Neutral Citation: [2022] UKFTT 00348 (TC)

Case Number: TC08589

FIRST-TIER TRIBUNAL
TAX CHAMBER

Bradford Tribunal Hearing Centre
Phoenix House
Rushton Avenue
Bradford
BD3 7BH

Appeal reference: TC/2017/08411

Income Tax – discovery assessment – stamp duty land tax – whether or not there was a valid discovery assessment – yes – appeal dismissed

Heard on: 1 and 2 December 2021
Judgment date: 8 September 2022
(summary decision released on 4 March 2022)

Before

TRIBUNAL JUDGE RICHARD CHAPMAN KC

Between

DAVID CHRISTOPHER WILBY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr David Wilby KC in person.

For the Respondents: Mr David Street, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal relates to a discovery assessment dated 11 April 2011 in the sum of £21,700 ("the Assessment"). The Assessment was made pursuant to paragraph 28 of Schedule 10 to the Finance Act 2003 and was in respect of Stamp Duty Land Tax ("SDLT") said to have been underdeclared in respect of the purchase on 11 June 2008 of the property known as and situate at 6 Woodstock Close, Pannal, Harrogate, North Yorkshire ("the Property").

2. It is appropriate to record some preliminary matters.

3. First, although Mr Wilby appeared in person, he is a well-respected King's Counsel and so presented his case at its fullest and with a clear understanding of the issues in the case. I am grateful both to him and to Mr Street for their assistance in this matter.

4. Secondly, this appeal has had a somewhat tortuous procedural history. The significance of this for the substantive appeal is that HMRC raised a concern that Mr Wilby was going to make allegations of fraud against the officers involved and so in turn intimated that (if such allegations were made and were unsuccessful) an application for costs might be made. In the event, the parties helpfully agreed that no allegations of fraud would be made, with the effect that no associated costs implications would arise.

5. Thirdly, Mr Wilby was very clear that he did not wish to provide any evidence or submissions as to his reasoning for his calculation of the SDLT in respect of the Property. As such, he does not contend that the amount of the Assessment was wrong if HMRC were right to make an Assessment at all, which entitlement he disputes for the reasons set out below.

6. Fourthly, Mr Wilby said during his submissions that he had been annoyed by what he perceived to be HMRC's allegations of wrongdoing. Mr Street helpfully made it clear that the Assessment was not (and never was) based on fraudulent or negligent conduct.

BACKGROUND

7. The following background was not in dispute and in any event appears from the documents within the hearing bundle.

8. By a TR1 dated 11 June 2008, Mr and Mrs Murphy transferred the Property to Mr Wilby. The TR1 stated that, "The Transferor has received from the Transferee for the Property the sum of Five Hundred Fourty [sic] Two Thousand Five Hundred Pounds (£542,500.00)." The official copy entries state in an entry dated 8 August 2008 that, "The price stated to have been paid on 11 June 2008 was £542,000." For completeness, I note that the official copy entries state that the Property is now registered in the names of both Mr and Mrs Wilby with effect from 11 February 2011. However, nothing turns on this as it is common ground that the relevant acquisition was by Mr Wilby and was as sole proprietor.

9. Mr Wilby submitted an SDLT return on 24 June 2008 ("the SDLT Return"). The SDLT Return stated that the date of the transaction was 11 June 2008. Box 10 of the SDLT Return asked, "What is the total consideration or value for money or money's worth, including VAT paid for the transaction reported in this return?". The answer given was £120,000. Box 60 asked for Mr Wilby's agent's name. The answer given was "Kay & Co" ("Kay"). Box 61 asked for the agent's address. The answer given was Kay's address in Leeds. The effect of the SDLT Return was that, on the answers given, no SDLT was declared to be due.

10. By a letter dated 11 April 2011 signed by Mr Daljit Soroya ("the April Letter"), HMRC wrote to Mr Wilby enclosing the Assessment. The April Letter included the following:

> "I am writing to you regarding the Stamp Duty Land Tax (SDLT) return that you submitted in respect of the above property.
>
> I have examined the SDLT return and compared the amount declared as paid for the property with information held by the Land Registry. This shows a large discrepancy between the amount on which SDLT has been paid and the actual amount paid for the property. The SDLT1 form submitted shows consideration of £120,000 whereas the Land Registry shows consideration recorded as £542,500.
>
> I believe that you have used an SDLT Mitigation scheme which has incorrectly understated the purchase price on which Stamp Duty Land Tax has been calculated. It is my view that Stamp Duty Land Tax should have been paid on the actual purchase price of the property as recorded by the Land Registry. The payment of any professional fees cannot be taken into account in calculating SDLT.
>
> The information recorded at Land Registry has led to HMRC making a discovery that an insufficient amount of SDLT has been paid."

11. The Assessment was also dated 11 April 2011 and was signed by Mr Soroya. The Assessment included the following:

> "The assessment covers an additional liability omitted from your Stamp Duty Land Tax (SDLT) return, reference 308518073MZ, discovered following the expiry of the enquiry period.
>
> It has been identified from research that there is a large discrepancy between the amounts on the SDLT 1 and the actual amounts recorded at Land Registry. This led to discovery that an insufficient amount of SDLT has been paid."

12. By a letter from Kay dated 6 May 2011 written on behalf of Mr Wilby, Mr Wilby appealed to HMRC against the Assessment.

13. HMRC initially responded to Mr Wilby's appeal by a letter dated 12 May 2011 from Mr Kane headed, "Without prejudice to further Argument". This letter provided an analysis of HMRC's position by reference to case law that there had been a discovery. This letter also made reference to tax mitigation schemes, giving the impression that HMRC were of the view that a tax mitigation scheme had been unsuccessfully employed by Mr Wilby.

14. There then appears to be a long hiatus, the reasons for which have not been adequately explained by HMRC. HMRC then formally responded to Mr Wilby's appeal by a letter dated 8 August 2017. This letter was headed "Without Prejudice". However, it does not contain any privileged material and in any event both parties have waived any privilege that it may in fact have by its inclusion within the papers before me whether through agreement or by it being included by one party and not objected to by the other. This letter rejected Mr Wilby's appeal upon the basis of the discrepancy between the SDLT Return and the Land Registry entries and offered him the option of either asking for the decision to be reviewed or to notify the appeal to the Tribunal.

15. Mr Wilby requested a review by a letter dated 23 August 2017, which was acknowledged by a letter dated 17 September 2017. The review was completed and dismissed by a letter dated 9 October 2017. On 2 November 2017, Mr Wilby issued a notice of appeal to the Tribunal.

16. Case management directions were initially given by Judge Poole on 29 March 2018. Various applications have taken place relating to witness evidence and disclosure, including those resulting in hearings before Judge Kempster on 16 July 2019 and Judge Scott on 3 November 2020. There is no need to recite the procedural history within this decision.

ISSUES

17. The parties very helpfully agreed at the outset of the hearing that only the following issues arise for determination:

(1) Whether or not it is necessary to identify who made the discovery.

(2) Whether or not an officer has made a discovery (and so whether or not the subjective test has been made out).

(3) Whether or not the officer's belief was one which a reasonable officer could form (and so whether or not the objective test has been made out).

(4) Whether or not all other requirements for a discovery assessment are made out.

18. These issues require the prior consideration of the legal framework and the making of relevant findings of fact.

THE LEGAL FRAMEWORK

19. There was no dispute as to the legal framework.

20. The power to make discovery assessments in respect of SDLT is provided by paragraphs 28 and 30 of Schedule 10 of the Finance Act 2003, paragraph 31 sets out the applicable time limits, and paragraph 32 sets out the procedure for doing so. In view of the fact that no allegations of fraudulent or negligent conduct are made, the relevant sub-paragraphs are as follows:

> "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.
>
> …
>
> 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-paragraph (2) and (3) below, and
>
> (b) may not be made in the circumstances specified in sub-paragraph (5) below.
>
> …
>
> (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 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 mention 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.

31. Time limit for assessment

(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.

…

32. Assessment procedure

(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 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."

21. The parties rightly agreed that the burden of proof is upon HMRC to demonstrate that it made a discovery and that the assessment was valid (see *Burgess and Brimheath v HMRC* [2015] UKUT 578 (TCC) at [38] to [43]). If that is discharged, then the burden is upon Mr Wilby to establish that the amount of the Assessment was wrong. However, Mr Wilby does not

seek to argue that the amount of the Assessment was wrong; his case is that there is insufficient evidence of a discovery at all, that the subjective and objective tests are not fulfilled, or that the Assessment is otherwise invalid.

22. It was common ground that the approach to a discovery assessment pursuant to paragraph 30 of Schedule 10 to the Finance Act 2003 is the same as the case law relating to section 29(5) of the Taxes Management Act 1970. I was referred to *Commissioners for Her Majesty's Revenue and Customs v Tooth* [2021] UKSC 17 *per* Lord Briggs and Lord Sales at [72] ("*Tooth*") in which the Supreme Court adopted the propositions set out by the Upper Tribunal (Morgan J and Judge Berner) in *Anderson v Revenue and Customs Comrs* [2018] UKUT 159 (TCC), [2018] STC 1210 at [24] ("*Anderson*"). The Upper Tribunal stated as follows in *Anderson* at [24]:

> "[24] Since the introduction of self-assessment, there have been comparatively few decisions on the meaning of s 29(1) TMA but there have been rather more as to the meaning and effect of s 29(5) and 29(6) TMA. The principal authorities on s 29(5) and (6) are, now, *Hankinson v Revenue and Customs Commissioners* [2012] 1 WLR 2322, *Revenue and Customs Commissioners v Lansdowne Partners Ltd Partnership* [2012] STC 544 and *Sanderson v Revenue and Customs Commissioners* [2016] STC 638. Although a detailed discussion of the decisions on s 29(5) and 29(6) is not necessary for present purposes, it is helpful to refer to some of the propositions established by those authorities, taken together with the decision in *Charlton* on s29(1). As will be seen, the decisions identify differences between what is involved under s 29(1) and what is relevant for s 29(5) and 29(6). We consider that the following propositions are now established by the various authorities:
>
> (1) s 29(1) refers to an officer (or the Board) discovering an insufficiency of tax;
>
> (2) the concept of an officer discovering something involves, in the first place, an actual officer having a particular state of mind in relation to the relevant matter; this involves the application of a subjective test;
>
> (3) the concept of an officer discovering something involves, in the second place, the officer's state of mind satisfying some objective criterion; this involves the application of an objective test;
>
> (4) if the officer's state of mind does not satisfy the relevant subjective test and the relevant objective test, then the officer's state of mind is insufficient for there to be a discovery for the purposes of subsection (1);
>
> (5) s 29(1) also refers to the opinion of the officer as to what ought to be charged to make good the loss of tax; accordingly, the 5 officer has to form a relevant opinion and such an opinion has to satisfy some objective criterion;
>
> (6) although s 29(1) directs attention to the position of the actual officer, s29(5) refers to the position of a hypothetical officer: *Sanderson v Revenue and Customs Commissioners* [2016] STC 638 at [25];
>
> (7) although there might be some points of contact between the real and the hypothetical exercises required by subsection (1) and subsection (5) respectively, the tests for the two exercises are different: *Sanderson* at [25];
>
> (8) the actual officer referred to in s 29(1) is not required to consider whether the test required for s 29(5) is satisfied: *Hankinson v Revenue and Customs Commissioners* [2012] 1 WLR 2322;
>
> (9) for the purposes of s 29(5), one question is what a hypothetical officer would have been "aware of";

> (10) for the purpose of s 29(5), the meaning of "awareness" does not require the hypothetical officer to resolve points of law nor to forecast and discount what the response of the taxpayer might be; it is enough that the information made available to the hypothetical officer would justify an amendment to the tax return: *Revenue and Customs Commissioners v Lansdowne Partners Ltd Partnership* [2012] STC 544 at [56]; "awareness" is a matter of perception and understanding, not of conclusion; in order to be "aware" of something, it is not necessary to form a conclusion that the thing is more probable than not: *Lansdowne Partners* at [70]; and
>
> (11) the purpose of s 29(5) is to provide for a cut-off point beyond which an actual officer is not able to raise a discovery assessment; an actual officer is not entitled to raise a discovery assessment under subsection (1) if a hypothetical officer could have been reasonably expected at an earlier defined point in time, on the basis of the information made available to him before that time, to be aware of the matter which the actual officer claims to have discovered under subsection (1); this cut-off point is not reached if before the defined point in time a hypothetical officer would only have had "a mere whim" that there was an insufficiency of tax or could only have "speculated" as to that possibility: the Upper Tribunal in *Sanderson* [2014] STC 915 at [50], upheld on appeal, [2016] STC 638 at [35]."

23. A wide approach is taken to the meaning of "discover". In essence, it means "to find out" and can be fulfilled not only where a new fact has been discovered but also where it newly appears that a taxpayer has been undercharged, including where there has been a change of view. Lord Briggs and Lord Sales stated as follows in *Tooth* at [73] and [74]:

> "73. On the question of what qualifies as a discovery for the purposes of what is now section 29(1) of the TMA, *Cenlon Finance Co Ltd v Ellwood (Inspector of Taxes)* [1962] AC 782 is the leading authority. It was concerned with section 41(1) of the Income Tax Act 1952, the predecessor of section 29. A first inspector agreed the taxpayer's computation of trading profits and issued an assessment to tax on the basis of it. Subsequently, the file was passed to a new inspector who, on the basis of the same facts as had been before the first inspector, came to the conclusion that an additional sum should have been included in the profit figure and he issued an additional assessment for tax in relation to the revised figure. The taxpayer argued (p 788) that it could not be said that the second inspector had discovered anything new and that it would be unjust to put the taxpayer in peril for an extended period of time (six years under the regime then applicable) when he had made all the facts known to the Revenue at the outset. However, the House of Lords held that there had been a discovery by the second inspector within the meaning of the provision, so that he was entitled to issue the new assessment. Viscount Simonds (p 794), with the agreement of the other members of the appellate committee, approved the judgment of Lord Normand in the decision of the Court of Session in *Inland Revenue Comrs v Mackinlay's Trustees* 1938 SC 765; 22 TC 305 and added, "I can see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation." Lord Denning observed (p 799), "[e]very lawyer who, in his researches in the books, finds out that he was mistaken about the law, makes a discovery. So also does an inspector of taxes".
>
> 74. In the *Mackinlay's Trustees* case, an assessment to surtax was made in 1935 on a view that the taxpayer was not entitled to certain profits under a partnership deed. In 1937 a different view was taken about that and a

discovery assessment was issued to claim the tax in relation to those profits. The change in view about the legal effect of the partnership deed was held to constitute a discovery for the purposes of the provision which became section 29(1) of the TMA. Lord Normand said (22 TC 305, 312):

> "I think the word 'discover' in itself, according to the ordinary use of language, may be taken simply to mean 'find out'. What has to be found or found out is that any properties or profits chargeable to tax have been omitted from the first assessment." Referring to the condition in what is now section 29(1)(b), Lord Normand said (22 TC 305, 312): "I think that, since these words must apply where the person chargeable has delivered a full and proper statement, they are apt to cover the case of a discovery of a mistake in the assessment caused by a mistake in the construction of the partnership deed or, it may be, caused by a mistake in the law applicable to such a deed, even where there has been a complete disclosure of all relevant facts upon which a correct assessment might have been based. I do not think it is stretching the word 'discovers' to hold that it covers the finding out that an error in law has been committed in the first assessment, when it is desired to correct that by an additional assessment."

Lord Normand considered that this wide interpretation of the word "discover" in the provision was also supported by its application in relation to the other conditions in the provision."

FINDINGS OF FACT

24. The findings of fact required in this case relate to HMRC's procedure and processes as applied in this case. In making these findings of fact, I keep in mind the burden of proof as set out above. Further, I reach these findings of fact upon the documents before me, the witness statements of Mr Kane and the oral evidence of Mr Kane, which included cross-examination by Mr Wilby. I note that Mr Kane was the only live witness in this case; Mr Wilby was given the opportunity to give oral evidence but he chose not to do so. I also note that Mr Kane was a credible witness who gave his evidence in a clear and helpful manner.

25. Mr Kane gave the following evidence as to the background and processes involved in the investigation of SDLT returns. I accept this evidence by virtue of the manner in which it was given, its consistency with the documentary evidence, and the absence of sufficient contrary evidence.

(1) In or about late 2008, Mr Kane was made responsible for enquiries opened by the Stamp Office in Birmingham where there had been concerns about the schemes being used to reduce SDLT. These schemes had a number of variants. However, the common theme was that they involved sub-sales through gifts or assignments which were not, in HMRC's view, effective to avoid a charge to SDLT ("the SDLT Schemes").

(2) HMRC decided that a team would be established which would investigate cases where there was a possibility that an ineffective scheme had been used. The team of inspectors was duly established in 2008 ("the Team") and comprised Mr Kane (the technical lead and HMRC officer), Mr David James (the data matching project lead and HMRC officer) and Jonathan Warburton (a third HMRC officer). There was also a clerical support team who were not officers but who were tasked with, amongst other things, writing letters to taxpayers and issuing notices of assessments. Mr Daljit Soroya and Mrs Elaine Lewis were members of the clerical support team. Although Mr James was the project leader, he and Mr Kane worked closely together. Mr James focused upon

the project aspects including obtaining the relevant information, whereas Mr Kane focused upon the technical drafting of documents and ensuring that everything was legally correct.

(3) The Team developed a system called "data-matching" to identify undisclosed instances of ineffective Schemes. This involved the following steps to produce a list of purchasers who would be the subject of discovery assessments.

(4) The Land Registry provided HMRC with data from the Land Registry which could be compared with data from SDLT returns. These were not individual official copy entries but were instead lines of electronic data. This comparison was carried out by HMRC data analysts known as the Risk and Intelligence Service. This resulted in an Excel file which identified those properties for which there was a mismatch between the consideration referred to on the TR1 which had been submitted the Land Registry and the declaration of consideration on the corresponding SDLT return.

(5) Each entry was considered by a member of the Team of inspectors to ascertain whether it should be excluded from the Excel file (and so rejected as unable to assert discovery). Exclusion would take place where there were any properties where another SDLT return had been made on the same date and where the aggregate of the SDLT returns matched the consideration on the TR1. Exclusion would also take place for any cases where there had been a disclosure to HMRC, where an enquiry had already commenced, or where a settlement had been reached. In order to exclude an item from the Excel file, an item named "Deselect" had to be changed from "No" to "Yes".

(6) At this stage, one of the three members of the Team checked that the mismatch of consideration on the TR1 and the declaration on the SDLT return did in fact relate to the same property, vendor and purchaser. During this check, the relevant member of the Team also identified what were termed "Indicative Agents". These were solicitors, accountants or advisors who were known to have promoted SDLT Schemes. The consideration of Indicative Agents was a method of checking the potential existence of an SDLT Scheme.

(7) Mr Kane said that when a member of the Team of inspectors completed the above checks and exclusions and chose to leave the "Deselect" item as "No", a decision was being made that an assessment was to be issued in respect of that property. I accept this evidence as to the manner in which the Team operated as Mr Kane was one of the inspectors carrying out the process and worked closely with the other two inspectors involved.

(8) Once this had been completed for each property, the Excel file was provided to the Stamp Office, who provided what was termed a Standard Intelligence Package ("the SIP") to the Team for each property. The SIP included a hard copy of the SDLT return, the TR1, and the Land Registry entry. This was then included in a mail merge spreadsheet.

(9) The assessments were to be printed from the mail merge spreadsheet. However, before being sent out, a document entitled "Pre assessment sticky" was completed, which set out the following tasks to be checked by a member of the clerical support team and an investigator:

> "Does the address on the assessment match the address on the SDLT1 or TBS print in the file?
>
> Do the addressees match the SDLT1 and have any joint purchasers been properly dealt with?

If the relevant box on the SDLT1 is ticked, has a copy of the letter been sent to the correct agent at the correct address?

Does the consideration figure on the assessment match the spreadsheet Land Registry consideration? If any doubt, check NetHousePrices.

Is the calculation of tax due and percentage used correct?

Check SAP notes – Has any tax been paid in excess of the amount that would have been due on the SDLT1 consideration? If so refer to Investigators.

Does anything else look wrong?

Final go ahead given for issuing assessment."

(10) The issue of the assessment would always be at the instruction of one of the Team of three inspectors. The assessment was in a standard form which would be sent with a letter also in a standard form. The templates for the assessment and the accompanying letter were drafted by Mr Kane.

(11) The letter and assessment would include as a reference the initials of the member of the clerical support team who initiated the mail merge resulting in the printing of the letter (who would also be the name and signature electronically printed at the end of the letter). The letter and assessment would also include the initials of one of the three inspectors. However, this did not mean that the inspector whose initials were on an assessment or letter gave the instruction to make the assessment; instead, they were included in order to be a point of contact for any response from the person being assessed, with the Team dividing these up equally between the inspectors.

26. Mr Kane also gave the following evidence as to his understanding of the way in which those processes were applied to Mr Wilby's SDLT Return. Again, I accept this evidence by virtue of the manner in which it was given, its consistency with the documentary evidence, and the absence of sufficient contrary evidence.

(1) The data matching exercise was carried out by breaking the raw data down in to batches with a maximum of 200 properties per batch. Mr Wilby's Property formed part of batch 4.

(2) The raw data for batch 4 was created on 29 November 2010. The checks were undertaken between 29 November 2010 and 10 February 2011.

(3) The mail merge was created on 10 February 2011.

(4) Kay was treated as an Indicative Agent. Mr Kane was aware that Kay was based in Manchester and Leeds. This was because Kay and Co, Manchester had made various disclosures of SDLT schemes for their clients. A member of the Team searched for Kay in Manchester on the internet and, in doing so, found Kay in Leeds and further found that both Kay in Manchester and Kay in Leeds were selling SDLT schemes. It was not clear from the evidence whether it was Mr Kane or someone else who carried out this research. Mr Kane did not know the nature of any connection between Kay in Manchester and Kay in Leeds. Kay in Leeds did not send any disclosures. There had been 25 instances of use of an SDLT Scheme (both disclosed and undisclosed) by the combination of Kay in Manchester and Kay in Leeds. Mr Kane did not know whether the 25 instances were all Leeds, all Manchester, or both and in what proportion.

(5) The pre-assessment sticky is not available for the file relating to Mr Wilby and the Property. The paper file was in pieces when Mr Kane obtained it from storage.

(6) There is no way of identifying which of the three inspectors carried out the checks in respect of Mr Wilby and the Property. However, I find as a fact that, on the balance of probabilities, one of the three inspectors did carry out these checks. I reach this conclusion because this was a carefully articulated and closely controlled procedure as set out above. Mr Kane's evidence, which I accept, was that assessments could not be made without following the process and procedure as set out above.

IDENTIFICATION

Submissions

27. Mr Street accepted that it was necessary for a particular officer to make the decision but submitted that there was no need to identify who that was. He noted that section 32(4) of the Finance Act 2003 refers to "an officer" but does not specify that it has to be a named officer. Paragraph 32(4) also enables an officer to delegate the actual process of issuing the assessment to clerical staff, and so the assessment remains valid if the person who is named on the assessment is different to the person who actually took the decision to assess.

28. Mr Wilby submitted that it was necessary to identify the officer in question. He said that it was necessary to know who the officer was in order to establish what was in the mind of the officer when taking the decision to assess. This is reinforced by HMRC not being entitled to use the collective knowledge of HMRC to justify an assessment. In particular, he relied upon *Tooth* at [34], [68] and [71] *per* Lord Briggs and Lord Sales:

> "[34] The administration of the Inland Revenue and Customs and Excise was amalgamated in 2005 pursuant to the Commissioners for Revenue and Customs Act 2005 ("the CRCA 2005"). The term "Commissioners" in that Act is a reference to the Commissioners of Revenue and Customs, which includes the Commissioners of Inland Revenue, ie the Board as that term is used in the TMA. By virtue of section 5 of the CRCA 2005 the functions of the Board were vested in the Commissioners of Revenue and Customs. Section 2(1) of that Act states that "[t]he Commissioners may appoint staff, to be known as officers of Revenue and Customs"; and section 2(3) states, "[a]n officer of Revenue and Customs shall comply with directions of the Commissioners (whether he is exercising a function conferred on officers of Revenue and Customs or exercising a function on behalf of the Commissioners)". By virtue of section 7 of that Act, functions conferred on an officer of the Board are vested in an officer of Revenue and Customs. Section 13 of the CRCA 2005 is headed "Exercise of Commissioners' functions by officers"; subject to certain reservations in relation to non-delegable functions which are not material, subsection (1) provides: "An officer of Revenue and Customs may exercise any function of the Commissioners". Section 14 provides for other powers of delegation; but subsection 14(4)(b) states that, subject to certain reservations which are not material, such delegation "shall not … prevent the exercise of the function by an officer of Revenue and Customs", ie in recognition of the general delegation of the Commissioners' functions pursuant to section 13 to enable any of them to be exercised by "an officer of Revenue and Customs". All these provisions contemplate that functions relevant to the assessment of taxes are to be exercised by individual officers of Revenue and Customs, either on the basis of powers vested directly in them as officers or on the basis of powers of the Commissioners delegated to them by virtue of section 13(1), when they are identified internally as the officer responsible for acting as such in relation to a particular matter.
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> …

> [68] Section 29(1) of the TMA, concerning discovery assessments, operates in two cases. First, it confers a power on "an officer of the Board", if he discovers a matter falling within sub-paragraphs (a) to (c) - we are concerned in this case with sub-paragraph (b) - and subject to subsections (2) and (3), to make an assessment in the amount which ought "in his opinion" to be charged to make good the loss of tax. Secondly, it confers a power on the Board themselves to make an assessment according to "their opinion", if the Board discover the deficiency of tax. These cases are distinct, as the language of the provision makes clear. Discovery by "an officer of the Board" is treated as something separate from discovery by "the Board", as the phrase "as the case may be" in the last part of section 29(1) also highlights. Moreover, the language and structure of the provision would make no sense if its operation turned on a concept of collective knowledge of the Board, derived from the knowledge of any and all of its officers. The reference to discovery by an officer of the Board would be otiose, since such discovery would on that hypothesis always constitute discovery by the Board. Further, the condition in section 29(5) operates by reference to the state of mind of a particular hypothetical officer of the Board dealing with the taxpayer's case at a particular point in time (either when the time limit for commencing an enquiry into a return made under section 8 or section 8A expired or when he informed the taxpayer that he had completed his enquiries into the return), and does not involve any concept of collective knowledge on the part of the Revenue: see *Langham (Inspector of Taxes) v Veltema* [2004] EWCA Civ 193;[2004] STC 544, para 36 (Auld LJ); *Sanderson v Revenue and Customs Comrs* [2016] EWCA Civ 19; [2016] 4 WLR 67, para 17(5) (Patten LJ); *Charlton*, paras 65-66. Section 29(1), which also in relevant part by use of similar language focuses on the state of mind of an officer of the Board, should not be interpreted differently.
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> [71] The position set out above continues to apply in relation to the operation of section 29(1) in its current form both as a matter of principle and because there has been no material change from its predecessor provision in the original version of section 29(3). Although it did not need to decide the point, the UT in *Charlton* at paras 40-43 rejected the contention the question whether a discovered had been made was to be tested by reference to the collective knowledge of the Revenue, rather than the knowledge of an individual officer. We consider it was right to do so."

Discussion

29. It is right that an officer must have made the discovery. However, I do not agree that it is inevitably the case that the assessment is not valid if the officer cannot be identified within the appeal. This is because the legislation does not say that the officer needs to be named. If a Tribunal can be satisfied that an officer has taken the decision then the decision is one by an appropriate individual person rather than based on any impermissible collective knowledge or collective conduct.

30. Importantly, the Team's procedure was that the inspectors (each of whom were officers) would each carry out the process of the checks and would ultimately decide that the relevant property would move forward to the mail merge stage by actively deciding not to change the "Deselect" item to "Yes". As such, the decision to discover in respect of Mr Wilby was made by an officer between the raw data being received on 29 November 2010 and the mail merge being produced on 10 February 2011. Also, this was confirmed by an officer because the procedure was such that one of the three inspectors checked and ultimately approved the file by reference to the pre-assessment sticky. Taking into account Mr Kane's evidence, I find as a

fact that the procedure was a tightly controlled one and that there is nothing to suggest that it was not followed as a matter of course. It therefore follows that a single officer did make the discovery when he completed the checks and actively chose not to exclude the entry on the Excel file relating to Mr Wilby and the Property.

31. I agree with Mr Wilby that HMRC needs to establish what the subjective belief of the officer was when making the decision to assess and that this is necessarily difficult if the officer cannot be identified. However, this is an evidential matter for the Tribunal on the balance of probabilities. It might be a rare case in which this can be made out in the absence of evidence from the officer in question, but this does not mean that it can never be made out.

THE SUBJECTIVE TEST

Submissions

32. Mr Street submitted that the subjective test was fulfilled because the procedures which each of the inspectors in the Team followed meant that an assessment would only be made if the checks revealed a discrepancy on the figures between the SDLT return and the Land Registry information, if the checks did not result in an exclusion from a discovery, and where there was an Indicative Agent.

33. Mr Wilby submitted that HMRC had not established what the basis of the discovery was. He said that the reason put forward for the discovery has changed over time. He noted that the original letter of 11 April 2011 only referred to a comparison between the SDLT Return and the Land Registry information. Mr Kane's first witness statement then brought into play the allegation that Kay was an Indicative Agent. The combination of the disclosure process and Mr Kane's other witness statements then explained the data matching process in more detail. Mr Wilby also submitted that the absence of any principle of "corporate knowledge" meant that as there was no evidence that the other officers knew of Mr Kane's researches about Kay then it was not reasonable to rely upon Kay being an Indicative Agent if it could not be said that it was Mr Kane who made the discovery.

Discussion

34. I find that the subjective test has been fulfilled. Whilst Mr Wilby is right to say that the full explanation for the discovery was not explained in the initial letter, the question for me is as to whether or not the subjective test has been fulfilled on the basis of the evidence before me at the date of the hearing. I agree that consistency (or otherwise) of explanation can play a part in establishing whether or not a belief was in fact held. However, in this case the differences in explanation only amount to further detail being provided about HMRC's investigative process. I accept Mr Kane's evidence that this was not provided in the initial letters because he and his Team did not want to reveal too much about their methodology in order to prevent avoidance.

35. I agree with Mr Street that the procedures were closely controlled and that the assessment would only have been made if a discovery had been made and that, in turn, that discovery was based upon the checks revealing a discrepancy on the figures between the SDLT Return and the purchase price set out at the Land Registry, that the checks did not result in an exclusion from a discovery, and that the checks revealed that Kay was an Indicative Agent. Whether or not the whole Team knew the research that led to Kay being treated as an Indicative Agent does not affect this – the important point is that the existence of an Indicative Agent was treated as being fulfilled because the matter passed the check set out in paragraph 26(4) above. In any event, even if Kay's position as an Indicative Agent had not been taken into account, the other discrepancies and checks would themselves constitute the subjective basis for the discovery. I note that I make these findings on the balance of probability and note that, whilst it is a rare

case where the subjective intention can be evidenced without identifying the officer, this is such a case.

THE OBJECTIVE TEST

Submissions

36. Mr Street submitted that the belief that there was a loss of tax was one which a reasonable officer could form. Again, he relied upon the checks made.

37. Mr Wilby submitted that this was not a reasonable decision. He said that there could be any number of reasons for a mismatch between the consideration set out on the SDLT Return and the consideration set out at the Land Registry. He also said that it could not be said that Kay was an Indicative Agent as there was no evidence as to whether SDLT Schemes were promoted by both the Manchester branch and the Leeds branch and, if so, in what proportion. He made the point that Mr Kane did not know Kay in Manchester and Kay in Leeds to be connected and he did not inform the other inspectors of his checks and researches about Kay. He also relied heavily upon the absence of any evidence of an SDLT Scheme actually being employed.

Discussion

38. I find that the belief that there was a loss of tax was one which a reasonable officer could form. This is for the following reasons.

39. First, crucially, there was an unexplained difference in consideration between the SDLT Return and the consideration set out at the Land Registry. This would in itself be sufficient to justify a discovery assessment. I note that this mismatch has still not been explained.

40. Secondly, there is no need to establish that an SDLT Scheme had been used. Instead, the question is as to whether or not there was a loss of tax.

41. Thirdly, in the overall context, it was reasonable to treat the involvement of Kay as an indicator. Mr Kane's evidence was that both Kay in Manchester and Kay in Leeds were promoting SDLT Schemes. Mr Wilby put to Mr Kane that Kay in Manchester and Leeds were in fact the same company, which I took to be an assertion by Mr Wilby that they were. However, Mr Kane frankly accepted that he did not know of any connection between them. The important point, however, is that the member of the Team carrying out the research (as, contrary to Mr Wilby's submission, it was not clear from Mr Kane's evidence that it was Mr Kane himself who carried out these checks) led that member to find that Kay in Leeds had been selling SDLT schemes. Whether or not this research was shared with the Team does not affect this as the objective analysis turns upon the view a reasonable officer would form rather than identifying what other officers within the Team actually knew about how the conclusion that Kay was an Indicative Agent came about. It was therefore reasonable to treat Kay's involvement as an indicator.

42. I note that, given the significance of the mismatch between the difference in consideration between the SDLT Return and the consideration set out at the Land Registry, I would have found that the objective test had been satisfied even if I had found that it was wrong to take the involvement of Kay into account.

VALIDITY

Submissions

43. Mr Street rightly noted that the burden is on HMRC to establish the validity of the Assessment, even though Mr Wilby did not put this in issue save as set out above (see *Burgess and Brimheath v HMRC,* above). I deal with these as follows.

Discussion

44. First, the provisions of paragraph 30 of Schedule 10 to the Finance Act 2003 are fulfilled. Paragraph 30(3) requires that, at the time they ceased to be entitled to give notice of enquiry into Mr Wilby's return, HMRC could not reasonably have been expected to be aware of the loss of tax on the basis of the information made available, such availability being pursuant to paragraph 30(4). The SDLT Return could not have alerted HMRC to the deficiency and Mr Wilby has not suggested that he or anybody on his behalf disclosed such information. Mr Wilby suggested that HMRC could have known this from HMRC records, but this would not be possible without carrying out the checks which ultimately led to the discovery and in any event there is no evidence that HMRC received any Land Registry documents relating to the Property within the time limit for an enquiry (which time limit ended on 11 April 2009 pursuant to paragraph 12(2)(a) of Schedule 10 to the Finance Act 2003). Further, paragraph 30(5) provides that no assessment can be made if the inaccuracy is attributable to a mistake and the return was made on the basis of or in accordance with the practice generally prevailing at the time it was made. There is no evidence at all as to the reason for the full consideration (when compared with the official copy entries) not being set out on the SDLT Return and so no evidence that this was a mistake. It follows that it cannot be said that this was in accordance with the practice generally prevailing.

45. Secondly, the Assessment was made within the statutory time limit as it was made on 11 April 2011 and so within four years after the effective date of the transaction (the effective date of the transaction being 11 June 2008) pursuant to paragraph 31(1) of Schedule 10 to the Finance Act 2003.

46. Thirdly, there is no evidence to suggest that the assessment procedure set out in paragraph 32 of Schedule 10 of the Finance Act 2003 was not followed.

DISPOSITION

47. For the reasons set out above, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

48. 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 CHAPMAN KC
TRIBUNAL JUDGE

Release date: 08TH SEPTEMBER 2022