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A VOYAGE OF DISCOVERY?

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The recent case of Robert Smith does nothing to clarify the confusing area of law on discovery, says Peter Vaines.

Another important case has appeared on the subject of discovery: *Robert Smith v HMRC* TC02768. In December 2012 the decision of the Upper Tribunal (UT) in *Charlton v HMRC* reviewed all the issues and authorities regarding discovery assessments, but *Smith* looks like a step back.

A crucial element of the decision in *Charlton* related to s29(5), Taxes Management Act 1970 (TMA 1970) which enables HMRC to make a discovery assessment outside the enquiry window if an officer of HMRC could not have been reasonably expected on the basis of the information made available to him or her before the deadline to have been aware of the insufficiency in the self assessment. It is this awareness test which always causes trouble. Whenever HMRC misses the deadline, it always claims that it did not have sufficient awareness of the relevant matters – so the deadline does not apply to it.

The issue in *Charlton* surrounded a tax avoidance scheme for which there was a DOTAS number. The UT concluded that the reference to the DOTAS number indicated clearly to the HMRC officer that this was an avoidance scheme and that the necessary forms filed as a result of the disclosure provided all the relevant information.

Unfortunately, the test articulated in *Charlton* was impossibly subjective. The officer of HMRC referred to in s29(5) is not the actual officer who received the information but a hypothetical tax officer of reasonable knowledge and understanding. However, there is no uniform standard. We are not looking at an officer of only general capability and experience nor at an ordinarily competent inspector. We are looking at an officer who is assumed to have a sufficient level of understanding under the circumstances. With all respect to the tribunal, this could mean anything.

It may have been thought that as *Charlton* was a tax avoidance scheme and therefore the least sympathetic category of case likely to be considered by the tribunal, the problems arising from such a subjective test would not arise in the majority of cases.

However, the case of *Smith* throws everything up in the air again. This too was a tax avoidance scheme but there was no DOTAS number, so we have to consider whether the information actually provided to the hypothetical officer satisfied the awareness test.

This is a real trap for the taxpayer because the only information which can be taken into account is that actually provided by the taxpayer himself. The fact that HMRC may know all about the scheme and have every conceivable piece of documentation does not matter. If that information did not come from the taxpayer it does not count. In the case of *Smith*, HMRC clearly knew all about the scheme. Indeed it had written a detailed technical memorandum on the scheme's effectiveness and had placed a message on a noticeboard for all tax officers stating that the scheme was to be challenged. HMRC also had enough information to raise assessments on 51 taxpayers who used the same scheme and the only reason they did not do so in the case of Mr Smith was because someone was sick and the matter got overlooked.

Nevertheless, despite the fact that HMRC knew all about it, had issued the technical memorandum, had warned all its inspectors, and had issued assessments to 51 taxpayers, it was still able to claim that it had insufficient awareness of the scheme in the particular case to raise an assessment on Mr Smith.

It will be interesting to see where matters go from here. We are quite some way from a consistent (and comprehensive) code in respect of discovery issues and this will only promote further litigation.

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