[2019] UKFTT 213 (TC)

TC07060

Appeal number: TC/2018/01199

STAMP DUTY LAND TAX – return showing consideration of £1 not enquired into – whether discovery made – whether hypothetical officer would have been aware of loss of tax – whether discovery stale – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

TIMOTHY GRAY **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Alexandra House, Manchester on 14 January 2019

Rory Mullan, instructed by Qubic Tax, for the Appellant

Michelle Poulter, litigator, HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal by Mr Timothy Gray ("the appellant") against an assessment made by the respondents ("HMRC") under paragraph 28 Schedule 10 Finance Act ("FA") 2003 of an additional liability of £34,400 said to have been omitted from the appellant's return for stamp duty land tax ("SDLT") in relation to the purchase of a property in Ripon, North Yorkshire.

Facts

The evidence

2. I had two witness statements prepared by Mr Peter Kane, an officer of HMRC who investigated the return, and a bundle prepared by HMRC containing "key documents", the documents exhibited by Mr Kane concerning the HMRC investigation of the case and some documents from the appellant. Mr Kane gave oral evidence and was cross-examined by Mr Mullan.

3. I also had a witness statement from the appellant and from Mr David Graham ("DG") of Qubic Tax. The appellant gave oral evidence and was cross-examined by Ms Poulter.

Undisputed facts: chronology of events

4. From the first witness statement and related oral evidence of Mr Kane and the documents I find the following facts which were not in dispute.

5. On 7 August 2009 the appellant delivered by electronic means to HMRC an SDLT return in form SDLT1. The entries of relevance to this case were:

Type of property:	01 [residential]
Description of transaction:	F [conveyance of freehold]
Estate or interest transferred:	FP [freehold w/ vacant poss]
Effective date of transaction:	31072009
Date of contract:	09012009
Are you claiming relief:	No
What is the total consideration:	1
What form does the consideration take?	30
Is this transaction linked to any other	No
Total amount of tax due	0
Lead purchaser	Mr T Gray
Agent's name:	Qubic Associates

6. In April 2011 HMRC had conducted a data matching exercise to identify cases where Qubic were the agents on the SDLT1. This exercise identified the SDLT1 in this case.

7. HMRC then searched and analysed Land Registry data for the address which showed that the appellant was the proprietor of the property and the price paid was £860,000. A copy of the TR1 (transfer form) with these details was in the bundle.

8. On 6 June 2011 HMRC issued a "discovery" assessment in the amount of £34,400 on the appellant.

9. On 15 June 2011 the appellant appealed against the assessment on the grounds that there was no discovery. He sent a 64-8 authorising Qubic as his agent.

10. HMRC said that due to circumstances (a criminal investigation into the proprietor of Qubic) they could not deal with Qubic.

11. On 1 July 2011 Qubic also submitted an appeal with the same grounds, and referred to "the disclosure of information in relation to the SDLT1 return and acquisition which was submitted within the related window".

12. On 31 January 2013 HMRC asked for evidence in support of the grounds of appeal and "evidence in support of the scheme".

13. No reply was received and the case lay on file until 2017. During this time HMRC litigated a number of SDLT avoidance scheme variants.

14. On 27 October 2017 HMRC set out its "view of the matter" and offered a review.

15. On 21 November 2017 the appellant accepted the offer.

16. On 3 January 2018 HMRC sent the conclusion of the review to the appellant, which was to uphold the assessment.

17. On 8 January 2018 a new agent, Stringer Mallard, enclosed a copy of a letter dated 31 July 2009 written by the appellant and said to have been sent to Birmingham Stamp Office.

18. On 1 February 2018 the appellant notified his appeal to the Tribunal.

Dealings between Qubic and HMRC and HMRC's internal processes

19. From both witness statements of Mr Kane and his oral evidence I set out the evidence about HMRC's dealings with Qubic and of HMRC's internal processes. The second witness statement was made in response to the appellant's skeleton argument. Unless there is an indication to the contrary, I find what is narrated in this section as fact.

20. During 2009 HMRC were investigating a company SFM Legal Services Ltd whose principal was Mr Malcolm Graham. SFM had been involved in the

implementation of SDLT avoidance schemes. Malcolm Graham was traced to Qubic Associates Ltd, which company had on 10 July 2009 disclosed to HMRC that it had been executing a SDLT avoidance scheme and gave the names of 14 people who had used it. These 14 did not include the appellant.

21. That Qubic disclosure on 10 July 2009 gave information about a "husband and wife" scheme and attached a document said to show the clients who used the scheme. I had a copy of this form which has four columns and 14 rows. Every entry had been redacted by HMRC. Mr Kane's evidence was that the columns were respectively of "Name", "address", "UTR" and "date of transaction". I find as a fact that the heading is what the information is each column described. I also find that the appellant's name and other details were not on this list. I do so because the appellant did not suggest that it was, but it would have been much better had I seen the unredacted names etc. There is no requirement to redact personal data where it is being disclosed for the purpose of proceedings before this or any other Tribunal or Court.

22. On 17 September 2009 HMRC visited Qubic's offices to meet, they thought, Malcolm Graham. He was not present but his brother David Graham was. David Graham told HMRC that the scheme Qubic had disclosed, the "husband and wife" scheme, was one which they were no longer selling, but they were selling one where only one[1] person was acquiring the property.

23. On 22 October 2009 HMRC met Malcolm Graham. At that meeting HMRC were told that the new residential scheme Qubic was doing avoided the effect of s 75A FA 2003 because there were only two parties. The property was "instantly put into trust". This became known within HMRC as the "trust and covenant" scheme ("T&C").

24. Malcolm Graham handed over what he said was a list of all Qubic's scheme users. This list did not cross refer to a scheme, an address, an SDLT1 or any other information. From that list as it appears in the bundle I find that it showed the appellant's name as the only unredacted one on the list.

25. It was Mr Kane's evidence (he was at the meeting) that Malcolm Graham's description of the T&C scheme confused both him and Mr James, the other HMRC officer who was questioning Malcolm Graham. He said that it was only in March 2010 when HMRC received a detailed disclosure of the T&C scheme and obtained knowledge of a "tampered counsel's opinion" used by Qubic that they were in a position to take a view as to the efficacy of the new scheme.

26. After that meeting, all Qubic work was put on hold due to an impending raid of Qubic's premises by Northumbria Police which took place on 11 March 2010. This raid related to allegations of fraud in the implementation of SDLT avoidance schemes. On legal advice Mr James, the team leader, had suspended all civil SDLT work into Qubic until they were given clearance by the Police and HMRC's Criminal Taxes unit.

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[1] According to Mr Kane's statement, the so called husband and wife scheme did not require the purchasers to be married. It was sufficient they there were at least two joint purchasers.

27. The embargo was released shortly before 5 August 2010, when Mr James issued an internal memo. This instructed Mr Pete Rowley to issue various letters to taxpayers about discovery assessments. Mr Kane says that "it is clear" from the memo that a firm conclusion had been reached by HMRC about the efficacy of both the husband and wife schemes and the T&C scheme which was the one the appellant used. It is not exactly clear to me from the memo, but I accept Mr Kane's evidence on this point and I infer that HMRC's view was that both schemes did not work.

28. Mr James's memo refer to "several names we are not aware of" from the disclosure list which was given to HMRC on 22 October 2009. Mr James asked for "work to track these down." I infer that the appellant was one of these.

29. Mr Kane led a small team of inspectors in Special Investigations looking at house price data from a website, as obtaining information from the Land Registry was "paper based, slow and costly". Mr Kane's team developed a system of data matching carried out for them by officers in HMRC's Risk & Intelligence Service ("RIS"). This used electronic data purchased from the Land Registry to include the address of the property, details of buyer and seller, date of the transaction and the consideration. It compared this data with that on the SDLT return database for transactions on the same date.

30. The results were set out in an Excel spreadsheet of all land transactions where there was a mismatch of the apparent consideration in respect of a transaction in the same property and on the same day. Because of the large numbers, the work was divided into chunks. These were worked in order of the nearness to any assessing deadline.

31. Mr Kane explained further that the exercise threw up a number of land transactions where, as in this case, the consideration on the SDLT1 was £1. He explained that based on their experience of examining these cases it was not possible to assume that just because the consideration was £1 there was an avoidance scheme in use. I accept his evidence on this point, as he gave examples of other legitimate reasons why £1 was used.

32. It was therefore, said Mr Kane, only the data matching that established that the Land Registry figure for a purchase was very much higher than the SDLT1 so as to allow an assumption to be made that there was in fact an avoidance scheme.

33. Once such a mismatch was identified, a Standard Intelligence Pack was produced by Stamp Office for each case, including a "hard copy" of the SDLT1. In this case this was done on 21 January 2011 (as was shown on the "hard copy" in the bundle).

34. A check was then undertaken to establish the current address of the purchaser using a National Insurance number. Because no NINO was included in the appellant's SDLT1 an Experian search was used and this was carried out on 18 April 2011 (as shown in the bundle).

35. Once all the information had been brought together one of the inspectors, Carl Wilkins, reviewed all the information and caused the assessment to be made.

Law

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

> "**Revenue assessments**
>
> *Assessment where loss of tax discovered*
>
> **28**—(1) If the Inland Revenue discover as regards a chargeable transaction that—
>
> (a) an amount of tax that ought to have been assessed has not been assessed, or
>
> (b) an assessment to tax is or has become insufficient, or
>
> (c) relief has been given that is or has become excessive,
>
> they may make an assessment (a "discovery assessment") in the amount or further amount that ought in their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) The power to make a discovery assessment in respect of a transaction for which the purchaser has delivered a return is subject to the restrictions specified in paragraph 30.
>
> …
>
> *Restrictions on assessment where return delivered*
>
> **30**—(1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28 … in respect of the transaction—
>
> (a) may only be made in the two cases specified in sub-paragraph (2) and (3) below, and
>
> (b) may not be made in the circumstances specified in sub-paragraph (5) below.
>
> (2) The first case is where the situation mentioned in paragraph 28(1) … is attributable to fraudulent or negligent conduct on the part of—
>
> (a) the purchaser,
>
> (b) a person acting on behalf of the purchaser, or
>
> (c) a person who was a partner of the purchaser at the relevant time.
>
> (3) The second case is where the Inland Revenue, at the time they—
>
> (a) ceased to be entitled to give a notice of enquiry into the return, or
>
> (b) completed their enquiries into the return,
>
> could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 28(1) ....
>
> (4) For this purpose information is regarded as made available to the Inland Revenue if—

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

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

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

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

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

(5) No assessment may be made if—

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

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

Discussion

The issues

37. Although they were not put in quite the same terms, the parties agreed that the only issues for my decision were:

(1) Was there a discovery of a loss of tax by HMRC?

(2) Whether, if there was, HMRC was nonetheless precluded from making an assessment by reason of the application of any of the restrictions in paragraph 30?

(3) Alternatively, was any discovery stale by the time the assessment was made?

38. In their statement of case and skeleton HMRC had put forward the effectiveness of the scheme deployed by the appellant as an issue. Mr Mullan's skeleton conceded that the scheme was ineffective as a result of s 75A FA 2003, no doubt with more than half an eye on the decision of the Supreme Court in *Project Blue Ltd v HMRC* [2018] UKSC 30.

Was there a discovery of a loss of tax?

39. Ms Poulter's skeleton referred to this issue as whether the discovery assessment was validly made by the Respondents. Mr Mullan's skeleton did not refer to the agent making the assessment. In that skeleton he had included a part headed "Relevance of section 29 TMA 1970". Most readers of this decision will know that s 29 Taxes Management Act 1970 ("TMA") deals with discovery assessments where the tax involved is income tax or capital gains tax. Paragraphs 28 and 30 Schedule 10 FA 2003 are in very similar terms, but Mr Mullan pointed out that while s 29(1) and (5) TMA refer to a particular officer of HMRC, Schedule 10 refers to "the Inland Revenue". He

suggested this made a difference and it did not follow that all the case law on s 29 TMA was necessarily relevant.

40. At the start of the hearing though he informed me that he had read my decision in *Katharine Tutty v HMRC* [2019] UKFTT 3 on this point and since he agreed with it he was no longer pursuing the point.

41. Ms Poulter's submission on this issue was that becoming aware that the consideration on the SDLT1 was £1 and on the TR1 at the Land Registry was £860,000 was not in itself sufficient to justify making a discovery assessment. But once HMRC had carried out the data matching exercise they became aware of the appellant's involvement in a Qubic scheme and that justified the officer concerned in thinking that there was use of a tax avoidance scheme and so a loss of tax, as tax on the actual purchase price had not been assessed.

42. Mr Mullan did not dispute that the officer who made the assessment had made a discovery. I find that Mr Wilkins, a officer of HMRC, did discover a loss of tax when all the pieces of information were brought together by it through the data matching exercise.

Was HMRC precluded from making an assessment by reason of the application of any of the restrictions in paragraph 30?

43. The only restriction in paragraph 30 that was in issue here was that in sub-paragraph (3), ie whether at the time a (hypothetical) officer of HMRC ceased to be entitled to give a notice of enquiry into the SDLT1, ie when the "enquiry window" closed, they could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the loss of tax.

44. HMRC say that at the time[2] the enquiry window closed no information had been provided by the appellant apart from the SDLT1.

45. The appellant says there were in fact three "sources" of information available to HMRC at 30 May 2010:

(1) the SDLT1 submitted on 30 May 2010

(2) the letter from the appellant to Birmingham Stamp Office dated 31 July 2009

(3) information given by Qubic to HMRC on 22 October 2009.

[2] There is a difference of view as to when the window closed. HMRC say it was 30 April 2010, the appellant in his appeal said 7 May 2010 and Mr Mullan's skeleton says 30 May 2010. Paragraph 12 Schedule 10 FA 2003 says it the date 9 months after the filing date. That date is 30 days after the effective date of the transaction, which in this case was the completion date, 31 July 2009. 30 days from that is 30 August 2009, so the relevant date is 30 May 2010, as Mr Mullan says.

(1) The SDLT1 as a source of information

46. Taking the three sources in turn, the appellant says that the SDLT1 disclosed the information set out in §5 and the address, title number, absence of a previous option, the names of the vendors and that they were not connected with the appellant.

47. The officer is also deemed to have available to them the information which can reasonable be inferred from the return (paragraph 30(4)(c)(i) Schedule 10 FA 2003). That information, says the appellant, includes the fact that purchase for a £1 of a residential freehold property does not represent an arm's length consideration, and that if the parties are not connected it is not a gift. Where there was no claim for a relief it would be reasonable for HMRC to infer that there was some form of sub-sale relief (which Mr Mullan says is not a relief for the purposes of the return) and that SDLT would have been payable.

48. The appellant also says that HMRC could reasonably infer the use of tax planning arrangements as the use of sub-sale relief to reduce SDLT was well known, and indeed highlighted by HMRC in Spotlight 10 of 7 June 2010. Such an inference is sufficient to allow HMRC to have discovered a loss of tax, bearing in mind their stated views on s 45 FA 2003, the wide application of s 75A FA 2003 and that quantification of the tax lost was unnecessary (see Statement of Practice 1/06).

49. For their part HMRC say that the SDLT1 gave no information about the scheme used, made no mention of an intermediate sub-sale or any other mechanism used to give effect to the requirements of s 45(1) FA 2003 (relief where there is a sub-sale) and did not indicate that the vendor had received more than the consideration shown on the return.

50. They cite *Neil Pattullo v HMRC* [2016] UKUT 270 (TC) (Lord Glennie) ("*Pattullo*") for the proposition that it is for the taxpayer to prove that he had "clearly alerted the officer to the insufficiency".

(2) The "disclosure" by the appellant

51. The appellant says that, assuming that the Tribunal accepts, contrary to HMRC's submissions, that the disclosure letter was received by HMRC, it was available to the hypothetical officer (paragraph 30(4)(c)(ii) Schedule 10 FA 2003). What that letter said is this (formatting retained):

> "**Re: Purchase of *North Lodge, North Street, Ripon, HG4 1HJ***
> **Re: Mr Tim Gray**
>
> I am writing to advise you that I have purchased a property namely, *North Lodge, North Street, Ripon, HG4 1HJ*. Although the chargeable consideration for Stamp Duty Land Tax Purposes is nil, I have filed an SDLT1 form reflecting the total purchase price and the fact that there is no SDLT to be paid.
>
> I am aware that there is no longer a self-certification form that needs to be filled where there is no chargeable consideration due for SDLT purposes but I wish to ensure that I have disclosed the purchase in full

> to HMRC. This letter therefore accompanies the SDLT1 form I have submitted.
>
> I have relied upon s 45 Finance Act 2003 to ascertain that the amount of SDLT that is payable under this transaction is nil. I do not believe there has (sic) been any scheme transactions involved and s75A FA 2003 does not apply here.
>
> If you have any questions then please feel free to contact me."

52. Mr Mullan's skeleton says that this letter informed HMRC that the actual purchase price from the ultimate vendor was greater than £1, the very information on which HMRC relied to make a discovery.

53. But before considering whether this letter would have made the hypothetical officer aware of a tax loss, I have to decide whether the letter was received by HMRC and indeed whether it was sent. This alleged disclosure was the entire subject of the witness statements of the appellant and David Graham and was covered in Mr Kane's second statement.

54. David Graham acknowledged that his statement was, because of the considerable passage of time, prepared to the best of his knowledge based on the information available to him and the records kept in respect of client arrangements.

55. He described the planning checklist that Qubic used to ensure that all necessary steps in the procedure of implementing their scheme were carried out. That checklist was exhibited by him and it shows, among other things, at Stage 1:

> "Client name: Gray
>
> P/O: North Lodge, North Street, Ripon [the address of the property purchased]
>
> Purchase price: £860,000
>
> Scheduled exchange date: 9/1/09
>
> Scheduled completion date: 31/7/09."

56. There is then a "key stage" being a list of documents *issued* and against each is a box for ticking when the document was "on file", a date and the initials of the person actioning the item. All boxes are ticked and are dated at various times in September 2008 and June 2009. The entries are all initialled "CM". After this is a box "Update introducer confirming above docs issued" which is not completed.

57. There is then another "key stage" list of documents *received* in the same format. All boxes, except "HMRC 'Authorising your agent' form" are ticked and are dated at various times in July 2009. After this is a box "Update introducer confirming above docs received" which is ticked but not dated or initialled.

58. The stage 2 list is also in the same format and every item but one is ticked, and all but three are dated and initialled. The dates given are in July or August 2009 (with the final entry "File archived" showing 16 September 2009).

59. David Graham pointed out that in the stage 2 list was an entry "Disclosure letter sent to client" ticked and dated 31 July 2009 initialled "CM" who David Graham said was Catherine Mole. There is also an entry "Signed disclosure letter received from client" dated 7 August 2009 and initialled "LW" who he said was Laura Watson.

60. Immediately after this is an entry "Signed Disclosure Letter sent to HMRC dated 7 August 2009 initialled "MSG" who he said was Malcolm Graham, his brother and proprietor of Qubic.

61. David Graham added that at the time he believed that postal correspondence was sent using first class post. Each member of staff was fully aware of the procedures and were trained appropriately.

62. The appellant's own witness statement says that he received a letter addressed to the Stamp Office drafted by Qubic which he signed and returned by post to Qubic as instructed, and that to the best of his belief Qubic sent the letter on his behalf to that office. In oral evidence he confirmed his signature and in cross-examination said he had received the draft on 31 July 2009 possibly by email. He agreed that in his witness statement he had only said "to the best of his belief" that the signed letter was sent to HMRC and that he did not know that it was sent.

63. On the more general subject of disclosure, David Graham said that he was aware of oral and written discussion between Qubic and HMRC about SDLT during which a full list of clients who had undertaken "planning arrangements" was produced to David James and/or a P J Rowley. He added that HMRC were fully aware of the specific planning that had been undertaken by the clients from the same discussions.

64. Mr Kane in his witness statements and oral evidence said that there was no evidence on file at HMRC to show that it had received the disclosure letter and that no supporting documents were produced with Qubic's letter of 1 July 2011 of any information said to have been disclosed. Mr Kane did accept at the meeting with David Graham on 17 September 2009 that HMRC had seen some Qubic disclosure letters but these were insufficiently detailed to explain how the scheme was said to work.

65. When the letter from Stringer Mallard of 3 January 2018 was received enclosing a copy of the signed letter of 31 July 2009 said to have been sent to Birmingham Stamp Office on 7 August 2009, Mr Kane caused a check to be made of that office's post ledger for August 2009 but there was no trace of this letter.

66. Mr Kane said that the copy of the letter does not identify the scheme used so it would have been impossible to link it to the generic disclosures Qubic made to the Stamp Office. He says that what would have happened had it been received by the Stamp Office was that a check would be made to see if there was SDLT paid by another party in respect of the same property on the same date and if there was an SDLT return for it. If not, Stamp Office would have opened an enquiry and referred the case to him to establish why no SDLT had been self-assessed.

67. I preface my consideration of whether the letter was sent or received by remarking that s 7 Interpretation Act 1978 had no part to play here. The disclosure letter was not

served under any provision in Part 4 FA 2003 and so s 84 of that Act does not apply and postal service of the letter of disclosure was not authorised under that section so as to bring s 7 of the 1978 Act into play.

68. I accept the appellant's evidence that he signed the draft of the letter sent to him on 31 July[3] and returned it to Qubic, and that Laura Watson completed the checklist to the effect that Qubic received it from the appellant on 7 August. Mr David Graham says that on the same day the letter was posted to HMRC by his brother, Malcolm Graham.

69. I do not accept that when David Graham refers to the staff being aware of the procedures and being trained he was talking about his brother, Malcolm Graham, but rather that he was referring to Catherine Mole and Laura Watson, whose job it was to control the checklist. Nor does David Graham says that he witnessed his brother posting the letter or why Malcolm Graham, rather than the staff, did so. I also think, from the similarity of the writing, that Malcolm Graham did not initial the checklist, but that Catherine Mole did.

70. But the most important consideration here is that there is no evidence from the person who is said to have actually posted the letter, Mr Malcolm Graham. Mr Mullan pointed out that HMRC had put forward no evidence to show how the search of the ledgers was carried out. But I have no reason to doubt Mr Kane's evidence on this, even if it would have been better if he had gone into more detail about the way the Stamp Office keeps its ledger and to have, for example, shown what the ledger said over the relevant period.

71. I conclude therefore having weighed up the evidence, including that some disclosures were made and received by HMRC, that it is more likely than not that Malcolm Graham did not post a letter to the Stamp Office in this case. Therefore it cannot have been available to the hypothetical officer. I add that, in coming to a decision on this (and any other point in this case), I have ignored the fact that from the witness box Mr Kane referred to Malcom Graham as a "convicted fraudster". Even if I assume that the conviction relates to the affairs of Qubic[4], such a conviction does not, it seems to me make it any more (or even any less) likely that he did not post the disclosure letter.

72. I therefore do not need to and do not consider here what difference it might have made had the letter been received. Mr Kane did address the point in his witness statements and oral evidence and there might be other cases where this point arises, so I give my thoughts on this in the discussion on whether the paragraph 30(3) hurdle has been cleared by HMRC.

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[3] The disclosure letter says under the space for a signature that it was signed "For and on behalf of Mr Tim Gray". But I am satisfied from comparing that signature with the one on his witness statement that the appellant did sign the letter himself, rather than it having been signed by someone else on his behalf.

[4] I have noted Mr Kane's reference to a "tampered counsel's opinion" at §25 but I do know of that is linked to Malcolm Graham's conviction, and I have no need to come to any view about it.

(3) Information from Qubic

73. The appellant says that Qubic provided a list of users of the "scheme it was selling at the time" on 22 October 2009. This list contained the appellant's name. HMRC had determined from the fact that the appellant had used a Qubic scheme that he had underpaid tax.

74. This list of users is not information within paragraph 30(3)(c) and I do not need to consider it. I will say that I do not think it is correct to infer that the list covered only one scheme.

Conclusion on paragraph 30(3) Schedule 10 FA 2003

75. I have held that the only information that would have been available to a hypothetical inspector on 30 May 2010 was that in the SDLT1. As to inferences, Mr Mullan asked me to decide that HMRC could reasonably infer the use of tax planning arrangements as the use of sub-sale relief to reduce SDLT was well known, and indeed rejected by HMRC in Spotlight 10 of 7 June 2010. This submission might just have had some legs had the requisite person been HMRC as a collective entity, as Mr Kane said that he had been partly responsible for the Spotlight. But the requisite person is an officer of HMRC, not HMRC as an entity, and I do not accept that that hypothetical officer (who is not to be confused with Mr Kane) would have been privy to the discussions about the Spotlight, and of course would not on 30 May 2010 have been aware of it and could not have read it.

76. There have been many cases in this century about discovery and the test in s 29(5) TMA which is equivalent to that in paragraph 30(3) and in particular where HMRC say there is a marketed avoidance scheme involved. I have been greatly helped in my understanding of what these cases require of this tribunal when considering paragraph 30(3), and in particular what precisely the hypothetical officer must be aware of, by the lucid discussion by Judge Thomas Scott in *John Hicks v HMRC* [2018] UKFTT 22 (TC), and I can do no better than reproduce what Judge Scott said:

> "*The level of awareness*
>
> 77. One of the thorniest issues in relation to section 29(5), which arises in this appeal, is the level of awareness of the insufficiency which the hypothetical officer must reasonably be expected to have at the relevant time.
>
> 78. Section 29(5) refers to awareness of the situation mentioned in subsection (1). That situation is an insufficiency of tax for the year of assessment. The necessary awareness is therefore more than a mere suspicion that there might be an insufficiency, and more than a realisation that the assessment raises issues to be followed up by HMRC.
>
> 79. That much is uncontroversial. But how certain does the hypothetical officer have to be for it to be unreasonable for him not to be "aware" of the insufficiency? Is it enough if the hypothetical officer could have concluded on the basis of the information then available that HMRC would have a good case in proving an insufficiency? Does awareness mean that HMRC would be more likely than not to succeed if the matter

were contested, or some other level of certainty? Further, is awareness of an insufficiency different from the real HMRC officer crossing the threshold in a discovery and if so how?

80. I confess that I do not find the Court of Appeal's analysis of these issues in *Sanderson*, which is of course binding on me, entirely easy to understand or apply in practice. In particular, I do not find the phrase "actual insufficiency" helpful as a measure of awareness, because the natural reading of those words in my view is that awareness of an actual insufficiency would (save perhaps for a glaring error or omission) be established only when a matter had been tested or settled.

81. I have considered the passages in Sanderson, at [18] to [28], which review and comment on the authorities regarding the requisite level of awareness. Those authorities include *Corbally-Stourton v HMRC* [2008] STC (SCD) 907, *Lansdowne*, and *Langham*. Two propositions are clear from the Court's analysis. First, the tests in subsections (1) and (5) are not the same: [25]. Secondly, the conclusion in Langham that the awareness must be of an actual insufficiency is correct: [22].

82. In my respectful opinion, the issue which Sanderson leaves opaque is the validity of the pronouncements at first instance and in the Court of Appeal in *Lansdowne*, set out at [19] and [20] in *Sanderson*. At first instance in *Lansdowne*, Lewison J formulated the level of awareness as "whether HMRC had sufficient information to make a decision whether to raise an additional assessment." In the Court of Appeal, Sir Andrew Morrit C stated, at [56]:

> "…I do not suggest that the hypothetical inspector is required to resolve points of law. Nor need he forecast and discount what the response of the taxpayer may be. It is enough that the information made available to him justifies the amendment to the tax return he then seeks to make. Any disputes of fact or law can then be resolved by the usual processes…"

83. Moses LJ in *Lansdowne* expressed a more nuanced view. He drew a distinction between perceiving or understanding a situation and drawing a conclusion that it is more probable than not. He stated, at [70]:

> "…Awareness is a matter of perception and understanding, not of conclusion…The statutory context of the condition is the grant of a power to raise an assessment. In that context, the question is whether the taxpayer has provided sufficient information to an officer, with such understanding as he might reasonably be expected to have, to justify the exercise of the power to raise the assessment to make good the insufficiency."

84. The Court of Appeal in *Sanderson* sets these comments in Lansdowne in the context of the dispute in that case about what was required of the hypothetical officer in terms of drawing inferences or resolving points of law. It states (at [23]):

> "…The decision in *Lansdowne* confirmed that the officer was not required to resolve (or even be able to assess) every question of law (particularly in complex cases) but that where, as Moses LJ expressed it, the points were not complex or difficult he was required to apply

> his knowledge of the law to the facts disclosed and to form a view as to whether an insufficiency existed. That is a matter of judgment rather than the application of any particular standard of proof. And the reference to the officer needing to reach a conclusion which justified the making of a discovery assessment has to be read in that context."
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> 85. One merit of the formulations proposed by Lewison J and Sir Andrew Morritt C is that they can be readily understood, and applied to the facts in any particular case. However, I read the conclusion at [23] of *Sanderson* as a caution against adopting these formulations as implying any particular standard of proof. The difficulty which that produces in my judgment is that while there is guidance as to what the necessary level of awareness is not there appears to be no clear guidance as to what it is.
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> 86. I have concluded that the practical effect of *Sanderson* is to require the exercise to focus on the level of disclosure in any particular case, and the extent to which that disclosure arms the hypothetical officer with sufficient information to justify the making of an assessment. As is stated in *Sanderson* (at [25]), "[t]he purpose of the condition is to test the adequacy of the taxpayer's disclosure…"
>
> 87. Subsection (5) is all about disclosure by the taxpayer (as defined by section 29(6)). The more extensive the taxpayer's disclosure by the closure of the enquiry window, the more difficult it would be for HMRC to establish that the hypothetical officer could not reasonably have been expected to be aware of the insufficiency. The taxpayer is incentivised by the legislation to place HMRC in a position where he can put them to proof at the close of the enquiry window with the question "what more need I have disclosed to have placed the officer in a position to be justified in raising an assessment?"

77. I respectfully agree with all that Judge Thomas Scott said in these passages, and in particular with the last sentence in [80]. The use of that phrase in *Sanderson* had always seemed to me to imply an impossibly high hurdle for an appellant who had not said in the return that he had used an avoidance scheme but it did not work. What Judge Scott says here also amounts to much the same thing as the passage from *Pattullo* that HMRC put forward, that it is for the taxpayer to prove that he had "clearly alerted the officer to the insufficiency".

78. I fully accept that a consideration of £1 for a house in Ripon is very unlikely to be a straightforward purchase of a freehold property for market value. No one would bat an eyelid had an officer of HMRC enquired into this return. But there was no hint of a disclosure of how any possible loss of tax arose, nothing to suggest an avoidance scheme other possibly than that Qubic was the appellant's agent, but the hypothetical officer could not be expected to know who Qubic were or, even if they did, whether all Qubic's filing of returns were of cases where there was an avoidance scheme used. What is more, if the hypothetical inspector had somehow come to the conclusion that there had been a scheme used, there is absolutely nothing in the return to explain what was done and how it worked.

79. The only answer that the appellant could reasonably have been given in response to the question "what more need I have disclosed to have placed the officer in a position to be justified in raising an assessment?" was "a lot more than you did".

80. My conclusion is that a hypothetical officer would not have been aware from the information available to them on 30 May 2010 of a loss of tax.

81. Picking up the earlier point about the disclosure letter (§72) my thoughts on what would have been the position had it in fact been received by HMRC are these.

82. Mr Kane noted that the alleged disclosure contained an anomaly if compared with the actual SDLT1 for the purchase. The appellant said in the letter that he had filed an SDLT1 reflecting the total purchase price and the fact that there was no SDLT to be paid, but the SDLT1 showed a consideration of £1, compared with the Land Registry figure of £860,000. If the letter had said the purchase price was £860,000 and the SDLT £0 then an enquiry would have been opened.

83. Mr Kane then referred to the statement in the disclosure letter by the appellant that "I do not believe there has been any scheme transactions involved and s75A FA 2003 does not apply here". Mr Kane said that this raised [I think he must mean "would have raised"] no more than a question in the mind of any officer as to what mechanism had been used to achieve the result and why no SDLT had been assessed, thus justifying an enquiry.

84. Mr Kane further points out that Qubic had disclosed the husband and wife scheme but that the appellant's scheme could not be that one, as there was only one purchaser, not joint purchasers. He assumed it would have been the scheme that David Graham told him they had moved on to without disclosing any details.

85. I accept what Mr Kane says. I merely remark that I do not understand why an officer receiving that letter should not have believed what was said and accepted that there was a valid claim to sub-sale relief, no avoidance scheme and so no loss of tax. A hypothetical officer should be taken to know that sub-sale relief exists for a genuine purpose to avoid double taxation and that accordingly, not every single use of s 45 FA 2003 would be part of an avoidance scheme. A hypothetical officer would see that the letter came not from Qubic, but from the appellant, and so could not be expected to work out that Qubic (whose name was shown as the appellant's agent on the SDLT1) were in fact not the appellant's usual solicitor or accountant, but a boutique firm supplying tax avoidance schemes which they did not wish to be connected with in the disclosure letter in which, according to the appellant, he made an appropriate disclosure of the transactions he had entered into.

86. In my view the disclosure letter was selective and misleading about the facts. It reads to me like an anti-*Ramsay* contingency. Assuming it was sent, it was designed to be as opaque about what actually happened as possible, while giving an impression of plausibility as a "making aware" within paragraph 30(3) Schedule 10 FA 2003.

Staleness

87. I indicated to Mr Mullan that I was not at all convinced by the submissions on staleness. As a result he did not press the point. I remain of that view. Even if it could be said that the discovery was a few months earlier than April 2011 I can see no basis for saying that HMRC made a discovery at a much earlier date and sat on their metaphorical hands. In mass marketed avoidance schemes there is inevitably going to be some delay, and in this case there was a wholly understandable fallow period of some months because of the police action against Mr Malcolm Graham. I accept Mr Kane's evidence that he was in no position to make a discovery even when he received the appellant's name (but only his name and no other details) in a list of clients in October 2009 (see §25).

Decision

88. Under paragraph 42(2) Schedule 10 FA 2003 the assessment stands good.

89. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 28 MARCH 2019