided to an officer for the purpose of an enquiry.

84. The Appellants submitted that the contents of the Trust and Estate return for each FURBS should be considered as being information which is notified in writing by the taxpayer to an officer of the Board, within the meaning of Subparagraph 29(6)(d)(ii). The Trust and Estate return for the First Appellant's FURBS is date stamped as received by the Respondents on 6 October 2004 so was available to an officer before 1 February 2006. However, information is only within 29(6)(d)(ii) if the existence of the information and the relevance of the information to the First Appellant's insufficiency of tax are notified in writing. Therefore we need to consider the contents of the Trust and Estate return in order to consider what was available.

85. The only relevant entry in the Trust and Estate return relates to dividends and other qualifying distributions from UK companies, in respect of which the FURBS declares dividends of £525,000. There was no written notification that the information in the Trust and Estate return was relevant to an insufficiency of tax of the First Appellant. On that basis we conclude that the information in the Trust and Estate Return of the First Appellant's FURBS was not information made available within the meaning of Subparagraph 29(6)(d)(ii).

86. Therefore we conclude that the only information made available at the time an officer ceased to be entitled to open an enquiry was the information contained in the First Appellant's return.

Could the officer have been reasonably expected to be aware of the insufficiency?

87. If the officer could not have reasonably been expected to be aware, on the basis of the information contained in the First Appellant's return, of the insufficiency of tax then the condition in Subsection 29(5) is satisfied. The test in Subsection 29(5) is an objective test and so we consider the awareness of a hypothetical officer.

88. Ms Whittam gave evidence that she considered there was nothing in the tax returns of any of the Appellants which would have alerted an officer to conclude that there was an insufficiency. We accept that this evidence was given with the aim of assisting the Tribunal but we bear in mind that Ms Whittam is not an expert witness and that the awareness of officers actually involved in the case is not relevant here.

89. The hypothetical officer should have the level of knowledge and skill which would reasonably be expected of an officer in the circumstances of the case. Here all the information available was contained within the First Appellant's return. There were no indicators, such as a DOTAS number, to suggest that the return was in any way out of the ordinary. Therefore we consider that the hypothetical officer should not be imbued with any particular specialist knowledge or expertise.

90. On the basis of the information contained in the First Appellant's tax return, we conclude that the hypothetical officer could not reasonably have been expected to be aware of the insufficiency of tax.

91. Mr Grierson suggested that it would have been possible for an enquiry to have been opened into the Appellants' returns. This submission appeared to be based upon Ms Whittam's acceptance, under cross examination, that the large dividend shown in

the Trust and Estate return for 2003/04 had identified that return as one into which an enquiry should be opened. Ms Whittam's evidence was that the large amount had alerted HMRC to the possibility that a particular avoidance scheme might be being used, and it was on this basis that an enquiry into the Trust and Estate return was in due course opened.

92. We have already concluded that the information in the Trust and Estate return was not information made available to the officer. But, even if we were wrong to reach that conclusion, the test is of what the hypothetical officer could reasonably be aware, and not what the hypothetical officer could reasonably do. That is clear from paragraph 33 of the judgment of Lord Justice Auld in *Langham v Veltema*:

> More particularly, it is plain from the wording of the statutory test in section 29(5) that it is concerned, not with what an Inspector could reasonably have been expected to do, but with what he could have been reasonably expected to be aware of. It speaks of an Inspector's objective awareness, from the information made available to him by the taxpayer, of "the situation" mentioned in section 29(1), namely an actual insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an insufficiency, as suggested by Park J.

93. Therefore, even if the hypothetical officer had available to him the information in the Trust and Estate return and the information in the First Appellant's return, we do not consider that the hypothetical officer could reasonably have been expected to have been aware of the First Appellant's insufficiency of tax.

94. We conclude that the condition in Subsection 29(5) is satisfied.

Was there a discovery?

95. In her submissions Ms Lemos took us through the correspondence which arose out of the enquiry into the Trust and Estate return. The enquiry was opened on 19 January 2006 and correspondence continued until the discovery assessments were raised in December 2009/January 2010. It is clear that considerably more information came into the Respondents possession at various stages as a result of that correspondence. The Respondents submitted that the new information and their new conclusions as to the taxable position led them to discover an insufficiency of tax. Ms Lemos relied upon, in particular, the letter of 23 October 2007 which she described as "the first discovery".

96. It is clear that no new information is required for there to be a discovery. In paragraph 37 of *Charlton* the Upper Tribunal held as follows in relation to what constituted a discovery:

> In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for

newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself.

97. Here we are satisfied that there was both new information and at least one new conclusion that there was income of the Appellants which should have been assessed to tax. We consider that the Respondents' freshly arrived at conclusion (set out in their letter of 23 October 2007) that the settlements legislation was applicable would constitute a discovery of an insufficiency for the purposes of Subsection 29(1). We consider the Respondents' better understanding of the facts as a result of receiving relevant company minutes (sent under cover of the agent's letter of 7 October 2009) would also constitute a discovery for Subsection 29(1). We conclude that the condition in Subsection 29(1) is met.

98. We should note that Mr Grierson had sought to persuade us that there could be no discovery as, once the Respondents had received the Trust and Estate returns, they should have had in mind the settlements legislation. So, he submitted, although the Trust and Estate return did not specify the settlor, the Respondents should have been put on enquiry as to the settlor's identity in order that (once they had identified the settlor) they could have opened an enquiry into the Appellants' returns. Mr Grierson submitted that any other interpretation made it too easy for the Respondents to state that they did not know the position. We reject this construction in its entirety. There is no statutory basis for the suggestion that, because an officer did not seek information when an enquiry into the Appellants' returns could have been opened, there can be no discovery of an insufficiency of tax at a later date. Such a construction would require the reading in of an additional restriction and/or time limit which are simply not present in the wording of Section 29.

The time issue

99. The time limit for raising an assessment is set out in Section 34 TMA 1970, the text of which for the year in which the assessment was raised is set out in the annex to this decision.

100. The year of assessment to which the discovery assessments relate is 2003/04. We have found that two of the discovery assessments were raised on 22 December 2009 and the third was raised on 21 January 2010. Therefore we are satisfied that each of the discovery assessments was raised at a time not later than five years after the 31st January following the end of the year of assessment. Therefore we conclude that the assessments were raised upon the Appellants within time.

Staleness

101. The Appellants argue that as there was a period of over a year with no requests for further information by the Respondents then any discovery the officer may have made has become stale, and so cannot be relied upon as the basis for raising a discovery assessment. The passage upon which the Appellants rely in making their submission that the discovery was stale is set out in the latter half of paragraph 37 of the Upper Tribunal's decision in *Charlton*:

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

102. While there was an apparent period of inactivity on the part of the Respondents between 27 May 2008 and 19 August 2009, we have found that the Respondents made a further request for material on 19 August 2009. Relevant company minutes were provided by the Appellants' agent on 7 October 2009. The discovery assessments were raised on 22 December 2009 and 21 January 2010, i.e. two and a half months, and three and half months, following the provision of those company minutes. We do not regard such relatively short periods as being sufficient to rob the resulting conclusion of its essential newness. Therefore we conclude that the point raised by the Appellant is hypothetical.

103. However, if we are wrong to reach that conclusion so that no discovery was made by an officer after 27 May 2008, we would agree with the Respondents that the passage in *Charlton* is *obiter* and so not binding upon us. We have carefully considered Section 29 TMA 1970 but we can find no justification in the wording of that section for holding that the assessment must be raised within a certain period of making the discovery as well as meeting the requirements of Section 34 TMA 1970. In our opinion the only statutory constraint relating to time is that the assessment must be raised within the time prescribed by Section 34. We conclude that the concept of a discovery becoming stale has no relevance insofar as lack of staleness is proposed as an additional condition which must be met in order to raise a discovery assessment.

Summary of conclusions in relation to the discovery assessments

104. We are satisfied that all the conditions required for the Respondents to raise the discovery assessments have been met and that the discovery assessments were validly raised.

Case management

105. We now consider the appropriate case management for the hearing of the substantive dispute between the parties. As noted above, the Directions of 24 March 2016 did not anticipate that the Appellants would seek permission to raise three new grounds of appeal in relation to the substantive issues. We now deal with that aspect of the Appellants' application as part of the case management.

106. The proposed new grounds are as follows:

> 3. The dividends were capital dividends which cannot be taxed as income of a settlor under sections 660A and 660G(3) of ICTA 1988

4. The Appellants were not settlors within section 660G(1), (2) of ICTA 1988 and HMRC is making an invalid attempt to lift the corporate veil in alleging that the Appellants were settlors

5. The dividends were not sums "paid by an employer" within section 386(1) of ITEPA 2003 because they were declared by the parent company Aeroplas Holdings Ltd rather than by the employer company Aeroplas (U.K.) Ltd.

107. This application was also unsupported by evidence.

Ground 3

108. The Respondents' submission in relation to Ground 3 was that as the application was unsupported it was not possible for the Respondents to state whether or not they objected. Ms Lemos submitted that it would be appropriate for the Appellants to seek permission to adduce evidence in support so that the Respondents could consider their position. That would result in Directions for the Appellants to file evidence in support and for the Respondents to be given the opportunity to file evidence in response if so advised and in any event to make submissions on the application. The Appellants were willing to proceed along the lines suggested by the Respondents.

109. We have considered whether we should decide the potentially opposed application in relation to Ground 3 now, in the interests of unnecessarily prolonging this appeal and with a view to the appropriate allocation of scant Tribunal resources. As the new hearing date for the substantive hearing has not yet been fixed, we eventually decided that we will accede to what ultimately became in essence a joint application for Directions. However, if the Respondents do oppose the Appellants' application in respect of Ground 3 (once it is supported with evidence), we direct that both parties' submissions on the application be referred back to Judge Bailey (given her familiarity with the papers) and will be decided on paper.

Grounds 4 and 5

110. The Respondents did not object to permission to amend being granted in respect of Grounds 4 and 5.

111. Although the application is unsupported and we cannot consider its prospects of success, and it is made late with no apparent reason for the delay, as the substantive hearing date has yet to be re-listed and as the Respondents do not object, we grant the Appellants permission to amend their grounds of appeal to include Grounds 4 and 5.

Conclusion

112. In summary, we conclude:

a) The Respondents are granted permission to amend their Statement of Case for each Appellant as set out in their application dated 15 March 2016;

b) We are satisfied that each of the discovery assessments raised upon the Appellants was validly raised in accordance with the requirements set out in Sections 29 and 34 TMA 1970;

c) The Appellants are refused permission to amend their Grounds of Appeal to include submissions on the application of Subsection 29(2) TMA 1970; and

d) The Appellants are granted permission to amend their Grounds of Appeal to include Grounds 4 and 5 as set out in their application dated 1 April 2016.

113. We have issued Directions for the future case management of this appeal, including the management of the outstanding part of the Appellants' supported application to amend, the production of witness evidence and for the relisting of this appeal with a revised time estimate. If the parties are dissatisfied with those Directions they may apply at any time for those Directions to be amended, revised or superseded.

114. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

JANE BAILEY
TRIBUNAL JUDGE

RELEASE DATE: 19 APRIL 2016

Annex setting out relevant legislation as it applied in 2009/10

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.

(2) Where-

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

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(3) 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) …

(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.

34 Ordinary time limit of six years

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not later than five years after the 31st January next following the year of assessment to which it relates.

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