[2020] UKFTT 0414 (TC)

TC07891

Appeal number: TC/2018/00546
TC/2018/00549

STAMP DUTY LAND TAX – whether discovery assessment validly made – whether stale – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MERIT DEVELOPMENTS NI **Appellants**
CONWAY ESTATES LIMITED

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO
MR JOHN ADRAIN

Sitting in public at Belfast on 20 May 2019

Mr Gittins, of Montpelier Group, for the Appellant

Mr Shea, presenting officer, for the Respondents

DECISION

Introduction

1. The appellants appeal against discovery assessments made to each of the appellants on an alternate basis on 29 June 2011 under paragraph 28, schedule 10, Finance Act 2003, each in the sum of £120,000.

2. It is not disputed that the appellants were involved in transactions which sought an stamp duty land tax (SDLT) advantage and that the arrangements did not in fact operate to provide that SDLT advantage.

3. The dispute between the parties is as to whether HMRC are able to make a discovery assessment in respect of the SDLT involved. There is no dispute between that parties that Conway Estates Limited will be liable to the amount assessed if the assessments have been validly made.

Background correspondence and chronology

4. Conway Estates Limited ("Conway") had acquired £3,000,000 of share capital in Merit Developments NI, an unlimited company ("Merit"). Merit was wholly owned by Conway. The land transaction in question took place between Merit and a third party on 29 August 2007 for consideration of £3,000,000. Subsequently, on the same day, the director of Merit resolved that the company would reduce its share capital, to be satisfied by way of a distribution in specie of the property.

5. Land Registry title shows a transfer of the property from the third party to Merit and a second transfer between Merit and Conway.

6. On 27 November 2007, SDLT1 returns were received by HMRC in respect of each of the transactions. Each return had a unique reference number on it.

7. An automatically generated request for information was sent to each of the appellants seeking clarification on 28 November 2007. The clarification sought was as to the total consideration payable, as the information provided appeared to be incomplete or incorrect.

8. On or before 14 February 2008 a response was produced by each of the appellants completing the form sent by HMRC, this time stating that the consideration was nil. Both forms include a handwritten note underneath the consideration box stating "Nil consideration as the transfer was an inter group transfer by way of dividend in specie".

9. On 27 February 2008 HMRC sent two letters, one to each appellant, advising that the matter would be suspended as no response had been received to the request for information. The appellants' representatives sent a single letter, with a heading referencing both companies and containing the SDLT reference for Merit only, to HMRC stating that they had already responded and providing further copies of the responses.

10. On 27 August 2008, following a call with HMRC, the appellants' representatives wrote two letters to HMRC, one for each appellant. The letters were identical and had the same two reference numbers at the top. These reference numbers are in the same format as SDLT reference numbers but neither number corresponds to the SDLT reference numbers for the Conway and Merit transactions. Each letter referred only to the property address in the heading. The letters were sent by DX and so would have arrived at the Stamp Office at least one day later.

11. Each letter stated that they did not consider that it was necessary to complete box 10 on the SDLT1 but "for the sake of administrative convenience and to progress matters" they enclosed the relevant form sent by HMRC on 28 November 2007, stating the consideration to be £3,000,000. The letters also stated that "By virtue of section 44 of the Finance Act 2008, the actual consideration on the transaction was reduced to £nil".

12. On 6 October 2008, HMRC wrote to each of the appellants stating that SDLT of £120,000 was due as the consideration had been stated to be £3,000,000 in the SDLT8a forms.

13. On 16 October 2008, the appellants' representatives wrote to say that it was their understanding that no SDLT was due and that the appellants' tax advisers would be responding in greater detail. On 6 January 2009, they wrote to HMRC again asking HMRC to advise why they considered that a nil liability was incorrect. Both of these letters were single letters, including the SDLT reference numbers for both transactions.

14. HMRC responded on 26 January 2009, in two letters (one for each appellant) to advise that no relief had been claimed on the returns. On 3 February 2009, the appellants' representatives wrote to say that they had referred the correspondence to the appellants' tax advisers and would be contact shortly.

15. On 4 September 2009, the appellants' representatives wrote to HMRC referring to their letter of 6 January 2009 and asking for a response. The heading of that letter includes a reference to "Merit Homes Limited". HMRC wrote on 28 September 2009, in two letters (one for each appellant) confirming that a response had been issued on 26 January 2009.

16. On 8 October 2009, in two letters (one for each appellant) HMRC wrote to the appellants' representatives "in response to a recent query from you" and asking for them to confirm their self assessment of the duty in box 14, specifying any amendments which they wished to make to reflect this, and asking for them to clarify the matter.

17. On 12 October 2009, the appellants' representatives wrote to say that they had no record of the earlier correspondence referred to in HMRC's letter of 28 September 2009. They enclosed copies of the SDLT1 returns "showing the basis on which the SDLT liability was reduced to nil" and stated that they understood that a full copy of the return may not have been available to the officer dealing with the matter. The

covering letter referred to "Ravencross Developments Limited" and "Merit Homes Limited". Ravencross was the previous name for Conway.

18. The copy return for Conway stated at box 10 (regarding the total consideration) that the consideration was £0 and includes the following note: "(Reduced to nil by s.44 Finance Act 2003)". The copy return for Merit stated at box 10 (regarding the total consideration) that the consideration was £0 and includes the following note: "(Reduced to nil by s.45 Finance Act 2003)".

19. On 14 December 2009, a compliance technician (since retired) for HMRC wrote, in a single letter, to the appellants' representatives stating that she had looked into the detail of the interaction between the representatives and HMRC. She advised that the automatic processing of the returns would not have picked up the handwritten notes and, as the system would not expect a return for a transaction with nil consideration, an exception report was generated. When the forms with details of the £3,000,000 consideration were first supplied, the system treated that as a correction of the return, creating an SDLT charge.

20. The author stated that she had thought, as she had discussed with the representative in a call that day, that the letter of 12 October 2009 should be treated as a taxpayer amendment but explained that she had changed her mind and agreed to undo the earlier correction, returning the SDLT charge to £0. The letter further notes that the handwritten notes on the form "did not constitute a full disclosure … there is no restriction on HMRC assessing the full tax due on the £3m consideration paid for the property … HMRC has six years [as the relevant time limit then was] following the effective date of the transaction in which to make such an assessment."

21. The same compliance technician produced a file note on the same date which states that "I now know that it is a potential subsale & divi in specie post s75a case, so it needs adding to the potentials list. Jayne is thinking about what to do about discovery cases … Discovery - needs stencil (SIP) & adding to discovery potentials".

22. Following further investigation of SDLT schemes and lead litigation, HMRC issued discovery assessments under paragraph 28. Schedule 10, Finance Act 2003 on 29 June 2011. These were issued to the appellants on an alternate basis.

23. The assessments were appealed on 16 August 2011. Following further correspondence between the parties, HMRC offered a statutory review of the decisions on 15 September 2017. The appellants accepted the review offer on 11 October 20176. HMRC issued a review decision on 20 November 2017, upholding the decisions. On 20 December 2017 the appellants appealed to the tribunal.

HMRC evidence

24. Officer Kane provided a witness statement and gave oral evidence at the hearing as follows:

25. In late 2008 he had taken responsibility for enquiries opened by the Stamp Office involving sub-sales followed by a distribution in specie of the property, often

utilising an unlimited company contracting to buy a company and, before completion of the contract, cancelling its share capital in an amount equal to the purchase price of the property and resolving to satisfy the repayment by distribution in specie of the property.

26. HMRC had been aware of such arrangements as early as 2006 and had in December 2006 introduced the s75A anti-avoidance rules with the intention of stopping what was perceived to be an abuse of the s45 FA 2003 sub-sale rules. There were numerous variations of the schemes, taking account of different user circumstances.

27. In late 2008 HMRC had under enquiry around 300 disclosed users of variants of the scheme. Around 70 of these cases related to transactions entered into before s75A had come into force. Some of these cases had provided documents and explanations as to how the scheme promotors believed that the schemes circumvented a charge to SDLT.

28. HMRC Stamp Office had established that more users had entered into the scheme after s75A came into force than before and were concerned that s75A did not had its intended effect across all of the scheme variations. It was therefore considered that a detailed consideration of each variant would be required in order to form a view of the relevant tax consequences.

29. Officer Kane requested scheme documents from a number of open enquiries and produced an analysis of three scheme variations. On 15 July 2009, Counsel's opinion was obtained that there was an arguable case that an SDLT charge would arise in each of the three scheme variations.

30. Following confirmation from Counsel that the schemes did not work, Officer Kane and his team began work to identify undisclosed users of the schemes. This was done on a rolling basis, data matching information by scheme and for time periods based on the proximity of the discovery assessment time limits. The team working on these cases was small and had to make a choice as to how to process matters.

31. HMRC had purchased Land Registry data in late November 2010 to speed up checks by looking for same day transfers, although checks would still be required against Companies House data. No Land Registry data was available for this case as the property involved was in Northern Ireland so manual checks had to be undertaken.

32. Data matching checks on this case were carried out in Summer 2011. The transactions were only linked once the data matching exercise had been carried out.

33. Once it was confirmed that neither return had been enquired into, the discovery assessments were made and issued.

34. The discovery was made, and could only have been made, when the team had checked the SDLT returns and Companies House records and identified:

(1) the same day onward transfer of the property;

(2) the shareholding of Conway in Merit;

(3) the date of the resolution declaring the dividend in specie.

35. This information was not established sometime after 20 April 2011, when the list identifying Merit as requiring further checks was produced.

36. It is not possible to conclude from the SDLT1 return that Merit was an unlimited company as the return does not specifically say that Merit is unlimited. Without that information, it is not clear that the arrangements were intended to avoid SDLT.

37. A letter sent by the officer to the appellants on the same day, reducing the SDLT charge to £0, sets out the ability of HMRC to raise discovery assessments. The letter heading refers to the appellants as "Conway Estates Limited" and "Merit Homes Limited". This correspondence followed correspondence from the appellants' solicitors on 4 September 2009, 12 October 2009 and 13 October 2009 each of which referred to "Merit Homes Limited" in the heading. A small number of SDLT schemes had used, as the first acquirer, a company limited in the Isle of Man.

38. No disclosure letters were received by HMRC. Although the SDLT1 returns have handwritten notes on the returns referring to ss44 and 45 FA 2003, these would not have been recorded in HMRC systems as SDLT1 forms are processed by machine and will only record the information in the boxes for each question. Officer Kane had visited the processing centre in order to determine the processes followed. HMRC guidance states that any disclosure or further information must be sent separately to HMRC Stamp Taxes Office and not to the Rapid Data Capture Centre (RDCC), where the returns were sent. Forms sent to the RDCC are destroyed after a period of time when there is no enquiry.

39. The correspondence with the appellants during 2008 was not undertaken because it was considered that there was a sub-sale scheme but, instead, was generated by an exception report. The consideration stated on each SDLT1 was £0. Where no consideration has been given, no SDLT1 return is required and, instead, an SDLT60 is submitted to the Land Registry with the land transaction return. Due to the mismatch, a query was sent to request details as the return appeared to be either incomplete or incorrect.

40. The information in the returns also does not prompt a conclusion that the SDLT is understated. There is nothing in the returns which gives any indication that an SDLT avoidance scheme had been used by either appellant or that tax which should have been assessed had not been. No known scheme promoter was identified in the returns or correspondence. HMRC were not aware that Montpelier had any involvement in the arrangements until their skeleton argument for the hearing was received.

41. The information provided by the agents in their letter of 12 October 2009 also does not lead to the conclusion that there has been an understatement of SDLT. That letter was provided after the enquiry window had closed and so does not fall within

the class of information regarded as made available to HMRC for the purposes of enquiry time limits.

42. The case file notes in respect of the appellants showed that an HMRC compliance officer who has since retired had noted, on 14 December 2009, that she "now know[s] that this is a potential sub sale and divi in specie post s75A case, so it needs adding to the potentials list. [A clerical manager] is thinking about what to do about discovery cases".

43. A matter placed on the potential scheme list would need to have further information obtained by disclosure or other sources in order to identify whether a scheme had been used and if so, which. Where a matter had been identified as actually involving avoidance, an enquiry would be opened immediately.

44. At the time the matter was added to the potentials list, HMRC had only the SDLT1 returns, SDLT8a forms and correspondence relating to those returns and forms. It did not know that Merit was an unlimited company.

45. It was not until a check against HMRC's record of companies was carried out that it was established that Merit was not a limited company established in the Isle of Man but, instead, an unlimited company registered in Northern Ireland. The list which included Merit for further checking was generated on 20 April 2011. The confirmation that Merit was unlimited was received on 28 June 2011.

HMRC submissions

46. HMRC submitted that:

> (1) it was clear from relevant case, such as *Valtema* and others that for a discovery to arise, an officer must be aware of an actual insufficiency and not simply aware that something may need to be enquired into.
>
> (2) nothing had been disclosed in either the SDLT returns nor the correspondence to indicate that the appellants' had used an SDLT scheme. Sub-sale relief can be used for legitimate purposes.
>
> (3) there was nothing in the SDLT returns to connect them, and no covering letter had been supplied with the SDLT returns which indicated that they were connected transactions. No correspondence before the enquiry window closed indicated that these were connected transactions.

47. HMRC therefore submitted that not enough information had been supplied before the end of the enquiry window for HMRC to be aware that there could be an insufficiency.

48. Further, it was not until Counsel's opinion was obtained in June 2009 that HMRC were able to conclude that the schemes did not work. At the end of the enquiry window, HMRC had no settled view as to whether the types of schemes led to an insufficiency of tax.

49. The appellants' submission that there was no requirement for HMRC to await Counsel's opinion as to the operation of the schemes was incorrect for two reasons: firstly, no disclosure had been made as to the use of a scheme and secondly, without Counsel's opinion, HMRC could not be certain that the schemes led to an insufficiency of tax.

50. The logical conclusion of the appellants' submissions that the references to s44 and s45 FA 2003 in the forms returned to HMRC in 2008 should have alerted HMRC to an insufficiency of tax was that the appellants should, similarly, have been aware from the contents of the returns that there was an insufficiency of tax in the returns and that they had negligently understated their liability to SDLT.

51. HMRC submitted that the discovery was made in 2011, not in 2009, and so there was no question of staleness in this case. The correspondence in December 2009 referred to by the appellants was dealing with processing the returns as instructed by the appellants and not to any discovery by the author of the letter. The reference to HMR's ability to make assessments was included to ensure that the appellants were aware that HMRC were not precluded from investigating those returns. The internal note stating that the matter was to be put on the "potentials list" was indication that further investigation was needed, and not evidence that a discovery had been made.

52. HMRC submitted that the matter was not then "put on hold" but, instead, this was one of thousands of cases which needed to be considered and resources were allocated according to priorities. Further work was needed to establish whether there was an insufficiency of tax. The work undertaken in this case to establish whether there was an insufficiency was undertaken, and so the discovery made, shortly before the assessments were raised in 2011:

(1) the SDLT return information was retrieved on 15 February 2011;

(2) the spreadsheet setting out the "phase 2 cases" for review, Including Merit, was dated 20 April 2011;

(3) the necessary Companies House information to confirm that Merit was unlimited was retrieved on 28 June 2011, the day before the assessments were made.

53. It was submitted that it was only when it was confirmed that Merit was unlimited that the discovery was made.

54. There was, therefore, no delay between the discovery and the making of the assessment and so the discovery was not stale.

Appellant evidence

55. Mr McElroy, solicitor, provided a witness statement and gave oral evidence at the hearing. His firm had acted on behalf of Merit nd Conway and he had been involved in the relevant transactions.

56. He had been advised that s45 Finance Act 2003 operated to reduce the amount chargeable to SDLT to nil and that no SDLT return was required, but that it was

prudent to do so in order to make full and proper disclosure to HMRC. The returns had been prepared on the advice of Counsel. He confirmed that no covering letter or other documents had been sent with the returns but did not know if the returns had been sent in the same envelope. He did not believe that he was aware at the relevant time that the forms would go to an automatic data capture centre. He was not aware that data written outside the boxes on the forms would not be captured.

57. He considered that enough information had been provided in the SDLT returns to identify that an SDLT scheme had been used as the references to s44 and s45 Finance Act 2003 would have been enough to alert a hypothetical officer to an actual insufficiency. The advice that had been obtained from Counsel was that the application of s44 and s45 reduced the chargeable consideration to nil. He considered that it was a question of interpretation and that, if HMRC did not agree that a dividend in specie fell within ss44 and s45 then they could be aware of an insufficiency. He agreed that there was no reference to a dividend in specie in the SDLT1 returns. He also agreed that there was no reason to claim sub-sale relief on a dividend in specie between two group companies as group relief would be available.

58. The responses to the SDLT8a forms, stating that consideration was nil, were also prepared on the advice of Counsel.

59. The SDLT8a forms were resubmitted in August 2008, following a conversation with HMRC as to the correct approach, showing consideration of £3,000,000 as it was considered that HMRC were incorrect in their view that no SDLT1 form should have been submitted and an SDLT60 used instead. A covering letter was sent to confirm that the chargeable consideration was nil.

60. He stated in the hearing that the scheme used had been discussed with the officer who had written the December 2009 letter, and he thought that the call had been made on the basis that the officer believed that a scheme had been used and he had the impression that she would open an enquiry.

61. Mr McElroy confirmed that no correspondence had been received from HMRC between December 2009 and January 2011.

Appellant submissions

62. The appellants submitted that HMRC were aware from 26 November 2007, or shortly thereafter, that the two transfers had taken place as the SDLT returns showed a transfer to Merit and a transfer from Merit to Conway on the same day. It was also submitted that, as there was a note on each of the SDLT1 returns referring to s44 and s45 Finance Act 2003, HMRC knew that the appellants considered that the chargeable consideration had been reduced to nil. The appellants also noted that Merit was not referred to as a limited company in its return whereas Conway was so referred to.

63. The responses on the SDLT8a forms also meant that by mid-February 2008 HMRC were also aware that there had been a dividend in specie transferring the property.

64. The appellants submitted that HMRC were therefore aware by mid-February 2008 that:

(1) both transfers took place on the same day

(2) Merit and Conway were parent and subsidiary

(3) Merit had unlimited liability; Conway had limited liability

(4) a dividend in specie had been paid, transferring the property

(5) the appellants had relied on s44 and s45 Finance Act 2003 to reduce the taxable consideration to nil

65. The appellants submitted that the letter of 27 August 2008 repeated this information and drew attention to the use of s44 Finance Act 2008 and that HMRC were therefore aware that the claim for sub sale relief involved two transfers, and knew that a normal sub sale relief claim would involve the assignment of a contract with a single transfer of the property and would not involve a dividend in specie.

66. The appellants submitted that no new information was established from Companies House and Land Registry searches. The fact that Merit was not a limited company was self-evident from the SDLT1 and in any case could have been quickly checked shortly after 14 December 2009.

67. The appellants submitted that the letter of 14 December 2009 shows that an HMRC officer had concluded that an assessment could be raised, as it shows that the author understood that the taxpayer considered that the liability to SDLT was reduced to nil by the operation of s44 or s45 Finance Act 2003.

68. The appellants submitted that it is incorrect that HMRC required counsel's opinion before they were able to determine whether there was an insufficiency of tax; the burden is on HMRC to show why the insufficiency could not be discerned from the return and/or related information. They had been advised that the appellants relief on s44 and s45 Finance Act 2003, which concern sub-sale relief known to HMRC to be used in tax avoidance, and which HMRC knew before 2007 was used in tax avoidance; they had been advised that there had been a dividend in specie, clearly connecting the appellants.

69. Therefore, they submitted that a hypothetical officer could have been reasonably expected to have been aware of the insufficiency such that the test in s30(b) is not met. HMRC's submissions that the correspondence during the enquiry window related only to queries over the return did not explain why no enquiry was opened as it was evidently in the mind of the relevant officer that the land transaction of £3,000,000 might have been relevant to SDLT.

70. It was submitted that the officer who wrote the December 2009 letter was able to identify the matter as being a potential sub-sale case on the basis of the information that was available before the enquiry window expired. The appellants submitted that this clearly suggests that HMRC had formed a view that there was an insufficiency before the enquiry window closed.

71. The appellants accordingly submitted that the discovery was made at the latest by 14 December 2009 if not earlier and that, as the assessments were not raised until June 2011, the discovery had become stale in line with decisions in *Pattullo* and others. HMRC's explanation that they were working cases on the basis of the discovery window shows that they deliberately chose to delay issuing the assessments without good reason.

Relevant law

72. Para 28 Schedule 10 FA 2003:

> (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.

73. Para 30 Schedule 10 FA 2003:

> (1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28 or 29 in respect of the transaction—
>
> (a) may only be made in the two cases specified in sub-paragraphs (2) and (3) below, and
>
> (b) may not be made in the circumstances specified in sub-paragraph (5) below.
>
> …
>
> (3) The second case is where the Inland Revenue, at the time they—
>
> (a) ceased to be entitled to give a notice of enquiry into the return, or
>
> (b) completed their enquiries into the return,
>
> could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 28(1) or 29(1).
>
> (4) For this purpose information is regarded as made available to the Inland Revenue if—
>
> (a) it is contained in a land transaction return made by the purchaser,

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

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

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

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

…

Discussion

74. The burden of proof is on HMRC to show that the assessments were correctly made, on the balance of probabilities.

Whether HMRC was precluded from raising an assessment by para 30(3), Schedule 10 FA 2003

75. It was not disputed that HMRC ceased to be able to give a notice of enquiry in to the SDLT returns on 27 August 2008, nine months after the date on which the returns were filed, as they were filed after the filling date (per para 12(2)(b), Schedule 10 FA 2003).

76. The question is whether they could reasonably have been aware, on the basis of the information available to them before that time, that an assessment to tax is insufficient. The definition of "information made available" is set out in para 30(4) Schedule 10 FA 2003.

77. The approach to be taken in considering whether there has been a discovery is set out in *Langham v Veltema* [2002] STC 1557 ('Veltema'), where the Court of Appeal established that the test is whether a hypothetical officer could have been reasonably expected to be aware of an actual insufficiency in the assessment, not that the officer should have been aware that something should be checked to see whether there is such an insufficiency. Although *Veltema* was concerned with income tax, there is no reason to consider that it does not apply in the case of income tax.

78. Considering the timetable in this case to establish what the hypothetical officer should be considered to know:

79. At 27 November 2007 Merit's SLDT1 states that a property has been acquired from an individual, that the consideration is nil, and that the form of the consideration was code '30', which is the code for cash. The "no" box is checked in box 9 which asks whether relief is being claimed. A handwritten note under box 10, which states consideration is "0" notes that consideration has been reduced to nil by s45 Finance Act 2003. The purchaser is stated to be "Merit Developments NI".

80. At the same date, Conway's SDLT return states that a property has been acquired from Merit, that the consideration is nil, and that the form of the

consideration was code '30', which is the code for cash. The "no" box is checked in box 9 which asks whether relief is being claimed. A handwritten note under box 10, which states consideration is "0" notes that consideration has been reduced to nil by s45 Finance Act 2003. The purchaser is stated to be Ravenscross Developments Ltd (the previous name for Conway). The vendor is stated to be Merit Developments NI.

81. The two SDLT1 returns were sent to an automated data processing centre which does not record information provided outside of the boxes on the form. The handwritten information below box 10 was therefore not recorded on HMRC's systems. However, we consider that it is information contained in a land return made by the purchaser and is therefore to be regarded as information made available to HMRC (per para 30(4)(a) Schedule 10 FA 2003).

82. At some point before August 27 2008 HMRC received two SDLT8a forms, requested by HMRC initially in December 2007, each stating that consideration is nil as the transfer was an inter-group transfer by way of a dividend in specie with a covering letter which includes a heading referring to each company and containing the SDLT reference for Merit only. The letter refers to a single letter from HMRC dated 27 February 2008.

83. However, this covering letter and its attachments are not information produced or provided to HMRC for the purposes of an enquiry into the SDLT1 submitted by Merit nor did the appellants submit that it should be treated as if it were an enquiry into the return. We find that the form is automatically produced by HMRC's systems to request information that is missing from the return and that it does not amount to a enquiry. Therefore, no enquiry was opened into that return. This information does not, therefore, fall within para 30(4)(b) or para 30(4)(c)(i).

84. We find that the letter from Merit's representative does not amount to information available to the hypothetical officer. Para 30(4) allows inference only in respect of information contained in a land return or in documents or information provided for the purposes of an enquiry into the return (para 30(4)(c)(i)). For any other information to be regarded as made available, its existence and its relevance must be notified in writing to HMRC (para 30(4)(c)(ii).

85. We do not consider that:

(1) the reference to Conway in the heading of the letter, and

(2) the reference in the SDLT8a for Conway to the same property, and

(3) the reference in the SDLT8a for Conway to a dividend in specie

amounts to notification in writing to HMRC of the existence of information regarding the group relationship between Merit and Conway.

86. It might be inferred from the letter and its attachments that there is some connection between Merit's transaction and Conway's transaction, and between Merit and Conway, but we consider that it is clear that the legislation requires that the existence of the information and its relevance to an insufficiency of tax be notified in

writing to HMRC. We consider that this means that the existence and relevance must clearly stated and not simply be capable of being inferred from information provided. We consider that, if Parliament had intended that the hypothetical officer should be regarded as having had access to information which could reasonably be inferred from information provided outside a land transaction return or enquiry, para 30(4)(c)(ii) would have included reference to such inference.

87. We consider, therefore, that the information available to a hypothetical officer with regard to Merit at 27 August 2008 was:

(1) that Merit had made reference in their SDLT1 to sub-sale relief in respect of a purchase from an individual;

(2) tax avoidance schemes existed which used sub-sale relief;

88. We do not consider that the hypothetical officer would be aware that Merit was unlimited. The lack of any suffix to the name does not mean that it can be reasonably inferred that Merit had unlimited status.

89. We do not consider that the hypothetical officer would be aware that Merit and Conway were members of the same group as there is no reference to Conway in the SDLT1.

90. We do not consider that the hypothetical officer would have been aware that the transfer was described as having been an inter-group transfer by dividend in specie.

91. We do not consider that it is reasonable to expect on the basis of the information provided in accordance with para 30(4) that the hypothetical officer would have been aware that the SDLT declared on Merit's return was insufficient. The fact that sub-sale relief can be claimed as part of tax avoidance arrangements does not mean that all sub-sale relief claims relate to tax avoidance arrangements. As set out in *Veltema*, we are not looking at what information the hypothetical officer could have found out if enquiries had been made but, instead, what information was actually available.

92. With regard to Conway, we consider that the information available to a hypothetical officer at 27 August 2008 was:

(1) that Conway had claimed sub-sale relief in respect of a purchase from Merit;

(2) tax avoidance schemes existed which used sub-sale relief.

93. We do not agree that the officer would have been aware that Merit was unlimited. In the same way as above, we do not consider that the lack of the suffix "Ltd" in respect of Merit on Conway's SDLT1 is information from which it can be reasonably inferred that Merit is unlimited.

94. As above. we do not agree that the hypothetical officer would have been aware of the group relationship between the companies as the SDLT8a forms and their covering letter were not information provided to HMRC for the purposes of an enquiry into Conway's return, for the same reasons given above in respect of Merit.

95. We also do not agree that the reference to Merit as the vendor in Conway's SDLT1 meant that the group relationship between them could be reasonably expected to be inferred by a hypothetical officer. All transactions have a vendor; sub-sale relief can be legitimately claimed. A hypothetical officer cannot be reasonably expected to infer that there is a group relationship between a vendor and purchaser simply because there is a reference to sub-sale relief in the return and the vendor is not an individual.

96. We do not agree that the information made available in accordance with para 30(4) was sufficient for a hypothetical officer to be reasonably expected to have concluded that the SDLT declared on Conway's return was insufficient. Although HMRC were aware at the time that there were tax avoidance schemes using sub-sale relief, not all claimants of sub-sale relief were undertaking tax avoidance schemes.

97. We consider, therefore, that HMRC were not precluded from raising a discovery assessment on each of the appellants.

Was the discovery assessment stale?

98. The Upper Tribunal has established in cases such as *Beagles* ([2018] UKUT 380 (TCC)) that, in certain circumstances, a discovery can become stale and is therefore invalidly issued. HMRC disagrees with this position but decisions of the Upper Tribunal are binding upon us and so we proceed on the basis that a discovery can become stale.

99. The assessments were issued on 29 June 2011. What needs to be established is when the discovery was made, and whether it could be regarded as having become stale by 29 June 2011. The appellants submit that the discovery had been made, at the latest, by the HMRC officer who wrote the letter of 14 December 2009 and that it had therefore become stale by June 2011 when the assessments were issued. HMRC submits that the discovery was made when it was established that Merit was an unlimited company, shortly before the assessments were issued in June 2011 and that the discovery could not be said to have become stale.

100. The discovery in question is the actual discovery that there was an insufficiency of tax, by a non-hypothetical HMRC officer. This involves a subjective test as to when the insufficiency was actually discovered, not when a reasonable officer might have been reasonably expected to have been discovered the insufficiency from the available information (as set out, for example, in *Pattullo* [2016] UKUT 270 (TCC) at §41). The appellants' submission that no new information was provided between 14 December 2009 and the making of the assessment is, accordingly, not relevant: when considering staleness, the question is whether the discovery has become stale, not whether the information on which the discovery is based has become stale.

101. The Upper Tribunal in *Pattullo* also noted that:

> "The process of discovery, or coming to a realisation, or forming a view, whichever expression one chooses, is not always as simple as is suggested by the metaphor of crossing a threshold. There may be moments when the discovery of new information causes an inspector briefly to form a view that more tax is owing than has been assessed.

> But then he may reflect that perhaps he has been overhasty in coming to that conclusion, perhaps he needs more information, one more piece of the jigsaw. This may happen a number of times. It may not always involve the acquisition of further information. It may involve legal research, or further reflection on the legal research already carried out. Or it may simply be a question of taking more time to think…"

102. We note that HMRC had established in July 2009 that various types of SDLT scheme did not work and so would create an insufficiency of tax. We do not consider that this amounts to a discovery in respect of the appellants' cases because neither appellant had specifically disclosed the use of an SDLT scheme to HMRC and there is no evidence before December 2009 that any HMRC officer had reviewed the file to establish that the returns showed an insufficiency of tax.

103. Indeed, the returns had been processed on the basis that there was an SDLT charge, following the SDLT8a forms submitted in August 2008. which the appellants were disputing. It is clear from the appellants' evidence that HMRC's concern in August 2008, when the amended SDLT8a returns were submitted, was that the returns were not required at all as a transaction for nil consideration would be dealt with using an SDLT60 form. That is, the concern was procedural rather than because there had been a discovery of an insufficiency.

104. As stated in evidence HMRC's systems had automatically identified that there was information missing in the SDLT returns and automatically generated requests for that information. When the information was provided, the SDLT returns were finally processed. On the basis of the information provided, the system calculated that additional SDLT was due. As is clear from *Pattullo*, a discovery can only be made by an HMRC officer. We do not consider that an automated invoice for unpaid SDLT generated as a result of automatic processing of a form creates a discovery of an insufficiency of tax for these purposes.

105. When the appellants challenged the SDLT invoices, the response from HMRC on 26 January 2009 from "Birmingham Finance Team" was that SDLT was due "because the consideration has been notified as £3,000,000 and no relief has been claimed … [and] no payment received". Separate letters were sent in respect of each of Merit and Conway. There is no reference to sub-sale relief nor to the dividend in specie. There is no indication that HMRC raised that the transactions or parties were connected.

106. The correspondence between HMRC and the appellants prior to December 2009 therefore focused on information which HMRC's systems considered was missing from the SDLT1 returns, and subsequently on demands for payment, rather than on any question as to whether the SDLT amount on the return was insufficient specifically as a result of the sub-sale relief which the appellants considered applied.

107. We considered the correspondence written and the file note created on 14 December 2009. This followed the provision of the copy SDLT1 returns by the appellants' representatives in a single letter which gave both SDLT references. From the contents of the file note, we consider it is clear that she had therefore reviewed the

information on the files and had realised that the transactions were connected and that the transactions involved a sub-sale and a dividend in specie. She clearly had some suspicion that the parties had used a scheme.

108. The information in the letter to the appellants notes that the handwritten note on the SDLT1 return does not amount to full disclosure of the arrangements involved, such as would be required to prevent a discovery assessment. We do not consider that this means that a discovery had been made but, instead, it can equally be interpreted as advising that the restoration of the SDLT position to that intended by the appellants is not acceptance that such position has been agreed by HMRC.

109. It is unfortunate that neither party produced the author of the letter as a witness; HMRC explained that she had since retired and was not available. The appellants argued that they were not in a position to demand that she appear, although we noted that an application could have been made to the Tribunal to require that she give evidence. No such application was made.

110. Nevertheless, on the balance of probabilities from the evidence provided to us, we do not consider that the author had made a discovery. As stated in *Beagles* (at §70):

> ”The relevant officer must come to a conclusion or have “found out” from the evidence before him or her that there is an insufficiency in the return”

and, as noted above, the Upper Tribunal in *Pattullo* noted that that process may take some time. It is clear from the file note that author considers that more work needs to be done to establish whether there actually is an insufficiency: the matter is referred to as a “potential” sub-sale and dividend in specie scheme and that it should be added to the “potentials” list. Although there is reference to discovery, the file note states that the matter needs “adding to discovery potentials”. The “SIP” stencil referred to was, from HMRC’s evidence, a copy of the SDLT1 return and copies of correspondence and call logs relating to the returns so that the information was available to the investigation team when the potentials list was processed.

111. HMRC’s evidence was that matters transferred to the potentials list still needed further information to determine whether a scheme had been used and, if so, which. The legal analysis undertaken in 2009, and Counsel’s opinion in July 2009 was that three variants of sub-sale schemes did not work. This is not, as in *Beagles*, a case where a specific scheme had been used and identified as such to HMRC in the return.

112. The author refers to “Merit Homes Limited” in the heading of the letter, following the heading in the appellants’ representatives’ letter in October 2009. We do not consider that she had established that Merit was an unlimited company, which was a key point to the arrangements. HMRC’s evidence was that without that information, or confirmation that the company was a limited company incorporated in the Isle of Man, it was not possible to conclude that an insufficiency of tax existed. As set out above, we do not consider that information about the status of Merit had been

provided to HMRC at August 2008 and further we consider that that no evidence as to Merit's status had been obtained by HMRC by December 2009.

113. Finally, the author reduced the SDLT liability on HMRC's systems on both returns to zero in December 2009. We do not consider that an HMRC officer, having made a discovery that there was an insufficiency of tax, would take such a course of action rather than open an enquiry. Although her letter includes a note of HMRC's powers in relation to discovery assessment, we do not consider that this indicates that she had actually reached a conclusion and so made a discovery by this date.

114. It should be noted that this does not mean that we consider that the insufficiency of tax was created by HMRC's letter of 14 December 2009. It is clear from the letter than the author is ensuring that the self-assessment shows the information stated on the SDLT1 returns and not amending the returns.

115. Between December 2009 and June 2011, the evidence of Officer Kane was that the team dealing with such potentials was extremely busy and was dealing with each case on the basis of proximity to discovery assessment deadlines. We do not consider that there was any evidence that a discovery had been made and that the assessment had been deferred until closer to the deadline: the evidence was clearly that no assessment or indeed necessary research was undertaken in respect of a case until it was close to deadline in order to ensure that the team made best use of its capacity to deal with the cases.

116. We do not consider that there is anything in the legislation that requires HMRC to start to undertake enquiries simply because it has some information that indicates that there might be an insufficiency of tax, where no discovery has yet been made. The point is clear when considering staleness that the concept requires that an officer has actually made a discovery, not simply that a discovery could have been made from information that HMRC could have requested.

117. We therefore conclude, on the evidence before us and the balance of probabilities, that the relevant discovery was made when HMRC established that Merit was an unlimited company on 28 June 2011. As the discovery assessment was made a day later, we do not consider that it can be considered to have become stale.

Conclusion

118. As we have decided that HMRC were not precluded from raising a discovery assessment by para 30 Schedule 10 Finance Act 2003 and that the assessments made on 29 June 2011 were not based on stale discovery, the appeals are dismissed.

119. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

RELEASE DATE: 17 OCTOBER 2020