[2019] UKFTT 3 (TC)

TC06912

Appeal number: TC/2018/01482

STAMP DUTY LAND TAX – discovery assessment – avoidance scheme – whether assessment invalid because not served on appellant until after time limit – whether discovery stale – whether discovery met conditions in paragraphs 28 and 30 Schedule 10 FA 2003 – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

KATHARINE TUTTY **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Magistrates Court, Southampton on 14 December 2018

Mr Robin Tutty for the Appellant

Mr David Street, litigator HM Revenue and Customs, for the Respondents

DECISION

1. This was the hearing of an appeal by Mrs Katharine Tutty ("the appellant") against a "discovery" assessment of stamp duty land tax ("SDLT") in the amount of £23,400.

Facts

2. From the evidence of Mrs Lynda Baker, an officer of HMRC, who made two witness statements and was cross-examined by Mr Tutty, I find the following facts.

3. On 5 March 2012 the appellant made a return of her liability to SDLT on Form SDLT1, the form prescribed for that purpose and set out in in Schedule 2 to the Stamp Duty Land Tax (Administration) Regulations 2003 (SI 2003/2387). The printout of the entries on this form showed, among other things:

> Q4 Effective date of the transaction: 23 February 2012
>
> Q9 Are you claiming relief? Yes
>
> If yes, please show the reason (Enter the code from the guidance notes): 28
>
> Q10 What is the total consideration in money or money's worth: £585,000.
>
> Q13 Is this transaction linked to any other(s)? No
>
> Q14 Total amount of tax due for this consideration: 0
>
> Q15 Total amount paid or enclosed with this notification: 0
>
> Q28 Address or situation of land: Half Acre, Barrack Lane, Truro, Cornwall, TR1 2DW
>
> Q49 National Insurance number of purchaser: [The appellant's NINO]
>
> Q56 Purchaser (1) address: Half Acre, Barrack Lane, Truro, Cornwall, TR1 2DW
>
> Q57 Is the purchaser acting as trustee? No
>
> Q59 Are the purchaser and vendor connected? No
>
> Q60 To which address shall we send the certificate? Property in Box 28
>
> Q61 I authorise my agent to handle correspondence on my behalf: Yes
>
> Q62 Agent's name: ARC Property Solicitors.

4. ARC Solicitors had been recommended to the appellant by a friend and on 28 September 2011 an Anthony O'Neill had emailed the appellant with a "SDLT planning letter of engagement" containing the terms on which "we" are being engaged. The terms of engagement included:

(1) The Provider of the "planning" was Omega Planning Ltd

(2) The fee was 50% of the stamp duty plus VAT

(3) The engagement was that the provider would implement an SDLT Mitigation scheme to save a "proportion" of SDLT that would be payable in the purchase of the property.

(4) The appellant irrevocably agreed to pay the fees on successful implementation of the SDLT Mitigation Scheme, with the provider entitled to deduct the fee from money held by it.

(5) The appellant agreed they had the opportunity to take advice.

(6) The appellant was to pass on any correspondence from HMRC as soon as possible and not to contact HMRC without the provider's express consent.

(7) The client was to keep all information received in the course of undertaking the SDLT scheme confidential and was liable for damages to the provider if they didn't.

(8) Under the heading "Risks" it was stated:

> "[HMRC] under current legislation have 9 months and 30 days from the completion date of the transaction (Enquiry period) to open an enquiry into a SDLT return submitted for the purposes of checking whether the correct tax has been paid."

(9) It was also stated that if the scheme was not successful (for whatever reason) the client would be liable to pay the full stamp duty plus any interest or penalties and, still under the heading "Risks", that the provider had absolute discretion to decide if the scheme had been successful.

(10) The provider agreed however that if an enquiry was suspended within the time limit and it was determined that the scheme had not been successful it would repay the fees and would pay any interest or penalties due.

(11) The provider was also to provide reasonable assistance to the client in relation to any enquires during the enquiry period.

5. The enquiry period ended on 30 December 2012 without an enquiry being opened.

6. HMRC say that a stock letter headed "Abode Solicitors Ltd trading as Arc Property Solicitors and Action Conveyancing" was sent in December 2013 to all people who used that firm when they bought a property, that the firm had stopped trading following action by the Solicitors Regulation Authority ("SRA") and that HMRC were reviewing the SDLT returns submitted by them. They said the review would take some time as there were large numbers involved, but that the recipient would be contacted "in the next few weeks" if HMRC intended to check the return. The appellant says she

did not receive this letter, and HMRC showed no evidence that it was sent to her or at what address. We find that the appellant did not receive this letter.

7. No evidence was offered by HMRC that they contacted the appellant in the "next few weeks" or at any time before January 2016.

8. HMRC's Counter Avoidance team created an electronic Standard Information Package ("E-SIP") which was used to interrogate HMRC's SDLT return database to seek a match for certain indicators, in this case a claim for "Code 28" relief and, among others, the use of an "indicative agent" (meaning one involved in SDLT schemes, including ARC Solicitors).

9. On 21 May 2014 such an E-SIP search result was created for the appellant's purchase. The print of the E-SIP search shows that:

(1) It was headed "SDLT Code 28 – Discoveries".

(2) It was created by case worker Zaynab Motara in the Birmingham Stamp Office risk team.

(3) Against the box "Additional purchaser(s)" is N.

(4) Against the box for "indicative agent" is Y.

(5) Under "Summary of SDLT risk" is "Discovery case (Indicative agents)".

10. On 11 November 2015 an HMRC officer made a request to HM Land Registry for an official copy of the register of title. As the response did not relate to the appellant's transaction a further request was made on 10 December 2015. The response to this also did not relate to the appellant's transaction.

11. An officer, referred to as "the reviewing officer" in Mrs Baker's supplementary witness statement, examined the Land Registry documents, the E-SIP information and the return at some time between 11 November 2015 and 4 December 2016 when instructions were given to make a discovery assessment.

12. An undated spreadsheet extract in the bundle shows:

(1) Under the heading "enquiry window" "22/02/2016"

(2) Under the heading "status" "Leeds to open 04/01/16"

13. On 11 January 2016 Mr T Pickersgill of HMRC's Counter-Avoidance Team 4 wrote to the appellant at an address in Lymington, Hants to say that:

> "I have examined the SDLT return and concluded that there is an insufficiency of tax. I believe that you have claimed relief in order to reduce the charge to SDLT. It is my view that this relief has been incorrectly claimed and SDLT should have been paid on the full purchase price of the property."

14. He enclosed, he said, "a discovery assessment" (*sic*) for SDLT of £23,400 that he said should have been paid. Both the notice of assessment (which was actually what

was enclosed) and the covering letter explained the appellant's appeal rights, and the covering letter said that if an appeal was made, the appellant should supply the reason the relief was claimed and certain documents and information listed on a schedule.

15. A copy of the correspondence was sent to ARC Property Solicitors (notwithstanding that HMRC had informed clients in 2013 that the firm had been shut down by the SRA).

16. On 26 February 2016 Mr Pickersgill wrote again to the appellant at the Lymington address saying he had neither received an appeal nor received the documents requested (he did not appear to realise that he had requested the documents etc only if the appellant had appealed). He informed the appellant of what she had to do to make a late appeal. This was also copied to ARC Solicitors.

17. On 12 May 2016 Mr Pickersgill refreshed the request for documents etc requiring a reply within 30 days. This letter was addressed to the appellant at an address in Salisbury.

18. On 17 May the appellant phoned Mr Pickersgill to say that she had received the letter of 12 May but not those of 11 January or 26 February. Mr Pickersgill said he would send her copies, which he did on 20 May 2016.

19. On 23 May the appellant said she had now received the earlier letters and requested an extension of time to take advice. She was given until 29 July 2016.

20. On 30 May she wrote to Mr Pickersgill explaining that she did not receive the earlier letters as she had sold the property in Lymington in 2012. She would not be able to supply the information as it was in the possession at the time of purchase of ARC Solicitors and presumably now the SRA. She asked among other things if details of the ARC scheme were known to HMRC before October 2013 when the SRA intervened.

21. On 15 August 2016 Mr Pickersgill replied explaining that HMRC systems showed the address in Lymington and that they used Equifax to find her address. He said that the ARC scheme was unknown to HMRC and was an "Undisclosed Scheme" (his capitalisation).

22. On 25 August Mr Robin Tutty, who is the appellant's former husband and a retired solicitor, wrote to Mr Pickersgill on his ex-wife's behalf. This was in response to what he said was an indication that HMRC might be willing to settle. He also asked in what respects the return was incorrect and asked Mr Pickersgill to provide a copy of it. He asked when HMRC because aware of the scheme.

23. On 5 September 2016 the letters of 11 January 2016 were returned to HMRC by Royal Mail through their returned letter service ("RLS").

24. On 4 November 2016 a Mrs McDermott replied enclosing a copy of the return. She said the actual scheme was unknown to HMRC. She offered three options for settlement, though only two were numbered as such. They all involved paying the full amount of tax, interest but no penalties.

25. On 23 November 2016 Mr Tutty responded saying he was seeking details of the advisory firm's insurers and with a view to formulating a claim against the advisers he asked in a phone call of 2 February 2017 whether HMRC had any details of a Tribunal ruling and details supporting the fact that the scheme does not work.

26. On 8 February 2017 HMRC wrote to Mr Tutty with details of what they knew of the scheme and referred to *Allchin v HMRC* [2013] UKFTT 198 (TC).

27. Following a great deal of further correspondence between Mrs McDermott and Mr Tutty the appellant notified her appeal to the Tribunal on 12 February 2018.

Law

28. The law relating to discovery assessments for SDLT is based on that in the Taxes Management Act 1970 ("TMA") but with minor differences. It is to be found in Part 5 Schedule 10 Finance Act ("FA") 2003:

> "**Revenue assessments**
>
> *Assessment where loss of tax discovered*
>
> **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.
>
> …
>
> *Restrictions on assessment where return delivered*
>
> **30**—(1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28 … in respect of the transaction—
>
> (a) may only be made in the two cases specified in sub-paragraph (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) … 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) ....

(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) …—

(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) … 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.

Time limit for assessment

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 ….

…

(5) Any objection to the making of an assessment on the ground that the time limit for making it has expired can only be made on an appeal against the assessment.

(6) In this paragraph "related person", in relation to a purchaser, means—

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

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

29. The differences between these provisions and s 29 TMA, apart from drafting matters, are that

(1) there is no equivalent in FA 2003 to the opening words of s 29(3) limiting the application of the two conditions (in subsections (4) and (5)) to cases where a return under s 8 TMA is made

(2) the conduct leading to a loss of tax that the officer must show in paragraph 30 is "fraudulent or negligent" conduct, whereas in s 29 TMA it is for the officer to show that the loss of tax was brought about carelessly or deliberately.

(3) there is no equivalent in FA 2003 to s 29(8) TMA which provides that an objection to the making of an assessment on the grounds that neither of the conditions was met can only be made on an appeal against the assessment.

30. Section 113 FA 2003 is relevant to these discovery provisions:

> "***113 Functions conferred on "the Inland Revenue"***
>
> (1) References in this Part to "the Inland Revenue" are to any officer of the Board, except as otherwise provided.
>
> …
>
> (3) In Schedule 10 (returns, assessments and other administrative matters)—
>
> (a) functions of the Inland Revenue under these provisions are exercisable by the Board or an officer of the Board—
>
> (i) paragraph 28 (discovery assessment),
>
> …;
>
> …
>
> (4) Nothing in this section affects any provision of this Part that expressly confers functions on the Board, an officer of the Board, a collector or a specific officer of the Board."

31. But by s 7 and paragraph 22 Schedule 1 and s 50 Commissioners for Revenue and Customs Act 2005 which make non-textual amendments to enactments section 113 is to be read as if it said:

> "***113 Functions conferred on "the Commissioners for Her Majesty's Revenue and Customs"***
>
> (1) References in this Part to "the Commissioners for Her Majesty's Revenue and Customs" are to any officer of Revenue and Customs, except as otherwise provided.
>
> …
>
> (3) In Schedule 10 (returns, assessments and other administrative matters)—

(a) functions of the Commissioners for Her Majesty's Revenue and Customs under these provisions are exercisable by the Commissioners or an officer of Revenue and Customs —

(i) paragraph 28 (discovery assessment), ;

…; ;

…

(4) Nothing in this section affects any provision of this Part that expressly confers functions on the Commissioners, an officer of Revenue and Customs or a specific officer."

32. Accordingly references in paragraphs 28 and 30 Schedule 10 FA 2003 to "the Inland Revenue" are to read as to "an officer of Revenue and Customs" and references to "they" in paragraph 28(1) are to be read as to "the officer".

33. Because service has been put in issue in relation to the assessments I set out the relevant paragraph of Schedule 10 FA 2003 and then sections 83 and 84 of that Act:

Assessment procedure

32—(1) Notice of an assessment must be served on the purchaser.

(2) The notice must state—

(a) the tax due,

(b) the date on which the notice is issued, and

(c) the time within which any appeal against the assessment must be made.

(3) After notice of the assessment has been served on the purchaser, the assessment may not be altered except in accordance with the express provisions of this Part of this Act.

(4) Where an officer of the Board has decided to make an assessment to tax, and has taken all other decisions needed for arriving at the amount of the assessment, he may entrust to some other officer of the Board responsibility for completing the assessing procedure, whether by means involving the use of a computer or otherwise, including responsibility for serving notice of the assessment.

83 Formal requirements as to assessments, penalty determinations etc

(1) An assessment, determination, notice or other document required to be used in assessing, charging, collecting and levying tax or determining a penalty under this Part must be in accordance with the forms prescribed from time to time by the Board and a document in the form so prescribed and supplied or approved by the Board is valid and effective.

(2) Any such assessment, determination, notice or other document purporting to be made under this Part is not ineffective—

(a) for want of form, or ;

(b) by reason of any mistake, defect or omission in it, ;

> if it is substantially in conformity with this Part and its intended effect is reasonably ascertainable by the person to whom it is directed.
>
> (3) The validity of an assessment or determination is not affected—
>
> (a) by any mistake in it as to—
>
> (i) the name of a person liable, or
>
> (ii) the amount of the tax charged, or
>
> (b) by reason of any variance between the notice of assessment or determination and the assessment or determination itself.
>
> *84 Delivery and service of documents*
>
> (1) A notice or other document to be served under this Part on a person may be delivered to him or left at his usual or last known place of abode.
>
> (2) A notice or other document to be given, served or delivered under this Part may be served by post.
>
> (3) For the purposes of section 7 of the Interpretation Act 1978 (c. 30) (general provisions as to service by post) any such notice or other document to be given or delivered to, or served on, any person by the Inland Revenue is properly addressed if it is addressed to that person—
>
> (a) in the case of an individual, at his usual or last known place of residence or his place of business;
>
> …"

34. I can see nothing that suggests that the authorities on discovery or service relating to income tax are not applicable to SDLT. Nor, I see, did Judge Barbara Mosedale in *Alison Lloyd v HMRC* [2017] UKFTT 828 (TC) at [57] ("*Lloyd*"). That case was cited to the Tribunal by HMRC in support of their argument on service.

Submissions of the parties

35. The appellant says that:

(1) while there may have been a discovery made under paragraph 28 Schedule 10 FA 2003 it is not accepted that that discovery flowed from the examination made on 21 May 2014, and on that date the assessment had lost its essential newness and was stale.

(2) she does not accept that a valid assessment had been made within the relevant time limit, because, inter alia, the purported assessment was not served on her at her usual or last place of abode, and the rules relating to deemed service are not relevant.

(3) HMRC have not provided any information to show that the scheme failed.

36. HMRC contend that:

(1) there was a valid discovery when HMRC examined the return selected for examination because of a combination of factors.

(2) HMRC could not reasonably have been expected to have been aware of the insufficiency of tax, because no information was provided to show why the Code 28 relief was claimed. Code 28 may apply to a number of valid reliefs as well as to SDLT mitigation schemes.

(3) The discovery assessment was made within the 4 year time limit.

(4) The notice of assessment was served on the appellant at the address last known to HMRC and so is deemed served under s 7 Interpretation Act 1978. In any event it was served on her on 20 May 2016 at her then current address.

(5) But in any event there is no time limit for service of the notice, for which proposition HMRC cite *Honig and others v Sarsfield (HM Inspector of Taxes)* (1985-6) 59 TC 337 ("*Honig*").

(6) The discovery was still fresh when the assessment was made, citing *Pattullo v HMRC* [2016] UKUT 270 (TCC) ("*Pattullo*").

(7) It is not up to HMRC to show that the assessment is wrong – the burden is on the appellant.

Discussion

Service

37. It is convenient to start with the issue of service as if the appellant succeeds there is no need to consider the discovery issues.

38. The situation here is the same as in *Honig* – the assessment was made, in the modern way, by entering the details in the HMRC computer as described in *Corbally-Stourton v HMRC* [2008] SpC 692. The appellant does not dispute that the assessment was so made at that time.

39. In *Honig* the Special Commissioners found, on the facts, that:

> "Volume 2 of the assessment books contains the seven originals of the assessments under appeal numbered consecutively 2583 to 2589. They are in essentially the same form as the notices of assessment issued to the Appellants and each states that it was 'issued' on 16 March 1970. Volume 1 contains a certificate signed by an Inspector of Taxes and dated 16 March 1970, stating that he had 'made' a number of assessments contained in volume 2, including numbers 2583 to 2589 inclusive."

40. The time limit for making the assessment was 5 April 1970. In the Court of Appeal Fox LJ said:

> "… the Special Commissioners found that the seven notices of assessments were posted first of all to the last-known address of Mrs. Honig (the widow). They were returned undelivered to the Tax Office and re-addressed to Mr. Honig's last-known address. Once again they were undelivered and returned to the Tax Office. On 7 April 1970 they were sent to Mr. Honig's current address - that being after the last date when the assessments were required by the statute to

> be made. There was no specific finding as to when the notices were sent to Mrs. Honig, nor when they were re-addressed and sent to Mr. Honig.
>
> …
>
> … I come to subs (5) [of s 29 TMA], which provides: 'Notice of any assessment to tax shall be served on the person assessed and shall state the time within which any appeal against the assessment may be made.' …
>
> It seems to me that the words in s 29(5) 'notice of any assessment to tax … ' necessarily imply that there is a difference between the notice and the assessment. One cannot have a notice of an assessment until there has been an actual and valid assessment. In subs (6) one finds the words 'After the notice of assessment has been served on the person assessed …'. The reference there to 'the person assessed' implies to my mind that there has been an assessment. It is clear that that subsection contemplates that an assessment is different from and will be followed by the notice of assessment and that its validity in no way depends on the latter. They are two wholly different things. The learned Judge referred to s 114(2) of the 1970 Act, which provides:
>
> > 'An assessment shall not be impeached or affected - (a) by reason of a mistake therein as to - (i) the name or surname of a person liable, or (ii) the description of any profits or property, or (iii) the amount of tax charged, or (b) by reason of any variance between the notice and the assessment'.
>
> That Section again draws a clear distinction between the assessment and the notice of assessment, and shows that they are different, the assessment being in no way dependent upon the service of the notice.
>
> In my view the result of these provisions is that the Court is not concerned here with the question of the date when the notices of assessment were served. The Court is concerned with a totally different question, namely: When were the assessments made? The giving of notice has nothing to do with the making of a valid and effective assessment. The statute clearly distinguishes between the assessment and notice of it and contains no provisions which makes the validity of the assessment in any way conditional upon the notice."

41. In the High Court Peter Gibson J had said:

> "Mr. Honig pointed out that there could be a serious injustice to a taxpayer were the Revenue to make an assessment but keep the same without service for many years, but in my judgment an aggrieved taxpayer is likely to have a public law remedy were the Revenue to behave in such fashion. I do not think that such considerations can affect the clear inference to be drawn from the statutory language."

42. I add, for the benefit of Mr Tutty, that in *Grunwick Processing Laboratories Ltd v Commissioners of Customs and Excise* [1986] STC 441 ("*Grunwick*") Macpherson J said:

> "There is only an appeal to this court on points of law. Here there are two submissions made, the remainder not being pursued with much, if any, enthusiasm before me. First, it is said that the assessment was not notified to the taxpayer company as the statute requires it to be (see s 46 and Sch 7, para 4 of the Value Added Tax Act 1983), and that the assessment is thus flawed. The chairman found that there was no proper notification, but he also held that the result was that the assessment was simply unenforceable unless and until it was notified properly. The point has very little, if any, merit since the taxpayer company plainly got the assessment through their own solicitors, but it is a point which exists and had to be met, and has to be met by me."

43. I therefore reject the appellant's argument that the failure to serve notice on the appellant until after the end of the four year period invalidated the assessment. I do not need to consider the questions of deemed service and the effect of s 84 FA 2003 or s 7 Interpretation Act.

44. But this is not to say that failure to serve a notice of assessment either within a short time of the making of it, or at all, is not capable of having deleterious effects on the person assessed. Under paragraph 32(2)(c) Schedule 10 FA 2003, as under s 30A(3) TMA (income tax and CGT) and paragraph 47(1)(b) FA 1998 (corporation tax), a notice of assessment must inform the appellant of the time within which an appeal against the assessment may be made. By paragraph 36(1)(b) Schedule 10 FA 2003 that time is a time within the 30 days after the date on which the notice of assessment was issued. HMRC take the view (see their Appeals, Reviews and Tribunal Guidance at paragraph 2180) that this means the date HMRC posts the decision notice, not the date of receipt of that notice. Thus in this case the appeal period ended 30 days after 11 January 2016, a time when the appellant was unaware of the issue of the notice (something proved by the return of the notice by Royal Mail's Returned Mail Service).

45. That leaves any person assessed who did not receive the notice within the time laid down or at all having to make a late appeal when they find out that an assessment had been made and having, at least according to HMRC, to show them that they had a reasonable excuse for not appealing in time. The list of acceptable excuses in ARTG 2250 does not include late receipt because the notice was sent to an address where the person was not to be found.

46. And while a demand to pay tax notice of which had not been given to the taxpayer may not be enforceable (*Grunwick*), interest will have accrued between the date the tax would have been paid had the notice been received in a timely manner and the actual date of payment. This point was raised by Mr Tutty with HMRC in this case, but to no avail. But neither in relation to interest or a demand for tax does this Tribunal have any jurisdiction.

47. As I mentioned earlier HMRC cited *Lloyd* to me in support of their argument that the assessment had been validly served. In that case Judge Mosedale said at [3] and [83] that the validity of the discovery assessment depended on whether it had been served on the appellant in accordance with the law. This seems to me to be contrary to

Honig and *Grunwick* and I cannot see anything in Schedule 10 FA 2003 that would differentiate SDLT from income tax or VAT in this regard.

Staleness

48. I now turn to the arguments on the discovery issues. I look first at the "staleness" point, as success on this for the appellant would make it unnecessary to consider any other issues. At the hearing I pointed out to the parties that the Upper Tribunal had recently given its decision in *Clive Beagles v HMRC* [2018] UKUT 380 (TCC) ("*Beagles*") and in that the Tribunal followed *Pattullo*, a case referred to by HMRC in their skeleton. I offered the parties the opportunity, but did not direct them, to make submission in writing on the effect of *Beagles*.

49. In order to establish whether the assessment of January 2016 was stale in the sense discussed in *Pattullo* and *Beagles*, it is first necessary to establish when the discovery can be said to have been first made.

50. The appellant says that the latest the discovery assessment can be said to have been made was on, or very shortly after, 21 May 2014, when, according to HMRC's skeleton, the appellant's SDLT1 was selected for examination. Mr Tutty suggested in his skeleton that the time of discovery may have been earlier but in my view he was confusing two issues: when there was a discovery, relevant to staleness, and what HMRC were aware of when, which is relevant to the condition in paragraph 30(3) Schedule 10 FA 2003.

51. HMRC's skeleton is somewhat unclear as to the time they say the discovery was made. They do, as the appellant suggests, refer to the selection of the return for examination on 21 May 2014 and then refer to paragraphs 5 to 14 of Mrs Baker's witness statement which Mr Street's skeleton said "explains the process that HMRC undertook when examining the return".

52. Paragraphs 5 to 8 of the witness statement explain that SDLT1s were selected if Code 28 was claimed with no explanation and an indicative agent was identified and that this was the case with the appellant's return. Paragraph 9 says that as part of the project remit "a number of checks were made to identify any reason as to why a claim to code 28 relief had been made". Those checks are shown in paragraphs 10 to 13 and consisted of checking whether or not there was:

(1) A separate disclosure letter or explanation why Code 28 relief had been claimed.

(2) An entry on box 13 showing that the transaction was linked to any other for which another return had been submitted.

(3) An entry on box 13 showing that the transaction was between connected persons.

(4) Any evidence that either vendor or purchaser were companies (indicating possible relief for group transactions).

53. The witness statement then says that on completion of these checks the reviewer concluded that one or more of the situations set out in paragraph 28(1) was present.

54. In the skeleton it is put slightly differently. That says that as a result of examining the return the combination of factors meant that HMRC came to the conclusion that it was more likely than not that one of the situations was present.

55. Before the hearing HMRC applied to put in a late supplementary witness statement from Mrs Baker, something which the appellant did not oppose, so I admitted it.

56. This statement clarifies parts of the main statement. In particular it argues that the selection of the return on 21 May 2014 was not the point at which the discovery was made but marked the beginning of the checks carried out by HMRC to identify "undisclosed" land transactions (this is of course not evidence of fact but opinion and I treat it as apart of HMRC's submissions). The checking exercise, she said, was carried out between January 2015 and March 2016 and included more than 500 SDLT1s, and involved establishing a spreadsheet so that cases could be checked in date order so that the discovery time limit would not be missed.

57. In cross-examination Mrs Baker said that nothing was done in this case between May 2014 and November 2015; that there were no valid Code 28 claims in the cases selected and that the Code 28 project team had been put together before 2012.

58. In my view there was no discovery in May 2014 or at any time before then. For there to be a discovery there had to be an officer of Revenue and Customs who makes it (HMRC rather clouded this issue by referring to "HMRC" as making the discovery, a point they wrongly identified as a difference between Schedule 10 FA 2003 and s 29 TMA - §32). To make a discovery the officer has to turn their mind to the material before them and come to an opinion as to the amount of loss of tax to be assessed. To be able to do that the officer must be sufficiently skilled to do that, whether or not they have the same skill and knowledge that is expected of the hypothetical officer referred to in paragraph 30(4) Schedule 10 FA 2005[1].

59. There is no evidence before me and no suggestion was made that Zaynab Motara was performing anything other than a clerical function in producing the E-SIP search document and no suggestion or evidence that she turned her mind to what that material showed or formed an opinion about the loss of tax to be assessed.

60. The only person who could have made a discovery was the reviewer (I assume Mr Pickersgill). As there were no more than three months between his discovery and the making of the assessment the discovery was not stale.

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[1] There is some evidence that the officer concerned must have certain skills and knowledge because before changes made to s 29 TMA by FA 1994, only an inspector of taxes or the Board of Inland Revenue itself could make a discovery (or indeed any) assessment. Thus only a person who would now be a Higher Officer or superior grade could do it.

Was there a valid discovery?

61. I must now consider whether the discovery meets the requirements of paragraphs 28 and 30. In my view the material before the officer made it reasonable for that officer to believe that an amount of £23,400 ought to be assessed. The combination of nil tax on consideration of £585,000 when the threshold was £125,000, a claim for Code 28 relief and the involvement of ARC Solicitors provide objective justification for the officer's opinion.

62. The only remaining question then is whether the paragraph 30(3) condition is met. An officer would have ceased to be entitled to open an enquiry on 30 December 2012. What information falling within paragraph 30(4) would have been available to an officer of Revenue and Customs at that time? It was the SLDT 1, the land transaction return referred to in paragraph (a) of paragraph 30(4) and any information which that officer could reasonably have been expected to infer the existence and relevance of from the SDLT1. It would also include any information, the existence and relevance of which ARC Solicitors or Omega Planning Ltd had notified HMRC in writing before 30 December 2012, but HMRC have not produced any such notification by either of those bodies.

63. An appropriately skilled officer who examined the SDLT 1 in 2012 would be or become aware of the tax of nil on a consideration of £585,000, that the threshold for SDLT was much less than that figure, that a claim for Code 28 relief was made to eliminate the tax and that ARC Solicitors were acting. There was nothing else from which the officer could infer any relevant information was in existence (such as a white space entry explaining why Code 28 was used or a DOTAS number), so the reasonable expectation has to based on the material just referred to.

64. In my view this material would not on its own have alerted an officer of HMRC to the existence of a deficiency or (as I prefer to put it) a loss of tax. Such an officer would have seen a claim for Code 28 relief, and knowing that Code 28 was a "catch-all" code for all reliefs not given any other specific code number they might well consider that there would have been grounds for an enquiry. But a claim for Code 28 relief, like any other claim, does not of itself demonstrate a loss of tax. Nor could the entry on the return showing that ARC Solicitors were the agent's for the appellant have by itself, or in combination with a Code 28 claim, have caused such an officer to realise there was a loss of tax. Nor do I think that such an officer could have inferred anything more from those entries that would demonstrate a loss of tax.

Decision

65. The assessment is upheld

66. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 31 DECEMBER 2018