Neutral Citation: [2023] UKFTT 00945 (TC)

Case Number: TC08982

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2020/01784
and all appeals listed in the Appendix

Procedure – Preliminary issue – Discovery assessments – Whether hypothetical officer could have been reasonably expected to be aware of loss of tax on basis of notification assumed to have been made by all appellants – No – Appeals dismissed

Heard on: 16-18 October 2023
Judgment date: 31 October 2023

Before

TRIBUNAL JUDGE BROOKS

Between

MRS E F BROSCH & MR R N BROSCH
(and the other appellants listed in the Appendix)

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Patrick Cannon, counsel, instructed by Goldstone Tax

For the Respondents: Marika Lemos, Colm Kelly and Aparajita Arya, all of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION ON PRELIMINARY ISSUE

INTRODUCTION

1. The Appellants (as listed in the Appendix) were users of stamp duty land tax ("SDLT") avoidance schemes. These were designed to take advantage of the rules that applied to sub-sales of real property in s 45 of the Finance Act 2003 ("FA 2003") to reduce the SDLT liability on the purchase of a residential property. The schemes were promoted by Cornerstone Tax Advisers ("Cornerstone") and were known as "Jeepster" (which involved a sub-sale by way of an assignment or gift between unmarried couples) and "Hummer" (which involved a sub-sale by way of an assignment or gift between married couples). It is not necessary for the purposes of this decision to describe how the schemes were intended to work as it is now accepted that they were ineffective and that, as a result, the full liability to SDLT was not recorded on the land transactions returns (the "SDLT1 returns") filed by each of the Appellants.

2. On 28 February 2022 HM Revenue and Customs ("HMRC") made an application that the appeals be stuck out on the following grounds:

(1) the Disclosure Notes provided by the Appellants listed in Appendix 1 of the application were not adequate to satisfy the requirements of paragraph 30(3) of schedule 10 to FA 2003;

(2) the Appellants listed in Appendix 2 of the application had not sent a Disclosure Note with their SDLT1 returns as claimed;

(3) the Appellants listed in Appendix 3 of the application had not provided any documentation that supported the claim that they implemented an SDLT avoidance scheme and accordingly the insufficiency or loss of tax was due to the negligent conduct of those Appellants and/or persons acting on their behalf; and

(4) there is no reasonable prospect of the Appellants being able successfully to argue that the schemes could work. As noted above, it is now accepted that the schemes are ineffective.

3. In a further application, dated 10 August 2023, HMRC, which does not accept that all Appellants disclosed their participation in the schemes and reserve their position on this issue, invited the Tribunal to direct that the following preliminary issue be determined in respect of all the appeals:

> On the assumption that all Appellants whose appeals are listed in the Appendix did notify HMRC in writing (within the meaning of paragraph 30(4)(c)(ii) of Schedule 10 to the Finance Act 2003 (FA 2003)) by means of a standard form disclosure note containing the following wording:
>
> > 'The chargeable consideration entered on this return has been calculated in accordance with the provisions of section 45 Finance Act 2003 as, between the exchange of contracts and completion, purchaser 1 executed a gift of a 99% interest in the contract at a time when it was 85% paid. Accordingly, on the advice of Counsel, that resulting percentage of the contract price does not fall to be counted as part of the chargeable consideration because of the "sub-sale".
> >
> > We are also advised that the provisions of section 75A FA 2003 do not apply to this transaction, as when operating a calculation under this provision the resulting chargeable consideration is

> less than that declared on the return. If you require further information, please contact us.'
>
> (or wording to very similar effect) could a hypothetical officer have been reasonably expected to be aware of the loss of tax (within the meaning of paragraph 30(3) of Schedule 10 to FA 2003) in the Appellants' SDLT Returns in respect of their use of what has come to be known to HMRC as the Jeepster or Hummer scheme?

4. As the preliminary issue essentially duplicated the first ground of the strike out application, HMRC's application of 10 August 2023 sought that grounds 2 and 3 of the strike out application be stayed and ground 4 (which was no longer in dispute) to be determined in favour of HMRC by consent.

5. On 6 October 2023 the Tribunal (Judge Poole) directed *inter alia* that:

(1) The present hearing (which had already been listed to determine the strike out application) should proceed as a hearing of the above preliminary issue;

(2) Determination of grounds 2 and 3 of HMRC's amended strike-out application be stayed until further order of the Tribunal; and

(3) By consent of the parties, it is confirmed that ground 4 of the said application dated 28 February 2022 is decided in favour of HMRC.

6. Marika Lemos, Colm Kelly and Aparajita Arya, all of counsel appeared for HMRC. The Appellants were represented by Patrick Cannon also of counsel. I am grateful for their helpful submissions both written and oral. However, although carefully considered, I have not found it necessary to record all of their arguments or refer to every authority cited in this decision.

EVIDENCE

7. In addition to an electronic hearing bundle, supplementary bundle and core bundle, comprising 1,002, 116 and 382 pages respectively, I heard from Peter Kane who, before his retirement on 31 December 2020, was an HMRC officer with over 32 years experience. He was an Inspector of Taxes on investigation duties for the Counter Avoidance Directorate, previously the Specialist Investigations (SCI) team, which he joined in July 2008. As part of his duties from late 2008, Mr Kane had responsibility for the investigation of returns where it was believed that an SDLT avoidance scheme had been used by property purchasers.

8. I found Mr Kane to be a helpful and straightforward witness who clearly sought to assist the Tribunal.

FACTS

9. As noted above it is not disputed that the Jeepster and Hummer schemes were ineffective and that, as a result, HMRC discovered that there was an amount of tax that ought to have been but was not assessed. It is also not disputed that the Appellants' SDLT1 returns, which included the names and addresses of the vendors and purchasers of the properties, the dates of the contract, the effective date of the transaction and the names of the respective agents, indicated that the properties in question had been purchased for valuable chargeable consideration (ie not 'nil' consideration). Also that none of the SDLT1 returns made any reference to the involvement of Cornerstone.

10. It is common ground that HMRC made the discovery and issued discovery assessments after the expiry of the enquiry windows into the Appellants' SDLT1 returns.

11. In his evidence Mr Kane explained that he was (and HMRC were) only aware that the Jeepster and Hummer SDLT schemes were not effective on 1 April 2010 when he received

challenge letters to the scheme drafted by leading counsel. In evidence Mr Kane said that it was agreed, following a wide-ranging discussion in conference, that leading counsel would draft such challenge letters if he was of the view that the schemes could be challenged but would provide a "traditional" Opinion if he considered the schemes to be effective. Mr Kane said that it was the receipt of the draft challenge letters that led to discovery assessments being issued, from 10 January 2011, on the basis that the schemes were challengeable on technical grounds.

12. Although HMRC waived privilege in respect of the 2010 legal advice and copies of the draft challenge letters were included in the hearing bundle, privilege was not waived in respect of the legal advice, mentioned by Mr Kane his witness statement, that had been received by HMRC from its Solicitors Office in 2007 (the "2007 Advice"). Mr Kane explained that he had referred to the 2007 Advice as he was made aware of it by the Stamp Office team and "wanted to put everything" in his statement.

13. Mr Kane, who had given evidence in the First-tier Tribunal in *Carter & Kennedy v HMRC* [2020] UKFTT 179 (TC) ("*Carter & Kennedy* FtT") which had concerned the Jeepster and Hummer SDLT schemes, also addressed HMRC's view of these schemes in the light of:

(1) a letter issued by Paul Needham an Officer of HMRC to Howard Kennedy (the taxpayer's solicitors) dated 8 May 2007 (see below) concerning an enquiry into the Hummer type of scheme on which Mr Needham was working; and

(2) HMRC's published guidance on section 75A FA 2003, 'Stamp duty land tax (SDLT) Technical News' Issue 5, which was published in August 2007.

Mr Kane explained that he had not referred to Mr Needham's letter (the "Needham Letter") in *Carter & Kennedy* FtT as he had only become aware of its existence in the current proceedings when it was disclosed by the Appellants. However, Mr Kane said that the Needham Letter did not alter the 1 April 2010 date on which he and HMRC had concluded the SDLT schemes were ineffective.

14. Given the significance Mr Cannon placed on the Needham Letter in his submissions it is necessary to refer to it and the background to it in more detail.

15. Mr Needham was a HMRC Stamp Office enquiry officer handling enquiry cases, including the Hummer and Jeepster arrangements. He was based in Bristol but when HMRC's Stamp Office relocated in 2007 to a single office in Birmingham Mr Needham did not move to the new Birmingham Stamp Office.

16. On 22 March 2007 Mr Needham wrote to Howard Kennedy, the taxpayer's solicitors, giving notice of his intention to enquire into the taxpayer's SDLT1 return. The letter also requested information and documents from the taxpayers to be provided to HMRC by 20 April 2007.

17. On 3 May 2007, having agreed further time to provide the information and documents with Mr Needham, Howard Kennedy wrote to HMRC (Mr Needham) providing some information and documents setting out the steps in the scheme and the significance of those steps to the SDLT analysis.

18. The response was the Needham Letter, dated 8 May 2007, the material parts of which state:

> "Thank you for your letter of 3 May with enclosures.
>
> …

> The position with regard to the Husband & Wife sub-sale scheme is that HMRC does not accept that the scheme achieves the tax savings claimed. We consider that S45(3)(b)(i) FA 2003 applies so as to bring all payments made into charge because they are made by the purchaser under the notional contract or a person connected with him. Furthermore, we consider that payment of the purchase price out of funds obtained jointly from a mortgage provider, or from the proceeds of sale of a jointly held property renders the scheme ineffective.
>
> We appreciate that participants in the scheme have received contrary advice from Counsel. Excise & Stamp Taxes is presently taking legal advice and for this reason it is not worthwhile in advancing the arguments in further detail.
>
> I will write to you again once we have received the legal advice."

19. By letter of 22 August 2007 Howard Kennedy sought an update from Mr Needham as to whether legal advice had been taken. However, it is clear from Mr Needham's response of 18 September 2007, that the legal advice was "still awaited" and that it would be "towards the end of next month" that he would be in a position to "write substantively in relation to your client's purchase". It was not until his letter of 26 February 2008 that Mr Needham wrote to Howard Kennedy stating that:

> "… The [legal] advice has now been received and I will be able to write to you substantively once I have received one piece of further information that is essential to establish the correct basis on which tax is correctly payable."

The information sought was in relation to the sale of another property that provided the source of funds used for the purchase of the "scheme" property. The letter concluded:

> "Please note that this matter is no longer being dealt with in the Bristol Stamp Office. That office is closing shortly and this matter is now being dealt with in the Birmingham Office, … ."

20. On 4 August 2008 Mike Friar of HMRC wrote separately to the taxpayers and Howard Kennedy. His letter to the taxpayers explained that his office had "assumed responsibility" for the enquiry into the SDLT1 return and that further information would be requested from Howard Kennedy. The letter to Howard Kennedy requested that further information and also recognised that this was in addition to that information which had been previously provided. The letter continued:

> "… I apologise for the long delay in providing a response to the details you have already provided. I appreciate that some debate has already taken place between you and my colleagues concerning the technical arguments. I do not intend to pursue these any further until I am in possession of the full facts. …"

21. In a letter of 17 November 2008, Rachel Garrett of HMRC explained to Howard Kennedy that following a "reorganisation" of HMRC's office she had taken over responsibilities for the enquiries into their client's SDLT1 returns. The letter also noted that HMRC was still waiting for the information requested by Mr Friar in his letter of 4 August 2008.

22. In the absence of that information on 19 February 2009 Ms Garrett wrote to the taxpayers and Howard Kennedy with an information notice requesting documents and information. The taxpayers responded on 5 March 2009 stating that a response to the information notice would be provided by Howard Kennedy. However, it took another letter to Howard Kennedy from Ms Garret, sent on 16 April 2009, before a response to the information notice was received on 1 May 2009.

23. On 12 May 2009, Ms Garratt wrote to Howard Kennedy, acknowledging the response to the information notice stating that the "information that has been provided in relation to your clients' land transaction return is now currently under consideration" and that she would contact Howard Kenedy "again in due course".

24. On 6 May 2010, Ms Garratt issued a closure notice to the taxpayers, stating HMRC's view that the scheme failed on technical grounds. The content of that letter mirrors the challenge letter provided to HMRC by leading counsel.

APPLICATION

25. At the commencement of the hearing I dealt with an application, made by the Appellants on 11 October 2023 pursuant to rule 16 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, for the disclosure of the 2007 Advice on the grounds that:

> "HMRC have put their legal advice front and centre of their case in order to support the validity of their discovery assessments, the relevant legal advice touching on "who in HMRC knew what, and when" should be released in unredacted form (save to the extent necessary to preserve the identity of taxpayers)."

26. The application was opposed by HMRC on the grounds that the 2007 Advice is privileged and that HMRC neither relied on it nor waived privilege in it.

27. Under rule 16(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 the Tribunal may require "any person" to "produce any documents in that person's possession or control which may relate to any issue in the proceedings. However, it is clear from rule 16(3) that the Tribunal cannot direct the disclosure of privileged documents. In so far as applicable in this case rule 16(3) provides:

> "No person may be compelled to … produce any document that the person could not be compelled to … produce on a trial of an action in a court of law in the part of the United Kingdom where the proceedings are due to be determined."

28. Mr Cannon accepted that the 2007 Advice is privileged and that unless privilege was waived the Tribunal cannot direct HMRC to disclose it. Ms Lemos confirmed that HMRC did not waive privilege.

29. It therefore followed that the application could not succeed and it was therefore dismissed.

LAW

30. Under paragraph 12 of schedule 10 FA 2003 HMRC may enquire into an SDLT1 return by giving notice of their intention to do so before the end of the period of nine months after the later of the filing date or the date on which the return was delivered.

31. It is common ground that in these appeals HMRC did not open an enquiry within that time limit but rely on paragraph 28 of schedule 10 under which an assessment can be issued where HMRC discover an insufficiency or loss of tax. This provides:

> **28 Assessment where loss of tax discovered**
>
> (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.

32. Paragraph 30, which contains the restrictions on HMRC's power to make a discovery assessment in cases where the purchaser has made an SDLT1 tax return provides:

30 Restrictions on assessment where return delivered

(1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28 or 29 in respect of the transaction—

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

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

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

(a) the purchaser,

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

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

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

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

(b) completed their enquiries into the return,

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

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

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

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

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

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

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

(5) No assessment may be made if—

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

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

33. Although paragraphs 28 and 30 of schedule 10 FA 2003 refer to "the Inland Revenue" such references 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" (see *Tutty v HMRC* [2019] UKFTT 3 (TC) at [30]-[31]).

34. At [19] of *Carter & Kennedy* FtT Judge Greenbank observed, in relation to paragraphs 28 and 30 of schedule 10 FA 2003, that:

> "These provisions relating to SDLT are similar – but not identical – to provisions which allow HMRC to make discovery assessments for income tax and capital gains tax, which are contained in s 29 of the Taxes Management Act 1970 ("TMA 1970"), and corporation tax, which are found in paragraphs 41 to 45 of Schedule 18 to the Finance Act 1998 ("FA 1998"). Many of the authorities to which I was referred by the parties concern the application of the income tax and capital gains tax provisions. Although the wording of s 29 TMA and paragraphs 28 and 30 Schedule 10 FA 2003 differ in some respects, the parties regarded the principles which are outlined in those cases as applicable equally to both sets of provisions. Unless otherwise mentioned, I have adopted the same approach."

The parties in the present case took a similar approach as do I.

35. As it is accepted that there was a discovery, the issue in this case concerns the condition in paragraph 30(3) – ie whether HMRC could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the insufficiency or loss of tax.

36. The similar provision in s 29 TMA was considered in the Court of Appeal in *Sanderson v HMRC* [2016] 4 WLR 67 where at Patten LJ (with whom Briggs and Simon LJJ agreed) said, at [17]:

> "The power of HMRC to make an assessment under section 29(1) following the discovery of what, for convenience, I shall refer to as an insufficiency in the self-assessment depends upon whether an officer "could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the insufficiency". It is clear as a matter of authority: (1) that the officer is not the actual officer who made the assessment (for example Mr Thackeray in this case) but a hypothetical officer; (2) that the officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law: see *Revenue and Customs Comrs v Lansdowne Partners LP* [2012] STC 544; (3) that where the law is complex even adequate disclosure by the taxpayer may not make it reasonable for the officer to have discovered the insufficiency on the basis of the information disclosed at the time: see *Lansdowne* at para 69; (4) that what the hypothetical officer must have been reasonably expected to be aware of is an actual insufficiency: see *Langham v Veltema* [2004] STC 544 per Auld LJ, at paras 33–34:
>
> > '33. More particularly, it is plain from the wording of the statutory test in section 29(5) that it is concerned, not with what an Inspector could reasonably have been expected to do, but with what he could have been reasonably expected to be aware of. It speaks of an Inspector's objective awareness, from the information made available to him by the taxpayer, of 'the

> situation' mentioned in section 29(1), namely an actual insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an insufficiency, as suggested by Park J. If he is uneasy about the sufficiency of the assessment, he can exercise his power of inquiry under section 9A and is given plenty of time in which to complete it before the discovery provisions of section 29 take effect.
>
> 34. In my view, that plain construction of the provision is not overcome by Mr Sherry's argument that it is implicit in the words in section 29(5) 'on the basis of the information made available to him' and also in the provision in section 29(6)(d) for information, the existence and relevance of which could reasonably be inferred from information falling within section 29(6) (a) to (c), that the information itself may fall short of information as to actual insufficiency. Such provision for awareness of insufficiency 'on the basis' of the specified information or from information that could reasonably be expected to be inferred therefrom does not, in my view, denote an objective awareness of something less than insufficiency. It is a mark of the way in which the subsection provides an objective test of awareness of insufficiency, expressed as a negative condition in the form that an officer 'could not have been reasonably expected … to be aware of the' insufficiency. It also allows, as section 29(6) expressly does, for constructive awareness of insufficiency, that is, for something less than an awareness of an insufficiency, in the form of an inference of insufficiency (My emphasis.)'

(5) that the assessment of whether the officer could reasonably have been expected to be aware of the insufficiency falls to be determined on the basis of the types of available information specified in section 29(6). These are the only sources of information to be taken into account for that purpose: see *Langham v Veltema*, at para 36:

> 'The answer to the second issue—as to the source of the information for the purpose of section 29(5)—though distinct from, may throw some light on, the answer to the first issue. It seems to me that the key to the scheme is that the Inspector is to be shut out from making a discovery assessment under the section only when the taxpayer or his representatives, in making an honest and accurate return or in responding to a section 9A enquiry, have clearly alerted him to the insufficiency of the assessment, not where the Inspector may have some other information, not normally part of his checks, that may put the sufficiency of the assessment in question. If that other information when seen by the Inspector does cause him to question the assessment, he has the option of making a section 9A enquiry before the discovery provisions of section 29(5) come into play. That scheme is clearly supported by the express identification in section 29(6) only of categories of information emanating from the taxpayer. It does not help, it seems to me, to consider how else the draftsman might have dealt with the matter. It is true, as Mr Sherry suggested, he might have expressed the relevant passage in section 29(5) as 'on the basis only of information made available to him', and the passage in

> section 29(6) as 'For the purposes of subsection (5) above, information is made available to an officer of the Board if, but only if,' it fell within the specified categories. However, if he had intended that the categories of information specified in section 29(6) should not be an exhaustive list, he could have expressed its opening words in an inclusive form, for example, 'For the purposes of subsection (5) above, information … made available to an officer of the Board … *includes any of the following*'."

37. With regard to the quality of information Patten LJ said, at [35]:

> "I think the Upper Tribunal was entitled to conclude, for the reasons it gave, that the information contained in the return was not enough to have made the notional officer aware of an insufficiency in the self-assessment. Mr Yates is right in his submission that this was not a simple case as presented in the return and that the non-disclosure of the self-cancelling nature of the transaction was not compensated for by the other factors that were disclosed. The fact that the information contained in the return might have been sufficient to cause the officer to ask further questions is not enough for the reasons already explained. …"

38. The Upper Tribunal (Birss J and Judge Greenbank) in *Beagles v HMRC* [2019] STC 54 at [100] endeavoured:

> "… to summarise the principles that we derive from Patten LJ's judgment [in *Sanderson*] as follows:
>
> (1) The test in s 29(5) is applied by reference to a hypothetical HMRC officer not the actual officer in the case. The officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law.
>
> (2) The test requires the court or tribunal to identify the information that is treated by s 29(6) as available to the hypothetical officer at the relevant time and determine whether on the basis of that information the hypothetical officer applying that level of knowledge and skill could not have been reasonably expected to be aware of the insufficiency.
>
> (3) The hypothetical officer is expected to apply his knowledge of the law to the facts disclosed to form a view as to whether or not an insufficiency exists (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [23]).
>
> We agree therefore with Mr Firth [counsel for the taxpayer] that the test does assume that the hypothetical officer will apply the appropriate level of knowledge and skill to the information that is treated as being available before the level of awareness is tested. The test does not require that the actual insufficiency is identified on the face of the return.
>
> (4) But the question of the knowledge of the hypothetical officer cuts both ways. He or she is not expected to resolve every question of law particularly in complex cases (Patten LJ, *Sanderson* [23], *Lansdowne* [69]). In some cases, it may be that the law is so complex that the inspector could not reasonably have been expected to be aware of the insufficiency (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [17](3)).
>
> (5) The hypothetical officer must be aware of the actual insufficiency from the information that is treated as available by s 29(6) (Auld LJ, *Langham v Veltema* [33]–[34]; Patten LJ, *Sanderson* [22]). The information need not be sufficient to enable HMRC to prove its case

(Moses LJ, *Lansdowne* [69]) but it must be more than would prompt the hypothetical officer to raise an enquiry (Auld LJ, *Langham v Veltema* [33]; Patten LJ, *Sanderson* [35]).

(6) As can be seen from the discussion in *Sanderson* (see [23]), the level of awareness is a question of judgment not a particular standard of proof (see also Moses LJ in *Lansdowne* [70]). The information made available must 'justify' raising the additional assessment (Moses LJ, *Lansdowne* [69]) or be sufficient to enable HMRC to make a decision whether to raise an additional assessment (Lewison J in the High Court in *Lansdowne* [2010] EWHC 2582 (Ch), [2011] STC 372, at [48])."

39. The law on discovery assessment was considered more recently in relation to the same SDLT schemes as in the present case by Judge Greenbank in *Carter & Kennedy* FtT. In a passage approved by the Upper Tribunal (Judges Jones and Andrew Scott) in *Carter & Kennedy v HMRC* [2022] STC 270 ("*Carter & Kennedy* UT") at [18], Judge Greenbank, having considered *Langham v Veltema* [2004] STC 544, *HMRC v Lansdowne Partners LP* [2012] STC 544, *Charlton v HMRC* [2013] STC 866, *Sanderson* and *Beagles*, stated, at [219]:

"The principles that I derive from those cases are, in summary, as follows.

(1) The objective awareness test relates to the adequacy of the disclosure that has been made by the taxpayer. The test requires the court or tribunal to identify the information that is treated as available by paragraph 30(4) at the relevant time and determine, whether, on the basis of that information, a hypothetical officer could not have been reasonably expected to be aware of the insufficiency.

(2) It is necessary to bear in mind the general principle as set out by Auld LJ in *Langham* (at [36]) that HMRC is only to be prevented from making a discovery assessment where the taxpayer "in making an honest and accurate return … [has] clearly alerted [HMRC] to the insufficiency of the assessment".

(3) If the level of disclosure is to prevent the issue of an assessment by HMRC, the information that is treated as available at the relevant time must be sufficient as to make the hypothetical officer aware of the actual insufficiency to a level that would justify the making of an assessment (Auld LJ, *Langham* [33] [34]; Patten LJ, *Sanderson* [22]; Moses LJ, *Lansdowne* [69] [70]). The information need not be sufficient to enable HMRC to prove its case (Moses LJ, *Lansdowne* [69]), but it is not enough that the information might prompt the hypothetical officer to raise an enquiry (Auld LJ, *Langham* [33]; Patten LJ, *Sanderson* [35]).

(4) The hypothetical officer should be treated as being of general competence, knowledge or skill, which includes a reasonable knowledge and understanding of the law (see Patten LJ, *Sanderson* [17(1)(2)]). In determining the adequacy of the disclosure, it can be assumed that the hypothetical officer will apply his or her knowledge of the law to the facts disclosed and to form a view as to whether or not an insufficiency exists (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [23]).

40. The Upper Tribunal in *Carter & Kennedy* UT also endorsed its comments in *HMRC v Hicks* [2020] STC 254 ("*Hicks*"), stating at [42]:

"We … agree with HMRC that the focus of the Appellants' appeal was misdirected. The Upper Tribunal in *Revenue and Customs Comrs v Hicks* [2020] UKUT 12 (TCC), [2020] STC 254, in considering s 29(5) of TMA

> 1970, emphasised at [193] to [196] the importance of the quality of the taxpayer's disclosure. It also held at [198] that 'there may be other cases where the law and the facts (and/or the relationship between the law and the facts) are so complex that adequate disclosure may require more than pure factual disclosure: namely some adequate explanation of the main tax law issues raised by the facts and the position taken in respect of those issues.'"

41. In *Hicks* the Upper Tribunal (Morgan J and Judge Brannan) observed, that the adequacy of the disclosure:

> "196. … will vary from case to case. It depends on the nature and tax implications of the arrangements concerned and not on the assumed knowledge (or lack of knowledge) of the hypothetical officer. The obligation is on the taxpayer to make the appropriate level of disclosure as befits a self-assessment system.
>
> 197. In a relatively simple case, where the legal principles are clear, it would be sufficient for a taxpayer simply to give a full disclosure of the factual position. The return must also make clear what position the taxpayer is adopting in relation to the factual position (eg whether a receipt was not taxable or whether a claim for relief was being made).
>
> 198. But there may be other cases where the law and the facts (and/or the relationship between the law and the facts) are so complex that adequate disclosure may require more than pure factual disclosure: namely some adequate explanation of the main tax law issues raised by the facts and the position taken in respect of those issues."

DISCUSSION AND CONCLUSION

42. The issue in this case is whether, from the information in and that accompanying the SDLT1 transaction return, ie the Disclosure Note (set out at paragraph 3, above), a hypothetical officer could reasonably have been expected to be aware of the insufficiency or loss of tax.

43. The primary argument of Ms Lemos for HMRC is that the information contained on the SDLT1 returns and in the Disclosure Note was not adequate to clearly alert the hypothetical officer to the insufficiency irrespective of when the enquiry window into the particular Appellants' SDLT1 returns ended. Alternatively she contends that the contents of the Disclosure Notes were not adequate to clearly alert the hypothetical officer to a loss of tax, where the enquiry window into the particular Appellants' SDLT1 returns closed before to 1 April 2010.

44. Mr Cannon, for the Appellants, contends that by 2007, in the light of the Needham Letter, particularly Mr Needham's assertion in it that the scheme was "ineffective", there was sufficient awareness of the loss of tax such that would justify an assessment. He accepts that there is a lack of evidence in support but says that this could have been resolved by the disclosure of the 2007 Advice. He contends that the refusal of HMRC to waive privilege in it is unfair as it would have assisted the Tribunal in ascertaining the underlying level of awareness of a hypothetical officer to the schemes concerned.

45. However, it is clear that no adverse inferences can or should be drawn from HMRC not waiving privilege in the 2007 Advice.

46. In *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 910 Brooke LJ, giving the judgment of the Court of Appeal said, at [16]:

> "… Ever since *Wentworth v Lloyd* (1864) 10 HLC 589 the courts have refused to permit a party to draw adverse inferences from the refusal by the

> other party to waive privilege in respect of the legal advice he has received. Brooke LJ applied this principle recently in his judgment in *Oxford Gene Technology v Affymetrix Inc* (CAT 23 November 2000: unreported save for a summary in The Times 5 December 2000), with which Aldous and Sedley LJJ agreed. Mr Anderson sought to rely on a dictum in the long judgment of Sir Thomas Bingham MR in *Ridehalgh v Horsfield* [1994] Ch 205, 236-7, but *Wentworth v Lloyd* was not cited to that court, and this judgment preceded the ringing affirmation of the sanctity of legal professional privilege in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court ex p B* [1996] AC 487, 503F-507D."

47. In Samuel Smith Old Brewery (Tadcaster) v Philip Lee t/a Cropton Brewery [2011] EWHC 1879 (Ch) Arnold J recognised, at [142] that:

> … the right to legal professional privilege is a fundamental one and that it is not permissible to draw any adverse inference from a refusal to waive legal professional privilege"

48. Turning to the awareness and knowledge that should be attributed to a hypothetical officer, Mr Cannon refers to *Charlton* in which the UT (Noris J and Judge Berner) observed, at [62], that:

> "… An assumption that the hypothetical officer must have a 'reasonable' knowledge of tax law does not mean an assumption of an average or typical level of knowledge; it means a level of knowledge reasonable in the particular circumstances of the case."

49. The Upper Tribunal continued, at [63]:

> "63. … The reference to 'general knowledge and skill' cannot therefore, in our view, be taken as a generic description applicable in all cases.
>
> 64. Nor do we consider that the reference by the First-tier Tribunal (Judge Avery Jones and Mr Menzies-Conacher) in *Swift v Revenue and Customs Comrs* [2010] UKFTT 88 (TC), [2010] SFTD 553, 12 ITLR 658 to 'an ordinary competent inspector' was intended to set the benchmark at a level which excluded relevant expertise. …
>
> 65. Our conclusion on this point, therefore, is that s 29(5) does not require the hypothetical officer to be given the characteristics of an officer of general competence, knowledge or skill only. The officer must be assumed to have such level of knowledge and understanding that would reasonably be expected in an officer considering the particular information provided by the taxpayer. Whilst leaving open the exceptional case where the complexity of the law itself might lead to a conclusion that an officer could not reasonably be expected to be aware of an insufficiency, the test should not be constrained by reference to any perceived lack of specialist knowledge in any section of HMRC officers. What is reasonable for an officer to be aware of will depend on a range of factors affecting the adequacy of the information made available, including complexity. But reasonableness falls to be tested, not by reference to a living embodiment of the hypothetical officer, with assumed characteristics at a typical or average level, but by reference to the circumstances of the particular case."

50. Mr Cannon contends that these passages from *Charlton* suggest that a hypothetical officer would have had some similarity to Mr Needham. As such, having been imbibed with some specialist knowledge and having had such understanding so as to be alerted to the use of the schemes by the Disclosure Note, he or she would have known by 8 May 2007 that the schemes did not work.

51. However, as Ms Lemos submits, this is not the description of the awareness of the hypothetical officer by the Court of Appeal in *Sanderson*, the Upper Tribunal in *Beagles* and its approval (in *Carter & Kennedy* UT) of the passage in *Carter & Kennedy* FtT. None of these authorities, all of which considered and cited *Charlton*, goes so far as to imbibe the hypothetical officer with specialist knowledge but describes that officer as being of general competence, knowledge and skill, albeit with a reasonable knowledge or understanding of the law.

52. With that in mind it is necessary to consider the information available to the hypothetical officer, ie that recorded in the SDLT1 returns, as set out at paragraph 9 above and in the Disclosure Note, and whether or not this would have enabled him or her to be aware of the insufficiency.

53. In my judgment there is nothing in the SDLT1 returns that would alert a hypothetical officer or lead him or her to infer that there was any insufficiency or loss of tax. If the SDLT1 returns had been considered without reference to the Disclosure Note there is nothing to suggest that the total consideration was not the purchase price of the property concerned. If the Disclosure Note had been taken into account it might suggest that the purchasers had benefited from sub-sale relief.

54. The Disclosure Note, which is set out a paragraph 3 above, refers to the following:

(1) that the chargeable consideration entered on the SDLT1 return has been calculated in accordance with s 45 FA 2003

(2) that "… between the exchange of contracts and completion, purchaser 1 executed a gift of 99% interest in the contract when it was 85% paid …";

(3) that advice had been obtained from counsel;

(4) that counsel had advised that "resulting percentage of the contract price does not fall to be counted as part of the chargeable consideration because of the "sub-sale";

(5) that s 75A FA 2003 does not apply to the transaction concerned; and

(6) that if further information was required "please contact us".

55. As with the SDLT1 returns there is no reference to Cornerstone in the Disclosure Note. Also, other than a reference to counsel having advised, there is also no detail or analysis to explain how s 45 FA 2003 is said to apply or s 75A FA 2003 is said not to apply to the transaction.

56. Moreover, it is not at all clear, given the references to a sub-sale for consideration, that the sub-sale agreement reflects a gift. It is also not clear to whom the "gift" was made. Indeed, there has not been a full disclosure of the facts, or relevance of any particular facts, in this case even though the Upper Tribunal in *Hicks* observed that even in "a relatively simple case" (which is not how I would describe the present case), a taxpayer should still provide "a full disclosure of the factual position". In addition there is the rather ambiguous reference to that "resulting percentage of the contract price" that "does not fall to be counted as part of the chargeable consideration" and there is no explanation of whether it is a reference to 99%, 85% or a different amount altogether.

57. Therefore, at best, I consider that the information provided in the SDLT1 returns and Disclosure Note might have prompted a hypothetical officer to raise an enquiry. But, as is clear from *Sanderson* at [35], that is not enough for me to conclude that that the information provided would have been such that a hypothetical officer could have been reasonably

expected to be aware of an insufficiency or loss of tax. It therefore follows that HMRC's primary argument succeeds.

58. Having come to such a conclusion, which is sufficient to dispose of all appeals in favour of HMRC, any further consideration of HMRC's alternative case or grounds 2 and 3 of HMRC's amended strike out application of 10 August 2023 is unnecessary.

59. Therefore, for the reasons above the appeals of all Appellants (as listed in the Appendix) are dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

60. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. 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.

JOHN BROOKS
TRIBUNAL JUDGE

Release date: 31st OCOTBER 2023

Appendix

SCHEDULE - APPEALS INCLUDED		
	Appellant(s)	**Tribunal ref**
1	Portlock & Calcutt	TC/2016/03332
2	Verma	TC/2017/02095
3	Hall & Hall	TC/2018/00137
4	Carnduff & Carnduff	TC/2018/00186
5	Brosch & Brosch	TC/2020/01784
6	Bryant & Bryant	TC/2020/03296
7	Byers & Juniel	TC/2020/03319
8	Jones & Jones	TC/2020/03376
9	Boulter & Boulter	TC/2020/03429
10	Hughes & Glossop	TC/2020/03513

11	Foss & Austin	TC/2020/03535
12	Tonzing & Haslam	TC/2020/03560
13	Foody & Foody	TC/2020/03561
14	Man & Man	TC/2020/03575
15	Blackman & De Pina	TC/2020/03685
16	Charles Charalambous	TC/2020/03694
17	Androula Charalambous	TC/2020/03695
18	Robinson & Robinson	TC/2020/03726
19	Horner & Horner	TC/2020/03910
20	Singh & Nijar	TC/2020/03984
21	Blackman & Blackman	TC/2020/03985
22	Blackburn & Blackburn	TC/2020/04171
23	Foat & Foat	TC/2020/04172
24	Chapman & Chapman	TC/2020/04192
25	Duggal & Duggal	TC/2021/00051
26	Brooks & Brooks	TC/2021/00282
27	Kavanagh & Kavanagh	TC/2021/00301
28	Coltart & Coltart	TC/2021/02214
29	Mulligan & Calvo	TC/2021/14188
30	Miller & Stuteley	TC/2022/11716
31	Mr and Mrs Forbes	TC/2022/13005
32	Nigel & Yvonne Jones	TC/2022/13006
33	Mr & Mrs Wilyman	TC/2022/13007
34	Mr & Mrs Steele	TC/2022/13008
35	Mr Hebburn-Heath & Mrs Friend	TC/2022/13010
36	Mr & Mrs Palling	TC/2022/13011
37	Gary & S Neate	TC/2022/13036

38	D M & P I Maughan	TC/2022/13038
39	J H & S Johnson	TC/2022/13040
40	D & A Bunce	TC/2022/13042
41	JV & R Doughty	TC/2022/13044
42	J & M D Adams	TC/2022/13045
43	Steve & Mrs Hibbins	TC/2022/13094
44	Neal Robinson & Karen Henry	TC/2022/13101
45	Mr & Mrs Fu	TC/2022/13103
46	Mr & Mrs Hale	TC/2022/13106
47	M and Mrs Brierley-Jones	TC/2022/13108
48	Mr And Mrs Anderson	TC/2022/13287
49	Mr and Mrs Lewis	TC/2022/13289
50	Mr and Mrs Gold	TC/2022/13319
51	Mr and Mrs Lawson	TC/2022/13417
52	Mr and Mrs Sevier	TC/2022/13421
53	Mr and Mrs Ejje	TC/2022/13425
54	Mr and Mrs Court	TC/2022/13426
55	Mr and Mrs Spano	TC/2022/13430
56	Mr and Mrs Halsey	TC/2022/13486
57	Mr and Mrs Nicholson	TC/2022/13490
58	Mr and Mrs Soulsby	TC/2022/13500
59	D Archer	TC/2022/13514
60	Mr & Mrs Smith-Bingham	TC/2022/13537
61	Mr Bartlett and Ms Fenner	TC/2022/13538
62	Mr and Mrs Sahi	TC/2022/13540
63	David Hannah	TC/2022/13541

64	Mr and Mrs Percival	TC/2022/13542
65	Mr and Mrs Green	TC/2022/13544
66	A Tugnet	TC/2022/13545
67	Mr E Phillips	TC/2022/13624
68	Duncan Malcolm and Alisa Doig	TC/2022/13626
69	Mr & Mrs Beaumont	TC/2022/13664
70	Mr & Mrs Simons	TC/2022/13914
71	Mr M and Mrs F Taylor	TC/2022/13955
72	J E Evans	TC/2022/13956
73	Normah Raja Nong Chik and Kar Seng Peter Yong	TC/2022/13966
74	Mr and Mrs Simmonds	TC/2022/14065
75	Mr & Mrs Guida	TC/2022/14108
76	Mr Drew-Edwards	TC/2023/00230
77	Cochrane & Cochrane	TC/2023/00250
78	Ferera & Lor	TC/2023/00256
79	Burke & Burke	TC/2023/00257
80	Thom & Thom	TC/2023/00388
81	Leslie & Leslie	TC/2023/00451
82	Havill & Havill	TC/2023/00546
83	Talbot-Williams & Talbott-Williams	TC/2023/00562
84	Dobby & Dobby	TC/2023/00622
85	Slade & Slade	TC/2023/00626
86	C Griffin	TC/2023/00674
87	MacKellar & MacKellar	TC/2023/00762
88	Clarke & Clarke	TC/2023/01195

89	Sicheri & Russo	TC/2023/01275
90	Meadows & Meadows	TC/2023/07808
91	Srivastava & Srivastava	TC/2023/09262
92	Bartlett & Bartlett	TC/2018/05353