SDLT – whether assessments made and served – assessments made but not issued or served – appeals allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07238

Appeal number: TC/2017/06138, TC/2018/00248, TC/2018/00252, TC/2017/01721, TC/2018/00410

BETWEEN

MITESH KUMAR KOTHARI
-and-
MICHAEL AND HELEN CUTLER
-and-
ANNETTE AND PAUL WILKINSON
-and-
DANIEL FOX **Appellants**

-and-

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

TRIBUNAL: JUDGE BARBARA MOSEDALE
SHEILA CHEESMAN

Sitting in public at Taylor House, Rosebery Avenue, London on 6 March 2019

Mr T Thornton of TT Tax for the Appellants

Mr D Street, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The above named appellants all entered into stamp duty mitigation schemes and paid no stamp duty on the acquisition of land on prices for which SDLT would (otherwise) have been due. HMRC raised – or purported to raise - SDLT assessments on them, on the basis that the SDLT mitigation scheme was ineffective to reduce liability to SDLT, slightly before the expiry of the four year time-limit for making discovery assessments.

2. All of the six appellants had been advised on their land purchase and on the stamp duty mitigation scheme by the same advisers (Simpson Millar LLP). Moreover, it appears that HMRC investigated and (purportedly) assessed 1,000s of taxpayers whom they thought had used ineffective stamp duty mitigation schemes similar or identical to those undertaken by these six appellants: the (purported) assessments were issued in batches; the six appellants were all assessed, or purportedly assessed, in the same batch.

3. Apart from that connection, and the fact they have now instructed the same tax litigation adviser to pursue these proceedings, (and the obvious link between Mr & Mrs Wilkinson, and Mr & Mrs Cutler), the various appellants are not connected.

4. All of the six appellants said that they were unaware of the (purported) assessments for some years after they were (purportedly) made. After becoming aware of them, they all sought to appeal them. Their grounds of doing so were identical: their case was that the assessments were not validly made, and even if they were, they were not validly issued. At least a part of their case was that HMRC's procedures for making and/or issuing assessments went wrong, at least in respect of the batch of assessments which included the taxpayers' assessments.

5. HMRC's original position was that all of the six appellants were out of time to appeal the assessments. The appellants did not accept that and claimed that in correspondence HMRC had in effect already given them leave to appeal them out of time. A hearing was set down to consider that matter. Before the hearing commenced, HMRC accepted that they had given Mr and Mrs Wilkinson leave to appeal out of time. The hearing then proceeded (on 31 August 2018) with respect to the remaining four appellants. The Judge's decision (reported at [2018] UKFTT 539 (TC)) was that HMRC had not given any of the four appellants leave to appeal out of time.

6. The Judge gave directions for a hearing which would determine whether the (purported) assessments were validly made and issued, as the answer to that would determine the four appellants' applications for leave to appeal out of time *and* the appeals of all six of the appellants (save that it would not determine whether the assessments were correct; that would be left to another day if it became necessary to decide it.)

7. In the event, before the hearing but after the evidence had been served, HMRC accepted that none of the six appellants had received the assessments until many years after they were purportedly made. HMRC withdraw their objection to the remaining four appellants' late appeals: the appeals – if late - are therefore admitted.

8. The remaining question for this second hearing was whether all or any of the six appeals should be allowed because the assessments were not validly made, or if validly made, not validly issued and/or served. As part of the question of whether the assessments were validly made, Mr Kothari raised the question whether HMRC had made a valid discovery assessment. Although that is a logically prior question, it affects only Mr Kothari's appeal as none of the other appellants suggest that HMRC did not make a valid and timely discovery, and so we will address it last. So this decision will determine:

(1) Whether the purported assessments were actually ever made;

(2) Whether, if made, the purported assessments were actually ever issued?

(3) Whether HMRC made a valid discovery assessment on Mr Kothari.

THE FACTS

THE EVIDENCE

9. The evidence on behalf of HMRC was given by Mrs Baker, an officer of HMRC. She filed two witness statements and was cross-examined. Witness statements were also given by each of the six appellants and by the solicitor, employed by Simpson Millar LLP, who had acted for them in the property purchases to which the SDLT returns related. As HMRC accepted their evidence, they were not called for cross-examination.

APPLICATION TO ADMIT FURTHER EVIDENCE

10. At the start of the hearing, Mr Street applied to admit further evidence. It was a single spreadsheet. While only a single spreadsheet, to make it easier to read it was presented as 2 separate A3 sheets rather than a single A2 sheet, and further, 3 sections of it were extracted onto smaller sheets. Mr Thornton opposed it on the basis it was late without good reason and put him in difficulties with preparing his cross examination.

11. Nevertheless, we admitted the extra evidence as we were satisfied it was relevant and it would probably be referred to in oral evidence by Mrs Baker whether or not it was admitted; we did not think its lateness was a compelling reason to keep it out as it was a small amount of information and had been served in response to an issue raised in the appellants' representative's skeleton argument. It was open to the parties to make submissions on what weight should be attached to it.

FINDINGS OF FACT

Mrs Baker's evidence

12. Mrs Baker was an HMRC officer and had been one for many years. Her evidence was challenged. In large part, we accepted her evidence as reliable and our below findings of fact are based on it. As explained at §24 below, in one respect her evidence was inconsistent but that inconsistency did not cause us to reject her evidence as a whole on the basis she appeared to be a helpful witness who otherwise gave logical and consistent evidence. We find as follows.

Identification of tax underpayment

13. HMRC had a unit looking at identifying SDLT avoidance. It concentrated on SLDT returns made by taxpayers who had instructed agents which HMRC considered had implemented SDLT avoidance schemes. HMRC obtained the relevant Land Registry returns and looked for discrepancies between the declared price paid on Land Registry forms compared to the SDLT returns of those taxpayers.

14. HMRC took the decision to check each of the appellants' SDLT returns in November 2012; at some point after that date HMRC obtained the Land Registry returns and identified discrepancies which led to the (purported) assessments the subject of this appeal.

The assessing team

15. Mrs Baker was not a part of the team identifying the avoidance but she was assigned to the SDLT team (some six officers) who were tasked with making the assessments once the unit referred to above had decided, at least in principle, that assessments should be made on particular taxpayers. Mrs Baker's team assessed users of a number of different SDLT schemes; the team made over 2,000 assessments.

16. As they had to make so many assessments, the team dealt with them in standardised batches. The assessments were all made in Mrs Baker's name. It was her job to ensure the team used the correct process in raising the assessments and also then to check 10% of every batch of assessments. She has no specific recollection of the batch the subject of this appeal.

17. All the assessments the subject of these joined appeals were part of a batch of 122 assessments purportedly made on 18 February 2013; that batch of 122 assessments was part of a larger group of some 442 taxpayers identified as using the same SDLT scheme.

The evidence of the meta-data

18. HMRC had disclosed to the appellants the 'meta-data' relating to the letters of assessment. The 'meta-data' was electronic data held on HMRC's servers which related to the letters. It showed that all the assessments in question were created and printed some time before 18/2/13. It showed that each document was 7 pages long, and that a single document related to the sole taxpayers (such as Mr Kothari and Mr Fox) as well as to joint taxpayers (such as Mr & Mrs Wilkinson and Mr & Mrs Cutler). In other words, the meta data appeared to indicate a single 7 page letter was sent to Mr Fox, while a single 7 page letter was sent jointly to Mr and Mrs Cutler. The 'electronic' size of the file was shown as 466 KB (and 467KB in Mr and Mrs Cutler's case) and the word count varied from 1,442 to 1,469.

19. The appellants' point is that the letters of assessment they had been shown as sent to them did not correspond with this meta-data. The assessments were not 7 pages long, had a lower word count than shown, and each married person had received an individual, and not joint, letter from HMRC. The appellants' case was that the meta-data was not reliable and was not good evidence that the assessments were created and printed before 18 February 2013.

20. Mrs Baker's evidence in large part explained the seeming discrepancies. Firstly, the assessments were done by a 'mail merge' by which I understood her to mean that a single package of documents had been created, and the computer had then taken the various taxpayers' details and printed off a version of the standard letter for each taxpayer showing their unique name, address and the details relevant to their particular assessment (eg. the property address, SDLT return reference and the amount of the assessment). The difference in personal details between the taxpayers explained the slight discrepancies in word count and file size in the meta data.

21. The major seeming discrepancy was that the document was said to be 7 pages long. But this was explained by Mrs Baker and we accept her explanation. It was that SDLT schemes were often implemented by couples (as couples would buy houses together) so HMRC had devised the package to include 2 letters, one to each spouse. But where there was only one taxpayer, the second letter in the package, although it was still printed, was blank and never sent. The seven page package comprised:

(1) cover letter to first spouse/single taxpayer (2 pages)

(2) discovery assessment (2 pages)

(3) letter to agent (one page)

(4) cover letter to second spouse (2 pages).

Process of assessment

22. Mrs Baker explained, and we accept, that the 'package' of letters for each taxpayer/taxpaying couple were printed around a month before the intended date of assessment in order that HMRC officers could check the correctness of the details of every single assessment, and in particular to cross-refer to HMRC's Taxpayer Business Service Database to ensure that the taxpayer's address was correct. We accept that this happened with the

appellants: the meta-data shows their letters were last printed off or modified on dates between mid-January to early February 2013.

23. We also accept her evidence that when the officer was satisfied the letter(s) of assessment was correct, an e-copy was exported onto HMRC's electronic file ('CAF') for the taxpayer and hardcopies were placed on the taxpayer's paper file held by HMRC. Once on the CAF system, further copies of the letters could be printed out directly from the CAF system and this was how, some years later, Mrs Baker was able to print off copies of the appellants' (purported) assessments and send the copies to them.

24. Mrs Baker's evidence was, however, confused over when the copy sent to the taxpayer(s) and their agent at the time of the (purported) assessment was actually printed. In oral evidence, she originally said that the letters were re-printed a few days before sending. This was not reflected in the meta-data which indicated each letter was last printed when last amended, up to a month before the issue date. When asked about this she appeared to imply that they may have been printed off the CAF system, but then later said duplicate copies would have been printed off at the time of the original mail merge. This left us unable to reach a conclusion on which copy of the letter was actually sent to HMRC's post-room for posting: was it a copy printed off at time of the mail-merge or a copy printed off a few days before it was sent to the post-room?

25. However, we do accept her evidence that HMRC had a system whereby the letters of assessment were printed at some point and sent to the post-room for dispatch. It was obvious that this must have happened because HMRC clearly did have a system for making multiple SDLT assessments. It seems Mrs Baker was confused on exactly when and how the copies of the letters sent to the taxpayers were printed.

26. We consider below the extent to which HMRC have satisfied us that they actually made and issued the assessments the subject of these appeals.

Posting of the assessments

27. We accept Mrs Baker's evidence that the process was that the team would send the batch of assessments to HMRC's post room a few days before the date shown on the letters. Mrs Baker was not able to speak to whether the assessment letters to the appellants were actually sent as she did not recollect any particular batch.

28. She was able to say that HMRC had strict procedures in order to protect taxpayers' identity: letters were not left lying around the office but locked in cabinets overnight. She was unable to give evidence on the actual procedure for posting although we accept her evidence that the post room had the same procedure of locking post away in cabinets overnight if not despatched the day of receipt into the room.

The assessment schedule

29. As mentioned above, HMRC produced at the hearing what Mrs Baker referred to as the master schedule. It was an excel spreadsheet of the 122 assessments which included the six the subject of this appeal (personal details were redacted in relation to the taxpayers not the subject of this appeal). This showed that Simpson Millar LLP was the agent for all 122 taxpayers and the (purported) assessment date for all 122 assessments was 18 February 2013. HMRC kept other spreadsheets for other SDLT schemes assessed by her team.

30. Mrs Baker was cross examined in detail on the schedule with the suggestion that it was not accurate. We find that the criticisms were not made out. While it had a column for 'settled date', and a date had been entered here for some of the appellants, she explained that 'settled date' was the date the taxpayer accepted liability to pay or the date on which HMRC informed

HMRC debt collection unit that the debt was to be collected. In the case of some of the appellants, the debt collection unit had been instructed to collect the (purported) assessment.

31. It was her evidence that assessments were only entered onto the spreadsheet once they had been 'issued' although we find she meant nothing more than that officers in her team treated the assessments as issued once they were sent to the post-room for posting. No one in the post room had responsibility for updating the spreadsheet once the letters were actually posted. Therefore, the entry on the spreadsheet that the assessments were issued was not good evidence that they had been posted; it was only good evidence that the person completing the spreadsheet thought that they had been sent to the post room for posting.

Evidence from the appellants' agent

32. Mr David Nash Harrington was a solicitor working with Simpson Millar Solicitors LLP, who were the agents in the property purchases for all of the appellants, and indeed for all of the taxpayers in the batch of 122 purported assessments of 18 February 2013. HMRC did not challenge his evidence.

33. Mr Harrington accepted that his firm had been notified of a number of discovery assessments on its clients related to their use of SDLT schemes in the purchases in which Simpson Millar were instructed. His evidence was that the firm scanned all correspondence received and also retained the hardcopy. Mr Harrington was unable to find in the firm's records either a hard copy or e-copy of any assessment dated 18 February 2013 relating to any of the appellants; nor was he able to find any communication from the firm to the appellants or vice versa about any such an assessment. He was therefore confident that the firm did not receive the assessments.

34. It was also his unchallenged evidence that a 'significant' number of clients have had HMRC make claims for unpaid tax in a situation where neither the firm nor its client has received the discovery assessment, especially with respect to assessments made in February 2013. However, his evidence failed to make clear whether or not Simpson Millar received assessments for some of the 122 other taxpayers purportedly assessed on 18 February 2013.

Evidence from the appellants

35. The appellants' evidence was also unchallenged. HMRC accepted that they ought to be allowed to lodge late appeals, as I understand it, because HMRC accepted that the appellants had not in fact received the assessments and so knew nothing about them and could not have been expected to make a timely appeal against assessments of which they were unaware.

36. Looking at the detail of their evidence, which we accept as unchallenged, it was that Mr Kothari had not received the assessment in 2013 and the first he knew about it was the nudge letter a significant number of years after the property purchase. His evidence was that it was unlikely post delivered to his address would have been overlooked. Mr Cutler's evidence was the same; and his wife gave a statement concurring; Mr Fox gave the same sort of evidence; Mr Wilkinson's evidence (with which his wife concurred) was the same; in addition, HMRC purportedly sent the assessments to the address of his previous residence; he believes that he notified HMRC of his change of address but accepted that might have been after 18 February 2013; in any event, he continued to own the previous address throughout February 2013 and would have received any post sent to either address.

Whether the assessments were issued?

37. The appellants' evidence that none of them received at their property the assessments dated 18 February 2013 is unchallenged. Mr Harrington's unchallenged evidence was that their agent did not receive the agents' copy of the letter either. We find as a fact no copies of the assessments the subject of this appeal were received at any point before copies were sent

to them by HMRC in or after 2016. HMRC's unchallenged position that Mr Wilkinson received a copy of the assessment on 19 July 2016, Mrs Wilkinson received it on 23 November 2018, and the rest of the appellants on specified dates in 2017 and we find that as a fact.

38. In our view, the finding of fact that neither the six appellants nor their agent received the assessments in 2013 means it inevitable that we find that HMRC did not in fact put the assessments into the postal system. While it seems a reasonable inference that post does occasionally go astray, it would be incredible for both the copy of the letter to the taxpayer and the copy of the letter to the taxpayer's agent to go astray; in the case of Mr and Mrs Wilkinson and Mr & Mrs Cutler it would require us to accept 3 copies of the same letter all in separate envelopes all went astray in the post. Moreover, it would require us to accept that this happened in respect of at least 4 packages of letters in the same batch of 122 packages of letters. We consider such an incredible coincidence to be extremely unlikely.

39. Mr Thornton's position was that the entire batch of 122 assessments must have gone astray somewhere in HMRC's offices. This would explain why none of the 122 taxpayers (as demonstrated by the spreadsheet) paid the tax liability at the earliest before receipt of the nudge letters sent in 2015. Mrs Baker's evidence, however, was that some of the 122 taxpayers had accepted they had received the assessments.

40. It does not seem to us to matter whether the whole or only part of the batch of 122 letters went astray: as it is considerably more likely than not, we find that something went wrong in HMRC's offices with the whole or a part of the batch of 122 letters which included those the subject of this appeal. While we accept that HMRC had systems in place to ensure letters were not left lying around the office and didn't go astray, Mrs Baker was unable to speak to this particular batch and our finding that the packages of letters were received by none of the intended recipients who are appellants in this appeal, including their agent, indicates to us that it is more likely than not that those letters were never posted, and that, on this occasion at least, HMRC's systems failed.

41. The error could have been made in the post room or could have been made by the team in which Mrs Baker was working. It is not clear. We do find that the assessments the subject of this appeal were not issued, if at all, until copies of the letters were sent to the appellants in or after 2016.

42. We note in passing that Mrs Baker's evidence was that HMRC did not receive back as undelivered any of the letters they sent out to the taxpayers and therefore proceeded on the assumption that they had been received: however, this evidence is also consistent with our finding that the letters were never sent.

43. We also note in passing that Mr and Mrs Wilkinson claimed that HMRC had mis-addressed the letters sent to them as they were sent to their old, rather than newly purchased, address. However, we do not accept that the delivery of an SDLT form showing the purchase of a property indicates to HMRC an address change as there is nothing to tell HMRC that it is the purchasers' new residence. And while Mr and Mr Wilkinson did notify an address change to HMRC, we are not satisfied that they did so before 18 February 2013. We therefore find that the letters of assessment, addressed to Mr and Mrs Wilkinson would have been correctly addressed had they been actually posted: but we have found that they were not posted.

Were the assessment made?

44. That raises the question of whether any of the six assessments the subject of this appeal were ever made; something went wrong with this intended batch of assessments (or part of it). Did it go wrong before or after the assessments were actually made? That depends on what amounts to the making of an assessment, and we will consider that as a matter of law first.

THE LAW

THE LAW RELATING TO THE MAKING AND ISSUING OF ASSESSMENTS

45. The Act does not institute a particular procedure for making an assessment. It provides as follows:

> ASSESSMENT PROCEDURE
>
> **32(1)** Notice of assessment must be served on the purchaser.
>
> **32(2)** The notice must state –
>
> (a) the tax due,
>
> (b) the date on which the notice is issued, and
>
> (c) the time within which any appeal against the assessment must be made.
>
> **32(3)** After notice of the assessment has been served on the purchaser, the assessment may not be altered except in accordance with the express provisions of this Part of this Act.
>
> **32(4)** Where an officer of the Board has decided to make an assessment to tax, and has taken all other decisions needed for arriving at the amount of the assessment, he may entrust to some other officer of the Board responsibility for completing the assessing procedure, whether by means involving the use of a computer or otherwise, including responsibility for serving notice of the assessment.

46. These provisions closely mirror those in the Taxes Management Act which apply in relation to most direct tax assessments; in particular ¶32(1)-(3) mirror s 30A(3)-(4) and ¶32(4) mirrors s113(1B) TMA.

47. But neither TMA nor the SDLT provisions set out exactly the process for making an assessment. Mr Thornton's first position was that giving notice of assessment was, for SDLT purposes, if not for any other tax, an essential part of the making of an assessment.

Does making the assessment include notification of the assessment?

48. He recognised that binding case-law in respect of other taxes is clear that notice of an assessment is not the assessment itself:

> It seems to me that the words in s 29(5) 'notice of any assessment to tax' necessarily imply that there is a difference between the notice and the assessment. One cannot have a notice of assessment until there has been actual and valid assessment….
>
> …The giving of notice has nothing to do with the making of a valid and effective assessment. The statute clearly distinguishes between the assessment and notice of it and contains no provision which makes the validity of the assessment in any way conditional on the notice.
>
> Per Fox LJ in *Honig and another v Sarsfield* [1986] STC 246

49. The difficulty for the appellants with the argument that the assessment for SDLT purposes included notification of it is that, as we have said, the provisions in Taxes Management Act 1970 which applied to the assessment in *Honig* have been very closely duplicated in Sch 10 of FA 2003. Parliament in 2003 must be supposed to have understood the interpretation given to the TMA provisions in cases including *Honig* and to have been content to have the same provisions with the same interpretation apply to SDLT assessments. What was said in *Honig* is therefore applicable to SDLT assessments.

50. Mr Thornton pointed out that s 113(1B) TMA was not in force at the time of the assessments in *Honig* and was not considered by the Court in that case albeit it was in force long before the judgment in the appeal. He considers that the Court would have reached a different conclusion had s 113(1B) been in force and that *Honig* is not good authority on what amounts to an assessment made at any time after s 113(1B) TMA came into force. And, as we have said, ¶32(4) mirrors s 113(1B) for SDLT.

51. Mr Thornton's point is that S 113(1B) TMA and its counterpart §32(4) on one reading at least imply that the issue of the notice of assessment is a part of the process of assessment as they say:

> [the assessing officer] may entrust to some other officer of the Board responsibility for completing the assessing procedure, whether by means involving the use of a computer or otherwise, including responsibility for serving notice of the assessment.
>
> (our emphasis)

52. While we understand the point that Mr Thornton is making, we do not agree with him that this means *Honig* is no longer good law. The section of TMA considered in *Honig* (s 29) was the forerunner of what is now s 30A. S 29 then, as s 30A is now, was headed:

> **Assessing procedure**

As s 30A(3) does now, s 29(5) did at the time of *Honig* require notice of assessment to be served on the taxpayer. So Parliament considered that service of the notice of assessment on the taxpayer was a part of the 'assessing procedure' set out in what is now s 30A and the Court of Appeal in *Honig* knew this. It seems that the 'assessing procedure' is a combination of making the assessment and notifying it to the taxpayer, and that has always been the case and the Court in *Honig* were aware of that.

53. Mr Thornton also suggests that an assessment does not crystallise until served because ¶32(3) expressly contemplates that an assessment may be informally altered up to that point; however, an identical provision was considered by the Court of Appeal in *Honig* (what was then s 29(6) and is now s 30A(4)) and therefore their decision was given in full knowledge of that provision. And that decision was that the assessment was made before, and was not completed by, notification to the taxpayer.

54. Mr Thornton also said that the Finance Act 2003 provisions should be read differently to those considered in *Honig* because the Finance Act only referred to a taxpayer as the 'person' assessed after the taxpayer received notice of assessment. Prior to that point, says Mr Thornton, the Act referred to the taxpayer as 'the purchaser'. We do not follow this point: s 31(2) which imposes time-limits refers to a 'person' rather than a 'purchaser' being assessed and, applying *Honig,* refers to when an assessment is made, and not when notified.

55. HMRC relied on the FTT cases of *Lloyd* [2017] UKFTT 828 (TC) and *Tutty* [2019] UKFTT 3 (TC) for the proposition that it was already decided that the SDLT provisions mirrored those of the TMA and should be interpreted the same way. We agree with Mr Thornton that that was not an issue in *Lloyd* where the issue was whether the assessments had been served at all. *Tutty* was far more relevant because it addressed the question of whether the SDLT assessment was valid when it had not been served on the taxpayer until after the time limit had expired. The Judge said at [28] that:

> 'the law relating to discovery assessments for SDLT is based on that found in the Taxes Management Act 1970 … but with minor differences….'

He went on to conclude that it was enough for the assessment to be made within the permitted time limit; as held in *Honig*, it did not matter if notification fell outside that time:

> [43] I therefore reject the appellant's argument that the failure to service notice on the appellant until after the end of the four year period invalidated the assessment…..

56. However, while, as an SDLT case, *Tutty* is directly on point, it is not binding on this Tribunal. Nevertheless, we our persuaded from our consideration of the comparison between the TMA and SDLT provisions that Parliament used virtually identical legislative provisions because it intended existing and future case law on these virtually identical provisions in the TMA to apply to those in the SDLT legislation. Parliament intended the law to be the same for assessments under Schedule 10 as under the TMA, at least on this point. Therefore, *Honig* is good law so far as SDLT assessments are concerned and we consider *Tutty* rightly decided on this. The effect is that only the making of the assessment must be within the time limit. While issue and service of the assessment is a part of the procedure of assessment, they can occur at a point in time after the last date for the making of an assessment.

When were the assessments made?

57. If we had agreed with Mr Thornton that making an SDLT assessment by necessity included notifying the taxpayer of it, we would have allowed the appeals. That would have been on the basis that it was accepted by all parties that the service of the assessments did not take place until 2016 at the earliest and that was clearly more than 4 years after the effective dates of the transactions (¶31(1) Sch 10 FA 2003) which in the cases in these appeals ranged in date from June 2009 to October 2010.

58. However, rejecting his case on this does not mean that the appellants lose their appeal. On the contrary, there is still the question of whether the assessments were made less than four years after the date of the transactions concerned.

59. HMRC's case is that all the discovery assessments at issue in this appeal were made on 18 February 2013. Mr Thornton does not accept that they were ever made. So what exactly amounts to the making of an assessment?

60. In the *Honig* case, the Court accepted (and it does not appear to have been in dispute) that the assessments were made when the inspector signed a certificate to that effect and placed it in the 'assessment book' held by that office of HMRC. That process was also noted in *Burford v Durkin* [1991] STC 7 at page 10.

61. In the much later case of *Corbally-Stourton* (2008) SPC 692, however, the tribunal recorded its findings that HMRC no longer kept assessment books. It accepted the officer's evidence that HMRC's practice was to make an assessment by keying into the computer the amount of the assessment. The Tribunal concluded:

> [93] It seems to me that [the officer] made the assessment when, having decided to make it, he authorised the entry of its amount into the computer. I find the that assessment was made.

This finding was followed in *Tutty,* where the FTT recorded at [38]:

> The situation here is the same as in *Honig* – the assessment was made, in the modern way, by entering the details in the HMRC computer as described in *Corbally-Stourton*…. The appellant does not dispute that the assessment was so made at that time.

62. However, we do not consider that these cases were recording the one and only way that HMRC could make an assessment; indeed, they do not purport to do that as clearly the later cases accepted that HMRC could change its process of making assessments. Indeed, while the Court of Appeal in *Burford v Durkin* regarded the assessment certificate to be a part of the

making of the assessment, it seems that was because at that time HMRC itself did not regard an assessment as made until the certificate in the assessment book was signed.

63. We consider that, as Parliament has not seen fit to specify a particular method of making an assessment, we do not see that the law requires one. And we see no reason why assessments for one tax have to be made in precisely the same way as assessments for another tax or even for the same tax. If assessments are made in the manner which HMRC has determined at that particular time for that particular tax, then the assessment could be valid.

64. Having said that, we do think that the making of an assessment does logically have an irreducible minimum of requirements: an HMRC officer acting as an HMRC officer must decide to make an assessment; he must then note the necessary details of the assessment in some form of reasonably permanent record held by HMRC. That appears to have happened in *Honig, Corbally-Stourton* and *Tutty*. And the Court of Appeal appears to have reached this conclusion in *Burford v Durkin* where Nicholls LJ said:

> …it seems to me that in this context making an assessment will normally involve (a) a decision to make an assessment in a particular amount; and (b) an appropriate documentary record being made of that decision with the intention that that document shall take effect as an assessment.

65. There is no suggestion in this case that HMRC did not follow its own procedures for making SDLT assessments; and if Mr Thornton should be taken as alleging that, we do not think that it is made out. But the question remains whether HMRC did make a decision to assess the appellants and whether it did make an appropriate documentary record of it.

66. Mrs Baker's evidence was that a decision was taken by HMRC at some point between November 2012 and 18 February 2013 to assess each of the appellants in the amount in which they were assessed. The evidence was vague; she does not state which officer or officers reached this conclusion nor the precise date on which the conclusion was reached. The gist of her oral evidence appeared to be that, while it was her name on the assessments, the original decision to assess was not taken by her but the team tasked with the investigation. Her team was tasked with the practicalities of making and issuing the assessments. They inputted the data into a computer to enable the package of letters to be printed; they then checked the letters and uploaded them on to the CAF system and placed hard copies on the taxpayers' files. They then gave, or intended to give, the letters to the post room for posting on the pre-determined date of assessment being 18 February 2013.

Did HMRC make the decision to assess?

67. Mrs Baker's evidence is not clear on whether the final decision to assess any of the appellants was taken by her, a member of her team, or was taken by the investigating team. We do not think it matters. Regulation 28 of Sch 10 allows 'HMRC' as a body to make an assessment; we think a decision to assess could be taken by an individual officer or by a group of officers. Regulation 32(4) expressly contemplates the possibility that one officer could take the decision to assess, leaving it to another officer to actually make and notify the assessment. Nor does the legislation require the decision making officer to be identified by name. This is consistent with what the Court of Appeal said in *Burford v Durkin.*

68. We think it is clear from Mrs Baker's evidence that the investigating team which undertook the 'reverse engineering' which she describes, took a decision in principle to assess all of appellants. Mrs Baker's team, or a member of it, carried out final checks on each of the appellants and by entering the details of the assessment into the CAF system and by placing hard copies on their files, took a final decision to make the assessment, or at least to implement the decision to assess which another officer had already decided to make. We do not think we

need to decide which HMRC officer actually made the final decision to assess. We do find that one was made in the case of each of the appellants.

Did HMRC then record the assessment?

69. Subject to one caveat, we find that HMRC did record each of the six assessments in a final form. They did this by entering the notice of assessment into the CAF system and by putting a copy of the assessment on each taxpayer's file. This was not quite the same process as described in *Corbally-Stourton* or *Tutty,* and certainly not the same system as described in *Honig* and *Burford v Durkin,* but, in our view, uploading the assessment into CAF and placing copies on the taxpayers' paper files was intended by HMRC to be a permanent record of the assessments and it was such a record. HMRC are not restricted to making an assessment by one particular method: it is enough if the decision to assess is made and what was intended to be a permanent record of it was created.

70. Mr Thornton's view was that it was not enough to enter the letters onto the CAF system and put them in the taxpayer's paper file: HMRC had to go further and make a paper or electronic entry in a list of assessments. He accepts that HMRC did keep a spreadsheet of the assessments but considers that that did not meet the test he set because it is not clear who had responsibility for updating it and when the entries were made. In particular, there was no evidence that the spreadsheet recorded the assessments on the appellants at the time that they were purportedly made on 18 February 2013. The entries may have been made later.

71. However, we do not accept that in order to validly make an assessment HMRC have to enter the details of it into some kind of list of assessments. We think all that is required is (a) the decision to assess and (b) the creation of a permanent record of it. Certainly no more than that was required in *Burford v Durkin*. We think the spreadsheet was irrelevant to the making of the assessment: it was a method of internal record keeping by HMRC and no more. It was not a step in the making of the assessment. So the date that the entries were made on it is not relevant to the question of whether and when the assessments were made.

72. As we said above, subject to a caveat, we think HMRC have proved that they made the assessments in this appeal as they have proved that an officer, or more than one officer, took the decision to do so and the same or another officer (also unnamed) entered the notices of assessment into the CAF system and placed hardcopies on the appellants' files. The caveat to this relates to the post-dating of the notices of assessment. At the time HMRC made the permanent record of the assessments, the assessments were not intended by HMRC to be in effect. They were post-dated. Mrs Baker was not in fact able to say when the permanent record of the assessments was created other than it was after the assessments were printed out (late January and early February) and before 18 February 2013.

73. So, if the making of a permanent record of the assessment perfected the decision to assess which had already been taken, but the assessment was post-dated, when, if at all, was the assessment actually made?

74. It seems to us that the assessment was made, and was made on the date stated on it. This was necessarily after the decision to assess was made and after the permanent record of the assessment was created. But we see nothing against post-dating an assessment in the statutory scheme. On the contrary, it seems good practice by HMRC to ensure that a communication carries the date on which it was actually posted. So where HMRC has taken the decision for practical reasons to issue assessments in batches, it seems good practice to post-date the assessments so that they are prepared and ready for posting in batches on the intended date of assessment.

75. But it does seem to us that HMRC did not actually make the assessment until 18 February 2013 arrived: by that point in time HMRC had already taken the decision to assess as at that date, and had already created the permanent record. The assessments were made on the date specified on them.

76. So we decide this point against the appellants. The assessments were made on 18 February 2013. But does that mean their appeal fails? §32 of Schedule 10 requires assessments to be served so there is a remaining question of whether the assessments were so served.

Were the assessments issued and served?

77. We note that the legislation actually required assessments to be both issued and served. This is clear because ¶32(1) expressly stated that notice of an assessment must be served on the purchaser; the need to serve an assessment necessarily implies that it is first issued and this is made plain in ¶32(2)(b) which refers to the requirement for the notice to state the date on which it was issued.

78. HMRC accepted that none of the appellants received the copies of assessments which HMRC had intended to issue to them on 18 February 2013. They accept, therefore, that they were not served, at least not before 2016. We have found, however, that something went wrong at HMRC's end: either the assessments the subject of this appeal never reached the post room or they never left it. They were not posted. That means that we have found that the assessments were neither issued nor served (at least not before 2016).

79. HMRC's case is that that does not matter. The assessments were made, and they were issued to each of the appellants at some point in 2016-2018 when there was correspondence passing between the appellants and HMRC, and HMRC forwarded copies of the assessments to the appellants. They point to *Honig* as authority that the issuing of the assessment did not have to be within the time limit for the making of the assessment.

80. We do not agree that *Honig* is authority for a proposition that an assessment can be issued years after it was made. That was not an issue in that case, where the original notices of assessment were sent out but (twice) returned undelivered; they were then sent out a third time and received within a month of the expiry of the time limit on the making of an assessment. In other words, the facts in *Honig* reveal an ongoing attempt by HMRC to serve the notice of assessment; on each occasion that the notice was returned undelivered, HMRC then identified a new address and/or person to which to send it and sent it out again relatively promptly. The Court in *Honig* expressly refused to be express an opinion on whether service years late was sufficient.

81. HMRC say that that question was addressed in the case of *Grunwick Processing* in the High Court [1986] STC 441. Macpherson J there stated:

> …the Chairman found that there was no proper notification [of the assessment], but he also held that the result was that the assessment was simply unenforceable unless and until it was notified properly. The point has very little, if any, merit since the taxpayer company plainly got the assessment through their own solicitors….
>
> …the matter could be and indeed, in my judgement, has been rectified by notification now. There has been formal notification in accordance with the 1983 Act so that any irregularity is cured, and the taxpayer company can no longer have the protection, in my judgement, of that argument.

It is difficult to glean the precise facts on this issue from the very short High Court decision. It seems the assessment may have been issued but not served, although the taxpayer received notification of it promptly via its agents.

82. Mr Thornton points out that the VAT legislation is not the same as the tax legislation in any event. And while that is true, in essentials it appears the same: VAT assessments must be both made and notified before they are effective and can be enforced.

83. Nevertheless, it seems to us that the SDLT and TMA legislation describe an assessment procedure. While it is clear that the legislation draws a distinction between the making and notification of an assessment, and there is no requirement for the notice of assessment to be issued by the final deadline for an assessment being made, nevertheless both steps are part of a single assessing procedure so there must be some proximity or nexus between the two steps.

84. We are fortified in this view because the statute clearly contemplates that notification of the assessment is a vital part of the assessing procedure. It states notice of assessment 'must' be served; the notice of assessment 'must' contain certain information. The right of appeal runs from the date of issue or even arguably from the date of service but not from the date the assessment was made. Yet if HMRC could serve that notice at any point in time, these provisions become otiose: HMRC could correct any errors in a notice of service by re-issuing it at any point, indeed they could even re-issue it after a Tribunal had ruled that an assessment had not been properly served. Such an interpretation of the law could not have been intended by Parliament.

85. We think that the provisions on service of both tax and VAT assessments were clearly intended to protect taxpayers and they should be interpreted in such a way to give them effect. If assessments can be made without any notification to the taxpayer for years, that makes the protection of the time limit on assessments illusory. It seems to us that although service of the assessment does not have to take place at the time by which an assessment must be made, nevertheless, service must be proximate to the making of the assessment. Moreover, particularly taking into account the provisions of ¶32, it must be part of a single assessing procedure.

86. We do not see that as inconsistent with *Grunwick* when it is clear that the taxpayer in that case did get notification (via its solicitors) of the assessment, it appears, shortly after the assessment was issued. We do not see *Grunwick* as being authority for the proposition that a failure to issue and/or serve an assessment can be corrected at any point in time: *Grunwick* was a case where the taxpayer was effectively served shortly after the assessment was issued.

87. We were also referred to the FTT decisions in *Alison Lloyd* and *Tutty*. In *Lloyd*, the appellant accepted that the assessments were made in time: see [2]. Apart from an issue about discovery, the only other live issue in the appeal was whether the assessments were served on the appellant. Unlike their case in this appeal, HMRC did not suggest in that appeal that the act of sending the appellant copies of the assessments some years after the assessments were made amounted to service of them. It follows from what we have said above that we think HMRC were right in *Lloyd* not to make that suggestion. The case, in our view rightly, proceeded on the basis that the notices of assessment sent to the taxpayer at the time of the making of the assessments were the only notices of assessment: if they were not sent or received, they were not served and the assessing procedure would have been incomplete with the effect that a validly made assessment could not be enforced.

88. In *Tutty*, the Tribunal found that HMRC correctly served the notice of assessment shortly after making it and shortly after the time limit for making it expired: that finding appears is entirely consistent with *Honig* and what we have said here. In *Tutty*, there was no long gap between the making of the assessment and the service of it. However, we do note that at [47] the Judge said that he considered *Lloyd* wrong to have proceeded on the basis that the assessment was invalid if it was not served. However, as we have said, ¶32(1) of Sch 10 FA 3 required notice of assessment to be served. That was recognised in *Honig*. It is a necessary

implication of the legislation that an assessment which is made but not served is and remains unenforceable.

Application of law to facts

89. We do not accept HMRC's position that it is possible at any time to correct a failure to issue and serve an assessment. That makes a nonsense of the provisions which require issue and service; it makes a nonsense of the time limits on the making of an assessment. We consider that not only is issue and service essential to the enforceability of an assessment, but that issue and service must have some proximity to the making of it. We do not know where the line should be drawn, but we are sure that HMRC crossed it in this case. We consider it was too late to issue and serve these assessments more than 3 years after they were made, particularly in circumstances when it could only have been failures in HMRC's processes which led to the failure to issue and serve the assessments in 2013 and, moreover, had HMRC taken more care to follow up the assessments, they should have realised much earlier (from the lack of response from any of the intended recipients) that there might have been a problem with the issue and service of this particular batch of 122 assessments.

90. In our view, the assessments in this appeal were and remain unenforceable because the assessing procedure was incomplete due to HMRC's failure to issue and serve the assessments and it was too late to rectify that in 2016 or thereafter. Unlike *Grunwick*, this was not a case were the appellants were effectively served by another means. They had no knowledge of the assessments which had not in fact been issued and served.

CONCLUSION

91. We said at the outset that this decision would not determine the merits of the assessment: it was agreed by all parties that the appellants did not even need to indicate to HMRC at this point in time whether they would even seek to put the case that the stamp duty avoidance scheme which they entered into was valid. Mr Thornton, at the first hearing, candidly admitted that he had not yet looked at it to form a view on the matter. The parties effectively wanted the question of the validity of the assessments determined as a preliminary issue and this was agreed.

92. In the event, we have decided that the appeals should be allowed because the assessments are all unenforceable because that HMRC did not complete the assessing procedure, as the assessments were not issued and served on the appellants in accordance with the requirements of the statute.

93. We note in passing that, based on the findings of fact in this case, we do not accept that any of the appeals were late: time to make an appeal runs from the date of issue or service (we do not decide) and not from the date of the making of the assessment. Therefore, time to make an appeal has not begun to run and the appeals could not be late.

94. Another technical (but probably academic) question is whether the Tribunal has jurisdiction to allow the appeal. The Judge in earlier hearings raised the question whether the proper way of dealing with a finding that an assessment was invalid is to allow or strike out the appeal. That question arose because the right of appeal is against an assessment. That question is entirely academic in view of the fact we have decided assessments were actually made and so can be appealed.

95. But we have also found that the assessments were validly made (subject to the question of whether the SDLT scheme was effective). Should we dismiss the appeals, but with the comment that the assessments are unenforceable, or should we allow the appeals? The answer

is probably academic as either way we have found the assessments cannot be enforced. But for the sake of clarity, we allow the appeals.

THE LAW RELATING TO WHEN A DISCOVERY ASSESSMENT IS VALID

96. That conclusion makes it unnecessary to consider Mr Kothari's case that HMRC were out of time to make a valid discovery assessment against him on 18 February 2013. Nevertheless, as the point was argued, and in case this matter goes further, we record our findings.

97. The parties were agreed that the purported assessments were made under Sch 10 Finance Act 2003. The Schedule permitted HMRC to made discovery assessments under provisions which were clearly based on those in s 29 TMA. We find, and it was not in dispute, that the case law on discovery assessments made under s 29 TMA was applicable to the discovery provisions in Sch 10 Finance Act 2003 relating to SDLT returns.

98. As with s 29 TMA, HMRC were only permitted to make a discovery assessment in one of two cases. The first case (¶30(2) Sch 10) was where the insufficiency in the SDLT return was attributable to fraudulent or negligent conduct on the part of the purchaser or his agent; the second case was in ¶30(3) and was, where there was no enquiry into the returns, when at the time that HMRC ceased to be entitled to give notice of enquiry into the SDLT return, HMRC:

> 'could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the [insufficiency]'

99. HMRC did not rely on the fraud or negligent conduct condition. So we only need to consider the condition contained in §30(3) which concerned whether HMRC could reasonably have been expected to be aware of the insufficiency at the time the enquiry window closed.

100. It was accepted that all the SDLT returns in the appeal self-assessed a nil liability to SDLT. It was also accepted that all the SDLT returns, with the exception of Mr Kothari's, showed a consideration being paid for the property which was significantly lower than the consideration actually paid. Mr and Mrs Wilkinson's showed a consideration of £121,000 when the actual price was £1,100,000; Mr and Mrs Cutler's return showed a consideration of £147,000 when the actual price was £490,000; Mr Fox's return showed a consideration of £142,500 when the actual consideration was £950,000. All the figures for the actual consideration were shown on the returns made to the Land Registry.

101. These 5 appellants accepted that, at the time the enquiry window closed HMRC could not have been reasonably expected to be aware on the basis of the SDLT returns, that there was an insufficiency in their self-assessments. HMRC had not obtained the Land Registry returns by the date the enquiry window closed. These appellants, therefore, accept that HMRC could have made a valid discovery assessment on 18 February 2013; and indeed we have found that they did, albeit one that for the reasons we have given above we have found to be unenforceable.

102. Mr Kothari does not accept that HMRC could have made a valid discovery assessment against him in February 2013. His SDLT return had a blank in the space where the consideration should have been entered; his position was that this was equivalent to returning a nil consideration and any reasonable HMRC officer was alerted to a real possibility of an undervalue even without sight of the Land Registry return which showed he had actually paid £500,000.

103. Mr Kothari accepts that all the hypothetical HMRC officer would have had to go on was his return. The question is what the legislation means by 'could not have been reasonably expected…to be aware of the [insufficiency]'. Was it enough that the officer had grounds to be suspicious? Or did the officer actually have to know the return was incorrect?

Awareness of actual insufficiency

104. In *Langham v Veltema* [2004] EWCA Civ 193 at [30-32], the Court of Appeal considered whether 'awareness or inference of actual insufficiency' was what was required to negate the condition referred to above or whether only awareness of a *possible* insufficiency was enough. The Court also considered whether it was relevant that the actual information available would have prompted a reasonable HMRC officer to enquire further. The Court concluded that the equivalent provision in the TMA (s 29) did not require an HMRC officer to enquire into the return [32] as the statutory test was concerned with:

> 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

In that case, the taxpayer made a return based on an undervaluation but there was nothing in the return or other information referred to in the section that indicated that the valuation was wrong. The officer was not fixed with knowledge that he could have obtained if he had made enquiries.

105. Mr Thornton accepted the *Langham v Veltema* authority was binding. He accepted, rightly in our view, that HMRC would not be taken to be aware of the Land Registry returns as these were not provided to HMRC by the appellants. There was nothing provided by the appellants to HMRC which indicated the true price paid for the properties.

106. Nevertheless, Mr Thornton's case was that the indications that something was wrong was so strong from Mr Kothari's SDLT return that HMRC should have inferred from it there was an under-declaration.

107. He relied on the later FTT case of *Corbally-Stourton* (above) where the Judge expressed the view at [51] that what the inspector needed at minimum to be aware of was that it was more likely than not that there was an insufficiency: s 29 did not require absolute certainty of an insufficiency. In that case, the Tribunal held that the return, from which it could be inferred that the taxpayer had used a tax avoidance scheme, nevertheless did not put the inspector on notice that an insufficiency was more likely than not because the tax inspector was not given the information from which he would have been able to form a view on whether the scheme was effective.

108. We do not agree that either of these cases support the contention put forward by Mr Thornton. It was possible for property to exchange hands for a consideration of nil without triggering an SDLT liability (for instance, from an executor to beneficiary). Therefore, it was not an obvious inference that Mr Kothari's return, which was taken as reporting a nil consideration with no SDLT liability, was more likely than not to be wrong. There were other explanations which were, on the minimal information available to HMRC, at least equally likely. HMRC were not to be treated as knowing what they would have discovered had they made enquiries or obtained the Land Registry return.

109. In any event, we note in passing that what was said in *Corbally-Stourton* is not binding on this Tribunal and is apparently inconsistent with what was said by the Court of Appeal in *Sanderson* [2016] STC 638 at [23] where the Court said it was a matter of the inspector's judgment as to whether an insufficiency existed rather than the application of any particular standard of proof. Either way, as we consider that there were equally plausible explanations for the nil consideration on Mr Kothari's return, other than it was incorrect, and which would not give rise to an insufficiency, we find on the basis of Mr Kothari's SDLT return HMRC 'could not have been reasonably expected, on the basis of the information made available to them .., to be aware of the' insufficiency. As *Sanderson* held, suspicion is not enough. Mr Kothari's return perhaps ought to have made HMRC suspicious of an insufficiency but it was not enough to make them aware of the insufficiency as there were other equally likely

explanations for the blank which, if they had been the true explanation, would not result in a tax liability.

110. In conclusion, we find HMRC were not precluded from making a valid discovery assessment because the condition in §30(2) was met. However, that finding is irrelevant as we have found that HMRC failed to complete the assessing procedure: the assessment was made but not issued and served. All six appeals must be allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

Barbara Mosedale
TRIBUNAL JUDGE

Release date: 26 June 2019