FIELD COURT TAX CHAMBERS

Discovery assessments [1]

Can a discovery become stale, and therefore unable to support a discovery assessment, if made after too long a delay?

Two tribunal cases were recently published within days of each other on the subject of discovery assessments – one in the First-tier Tribunal, *S Miesegaes v HMRC* [2016] UKFTT 375; and another in the Upper Tribunal in *Pattullo v HMRC* [2016] UKUT 0270.

Both these cases dealt with the conventional arguments regarding what is a discovery, although the Upper Tribunal had a few robust things to say about the difficulties inherent in the requirement to consider the characteristics a hypothetical officer. There was also the curious suggestion in *Miesegaes* that a taxpayer who makes adequate disclosure of all the relevant facts is not protected from a discovery assessment. That would seem to suggest that an adequate disclosure is somehow inadequate.

However, this particular conundrum will have to wait for another day. I want to concentrate on another interesting aspect of these cases – which was that both the tribunals, completely independently, examined the comparatively new concept that a discovery may become stale and therefore unable to support a discovery assessment, if it is made after too long a delay.

The argument was that if HMRC make a discovery but wait too long before raising their discovery assessment, it should be debarred from doing so. Obviously, HMRC has to raise its discovery assessment within the relevant statutory time period. The suggestion, though, was that sometime before the expiry of the statutory time limit, HMRC could run out of time on the basis of staleness.

The First-tier Tribunal in *Miesegaes* said in clear terms that there is no concept of staleness of a discovery. A discovery can take place at any time, even before the enquiry window has closed; and the only time limitation for the making of the discovery assessment is the statutory time limit contained in 34 TMA 1970 s 34.

However, the Upper Tribunal in *Pattullo* took rather a different view. It said that there is a need for the discovery to be acted upon while it remains fresh; and this is something which arises from the natural meaning of s 29(1). The Upper Tribunal said in particular:

> "It would, to my mind, be absurd to contemplate that having made a discovery of the sort specified in s 29(1), HMRC could in effect just sit on it and do nothing for a number of years before making an assessment just before the end of the limitation period specified in s.34."

[1] This article was first published in the InBrief section of Tax Journal published by LexisNexis on 8th July 2016

It is a pity that the Upper Tribunal provided no further guidance on this point. Indeed, the judge went on to say:

> "I do not think it would be helpful to try to define the possible circumstances in which a discovery would lose its freshness and be incapable of being used to justify making an assessment."

I would respectfully disagree. I think it would have been extremely helpful if the Upper Tribunal had tried to define the circumstances in which a discovery would fatally lose its freshness. It would be of great interest and value to taxpayers. As it happened, the facts in *Pattullo* were such that the discovery had not become stale by the time the discovery assessment was made, so that the issue did not have to be taken further. However, having regard to this clear conflict (and the uncertainty which now exists over the concept of staleness), this issue is bound to arise again before too long.

Peter Vaines

Field Court Tax Chambers