[2017] UKFTT 828 (TC)

TC06223

Appeal number: TC/2015/05562

SDLT -discovery assessment – whether disclosure letters made HMRC aware of insufficiency - no – whether assessments served on appellant or at usual or last known place of residence – yes - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALISON LLOYD **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale
Mr David Batten

Sitting in public at Reading Employment Tribunal, Friar Street, Reading on 19 September 2017

Ms Rahman and Mr Khan, of Churchill Tax Advisers for the Appellant

Mr Shea, HMRC Officer, for the Respondents

DECISION

1. The appellant was assessed to SDLT on two property transactions on 1 March 2012. She appealed. HMRC accepted that the appeal was lodged in good time; the appellant did not contest her liability to the tax assessed nor to the calculation of the assessment (one assessment for £1,765 and one for £39,521). The only issue between the parties was whether the two discovery assessments were valid and had been duly served.

2. Initially, one ground of appeal was that the assessments were out of time: at the hearing Ms Rahman confirmed that the appellant now accepted that the assessments were in-time as made on 1 March 2012 and would not pursue this ground of appeal. So we dismiss that ground of appeal.

3. That left only two remaining grounds of appeal, although at the hearing the parties referred to there being three grounds of appeal, as there were two main areas of dispute in respect of the first remaining ground of appeal. Those two grounds were whether:

(1) the preconditions for making a discovery assessment were met. In particular:

(a) Did HMRC receive two letters of disclosure from the appellant's solicitors?

(b) And if they did, whether the disclosure was sufficient to prevent the discovery assessment?

(2) whether the discovery assessments were notified to the appellant in accordance with the law. This also split into two questions:

(a) Were the notices of assessment actually received by the appellant;

(b) If not, were they deemed to have been served on the appellant?

4. It was accepted that the notices of assessment were sent to 'East Lodge' which had at various times been the appellant's address. It was her case that at the date of the assessments her address was 'Willow Tree Farm' and HMRC knew that. Both addresses were in the South West of England, but not in the same county.

Ground 1(a): did HMRC receive the discovery letters?

Ground 1(a): the law

5. We deal with the statutory law on discovery assessments in detail below when dealing with Ground 1(b) and the question of whether the content of the disclosure letters was sufficient to prevent a later discovery assessment. Ground 1(a) was simply a question of fact and that was whether the disclosure letters were ever sent or received.

6. We were referred to s 7 of the Interpretation Act 1978 which applies wherever an Act 'authorises or requires' a document to be served by post and which effectively

raises a presumption that a letter which is posted is received in due course. S7 means it is for the recipient to prove that the letters were not received.

7. However, strictly speaking, it seems to us that the Interpretation Act 1978 is not relevant here because the disclosure letters were not letters either authorised or required to be sent by post; there is no reference to disclosure letters whatsoever in the legislation applicable to SDLT. The disclosure letters were not letters which the SDLT legislation 'authorises or requires' to be served at all.

8. But it also seems to us that it would make no difference whether or not s 7 is strictly applicable: as the burden of proof is on HMRC to prove that the conditions to make a discovery assessment are met (see *Household Estate Agents Ltd* [2008] STC 2045 per Henderson J at [45]), whether or not s 7 applies, it is for HMRC to prove (if they can) that they did not receive the disclosure letters.

9. So far as the question of whether the letters were actually sent is concerned, even though the burden of proof is on HMRC to prove that the conditions for making a discovery assessment are met, they would not have to prove that a disclosure letter was not sent in the absence of any evidence that it was sent. So the question is whether Ms Lloyd can show it was more likely than not the disclosure letters were sent (a 'prima facie' case) and whether HMRC can rebut that.

Ground 1(a): the facts

The evidence

10. The Tribunal had the benefit of various documents, such as copy letters, and the witness evidence of the appellant and an HMRC officer, Mr Kane. It also had print outs of HMRC's SA notes which were explained to us and accepted to be the electronic notes which were made by the self-assessment HMRC team, and recorded matters such as the taxpayer's addresses as known to HMRC.

11. It makes sense to start the recital of facts with the SA Notes as they turned out to be only really relevant to the question of the reliability of Ms Lloyd's evidence. We explain why.

The SA Notes

12. The appellant put reliance on HMRC's SA notes as proving that the notices of assessment were not correctly served on her because they were posted to East Lodge. It was her case that the SA notes showed that (a) East Lodge had ceased to be her 'base address' in January 2011; (b) a return letter service was set in July 2011 in respect of East Lodge (c) and HMRC knew East Lodge was not her address by the start of 2012 as they wrote to her at Willow Tree Farm on 25 January 2012.

13. We don't agree entirely with the appellant's analysis of the SA notes and we do not agree with what can be drawn from them. In particular, the SA notes could only record what HMRC thought her address was: the fact that the SA notes show a particular address does not actually mean that that address was correct.

14. Having said that, it was accepted that HMRC did send the appellant a letter addressed to her at Willow Tree Farm on 25 January 2012. Nevertheless, it is clear that the officer was uncertain of the appellant's address at that date as he sent duplicate copies of the letter, one to her at East Lodge and one to her at Willow Tree Farm. Therefore, the appellant is wrong to say that HMRC knew as at 25 January 2012 that East Lodge was not her address.

15. It was also not in dispute that an 'RLS' (accepted to mean 'return letter service') was set by HMRC on 13 July 2011 and unset on 2 December 2011. So far as the RLS was concerned, this did not appear significant to us. It indicated that a letter to East Lodge was returned undelivered around July 2011: that was four months before the appellant gave East Lodge as her address in her tax return (see below). Even if the 'RLS' indicated that she was not receiving post at East Lodge in July 2011, the position changed later as we explain below. Indeed, as we say at §§100-101, we put some weight on the fact that the assessments sent to her at East Lodge on 1 March 2012 were not returned undelivered.

16. But the matter that the appellant and her advisers put most weight on was (a), the claim that East Lodge ceased to be her base address in January 2011. This claim was based on the following two consecutive entries (in reverse date order) in the SA notes:

> 29/01/2011 Base address changed from East Lodge [post code]
>
> 27/01/2011 Base Address changed from EAST LODGE [post code]

17. It was the appellant's case at the hearing that this (a) showed that HMRC's systems did not have East Lodge as her address from January 2011 and (b) that she had actually notified HMRC of an address change from East Lodge to Willow Tree Farm on 28 January 2011 when submitting her tax return (presumably for 09/10).

18. While taken at face value, without analysis, those two consecutive entries would be read as indicating that East Lodge ceased to be her 'base' address in HMRC's SA system in January 2011, we do not accept that these two entries do actually mean that on close analysis. The reasons for this are as follows:

(a) A separate print out of her electronic address history held by HMRC shows that, although her East Lodge address was altered, or re-formatted, and/or simply re-entered on 28 January 2011, East Lodge remained her base address held by HMRC from 6/1/11 until the print out ceased on 1 December 2011.

(b) This is confirmed by the next base address change (on 8 March 2012) where the address was changed *from* East Lodge. In other words, East Lodge was clearly her base address up to 8 March 2012.

(c) The appellant's case is that the RLS relates to East Lodge: that presupposes her base address was East Lodge as at July 2011. That would not be true if the 29 January 2011 entry had changed her address *from* East Lodge (as there was no base address change recorded between 29/1/11 and 8/3/12).

19. Our conclusion was that, while sometimes 'Base address changed from...' indicated an actual change of address in the SA records, it clearly did not do so in every case as, if that were true, the entry for 29 January would make no sense (because East Lodge would have ceased to be her base address on 27 January). Our conclusion was that 'base address' changes could indicate nothing more than minor formatting changes, such as a change from caps to lower case (as appeared to have happened on 27 January). And that must be all that was indicated by these two entries in January 2011 as the evidence was that East Lodge did remain Ms Lloyd's base address on HMRC's system until 8 March 2012 for all the reasons given above.

20. Indeed, whether or not there was a base address change on or around 28 January 2011 was irrelevant in the sense that everyone agreed, as was clear from the SA Notes, that East Lodge was her base address in the SA system at the time of the assessments (1 March 2012). What was relevant, however, was that the evidence given around the two entries set out above led us to believe that the appellant's evidence was suggestible and unreliable as we explain that below.

Ms Lloyd's evidence

21. In oral evidence given in examination in chief Ms Lloyd was quite emphatic that she had notified HMRC of a change of address from East Lodge to Willow Tree Farm on 28 January 2011. She was cross examined and again stated that she knew she had notified HMRC of her change of address to Willow Tree Farm at that time.

22. Yet this evidence, which she clearly regarded as significant, was not in her witness statement. In her witness statement, she had merely said 'I understand' that HMRC's SA notes indicated that her last known address was Willow Tree Farm because of those two entries about the base address change on 27 and 29 January 2011 discussed above. Later in cross examination, she accepted that in this part of her witness statement she was merely repeating what her adviser had said to her about these two entries in her SA Notes. She accepted that at the time she made the statement she knew she was not giving evidence but making inferences. She explained this was why she had qualified what she said with the words 'I understand...'.

23. Our conclusion from all this was that, when she wrote her witness statement, a week before the hearing, she had no recollection of, on or around 28 January 2011, notifying to HMRC a change of address to Willow Tree Farm from East Lodge either on the tax return or otherwise: had she recollected doing so she would have put it in her witness statement. But as her evidence at the hearing went much further than her witness statement, emphatically claiming that she actually recollected notifying a change of address on 28 January 2011, it seemed to us that this recollection could not be trusted as reliable. It seemed likely it had been suggested to her as an explanation for these two entries in the SA Notes.

24. In any event, we have concluded that the SA Notes entry, however curious, did not actually mean that any change of address had been notified to HMRC at this time. (There had been an actual change of address notified on 6 January 2011 and that was from 'Saturn Croft' *to* East Lodge.)

25. Her evidence was also demonstrated to be unreliable in another context. One issue in the appeal was whether she actually received the assessments. They were, as we have said, dated 1 March 2012 and sent to the East Lodge address. Her oral evidence in the hearing was that, while she owned East Lodge, it was occupied by tenants from May 2010 to May 2012 and she had nothing to do with the property which was in the hands of letting agents (although no other evidence of this was produced). It was pointed out to her that her Notice of Appeal stated that the property was empty at the relevant time and the mailbox overflowed. In the hearing, at first she appeared to agree with this, and she then said she had been confused, and that the property was tenanted at the time.

26. So it appeared that she had two explanations for why she did not receive the assessments: one was that the property was occupied by tenants and the other was that it was empty and the mailbox overflowed. The two explanations could not both be right and without evidence either way, we did not know which, if either, was correct, but it contributed to our doubts over the reliability of the appellant's evidence.

27. We also note that her evidence was somewhat reticent in that in examination in chief and her witness statement she gave the impression her relationship with the solicitor who acted for her in the SDLT matter was a normal client relationship, referring to the firm as 'Wentworth solicitors', yet in cross examination it became clear she had been one of the two directors in that firm of solicitors, and she was therefore the business partner of the solicitor who acted for her in the SDLT matter.

Peter Gerald Kane

28. Mr Kane was an HMRC officer who was in the SDLT team, and in July 2008 had been given the task of reviewing mass-marketed SDLT schemes. He had invented a system by which HMRC could identify likely SDLT-scheme users.

29. We accepted his evidence. It was credible and he was careful to state the difference between what he knew and what he surmised.

30. Mr Khan in cross examination seemed to suggest to Mr Kane, without putting it in so many words, that Mr Kane was not being truthful in stating that HMRC had not received the disclosure letters. He seemed to imply this because he thought it suspicious that Mr Kane had assessed Ms Lloyd just a few days before the four year time limit would have prevented an assessment being made. We struggled, as did Mr Kane, to make sense of this suggestion. The disclosure letters were dated 10 March 2008 while the assessments were dated nearly 4 years later. There was no obvious link between them.

31. On the contrary, we accepted Mr Kane's evidence that the assessments were triggered because his system in 2011 had let to him identifying 'suspect' SDLT returns. He had cross referenced the information from the suspect SDLT returns with information at the Land Registry, which in this and some 15,000 other cases had revealed significant discrepancies. We accept he prioritised for assessment SDLT returns, such as Ms Lloyd's, which were close to the four year limit and that was the true explanation of why the assessments on 1 March 2012 were so close to the time limit.

32. In so far as Mr Khan was implying Mr Kane acted improperly or was being less than truthful, we reject the suggestion. Mr Kane seems to have acted entirely properly and we accepted his evidence as reliable. We also accept that he never saw the disclosure letters.

Findings of fact

The purchases and SDLT returns

33. The appellant purchased a property called 'Staffordshire Croft' on 5 March 2008 for £176,500 (as shown on her land registry form); her SDLT return was submitted electronically and dated the same date as the purchase and showed a purchase price of £109,000.

34. The following day (6 March 2008) she purchased a property which she described as 'Land at Willow Tree Farm' for £1,022,00 (as shown on her land registry form); her SDLT return was submitted electronically and was dated the same date as the purchase and showed a purchase price of £135,950.

35. At the time of these transactions, the appellant was one of two partners in the firm of Wentworth Solicitors. That firm handled the conveyancing and electronically submitted the SDLT returns (the SDLT1s).

The disclosure letters

36. There was produced to the Tribunal two copy letters on Wentworth Solicitors' headed notepaper dated 10 March 2008, one each for the two land transactions, and both of which stated:

> Please find enclosed copy SDLT5. An SDLT saving scheme has been utilised in this case. There is no disclosure number applicable to this scheme. This declaration is intended to trigger the 9 month enquiry window.

Both letters indicated in bold typing that they were to be sent by recorded delivery. The 'SDLT5' referred to in the letters was the submission receipt for the electronically filed SDLT returns.

37. HMRC did not accept that these two letters had ever been sent to HMRC or that they had ever been received by HMRC. We refer to the letters as 'the disclosure letters' but that does not mean we accept that were sent, received or that they disclosed anything relevant. We go on to consider these matters.

Did HMRC receive the letters?

38. Mr Kane's evidence was that HMRC's SDLT office, to which the letters were addressed, was systematic in recording all post received. A log was kept and would indicate if a letter was received, from whom, in respect of which taxpayer by UTRN ('unique taxpayer reference number') and the team to which it was forwarded for action. He had made enquiries and been informed (the email was produced) that there was no record of either of the disclosure letters being received by HMRC.

39. He had reviewed the files HMRC held for these two land transactions and neither contained the relevant disclosure letter.

40. The appellant's representative pointed out that a contemporaneous email exchange between two HMRC officers, disclosed by HMRC, contained the statement 'I'm not certain that disclosures were logged by us back in 2008.' Mr Kane's explanation for this was that that phrase meant no more than that at that point in time HMRC did not record the *type* of letter received, although they started to do this shortly afterwards. Mr Kane's explanation made sense in the context of the email as a whole as it had also stated that no post at all had been received in respect of Ms Lloyd's purchases. So we read nothing into that phrase. It does not imply that a disclosure letter may have been received but not logged. It simply meant HMRC that at that point in time HMRC did not note down the type of letter received.

41. Because we find HMRC did keep a contemporaneous log of post received and these letters were not entered in it, nor is there any other evidence of receipt, HMRC have established a 'prima facie' case that the disclosure letters were not received: in other words, they have proved their case unless the appellant can rebut it.

42. The appellant's case in rebuttal is that the letters must have been received because they were acted upon. She says they were acted upon because they triggered an enquiry by the Valuation Office ('VO'). The evidence she produced in support of this was a copy letter written by the VO to Wentworth Solicitors on 19 March 2008 (which was some 9 days after the disclosure letters were dated).

43. We find that the VO's letter referred to the submission of the SDLT1 made on Willow Tree Farm and asked for a plan to be sent to the VO. We reject this as evidence that HMRC received the disclosure letters.

44. Firstly, on its face, the VO letter appears to be a response to the SDLT1 (the original return made on 6 March 2008) and not a response to the disclosure letters to which it does not refer. Secondly, there is no logic in the suggestion that the VO would have been given a copy of, or acted upon, a disclosure letter sent to HMRC. It was HMRC who had responsibility for ensuring the right amount of SDLT was paid, not the VO. The VO was interested in valuing land. We also accept Mr Kane's evidence that there was no record of any interaction with the VO on the appellant's file for Willow Tree Farm.

45. Ms Lloyd also said that she spoke to someone from the VO office and discussed her disclosure. She said she had a note of the conversation although accepted she had not produced it in evidence. For the above reasons we do not consider her recollections reliable and we do not consider it probable that the VO would have written in response to the disclosure letter.

46. Our conclusion is that the appellant has failed to establish that the letters were acted upon. She has therefore failed to rebut the case that the letters were not received. Indeed, because the letters invited HMRC to open an enquiry, HMRC's failure to do so supports (if weakly) HMRC's case that the letters were not received.

47. Our conclusion is that HMRC have established it was more likely than not that the letters were not received: they were not recorded in the contemporaneous log of

post or anywhere else in HMRC's systems. The appellant has failed to rebut that prima facie case as she has not proved that the letters were acted upon.

Were the letters sent?

48. It may seem counter-intuitive but we deal with the question of whether the disclosure letters were ever actually sent after our conclusion that they were not received, because our finding they were not received raises the question of whether they were ever sent.

49. The letters on their face stated they were to be sent recorded delivery, so Wentworths would have been able to check whether HMRC ever signed for them. The appellant was unable to produce any record showing that the letters had ever been posted or that HMRC had signed for them. HMRC suggested, therefore, that they had not been sent.

50. The appellant's position was that, while she was a partner in Wentworths at the time the letters were (purportedly) sent, she did not deal with her own legal matters, which were handled by her then business partner and his PA. She therefore did not herself write or send the two letters and could not give direct evidence that they were actually sent.

51. Nevertheless, she told the Tribunal that she had been informed by those acting for her that the letters had been both sent, and signed for by HMRC on receipt. She had also been sent copies of the letters for her records and it was those copies which were relied on in the hearing before us.

52. As we have said, we do not accept her recollections as reliable: she was shown to be a suggestible witness. Nevertheless, we do accept that she was given by her business partner the copies of the letters she produced to the Tribunal. Those copies, however, were the only evidence the letters had ever been sent.

53. She could not produce any other evidence that the letters had been sent. This was because she was unable to produce the file that Wentworths ought to have retained on her transactions, and which ought to have contained the receipts for recorded delivery letters. Her explanation for being unable to produce the file was that she had not taken a copy of any documents on the file before she left the firm, and she did not ask to take her files with her when she ceased to be a partner at the firm on 31 March 2009. Thereafter, in February 2010 the firm collapsed, and was taken over by the Law Society. The Law Society discovered that all the files relating to all the firm's clients had been removed by the appellant's now ex-business partner and could not be found.

54. In conclusion, the only evidence that the disclosure letters were ever sent is the copy letters provided to Ms Lloyd. Ms Lloyd did not even claim to be able to verify that they were actually sent. Nevertheless, the copy letters alone would ordinarily be good evidence the letters were sent as there would be no reason to suppose that the solicitor would forward to his client-cum-business partner copies of letters he had not sent. But here, on the appellant's own case, the circumstances were very odd. In particular, the removal of all client files by her ex-partner does not appear to the

actions of a solicitor with nothing to hide. When we take into account that HMRC have established that they did not receive the letters even though the copy letters indicate that the letters were supposed to have been sent recorded delivery, we consider that it is more likely than not that the letters were never sent.

55. That concludes Ground 1(a) against the appellant and strictly we do not need to consider Ground 1(b) because we have decided as a matter of fact that the disclosure letters were never sent. Whether if sent and received, the disclosure letters would have been sufficient to prevent the later discovery assessments is therefore irrelevant to the outcome of this appeal.

56. However, for the sake of completeness, and because the answer to this issue seemed quite straightforward on the authorities, we deal with it.

Ground 1(b): the law

57. The validity of the assessments depended on whether they met the preconditions for a discovery assessment in respect of stamp duty land tax, which was set out in §28 Sch 10 of Finance Act 2003. While there is little authority on these provisions, there is a wealth of authority on very similar provisions in the Taxes Management Act 1970 which the SDLT provisions largely duplicate. It seems to us, and neither party suggested otherwise, that the authorities on the TMA discovery provisions applied equally to the SDLT discovery provisions (save to the extent of any actual differences between the provisions).

58. The ability for HMRC to make a SDLT discovery assessment was set out in §28 Sch 10 of Finance Act 2003 which provided as follows:

> **§28 Assessment where loss of tax discovered**
>
> (1) If the Inland Revenue discover as regards a chargeable transaction that –
>
> (a) an amount of tax that ought to have been assessed has not been assessed, or
>
> (b) an assessment to tax is or has become insufficient, or
>
> (c) relief has been given that is or has become excessive,
>
> They may make an assessment ('a discovery assessment') in the amount or further amount that ought in their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) The power to make a discovery assessment in respect of a transaction for which the purchaser has delivered a return is subject to the restrictions specified in §30.

59. The appellant accepts that an amount of tax which should have been assessed in her two land transaction returns was not assessed in them and so that §28(1) applied. The point was simple: she purchased Staffordshire Croft for £176,500 and Willow Tree Farm for £1,022,00; yet her land transaction returns showed the purchase prices respectively as £109,000 and £135,950.

60. While it was her case that she had utilised some sort of tax avoidance scheme, which explained the difference in actual to declared purchase price, she had no evidence of what that scheme was and did not, as we have said, argue that tax was due on any less figure than the actual (rather than declared) purchase price.

61. As Ms Lloyd had made a return for each of the two land transactions, the restrictions in §30 applied. Those restrictions were:

> **§30 Restrictions on assessment where return delivered**
>
> (1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under §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.

62. Sub-paragraph (5) which dealt with returns made in accordance with generally accepted accounting practice was not relevant: the appellant did not suggest that the return was made in accordance with such practice. What was relevant were the preconditions for making a discovery assessment.

63. The precondition specified in §30(2) was where a relevant person was fraudulent or negligent. HMRC did not allege that the appellant, or anyone else in connection with this matter, had been fraudulent or negligent, so the pre-condition in §30(2) was not met. Therefore, the discovery assessments could not be valid unless the pre-condition in §30(3) was met. That pre-condition was:

> (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)...

64. The condition was explained further in §30(4) which stated that:

> (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 §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.

65. There was no suggestion that there was any information in the returns themselves which should have alerted HMRC to the insufficiency, nor had there been any enquiry into the returns. The issue in this appeal surrounded sub-paragraph (4)(c)(ii). It was, as we have said, the appellant's case that she had made a written disclosure to HMRC (one letter each in respect of the two purchases) and that those two disclosure letters prevented HMRC making a later discovery assessment.

What information can HMRC reasonably be expected to be aware of?

66. So the question is what HMRC knew, or should have surmised from, the content of the discovery letters (assuming, contrary to what we have found, that the letters were both sent and received).

67. The test in s 29 TMA was summarised by the Court of Appeal most recently in the case of *Sanderson* [2016] STC 638 as:

> (1) the tribunal must consider the awareness of a hypothetical HMRC officer
>
> (2) that officer has the characteristics of an officer of general competence, knowledge or skill which includes a reasonable knowledge and understanding of the law (citing *Lansdowne* [2012] STC 544 CA)
>
> (3) if the law is complex even adequate disclosure may not make the hypothetical officer aware of the insufficiency
>
> (4) the awareness must be of an actual insufficiency (citing *Langham v Veltema* [2004] STC 544*)*
>
> (5) awareness can only come from the sources of information specified in S 29(6) (citing *Langham v Veltema)*

68. In the hearing, the entire focus was on item (4) of this list. Was the disclosure in the letters sufficient to put the hypothetical HMRC officer on notice of the insufficiency?

69. We were referred to the Court of Appeal decision in the case of *Langham v Veltema* [2004] STC 544 CA. In that case, the taxpayer submitted a tax return showing a transaction at an undervalue. There was nothing in the return itself to indicate that transaction was at an undervalue nor was there a separate disclosure; but the hypothetical officer ought to have known another department of HMRC might have investigated the valuation. Nevertheless, the Court of Appeal concluded the later discovery assessment was valid:

> [33] More particularly, it is plain from the wording of the statutory test in S 29 (5) that it is concerned, not with what an Inspector could reasonably have been expected to do, but with what he could have been reasonably expected to be aware of. It speaks of an Inspector's objective awareness, from the information made available to him by the taxpayer, of "the situation" mentioned in S 29 (1), namely an actual

> insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an insufficiency,…
>
> ....
>
> [36] ...the scheme is that the Inspector is to be shut out from making a discovery assessment under the section only when the taxpayer....in making an honest and accurate return...have clearly alerted him to the insufficiency of the assessment, not where the Inspector may have some other information, not normally part of his checks, that may put the sufficiency of the assessment in question....
>
> Per Auld LJ

70. In *Sanderson,* the Court of Appeal answered its question this way:

> [22] ... The hypothetical officer must, on an objective analysis, be made aware of an actual insufficiency in the assessment by the matters disclosed in the S 29 (6) information….
>
> [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…. The points were not complex or difficult it was required to apply his knowledge of the law to the facts disclosed and form a view as to whether an insufficiency existed. It is a matter of judgement rather than the application of any particular standard of proof…..

71. The Court of Appeal went on to apply its test in the practical circumstances of the case before it. It concluded that there was enough information for the hypothetical officer to suspect an insufficiency but not enough for him to be aware of an actual insufficiency. It is not for HMRC to infer crucial elements of the scheme. In that case, the taxpayer failed to disclose significant facts about the scheme, such as its self-cancelling nature. His disclosure should have been enough to make HMRC suspicious but not enough to satisfy them of the insufficiency: it did not prevent a discovery assessment.

72. The appellant specifically relied on the Upper Tribunal decision in *Charlton* [2013] STC 866. In that case, the taxpayers entered into complicated tax avoidance scheme involving the purchase and partial surrender of life insurance policies. The taxpayers' tax returns disclosed the SRN (scheme reference number) for the relevant scheme and a brief outline of what had been done but otherwise did not draw the attention of HMRC to the insufficiency.

73. To obtain a SRN the promoter of any scheme had to complete and file with HMRC a form AAG1 and the hypothetical HMRC officer reading the tax return ought to have known this. The AAG1 explained how the tax scheme worked and the interpretation of the legislation it relied on to be effective. The Upper Tribunal concluded, therefore, that the hypothetical officer ought to have inferred from the SRN the existence and relevance of the form AAG1 to the insufficiency and was therefore was fixed with knowledge of the contents of the AAG1. It was critical that HMRC were in possession of the AAG1. The contents of the AAG1 meant HMRC was fixed with knowledge of the insufficiency when the enquiry window closed.

Whether the disclosure was sufficient to prevent the discovery assessment?

74. Had HMRC received the disclosure letters in this appeal, they would under the case law referred to above be fixed with knowledge of their contents. Their contents should have made them suspicious that there might be an insufficiency in the appellant's SDLT returns because they invited HMRC to open an enquiry.

75. But we find the letters were not sufficient to give HMRC an awareness of the actual insufficiencies. Indeed, the disclosure letters contained almost no information. They did not explain that the land had in fact been purchased for a higher value than declared on the SDLT: they certainly did not mention the actual discrepancy between the price paid and the amount declared. And while the letters did explain that a tax avoidance scheme had been used, they did not identify the scheme, so HMRC would have been unable to form a view whether or not it was an effective scheme. Indeed, the letters were somewhat ambiguous on whether a scheme had been used at all as the letters also said that the scheme was not a notifiable one.

76. The binding authority of cases such as *Langham v Veltema* and *Sanderson* make it clear that suspicions, without concrete knowledge of the actual insufficiency, are not enough to prevent a later discovery assessment.

77. The appellant specifically relied on *Charlton.* Her agent's argument seemed to be that because in *Charlton* the taxpayer disclosed the DOTAS number, that meant there was sufficient disclosure in this case because the appellant had disclosed that there was no applicable DOTAS number. That is a quite erroneous analysis of *Charlton*: the significance of disclosing the DOTAS number in *Charlton* was that that meant HMRC could match the tax return to the actual scheme used (as HMRC had to have the AAG1 for that DOTAS scheme). The DOTAS number therefore meant HMRC knew the precise scheme used and should therefore have been able to take an informed view of whether there was an insufficiency in the tax return.

78. The position here is the reverse. The lack of DOTAS number meant that absolutely no information about the scheme used was disclosed to HMRC in the SDLT return. Unlike in *Charlton,* the tax return did not put them in a position where they could take an informed view of whether there was an insufficiency in Ms Lloyd's SDLT return.

79. So if we had not dismissed her case on this on the basis that the content of the letters was not in fact known to HMRC because the letters were neither sent nor received, we would dismiss her case on the basis that even if received, their content failed to make them aware of the insufficiency and so did not prevent a discovery assessment.

Ground 2 – were the discovery assessments validly served?

80. HMRC have shown that the disclosure letters did not preclude discovery assessments. But HMRC must also prove that the assessments were validly served. The appellant's second line of defence to the assessments is that she does not accept that the discovery assessments were validly served.

The law

81. §32(1) requires notice of the assessment to be served on the taxpayer. §84 provides as follows:

> **84 Delivery and service of documents**
>
> (1) A notice or other document to be served under this Part on a person may be delivered to him or left at his usual or last known place of abode.
>
> (2) a notice or other document to be given, served or delivered under this Part may be served by post.
>
> (3) For the purposes of section 7 of the Interpretation Act 1978...any such notice or other document to be given or delivered to or served on, any person by the Inland Revenue is properly addressed if it is addressed to that person –
>
> (a) in the case of an individual, at his usual or last known place of residence or his place of business
>
> .....

82. The Interpretation Act 1978 s 7 provides that where a document is authorised or required by any Act to be served by post:

> 'the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

The dispute on ground 2

83. HMRC have to prove service: they can do this only by showing that the assessments were actually delivered to Ms Lloyd, or that she was deemed to be served with them by post (even if she didn't actually receive them). HMRC's case is that they sent the assessment to Ms Lloyd at East Lodge. Ms Lloyd does not dispute that. Her case is that she was not at East Lodge and did not receive them.

84. It is a necessary corollary of her position that she cannot prove that the assessments were not received at East Lodge. So *if* the assessments were properly sent to East Lodge, then s 7 of the Interpretation Act means that she was deemed to be served.

85. So, in summary, there are two matters in dispute:

(a) Whether the appellant was actually served with the assessments;

(b) Whether the assessments were sent to the correct address: in other words, was East Lodge Ms Lloyd's usual or last known place of residence when the assessments were sent to her. (There was no suggestion it was her place of business).

Did she receive the assessments?

86. Her evidence was that she did not receive the two notices of assessment. In her notice of appeal this was stated to be because East Lodge was empty at the time; in her witness statement and oral evidence this was stated to be because East Lodge was occupied under a two year lease and she had no contact with the tenants. While a property could be both let and empty, she did not suggest this was the position. At the hearing her position was that her Notice of Appeal was erroneous in stating the property was empty.

87. As we have said, we could not find her evidence reliable. However, rejecting her evidence simply means we do not know who, if anyone, occupied East Lodge at the time the assessments were delivered there. An absence of evidence is not proof that she received the assessments, and to succeed on this part of the case HMRC must prove on the balance of probability that she received the assessments.

88. Their case on this is that they want the Tribunal to infer that she received the assessments because they consider she was shown to be untruthful in denying receipt of other letters from HMRC.

89. The evidence is that on an unrelated tax matter, about a year later, Ms Lloyd wrote to HMRC from East Lodge, and received letters from HMRC sent to her at East Lodge from 5/11/12 through to 30/7/13. By August 2013 her address had changed to Willow Tree Farm.

90. HMRC wrote to her at East Lodge chasing payment of the SDLT assessment on 26, 27 and 28 February 2013 (3 letters on 3 successive days). No reply was received. Ms Lloyd stated in a letter written in response to another chasing letter sent at the end of 2013 that that letter was the first she had heard about the SDLT assessments. In the hearing, she reiterated that she had not received those first three chasing letters: she did not offer an explanation for how she failed to receive 3 letters from HMRC at a time when she had clearly received other letters from HMRC officers written to the same address, and from which she herself had written.

91. HMRC put it to her that she was being untruthful over her statement she did not receive these three letters nor the earlier assessments. She denied it.

92. Letters do go astray in the post but it is very unlikely that three letters would all go astray. We consider it unlikely that she received none of the chasing letters as she was clearly receiving post at that address at that time, and using it as her correspondence address. We take account that her oral evidence at the hearing was demonstrated to be unreliable and so we do not accept as reliable her denial of receipt of all three chasing letters. We consider it more likely than not that she did receive the three chasing letters.

93. Nevertheless, it is for HMRC to prove that is was more likely than not that she received the assessments. It is not enough to prove that she received the three chasing letters, which were sent nearly a year later. And while we do not accept her evidence

that East Lodge was tenanted or empty at the time of the assessments, that is not the same as showing that Ms Lloyd was in residence and/or received post sent there.

94. Bearing in mind we were unable to accept as reliable what she said in evidence, the only evidence we have of where she received post in early 2012 is as follows:

(a) It was not in dispute that she owned both East Lodge and Willow Tree Farm at that time;

(b) The tax return she filed on 15 December 2011 showed her address as East Lodge.

(c) On 25 January 2012 HMRC sent her duplicate letters (on an unrelated matter) to her at both East Lodge and Willow Tree Farm

(d) A telephone note of a conversation by Officer Venner with Ms Lloyd's agent on 9 February 2012 recorded the agent as saying that (a) Ms Lloyd had written to him from East Lodge, (b) the copy of the 25/2/12 letter he had been given had the East Lodge address and (c) he understood she divided her time between East Lodge and her farm.

(e) The agent promised Officer Venner a copy of the 64-8: this was signed by her on 9 February 2012 and showed her address as Willow Tree Farm.

(f) A long letter written by her on another matter to HMRC dated 19 April 2012 was sent from Willow Tree Farm and included a statement that she had lived at Willow Tree Farm since May 2010, although it also indicated that in the 7 years prior to 2010 she had regularly swopped between East Lodge and other residences.

95. The tax return was good evidence that her address in December 2011 was East Lodge. We note in evidence Ms Lloyd said that her electronic tax return was pre-populated with East Lodge as her address and she had tried but failed to change it to Willow Tree Farm. We do not accept this evidence as (a) we found her evidence unreliable (b) if true, it fails to explain why she did not write a separate letter notifying HMRC of her correct address and (c) the form indicates that it was not a pre-populated box as it says 'Your address (if changed).'

96. However, for the same reason that the tax return is good evidence of her address in December 2011, the form 64-8 is good evidence that her address in February 2012 was Willow Tree Farm. Similarly, the letter of 19 April 2012 is good evidence that her address in April 2012 was Willow Tree Farm.

97. These various pieces of evidence are in conflict because Ms Lloyd did not claim to have moved between December 2011 and February 2012. It was her case at the hearing – and in the April 2012 letter - that she resided throughout this period at Willow Tree Farm.

98. The note of the conversation with the agent on 9 February 2012 appears to offer an explanation of the apparent conflict: the explanation it offers is that at that time she moved between the properties and used both addresses for correspondence. But we

are conscious that that note is hearsay at twice removed: the officer reported what the agent said but neither the agent nor officer (now very ill) gave evidence. Hearsay is weak evidence because it is difficult to verify through challenge. However, we have decided to put weight on it because it explains away the conflict in the evidence. In other words, it is consistent with the various pieces of contemporaneous evidence. It is also consistent with the fact that the officer did appear uncertain of her address as he had sent duplicate letters to both addresses and so it is not surprising he chose a few days later to discuss her address with her newly appointed agent.

99. We find, therefore, that in early 2012 Ms Lloyd split her time between both addresses and really did at that period in time use both addresses for correspondence. She also received post at East Lodge as she received the East Lodge copy of the 25 January letter.

100. It is also relevant that (in the absence of evidence that anyone else occupied the property) it is more likely than not that the owner of the property (Ms Lloyd) would receive the post that was sent to her property, even if she did not always reside there. Moreover, we accept HMRC's case that the assessments were not returned undelivered.

101. But is that enough for HMRC to satisfy us on the balance of probability that Ms Lloyd actually received the assessments? We have considered this carefully. We disregard her evidence in rebuttal for reasons already given. But have HMRC actually established it was more likely than not that she received the letters? We conclude that (although it is not beyond reasonable doubt) more likely than not she did receive the letters as she never suggested in her current or contemporaneous evidence any move to Willow Tree Farm took place at the end of 2011 or start of 2012; therefore, as it appears that she owned East Lodge and gave it as her place of residence in December 2011 and received post there in January 2012, it is more likely than not that that continued to be the case. We consider that is so despite her use of the farm address on the 64-8 because her agent said she moved between the two properties which implies that she received and sent post from both properties throughout the period in question. Certainly, despite the conversation over her address, her agent did not suggest when sending in the 64-8 that there had been any address change. The form 64-8 was the form on which a change of agent, not address, was notified. Lastly, the assessments were not returned undelivered.

102. For these reasons, we think it more likely than not that she actually received them.

103. We note that she took no action in respect of them at that time: but we read nothing into that because we have already found she ignored other letters she most likely received.

104. Nothing turns on the date the assessments were received, but if it did, s 7 would deem the notices of assessment to be received on the day in which they would have been received in the normal course of post.

Were the assessments deemed to be correctly served?

105. That conclusion makes it unnecessary for us to consider whether the assessments were deemed to be correctly served. We have found that they were actually served. But the for the sake of completeness, we consider the point. As we have said, the question on deemed service is whether East Lodge was Ms Lloyd's usual or last known place of residence when the assessments were sent to her.

Usual place of residence?

106. Our finding of fact is that at the start of 2012 she alternated between the properties, and which ever one she actually resided in at any point in time, received and sent post from both. It seems to us she was a person with two homes. HMRC have therefore established it to be more likely than not that East Lodge was one of her usual places of residence as at 1 March 2012.

107. The Act appears to contemplate that a person will have only one usual place of residence. But it seems to us that where a person is shown to have simultaneously two places of residence, then the phrase 'usual place of residence' applies to both. If that were not the case, it would be impossible to serve someone like Ms Lloyd who used two addresses, as neither could be established to be her usual place of residence.

Last known place of residence?

108. Whether or not East Lodge was her usual place of residence as at 1 March 2012, was it her last known place of residence as at that date? HMRC relied on the Judge's summary of the law in the case of *Tinkler* [2016] UKFTT 170 (TC) where she said:

> [74]....There is no authority on this exact phrase or at least none brought to my attention. I think it is obvious that the reference to "last known" is a reference to HMRC's knowledge. Beyond that, HMRC referred me to *Berry v Farrow* [1914] 1 KB 632 where court had to consider the meaning of 'last known place of abode' which was used in the TMA 1880. Bankes J said
>
> "..what…is the meaning of the expression 'usual or last known place of abode'…? It is, I think, clear that the object of the notice is to give the person charged an opportunity of challenging the correctness of the assessment…and a construction should therefore be adopted which would include some place at which the notice would be likely to be brought to his attention…."
>
> The Judge decided that the address on which the notice was served in that case was not the taxpayer's place of abode, as it was the office of his company at which he rarely visited; it was therefore not his usual or last known place of abode.
>
> 75. I think what the Judge said here must be seen in context. I think the expression 'usual or last known place of residence' shows Parliament was trying to strike a balance between the taxpayer being given actual notice of an enquiry while at the same time giving constructive notice of an enquiry to a taxpayer who does not keep

HMRC up to date with his address. If Parliament were concerned only with actual notice, they would have simply required actual service and not bothered with s 115(2) at all.

76. My attention was also drawn to the CPR which uses a very similar phrase. Both parties referred me to *Marshall and Rankine v Maggs* [2006] EWCA Civ 20. This was a case of service under the CPR and the question was whether service had been made at the individual's 'usual or last known residence'. In that case, the Court of Appeal unanimously decided at [68] that the phrase 'last known residence' could not include a place where the person concerned had never resided. That finding is not relevant here: ....The Court of Appeal in Marshall , however, went on to make non-binding comments (obiter) on the meaning of 'last known residence':

"[71]…In our view, knowledge in this context refers to the serving party's actual knowledge or what might be called his constructive knowledge, ie knowledge which he could have acquired exercising reasonable diligence"

77. .....

78. HMRC did not agree that the reference to last known place of residence would have the same meaning in the TMA as the similar phrase in the CPR: in other words, HMRC did not accept that HMRC were required to exercise some due diligence for the purposes of s 115(2) TMA. However Mr Jones did not really suggest any reason why the two phrases would have different meanings.

79. Nevertheless, I do accept that a different level of due diligence may be required for s 115(2) than for the CPR. A claimant and defendant might have no relationship and certainly the defendant may have no responsibility to keep the claimant informed of his current address. On the other hand, HMRC do require taxpayers to complete tax returns, a part of which requires the taxpayer to inform HMRC of their address. So a taxpayer does have some sort of responsibility or duty to keep HMRC appraised of their address and therefore the obligation on HMRC to make enquiries about the taxpayer's address are, I think, less than they would be on a claimant using the CPR.

80. But in principle I think the dicta in *Marshall v Maggs* apply and HMRC have some responsibility for ascertaining the taxpayer's address. When the Court of Appeal said that some due diligence would be required of the claimant, they were referring to "knowledge which he could have acquired exercising reasonable diligence". My view is that where taxpayers are required to notify HMRC of their address, I do not think an exercise of reasonable diligence would oblige HMRC in all cases (before sending a letter) to make enquiries to find out if the taxpayer has moved. But I do think 'reasonable diligence' would oblige HMRC to make reasonable enquiries when they have

> indications that the address they have for the taxpayer is no longer current. If reasonable enquiries do not advance the situation, then they need go no further and must rely on what information they have.

109. HMRC suggested that this passage supported the view that the appellant has a duty to keep HMRC up to date with his/her address, and where the taxpayer failed to do so, HMRC could send any post to his/her last known address. But that is to mis-read what it said. What the Judge actually said was that, although the taxpayer making tax returns has a duty to keep HMRC informed of his/her address, any indication that the address held by HMRC had changed needed to be considered. Reasonable diligence requires HMRC to make reasonable enquiries when on notice that the taxpayer's address may have changed.

110. The agent sent what he said was a duplicate 64-8 to HMRC with a letter dated 22 February 2017. While HMRC's systems indicate that they received the 64-8 on 7 March 2012, HMRC accept that the form was actually received on 27 February 2017. It seems it was merely entered into the appellant's SA notes on 7 March.

111. This time discrepancy explains why HMRC sent the assessments to East Lodge: on 1 March 2012 East Lodge was shown as her address in HMRC's SA notes. But the question is whether East Lodge was her 'last known place of residence' as at 1 March 2012, and not whether it was her place of residence as shown in HMRC's SA notes.

112. At the hearing, HMRC suggested that they must be allowed a reasonable amount of time to update their systems. They suggested assessments sent to a taxpayer's old address only four days after receipt of an apparent address change was service to the taxpayer's 'last known place of residence'. We do not agree. If HMRC cannot manage to update their systems with the taxpayer's change of address on the day it is received, then they need some kind of system that alerts them when an address is updated on their system shortly after an assessment has been despatched, so that they can re-send the assessment to the correct address.

113. However, even though we don't accept that the legislation permits HMRC time to update their systems with a change of address, that does not answer the question of whether East Lodge was Ms Lloyd's last known place of residence as at 1 March 2012.

114. When the notices of assessment were dispatched, the officer must be fixed with the knowledge of Ms Lloyd's 64-8. He must be taken to know that she had given Willow Tree Lodge as her address in late February 2012. However, he must also be taken to know what else was known to HMRC at the time and HMRC also knew the information summarised at §94 (a)-(e) above. So the officer would know that Ms Lloyd effectively had two places of residence, one of which was East Lodge and one of which was Willow Tree Farm. The 64-8 did not contain new information in that sense. East Lodge was therefore one of her two last known places of residence. The notices of assessment were therefore deemed to be correctly served when sent to East Lodge.

115. We dismiss the appeal.

116. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 17 NOVEMBER 2017