TC08061

STAMP DUTY LAND TAX – discovery assessments – whether information made available to HMRC before enquiry window closed – whether HMRC could reasonably have been expected to be aware of insufficiency of tax before that time – date on which discovery was made - whether "stale" – held discovery assessments valid – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/05400
TC/2019/05401

BETWEEN

PETER STEN BERTELSEN
SUSANNAH BERTELSEN **Appellants**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

The hearing took place on 4 March 2021. With the consent of the parties, the form of the hearing was a remote video hearing on the Tribunal video platform. A face to face hearing was not held because of the ongoing restrictions and concerns for public health resulting from the COVID-19 pandemic. The documents to which I was referred are described in the decision notice.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Gavin Lenthall, Hampton Tax Advisors LLP, for the Appellants

Rebecca Arnold, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION AND SUMMARY

1. Mr and Mrs Bertelsen, the Appellants, appeal against discovery assessments dated 16 November 2011 issued by HMRC pursuant to paragraph 28 of Schedule 10 Finance Act 2003 ("FA 2003"). The discovery assessments both assess stamp duty land tax ("SDLT") of £180,000, and were issued to each Appellant in respect of the acquisition of a residential property in West Sussex (the "Property") on 22 November 2007.

2. The discovery assessments were issued on the basis of a valuation provided by the district valuer. HMRC have since amended the assessments to £174,600 each reflecting the actual consideration paid by Mr Bertelsen. HMRC have confirmed that they are not seeking double recovery – both Appellants have been assessed on a protective basis to avoid the situation where HMRC is found to have assessed the wrong party and is then out of time.

3. The Appellants gave Notice of Appeal to the Tribunal on 17 August 2019. Their grounds of appeal were that they had made disclosure to HMRC of the transactions within the enquiry window and, alternatively, any discovery (if there was one) had become stale. At the hearing Mr Lenthall confirmed that the only ground of appeal related to the validity of the discovery assessments and no challenge was made to the (reduced) quantum. Although the matter has taken several years to progress from the issue of the discovery assessments to the appeal being made to the Tribunal the appeal was made in time (although Mr Lenthall has criticised the delays on the part of HMRC in progressing matters).

4. For the reasons set out below I have concluded that HMRC made a discovery in November 2011 and the conditions for issuing the discovery assessments were satisfied. Whilst current (binding) case law supports the conclusion that a discovery can become stale (which can then prevent HMRC from being able to issue a valid discovery assessment within the statutory time limit), the discovery which had been made in the present appeal had not become stale. The discovery assessments were validly issued by HMRC and the appeal is dismissed.

FACTS

5. The facts set out below are common ground. One factual matter in issue between the parties is whether a letter dated 7 December 2007 from Target Tax Consultancy ("Target"), then the Appellants' representative, (the "December 2007 Letter") had been sent to or received by HMRC explaining the transaction. This is addressed in the Discussion.

6. On 10 December 2007 the Rapid Data Capture Centre ("RDCC") of HMRC in Netherton received a land transaction return SDLT1 from Mr Bertelsen in respect of the purchase of the Property (the "first return"). They also received that day an SDLT1 from Mrs Bertelsen in respect of the acquisition of the Property (the "second return"). Both returns showed the effective date of transaction as being 22 November 2007.

7. The first return, submitted with two forms SDLT2, stated the names of four vendors, Heather Ann Burrough, Simon James Burrough, John Patrick Geoghegan Randel and Graham John Healey (the "Vendors") and the purchaser was Mr Bertelsen. The first return declared a total consideration figure in the sum of £1 and nil SDLT payable. Code 30 ("cash") was entered in box 12 'What form does the consideration take'.

8. The second return showed the vendor as being Mr Bertelsen and the purchaser as being Mrs Bertelsen. That return declared a total consideration figure in the sum of £Nil and nil SDLT payable. An SDLT8 was issued in respect of the entry at Box 10 on 10 December

2007 and the entry was amended to £1 on 20 December 2007. Code 34 ("other – for example market value") was entered in box 12 'What form does the consideration take'.

9. No reliefs were claimed in either of the returns.

10. In April 2010 HMRC received an opinion from leading counsel as to the efficacy of various SDLT sub-sale arrangements, one of which was the variant that had been implemented by the Appellants.

11. On 14 November 2011 Officer Jonathan Warburton requested a valuation in respect of the Property. He received an estimated valuation of £4,500,000 from the senior surveyor the following day, and on that day, 15 November, he instructed that discovery assessments be raised. The discovery assessments of £180,000 each were issued to the Appellants on 16 November 2011.

12. Target appealed to HMRC against the discovery assessments on 2 December 2011. That appeal attached a copy of the December 2007 Letter.

13. The Appellants gave notice of appeal to the Tribunal on 17 August 2019.

RELEVANT LEGISLATION

14. The relevant paragraphs of Schedule 10 FA 2003 are as follows:

> "12 (1) The Inland Revenue may enquire into a land transaction return if they give notice of their intention to do so ("notice of enquiry")—
>
> (a) to the purchaser,
>
> (b) before the end of the enquiry period.
>
> (2) The enquiry period is the period of nine months—
>
> (a) after the filing date, if the return was delivered on or before that date;
>
> (b) after the date on which the return was delivered, if the return was delivered after the filing date;
>
> (c) after the date on which the amendment was made, if the return is amended under paragraph 6 (amendment by purchaser).
>
> …
>
> 28 (1) If the Inland Revenue discover as regards a chargeable transaction that—
>
> (a) an amount of tax that ought to have been assessed has not been assessed, or
>
> (b) an assessment to tax is or has become insufficient, or
>
> (c) relief has been given that is or has become excessive,
>
> they may make an assessment (a "discovery assessment") in the amount or further amount that ought in their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) The power to make a discovery assessment in respect of a transaction for which the purchaser has delivered a return is subject to the restrictions specified in paragraph 30.
>
> …
>
> 30 (1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28 or 29 in respect of the transaction—

(a) may only be made in the two cases specified in sub-paragraphs (2) and (3) below, and

(b) may not be made in the circumstances specified in sub-paragraph (5) below.

(2) The first case is where the situation mentioned in paragraph 28(1) or 29(1) is attributable to fraudulent or negligent conduct on the part of—

(a) the purchaser,

(b) a person acting on behalf of the purchaser, or

(c) a person who was a partner of the purchaser at the relevant time.

(3) The second case is where the Inland Revenue, at the time they—

(a) ceased to be entitled to give a notice of enquiry into the return, or

(b) completed their enquiries into the return,

could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 28(1) or 29(1).

(4) For this purpose information is regarded as made available to the Inland Revenue if—

(a) it is contained in a land transaction return made by the purchaser,

(b) it is contained in any documents produced or information provided to the Inland Revenue for the purposes of an enquiry into any such return, or

(c) it is information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 28(1) or 29(1)—

(i) could reasonably be expected to be inferred by the Inland Revenue from information falling within paragraphs (a) or (b) above, or

(ii) are notified in writing to the Inland Revenue by the purchaser or a person acting on his behalf.

(5) No assessment may be made if—

(a) the situation mentioned in paragraph 28(1) or 29(1) is attributable to a mistake in the return as to the basis on which the tax liability ought to have been computed, and

(b) the return was in fact made on the basis or in accordance with the practice generally prevailing at the time it was made."

15. From 1 April 2011 paragraph 31 set out the time limit for making an assessment as follows:

> "31(1) The general rule is that no assessment may be made more than 4 years after the effective date of the transaction to which it relates.
>
> (2) An assessment of a person to tax in a case involving a loss of tax brought about carelessly by the purchaser or a related person may be made at any time not more than 6 years after the effective date of the transaction to which it relates (subject to sub-paragraph (2A))."

16. Prior to that, paragraph 31(1) had provided that the general rule was that no assessment may be made more than six years after the effective date of the transaction to which it relates. (Paragraphs 28 to 30 have not been amended since their introduction in 2003.)

17. The transactions entered into by the Appellants rely on the provisions of s45 FA 2003, and on s75A FA 2003 not applying.

EVIDENCE

18. I had a hearing bundle of 337 pages, a bundle of authorities and skeleton arguments from the Appellants and HMRC.

19. HMRC called two witnesses, both of whom were cross-examined on their evidence and answered questions from the Tribunal. They served the following witness statements:

(1) Peter Kane dated 13 November 2020 – Mr Kane is a former officer of HMRC, who had worked in Specialist Investigations from July 2008 and had been responsible for projects involving mass-marketed SDLT schemes. This involved his overseeing and working open enquiries where disclosures had been made by or on behalf of users to the Stamp Office. He was based in Solihull.

(2) Jonathan Warburton dated 16 November 2020 – he is an officer of HMRC working in the Fraud Investigation Service and had been an investigator working for Mr Kane in Specialist Investigations in Solihull from December 2009. Officer Warburton had given the instruction that the discovery assessments be issued to the Appellants in November 2011.

20. Mr Lenthall's main challenge to Mr Kane's evidence was that Mr Kane had taken on his role in July 2008 whereas the letter which Mr Lenthall sought to establish had been sent to HMRC and which, he submitted, precluded HMRC from issuing the discovery assessments, had been sent in December 2007. Furthermore, Mr Lenthall contended that whilst the published guidance stated that taxpayers should send disclosures to the Complex Transactions Unit in Birmingham it did not say that those sent to the RDCC would be disregarded.

21. Mr Lenthall put forward minimal challenge to the evidence of Officer Warburton, with Officer Warburton accepting that whilst he described it as odd that the consideration for the purchase of the Property was not recorded at the Land Registry he was not stating that anything had been wrong. Mr Lenthall accepted in closing that the events in November 2011 (which I set out in the Discussion) were as described by Officer Warburton.

22. Both Mr Kane and Officer Warburton were credible and helpful witnesses to the Tribunal, and I accept their evidence.

23. The Appellants served witness statements from Gavin Lenthall (dated 11 February 2021) and Rachel Verinder (dated 17 January 2021). Both Mr Lenthall and Ms Verinder had worked for Target in 2007 (with Ms Verinder having worked for Mr Lenthall), and Mr Lenthall had continued to advise the Appellants at his new firm. Those statements addressed the sending of the SDLT forms to HMRC in December 2007, evidence as to whether the December 2007 Letter was sent with those forms and, in the case of Mr Lenthall's statement, his experience with other taxpayers.

24. Ms Verinder's witness statement stated that she had sent the December 2007 Letter to HMRC with the SDLT returns, together with an additional copy of that letter. She did not attend the hearing. Mr Lenthall explained that he no longer worked with her, and they had had to track her down to obtain her witness statement. Ms Verinder's witness statement was not agreed by HMRC, a matter which was known by the Appellants ahead of the hearing. As Ms Verinder was not available for cross-examination, I have placed less weight on her evidence when making my findings of fact.

25. Mr Lenthall was the Appellants' representative at the hearing, as well as a witness. At the hearing I drew attention to this dual-role, noting an apparent conflict – as adviser to the Appellants, he has an interest in whether the December 2007 Letter is found to have been sent. Neither party made any representations or raised any concerns. I decided it would be unfair to refuse to admit Mr Lenthall's evidence. I have, however, been mindful of Mr Lenthall's apparent interest when assessing his evidence. I have given weight to his description of the processes that Target followed when sending correspondence, but placed less weight on the evidence which is essentially hearsay, being based on what he had understood that Ms Verinder did in 2007.

SUMMARY OF APPELLANTS' SUBMISSIONS

26. Mr Lenthall submitted that:

(1) HMRC received the December 2007 Letter which had disclosed the facts of the transactions and how the SDLT returns were completed.

(2) The contents of that letter were sufficient to preclude HMRC from issuing an assessment under paragraph 28 by virtue of paragraph 30(3).

(3) In the alternative, any discovery by HMRC was "stale" by the time the assessments were made on 16 November 2011, relying on the decision of the Upper Tribunal in *Beagles*. In *Pattullo* Lord Glennie held that a discovery would become stale "on any view" after a period of 18 months. HMRC had received counsel's advice on 1 April 2010. The valuation of the Property was set out in the December 2007 Letter so was known to HMRC on receipt of that letter. Therefore, any discovery was made in April 2010 and the discovery had become stale by 16 November 2011.

27. Mr Lenthall also noted that:

(1) a different taxpayer in an identical situation where a covering letter was submitted with the SDLT returns received an assessment within the normal nine-month enquiry window; and

(2) another taxpayer in an identical situation where a discovery assessment was issued outside the nine-month enquiry window had that assessment vacated when the covering letter was brought to the attention of HMRC.

28. Following the issue of the discovery assessments in November 2011, it has taken HMRC over nine years to bring this matter to the Tribunal, including two periods of three years where no correspondence was received from HMRC and it was believed by the Appellants that their files were closed.

SUMMARY OF HMRC'S SUBMISSIONS

29. HMRC observed that mass-marketed SDLT tax avoidance schemes proliferated from around 2007 with numerous variants being implemented in thousands of cases. In late 2008, HMRC began an exercise to establish the facts and categorise the different variants being implemented. Due to the numbers being implemented, a decision was taken within HMRC to seek to form a view as to whether each individual variant of the scheme was challengeable. Once a view was formed that a particular variant was challengeable, research was undertaken to identify users of the particular variant who were unknown to HMRC, with a view to assessing the tax believed due.

30. Against that background, Ms Arnold submitted that:

(1) The discovery was made by Officer Warburton on 15 November 2011 - it was at this point he had possession of counsel's opinion, the Appellants had been identified as

users of the scheme and he had a valuation on the Property. It was at this point Officer Warburton requested that the discovery assessments be raised.

(2) Pending the outcome of the appeals in *Beagles* and *Tooth*, HMRC denies that a concept of "staleness" exists. In any event, the discovery in this case was not stale on any view, as the assessments were issued one day following the making of the discovery.

(3) At the time the enquiry window closed on 22 September 2008 HMRC had not reached a firm conclusion as to the tax consequences of the transactions.

(4) HMRC did not receive the December 2007 Letter. The published guidance directed taxpayers to send correspondence to the Complex Transactions Unit. The Appellants had not done that, and HMRC's processes at the time were that correspondence received in Netherton would be sent on to the Complex Transactions Unit, at which point they were logged onto the system and reviewed. There is no evidence that the December 2007 Letter was received by the Complex Transactions Unit.

(5) If HMRC had received the December 2007 Letter, they would have been likely to have opened an enquiry within the enquiry window.

(6) In any event, even if the December 2007 Letter had been received, the letter only provided a brief outline of the transactions involved in the acquisition of the Property. The contents of the letter were not sufficient to alert HMRC to actual insufficiencies in the returns. The letter did not set out the full factual and legal position.

(7) HMRC cannot comment or speculate on the position of different taxpayers.

DISCUSSION

31. The burden of proof is on HMRC to establish, on the balance of probabilities, that the conditions for a valid discovery assessment to be issued are met.

32. The discovery assessments were issued by HMRC on 16 November 2011. It was common ground that they were raised within the four-year time limit as specified at paragraph 31(1) of Schedule 10.

33. Paragraph 28(1) provides that HMRC may make a discovery assessment if they "discover" as regards a chargeable transaction that an amount of tax that ought to have been assessed has not been assessed or that relief has been given that is or has become excessive. I refer to these as being an insufficiency of tax or an insufficiency of SDLT.

34. Paragraph 30(1) then provides that a discovery assessment may only be made if the conditions in paragraph 30(2) or 30(3) are satisfied, and may not be made in the circumstances specified in paragraph 30(5).

(1) The first case (in paragraph 30(2)) applies where there is fraudulent or negligent conduct; no such conduct is alleged here.

(2) The second case (in paragraph 30(3)) is where HMRC, at the time they ceased to be entitled to give a notice of enquiry into the return, could not reasonably have been expected, on the basis of the information made available to them before that time, to be aware of the insufficiency of tax. (Paragraph 30(4) then sets out what information is regarded as made available to HMRC.)

(3) Paragraph 30(5) provides that no assessment may be made in certain circumstances where the return was made on the basis of or in accordance with the

practice generally prevailing at the time it was made. It was not argued that this applied in the present appeal.

35. The issues before me are:

(1) Was there a discovery within paragraph 28(1) and, if so, when was it made and had it become "stale" (if such a concept exists)?

(2) Was the condition in paragraph 30(3) satisfied?

36. On the basis of the parties' submissions, the factual issue of whether or not the December 2007 Letter was sent to or received by HMRC is potentially relevant to both issues. I therefore address this first.

37. Whilst Mr Lenthall has referred to the treatment of other taxpayers, and to the Appellants' understanding that their file had been closed given various delays by HMRC, this Tribunal does not have jurisdiction to address matters of fairness. I have taken account of such submissions to the extent that evidence of HMRC's actions in respect of other taxpayers provides an illustration of HMRC's processes.

38. Whilst the discovery assessment provisions applicable to SDLT have been considered in other decisions of this Tribunal, the case law of the Upper Tribunal and Court of Appeal to which I was referred (as well as some other Tribunal decisions) related to the provisions of the Taxes Management Act 1970 ("TMA 1970"). I consider that these authorities are equally applicable to the matters in issue before me (and neither party submitted otherwise in any event).

December 2007 Letter from Target to HMRC

39. The hearing bundle contained a copy of this letter, which was said by the Appellants to have been sent to the RDCC of HMRC in Netherton with the SDLT returns in December 2007. The copy before me was the copy from Target's files which had been sent by Target to HMRC in December 2011 with their appeal following receipt of the discovery assessments.

40. Mr Lenthall's evidence in this witness statement (which was challenged by HMRC) was that he was "100% confident" that this was sent to HMRC. His evidence was that it was sent to HMRC in Netherton in the same envelope as the SDLT1 forms. He did not send it himself. He said this was done by Ms Verinder, which she confirmed in her witness statement. Target's file copy of this letter had been sent to HMRC on 2 December 2011. That file copy (or white copy, as Mr Lenthall referred to it) was not on headed paper and had initials which Ms Verinder said were "RV" (and could have been although they are not clear). He acknowledged in cross-examination that this letter had not been sent to the Complex Transactions Unit in accordance with HMRC's published guidance (stating he had not been aware of this guidance at that time).

41. In his submissions Mr Lenthall said that the risks arising from HMRC's processes for dealing with post should not be pushed onto the taxpayer, and that the fact that HMRC requested that covering letters be sent to the Complex Transactions Unit should not mean that letters sent to Netherton are disregarded.

42. Ms Arnold submitted that whilst HMRC bear the burden of establishing that the discovery assessments were validly issued, the service of a letter is a rebuttable presumption. HMRC submit that this letter was wrongly addressed (being sent to HMRC in Netherton rather than to the Complex Transactions Unit) and they have no evidence of it being received. It was not, however, HMRC's position that letters sent to Netherton would be disregarded.

43. The guidance for making disclosures to HMRC was published in Statement of Practice SP1/06 (published on 3 January 2006). These principles were adopted by the Stamp Office

for SDLT returns and publicised in issue 4 of the Stamp Duty Land Tax Technical Newsletter SDLTTN4 Technical News. The guidance on "Stamp Duty Land Tax: Finality and Discovery" at paragraph 7 was that parties should write to the Complex Transactions Unit in Manchester (at that time), quoting the UTRN, and stated that parties should not send disclosures to the RDCC at Netherton "or put them in the same envelope as land transaction returns, as this causes difficulty for the automated processing system". The guidance was also included at paragraph 100-070 of the SDLT manual, which was later updated to state that disclosures should be sent to the Complex Transactions Unit in Birmingham, repeating the statement that disclosures should not be sent to Netherton or put in the same envelope as land transaction returns.

44. Mr Kane gave evidence as to HMRC's processes for dealing with disclosures:

(1) If a disclosure was made in accordance with the published instructions then it would be addressed to the Complex Transactions Unit of the Stamp Office.

(a) The Complex Transactions Unit kept a list, in the form of a spreadsheet, of any correspondence coming in.

(b) Disclosures would be handed to members of the compliance team who would then open an enquiry and request specified documents. The team was quite small, and the approach was quite mechanistic, with enquiries being opened as a matter of routine to protect HMRC. They did not chase up taxpayers who did not provide the documents. They were focused on identifying test cases for particular transactions.

(c) There were sometimes mistakes in that an enquiry was not opened straight away. Mr Kane did not know why this would have happened – there were a small number of instances, but HMRC were able to identify them and issue discovery assessments within the four year time limit.

(2) A number of disclosures were not submitted to the Complex Transactions Unit and were instead attached to manual SDLT returns and sent to the RDCC in Netherton. That office processed manual returns by scanning them using character recognition. Where there was a letter attached to a return, the instructions to the officers working in the RDCC were to separate the letter/disclosure from the return, write the UTRN number on it (if it was not already set out in the letter), and place this in a box. That box was in turn sent every 10-14 days to the Complex Transactions Unit. That letter would then be dealt with as above.

45. Mr Kane denied that disclosures sent to RDCC were disregarded. They had a process for dealing with them. He emphasised that:

(1) Where at any time following the issue of a discovery assessment it was asserted that a disclosure of the use of the scheme had been made to the Stamp Office a check was again made of the spreadsheet maintained by the Complex Transactions Unit to see if they had recorded receipt of any post connected to that UTRN.

(2) Mr Kane had been aware of an article written by Patrick Cannon (published in June 2008) which he regarded as saying that the Stamp Office would ignore disclosures sent with returns. He was concerned to test this and to check the processes in place as Mr Kane's view at that time was that if disclosures had been made there was a risk that HMRC could not then make a discovery.

46. In the context of the SDLT returns submitted by the Appellants, Mr Kane explained that he had checked the SIP file (as described further below) for the acquisition of the Property by the Appellants and this did not contain any disclosure letters.

47. I accept Mr Kane's evidence and I accept that the process described above applied in December 2007.

48. On the basis of the evidence before me I find that:

(1) The December 2007 Letter was sent by Target to HMRC in Netherton with the SDLT returns in December 2007.

(2) That letter was not received by the Complex Transactions Unit in Birmingham. In reaching this conclusion I rely on the following:

(a) It had not been addressed to them.

(b) It was not recorded in the spreadsheet maintained by the Complex Transactions Unit. It was not retrieved by them when they put together the SIP, or when Officer Warburton sought information as to the purchase price of the Property.

(c) I would expect that, had such letter been received, HMRC would have opened an enquiry to obtain further information from the Appellants. Their failure to do so indicates it is likely that the letter was not received.

49. It is apparent that HMRC had no way of identifying whether any correspondence which was sent with returns to the RDCC in Netherton went missing at that stage and did not reach the Complex Transactions Unit. No attempt was made to record the existence or content of disclosures at that stage. The system relied on taxpayers following the clearly published guidance (and only sending disclosures to the Complex Transactions Unit) or, if letters were sent to the RDCC, on them being detached, placed in a box and sent on to Birmingham. That process adopted by HMRC was low-tech, but eminently practical. It cannot, however, have been infallible.

50. Having made findings as to what actually happened there is then a question as to whether a different outcome is deemed to apply and, separately, the significance of the language used in paragraph 30(3) which refers to whether information was made available to HMRC.

51. Section 7 of the Interpretation Act 1978 provides:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

52. I have considered whether this provision could apply such that HMRC is deemed to have received the December 2007 Letter in the light of my finding that Target did post it to HMRC in Netherton. I have concluded that it does not:

(1) This presumption applies where a letter or document has been "properly" addressed. In the present instance the December 2007 Letter was not sent to the Complex Transactions Unit. It was clear from the published guidance that disclosure letters should be sent to that unit and that guidance expressly stated that disclosures

should not be sent with the returns to Netherton. Failure to follow that guidance means that the letter was not properly addressed.

(2) Whilst it was not unreasonable for a taxpayer to expect that a letter relating to SDLT on a specified transaction would, if sent to an office of HMRC which dealt with SDLT, either be dealt with there or make its way to the appropriate recipient at another office, this is not the same as being able to benefit from the presumption in the Interpretation Act in circumstances where the information as to the correct address was readily available.

(3) In any event, the presumption afforded to the sender of a letter by s7 is rebuttable where the contrary appears. I have found that this letter was not received by the Complex Transactions Unit. The contrary does therefore appear.

53. Mr Lenthall relies on the sending of the December 2007 Letter in the context of both the timing of the discovery of the insufficiency of tax and whether information had been "made available" to HMRC within the enquiry window.

54. HMRC accepted that if the December 2007 Letter had been received by the Complex Transactions Unit then the information within it would have been made available to HMRC for the purposes of paragraph 30(3) (although they disagreed as to whether it was sufficient for them to have been aware of the insufficiency).

55. A question which then arises is whether making something available to HMRC is different from determining whether or not it was received by HMRC. I consider that it is. There is an inherent focus in the former on the perspective of the sender – by setting information out in writing and sending it to an office of HMRC which deals with SDLT along with the SDLT returns, Target were intending that the information set out therein be read and considered by HMRC alongside the returns and acted upon (or not) accordingly. A second copy of that letter had been included with the returns, for the stated reason that this could be sent to the Complex Transactions Unit. That is not to say that sending a disclosure to any office of HMRC would be sufficient – but I consider that the information in the December 2007 Letter was made available to HMRC by sending it to Netherton with the SDLT returns.

56. I have therefore concluded that whilst the December 2007 Letter was not received by HMRC (or deemed to have been received by them) the information within it was nevertheless made available to them.

Discovery of an insufficiency of SDLT

57. I address first the submissions and evidence relevant to the making of the discovery before considering whether or not HMRC were prevented from issuing a discovery assessment by paragraph 30(3).

58. Paragraph 28(1) provides that HMRC may make a discovery assessment if they "discover" as regards a chargeable transaction an insufficiency of SDLT.

59. There is considerable case law on the meaning of a discovery, and I find the following paragraph from the Upper Tribunal's decision in *HMRC v Charlton* [2012] UKUT 770 (TCC) to be particularly helpful (and in any event it is binding upon me):

> "37. In our judgment, no new information, of fact or law, is required for there to be a discovery. 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. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment

> should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment. But that would not, in our view, include a case, such as this, where the delay was merely to accommodate the final determination of another appeal which was material to the liability question. Such a delay did not deprive Mr Cree's conclusions of their essential newness for s 29(1) purposes."

60. As noted by the Upper Tribunal in *Beagles v HMRC* [2018] UKUT 0380 (TCC) at [70], this is a "relatively low threshold".

61. HMRC's position was that the discovery was made by Officer Warburton on 15 November 2011 – HMRC had come to the conclusion (based on counsel's advice) that the sub-sale arrangement did not work in April 2010, the RIS had identified the Appellants as potential users of this scheme and on that date Officer Warburton received a value for the Property such that they could identify an insufficiency of SDLT. They relied on the evidence of Mr Kane and Officer Warburton as to these events.

62. Mr Lenthall did not challenge Officer Warburton's description of the events of November 2011. Instead, he submitted that once HMRC had the December 2007 Letter and the advice from counsel, they were in a position to make a discovery and issue a letter seeking further information from the Appellants (along the lines of that which had been issued to an unrelated taxpayer). This was in April 2010 and, he submitted, such discovery was stale by November 2011. There could not then be a new discovery of that same insufficiency in November 2011.

63. On the basis of the evidence from Mr Kane and Officer Warburton, which I accept, I find as follows:

(1) The Stamp Office had been aware of various SDLT avoidance schemes relying upon a sub-sale from at least early 2006. Anti-avoidance legislation had been quickly introduced – s75A FA 2003 – which had effect from 6 December 2006 to tighten up the rules.

(2) Mr Kane took on the investigation of the enquiries which HMRC had opened into both the sub-sale and distribution in specie which they described as the "husband and wife" or "HW" variants of the sub-sale schemes.

(3) A problem which Mr Kane faced was that the introduction of s75A had not reduced the number of disclosures which were referring to the use of s45(3) FA 2003. In addition, the Stamp Office were unable to agree whether or not the numerous sub-sale schemes relying upon the s45(3) disregard succeeded in their intention of avoiding a charge to SDLT and could also not agree whether the wording of s75A was sufficient to counteract those schemes.

(4) In late 2009 Mr Kane drafted a paper, which was finalised by the Stamp Office specialists, to the advisory solicitor setting out, in detail, four different examples of sub-sale transactions to seek their view as to the strengths and weaknesses of each variant. The technical specialists within HMRC had not been able to agree on the outcomes and, because of the complexities, the advisory solicitor instructed counsel. HMRC received leading counsel's opinion on 1 April 2010, which included draft challenge letters which could be sent to users. One of the variants on which they had received an opinion was a sub-sale by way of deed of gift, and Mr Kane considered that the transactions in this appeal were examples of this variant.

(5) There was then a project to identify users of these schemes, which Mr Kane referred to as the process of HW data matching. At that time the only users of which HMRC were aware were those where a disclosure had been made to HMRC. However, Mr Kane was aware from chat rooms and feedback from advisers (who were commenting on losing clients to other advisers marketing SDLT schemes) that there were a lot more cases about which relied on these schemes. Mr Kane's task was to work out how to find these other cases that had not been disclosed to HMRC.

(6) In 2009 HMRC had conducted a data matching exercise looking for the distribution in specie variant. This had been done manually, looking for certain indicators, then identifying whether they could be discounted (on the basis that there was no avoidance). This manual exercise had been very, very slow. HMRC had bought 2.2 million lines of data from the Land Registry and officers had looked at the SDLT returns database and compared this to information at the Land Registry.

(7) For the HW variant, Mr Kane's team instructed the Risk and Intelligence Section within HMRC ("RIS") to conduct this data matching. This exercise started in Summer/Autumn 2010. It was only done after HMRC had reached the view (on the basis of counsel's opinion) that there was tax to be charged once relevant cases were identified. The indicators used by HMRC were that there was more than one return on the same day for the same property and the consideration was different between the Land Registry data and the SDLT returns, or there was no consideration on the Land Registry data.

(8) Once the team had identified potential discovery cases a request was made to the Stamp Office to produce a Standard Intelligence package ("SIP") for each case. The Stamp Office would first check if an enquiry had already been opened into the return (in which case no further action was needed). The SIP included SDLT returns, any Land Registry information and copies of any letters held by the Stamp Office in relation to the return (eg any disclosures made).

(9) This work on identifying potential users was conducted in tranches, according to how close HMRC were to the assessing time limits. HMRC were working close to the end of the discovery assessment window throughout, as in April 2011 the window had reduced from six years to four years, which led to HMRC working "like mad" to raise the assessments in time. Timing was such that a lot of the discovery assessments were being raised just a few days before the expiry of the time limit.

(10) The acquisition of the Property by the Appellants was identified by this HW data matching exercise. This was around October 2011.

(11) In November 2011 Officer Warburton received the two SDLT1 returns which had been submitted by the Appellants.

(12) The presence of two SDLT1 returns for the same property on the same day and in which no SDLT had been paid was an indicator of the use of an SDLT avoidance scheme. To test whether or not this was the case Officer Warburton checked the Land Registry data to determine the consideration paid for the Property but was unable to find an amount. He did not know why this information was not recorded at the Land Registry, but it was unusual. As a result, on 14 November 2011 Officer Warburton requested a valuation of the Property from the Valuation Office Agency.

(13) On 15 November 2011 Officer Warburton received a valuation report from the senior surveyor at the Land Registry Valuation unit who estimated a value of £4,500,000. He concluded that the large discrepancy between the valuation and the

consideration shown on the first and second returns on which SDLT had been calculated together with the presence of two concurrent SDLT1 returns was as a result of the Appellants having used an SDLT avoidance scheme. He believed that the avoidance scheme had incorrectly understated the consideration and that SDLT should have been paid on an amount that was greater than or equal to the valuation.

(14) At that point in time, HMRC's understanding of the scheme and who was likely to owe the tax was such that he did not know if the charge to SDLT would fall on the purchaser who made the first return or the purchaser who made the second return. On 15 November 2011 he instructed that discovery assessments be issued to both Mr Bertelsen and Mrs Bertelsen.

64. I agree that the discovery of an insufficiency of SDLT in respect of the acquisition of the Property was made by Officer Warburton in November 2011. It was made after the Appellants had been identified by the data matching exercise as potential users of the HW variant of the sub-sale scheme, against the background that Officer Warburton was already aware of the advice from April 2010 and that HMRC's position was that this scheme did not work, and he discovered the insufficiency once he had information before him revealing that a market price had been paid to the Vendors of the Property.

65. I do not accept Mr Lenthall's submission that there was or should have been a discovery in April 2010. Paragraph 28(1) requires that the discovery is made "as regards a chargeable transaction" and whilst in April 2010 HMRC had reached the conclusion that transactions which used one of the sub-sale schemes which had been put to counsel, including the HW variant, did not work and that insufficient tax had been declared by purchasers who had entered into such schemes, the requirement is that there is a discovery for a particular transaction. The pieces of the puzzle were only put together in November 2011.

66. This is different from the situation in *HMRC v Tooth* [2019] EWCA Civ 826. Mr Tooth had participated in a scheme which was described by the Court of Appeal as being designed to utilise employment-related losses. His return for 2007-2008 was filed on 30 January 2009. On 14 August 2009 HMRC gave notice of their intention to enquire into the claim under Schedule 1A TMA 1970. Following the decision of the Supreme Court in *Cotter*, HMRC started to indicate that they would instead issue discovery assessments under s29 TMA 1970.

67. The Court of Appeal considered when HMRC had made the relevant discovery for this purpose. Counsel for HMRC argued that the discovery was made following a letter from the taxpayer's adviser in March 2014. Having referred to *Charlton*, Floyd LJ said:

> "61. I agree with the UT's approach in both passages. 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."

68. Floyd LJ went on to note that HMRC's pleaded case before the Tribunal had not tackled directly the need to show a new conclusion that the self-assessment was insufficient. The pleadings indicated that the officer's view was that there was an insufficiency prior to the new conclusion, but that HMRC had used the wrong mechanism to challenge it.

69. There was no evidence before me that any officer of HMRC had reached any conclusion in relation to the efficacy of the arrangements entered into by the Appellants at any time before Officer Warburton considered the matter. This is irrespective of the fact that I have found that the December 2007 Letter had been sent to HMRC, and concluded that this was made available to HMRC.

Can a discovery become stale?

70. Mr Lenthall submitted that the discovery was made in April 2010 and had become "stale" by the time the discovery assessments were issued on 16 November 2011.

71. HMRC's position (pending the outcome of the appeals in *Tooth* and *Beagles*) was that there is no concept of staleness, and that the only time limits on issuing a discovery assessment are those set out in paragraph 31. However, Ms Arnold acknowledged the current state of the case law on this issue and submitted that even if there were a concept of staleness, in the present instance the discovery was not stale – the discovery was made by Officer Warburton on 15 November 2011 and the assessments were issued the following day.

72. In *Beagles* the Upper Tribunal considered the case law and rejected HMRC's submission that there is no concept of "staleness". That decision is being appealed to the Court of Appeal. That appeal is stayed behind *Tooth's* appeal to the Supreme Court.

73. Nevertheless, I consider that current law is that there is a concept of staleness involved in a discovery. The determination of whether or not a discovery which was once new has become stale will depend on the facts – this will include, I consider, not only the passage of time between the making of the discovery by HMRC and the issue of the assessment, but will also involve other factors related to the reasons for any gap in time and the existence or nature of communication with taxpayer in that period.

74. On the basis that I have concluded that the insufficiency of tax was discovered in November 2011 and the discovery assessments were issued on 16 November 2011, I do not consider that there is any possibility that the discovery can have become stale.

Could HMRC reasonably have been expected to be aware at the end of the enquiry window?

75. HMRC cannot issue a discovery assessment if, at the time they ceased to be entitled to give a notice of enquiry into the return, they could reasonably have been expected, on the basis of the information made available to them before that time, to be aware of the insufficiency of tax.

76. HMRC ceased to be entitled to open an enquiry on 22 September 2008. At that time, HMRC had received the SDLT forms from the Appellants and Target had sent the December 2007 Letter (although I have found that this was not received by the relevant unit but the information was made available to HMRC).

77. The December 2007 Letter refers to the enclosure of two signed SDLT forms, and states:

> (1) Mr Bertelsen acquired the property from four named sellers for £4,365,000 and gifted it to his wife.
>
> (2) Section 45(3) states that the first conveyance shall be disregarded, and nil consideration was paid on the second conveyance. The result is no SDLT is payable.
>
> (3) Section 75A does not apply because the original sellers did not enter into a scheme transaction as they were not aware of the gift which was made.

(4) The standard answers to boxes 10 and 12 on SDLT1 do not allow for accurate answers, so they have therefore entered consideration of £1.

(5) A copy of the letter and enclosures is provided for forwarding to the Complex Transactions Unit if deemed appropriate.

78. Mr Lenthall submitted that the level of disclosure in this letter precluded HMRC from being able to issue discovery assessments subsequently.

79. Ms Arnold submitted that:

(1) HMRC did not receive the December 2007 Letter and accordingly the information was not made available within the enquiry window.

(2) In any event, this letter does not set out the full factual position – it does not contain the UTRNs, or state that this was a scheme. There was no explanation of the precise details of the structuring of the transaction, its implications or an analysis of how the reliefs claimed were said to apply.

(3) Even if there had been a full disclosure of the scheme within the enquiry window, HMRC did not have a view of the tax consequences until April 2010.

(4) Mr Lenthall's submissions wrongly conflate an awareness of the need to make further enquiries with an awareness of an actual insufficiency.

80. The level of disclosure and protection afforded to a taxpayer thereby was addressed by Special Commissioner Charles Hellier in *Corbally-Stourton v HMRC* [2008] STC (SCD) 907 where he said:

> "79. A taxpayer who makes a completely full and frank disclosure achieves certainty at the end of the enquiry window or on completion of the enquiry. A taxpayer who makes a non-negligent partial disclosure may have to wait a few more years. That is not an unfair balance. And it is also one which is sufficiently precisely formulated to enable a taxpayer to regulate his conduct so as to be able to foresee to a reasonable extent the consequences of his actions: those precise consequences might depend upon the diligence or otherwise of HMRC but he knows that, depending on his course of conduct, there will come a time within a not unreasonable period when a liability is no longer capable of assessment."

81. That reference to "completely full and frank disclosure" reflects the important principle that the protection of paragraph 30(3) applies where a taxpayer has set out a sufficient level of information for HMRC to assess and reach a conclusion as to whether they agree with the position taken by the taxpayer – and I consider that such fullness of disclosure applies not only to the level of factual information which is contained in a disclosure letter, but also to the basis on which the taxpayer has reached its conclusions as to the relevant law.

82. In *Beagles* the Upper Tribunal summarised the principles from the case law:

> "99. The leading cases on the application of s29(5) are now *Hankinson*, *Lansdowne* and *Sanderson*. We were referred to these cases by the parties. We will refer predominantly to the decision of the Court of Appeal in *Sanderson* and the leading judgment of Patten LJ as in it he set out a summary of the relevant principles which incorporates relevant extracts from the decisions in the other cases. The relevant passage is at [17] to [23] of his judgment. We will not set it out in this decision.
>
> 100. We endeavour to summarise the principles that we derive from Patten LJ's judgment as follows:

> (1) The test in s29(5) is applied by reference to a hypothetical HMRC officer not the actual officer in the case. The officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law.
>
> (2) The test requires the court or tribunal to identify the information that is treated by s29(6) as available to the hypothetical officer at the relevant time and determine whether on the basis of that information the hypothetical officer applying that level of knowledge and skill could not have been reasonably expected to be aware of the insufficiency.
>
> (3) The hypothetical officer is expected to apply his knowledge of the law to the facts disclosed to form a view as to whether or not an insufficiency exists (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [23]).
>
> We agree therefore with Mr Firth that the test does assume that the hypothetical officer will apply the appropriate level of knowledge and skill to the information that is treated as being available before the level of awareness is tested. The test does not require that the actual insufficiency is identified on the face of the return.
>
> (4) But the question of the knowledge of the hypothetical officer cuts both ways. He or she is not expected to resolve every question of law particularly in complex cases (Patten LJ, *Sanderson* [23], *Lansdowne* [69]). In some cases, it may be that the law is so complex that the inspector could not reasonably have been expected to be aware of the insufficiency (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [17(3)]).
>
> (5) The hypothetical officer must be aware of the actual insufficiency from the information that is treated as available by s29(6) (Auld LJ, *Langham v Veltema* [33] [34]; Patten LJ, *Sanderson* [22]). The information need not be sufficient to enable HMRC to prove its case (Moses LJ, *Lansdowne* [69]) but it must be more than would prompt the hypothetical officer to raise an enquiry (Auld LJ, *Langham v Veltema* [33]; Patten LJ, *Sanderson* [35]).
>
> (6) As can be seen from the discussion in *Sanderson* (see [23]), the level of awareness is a question of judgment not a particular standard of proof (see also Moses LJ in *Lansdowne* [70]). The information made available must "justify" raising the additional assessment (Moses LJ, *Lansdowne* [69]) or be sufficient to enable HMRC to make a decision whether to raise an additional assessment (Lewison J in the High Court in *Lansdowne* [2011] STC 372 at [48])."

83. Applying these principles to the present case, I consider it is significant that at the time the enquiry window closed the Stamp Office had not reached a conclusion as to whether they could successfully challenge the different variants of sub-sale transactions. That remained the case for over a year before they then instructed counsel. So, irrespective of arguments as to the sufficiency of the disclosure in the December 2007 Letter and whether it was received by HMRC, the unchallenged evidence was that in September 2008 HMRC did not have a settled view as to whether or not sub-sale transactions (including the HW variant) which claimed relief from SDLT for the first transaction and then declared that there was no chargeable consideration for the second transaction were effective. The consequence of this is that it could not be said that a hypothetical officer could at that time (ie in September 2008) have concluded that there was an insufficiency of tax.

84. My conclusion is that in this situation the second case (in paragraph 30(3)) is satisfied with the consequence that HMRC were able to issue valid discovery assessments after the enquiry window had closed (subject to the time limits in paragraph 31).

85. In support of this conclusion, I also note that:

(1) Even if HMRC had reached a conclusion as to the application of the law in September 2008, I would be reluctant to conclude that the level of disclosure in the December 2007 Letter was such as to preclude the making of a discovery by HMRC. I am not convinced by HMRC's position that the letter needed to include the UTRN (as the purchasers and the property were readily identifiable from the letter itself and it had been sent in the same envelope as the SDLT returns) or refer to the fact that it was a scheme. However, the legal analysis was scant – I would have expected to see a more detailed explanation of sub-sale relief and how the conditions were said to be satisfied, and in particular an explanation as to the requirement that some person other than the original purchaser had become entitled to call for a conveyance to him. The application (or otherwise) of s75A also merited further explanation.

(2) Furthermore, looked at as a whole, I consider that the December 2007 Letter is a classic example of the provision of information that would prompt the hypothetical officer to raise an enquiry and not more than that. It was not sufficient to enable HMRC to make a decision as to whether to raise an additional assessment.

86. Whilst these two points support my conclusion, I consider that the very fact that HMRC only concluded that it could challenge the transactions after receiving counsel's advice in April 2010 (more than 18 months after the enquiry window closed) of itself means that the second case in paragraph 30(3) is satisfied.

CONCLUSION

87. For the reasons set out above, I have concluded that the discovery assessments were validly issued. The appeals are dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

88. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 18 MARCH 2021