Not sleeping but dead!

Mark McLaughlin looks at whether the concept of 'staleness' in HMRC discoveries is capable of being resurrected

The facility for a discovery assessment to be issued to an individual outside the normal time limit of four years is a key weapon in HMRC's armoury of powers.

HMRC commonly uses its discovery powers to issue extended time limit assessments, if (among other things) the taxpayer has undeclared income or capital gains, or if HMRC considers that a self-assessment return for a 'closed' tax year understates the taxpayer's liability.

In such circumstances, HMRC can make discovery assessments if the tax under-assessed, etc., is attributable to:

- Careless or deliberate conduct of the taxpayer (or a person acting on his behalf); or
- Something of which the HMRC officer could not have been reasonably expected to be aware when the enquiry window closed (or a closure notice was given in an enquiry) based on the information available to them before that time (TMA 1970, s 29(4), (5)).

Take your time…

The normal time limit for HMRC to make a discovery assessment of four years from the end of the tax year to which it relates is extended to six years if the loss of tax was brought about carelessly, or 20 years if it was brought about deliberately (TMA 1970, ss 34, 36). The onus is on HMRC to prove careless or deliberate conduct, as appropriate.

If the loss of tax involves an offshore matter or offshore transfer, HMRC may make an assessment up to 12 years after the end of the tax year to which it relates (TMA 1970, s 36A).

Similar discovery and extended time limit provisions apply to companies (FA 1998, Sch 18, paras 41-46), but this article focuses on individuals.

…but not too long!

The scope of the discovery provisions has been the subject of numerous tribunal and court cases. A point of contention has been whether a discovery can become 'stale' (and hence invalid) if there is a significant period between HMRC making a discovery and raising an assessment to recover the loss of tax, etc. The concept of staleness was a judicial construct, which was considered in cases including Pattullo v Revenue and Customs [2016] UKUT 270 (TCC) and Beagles v Revenue and Customs [2018] UKUT 380 (TCC).

However, the concept of staleness for discovery purposes was subsequently rejected in Revenue and Customs v Tooth [2021] UKSC 17. In that case, the Supreme Court (SC) unanimously dismissed HMRC's appeal on the basis that there was no deliberate inaccuracy in the respondent's tax return. However, the SC went on to consider the discovery issue. The SC disagreed with the Court of Appeal's (CA's) decision that as HMRC formed its view of the relevant tax return entry in 2009, a discovery in 2009 would have been 'stale' by 2014. The CA did not specifically refer to 'staleness', but to whether it was necessary that HMRC's discovery was 'new' when they issued the discovery assessment to Mr Tooth.

Floyd LJ stated: "The requirement for the conclusion to have 'newly appeared' is implicit in the statutory language 'discover'. The discovery must be of one of the matters set out in (a) to (c) of section 29(1). In the present case the officer must have newly discovered that an assessment to tax is insufficient. It is his or her new conclusion that the assessment is insufficient which can trigger a discovery assessment. A discovery assessment is not validly triggered because the officer has found a new reason for contending that an assessment is insufficient, or because he or she has decided to invoke a different mechanism for addressing an insufficiency in an assessment which he or she has previously concluded is present."

When the Tooth case reached the SC, it was subsequently considered there was no concept of 'staleness' for discovery purposes. Lord Briggs and Lord Sales, delivering the unanimous decision of the SC, concluded:

"In our judgment… there is no place for the idea that a discovery which qualifies as such should cease to do so by the passage of time. That is unsustainable as a matter of ordinary language and, further, to import such a notion of staleness would conflict with the statutory scheme. That sets out a series of limitation periods for the making of assessments to tax, each of them expressed in positive terms that an assessment "may be made at any time" up to the stated time limit."

HMRC's Enquiry manual (at EM3260) was subsequently updated to state that the SC in Tooth determined at a discovery cannot become stale and therefore invalidate an assessment.

They think it's all over…

Following the SC's decision in Tooth, numerous Upper Tribunal (UT) decisions were reached on the basis that a discovery by HMRC could no longer be argued to be 'stale', including Good v HMRC [2021] UKUT 0281 (TCC); Hargreaves v HMRC [2022] UKUT 00034 (TCC); and HMRC v Jafari [2022] UKUT 00119 (TCC).

Nevertheless, the SC's rejection of the concept of staleness in Tooth was not the final word on the matter. In Harrison v Revenue and Customs [2023] UKUT 00038 (TCC), the UT dismissed the taxpayer's appeal against a discovery assessment. It had been submitted for the taxpayer (among other things) that because the statements of the SC in Tooth on staleness were obiter dicta (i.e., not binding as a general principle), the Upper Tribunal in Harrison had no option but to follow the binding ratio (i.e., the rationale for the decision) of the CA in Tooth, to the effect that the concept of staleness applied to discovery assessments.

However, in Harrison, the UT did not accept that it must or should ignore the SC's decision in Tooth and follow the CA's decision instead, solely because the SC's decision on staleness was not part of the ratio in that case. That approach failed to take into account that the "clear and comprehensive general guidance" given by the SC could not be discounted or ignored altogether simply because it did not, strictly speaking, form part of the ratio of the decision.

Not 'pining for the fjords'!

At this point, a slight digression is necessary. Those individuals of a certain vintage (present company included, unfortunately!) will remember Monty Python's 'dead parrot sketch', about a non-existent species of parrot (a 'Norwegian Blue') sold by an unscrupulous pet shop owner to a customer. Not surprisingly, the customer tried to return the dead parrot to the pet shop after arriving home to discover that the parrot was, in fact, already dead. The pet shop owner tried

(unsuccessfully) to convince the customer that the parrot was not dead but was only sleeping. So, what relevance does this sketch have to discovery assessments and the issue of staleness? The UT in Harrison commented: “We do not accept that, notwithstanding [the SC in Tooth], the doctrine of staleness is, like Monty Python’s parrot, ‘not dead, only sleeping’. It is deceased.”

Conclusion

Following the UT’s decision in Harrison (and subject to any further appeal) and borrowing another analogy from Monty Python’s dead parrot sketch, it would seem the concept of staleness in discovery has “ceased to be” and is “bereft of life”. Of course, that does not mean that discovery assessments cannot be challenged on other grounds if the conditions for a valid discovery assessment do not appear to be satisfied.

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