TC02613

Appeal number: TC/2011/01034

Stamp Duty Land Tax – Sub-sale Relief – s45 FA 2003. Whether tax mitigation scheme qualified for relief – No. Whether discovery assessment valid – Yes. Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

EDWARD ALLCHIN **Appellant**

- and -

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

TRIBUNAL: JUDGE DR K KHAN
MS LESLEY STALKER CTA ATT

Sitting in public at Bedford Square on 20-21 February 2013

Dr David Southern, Counsel instructed by L B Group Ltd, Chartered Accountants for the Appellant

Hui Ling McCarthy, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant appeals by notice of 8 February 2011 against a discovery assessment to Stamp Duty Land Tax ("SDLT") dated 11 December 2009. The assessment is for £87,310. The SDLT arises in connection with the Appellant's acquisition of 41 Kendal Street, London W2 2BU ("the Property") on 14 November 2007. The discovery assessment arises from the Appellant's use of a SDLT mitigation arrangement.

2. In the land transaction return ("SDLT 1") received by Her Majesty's Revenue and Customs ("HMRC") on 28 November 2007, the Appellant declared that the consideration paid for the acquisition of the Property was £356,250 which meant a SDLT charge of £10,619. However the Land Registry records showed on the forms used to transfer the Property (TR1) the consideration to be £2,450,000. It would have resulted in a charge to SDLT of £98,000 rather than £10,619.

3. In the light of the Land Registry records, it became apparent to HMRC that the SDLT 1 return delivered by the Appellant understated the amount of chargeable consideration properly due following the acquisition of the Property. Accordingly, the discovery assessment was issued to recover the SDLT which should have been paid on the consideration of £2,450,000.

Background Facts

4. The facts are largely agreed though the order in which events took place is seen differently by the two parties. In particular the date and time of the execution of a Deed of Novation.

5. On 31 July 2007, Foxtons, the agents for Mr and Mrs A Dean (the "Vendors") sent a Memorandum of Sale regarding the purchase of the Property by Edward Allchin to Messrs Crust Lane Davies, solicitors to the Appellant. The agreed sale price was stated at that time to be £2,375,000, a draft sale contract ("the Contract") was sent by Messrs Seddons, the Vendors' Solicitors, to Mr Allchin's Solicitor. The Contract recorded Mr Allchin as the "Buyer".

6. On 3 August 2007, Mr Allchin entered into an agreement with Big Bracket Tax Planning Limited ("Big Bracket") whereby for a fee Big Bracket agreed to provide Mr Allchin with advice and assistance in saving SDLT on the purchase of the Property.

7. On 8 August 2007, a mortgage offer was made to Mr Allchin by Standard Life Bank Limited for an advance of £1,187,500. On the same day, the sum of £237,500 was transferred by telegraphic transfer from an account in Mr Allchin's sole name held at St James Place Bank to Mr Allchin's Solicitors' client account.

8. On 10 August 2007 Mr Allchin's Solicitors wrote to the Vendors Solicitors indicating that as part of their client tax planning they had been advised, "to request

that your client executes a Deed of Novation between exchange of contracts and completion if required".

9. This reference was to the tax mitigation scheme provided by Big Bracket which involves (broadly) Mr Allchin's proposed acquisition of the Property utilising the following two steps. The steps were:

> **Step 1** – the entry into a sale agreement for the sale of the Property from the Vendors to a limited company; and
>
> **Step 2** –the entry into a document entitled a "Deed of Novation" pursuant to which Mr Allchin would be substituted for the limited company as the purchaser in step 1.

10. On 14 August 2007, the Vendor's Solicitors wrote to Mr Allchin's Solicitors with a revised form of Contract incorporating the various agreed changes. The purchase price was said to be £2,450,000 and the Buyer was stated to be Alpine Investment Limited (UK Company No.06239455) ("Alpine") rather than Mr Allchin, as was recorded in the original draft Contract.

11. The shares in Alpine were owned by Corporate Factoring Services (a company incorporated in the Isle of Man). The purchase price increased by £75,000 following a last minute negotiation by the Vendors.

12. On 17 August 2007 contracts were exchanged at 15.25 using Formula B of the Law Society's formula for exchanging contracts between the Vendor's Solicitors and Mr Allchin's Solicitors (who held themselves out as acting on behalf of Alpine).

13. The contract incorporated Standard Conditions of Contract (Fourth Edition) subject to a number of agreed variations. A deposit of £237,500 was paid by Alpine on 21 August 2007 from funds belonging solely to Mr Allchin. Completion was scheduled for 15 October 2007, although ultimately this took place on 14 November 2007.

14. Although paid by Alpine, it appears that the sum of £237,500 came from the account of Mr Edward Allchin through his solicitors, Crust Lane Davies. The trail of money shows that the sum was transferred from Mr Allchin's account on 8 August 2007 and paid to the Seller's Solicitors on 25 August 2007.

15. On 12 November 2007, Mr Allchin's Solicitors received funds from Mr Allchin's current account in the sum of £1,133,719.75 from Mr Allchin's sole bank account with St James Place Bank.

16. On 13 November 2007, Mr Allchin's Solicitors received mortgage funds into Mr Allchin's current account with them in the sum of £1,187,500 from Standard Life Bank.

17. On 14 November 2007, the Vendors, Alpine and Mr Allchin each signed separate documents entitled "Deed of Novation" which recorded inter alia that:

(a) The Vendor released Alpine from the obligation to purchase the Property in return for Mr Allchin's obligation to purchase the Property pursuant to the details of the Deed of Novation; and

(b) The Contract was cancelled in return for the Vendor's entering into a Deed of Novation with Mr Allchin.

18. On 14 November 2007, Mr Allchin's Solicitors transferred funds in two tranches totalling £2,212,500 (comprising funds which Mr Allchin had paid into his Solicitor's client account and the mortgage monies from Standard Life Bank) to the Vendor's Solicitors. On the same day, the Land Registry Transfer Deed (TR1) was executed to transfer the Property from the Vendors to Mr Allchin where consideration stated to be £2,450,000.

19. On 14 November 2007, the Purchaser's Solicitors, Crust Lane Davies requested that HSBC make two payments to the Vendor's Solicitors, from the Appellant's current account. The first payment was £1,856,250 and the second was £356,250. The Tribunal will look to establish if these payments were made by Alpine before the novation.

20. The instructions to make these payments appeared to have come from Mr Matthew Harrison of Big Bracket by emails timed at 12.22 and 12.32 respectively.

21. On 14 November 2007 the Deed of Novation were executed. It is not clear exactly when the execution took place. The sequence suggested by the Appellant is that the £1,856,250 was paid then the Deed of Novation was entered into and then the £356,250 was paid to the Vendor's solicitors. This sequence of events is disputed by the Respondents.

22. The Vendors then transferred the Property to the Appellant in his sole name.

23. The Respondents say that the Appellant had not provided any particulars in respect of the source of funds paid to the Vendors for the Property or used to cover incidental costs such as Solicitor's fees and searches. It appears that the money was provided by the Appellant personally and £1,187,500 of the funds came from the mortgage advance from Standard Life Bank on 13 November 2007. These are the only two sources of funds.

24. The SDLT 1 form returned by Mr Allchin showed the consideration for the transfer as being £356,250 which the Appellant paid to the Vendors under the terms of the Deed of Novation and this is the only chargeable consideration for his acquisition of the Property on which SDLT was charged. The SDLT 1 form was received by HMRC on 28 November 2007.

25. The Appellant says that sub-sale relief under Section 45 FA 2003 applies to the transaction entered into since the original Contract was not completed.

26. HMRC say that the Appellant is liable to SDLT on the full amount of the consideration of £2,450,000 since that entire sum was provided by the Appellant

himself. They say that Alpine did not pay the deposit of £237,500 or the further amount of £1,856,250 since these were sums belonging to the Appellant.

The legal setting

27. SDLT was designed as a transaction based tax, self-assessed rather than a tax on the execution of an instrument which evidenced the property transaction.

28. It is charged on "land transactions" regardless of whether there is an instrument or not effecting the transfer and whether executed in the UK or otherwise, it applies to UK land.

29. A land transaction means "any acquisition of a chargeable interest" however acquired or however the acquisition is effected, whether by act of the parties, by order of a Court or other authority or under any statutory provision or by "operation of law". A chargeable interest is an estate, interest, right or power in or over land in the UK, or the benefit of an obligation, restriction or condition affecting the value of any such interest, right or power, other than an exempt interest. This is a very wide definition and catches a broad range of transactions.

30. The legislation refers to Purchaser and Vendor in relation to a land transaction and these "are to the person acquiring and the person disposing of the subject matter of the transaction". It is required that the Purchaser gives consideration for the acquisition. For this purpose the "chargeable consideration" is defined as "any consideration in money or monies worth given for the subject by the transaction, directly or indirectly, by the Purchaser or a person connected with him".

31. Section 44 makes special provisions for a contract to acquire a chargeable interest which is to be completed by a conveyance. A person is not regarded as entering into a land transaction by reason of entering into a contract for a land transaction unless the contract is "substantially performed" or completion takes places (The HMRC interpret substantial performed as meaning that 90% or more of the consideration due is paid).

32. Contracts and completion are treated as part of a single land transaction for which the effective date is the date of the conveyance. This is the case provided that it is completion of the land transaction proposed, between the same parties, in substantial conformity with the original contract. This means that, for example, where there is a sub-sale, a person is not regarded as acquiring a chargeable interest on contract but only on completion.

33. In our case, Alpine never acquired a chargeable interest in the Property nor was it involved in a land transaction.

34. Section 45 contains special rules for dealing with land transactions where there is an assignment, sub-sale or other transaction. In such a situation the original purchaser does not complete the transaction. The person to whom the contract or

rights are transferred, the transferee, is not treated as entering into a land transaction as a result of only the assignment, sub-sale, etc. The provisions of s44 apply as if there was a secondary contract for a land transaction under which the transferee was the purchaser. The substantial performance or completion of the original contract takes place at the same time or in connection with the substantial performance or completion of the secondary contract.

Legislation

35. Section 42(1) FA 2003 establishes the charge to SDLT on "land transactions".

Under s.42 (2) FA 2003, SDLT is chargeable:

"(a) whether or not there is any instrument effecting the transaction,

(b) if there is such an instrument, whether or not it is executed in the United Kingdom; and

(c) whether or not any party to the transaction is present, or resident, in the United Kingdom."

A land transaction means "any acquisition of a chargeable interest" (s.43 (1) FA 2003), "however the acquisition is effected, whether by act of the parties, by order of a court or other authority, by or under any statutory provision or by operation of law" subject to provisions to the contrary (s.43 (2) FA 2003).

Under s.48(1) FA 2003, a chargeable interest means "an estate, interest, right of power in or over land in the United Kingdom, or the benefit of an obligation restriction or condition affecting the value of any such estate, interest, right or power" other than exempt interests, such as mortgages (s.48(2) FA 2003).

References to the "purchaser" and "vendor" in relation to a land transaction "are to the person acquiring and the person disposing of the subject matter of the transaction" (s.43 (4) FA 2003).

Section 43(5) FA 2003, provides that "[a] person is not treated as a purchaser unless he has given consideration for, or is a party to, the transaction". Pursuant to s.85 (1) FA 2003, liability to pay the SDLT in respect of a chargeable transaction falls on the purchaser.

Pursuant to s.49 (1) FA 2003, a land transaction is a "chargeable transaction" if it is not a transaction that is exempt from charge. A land transaction is exempt from charge if there is no chargeable consideration for the transaction (para. 1, Sch 3 to FA 2003).[2]

[2] Schedule 3 to FA 2003 also provides for other transactions to be exempt from charge, but these are not applicable here.

The "chargeable consideration" for a transaction is, except as otherwise expressly provided, "any consideration in money or money's worth given for the subject matter of the transaction, directly or indirectly, by the purchaser or a person connected with him" (para. 1(1) of Sch. 4 to FA 2003).

Contract and Conveyance (s.44 FA 2003)

A person is not regarded as entering into a land transaction by reason of entering into a contract for a land transaction unless the contract is substantially performed or completion takes place (ss.44(1), (3) and (4) FA 2003).

Contract and Conveyance: effect of transfer of rights (s.45 FA 2003)

Section 45 FA 2003 is in effect a relieving provision dealing with sub-sales and assignment of rights under a contract of sale.

So far as is relevant, section 45 provides as follows:

"(1) This section applies where-

(a) a contract for a land transaction ("the original contract) is entered into under which the transaction is to be completed by a conveyance, …

(b) there is an assignment, subsale or other transaction (relating to the whole or part of the subject matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him, and

(c) paragraph 12B of Schedule 17A (assignment of agreement for lease) does not apply.

References in the following provisions of this section to a transfer of rights are to any such assignment, subsale or other transaction, and references to the transferor and the transferee shall be read accordingly.

(2) The transferee is not regarded as entering into a land transaction by reason of the transfer of rights, but s.44 (contract and conveyance) has effect in accordance with the following provisions of this section.

(3) That section applies as if there were a contract for a land transaction (a "secondary contract") under which –

(a) the transferee is the purchaser, and

(b) the consideration for the transaction is –

(i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and

(ii) the consideration given for the transfer of rights.

The substantial performance or completion of the original contract at the same time as, and in connection with, the secondary contract shall be disregarded …

(4) …

(5) …

(6) Section 839 of the Taxes Act 1988 (connected persons) applies for the purposes of s.45 (3) (b) (i).

(7) In this section "contract" includes any agreement and "conveyance" includes any instrument".

Anti-avoidance (ss.75A-C FA 2003)

Section 75A is a general anti-avoidance rule for SDLT, introduced by the SDLT (Variation of the Finance Act 2003) Regulations 2006 with effect from 6 December 2006. It therefore potentially applies to the transactions in question.

At the time that the relevant transactions took place, ss.75A-C provided:

"75A Anti-avoidance

(1) This section applies where –

(a) one person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it,

(b) a number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition ("the scheme transactions") and

(c) the sum of the amounts of stamp duty land tax payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V.

(2) In subsection (1) "transaction" includes, in particular –

(a) a non-land transaction

(b) an agreement, offer or undertaking not to take specified action,

(c) any kind of arrangement whether or not it could otherwise be described as a transaction, and

(d) a transaction which takes place after the acquisition by P of the chargeable interest.

(3) The scheme transactions may include, for example –

(a) the acquisition by P of a lease deriving from a freehold owned or formerly owned by V;

(b) a sub-sale to a third person;

(c) the grant of a lease to a third person subject to a right to terminate;

(d) the exercise of a right to terminate a lease or to take some other action;

(e) an agreement not to exercise a right to terminate a lease or to take some other action;

(f) the variation of a right to terminate a lease or to take some other action.

(4) Where this section applies –

(a) any of the scheme transactions which is a land transaction shall be disregarded for the purposes of this Part, but

(b) there shall be a notional land transaction for the purposes of this Part effecting the acquisition of V's chargeable interest by P on its disposal by V.

(5) The chargeable consideration on the notional transaction mentioned in sub-sections (1)(c) and (4) (b) is the largest amount (or aggregate amount) –

(a) given by or on behalf of any one person by way of consideration for the scheme transactions, or

(b) received by or on behalf of V (or a person connected with V within the meaning of s.839 of the Taxes Act 1988) by way of consideration for the scheme transactions.

(6) The effective date of the notional transaction is –

(a) the last date of completion for the scheme transactions,

or

(b) if earlier, the last date on which a contract in respect of the scheme transactions is substantially performed.

(7) This section does not apply where subsection (1)(c) is satisfied only by reason of –

(a) sections 71A to 73, or

(b) a provision of Schedule 9.

75B Anti-avoidance: incidental transactions

(1) In calculating the chargeable consideration on the notional transaction for the purposes of s.75A (5), consideration for a transaction shall be ignored if or in so far as the transaction is merely incidental to the transfer or the chargeable interest from V to P.

(2) A transaction is not incidental to the transfer of the chargeable interest from V to P –

(a) if or in so far as it forms part of a process, or series of transactions, by which the transfer is effected,

(b) if the transfer of the chargeable interest is conditional on the completion of the transaction, or

(c) if it is of a kind specified in s.75A(3)

(3) A transaction may, in particular, be incidental if or in so far as it is undertaken only for a purpose relating to –

(a) the construction of a building on property to which the chargeable interest relates.

(b) the sale or supply of anything other than land, or

(c) a loan to P secured by a mortgage, or any other provision or finance to enable P, or another person, to pay for part of a process, or series of transactions, by which the chargeable interest transfers from V to P

(4) In subsection (3) –

(a) paragraph (a) is subject to subsection (2)(a) to (c)

(b) paragraph (b) is subject to subsection (2)(a) and (c) and

(c) paragraph (c) is subject to subsection (2) (a) to (c).

(5) The exclusion required by subsection (1) shall be effected by way of just and reasonable apportionment if necessary.

(6) In these sections a reference to the transfer of a chargeable interest from V to P includes a reference to a disposal by V of an interest acquired by P.

75C Anti-avoidance: supplemental

(1) A transfer of shares or securities shall be ignored for the purposes of s.75A if but for this subsection it would be the first of a series of schemes transactions.

(2) The notional transaction under s.75A attracts any relief under this Part which it would attract if it were an actual transaction (subject to the terms and restrictions of the relief).

(3) The notional transaction under s.75A is a land transaction entered into for the purposes of or in connection with the transfer of an undertaking or part for the purposes of paragraph 7 and 8 of Schedule 7, if any of the scheme transactions is entered into for the purposes of or in connection with the transfer of the undertaking or part.

(4) In the application of s.75A(5) no account shall be taken of any amount paid by way of consideration in respect of a transaction to which any of ss.60, 61, 63, 64, 65, 66, 67, 69, 71, 74 and 75, or a provision of Schedule 6A or 8, applies.

(5) In the application of 75A(5) an amount given or received partly in respect of the chargeable interest acquired by P and partly in respect of another chargeable interest shall be subjected to just and reasonable apportionment.

(6) Section 53 applies to the notional transaction under s.5A.

(7) Paragraph 5 of Schedule 4 applies to the notional transaction under s.75A.

(8) For the purposes of section 75A –

(a) an interest in a property-investment partnership (within the meaning of paragraph 14 of Schedule 15) is a chargeable interest in so far as it concerns land owned by the partnership, and

(b) where V or P is a partnership, Part 3 of Schedule 15 applies to the notional transaction as to the transfer of a chargeable interest from or to a partnership.

(9) For the purposes of s.75A a reference to an amount of consideration includes a reference to the value of consideration given as money's worth.

(10) Stamp duty land tax paid in respect of a land transaction which is to be disregarded by virtue of s.75A(4)(a) is taken to have been paid in respect of the notional transaction by virtue of s.75A(4)(b).

(11) The Treasury may by order provide for s.75A not to apply in specified circumstances.

(12) An order under subsection (11) may include incidental, consequential or transitional provision and may make provision with retrospective effect."

(2) The amendment made by subsection (1) has effect in respect of disposals and acquisitions if the disposal mentioned in new s.75A (1) (a) (inserted by that subsection) takes place on or after 6 December 2006.

(3) But –

(a) the transitional provisions of sub-paragraphs (2) to (5) of paragraph 1 of the Schedule to the Stamp Duty Land Tax (Variation of the Finance Act 2003). Regulation 2006 (SI 2006/3237) continue to have effect in relation to this section as in relation to that paragraph, and

(b) a provision of new s75C (inserted by subsection (1) above) shall not have effect where the disposal mentioned in new s.75A (1) (a) took place before the day on which this Act is passed, if or in so far as the provision would make a person liable for a higher amount of tax than would have been charged in accordance with those regulations."

Cases Referred to

1. *Escoigne Properties Ltd v ITC* [1958] 1 All ER 406
2. *Re United Railways of Havana and Regia Warehouses Ltd* [1960] Ch 52
3. *Littlewoods Mail Order Stores Ltd v IRC* [1963] AC 135
4. *Clarke Chapman-John Thompson Ltd v IRC* [1975] STC 567
5. *Abbey National Building Society v Cann* [1990] 1 All ER 1085
6. *Langham v Veltema* [2004] STC 544
7. *BMBF v HMRC* [2005] 1 AC 684
8. *Corbally-Stourton v R & C Comrs* [2008] STC (SCD) 907
9. *HMRC v Barclays Bank plc and another* [2008] STC 476
10. *HMRC v Household Estate Agents Ltd* [2008] STC 2045
11. *Talisman Energy (UK) Limited v HMRC* [2009] UKFTT 356 (TC)
12. *DV3 RS LLP v R & C Comrs* [2011] SFTD 531
13. *Vardy Properties v R & C Comrs* [2012] SFTD 1398
14. *ALH Group Property Holdings Pty Limited v CCSR* [2012] HCA 6
15. *R & C Comrs v Lansdowne Partnership* [2011] STC 372
16. *R & C Comrs v Lansdowne Partnership* [2012] STC 544
17. *R & C Comrs v Charlton* [2012] UKUT 770 (TCC)
18. *Sanderson v HMRC* [2012] SFTD 1033
19. *R & C Comrs v DV3 RS LLP* [2012] UKUT 399 (TCC)

Textbooks Referred to

20. *Bennion on Statutory Interpretation* 5th ed (2008), pp1231-1245
21. *Chitty on Contracts* 31st Edn, 19-086-19-088

Witness Statement of David Nicholas James

22. Mr James, an Inspector of Taxes at HMRC, provided a witness statement dated 2 April 2012 and also gave oral evidence. He made the following points:

    (1) In 2008 he investigated a number of SDLT returns where purchasers of residential properties had used an SDLT avoidance scheme.

    (2) The use of SDLT avoidance schemes was characterised by a low amount of consideration being declared on the SDLT return than was actually paid for the acquisition of the property in question as recorded at the Land Registry.

(3) He conducted a review of the amount of consideration which purchasers declared on the SDLT return with those declared on the Land Registry forms and he discovered that the amount of consideration declared in a number of SDLT returns was lower than that appearing in the Land Registry records and concluded that an insufficient amount of SDLT had been paid in respect of those transactions.

23. The data from the Land Registry was initially obtained from the commercial website *Nethouseprice.com* which acquires property price data from the Land Registry and publishes it on the internet.

24. He investigated several companies involved in selling SDLT tax mitigation schemes.

25. He decided to raise a discovery assessment on a number of purchases after discovering the difference in purchase consideration stated in the SDLT form and the Land Registry documentation.

26. He said at the time in 2008, HMRC was not aware that there were SDLT mitigation schemes being used in residential properties. He also said it is very difficult given the substantial number of property transactions to properly investigate cases where there was a discrepancy between the information given on the SDLT form and that given to the Land Registry. The internal checking facilities did not exist for HMRC to find out whether the price which was being declared was the proper price. He said he found, in a number of tax mitigation schemes, it was "part of the plan" that SDLT returns would show a small amount of consideration as a small amount of tax was being paid on the property purchased.

27. He explained that the Land Registry was not part of the HMRC and they operated separately. He had to submit a request and pay a fee to obtain information on Land Registry transactions just as members of the public were required to do and this made checking difficult.

28. He explained at the time there were over a million SDLT returns per year for the years 2007-2009. This made investigation of individual returns a substantial task.

Terms

36. The following terms are used:

(a) "Original Contract" is the contract between the Vendor and Alpine. This is not a completed transaction since it is not "substantially performed" (less than 90% of the purchase price is paid).

(b) The "Substituted Contract" is the Novation Agreement (14 November 2007) entered into between the Vendor Alpine and the Appellant. This seeks to transfer the rights of Alpine to the Appellant.

(c) The "Secondary Contract" is a notional contract which establishes the consideration payable for SDLT purchases as the consideration payable to the Vendor under the Substituted Contract and the amount paid to Alpine for the transfer of rights. The consideration payable under the Original Contract is therefore attributable to the Secondary Contract. Performance under the Original Contract is disregarded and the SDLT charge arises under s44 FA 2003.

Appellant Submissions

37. The Appellant makes four main submissions

Submission 1

38. That s.45 FA 2003 is "engaged". The wording of s.45 (1) (b) FA 2003 – "an assignment, sub-sale or other transaction" allows a novation to fall within that definition. It is not a sub-sale or assignment but it is an "other transaction" whereby a third party becomes entitled to call for a conveyance.

39. The Appellant says that s.45 (3) does not necessarily assume that the Original Contract is still in existence and survives the sub-sale.

40. The *Ejusdem Generis* rule of interpretation, a reference to a specific class followed by a general reference, does not apply to s.45 FA 2003 (Bennion on Statutory Interpretations 5th edn (2008), pp. 1231-1245) and the expression "or other transaction" encompasses a novation.

Submission 2

41. In this submission the Appellant focuses on the consideration which is liable to SDLT.

42. Under the Substituted Contract (Novation) the Vendor releases Alpine in consideration of Mr Allchin agreeing to perform the Original Contract. The new purchaser under the Original Contract is now Mr Allchin.

43. In looking at the consideration payable on a sub-sale, the Appellant says that a payment of only 9.6% of the purchase price, i.e. £237,000, was paid by Alpine. Section 45(3) FA 2003 seems to envisage that Mr Allchin would have paid Alpine an amount equivalent to what Alpine had already paid the Vendor. In fact, no payment was made between Mr Allchin and Alpine (transfer was by gift) and Mr Allchin took over the liabilities of Alpine under the Original Contract.

44. Section 45(3)(b) FA 2003 says that the consideration payable under the Secondary Contract is "so much of the consideration of the Original Contract, as is attributable to the subject matter of transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him and (ii) the consideration given for the transfer of rights,"

45. The Appellant says that the words "is to be given" means a future payment rather than payments made and therefore only applies to outstanding consideration. It does not apply to the total consideration. To that extent, the legislation ignores any consideration already paid by Alpine prior to the Substituted Contract.

46. The Appellant's submission is that the words "so much of the consideration under the original contract … to be given directly or indirectly by the transferee or a person connected with him" can be confined to the amounts payable under the Substituted Contract by Mr Allchin and do not encompass amount already paid under the Original Contract. This means that the £1,856,250 payment on 14th November 2007 should be left out of account for SDLT purposes. Alternatively if the tax mitigation scheme was not undertaken properly, the SDLT consideration should be £2,212,500 rather than £2,450,000 which takes account of the £237,500 deposit. These are submissions made in the alternative.

47. The Appellant says that there was no consideration passing between Alpine and Mr Allchin and that any consideration paid by Alpine drops out and the only relevant consideration for SDLT is that paid by Mr Allchin.

48. Since Mr Allchin had no legal obligation to make any payment to the Vendor, the sums paid before the Substituted Contract or Novation would therefore drop out and not be included in the payment by him under the Secondary Contract.

Submission 3

49. The Appellant's third submission concerns s.75A FA 2003, under which the steps in a composite transaction can be amalgamated for tax purposes into a notional disposal by the Vendor to Mr Allchin.

50. The Appellant draws reference to the words "in connection with" in s.75A (1) (b). These words also appear in s.45 (3) FA 2003. The Appellant says that the words should be given a narrow meaning so the transaction from the Vendor to Alpine is not a scheme transaction because that contract is novated to Mr Allchin and in effect there is only one transaction, which is the sale from the Vendor to Mr Allchin.

51. Section 75 therefore does not apply.

Submission 4

52. The Appellant's fourth submission concerns the assessment. The relevant provisions are the administrative provisions regarding returns as set out in FA 2003, ss.76-78A and Schedule 10. The Appellant's submissions on this point are best made if one quotes directly from their skeleton argument.

53. The Appellant states:

> "The legal question is: having regard to the public sources of information about land prices as well as the price paid given in the TR1, was the information given in Box 10 of SDLT 1 information made available from

which the hypothetical reasonable inspector could reasonably have been expected to infer that there was an insufficiency in the tax declared? Put differently, will non-disclosure of the use of a sub-sale scheme inadequate disclosure?"

54. The Appellant proposed that within the scope of "process now, check late" procedure for self assessment, should the hypothetical reasonable inspector have inferred from the information in the return that something unusual might have occurred, giving rise to a loss of tax, and requiring some further action on his part within the Inquiry window?

55. The Appellant says that on the face of the return a reasonable inspector would have made further inquiry and "inaction beyond the inquiry window was not justified". He submits that there was "no ground for the making of a discovery assessment under the relevant provisions."

56. In summary the Appellant says that the tax mitigation was successful and the Appellant owes only £10,690 of SDLT declared in his SDLT 1 form. The sub-sale relief provisions are engaged, some or all of the consideration provided for the purchase price is excluded and the anti-avoidance provision in s.75A FA 2003 is not engaged.

Respondents' submissions

57. Perhaps it is best to summarise the Respondents' submissions as follows:

(a) Section 45 FA 2003 is not engaged therefore SDLT on the full purchase of £2,450,000 arises to the Appellant as purchaser of the Property pursuant to section 44 FA 2003.

(b) Alternatively, if the Respondents are wrong and s45 FA 2003 is engaged, then the full amount of the £2,450,000 consideration paid by the Appellant to the Vendors represents the consideration for the transaction completed by virtue of the deemed Secondary Contract under s.45(3)(b)(i) FA 2003.

(c) Alternatively, the arrangements are caught by section 75A FA 2003 with the result that SDLT is due on the full £2,450,000 received by the Vendors.

58. The Respondents say that the issue of the discovery assessment to the Appellant is to make good to the Crown the amount of SDLT lost on account of his understatement of the chargeable consideration for the acquisition of the Property.

59. The Respondents say that s.45 FA 2003 requires the Original Contract between the Vendors and Alpine to be in existence at the time of the sub-sale. This was accepted as common ground between the parties. The Respondents further say that the Novation brings an end to the Original Contract before the new Contract comes into

existence. Consequently there is no transfer of Alpine's right under the Original Contract to Mr Allchin. Consequently there is no "transfer or rights" from Alpine to Mr Allchin.

60. The Respondents say that if they are wrong on the engagement of s.45 FA 2003 then only the deposit (£237,500) is to be taken out of the consideration since the Appellant has not proved the timing of the transactions, which is to say that the Novation took place between the two transfers of cash. The two relevant times are 12.23 and 12.32. While there is evidence of instructions given to the bank there is no evidence of when the bank acted on the instructions or when the Novation actually took place.

Discussion

61. The key issue in this case is whether s.45 FA 2003 is engaged. The Respondents say it is not and the Appellant say it is.

62. Section 45 FA 2003 is a complex action. It governs the situation where there is a contract for a land transaction and where that transaction is to be completed by a conveyance after an assignment, sub-sale or other transaction, relating to the whole or part of the subject matter of the contract. A person other than the original purchaser becomes entitled to call for the conveyance to be made directly to him or her as the case may be. The person to whom the Contract is transferred, the transferee if you like, is not treated as entering into a land transaction as a result of the assignment, sub-sale or other transaction, which means that there is no SDLT or reporting obligations under the law. Pursuant to s.45 FA 2003, once the assignment, sub-sale or other transaction has been entered into there is a Secondary Contract for a land transaction. The transferee is treated as the purchaser and the consideration on which SDLT becomes payable is the aggregate of the consideration under the Original Contract given directly or indirectly by the transferee or a connected party together with the consideration given for the assignment, sub-sale or other transaction itself.

63. In order to qualify for sub-sale relief, it is important that the Original Contract is not "substantially performed" before completion and the Original Contract and Secondary Contracts are completed at the same time. The Original Contract is disregarded for SDLT purposes and the transferee only being liable for SDLT. The original purchaser drops out.

64. The idea behind sub-sale relief is that if a buyer "transfers his rights" under the Original Contract before it is substantially performed or completed and there is no liability to SDLT. The SDLT is paid only by the person who takes a transfer of those rights. The term "transfer or rights" includes sub-sale, assignments and other arrangements. The Appellant propose that it includes a novation.

65. In a sense sub-sale relief is automatic. If the parties satisfy the requirements set out in s.45 FA 2003 then one qualifies for the sub-sale relief and no further claim is required. In essence, s45 requires the following:

(a) The contract is for a land transaction which is to be completed by a conveyance;

(b) There is an assignment or other transaction which results in a person other than the original buyer becoming entitled to call for a transfer of the land to him or her; and

(c) There are two contracts in place and the first contract takes place at the same time as, and in connection with, the substantial performance or completion of the second contract.

66. If these conditions are satisfied, the effect of s.45 is then to disregard the first contract for the purposes of SDLT. The second purchaser or transferee is not treated as entering into a land transaction by virtue of the sub-sale and there is a notional contract between the first purchaser and the second purchaser which is called the Secondary Contract, under which the chargeable consideration for SDLT arises.

Is section 45 FA 2003 engaged

67. The requirements in s.45 FA 2003 for the section to be engaged there must be both a transfer of rights and the Original Contract must continue to be in existence. The section states that it applies when:

(i) a contract for a land transaction ("the Original Contract") is entered into under which the transaction is to be completed by a conveyance s.45(1)(a); and

(ii) there is an assignment, sub-sale or other transaction (relating to the whole or part of the subject matter of the Original Contract) ("transfer of rights") as a result of which a person other than the original purchase becomes entitled to call for a conveyance to him: s.45 (1) (b).

68. The section contemplates that "a person other than the original purchaser to become entitled to call for a conveyance to him at the time when the original contract is "to be completed".

69. The requirements in s.45 (1) (a) and s.45 (1) (b) are cumulative and the secondary purchaser must become entitled to call for a conveyance at the time when the completion of the original contract remains outstanding. The idea of the transfer of rights is that both the Original Contract and the notional secondary contract are treated as part and parcel of the same transaction.

70. This is borne out by s.45 (3) FA 2003 which anticipates that the original contract would be substantially performed or completed "at the same time as, and in connection with, the substantial performance or completion of the secondary contract". When this occurs, the substantial performance or completion of the Original Contract is ignored. Section 45(3) postulates the existence of a secondary contract where the Appellant is charged to tax as the purchaser. For this reason, the acquisition by the transferee is the only chargeable transaction and the consideration

is calculated, in part, by the transaction effecting the transfer of rights. A transfer of rights is essentially one transaction with two parts.

71. Let us examine the facts. The method used to transfer rights from Alpine to Mr Allchin is a novation. Under a novation the rights and obligations of one party are not transferred to a third party. Rather, a novation extinguishes one contract and replaces it with another, under which a third party takes up rights and obligations duplicating those of the party to the original contract. All the parties to the original contract, which is to say the Vendor and Alpine and incoming party, Mr Allchin, must consent to the novation for it to be valid. This makes it different from an assignment. *Chitty on Contracts* 31st edn at para.19-088 states:

> "It should, however be noted that the effect of a novation is not to assign or transfer a right or viability, but rather to extinguish the original contract and replace it with another."

72. The use of a novation therefore meant that there is no "transfer of rights" from Alpine to Mr Allchin. It is the ending of a contract and its replacement with another. It is therefore not a transfer.

73. The existing case law supports the view that the original contract must continue to exist.

74. The First-tier Tribunal in *Vardy Properties v. R&C Commissioners* [2012] SFTD 1398 stated:

> "The parties agreed that, for s.45 FA 2003 to apply, the "original contract" referred to in s.45(1)(a) must still be extant (i.e. incompleted) at the time when the "transaction" referred to in s.45(1)(b) occurred. We agreed that this is inherent in the structure of the two provisions when read together."

75. This view agrees with the Upper Tribunal's analysis in *HMRC v. DV3* [2012] UKUT 399 (TCC) which states:

> "[26] It can at once be seen that s45 is dealing with a wide variety of different factual situations, the common feature of which are that –
>
> (a) there is an original contract, which is do to be completed by conveyance, and
>
> (b) as a result of a further transaction relating to the whole or part of the subject matter of the original contract, someone other than the original purchaser becomes entitled to call for a conveyance."

76. There is no doubt that for s45 to be engaged there must be a transfer of rights at a time when the Original Contract is alive since that contract is only treated as completed when the secondary contract is completed or substantially performed. The legislation contemplates its continued existence until that time.

77. Was there a transfer of rights by virtue of the Deed of Novation? Under the novation the Original Contract is cancelled by mutual agreement and as such there is effectively a rescission of that contract. It is clear that the original debtor, Alpine, is discharged from their liability but that is distinct and separate from the acceptance by Mr Allchin of the position of substitute debtor. He enters into a new contract with the Vendor to buy the Property.

78. In commenting on a Novation, the Court in *Re United Railways of Havana & Regia Warehouses Limited* [1961] Ch.52 Jenkins LJ stated:

> "The discharge of the original debtor must proceed, and is distinct from, the acceptance by or imposition upon the creditor of the substituted debtor. It follows from this although the elements of statutory novation may, and usually will, be comprised in one statute or decree and, for practical purposes, operates simultaneously, each has nevertheless a separate and distinct legal identity."

79. Ms McCarthy for the Respondents say that there is no transfer of rights from the Original Contract to Mr Allchin because the rights obtained by the new contracting parties flow from a new contract. This seems a sensible view.

80. This view is supported by the case of *ALH Group Property Holdings Pty Ltd v. The Chief Commissioner of State Revenue*, a decision of the High Court of Australia which states at para.27:

> "Handley, AJA was also correct to identify the rescission of the existing 2003 Contract as essential to its novation. "Novation" is a term derived from the Civil Law; Lord Selbourne LC observed in *Scarf v. Jardine* and therefore from Roman Law. The term applied in two classes of cases: where the parties to a contract make a new contract, with new obligations, implying the rescinding and existing contract; and, more commonly, by agreements, where "the obligation of a third party is by express agreement accepted by one party to an existing contract with the consent of the other party, who, by the new contract, is released from his obligation under the original contract."

81. It must therefore be correct to say that there is no transfer of rights but rather the ending of one contract and the assumption by the new purchaser of the same obligations under a separate and distinct contract. For that reason, there is not a time when both contacts co-exist.

82. The terms of the Deed of Novation itself are interesting. It clear that the contract was brought to an end and Alpine was discharged from its obligations under the Agreement. A new agreement was entered into for the sale of the Property between the Vendors and Mr Allchin.

83. The Deed of Novation provides in recital (B) as follows:

> "The parties hereto have agreed to transfer the rights and obligations of the Vendor under the Agreement to the Substitute Purchaser (the Appellant) in accordance with the terms of this Deed. Accordingly, the

> agreement between the Vendors and the Purchaser (Alpine) is cancelled and replaced by an Agreement by the Vendors and the Substitute Purchaser.

84. The contract is therefore "cancelled" by mutual agreement between the parties so releasing each other from all obligations under the Agreement.

85. Clause 2.1.1 of the Deed of Novation provides:

> "The Vendors release the Purchaser from the obligation to purchase under the Agreement in return for the Substitute Purchaser's obligation to purchase the Property pursuant to the terms of this Deed."

86. Clause 2.1.2 provides:

> "The Purchaser agrees to the cancellation of the Agreement."

87. It is common ground between the Appellant and Respondent that both contracts must continue to exist for the purposes of s.45 FA 2003. It is clear that they did not exist at the same time.

88. Mr Southern for the Appellant says that there was the first funding (£1,856,250) followed by the novation agreement which was followed by a second transfer of funds £356,250 to complete the purchase. The transfer was between solicitors' accounts and at the time of the first transfer Mr Allchin had no legal obligations to make any payments to the Vendor and therefore that sum cannot be included in the payment by him under the Secondary Contract. This would mean only the £356,250 is charged to SDLT.

89. The Tribunal finds that there is no evidence that the Novation actually took place at that time which is between the two payments.

90. The Appellant has not been able to prove that a novation took place between the two transfers, which is to say between 12.23 and 12.32 on 14th November 2007. We understand that Alpine and Mr Allchin each signed separate documents called a Deed of Novation. We know that two transfers of £1,856,250 and £356,250 took place and instructions were given to the bank. There is no evidence of when the bank acted on the instructions to transfer and when the actual transfer took place in November. There is no evidence from the bank or the scheme providers as to when the execution of the Novation took place.

91. It would have been possible for the Appellant to call witnesses or to provide documentary evidence to support their submission that the novation took place between the two transfers but the Tribunal finds that this has not been done. In the circumstances therefore the Tribunal finds that there is no evidence that the novation took place between the two transfers of money. This is a question of evidence and the Appellant has been unable to prove its case or to discharge the onus placed on them.

92. What then are our conclusions? The parties agree that there is a requirement for the contract between the Vendors and Alpine to stay in existence at the same time as the Secondary Contract between the Vendors and Mr Allchin. It is clear that the use of a novation was not clearly thought out from a legal point of view in implementing the tax mitigation scheme. A novation brings the Original Contract to an end. For this reason, there was no transfer of rights as anticipated by the legislation but rather the ending of the Original Contract and the entering into by the Appellant of an entirely new contract with the Vendor. For this reason, the legal effect of the transaction entered into does not satisfy the statutory requirement at s.45 (1) FA 2003.

93. Mr Southern makes an argument around the concept of *scintilla temporis*. He used the House of Lord's decision in *Abbey National Bank Society v. Cann & Others* [1919] 1 All ER 1985 where the Court looked at the rights of a person with an equitable interest in a home to remain in occupation, where a bank sought repossession. The question was whether the legal estate which vested in the purchaser was, from the outset, subject to the Banks' rights. The Court said:

> "… the transaction necessarily involve conveyancing steps which, in contemplation of law, must be regarded as taking place in a defined order, so that there is a "*scintilla temporis*" between the purchaser's acquisition of the legal estate and the creation of the Society's charge during which the estoppel could be fed."

94. In the Tribunal's view there is no such *scintilla temporis* in this case. The circumstances are different. In a novation one contract is extinguished and replaced with another, as night follows day, there is no period when they both existed together. The doctrine does not have a place where there is the formation of altogether new contracts.

Consideration

95. The purpose of the transfer of rights provisions is to prevent a double charge to tax. In this case, given that the Original Contract has been novated; the notional Secondary Contract calculates the chargeable consideration and the Appellant is substituted for Alpine under the Original Contract by the Deed of Novation. In the original sale contract it is provided that the "Seller will sell and the Appellant will buy the Property for the Purchase Price". The Purchase Price is contractually defined as £2,450,000. The chargeable consideration on which the Appellant must pay SDLT is the aggregate of the consideration given by him and under the Secondary Contract. Under s.45 (3) (b) (i) the consideration which the Appellant gives, "directly or indirectly" is considered as part of the chargeable consideration. It was clear that the £237,500 paid by Alpine was paid for and on behalf of the Appellant. Alpine did not have use of those funds and it was not its funds at any point. The whole purpose of providing Alpine with those funds was to allow a deposit payment on behalf of the Appellant.

96. The observation of the Court in *Vardy* is instructive when looking at the chargeable consideration point. It is stated there:

> "A pre-ordained scheme has been established in which C, at an early stage provides the cash to B which will ultimately be used by B to pay A for the purchase of the property. In those circumstances, we are satisfied that when, as a result of a later step in the scheme, there is a transfer of rights which ultimately entitles C to call for a conveyance of the property, it can be said that A's purchase price, though it will be received from B, is "to be given indirectly by C within the meaning of s.45 (3) (b) (i)."

97. In this case, Mr Allchin provided all of the purchase money. There was no other source of funds. The Tribunal finds that the £237,500 deposit was paid by Mr Allchin.

98. Mr Southern said that the words "is to be given" in s.45 (3) (b) carries with them a reference to the future rather than back to the past and are intended to apply only to the outstanding consideration, not the total consideration.

99. In other words, it refers only to monies given by the Appellant after the transfer of rights. The words require one to identify that part of the consideration due under the Original Contract which the Appellant is obliged to give (directly or indirectly) as a result of the transfer or rights. In his view the Tribunal must look entirely at the Secondary Contract which is a hypothetical construct for SDLT purposes. He says that the words "so much of the consideration under the Original Contract … to be given directly or indirectly by the transferee or a person connected with him" can be confined to the amounts payable under the Substituted Contract by Mr Allchin plus any amounts given to Alpine.

100. The Tribunal does not accept this interpretation of the provision. In this case, the Original Contract has to be read as if Mr Allchin had agreed to purchase the Property for the Purchase Price as stated in Clause 2.1.3 – 2.1.5. If Mr Allchin had not completed the purchase, he would have been sued for the Purchase Price. He alone is responsible for the completion and the payment under the contract.

101. Furthermore, even if Mr Southern is right, that the expression "is to be given" refers to consideration given after the novation, there is no evidence that the sum of £1,187,500 was paid to the vendors before the Deed of Novation was executed. The Appellant has failed to discharge the burden of proving the time and date of this transfer. There is no clear evidence to pinpoint when the Novation took place.

102. Given that the Appellant has been unable to provide any evidence of the timing of the different tranches of payment and given the fact that the entire purchase price was provided either directly or indirectly by Mr Allchin, the Tribunal finds that the entire amount of £2,450,000 is the chargeable consideration. The Tribunal accepts the reasoning in the *Vardy* case regarding the consideration which is provided pursuant to Clause 45(3), where there is a pre-ordained transaction. The facts support an indirect payment from Mr Allchin.

103. In the circumstances, the Tribunal finds that Mr Allchin provided the entire consideration pursuant to the terms of s.45 (3). It should be added in caution that

there may be cases when indirect consideration may not be considered part of the chargeable consideration. It is not for this Tribunal to explore all those situations.

Discovery assessment

104. In the case of every notifiable transaction a land transaction return must be delivered within 30 days of the effective date of the transaction. The effective date is ordinarily the date of completion. The return must contain a declaration that it is complete and correct.

105. HMRC may give notice of an inquiry into a return within 9 months of the filing date. If after the close of the inquiry window, or after completion of an inquiry, HMRC discover that the assessment to tax of a chargeable transaction is less than the correct amount of tax, they may issue a discovery assessment.

106. A discovery assessment may only be made in a case where either (a) the underpayment of tax is due to the fraudulent or negligent conduct of the taxpayer or a person acting on his behalf or (b) at the time when HMRC ceased to be entitled to start an inquiry they could not have been reasonably expected, on the basis of the information available to them, to have been aware of the underpayment of tax.

107. The general time limit for assessments is 6 years after the effective date of the transaction or in the case of fraudulent or negligent conduct; the time limit is 21 years.

108. In this case, the SDLT 1 form was lodged on 20th November 2007 by Big Bracket and the inquiry window closed on 13th September 2008. A discovery assessment was issued to Mr Allchin on 11th December 2009, which was past the inquiry period.

109. Fraudulent or negligent conduct is not alleged in this case.

110. The Appellant says in their Further and Better Particulars that there was no loss of tax, they state:

> "The discovery assessment dated 11th December 2009 was invalid because there was no loss of tax to discover."
>
> "The SDLT paid … had been correctly accounted for in the amount due by law."

111. If the Appellant challenged the discovery assessment on the ground of no loss of tax, then given the findings of the Tribunal on s.45 FA 2003, that is the end of the matter.

112. However, the Appellant raised another point. He says that the HMRC's approach of "process now, check later" does not justify "prolonged inaction, where there are grounds to suspect that something may be amiss". They say that "HMRC's hypothetical officer …… would have been sufficiently aware having regard to the

relevant context of the property market and there was therefore no ground for making a discovery assessment under the relevant provisions." This raises a second argument.

113. Mr Southern said that from the SDLT 1 form HMRC should have been aware that a Central London property should go for considerably more than was declared. They should have gone to the Land Registry and checked the price and realised that there was a tax scheme and more tax had to be paid. We heard evidence from Mr James that HMRC did not, at that time, have adequate facilities for checking house prices. They used the site available publicly called *nethouseprice.com.*

114. The Appellant's main contentions are as follows:

(a) That the consideration provided on SDLT 1 form was lower than one would normally have expected but that this was discoverable should HMRC have referred to the public websites or gone to the Land Registry to check to TR1; and

(b) HMRC were aware at the time that avoidance schemes in relation to high value residential properties were in use and should have been alerted by the circumstances that there was a scheme in progress.

115. We heard evidence from Mr James that this was not quite the case. HMRC had very little knowledge at that time that stamp duty schemes were being undertaken for residential properties. This has changed over the years. It seems that the facilities available to HMRC officers for checking stamp duty schemes and prices relating to residential properties were very limited and there were over 3 million conveyances at the time which would have made the task very onerous.

116. The Appellant draws reference to the Upper Tribunal's decision in *R&C Commissioners v. Charlton* [2012] UKUT 770 (TCC) ("*Charlton*") where the Tribunal stated at para.58:

> "There is no single eponymous hypothetical officer. Nor is there any single benchmark of the knowledge and experience the hypothetical officer should be expected to have. The test of reasonable awareness must be applied to the circumstances of each case… The test of reasonable awareness must in our view be applied to the particular context in which the question arises and without regard to any perceived lack of expertise or specialisation of individual officers ..."

117. On this test, the Appellant says that the hypothetical officer did not act expeditiously or reasonably.

118. Let us look at the law. HMRC can raise a discovery assessment pursuant to paragraph 28(1) of Sch.10 which states:

> "an amount of tax that ought to have been assessed has not assessed." if under Sch.10, Para. 30(3):
>
> … at the time they –

(a) ceased to be entitled to give a notice of inquiry 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)…"

119. It is necessary to establish the state of Mr James' knowledge by reference to what information had been made available by the Appellant or those acting on his behalf, on 13 September 2009. This is the time the inquiry window closed. As explained by Ms McCarthy, he had no information from the Appellant or anyone acting on their behalf other than disclosed on the face of the SDLT 1 form.

120. From the evidence given by Mr James, he said that he first became aware of Big Bracket's involvement with SDLT avoidance schemes and Ashton Court's involvement, who were named in the SDLT 1 as the Appellant's agent, in December 2008. This is approximately three months after an inquiry window had closed.

121. The second point consideration is what is regarded as "information made available to" HMRC under Sch.10, para.30 (4). In this regard, the only information was the SDLT form which contained no express notice that the Appellant had entered into a tax avoidance scheme. It would have been advisable for the Appellant to make a fuller disclosure by writing a separate letter to HMRC explaining the circumstances surrounding a transaction. This was not done. In other words, the Appellant did not supplement the information in the SDLT 1 form with a more complete disclosure of the facts and circumstances of the transaction. This would have been a reasonable disclosure to make.

122. A few points can be made regarding the information. First, even if one looks at *nethouseprice.com*, it can be seen that other properties at the address of the purchase property would have gone for prices in or around £400,000 and considering that the SDLT 1 forms stated £356,250 it was entirely plausible that this could have been a property being sold in that location. Secondly, there is no requirement for HMRC to investigate and they did not have to investigate in this case. Under the self-assessment scheme it is the taxpayer who must tell HMRC what the tax should be and it is up to the taxpayer to get it right by providing requisite and sufficient information on which HMRC can make a determination of the tax liability.

123. This view is supported in the case *Langham (Inspector of Taxes) v. Veltema* [2004] EWCA Civ 193 where the Court of Appeal pointed out (at 552):

"The test in s.29 (5) is awareness of actual insufficiency; here, neither the return nor the associated documents made the Inspector aware of any actual insufficiency, nor, for that matter, did the P11D, even if relevant for the purpose. There is no obligation in the statute to oblige the Inspector to make inquiries unless he is put on notice by the information made available by the taxpayer as to the insufficiency of the return."

124. The Court went on to say that (at page 553) the question which must be asked is:

> "… what is the relevant information before the Inspector on the basis of which he could be said to have been reasonably expected to be aware of an insufficiency? Is it simply that emanating from the taxpayer and any inference that would reasonably be expected to be inferred from it."

125. The Court went further in discussing the new self-assessment scheme at that time and stated that the purpose is to "simply bring about early finality of assessments of tax, based on an assumption of an honest and accurate return and accompanying documentation by the taxpayer."

What emerges is from the case of *Veltema* and later on from *Charlton* is that the onus is on the taxpayer or his agent to clearly alert HMRC to the insufficiency of the assessment. It is up to the Inspector to assess the available information. The Inspector is not to have attributed to him further information that he might have obtained if he had carried out his own investigation prior to the end of the inquiry window. In *Charlton*, the court sought to clarify the test to say that officers should be aware of possible deficiencies based on information made available and not whether the officer has sufficient information to enable him to estimate the deficiency. The point is that the Inspector had very little information disclosed to him.

126. It is clear HMRC did not have sufficient information and were not under an obligation to make further checks of the type described by Mr Southern and were therefore entitled to make a discovery assessment for the loss of tax. They were not aware, based on the available information, at 13 December 2008 that there was a problem. They did not know there was a tax mitigation scheme in progress, the parties such as Big Bracket and Ashton Court were unknown to them and it was only through enquiries otherwise that they came to realise that a discovery assessment should be made. The low price of itself would not be enough to alert the Inspector of a tax mitigation scheme. There are many reasons why a property price would be low, for example, a house with subsidence or there are issues relating to planning and the neighbourhood. The arguments of the Appellant, though interesting, are not persuasive.

127. In the circumstances the Tribunal therefore finds that the discovery assessment was validly made.

CONCLUSIONS

1. The Tribunal has been asked not to proceed to s.75A FA 2003 if the finding is that s.45 FA 2003 is not engaged. The Tribunal finds that the s. 45 FA 2003 is not engaged for the reasons given above. The land transaction to be taxed is the sale from the Vendors to the Appellant with a chargeable consideration of £2,450,000.

2. In the circumstances the Tribunal, as requested by the parties, did not explore fully section 75A FA 2003, an anti-avoidance provisions dealing with scheme transactions.

3. The Tribunal finds that the discovery assessment is valid.

4. The appeal is therefore dismissed.

5. The parties may apply separately on matters of costs.

DR K KHAN
TRIBUNAL JUDGE

RELEASE DATE: 27 March 2013