3. The meaning of "discover"

3.1 Introduction

The fundamental ingredient of a discovery assessment is that HMRC have "discovered" an under-assessment. This hurdle has long existed, pre-dating the self-assessment rules by many years.

Indeed, the principal definition of what is necessary to substantiate a discovery goes back over 100 years.

It should be noted that, despite a discovery being a fundamental ingredient to a discovery assessment, many practitioners and HMRC officers have wrongly assumed that the condition was abolished (or somehow watered down) when self-assessment was introduced, leaving only the two hurdles discussed in **Chapters 4 and 5** below.

3.2 What is a discovery?

3.2.1 What must be discovered?

Even this basic question can often be answered wrongly. For example, it is very common to see HMRC quoting from (or, worse, paraphrasing) the Upper Tribunal's decision in *Charlton* as follows:

> "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."

For the avoidance of doubt, the author has no issues with what the Upper Tribunal said in that passage. However, context is everything. The point is that s. 29(1) is very specific as to what must be discovered for the purposes of a discovery assessment. The discovery must be either:

- 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
- that an assessment to tax is or has become insufficient, or

- that any relief which has been given is or has become excessive.

These three situations are often abbreviated as "a loss of tax", which broadly (although not exactly) covers the statutory test.

The important point is that what is claimed to have been discovered must fall within at least one of those three descriptions. Otherwise, the purported discovery is simply irrelevant for the purposes of any assessment.

Example

Benjamin's 2018 tax return was submitted late on 15 March 2018. An HMRC officer discovers this fact on 10 November 2018.

Whilst learning that the tax return was late might well be a discovery in the general sense of the word, it is not a relevant discovery for the purposes of s. 29(1).

In short, HMRC need to discover that the tax that they seek to recover is indeed due to them.

The point became particularly clear in two cases in 2018. In *Robertson*, the taxpayer was found to have become liable for the High Income Child Benefit Charge. Although that charge has the look of a provision that imposes tax on a portion of a taxpayer's income, the statute clearly imposes a freestanding charge to income tax if certain conditions are met. Accordingly, failure to self-assess for the charge would not amount to "income which ought to have been assessed to income tax … hav[ing] not been assessed". As the taxpayer had not self-assessed at all, the second limb of s. 29(1) was not satisfied and the third (concerning relief) was similarly irrelevant.

The same outcome was reached in *Monaghan* which concerned the pensions legislation and the provisions for unauthorised member payments. Again, the Tribunal noted the nature of the statutory charge, which did not deem there to be income that should have been assessed. The Tribunal also noted the specific modifications to the discovery rules conferred by the legislation which did not extend to assessing the individual worker. The Tribunal commented:

> "We can then only conclude that the legislation has either missed fire or it was a policy decision in 2004 or 2005 not to exercise a power to make an NSA [an assessment which is not a self-assessment, e.g. a discovery assessment] on an individual."

In both cases, the Tribunal noted that a different outcome could have been reached had there been an inadequate self-assessment by the taxpayer (which would have engaged s. 29(1)(b)). The author is not entirely sure that this is in fact correct in relation to unauthorised payments, but this is not yet something that has been tested in the Tribunal. In any event, both *Robertson* and *Monaghan* are the subject of appeals by HMRC to the Upper Tribunal.

Law: TMA 1970, s. 29(1); ITEPA 2003, s. 681B; FA 2004, s. 208, 209, 255
Cases: *HMRC v Charlton (and others)* [2012] UKUT 770 (TCC); *Robertson v HMRC* [2018] UKFTT 158 (TC); *Monaghan v HMRC* [2018] UKFTT 156 (TC)

3.2.2 Facts and laws may be discovered

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

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

As Viscount Simonds held (with emphasis added):

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

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

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

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

Something "new"

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

> "Whilst we accept that it might be possible for an officer to discover the same insufficiency in a 35 return more than once if it is for different reasons, it is not, in our view, possible for an officer to make the same discovery twice for the same reasons. The insufficiency cannot 'newly appear' to the officer for a second time."

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

Case: *Beagles v HMRC* [2018] UKUT 380 (TCC)