TC07665

STAMP DUTY LAND TAX – discovery assessments – paragraph 28 and paragraph 30 Schedule 10 Finance Act 2003 – whether assessment "stale" – whether disclosure note containing details of tax avoidance scheme sent to HMRC – whether disclosure sufficient to "notify" HMRC of the insufficiency – paragraph 30(4)(c)(ii) Schedule 10 Finance Act 2003 – whether HMRC could not reasonably have been expected to be aware of the insufficiency of tax before the relevant date – paragraph 30(3) Schedule 10 Finance Act 2003

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2016/3330
TC/2016/3334
TC/2016/6470

BETWEEN

(1) MS VICTORIA CARTER & MR PETER KENNEDY
(2) MS MICHAELA BURNIKELL & MR KEVIN GRAHAM
(3) MR JAMES LANG & MRS GILLIAN LANG

Appellants

-and-

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

TRIBUNAL: JUDGE ASHLEY GREENBANK

Sitting in public at Taylor House, Rosebery Avenue, London on 21 to 23 May 2019 and on 18 September 2019

David Bedenham, counsel, instructed by Reynolds Porter Chamberlain LLP, for the Appellants

Marika Lemos, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION ON A PRELIMINARY ISSUE

INTRODUCTION

1. This decision notice relates to a preliminary issue in relation to three appeals by various appellants against assessments to stamp duty land tax ("SDLT") made by the respondents, the Commissioners for Her Majesty's Revenue and Customs ("HMRC"). Each of the three appeals is described to me as a "lead appeal" but there is no direction under rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 in place in relation to any of them.

2. The appellants in each of the three appeals participated in tax avoidance schemes promoted by Cornerstone Tax Advisers ("Cornerstone"). The schemes were designed to take advantage of the rules which applied to sub-sales of real property in s45 of the Finance Act 2003 ("FA 2003") to reduce the SDLT liability on the purchase of a residential property.

3. There are many variants of these schemes, but the particular variants at issue in these appeals were known as "Jeepster" (which involved a sub-sale by way of an assignment or gift between unmarried couples) and "Hummer" (which involved a sub-sale by way of an assignment or gift between married couples). The appeal made by Ms Michaela Burnikell and Mr Kevin Graham (under appeal number TC/2016/03334), which I shall refer to as the "Burnikell/Graham appeal", involves the "Jeepster" form of the scheme. The appeals made by Ms Victoria Carter and Mr Peter Kennedy (under appeal number TC/2016/03330), which I shall refer to as the "Carter/Kennedy appeal", and by Mr James Lang and Mrs Gillian Lang (under appeal number TC/2016/06470), which I shall refer to as the "Lang/Lang appeal", involve the "Hummer" version of the scheme.

4. It is HMRC's case that, even if they were properly implemented (which HMRC does not concede), the Jeepster and Hummer schemes were not effective to secure the reduction in SDLT which they sought to achieve. This decision notice does not, however, relate to the effectiveness or otherwise of the schemes. The issue before the Tribunal is a preliminary issue and concerns the validity of the assessments made by HMRC.

THE HEARING AND THE EVIDENCE

5. I was provided with agreed bundles of documents for the hearing. In the course of the hearing, I also accepted other documents in evidence.

6. The bundles of documents included:

   (1) three witness statements from Mr Peter Kane, an officer of HMRC, employed in the Counter Avoidance Directorate at HMRC, who, at material times, had overall responsibility for the investigation of land transaction returns in cases where HMRC believed that an avoidance scheme had been used to reduce SDLT liabilities;

   (2) a witness statement from Mrs Joyce Randall, an officer of HMRC, currently employed in the Counter Avoidance Directorate at HMRC, but who, at material times, was employed by HMRC at the Stamp Office in Birmingham and who coordinated HMRC's response to avoidance of SDLT;

   (3) two witness statements from Mr Mo Hakim, a solicitor and a partner in Child & Child (formerly known as Lloyd & Associates LLP ("Lloyd & Associates"), the firm engaged by the appellants in the Carter/Kennedy and Burnikell/Graham appeals in relation to the purchase of the properties which are the subject of those appeals;

   (4) two witness statements from Mrs Jenny Barnes, a legal secretary, employed by Child & Child (formerly known as Lloyd & Associates LLP);

(5) a witness statement of Mr Alan Zefferttt, a solicitor and partner in Anthony Gold Solicitors and formerly a partner in Landau Zefferttt Weir ("LZW"), the firm engaged by the appellants in the Lang/Lang appeal in relation to the the purchase of the property which is the subject of that appeal;

(6) a witness statement of Mr Patrick O'Brien, a tax adviser currently employed by Cornerstone, the promoters of the Jeepster and Hummer schemes but who was not employed by Cornerstone at the time of the implementation of the schemes in relation to the sales and purchases of the properties at issue in these proceedings;

(7) a witness statement of Mr Graham Cowie, a self-employed tax adviser, who worked with Cornerstone to implement the schemes in relation to the sales and purchases of the properties at issue in these proceedings.

The statements of Mr Kane and Mrs Randall were submitted on behalf of HMRC. The remaining witness statements were submitted on behalf of the appellants.

7. In the course of the hearing, I was also provided with a witness statement from Mr Robert Waterson, a solicitor employed by Reynolds Porter Chamberlain LLP, the solicitors to the appellants in these appeals. This statement was submitted on behalf of the appellants.

8. All the witnesses gave oral evidence and were cross-examined on their statements, with the exception of Mr O'Brien and Mr Waterson. Mr O'Brien did not appear. HMRC objected to his witness statement. I have decided not to take his witness statement into account except to the extent that Mr Cowie referred to passages from it in his own statement.

9. Mr Waterson's statement concerns the metadata attaching to various electronic files, copies of which were exhibited to their statements by other witnesses (Mr Hakim and Mrs Barnes). I accepted his statement in evidence, although I accept HMRC's submissions regarding the limitations of that evidence. Mr Waterson is not, and did not hold himself out to be, an expert on computer systems. His evidence simply confirms the results that he obtained from making certain searches on the systems in question.

10. The initial hearing took place in London over three days between 21 and 23 May 2019. At the conclusion of those three days, I had heard the evidence of all of the witnesses who were to give oral evidence. The parties had not, however, made their submissions.

11. On 24 May 2019, the Tribunal issued directions requiring the parties to make written submissions. The Tribunal also made arrangements to relist the appeals for a further hearing. Following the receipt of written submissions from the parties, the Tribunal confirmed that a further hearing would be necessary. That hearing took place on 18 September 2019 also in London.

THE PRELIMINARY ISSUE

12. The assessments in each of these cases were made by HMRC under paragraph 28 of Schedule 10 to FA 2003, which permits HMRC to make an assessment outside the normal process of enquiry into returns where a loss of tax has been "discovered" (a "discovery assessment"). The power to make a discovery assessment in respect of a transaction for which the purchaser has delivered a land transaction return (also referred to as an "SDLT1 return") is subject to certain restrictions, which are set out in paragraph 30 of Schedule 10 to FA 2003. Details of the legislation are set out at [15] to [19] below.

13. The parties have agreed that certain issues relating to the validity of the discovery assessments and, in particular, certain aspects of the requirements of paragraph 30 should be determined as a preliminary issue. By directions agreed between the parties and made by Judge Poole on 13 January 2017, the preliminary issue was expressed as follows:

> "Were the notices of assessment issued to the Jeepster appellants and the Hummer appellant, and issued pursuant to paragraph 28 of Schedule 10 to [FA 2003], validly made, in particular, was at least one of the conditions referred to in paragraph 30(1)(a) of Schedule 10 to [FA 2003] satisfied in this case?"

14. I have set out details of the specific issues between the parties at [51] to [58] below.

THE RELEVANT LEGISLATION

15. It will assist my explanation of the issues before the Tribunal if I first set out the relevant legislation.

16. HMRC may enquire into a land transaction return if HMRC give notice of their intention to do so before the end of the period of nine months after the later of the filing date or the date on which the return was delivered: paragraph 12 Schedule 10 FA 2003. In the case of the transactions in all of these appeals, the filing date was the date 30 days after the effective date of the transaction: s76 FA 2003 and paragraph 2 Schedule 10 FA 2003.

17. In certain circumstances, HMRC has power to make a discovery assessment outside the normal enquiry process. The relevant provision is in paragraph 28 Schedule 10 FA 2003. It provides:

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

18. There are restrictions on HMRC's power to make a discovery assessment in cases where the purchaser has made a return. These restrictions are contained in paragraph 30 Schedule 10 FA 2003. Paragraph 30 provides:

> **30 Restrictions on assessment where return delivered**
>
> (1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28 or 29 in respect of the transaction—
>
> (a) may only be made in the two cases specified in sub-paragraphs (2) and (3) below, and
>
> (b) may not be made in the circumstances specified in sub-paragraph (5) below.
>
> (2) The first case is where the situation mentioned in paragraph 28(1) or 29(1) is attributable to fraudulent or negligent conduct on the part of—
>
> (a) the purchaser,
>
> (b) a person acting on behalf of the purchaser, or
>
> (c) a person who was a partner of the purchaser at the relevant time.

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

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

(b) completed their enquiries into the return,

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

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

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

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

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

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

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

(5) No assessment may be made if—

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

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

19. These provisions relating to SDLT are similar – but not identical – to provisions which allow HMRC to make discovery assessments for income tax and capital gains tax, which are contained in s29 of the Taxes Management Act 1970 ("TMA 1970"), and corporation tax, which are found in paragraphs 41 to 45 of Schedule 18 to the Finance Act 1998 ("FA 1998"). Many of the authorities to which I was referred by the parties concern the application of the income tax and capital gains tax provisions. Although the wording of s29 TMA and paragraphs 28 and 30 Schedule 10 FA 2003 differ in some respects, the parties regarded the principles which are outlined in those cases as applicable equally to both sets of provisions. Unless otherwise mentioned, I have adopted the same approach. For ease of comparison, the relevant provisions of s29 TMA are set out in the Appendix to this decision notice in the form which they were in at the time of the issue of the discovery assessments in these appeals.

BACKGROUND FACTS

20. There is considerable dispute between the parties as regards certain of the facts. For the most part, I will deal with those disputed facts in the context of the issues to which they are relevant. In this section, I have set out some largely undisputed facts, which provide some helpful background, and which will assist my explanation of the issues before the Tribunal.

The property transactions involved in these appeals

21. I will first set out some details of the underlying transactions, which form the background to the individual appeals. There is no dispute between the parties about these facts.

The Carter/Kennedy appeal

22. Ms Carter and Mr Kennedy are a married couple. They assert that they have implemented the tax avoidance scheme referred to as "Hummer" in connection with their purchase of 16 Ceylon Road, London, W14 0PY ("16 Ceylon Road") on 22 May 2009.

23. HMRC received the SDLT1 return for the transaction on 3 June 2009. In that return, Ms Carter and Mr Kennedy declared that the consideration paid by them for the purchase of 16 Ceylon Road was £130,763. This resulted in a charge to SDLT of £nil.

24. The period allowed under paragraph 12 Schedule 10 FA 2003 for HMRC to enquire into the return expired on 22 March 2010. HMRC had not issued an enquiry notice by that date.

25. On 6 September 2011, HMRC issued a discovery assessment to Ms Carter and Mr Kennedy for the amount of £32,640. This was on the basis that Ms Carter and Mr Kennedy had paid a consideration of £816,000 for the property.

The Burnikell/Graham appeal

26. Ms Burnikell and Mr Graham are an unmarried couple. They assert that they have implemented the tax avoidance scheme referred to as "Jeepster" in connection with their purchase of 9 Crown Hill, Waltham Abbey, Essex EN9 3TF ("9 Crown Hill") on 12 October 2009.

27. HMRC received the SDLT1 return for the transaction on 29 October 2009. In that return, Ms Burnikell and Mr Graham declared that the consideration paid by them for the purchase of 9 Crown Hill was £198,125. This resulted in a charge to SDLT of £1,981.

28. The period allowed under paragraph 12 Schedule 10 FA 2003 for HMRC to enquire into the return expired on 12 August 2010. HMRC had not issued an enquiry notice by that date.

29. On 6 September 2011, HMRC issued a discovery assessment to Ms Burnikell and Mr Graham for the amount of £48,018.75. This was on the basis that Ms Burnikell and Mr Graham had paid a consideration of £1,250,000 for the property.

The Lang/Lang appeal

30. Mr and Mrs Lang are a married couple. They assert that they have implemented the tax avoidance scheme referred to as "Hummer" in connection with their purchase of The Old Farmhouse, Amport, Andover, Hampshire, SP11 8JB ("The Old Farmhouse") on 15 September 2009.

31. HMRC received the SDLT1 return for the transaction on 26 October 2009. In that return, Mr and Mrs Lang declared that the consideration paid by them for the purchase of The Old Farmhouse was £139,534. This resulted in a charge to SDLT of £nil.

32. The period allowed under paragraph 12 Schedule 10 FA 2003 for HMRC to enquire into the return expired on 15 July 2010. HMRC had not issued an enquiry notice by that date.

33. On 6 September 2011, HMRC issued a discovery assessment to Mr and Mrs Lang for the amount of £35,213.64. This was on the basis that Mr and Mrs Lang had paid a consideration of £880,341 for the property.

The Cornerstone schemes

34. As I have mentioned above, each of the appellants entered into a tax avoidance scheme, marketed by Cornerstone, in relation to their purchases of the relevant properties. The schemes were intended to reduce their liabilities to SDLT on the purchase of the properties. The details of the schemes are not relevant for present purposes. However, I have set out below, details of the manner in which Cornerstone provided its advice regarding the implementation of these schemes and, in particular, the arrangements for the submission to HMRC of "disclosure notes"

which were designed to provide some form of protection for participants against the issue of discovery assessments. These details are drawn principally from the evidence of Mr Cowie.

35. Cornerstone provided standard advice to the solicitors who were engaged by clients to implement the schemes. This advice was contained in a series of standard emails which were usually sent by Cornerstone to the relevant solicitors attaching copies of pro forma standard transaction documents, standard clauses for insertion into documents, and an illustration of the intended benefits of the scheme. These emails also attached a copy of a standard disclosure note, which it was intended should be submitted to HMRC by the solicitors together with the SDLT1 return on completion of the transaction.

36. The pro forma disclosure note was in the following form:

> "The chargeable consideration entered on this return has been calculated in accordance with the provisions of section 45 Finance Act 2003 as, between the exchange of contracts and completion, purchaser 1 executed a gift of a 99% interest in the contract at a time when it was 85% paid. Accordingly, on the advice of Counsel, that resulting percentage of the contract price does not fall to be counted as part of the chargeable consideration because of the "sub-sale".
>
> We are also advised that the provisions of section 75A F. A. 2003 do not apply to this transaction, as when operating a calculation under this provision the resulting chargeable consideration is less than that declared on the return. If you require further information, please contact us."

37. Other than the details of the success fee (see below), Mr Cowie, who worked on the Jeepster and Hummer schemes when he was engaged by Cornerstone, confirmed that the emails were not specifically tailored to individual transactions. In relation to the disclosure note, the email simply referred to "a disclosure note to be appended to the SDLT1 when it is submitted" in the list of documents which were attached to the email. There was no further instruction to the solicitor as to how the disclosure note should be dealt with, for example, whose contact details should be inserted at the foot of the disclosure note, although Mr Cowie's evidence, which I accept, was that it was intended to be the contact details of the relevant solicitor and not, for example, Cornerstone.

38. In his evidence, Mr Cowie confirmed that, in his experience, Cornerstone did not take any steps to confirm that the solicitors had submitted disclosure notes. This was left to the solicitors instructed by the clients.

39. The standard email would also contain details of arrangements for the payment of Cornerstone's success fee. Mr Cowie confirmed in oral evidence, that as regards Cornerstone's success fee, "success" was defined by reference to whether an enquiry was opened into the SDLT1 return within the enquiry window.

The arrangements for dealing with SDLT disclosures within HMRC

40. As I discuss below, it is the appellants' case in each of these appeals that a disclosure note, broadly in the standard form provided by Cornerstone, was sent to HMRC by the solicitors who were acting for the relevant appellants together with the SDLT1 return. HMRC accept that they received the SDLT1 returns, but it is HMRC's case that they did not receive the disclosure notes and that there is no reliable evidence that the disclosure notes were sent to HMRC. I have dealt with the evidence of those matters below.

41. At this stage, I will, however, summarize briefly the facts that I have found regarding the general approach to disclosure in SDLT avoidance cases. Some of these facts are drawn from Mrs Randall's evidence. Mrs Randall also gave detailed evidence on the approach of the Stamp

Office to avoidance cases and the processes within the Stamp Office at the time for handling the submission of disclosures in SDLT cases. I have summarized the main points from her evidence at [135] to [145] below, where I deal with the handling of disclosure notes in these appeals.

42. Following the decision of the Court of Appeal in *Langham v Veltema* [2004] STC 544 ("*Langham*"), HMRC issued a Statement of Practice in 2006, SP1/06, which concerned disclosures made for income tax, capital gains tax and corporation tax self-assessments. The statement of practice recommended that taxpayers who wished to protect themselves from a discovery assessment should include further information in the "Additional Information" section of the return (the "white space")

43. The statement of practice was adopted by the Stamp Office for SDLT purposes in SDLT Technical News Issue 4 in 2006. However, there was (and remains) no "white space" on an SDLT1 return in which the taxpayer might make a disclosure. So if a taxpayer wanted to provide additional information to support the position taken in an SDLT1 return, including making a disclosure of views taken in the context of avoidance scheme, the taxpayer would have to provide a separate document or letter to HMRC. Furthermore, the HMRC office to which SDLT1 returns had to be sent, the Rapid Data Capture Centre ("RDCC") in Netherton, was simply a processing centre. It had no capacity to deal with questions arising from returns. So in SDLT Technical News Issue 4, HMRC advised taxpayers to send any disclosures in writing to "the Complex Transactions Unit in Manchester, quoting the UTRN at or before the time at which they submit the land transaction return for that land transaction".

44. In SDLT Technical News Issue 4, the Stamp Office also confirmed that if a disclosure was made in this way, it would be treated "for the purposes of paragraph 30(4)(a) of Schedule 10 to the Finance Act 2003, as if it had been contained in the land transaction return for that land transaction". The advice continued:

> "Please do not send disclosures to the Rapid Data Capture Centre at Netherton, or put them in the same envelope as land transaction returns, as this causes difficulty for the automated processing systems."

45. The guidance was updated in HMRC Stamp Taxes Technical Newsletter 42 of March 2007. When the guidance was updated in 2007, taxpayers were requested to send disclosures to the Complex Transactions Unit in Birmingham rather than Manchester. The guidance was also included in HMRC's SDLT Manual (at paragraph 100-070).

46. Mrs Randall said that it was not uncommon for users of SDLT avoidance schemes to seek to protect themselves from a discovery assessment by making a disclosure to HMRC. These disclosures took a wide variety of forms both in their content and the manner in which they were made.

47. Notwithstanding the guidance contained in Technical Newsletter 42 and HMRC's manual, many taxpayers continued to send letters and disclosures with SDLT1 returns to the RDCC at Netherton. By 2010 many returns were being filed on-line and correspondence relating to on-line returns would also often arrive at the RDCC without being attached to a paper return. HMRC put in place arrangements to ensure that correspondence, which had been sent to Netherton, was forwarded to the Birmingham office. Mrs Randall gave evidence of these arrangements, which I have summarized below.

48. Mrs Randall became aware that many of the cases in which disclosure notes were sent to Netherton appeared to relate to cases involving Cornerstone schemes. On 10 December 2010, she wrote to Cornerstone to request that disclosures of arrangements entered into by

Cornerstone's clients be sent to the Complex Transactions Unit in Birmingham, and not to Netherton, which could not deal with disclosures.

49. Cornerstone (Mr David Hannah) responded to Mrs Randall's letter on 25 January 2011. In his letter, Mr Hannah refused to advise clients to separate the disclosure from the return on the grounds that it would lead to anyone considering the return not to be in full possession of the facts and it would increase the difficulties for clients in proving that appropriate disclosure had been made.

50. Following this exchange of correspondence, Mr Nick John, Deputy Director for Stamp Office customer relations wrote to Mr Hannah on 17 March 2011 setting out proposed arrangements under which HMRC would provide receipts for disclosure notes sent directly to the Birmingham office.

THE ISSUES BEFORE THE TRIBUNAL

51. The preliminary issue as referred to in the direction issued by Judge Poole is whether or not assessments were validly made and, in particular, whether at least one of the conditions referred to in paragraph 30(1)(a) Schedule 10 FA 2003 was satisfied.

52. The appellants have raised various challenges to the validity of the discovery assessments. Some of these challenges are only relevant to particular appeals.

53. The first issue that the appellants have raised is whether, at the time at which the assessment was made, the "discovery" of the insufficiency of tax was sufficiently "new" that an assessment could be made under paragraph 28 Schedule 10 FA 2003. I have referred to this issue as the "staleness issue". It is relevant to all of the appeals.

54. The remaining issues relate to the conditions in paragraph 30 themselves. Paragraph 30(1)(a) refers to two cases in which a discovery assessment can be made. Those two cases are set out in sub-paragraph (2) and sub-paragraph (3) of paragraph 30.

55. For the purpose of the preliminary issue before the Tribunal, HMRC did not assert that there was any question of fraudulent or negligent conduct on the part of any relevant person in these appeals. The provisions of sub-paragraph (2) are therefore not relevant to the issues before me. However, HMRC sought to reserve its position to rely on sub-paragraph (2) if evidence were to emerge of fraudulent or negligent conduct on the part of any relevant person.

56. The remaining arguments before the Tribunal therefore focussed on the requirements of sub-paragraph (3). That sub-paragraph requires, in summary, that HMRC could not reasonably have been expected to be aware of the insufficiency of tax at the time at which they ceased to be entitled to enquire into the return based on the information made available to them before that time. For this purpose, the information treated as made available to HMRC is defined by sub-paragraph (4). The appellants in each of the three appeals say that this condition was not satisfied in their case.

57. As I have mentioned above, the standard advice from Cornerstone in relation the schemes was that the solicitors acting for the purchasers should "append" a disclosure note in the prescribed form to the SDLT1 return when that return was submitted to HMRC. For the purposes of the hearing of this preliminary issue, HMRC accepted that if:

> (i) the appellants had made a disclosure to HMRC in the form of the standard disclosure notice provided by Cornerstone to participants in the Jeepster or Hummer schemes and
>
> (ii) if that disclosure was made in an appropriate manner after the time at which HMRC became aware that it could challenge the Jeepster and Hummer schemes (which HMRC say was on 1 April 2010),

then the contents of that disclosure would have been such that HMRC could have been reasonably expected to be aware of the insufficiency of tax. My understanding is that HMRC are taking this approach only in relation to this preliminary issue hearing and for these appeals. HMRC may decide to contest that issue in subsequent appeals.

58. On that basis, it follows that, if any of the appellants made such a disclosure before HMRC ceased to be entitled to enquire into the return, the requirements of paragraph 30(3) would not be met and the relevant discovery assessment would not be valid. However, HMRC raised three challenges to the assertion that this information was made available to them at the relevant time.

(1) First, HMRC say that there is no reliable evidence that the disclosure notes were sent to or received by HMRC. This issue is relevant to each of the three appeals.

(2) Second, HMRC say that, even if the disclosure notes were received by HMRC, the manner of the disclosures in certain of these appeals were such that they did not "notify" HMRC of the information for the purposes of paragraph 30(4)(c)(ii) Schedule 10 FA 2003. HMRC accepted in argument that this issue is not relevant to the Lang/Lang appeal and so this issue is only relevant to the Carter/Kennedy and Burnikell/Graham appeals.

I have dealt with these first two issues together in this decision notice and referred to them as the "paragraph 30(4) issues".

(3) Third, HMRC say that it was not aware that it was in a position to challenge the Jeepster and Hummer schemes until, at the earliest, 1 April 2010. As a result, if the relevant time – in these cases, the time at which HMRC ceased to be entitled to enquire into the relevant returns – occurred before 1 April 2010, HMRC could not reasonably have been expected to be aware of the insufficiency of tax at that time even if the disclosure notes had been sent to and received by HMRC in a manner which properly notified HMRC of that information. This issue is only relevant to the Carter/Kennedy appeal.

I have referred to this issue as the "paragraph 30(3) issue".

THE "STALENESS ISSUE"

59. I will turn first to the staleness issue. The question is whether any discovery which was made by HMRC in these appeals had lost its essential "newness" by the time at which the relevant assessment was made with the consequence that HMRC could not make a valid discovery assessment.

Can a discovery become "stale"?

60. The first issue that I should address is whether it is possible for a discovery to become "stale" in this way so that an assessment will not be valid even if it made within the relevant statutory time limit. That question has been at issue in a number of recent cases. Those cases involved discovery assessments made under the provisions of s29 TMA which relate to income tax and capital gains tax rather than the equivalent provisions relating to SDLT which are found in paragraphs 28 and 30 Schedule 10 FA 2003, but, as I have described above, the principles are essentially the same.

61. Ms Lemos advanced the argument that the principle that a discovery, once made, can become "stale" is erroneous. This argument is consistent with HMRC's approach in some of the more recent cases. However, the current state of the case law is relatively clear. I will not revisit the authorities in this decision notice. It is sufficient to say that the existence of a concept of "staleness" is acknowledged in the Upper Tribunal decisions in *Pattullo v. Revenue & Customs Commissioners* [2016] UKUT 270 (TCC), [2016] STC 2043 and *Beagles v. Revenue*

& Customs Commissioners [2018] UKUT 380 (TCC), [2019] STC 54. Those decisions are binding upon me and I will follow them.

The relevant facts

62. The question for this Tribunal is therefore whether the relevant discovery of the insufficiency of tax in each of these appeals had lost its essential "newness" before the time at which the assessment was made. This issue turns on the evidence relating to HMRC's enquiry into the schemes in question, which is found principally in the evidence of Mr Kane.

63. I have set out in the paragraphs below the facts that I have found from the evidence. Some of this evidence is also relevant to the paragraph 30(3) issue which I discuss at [208] to [232] below.

Background

64. Mr Kane assumed responsibility for enquiries into SDLT schemes relying upon sub-sale arrangements in late 2008. His evidence, which was unchallenged, was that the introduction of the anti-avoidance provision in s75A FA 2003, which took effect from December 2006, was intended to stop sales of SDLT avoidance schemes, which relied on the sub-sale provisions. In fact, it became apparent – primarily from disclosures made by promoters and scheme users which prompted HMRC to open enquiries into the arrangements that had been disclosed – that the introduction of s75A may have had the opposite effect. HMRC became aware of even more schemes following its introduction.

65. HMRC became aware that some of these schemes were marketed by Cornerstone. Mr Kane established procedures to determine whether or not these schemes – which included the Jeepster and Hummer versions of the scheme – could be successfully challenged. At or around the same time, Mr Kane also established procedures to identify cases in which particular schemes may or may not have been used.

HMRC's investigation into whether the schemes could be challenged

66. It is Mr Kane's evidence that there were initially differing views within HMRC as to whether or not the Jeepster and Hummer versions of the scheme were susceptible to challenge under the legislation as it existed at that time, in particular, s75A FA 2003. He said that HMRC first reached a view that the Jeepster and Hummer versions of the scheme could be successfully challenged following a consultation with leading counsel, Malcolm Gammie QC, in early 2010.

67. Mr Kane's evidence was that counsel was asked to consider various different schemes based on the sub-sale provisions and to advise upon the prospects of HMRC's being able to challenge them. Mr Kane was not able to identify the precise date of the consultation with counsel. It was his evidence that no firm conclusions were reached at the consultation and that it was agreed that, if counsel came to the conclusion that a particular scheme was susceptible to challenge, counsel would prepare a draft of a letter to be sent to taxpayers and their advisers challenging the scheme. Mr Kane referred to these draft letters as "challenge letters". Counsel's chambers sent the challenge letters in relation to the Jeepster and Hummer schemes to HMRC on 1 April 2010.

68. Mr Kane was challenged on his evidence concerning the consultation with counsel. Mr Bedenham put to him that there must have been a point prior to 1 April 2010 when it became apparent to HMRC that sub-sale schemes involving a gift or assignment could be successfully challenged. There was, in particular, reference to correspondence in which Mr Kane appeared to accept that he was aware of the possibility of a challenge to the Jeepster and Hummer schemes at some point in 2009. However, Mr Kane explained that this was an error, which he had immediately corrected. The date given in the correspondence referred to the investigation into other types of scheme and not the Jeepster and Hummer schemes.

69. Mr Kane was clear in his evidence. I have accepted that evidence and so I have accepted 1 April 2010 as the date on which Mr Kane first became aware that the Jeepster and Hummer schemes might be successfully challenged.

HMRC's procedures to identify cases in which use of the schemes gave rise to an "insufficiency of tax"

70. As I have mentioned above, HMRC became concerned that many transactions in which SDLT schemes had been used were not being identified by its usual procedures. Mr Kane put in place procedures to test whether or not there were likely to be many undisclosed scheme users.

71. In the early stages, these procedures involved using information available on public internet sites (in particular, nethouseprices.com) which provided details of the purchase prices of properties using data purchased from the Land Registry. HMRC staff compared this information with information disclosed in SDLT1 returns and, where there was a material discrepancy, HMRC purchased specific data from the Land Registry to support any enquiry into the return.

The data matching exercise

72. Following the consultations with counsel concerning the viability of these schemes, HMRC put in place a wider data matching exercise. This exercise began in earnest in October 2010. Mr Kane received formal authorization to proceed with the data matching exercise on 15 October 2010. On 19 October 2010, HMRC acquired two years of data in electronic form for a period between 2007 and 2009 comprising over 2 million lines of data from the Land Registry.

73. The first stage of the exercise was conducted by a team of data analysts known as the Risk and Intelligence Services ("RIS") team. These data analysts compared data purchased in bulk from the Land Registry with details extracted from SDLT1 returns to identify cases in which there was a material discrepancy between the consideration disclosed to the Land Registry and that shown on the SDLT1 return for the same transaction. The data analysts did not have access to the SDLT1 return itself.

74. The RIS team passed the results of the data matching exercise to Mr Kane's team on 29 November 2010. The RIS team identified 3,374 cases in which there was a material discrepancy between the consideration disclosed on the SDLT1 return and the consideration shown on the Land Registry records.

Investigative work by HMRC

75. Mr Kane's team then undertook further searches and enquiries to identify the cases in which it was likely that the discrepancy between the SDLT1 returns and the Land Registry records was likely to be due to the use of a scheme. The various steps in this process are recorded in an internal HMRC memorandum headed "Next steps on receipt of CONNECT data" dated 19 November 2010, which was prepared by Mr David James, one of the investigative officers in Mr Kane's team. There are 17 steps set out in the memorandum. Some of these steps are simple data management steps designed to separate the data into various pre-determined categories. Other steps, which had to be undertaken by HMRC officers of a particular grade with SDLT compliance experience, were designed to identify cases for the issue of assessments and to exclude cases where there may be another explanation for discrepancy (for example, where the transaction in question was a sub-sale to which relief under s45 FA 2003 should, in HMRC's view, apply).

76. Mr Kane's team would then ask the Stamp Office to prepare a Standard Intelligence Package (referred to as a "SIP") for each transaction in which a discrepancy had been identified

and HMRC suspected that an avoidance scheme had been used. The SIP contained relevant documents from HMRC's files, including a print-out of the SDLT1 return and a checklist of the steps that had to be carried out (referred to as the "Pre-assessment Sticky") before a discovery assessment could be issued. Some of these steps had to be checked by officers of a particular grade.

77. Mr Kane's team carried out these final steps. For the reasons that I have set out below in relation to the issue of assessments for the first two batches, it would appear that these steps took place after draft assessment letters had been prepared. The bulk of the steps on the Pre-assessment Sticky involved final checks on the details set out in the draft discovery assessments including the details of the transaction, the consideration declared in the SDLT1, the consideration as determined from the Land Registry data, and the calculation of the SDLT due. Discovery assessments were issued in 1,361 out of the 3,374 cases identified by the RIS team.

More detail on the investigative work undertaken by HMRC

78. For the purpose of the investigative work, which was undertaken by Mr Kane's team, the data received from the RIS team was divided into nine batches. Mr Kane's team undertook the investigation work on each of the batches sequentially. A timetable was prepared for work on each of the batches of data (although the first two batches were later combined). The timetable for the issue of assessments initially stretched over a period of just under six months. However, this timetable was revised and extended as work progressed.

79. The investigative work on the first batch of cases began following the receipt of the data from the RIS team on 29 November 2010. There was a review of the project in a telephone conference call on 16 December 2010 in preparation for the issue of the first assessments. This call was led by Mr James. In that call, Mr James is reported as outlining the current position as "1200 or so assessments to start going out on 10 January 2010 (sic)". The date is clearly an error and should have been a reference to 10 January 2011.

80. The instructions prepared by Mr James for HMRC staff who would issue the assessments in the first two batches envisage the preparation of assessments on 5 January 2011. The checks set out in the Pre-assessment Sticky were then to be undertaken on 6 and 7 January so that the assessments could be approved and issued on 10 January 2011 (the following Monday).

81. This timetable was met. HMRC issued discovery assessments to users of the Jeepster or Hummer schemes in the first two batches of cases on 10 January 2011.

82. The appellants in all of the cases before the Tribunal were in the seventh batch ("batch 7"). Mr Kane's evidence was that the information for the investigative work on this batch involved in the 17 steps in Mr James's memorandum was extracted from the file prepared by the RIS team on 12 July 2011 and that his team therefore began work on these cases on or after 12 July 2011. Mr Kane could not recall precisely when the SIP files for these cases were produced. However, it was his evidence that they must have been produced shortly after 12 July 2011. The final investigative work was then completed. The discovery assessments for all cases in batch 7 were issued on 6 September 2011. I accept Mr Kane's evidence on these points.

Other matters dealt with in Mr Kane's evidence

83. It was Mr Kane's evidence that much of the data analysis was done by staff who were not "authorized officers" of HMRC. However, as I have described, both in the initial analysis, which was undertaken in relation to the information received from the RIS team, and in the final review following the receipt of the SIP files, some of the steps had to be taken by or approved by one of the authorized officers within the team. Once again, I accept Mr Kane's evidence on these points.

84. In his first witness statement, Mr Kane described his awareness of the loss of tax in each of these appeals (and so his decision to issue discovery assessments) as being driven by his knowledge of the discrepancy between the consideration shown in the SDLT1s and the Land Registry data. Mr Bedenham made much of this statement. However, I am satisfied that the decision to issue assessments was not driven by the discrepancy alone. As Mr Kane explained, there were other reasons – other than the use of one of the Jeepster or Hummer schemes – which might give rise to the discrepancy and it was not until further work had been done that HMRC was in a position to identify cases in which it was likely that one of the schemes had been used.

85. It was also Mr Kane's evidence that it was not until a member of his team had examined the SIP file that he or she would have been able to determine whether an assessment should be issued in any particular case. I have dealt with this assertion in my discussion below of the issues surrounding the timing of discovery in these cases.

The parties' submissions

86. I have received extensive submissions from both parties, for which I am grateful. Without setting them out in full, I have attempted in the paragraphs below to summarize the main points from those submissions.

HMRC's submissions

87. Ms Lemos makes the following points for HMRC.

(1) Even if it is possible for a discovery to become "stale", whether and when a discovery is made is not a hypothetical question. The "discovery" which is referred to in paragraph 28 of Schedule 10, is the discovery that is made by the actual officer of HMRC, who examines the actual return and discovers the actual insufficiency of tax. This is clear from the wording of paragraph 28 itself where the power to make a discovery assessment is qualified in respect of transactions for which the purchaser has delivered a return. It is also supported by authority (see *Anderson v Revenue and Customs Commissioners* [2018] UKUT 159 (TCC), [2018] STC 1210 ("*Anderson*") [24] and [28] to [30] and *Sanderson v Revenue and Customs Commissioners* [2016] EWCA Civ 19, [2016] STC 638 ("*Sanderson*") per Patten LJ at [25]).

(2) On the facts of these appeals, no officer of HMRC could have "discovered" an "insufficiency" in the any of the appellants' returns before 12 July 2011. It was only shortly after that time that a member of Mr Kane's team obtained the SIPs which contained copies of the SDLT1 returns for the transactions in batch 7. The RIS team did not have sight of the SDLT1 returns and did not have sufficient knowledge of the SDLT legislation. The first time that an officer of HMRC could have seen all of the information available to HMRC which could have enabled him or her to make a "discovery" as regards a particular return, was upon receipt of the SIP.

(3) The discovery assessments were all issued on 6 September 2011. Even if the SIPs had been received on 12 July 2011 when work in respect of the cases in batch 7 cases began, and even if an officer of HMRC had inspected the SIPs on that day and identified an insufficiency, there would have been a period of less than two months between the discovery of the insufficiency in the returns by an officer and the issue of the discovery assessments. There is no basis on which the relevant discovery in any of these cases could have become stale by the time the relevant discovery assessment was issued.

(4) In particular, there is no concept of "corporate discovery" within paragraph 28. In this respect, there is no material distinction between the requirements of paragraph 28 and the requirements of s29 TMA. A discovery has to be made by an actual officer

examining an actual return (see above). A progression of knowledge and understanding may lead to a discovery being made (*Hicks v Revenue and Customs Commissioners* [2018] UKFTT 0022) but it is only when a conclusion is reached by the actual officer that a discovery is made. It does not matter that the relevant information may have been available to the officer at an earlier date (see the decision of the Upper Tribunal in *Sanderson v Revenue and Customs Commissioners* [2013] STC 915 at [24]).

The appellants' submissions

88. Mr Bedenham made the following submissions for the appellants.

(1) There is no authority that a "discovery" can only be made by an officer who has examined the particular taxpayer's return. Nor is such an approach supported by the language of paragraph 28. If it were correct, it would have the surprising consequence that an officer might know that there is an insufficiency of tax because he or she had seen the relevant data and yet there would be no "discovery" because that particular officer had not looked at the actual return.

(2) Once an officer has determined that there is an insufficiency of tax – whether by examining the return or any other information – that is a "discovery". If another officer later reaches the view that there is an insufficiency of tax on the same legal basis - whether or not by looking at the same documents or information – that is not a new "discovery" (*Tooth v. Revenue and Customs Commissioners* [2018] UKUT 38 (TCC), [2018] STC 824 ("*Tooth UT*") at [79(7)]). If there is undue delay between the "discovery" and the issue of an assessment, the discovery will become stale.

(3) The RIS team sent the results of the data matching exercise to Mr Kane's team on 29 November 2010. Those results set out the consideration shown on the Land Registry records and the consideration shown on the SDLT1 returns. On 29 November 2010, Mr Kane's team had all the information which Mr Kane says in his evidence triggered the discovery of an insufficiency of tax.

(4) Mr Kane acknowledged in his evidence that he came to a conclusion that a discovery assessment should be issued to the appellants on the basis of the discrepancy between the consideration shown on the Land Registry records and the consideration shown on the SDLT1 returns. Mr Kane had that information and made that discovery in December 2010. This conclusion is supported by the internal documents. In the note of the conference call on 16 December 2010, Mr James was able to say that the "1200 or so assessments [are] to start going out on 10 January 2010". Mr Kane must have known this information.

(5) Mr Kane must have "discovered" the insufficiency of tax in relation to each of the appellants by the latest in December 2010. He did not reach that conclusion at a later time. Other HMRC officers were responsible for overseeing issue of the discovery assessments at a later stage, but the discovery had already been made.

(6) The relevant discoveries were made in December 2010. The assessments were not issued until September 2011 seemingly for administrative convenience. By that time, the discoveries were "stale".

Discussion

89. In order to determine the staleness issue, I have decide whether a "discovery" was made in each of the appeals and, if a discovery was made, when it was made.

90. There is no real dispute between the parties that Mr Kane or one of his team must have made a "discovery" at some stage in the process. The issue is when that discovery was made. However, an understanding of the nature of a discovery is important to that timing issue.

The meaning of "discovery"

91. There was also little dispute between the parties as to the meaning of a "discovery" in this context. I will not recite all of the authorities to which I was referred. It is sufficient, for present purposes, to adopt the words of the Upper Tribunal in *Revenue & Customs Commissioners v. Charlton* [2012] UKUT 770 (TCC), [2013] STC 866 ("*Charlton*"). The Upper Tribunal (Norris J and Judge Berner) said this at [37]:

> **37.** In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment. But that would not, in our view, include a case, such as this, where the delay was merely to accommodate the final determination of another appeal which was material to the liability question. Such a delay did not deprive Mr Cree's conclusions of their essential newness for s 29(1) purposes.

This passage is cited with approval by the Court of Appeal in *Tooth v. Revenue & Customs Commissioners* [2019] EWCA Civ 826 ("*Tooth CA*") at [60].

92. The hurdle for a discovery is therefore low. All that is required is that it "newly appears" to an officer of HMRC that there is an insufficiency of tax in an assessment. This awareness involves both a subjective element – the officer must believe that there is a loss of tax – and an objective element – that belief must be honestly and reasonably held (*Anderson* [24] – [32]).

93. What must "newly appear" to the officer is the insufficiency of tax itself not the reason for the insufficiency. This point is emphasised by the Court of Appeal in *Tooth CA* (per Floyd LJ at [60]). If an insufficiency has already been identified, there is therefore no "discovery" where an officer finds a new reason for contending that an assessment is insufficient or decides to address the an insufficiency in a different way (per Floyd LJ in *Tooth CA* at [61]).

94. The awareness of the insufficiency will inevitably involve both an understanding of the facts that relate to a particular taxpayer and the application of tax law to the particular set of facts. It is only when these elements are combined that an officer will be sufficiently aware of the relevant insufficiency. However, it is not necessary for the officer to be absolutely certain that a loss of tax will arise. Although the officer must have more than a suspicion that there will be a loss of tax, it is sufficient that the officer believes that the information available to him or her "points in the direction of an insufficiency of tax" (*Anderson* [28], which is set out below).

Who can make a discovery?

95. The discovery must be made by an actual officer. There is authority for this proposition in the decision of the Upper Tribunal in *Anderson* (which refers to the judgment of Patten LJ in *Sanderson* at [25]). In *Anderson*, the Upper Tribunal says this at [28]:

> **28.** In *Sanderson*, Patten LJ described the power under section 29(1) in this way:
>
> > "The exercise of the section 29(1) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on all the available information at the time when the discovery assessment is made."
>
> We consider, with respect, that this test is in accordance with the earlier authorities. This passage describes the test somewhat briefly because, of course, that case concerned s 29(5) rather than s 29(1). Having reviewed the authorities, we consider that it is helpful to elaborate the test as to the required subjective element for a discovery assessment as follows:
>
> > "The officer must believe that the information available to him points in the direction of there being an insufficiency of tax."
>
> That formulation, in our judgment, acknowledges both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not.

96. It might be thought that there is a difference in this respect between paragraph 28 Schedule 10 FA 2003 and the income tax and capital gains tax provisions in s29 TMA. The opening words of paragraph 28, begin "if the Inland Revenue discover …" whereas the opening words of s29(1) TMA begin "if an officer of the Board or the Board discover…". In this respect, Ms Lemos referred me to the decision of this Tribunal in *Tutty v. Revenue & Customs Commissioners* [2019] UKFTT 3 (TC) ("*Tutty*") (at [30] - [32]) as authority for the proposition that paragraph 28 should not be regarded as requiring any different interpretation to s29 TMA in this respect. I am, of course, not bound by that decision, but Mr Bedenham did not challenge this interpretation, and I have adopted that approach.

97. The better view would appear to be that there is no concept of a corporate discovery in the sense that it might be permissible to impute to an officer knowledge held within HMRC more generally of either the technical aspects or the transactional facts, which might provide evidence of the insufficiency. This conclusion follows from the awareness of an insufficiency having to arise to an actual officer (see above) but it is also supported by statements of the Upper Tribunal in *Charlton* (at [40] to [42]), albeit that in that case it was not necessary for the Upper Tribunal to determine the issue. Once again, I did not understand the parties to disagree on this point.

98. At this point, the parties diverge. Mr Lemos says that the discovery has to be made by the relevant officer having all the relevant and necessary information and that this must be an officer who has examined the return. In support of this submission, she refers to the decisions of this Tribunal in *Tutty* (at [58] – [62]) and *Timothy Gray v Revenue and Customs Commissioners* [2019] UKFTT 0213 ("*Timothy Gray*") (at [42] and [87]). Mr Bedenham disputes this submission. He says the wording of the relevant legislation (whether that be s29(1) TMA or paragraph 28) does not support this conclusion. Furthermore, it would result in the surprising conclusion that an officer of HMRC in possession of all the relevant factual and technical information who becomes aware of the loss of tax, cannot make a discovery simply because he or she has not examined the relevant tax return.

99. On this point, I agree with Mr Bedenham. The provisions, which govern the issue of discovery assessments, have their limitations when applied in the context of large-scale enquiries into mass-marketed schemes involving numerous officers of HMRC. But it is not necessary to read-in limitations which are not justified by the legislation. The legislation – whether paragraph 28 Schedule 10 FA 2003 or s29 TMA – does not specify that the relevant

officer must be an officer who examines the return. Nor, as I read them, do the decisions of this Tribunal in *Tutty* or *Timothy Gray* or the higher courts and tribunals to which I have been referred (e.g. *Sanderson* and *Anderson*) support the conclusion. Whilst I accept that a discovery is only made where an officer, who is in possession of both the facts relating to the particular taxpayer and a knowledge of the relevant tax law, becomes aware of the loss of tax, that conclusion does not require the officer to be in possession of the relevant information as a result of examining the physical return. An officer might equally reach that level of awareness from information, which is extracted from a return, but held in some other form (physical or electronic), or from information provided to him or her by a colleague. For the purposes of the legislation, it cannot matter how the officer came by the information.

Application to these appeals

100. I must then seek to apply those principles to the facts of the current appeals.

101. In the current appeals, there is no doubt that at some point in the process a relevant HMRC officer must have made a discovery. The question is when was that discovery made.

102. As I have mentioned above, a discovery is made when a HMRC officer becomes aware of an insufficiency of tax in a return or assessment. In order to do so, the relevant HMRC officer must be in possession of knowledge of the facts applicable to the particular taxpayer and of the technical analysis, which enables him or her to determine that there is a loss of tax. In the present case, the earliest point in which any HMRC officer could have had sufficient technical knowledge to determine that there was an insufficiency was 1 April 2010, when Mr Kane received the challenge letters from counsel's chambers. At that stage, however, no analysis had been done of the circumstances of the appellants in these appeals, which could have enabled a discovery to be made.

103. As I have mentioned above, it is the appellants' case in each of these appeals that they submitted a disclosure note to HMRC with the SDLT1 return and it is HMRC's case that they did not receive them. However, whether or not the disclosure notes were sent and/or received is irrelevant for this purpose. It is clear that no relevant officer had applied his or her mind to the disclosure notes even if they had been received by HMRC.

104. As regards the earliest point at which a discovery could have been made, Ms Lemos says that a discovery could not have been made until authorized officers obtained the SIP files from the Stamp Office. It is only at that stage that the authorized officers examined the return and so would have necessary combination of knowledge of the facts relating to the particular taxpayer and of the technical tax position, which would enable the officer to make a discovery.

105. Mr Bedenham says that Mr Kane is the relevant officer. He became aware in April 2010 that this particular type of scheme was potentially challengeable. He must have seen the data prepared by the RIS team which identified particular taxpayers and the difference between the consideration which was shown in their SDLT1 returns and the consideration shown on the Land Registry records. It was Mr Kane's evidence that that information was sufficient to enable him to make a discovery. We know that Mr Kane must have known of the insufficiencies of tax in relation to all of the transactions within the data analysed by the RIS team because Mr James referred to the 1200 or more cases in which assessments would be issued in his conversation with other members of staff on 16 December 2010. At that point and no later, Mr Kane have been aware of an insufficiency of tax in the assessments of each of the appellants.

106. I cannot agree with Mr Bedenham on this issue. In December 2010, HMRC had only undertaken the investigative work on the first two batches of the data which it had received from the RIS team. The only work that had been done on the data in batch 7 (which included

the transactions undertaken by all of the appellants) was the work done by the RIS team itself to identify transactions in which there was a material discrepancy between the consideration shown on the SDLT 1 returns and the consideration shown in Land Registry records. No work had been done, at that time, by Mr Kane's team to exclude from the data in batch 7 cases where there may be an alternative explanation for the discrepancy in the consideration shown on the returns and on the Land Registry records. The RIS team were not authorized officers and would not have possessed the necessary tax expertise to identify any insufficiency for tax. It was only when the investigation was undertaken by Mr Kane's team that it would have been possible to identify the cases within the original data for batch 7 in which the difference in the values of the consideration was likely to be attributable to a loss of tax as a result of the type of scheme covered by counsel's advice.

107. I do not place much weight on the comments made by Mr James in the meeting of 16 December 2010 in this respect. Mr James would have been aware of the proportion of cases in the first two batches, which were likely to result in assessments. It would have been relatively straightforward for him to extrapolate that result across all of the batches of data to enable him to arrive at an estimate of the number of assessments which was likely to arise from the data as a whole. As regards the data in batch 7, there was, therefore, in my view, likely to have been insufficient information available to Mr Kane to identify a loss of tax in relation to individual taxpayers within batch 7 at that time.

108. For the reasons that I have discussed above, I do not agree with Ms Lemos that an insufficiency of tax could only have been ascertained once a relevant officer had examined the SDLT1 return following the receipt of the SIP files from the Stamp Office.

109. The timetable for the issue of the assessments in relation to transactions in batch 1 and 2 shows that draft assessments were prepared before the officers in Mr Kane's team examined the SIP files to make their final checks. If HMRC were in a position to draw up draft assessments following the initial investigative steps by Mr Kane's team (i.e. the 17 steps), it must have been possible for Mr Kane, the officer in charge of the operation, to identify with sufficient certainty that there was an insufficiency of tax in the returns of the particular taxpayers at that time at which that work had been done in relation to each batch – that is, before the final checks on the Pre-assessment Sticky were made. In reaching that conclusion, I have taken into account that it is sufficient for these purposes for the information to point in the direction of an insufficiency of tax. It is not necessary for inspectors to establish with absolute certainty that there was an insufficiency.

110. For these reasons, in my view, the earliest date on which Mr Kane's team and therefore Mr Kane himself could have made a discovery in relation to the appellants in these appeals was the date on which Mr Kane's team began work on the data in batch 7. That date was 12 July 2011 which was the date when the data in batch 7 was extracted from the file provided by the RIS. This means that I agree with Ms Lemos on the relevant date, but I reach that conclusion for different reasons.

Were the discoveries "stale"?

111. The assessments for the transactions within batch 7 were issued by HMRC on 6 September 2011. That date was less than two months after the earliest date on which a discovery could have been made. On any view, the discoveries had not become stale within that period.

Conclusion

112. For these reasons, in my view, no question of "staleness" arises in the context of these appeals.

THE "PARAGRAPH 30(4) ISSUES"

113. I will now turn to the paragraph 30(4) issues.

Introduction

114. One of the circumstances in which HMRC may issue a discovery assessment is where, at the time at which HMRC ceased to be entitled to enquire into the SDLT1 return, HMRC could not reasonably have been expected to be aware of the insufficiency of tax in the appellants' returns on the basis of the information made available to HMRC before that time. I describe this test in more detail below. However, the paragraph 30(4) issue relates to the information which is treated as made available to HMRC for the purposes of this test.

115. HMRC say that the information contained in the disclosure notes should not be regarded as having been available to HMRC at the time. HMRC give two reasons for this:

(1) first, HMRC say that there is no reliable evidence that the disclosure notes were sent to HMRC by or on behalf of any of the appellants;

(2) second, HMRC say that, even if the disclosure notes were sent by the appellants and received by HMRC, the manner of the disclosures in the Carter/Kennedy and Burnikell/Graham appeals was such that they did not "clearly alert" HMRC to the information and so did not "notify" HMRC of that information (for the purposes of paragraph 30(4)(c)(ii) Schedule 10 FA 2003).

The evidence

116. These issues turn largely on the witness evidence of Mrs Randall, Mr Hakim, Mrs Barnes and Mr Zeffertt. I will begin by reviewing the evidence of Mr Hakim, Mrs Barnes and Mr Zeffertt in the context of the relevant appeals. I will then turn to the contents of Mrs Randall's evidence as it relates to all of the appeals.

The Burnikell/Graham appeal

117. The solicitors acting on the purchase of the property for the appellants in the Burnikell/Graham appeal were Lloyd & Associates. The partner in charge was Mr Hakim. However, much of the administration of matters on the file were dealt with by Mrs Barnes, a legal secretary at Lloyd & Associates, and Clare Barnes, Mrs Barnes's daughter, who was also employed as a legal secretary at Lloyd & Associates.

Mr Hakim's evidence

118. Mr Hakim gave evidence that Lloyd & Associates had acted in relation between 40 and 50 transactions for which the Jeepster and Hummer schemes had been used. Arrangements had been put in place to ensure that the SDLT1 return and the disclosure note were filed with HMRC. It was his evidence that the importance of submitting the disclosure note with the SDLT1 was made clear to all staff. The standard procedure was for the disclosure note to be "appended" to the SDLT1 return and sent with the SDLT1 return by document exchange to the RDCC in a pre-printed envelope of a type which was issued by HMRC at the time.

119. Mr Hakim's evidence included certified copies of scanned versions of the SDLT1 return, the disclosure note, the land transfer and the land transaction return certificate (SDLT5). The metadata also exhibited to his evidence showed that the documents were scanned to an electronic file in the firm's systems on 22 October 2009.

120. The disclosure note in the scanned file was in the form set out at [36] above. No additions had been made to the disclosure note to identify the transaction to which it related. In particular, the disclosure note did not contain details of the property to which the transaction related, the date of the transaction, the names of the parties, any reference number to identify the taxpayer or the contact details of Lloyd & Associates.

121. When asked why no amendments had been made to the standard disclosure note provided by Cornerstone to identify the transaction, Mr Hakim's said that he did not consider amending the disclosure notes as he had not been instructed by Cornerstone to do so.

122. Mr Hakim confirmed in cross-examination that part of his fee was based on "success", which was defined as no enquiry being opened by HMRC within the enquiry window. He was not aware of any enquiry having been opened into his clients' returns within the relevant enquiry window.

Mrs Barnes's evidence

123. Mrs Barnes gave evidence that she and her daughter were briefed on the procedures which had to be followed to notify HMRC of the transactions in the Jeepster and Hummer schemes. She says that she was provided with a checklist of steps for the Jeepster and Hummer transactions and that the checklist contained an instruction to attach the disclosure note to the SDLT1 return when it was sent to HMRC. She was not able to produce a copy of the checklist which was used. The standard procedure was to "attach" the disclosure note to the SDLT1 return and to send the documents to HMRC by document exchange as described by Mr Hakim.

124. Mrs Barnes says that she prepared the SDLT1 return and the disclosure note for the transaction in the Burnikell/Graham appeal. There was an email exchange between Mrs Barnes and Mr Cowie prior to the submission of the SDLT1 return. On 20 October 2009, Mrs Barnes sent a copy of the SDLT1 return to Mr Cowie for him to review certain aspects before it was submitted. Mr Cowie responded on 21 October 2009 providing details of the entries, which should be made on the SDLT1 return. In his email, Mr Cowie reminded Mrs Barnes that the return should be submitted with the usual disclosure note, a copy of which was attached to the email.

125. Mrs Barnes says that she submitted the SDLT1 return to HMRC together with a copy of the disclosure note by document exchange. She exhibited to a witness statement a copy of the electronic file which includes a copy of a scan of the SDLT1 return and the disclosure note which was prepared at the time of the transaction. The scanned file is dated 22 October 2009.

The Carter/Kennedy appeal

126. The solicitors acting on the purchase of the property for the appellants in the Carter/Kennedy appeal were also Lloyd & Associates. The partner in charge was once again Mr Hakim. Mrs Barnes and her daughter dealt with much of the administration of the file.

127. The evidence of Mr Hakim and Mrs Barnes in relation to the Carter/Kennedy appeal was in most respects the same as their evidence in relation to the Burkinell/Graham appeal. The key differences were that Mrs Barnes was unable to locate a locally stored copy of a scan of the documents as sent to HMRC; and that Mrs Barnes did not exhibit copies of correspondence with Cornerstone regarding the entries on the SDLT1 in relation to this appeal. Mrs Barnes was, however, able to locate a copy of the scanned full file for the transaction which included the SDLT1 return and the disclosure note.

128. The disclosure note was in the same form as that exhibited in relation to the Burnikell/Graham appeal. No additions had been made to the disclosure note to identify the transaction to which it related or the firm of solicitors invovled.

129. In a second witness statement, Mrs Barnes sought to explain the reasons why a locally scanned copy of the SDLT1 return and the disclosure note was not available for the purchase of the property in the Carter/Kennedy appeal. Her explanation was that by that time, Lloyd & Associates had implemented a new document storage system with a third party provider. The documents were recovered from storage with that provider. However, this explanation was based on her statement that the transactions in the Carter/Kennedy appeal took place after those

in the Burnikell/Graham appeal. That was not the case, as Mrs Barnes accepted in cross-examination.

The Lang/Lang appeal

130. The solicitors acting on the purchase of the property for the appellants in the Lang/Lang were LZW. The partner in charge was Mr Zeffertt.

Mr Zeffertt's evidence

131. Mr Zeffertt gave evidence that LZW had acted in a number of transactions involving Cornerstone. Arrangements had been put in place to ensure that the SDLT1 return and the disclosure note were filed with HMRC. It was his evidence that it was "standard practice" to append the disclosure note to the SDLT1 return so that they were sent to HMRC together by document exchange addressed to the RDCC in a pre-printed envelope of a type which was issued by HMRC at the time.

132. Mr Zeffertt's evidence was that LZW had sent the SDLT1 return and the disclosure note for the transfer of [the property] to HMRC on 20 October 2009 by document exchange. He exhibited to his witness statement certified copies of the SDLT1 return, the disclosure note, the land transfer and the land transaction return certificate (SDLT5). Mr Zeffertt did not purport to give direct evidence that he had personally appended the disclosure note to the SDLT1 return and/or included the disclosure note with the SDLT1 return for the transfer of the property when the return was submitted to HMRC. His evidence was simply that he could recall sending many such disclosure notes with the SDLT1 return and it was standard practice for his firm to do so.

133. The main text in the certified copy of the disclosure note attached to Mr Zeffertt's witness statement was in the form of the standard disclosure note as provided by Cornerstone and as set out at [36] above. However, the disclosure note was in letter form. It clearly identified LZW as the solicitors involved in the transaction, provided details of the purchasers (Mr and Mrs Lang), details of the property and a taxpayer reference number.

134. LZW did not charge a fee, which was to any extent dependent upon the success of the scheme.

Mrs Randall's evidence

135. Mrs Randall gave evidence of the systems, which were put in place at the Stamp Office to deal with disclosures.

136. As I mentioned above, taxpayers were instructed to send paper SDLT1 returns to the RDCC at Netherton. There were standard pre-printed envelopes available to taxpayers and their solicitors for this purpose.

137. The RDCC was, however, only set up to process returns. The staff were not qualified to deal with correspondence relating to returns. HMRC issued guidance requesting that taxpayers should send any correspondence (including disclosures) to other offices (initially in Manchester and then in Birmingham), which were equipped to deal with the correspondence. For the purposes of these appeals, at all material times, the relevant office was the Birmingham office.

138. Notwithstanding HMRC's published guidance, many taxpayers continued to send correspondence (including disclosures) relating to SDLT1 returns to the RDCC at Netherton rather than the Birmingham office. In the case of disclosures that were attached to or included with paper returns, Mrs Randall's understanding was that staff were instructed to separate the disclosure from the return and forward it to the Birmingham office.

139. The staff at the RDCC would normally simply apply a date stamp to the disclosure and place it with all correspondence and other disclosures in the internal post to the Birmingham

office. No further processing was done by RDCC staff. Mrs Randall provided some examples of cases in which a member of staff may have added some other means of identification to the disclosures (for example, a postcode of the relevant property), but she accepted that this was not consistently done. RDCC staff kept a record of SDLT1 returns which they had received, but kept no record of correspondence or disclosures which they had received or passed on to other offices.

140. When the internal post was received in the Birmingham office, it was handled by a central administration team. Once again, the central administration team kept no record of items of correspondence or disclosures that were received in the internal post from the RDCC. The central administration team would allocate the correspondence (including disclosures) to the relevant team within the Birmingham office.

141. Any disclosures relating to SDLT1 returns would be passed to the Stamp Office technical team. The technical team did keep a record of the disclosures that had been received, but to do so had to undertake further work to link correspondence and disclosures to the relevant returns. Mrs Randall explained the process by which disclosures not containing any reference to a property were matched to the relevant return. It was her evidence that, during her time at the Stamp Office (over 7 years), she was not aware of more than a small number of disclosures (she estimated between five and ten) which were not matched to returns. If there had been a greater number of unmatched disclosures, she would have had to raise the issue with senior management within HMRC. That did not become necessary.

142. In cases in which the Stamp Office was initiating counteraction measures, the risk team within the Birmingham Stamp Office would create a SIP file. The SIP file would include the SDLT1 return and any disclosure that had been made. This SIP file would then form the basis of the case file for the particular enquiry or appeal.

143. In addition, Mrs Randall gave evidence relating to the transactions involved in these appeals.

(1) Notwithstanding the existence of the systems within the Stamp Office to match disclosures to SDLT1 returns, there were no disclosure notes on the SIP files relating to any of the appeals.

(2) Mrs Randall had undertaken a review of SIP files relating to transactions involving Lloyd & Associates where a return should have been made in the period between September 2009 and August 2010. There were 13 such files. She was unable to find a single example of a disclosure made by Lloyd & Associates on those files. (The transactions involved in the Carter/Kennedy appeal would have been covered by this review. The transactions involved in the Burkinell/Graham appeal would not.)

(3) In relation to the Lang/Lang appeal, Mrs Randall confirmed that she had been able to trace almost 200 disclosures received by HMRC from LZW. However, there was no copy of a disclosure note on the file for the transaction involved in the Lang/Lang appeal.

144. In cross-examination, Mrs Randall accepted that, although she was only aware of a small number of cases in which it had not been possible to match disclosure notes with the relevant SDLT1 returns, she had not enquired of the RDCC or the central administration team at the Birmingham office as to whether there was other unreferenced correspondence of which she was unaware, which had not been passed on to the Birmingham Stamp Office.

145. Mrs Randall also accepted that:

(1) if disclosures in the form exhibited to Mr Hakim's witness statement in relation to the Carter/Kennedy appeal and the Burnikell/Graham appeal had been sent to the RDCC

with the SDLT1 return and not been separated from the relevant return, it would have been possible to identify the relevant return;

(2) if her team had received a disclosure in the form of the disclosure note exhibited to Mr Zeffertt's witness statement in relation to the Lang/Lang appeal, her team would have been able to identify the relevant SDLT1 return and the relevant transaction.

The burden of proof

146. There was some dispute between the parties on the question of the burden of proof on this question. So I will turn first to that issue.

The parties' submissions

HMRC's submissions

147. Ms Lemos made the following submissions.

(1) HMRC accept that that the burden of proving that the condition in paragraph 30(1)(a) Schedule 10 FA 2003 is satisfied is on them. However, the burden of proving that the condition in paragraph 30(4)(c)(ii) is satisfied falls on the appellants.

(2) In the context of these appeals, the appellants had to prove two matters in order to show that the condition in paragraph 30(4)(c)(ii) is satisfied:

(a) first, that a disclosure note was sent by (or on behalf of) each of the appellants; and

(b) second, that even if a disclosure note was sent, that the manner in which the disclosure was made was not such as to satisfy the requirement that an officer of HMRC was "notified in writing" of the existence and relevance of the information in it to the insufficiencies in the appellants' returns.

On both of these issues, Ms Lemos says the burden lies on the appellants. In support of her submission, she referred to the decision of the Court of Session in *R (Pattullo) v Revenue and Customs Commissioners* [2009] CSOH 137, [2010] STC 107 (at [104]) ("*Pattullo CSOH*") and the decisions of this Tribunal in *Robert Smith v Revenue and Customs Commissioners* [2013] UKFTT 368 (TC) ("*Robert Smith*"), *Alison Lloyd v Revenue and Customs Commissioners* [2017] UKFTT 828 (TC) and *Timothy Gray*.

148. In response to Mr Bedenham's submission that, if the appellants had discharged the burden to show that they sent the disclosure notes, the burden shifts to HMRC to show that they were not received, Ms Lemos argued that, given the significance of the disclosure notes in providing certainty to the appellants, it was incumbent upon the appellants to put in place steps to enable them to prove that the disclosure notes had been sent and received. She invited the Tribunal to find that the burden on this issue lies solely on the appellants.

The appellants' submissions

149. Mr Bedenham accepts that the burden is on the appellants to show, on the balance of probabilities, that the disclosure notes were sent to HMRC. However, once the appellants have discharged that burden, the burden falls on HMRC to show that the disclosure notes were not received (if that is part of their case). Mr Bedenham says that this conclusion is clear from the wording of Schedule 10 FA 2003 which firmly places the burden on HMRC to show that one of the two cases in paragraph 30(1)(a) applies. He relies on the wording of paragraphs 28 and 30 Schedule 10 in support of his position.

Discussion

150. I only need to refer to two authorities on this issue.

151. The first is the decision of Henderson J in *Revenue & Customs Commissioners v Household Estate Agents Limited* [2007] EWHC 1684 (Ch), [2008] STC 2045 ("*Household Estate Agents*"). The case concerned a discovery assessment made under paragraph 42 Schedule 18 to the Finance Act 1998 ("FA 1998"). (Paragraphs 41 to 45 contain equivalent provisions for the purposes of corporation tax to the provisions of paragraphs 28 and 30 Schedule 10 FA 2003 for SDLT and s29 TMA 1970 for income tax and capital gains tax.) One point at issue was whether the burden of proof in showing whether or not paragraph 45 Schedule 18 FA 1998 – the corporation tax equivalent of paragraph 30(5) Schedule 10 FA 2003 – applied to prevent HMRC from issuing a valid discovery assessment fell on HMRC, as the Special Commissioners had found, or on the taxpayer. At [43] to [48], Henderson J said this:

> **43.** The Commissioners decided this issue by reference to the burden of proof, holding in paragraph 3 of their conclusions that paragraph 45 did not apply because HMRC had not satisfied them that the return was not made in accordance with a generally prevailing practice. In other words, I take them to have held that the burden was on HMRC to satisfy them that the return was not, in the words of paragraph 45, "in fact made on the basis of or in accordance with the practice generally prevailing at the time when it was made"; and that since HMRC had adduced no evidence to discharge that burden, it was not open to them to make a discovery assessment.
>
> **44.** In my view the Commissioners plainly fell into error in adopting this approach to paragraph 45. It is necessary to begin by examining the relationship of paragraph 45 to paragraphs 42, 43 and 44. By virtue of paragraph 42(1), the power to make a discovery assessment for an accounting period for which the company has delivered a company tax return
>
> > "is only exercisable in the circumstances specified in paragraph 43 or 44 and subject to paragraph 45 below."
>
> It follows, as I have already explained, that in cases where the company has delivered a return a discovery assessment may be made only if the conditions of paragraph 43 or paragraph 44 are satisfied. If either or both of those paragraphs are satisfied, there is power to make the assessment; but the power is also "subject to paragraph 45 ", which prohibits the making of an assessment if, put shortly, the insufficiency of tax is attributable to a mistake in the return and the return was in fact made in accordance with the generally prevailing practice at the time.
>
> **45.** It can thus be seen that it is only necessary to consider paragraph 45 in a case where the conditions of either paragraph 43 or paragraph 44 are satisfied, and it operates as a further restriction on the power of HMRC to make a discovery assessment. However, it seems clear to me as a matter of general principle that the burden of proof must rest on the party who asserts that there has been an operative mistake in the return, and that the return was in fact made in accordance with the generally prevailing practice. That party will inevitably be the taxpayer, not HMRC. In other words, the burden lies on the taxpayer to establish that paragraph 45 applies, not on HMRC to establish that it does not apply.
>
> **46.** I base this conclusion on the structure and wording of paragraphs 42 to 45, and on the general principle that the legal or persuasive burden of proof "lies upon the party who substantially asserts the affirmative of the issue": see Phipson on Evidence , 16th edition, para 6–06. The matter can usually be tested by asking which party would succeed if no evidence were adduced on the issue: see, for example, in a tax context, the illuminating judgment of Slade J in *IRC v Garvin* (1979) 55 TC 24 at 51F–57E, to which I was helpfully referred by Mr Woolf, especially at 54I–55A. In the context of paragraph 45,

> if no evidence were adduced as to the existence of an operative mistake in the return or as to the existence of the generally prevailing practice, there would be no basis upon which the Commissioners could conclude that paragraph 45 applied, and accordingly nothing to restrict the power of HMRC to make a discovery assessment if the conditions of paragraph 43 or paragraph 44 were satisfied.
>
> **47.** I find further support for my conclusion in considerations of policy and common sense. Although the general policy of paragraph 42, as Park J explained in *Langham v Veltema*, was to place restrictions on the previously unfettered right of an inspector to make a discovery assessment within normal time limits, I cannot believe that Parliament intended to place upon HMRC, in every case where paragraph 43 or paragraph 44 was satisfied, the additional burden of establishing the negative proposition that there had been no operative mistake in the return, and that the return had not been made in accordance with the generally prevailing practice. Quite apart from the difficulties involved in establishing a negative, the question whether a mistake was made is likely to depend on matters within the exclusive knowledge of the taxpayer, and the question of the existence of a settled practice will depend on the evidence of taxpayers and their professional advisers at least as much as on the practice of HMRC.
>
> **48.** By contrast, it seems to me that the burden of establishing that paragraphs 43 or 44 apply must rest on HMRC, because in the absence of any evidence of fraud or negligent conduct (paragraph 43), or of material to satisfy the test of objective non-awareness (paragraph 44), there would be no basis for a conclusion that either of those paragraphs applied, and nothing to displace the general rule that discovery assessments may not be made. I would add, however, that in relation to paragraph 44 the question is unlikely to be of much practical significance, because the nature of the enquiry is an objective one and the return and accompanying documents which have been submitted to HMRC should always be available. So cases where there is no evidence, or where the Commissioners are unable to reach a conclusion without recourse to the burden of proof, should be rare if not non-existent. With regard to paragraph 43, placing the burden upon HMRC would accord with the long-established general rule, before self-assessment, that the Revenue had to establish fraud or wilful default in order to make an assessment outside the normal six year time limit: see for example *Hudson v Humbles* (1965) 42 TC 380 at 384 and *Brady v Group Lotus Car Companies Plc* (1987) 60 TC 359 at 386H per Dillon LJ.

152. As I mentioned above, paragraph 45 Schedule 18 FA 1998 contains a provision for corporation tax purposes which is equivalent to paragraph 30(5) Schedule 10 FA 2003 for SDLT purposes. Paragraph 43 contains a provision for corporation tax purposes which is equivalent to paragraph 30(2) for SDLT purposes and paragraph 44 is the equivalent of paragraphs 30(3) and (4).

153. Henderson J decides that the burden of proof that paragraph 45 (that is paragraph 30(5) in our context) can apply falls on the taxpayer. He does so on the basis of the general principle that the persuasive burden "lies upon the party who substantially asserts the affirmative of the issue" (at [46]).

154. At [48], Henderson J also concludes that the burden of establishing that the requirements of one of the conditions in paragraphs 43 and 44 have been met must rest with HMRC. Paragraphs 43 and 44 are the equivalent provisions to the two cases in which a discovery assessment can be made which, in the SDLT context, found in paragraph 30(2) and paragraphs 30(3) of Schedule 10 FA 2003 respectively. Henderson J goes on to identify that in a paragraph

44 case – i.e. paragraph 30(3) case – the question of the burden of proof "is unlikely to be of much practical significance, because the nature of the enquiry is an objective one and the return and accompanying documents which have submitted to HMRC should always be available. So the cases where there is no evidence, or where the Commissioners are unable to reach a conclusion without recourse to the burden of proof, should be rare if not non-existent."

155. This is of course one such case. However – on the basis of the wording of paragraph 30(4)(c)(ii) and following the reasoning and principles set out by Henderson J in *Household Estate Agents* (at [46]) – it seems to me that the burden of showing that information has been "notified in writing" to HMRC must fall on the taxpayer once HMRC has articulated a prima facie case that the information in question was not so notified and so was not information available for the purposes of the application of the test in paragraph 30(3) – on which the burden must fall on HMRC.

156. In these circumstances, if no or insufficient evidence is adduced on the issue, HMRC would succeed – or at least the test in paragraph 30(3) would be applied without reference to the information in question. On the other hand, if sufficient evidence is produced that the information was made available, the burden falls back on HMRC to show that the test in paragraph 30(3) is met by reference to that additional information.

157. Mr Bedenham accepts that the burden lies on the appellants to show that the disclosure notes were sent. As he also noted, in the present circumstances, the question as to whether or not the disclosure notes were sent but not received does not arise because the appellants' case is that disclosure notes were included with the SDLT 1 returns, which HMRC accepts they received. That having been said, in my view, given the general principle, the burden must fall on the taxpayer in the event of any dispute to show that HMRC were "notified" of the existence and relevance of the information as required by paragraph 30(4)(c)(ii). That burden will inevitably encompass overcoming, on the balance of probabilities, any assertion on the part of HMRC that the relevant information was sent but not received. The evidence that the taxpayer may need to bring to discharge that burden, will, of course, inevitably depend upon the circumstances of the case.

158. Ms Lemos argued that, in addition to showing that the disclosure notes were sent, the appellants also need to demonstrate that the manner of any disclosure was sufficient to "notify HMRC of the insufficiency". For the reasons that I have given, in my view, the burden is on the appellants to show that the existence and relevance of the information was "notified in writing to HMRC". That is a single question, of which the issue as to whether or not the disclosure notes were sent is a part. I discuss in more detail below whether the manner in which the disclosure is made can affect whether or not it has been "notified" to HMRC. But if it can, it is a part of the same question and so the burden must also fall on the taxpayer.

159. The second case to which I will refer is the decision of the Court of Session in *Pattullo CSOH*. The case involved an application for judicial review of HMRC's decision to issue a discovery assessment. On the question of the construction of section 29 TMA, Lord Bannatyne said this at [104]:

> **104.** It seems to me that on a proper construction the first preliminary part of the test is no more than an assertion by the officer of a newly discovered insufficiency. The heart of the test I judge is clearly contained in part (II) of the test. On a proper understanding a discovery assessment can only be foreclosed if the taxpayer has clearly alerted in his return the officer to the insufficiency of tax which the officer has asserted he has newly discovered, thus rendering it not a new discovery but rather something on the information provided by the taxpayer the officer should have been aware of during the enquiry window. In my judgement on a proper construction the section clearly

> places the emphasis on the adequacy of the disclosure by the taxpayer. That fits in with the underlying purpose of the scheme. Thus the taxpayer is given the right of early finality. However, there is a corresponding duty on the taxpayer to clearly alert the officer to the insufficiency. If he does not the officer can newly discover an insufficiency. Accordingly I broadly accept counsel for the respondent's argument that in terms of the section it is for the taxpayer (once a newly discovered insufficiency is asserted) to prove that he has clearly alerted the officer to the insufficiency.

The reference in this passage to "part (II)" of the test is a reference to the explanation of the provisions of section 29 TMA by the Special Commissioners in *Corbally-Stourton v Revenue & Customs Commissioners* [2008] STC (SCD) 907 at [59] and refers, in particular, to the condition for the issue of an assessment in s29(5) TMA (the equivalent of paragraph 30(3) Schedule 10 FA 2003). The reference to whether a taxpayer has "clearly alerted" HMRC to an insufficiency is a reference to the judgement of Auld LJ in *Langham* (at [36]).

160. Ms Lemos submitted that this passage clearly demonstrates that the burden is on the taxpayer to show that information was notified to HMRC for the purposes of paragraph 30(4)(c)(ii). I do not entirely agree with her. In my view, the words of Lord Bannatyne are not so specific. He appears to suggest that once HMRC has asserted that a discovery has been made, the burden then falls upon the taxpayer to show that the circumstances do not meet the condition in s29(5) TMA (i.e. paragraph 30(3)). If that is a correct interpretation, then I prefer the explanation Henderson J in *Household Estate Agents* to which I refer above. However, I do accept that the general principles set out by Auld LJ in his judgment in *Langham* (to which I refer below) are consistent with the imposition of the burden on the taxpayer to demonstrate that information within paragraph 30(4)(c)(ii) has been notified to HMRC.

Were the disclosure notes "notified" to HMRC?

161. As I have explained above, the two issues that have been raised before this Tribunal in relation paragraph 30(4)(c)(ii) – i.e. whether the disclosures notes were sent to HMRC and whether the disclosures were "notified" in writing to HMRC are simply two aspects of the question posed by that sub-paragraph. To put that question in the context of these appeals, that question is, is the information in the disclosure notes, information the existence of which, and the relevance of which as regards the insufficiency of tax were notified in writing to HMRC by the appellants or a person acting on their behalf?

Were the disclosure notes sent to HMRC?

162. I will deal first with the question as to whether, on the balance of probabilities, the disclosure notes were sent to HMRC.

HMRC's submissions

163. Ms Lemos submitted that the appellants had not discharged the burden on them to show that the disclosure notes had been sent by the appellants to HMRC with the SDLT1 returns. There was no reliable evidence that the disclosure notes had been sent to HMRC.

<u>The Carter/Kennedy and Burnikell/Graham appeals</u>

164. In relation to the Carter/Kennedy and Burnikell/Graham appeals, she made various criticisms of Mr Hakim and Mrs Barnes's evidence.

(1) Notwithstanding his assertion that he was aware of the importance of submitting the disclosure note, Mr Hakim did not check that the disclosure notes were included with the SDLT1 returns before they were sent to HMRC.

(2) Although Mr Hakim claimed that it was standard practice for a disclosure note to be appended to each SDLT1 return, he could not confirm whether and how this was

actually done in the case of the transactions, which were involved in the Burnikell/Graham appeal or the Carter/Kennedy appeal.

(3) The photocopied or scanned versions of the disclosure note produced to the Tribunal as evidence that the disclosure note had been sent to HMRC with the SDLT1 (whether appended to witness statements of Mr Hakim and Mrs Barnes or provided in documentary evidence) were not consistent. This suggested that they were not the same document.

(4) The photocopied or scanned versions of the SDLT1 and the disclosure note bore marks, which Ms Lemos suggested were staple marks, and which she asserted showed that the disclosure notes were not stapled to the SDLT1 return as Mr Hakim and Mrs Barnes had claimed in their evidence.

(5) Ms Lemos raised various issues concerning the metadata for the scanned files. She suggested that the metadata did not show that the files were the same documents as those suggested by Mr Hakim.

(6) Mr Barnes was unable to recall key details such as:

(a) what period the Jeepster and Hummer transactions covered;

(b) if there were any differences between the procedures applicable to the Jeepster and Hummer schemes and those applicable to other schemes (despite claiming that she had to follow specific procedures for each different scheme);

(c) details of the briefing which she said Mr Hakim had given;

(d) items which were on the checklists applicable to Jeepster and Hummer transactions; and

(e) whether she would print off the disclosure note attached to an email from Mr Cowie, or whether she would use a pre-printed version present in the office;.

(7) Mrs Barnes' could not recall specific details of the procedures she had undertaken in connection with the transactions involved in the appeals including:

(a) who scanned the Burnikell/Graham returns;

(b) why the scanned version of the SDLT1 in the Burnikell/Graham appeal was modified an hour after it was created;

(c) whether or not the disclosure note was stapled to the inside cover of the Burnikell/Graham file (which she had recently seen): and

(d) the fact that the transactions in the Carter/Kennedy appeal took place before those in Burnikell/Graham appeal.

(8) Mrs Barnes's witness statements were shown in cross-examination to contain some inaccuracies.

(a) Mrs Barnes claimed that it was "standard practice" was for the SDLT1 and the disclosure note to be scanned, but this did not occur in the Carter/Kennedy appeal.

(b) The reasons which Mrs Barnes gave as to why she could not find a scanned copy of the SDLT 1 return and the disclosure note for the Carter/Kennedy appeal proved to be speculation.

(c) Mrs Barnes accepted in cross-examination that Mr Hakim's personal assistant was also processing Jeepster and Hummer transactions, despite the claim

in Mrs Barnes's witness statement that only she and her daughter processed the Jeepster and Hummer transactions.

(d) Mrs Barnes claimed in her first witness statement that the stapling on the disclosure note for the Burnikell/Graham appeal exhibited to her witness statement demonstrated that the note was stapled to the SDLT1, but accepted in cross-examination that it did not.

(9) Ms Lemos made various other more general criticisms of the evidence:

(a) She criticised the late production of documentary evidence by the appellants in particular the fact that some of the emails exhibited to Mrs Barnes's second witness statement were not disclosed until after Mr Hakim had given evidence.

(b) Mr Hakim was unable to identify the source of a copy of the disclosure note which was certified by his current firm Child & Child and which was provided to HMRC in the course of its enquiry. He was equally unable to identify the transaction to which that disclosure note might refer.

(c) Mr Hakim volunteered that the email "instructions" which he received from Cornerstone were not always followed and that his firm did not always wait for instructions to be received from Cornerstone before it began work on a transaction.

(10) Ms Lemos contrasted Mr Hakim's evidence that he did not consider marking up disclosure notes to show that they had been sent by his firm as Cornerstone had not told him to do so with Mr Cowie's evidence that he did not need to instruct solicitors to mark-up disclosures, as they were experienced professionals.

(11) Mrs Randall's evidence was that systems were in place to track unmarked disclosures. Notwithstanding the existence of those systems, she was unable to find a single example of a disclosure made by Lloyd & Associates in her review of the files. This evidence was difficult to reconcile with Mr Hakim's evidence that the firm had acted for clients involved in 40-50 cases using the Jeepster or Hummer schemes.

<u>The Lang/Lang appeal</u>

165. In relation to the Lang/Lang appeal:

(1) Ms Lemos noted that Mr Zeffertt did not provide direct evidence that he had submitted the disclosure note to HMRC with the SDLT1 return. His evidence was limited to the fact that it would have been standard practice in this office for him or one of his employees to have enclosed the disclosure letter with the SDLT1 return.

(2) The evidence of Mrs Randall – that she had found nearly 200 examples of disclosures by LZW – coupled with the fact that the alleged disclosure clearly contained sufficient details for the disclosure to be matched with the relevant return if it had been received by HMRC – suggested that LZW may simply have failed to include the disclosure note with the SDLT1 return in error.

The appellant's submissions

166. Mr Bedenham says that the evidence in each of the appeals was sufficient to establish, on the balance of probabilities, that the disclosure notes were included with the SDLT1 returns, which HMRC confirm they received.

<u>The Carter/Kennedy and the Burkinell/Graham appeals</u>

167. He makes the following points in relation to the Carter/Kennedy and the Burkinell/Graham appeals.

(1) Mrs Barnes gave evidence that she worked on the Burnikell/Graham and Carter/Kennedy files.

(2) Mrs Barnes confirmed that, for the Jeepster and Hummer files, it was made clear to her that a disclosure note had to be attached to the SDLT1 return and sent to HMRC. She was provided with a checklist of steps that included the submission of the SDLT1 with the disclosure note. Mrs Barnes's evidence was that disclosure notes were sent in all Jeepster and Hummer cases.

(3) There was no reason to believe that Mrs Barnes did not follow her instructions. This was particularly the case given the other evidence relating to these transactions:

(a) in the Burkinell/Graham appeal:

(i) in the email exchange between Mrs Barnes and Mr Cowie on 20 October 2019 and 21 October 2019, Mr Cowie reminded Mrs Barnes that the return should be submitted with "the usual disclosure note"; and

(ii) Mrs Barnes made a contemporaneous electronic scan of the documents sent to HMRC, which included the SDLT1 and the disclosure note.

(b) in the Carter/Kennedy appeal: although Mrs Barnes had been unable to locate the locally stored copy of the scan of the documents sent to HMRC, she was able to locate the scanned copy of the full file, which included the SDLT1 return and the disclosure note.

(4) Mr Hakim gave evidence of the background to his firm's involvement with the Jeepster and Hummer schemes and the processes put in place to ensure that the steps were implemented correctly. His evidence was that he had made very clear to everyone involved the significance and the importance of ensuring that the note was included in the SDLT1 return.

168. The only evidence that HMRC called to rebut the appellants' evidence was that of Mrs Randall, who gave evidence that she could not find a record of the disclosure note on HMRC's file. However, Mrs Randall's own evidence betrayed significant gaps and flaws in HMRC's systems for dealing with disclosures. Furthermore, although Mrs Randall's witness statement contained a statement that she had been "unable to find a single example of any disclosures made by Lloyds", she accepted during cross-examination that she had only reviewed a limited number of files.

169. As regards Ms Lemos's criticisms of the evidence, Mr Bedenham says that:

(1) the line of questioning in which witnesses were asked to opine on whether a given dot on a photocopy or scan was a staple hole as opposed to some other mark was a red herring;

(2) HMRC's attempts to impugn the contemporaneous electronic file of the documents by reference to the metadata were not made out.

<u>The Lang/Lang appeal</u>

170. Mr Bedenham makes the following points in relation to the Lang/Lang appeal.

(1) Mr Zeffertt's evidence both in his witness statement and in oral evidence was very clear. In particular Mr Zeffertt confirmed:

(a) the copy of the disclosure note exhibited to his witness statement was LZW's file copy, the originals of which were sent to HMRC;

(b) procedures were in place to ensure that the SDLT1 return and the disclosure note were placed in the same envelope and sent to HMRC by document exchange either by Mr Zeffertt himself or by one his employees;

(2) HMRC had acknowledged that in hundreds of other cases, Mr Zefferttt's firm sent disclosure notes to HMRC.

(3) Mr Zefferttt had no financial interest in the outcome of these appeals.

171. Once again, the only evidence that HMRC called to rebut this evidence was Mrs Randall's evidence that she could not find a record of the disclosure note on HMRC's file. However, Mrs Randall's own evidence betrayed significant gaps and flaws in HMRC's systems for dealing with disclosures.

Discussion

172. This issue is essentially one of fact and turns on the evidence of the various witnesses. I will deal separately with the appeals relating to transactions which were handled by LZW and those which were handled by Lloyd & Associates.

The Lang/Lang appeal

173. In the Lang/Lang appeal, the appellants' only witness on this issue was Mr Zefferttt. His evidence was very straightforward. He did not purport to give direct evidence that he had personally placed the disclosure note in the same envelope as the SDLT1 return. He relied on the standard practice of his firm, LZW, to send the disclosure note with the SDLT1 return in the same pre-printed envelope by document exchange to the RDCC. He produced the file copies of the SDLT1 return and the disclosure note. The note included references to the taxpayers and the property so that the transaction to which it referred could be identified easily.

174. The main evidence to the contrary was the evidence of Mrs Randall. She said that she had not been able to find a copy of the disclosure note on HMRC's files. However, she was aware of many other cases in which LZW had made disclosures.

175. The issue therefore become one of the relative reliability of the office practices of LZW and HMRC. Mr Zeffertt's evidence on the office practices operated by LZW was very clear. While I accept Mrs Randall's evidence, that she could not find a copy of the disclosure note on HMRC's files, there were, to my mind, simply too many stages within HMRC's systems at which a disclosure note, once it had been separated from the SDLT1 return, could have gone astray. In my view, on the balance of probabilities, LZW sent the disclosure note with the SDLT1 return. HMRC accept that they received the SDLT1 return. So, in my view, on the balance of probabilities, HMRC also received the disclosure note.

The Burnikell/Graham appeal and the Carter/Kennedy appeal

176. In the Burnikell/Graham appeal, Mr Hakim's evidence was limited to the procedures that were put in place to ensure that the disclosure note was included with the return. It was Mrs Barnes who gave direct evidence that she had sent the disclosure note with the SDLT1 return in the same pre-printed envelope by document exchange to the RDCC. In support of her evidence, she produced two pieces of contemporaneous evidence: the email exchange with Mr Cowie concerning the details for inclusion in the SDLT1 return and the scanned copies of the SDLT1 return and the disclosure note. In this case, the disclosure note had not been adapted to include any reference to the parties to the transaction or to provide details of the property.

177. As regards the Carter/Kennedy appeal, Mr Hakim's evidence was essentially the same. The main differences in Mrs Barnes's evidence were that Mrs Barnes could only produce the file copies of the SDLT1 return and the disclosure note and there was no exchange of correspondence with Mr Cowie in evidence.

178. The main evidence to the contrary was again the evidence of Mrs Randall. She said that she had not been able to find a copy of the disclosure notes on HMRC's files. She was also unable to find a copy of a disclosure note on other files on which Lloyd & Associates had acted. That review was, however, limited to some 13 of the 40 or 50 files on which Lloyd & Associates had acted. It covered the period of the transactions involved in the Carter/Kennedy appeal, but not those involved in the Burnikell/Graham appeal.

179. Ms Lemos challenged much of the appellants' evidence. I agree with her that Mrs Barnes's recollection of events was, at times, not very clear and, at others, clearly wrong. She struggled to recall some of the detail of office procedures under cross-examination. However, that was, to an extent understandable as she was seeking to recall events from about 10 years ago.

180. Ms Lemos also sought to undermine other aspects of the evidence. I have set out her criticisms at some length at [164] above. I will address some of them below.

181. Some time was spent in cross-examination considering marks on the copies of the SDLT1 returns and the disclosure notes to determine whether or not they provided any evidence that the SDLT1 returns and the disclosure notes were stapled together. That discussion did not, in my view, advance the case very far. The cross-examination related to file copies, not the originals which had been sent to HMRC and there may have been any number of reasons why the marks, even if they were staple marks, were not identical. The only matter that I took from that evidence – when taken with Mrs Barnes's evidence as a whole – was that the office procedures at Lloyd & Associates were not as consistently applied as they were at Mr Zefferttt's firm.

182. There was also some discussion of the metadata attached to the file copies produced by Mrs Barnes and Mr Hakim. In response to Ms Lemos's criticisms, the appellants sought to introduce evidence from Mr Waterson to explain the notation in the metadata. Mr Waterson is not a computer expert, his evidence is limited to the steps that he had taken and the results that he obtained. I accept the limitations of his evidence but I am satisfied that they were the same file.

183. In the final analysis, this question therefore again turns on an assessment of the office procedures of Lloyd & Associates and HMRC. In the case of these appeals, I have come to the view that, on the balance of probabilities, the disclosure notes were sent to HMRC. The appellants' evidence is perhaps not as clear as that in the Lang/Lang appeal. Mrs Barnes's recollections of the office procedures proved, at times, to be inaccurate. However, given the time that has elapsed that was to an extent understandable. She remained clear in her central claim that she and her daughter were responsible for submitting the disclosure notes and the SDLT1 returns to HMRC. Although Mrs Barnes accepted that Mr Hakim's personal assistant dealt with some of the administration of the Jeepster and Hummer files, the evidence showed that Mrs Barnes was dealing with the return and disclosure note for the transactions involved in the Burnikell/Graham appeal. In the case of both appeals, other evidence (the scanned copy or the filed copy) supported her evidence. In my view, that evidence is sufficient to discharge the burden on the appellants. As I have mentioned above, there were clear shortcomings in HMRC's internal procedures, which could explain why individual disclosure notes may have been mislaid once they were separated from the relevant returns.

Did the disclosures "alert" HMRC to the insufficiency?

184. I will now turn to whether or not the manner in which the dislcosures were made was sufficient to "alert" HMRC to the insufficiency.

185. HMRC accept that this issue is not relevant to the Lang/Lang appeal.

HMRC's submissions

186. Ms Lemos says that information can only be "notified" to HMRC if the information and the manner in which it is provided "clearly alerts" the HMRC officer to the insufficiency. The requirement clearly to alert HMRC to the insufficiency is part of the duty on the taxpayer to provide an honest and accurate return or accompanying information if he or she wishes to benefit from finality in his or her tax affairs and from the protection against subsequent discovery assessments afforded by paragraph 30(3) Schedule 10 FA 2003 (*Langham* [31] and [36]). In the context of the Carter/Kennedy and Burnikell/Graham appeals, the unreferenced, undated disclosures sent by Mr Hakim's firm to an HMRC office other than that specified in HMRC guidance did not "alert" HMRC to an insufficiency.

187. She supports this submission with reference to other principles derived from the case law authorities. In particular, she refers to comments in the cases to the effect that the focus of the test is on what the taxpayer actually provides (*Charlton* [56]), not what a hypothetical officer could have found out (*Langham* [33][34]) or what might be known to particular persons within HMRC (*Charlton* [66]).

The appellants' submissions

188. Mr Bedenham says that this submission conflates two issues: (i) whether information made available for the purposes of paragraph 30(4) – in this context whether it was notified in writing within paragraph 30(4)(c)(ii) – and (ii) whether from that information HMRC ought reasonably to have been aware of the insufficiency for the purposes of paragraph 30(3).

189. On the question of whether the disclosure notes were "notified" to HMRC, HMRC accept that the disclosure note in the Lang/Lang appeal was "notified" to HMRC. The only relevant difference between the facts of the Lang/Lang appeal and the facts of the Carter/Kennedy and the Burkinell/Graham appeals was that the disclosure notes did not on their face identify the returns to which they related. However, the appellants in the Carter/Kennedy and the Burkinell/Graham appeals included the disclosure note in the same envelope as the SDLT1 return, which contained all the relevant details. That was sufficient to identify the return to which the disclosure note related. The process by which it was separated from the SDLT1 return was an internal HMRC process. It could not affect whether or not the disclosure notes were notified to HMRC.

190. There was nothing in the point that the disclosure notes were sent to the RDCC rather than the Complex Transactions Unit in Birmingham as specified in HMRC guidance. The RDCC was not a random HMRC address; it was the address to which the SDLT1 returns had to be sent.

Discussion

191. Without revisiting all of the authorities to which I have been referred, I must first set this question in context.

192. In a case where a taxpayer has made a return, paragraph 30(3) Schedule 10 FA 2003 permits HMRC to issue a discovery assessment if, at the time HMRC ceased be entitled to enquire into the return, they could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the insufficiency of tax in the return.

193. The test in paragraph 30(3) is an objective test. It is performed by reference to the position of a hypothetical HMRC officer of general competence knowledge or skill, not the actual officer who examines the taxpayer's return or who is dealing with the taxpayer's affairs (Patten LJ, *Sanderson* [17]). I have referred to this test below as the "objective awareness test", adopting the nomenclature used by Henderson J in *Household Estate Agents*.

194. Paragraph 30(4) defines the information, which is treated as having been "made available" to the hypothetical officer for the purpose of the objective awareness test in paragraph 30(3). It is an exhaustive list (Auld LJ, *Langham* [36]). The information specified in paragraph 30(4)(c)(ii) – information, the existence and relevance of which are "notified" in writing to HMRC – forms part of that list.

195. Ms Lemos says that in addition to being physically provided to HMRC, information will only be "notified" to HMRC if it "clearly alerts" HMRC to the insufficiency of tax. Those words are taken from the judgment of Auld LJ in *Langham*. He says this at [36]:

> 36. The answer to the second issue— as to the source of the information for the purpose of section 29(5) — though distinct from, may throw some light on, the answer to the first issue. It seems to me that the key to the scheme is that the Inspector is to be shut out from making a discovery assessment under the section only when the taxpayer or his representatives, in making an honest and accurate return or in responding to a section 9A enquiry, have *clearly alerted* him to the insufficiency of the assessment, not where the Inspector may have some other information, not normally part of his checks, that may put the sufficiency of the assessment in question. If that other information when seen by the Inspector does cause him to question the assessment, he has the option of making a section 9A enquiry before the discovery provisions of section 29(5) come into play. That scheme is clearly supported by the express identification in section 29(6) only of categories of information emanating from the taxpayer. It does not help, it seems to me, to consider how else the draftsman might have dealt with the matter. It is true, as Mr. Sherry suggested, he might have expressed the relevant passage in section 29(5) as "on the basis only of information made available to him", and the passage in section 29(6) as "For the purposes of subsection (5) above, information is made available to an officer of the Board if, but only if ," it fell within the specified categories. However, if he had intended that the categories of information specified in section 29(6) should not be an exhaustive list, he could have expressed its opening words in an inclusive form, for example, "For the purposes of subsection (5) above, information … made available to an officer of the Board … includes any of the following…".
>
> (My emphasis)

196. The words of Auld LJ to which Ms Lemos refers form part of the passage in which he identifies the scheme of the legislation as being (in summary) to prevent HMRC from making a discovery assessment only when the taxpayer has made an "honest and accurate return" and has "clearly alerted" HMRC to the insufficiency of the assessment whereas the legislation should not prevent HMRC from issuing an assessment simply because the HMRC officer may have some other information which is "not normally part of [the officer's] checks" that may put the sufficiency of the assessment in doubt.

197. That part of this passage refers to the operation of the test as a whole. As I have identified above, there are, of course, two parts to the test: the first identifies the information which is treated as made available to the hypothetical officer (as defined by s29(6) TMA, or paragraph 30(4) Schedule 10 in the SDLT context); the second applies the objective awareness test (in s29(5) TMA, paragraph 30(3) in the SDLT context) to that information.

198. The objective awareness test is focussed on the quality of the content of the information, which is treated as being available to the hypothetical HMRC officer at the relevant time (*Charlton* [56]). The words from Auld LJ's judgment to which Ms Lemos refers (i.e. "clearly alerted") most naturally apply to this part of the test and to the content of any disclosure.

199. It might be suggested that those words are perhaps less apt to apply to the part of the test which identifies the information available to the hypothetical HMRC officer. That part of the test, for the most part, simply lists documents that have been provided to HMRC and which are treated as made available to the hypothetical HMRC officer. It is an exhaustive list. It is not relevant whether the actual officer involved in making the assessment had the information in the list or indeed additional information which is not in the list.

200. Paragraph 30(4)(c)(ii) is part of that prescribed list of information in paragraph 30(4). However, I agree with Ms Lemos that I must adopt a purposive construction of paragraph 30(4), which is consistent with and informed by the scheme of paragraph 30 as a whole (as identified by Auld LJ in *Langham*). This is the approach taken by the Upper Tribunal in *Charlton* when applying the provisions of s29(6)(d)(i) TMA (*Charlton* [74]) and I should adopt the same approach to the interpretation of paragraph 30(4)(c)(ii) Schedule 10 FA 2003.

201. The question for me is whether the manner in which information is provided to HMRC can determine whether it is notified to HMRC for the purposes of the paragraph. In my view, it can, in appropriate circumstances. This might be the case, if, for example, the manner in which the information is provided is designed to conceal the relevance of the information and so it is not part of "an honest and accurate return".

202. In these appeals, Ms Lemos relies on two issues in support of her submission that the disclosure notes were not "notified" to HMRC:

(1) first that the disclosure notes were not referenced or marked in any way which would allow the relevant return to be identified;

(2) second, that the disclosure notes were not sent to the office identified in the HMRC guidance.

203. On the facts of these appeals, in my view, the fact that the disclosure notes were not cross-referenced in any way to the SDLT1 return cannot affect whether or not they are treated as "notified" to HMRC for the purposes of paragraph 30(4)(c)(ii). The disclosure notes were sent with SDLT1 return. The SDLT1 return contained all the details of the taxpayers and the property, which were required to enable HMRC to match the disclosure with the relevant transaction. The only reason that HMRC could not match the disclosures with the transactions was because they chose as part of their own internal processes to separate the disclosure from the return. Once they had received both the disclosure note and the SDLT1 return, HMRC would have all the information which they required to match the disclosure to the transaction. The information in the disclosure note cannot cease to be available to HMRC simply because HMRC chose to separate it from the return.

204. I am supported in this conclusion by the observations of Auld LJ in *Langham* (at [32]) and the Upper Tribunal in *Charlton* (at [57]) to the effect that the hypothetical officer test cannot be dependent upon the internal organization and processes of HMRC.

205. Ms Lemos also points to the fact that the disclosure notes were not sent to the office of HMRC identified in HMRC guidance.

206. Once again, in my view, the submission of the disclosure notes to the office of HMRC to which the SDLT1 return has to be sent must be regarded as notification to HMRC for the purposes of paragraph 30(4)(c)(ii). I reject Ms Lemos's submission that the delivery of the disclosure note to the RDCC was, in itself, a deliberate attempt to conceal the information in the disclosure note. Although they were not sent to the office identified in HMRC's guidance, the disclosure notes were sent with the return to the correct office for submission of returns in the pre-printed envelopes. There was no attempt to disguise their relevance to the return. Indeed it was implicit in the manner in which the disclosure notes were delivered to HMRC

that the information in them was relevant to the return. In my view, it would be appropriate to expect the hypothetical officer to have regard to information provided with the return as part of his or her "normal checks" (to use the words of Auld LJ in *Langham*). The approach may of course be different if the disclosure notes had been sent to another office.

Conclusion

207. For the reasons that I have given above, in my view, the disclosure notes were "notified" in writing to HMRC by the appellants or a person acting on their behalf.

THE "PARAGRAPH 30(3) ISSUE"

Introduction

208. The final issue before me relates to the application of the objective awareness test in paragraph 30(3) Schedule 10 FA 2003. The question is whether at the time at which HMRC ceased to be entitled to enquire into the return a hypothetical HMRC officer could not reasonably have been expected to be aware of the insufficiency of tax from the information available to him or her (as defined in paragraph 30(4)) at that time.

209. HMRC conceded that if the Tribunal found that the disclosures notes in relation to the Lang/Lang appeal and the Burnikell/Graham appeal were notified to HMRC in a manner which met the requirements of paragraph 30(4)(c)(ii), HMRC would accept that the discovery assessments issued to the appellants in those appeals were invalid because the enquiry window for those appeals closed after 1 April 2010. This issue is therefore only relevant to the Carter/Kennedy appeal.

HMRC's submissions

210. In summary, Ms Lemos, says that HMRC were not aware that they were in a position to challenge the Jeepster and Hummer schemes until, at the earliest, 1 April 2010. For cases where HMRC ceased to be entitled to enquire into the return before that date, a hypothetical HMRC officer could not reasonably have been expected to be aware of the insufficiency of tax at the relevant date even if the disclosure notes had been sent to and received by HMRC in a manner which properly notified HMRC of the information.

211. In relation to the Carter/Kennedy appeal, HMRC ceased to be entitled to enquire into the return on 22 March 2010. On that date, the hypothetical HMRC officer could not have known that the scheme was capable of being successfully challenged. Until 1 April 2010, HMRC were still considering whether the schemes could be challenged.

212. Ms Lemos referred me to the decision of this Tribunal in *Robert Smith* and in particular to the passages in that decision where the Tribunal refers to the decision of the Court of Session in *Pattullo CSOH*. She submitted that the disclosure note in the Carter/Kennedy appeal did not contain any of the information set out by Lord Bannatyne in *Pattullo CSOH* (at [114] and [115]) and was designed to pass through the initial checks carried out by HMRC without clearly alerting HMRC to the insufficiency.

213. In Ms Lemos's submission the information contained in the disclosure note was sufficient to justify the opening of an enquiry into the return. However, that was not the relevant test (*Langham* [33]). The law in this area was of a degree of complexity that it was not reasonable to expect a hypothetical officer to be aware of the insufficiency as a result of the information in the disclosure note and the return (see the approach taken by the Tribunal in *Robert Smith* at [82]).

The appellants' submissions

214. Mr Bedenham referred to the case law authorities on the extent of the technical knowledge and awareness that should be attributed to the hypothetical HMRC officer for the

purpose of applying the objective awareness test in paragraph 30(3) (including the decision of the Court of Appeal in *Revenue and Customs Commissioners v Lansdowne Partners Limited Partnership* [2011] EWCA Civ 1578, [2012] STC 544 ("*Lansdowne*") and the decision of the Upper Tribunal in *Charlton*).

215. Based on those authorities, he submitted that it was not necessary for the hypothetical officer to be able to resolve all questions of law. It was sufficient that the officer had information to justify the assessment. The level of disclosure made in the disclosure note and in particular the references to s75A FA 2003 and s45 FA 2003 was sufficient to make an HMRC officer aware of the insufficiency and to justify an assessment even at a time before Mr Kane had consulted counsel on efficacy of the Jeepster and Hummer schemes.

216. Furthermore, he submitted that the challenge letters were sent by counsel's chambers to HMRC on 1 April 2010. Counsel must have been instructed well before that time and by 22 March 2010, a hypothetical HMRC officer would have had an awareness from the disclosure sufficient to justify an assessment.

Discussion

217. I was referred to a number of decisions on the application of the objective awareness test in s29(5) TMA. The parties have accepted that the same principles should apply to the test in paragraph 30(3) Schedule 10 FA 2003.

Principles derived from the case law

218. Mr Bedenham referred me specifically to the decisions in *Lansdowne* and *Charlton* in his written submissions and during the course of the hearing I was referred by the parties to several of other leading cases on the application of s29(5), including the decisions of the Court of Appeal in *Langham* and *Sanderson* and the decision of the Upper Tribunal in *Beagles*. I do not intend to set out a comprehensive review of the case law in this decision notice. Instead, I have attempted to summarize below the principles that I derive from them and which I will then apply to the application of paragraph 30(3).

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

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

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

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

(4) The hypothetical officer should be treated as being of general competence, knowledge or skill, which includes a reasonable knowledge and understanding of the law

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

220. I did not understand Mr Bedenham or Ms Lemos's submissions to depart materially from the principles that I have set out above. They do, however, differ on the application of those principles to the facts of the Carter/Kennedy appeal.

Application of those principles to the Carter/Kennedy appeal

221. I should therefore turn to the application of those principles to the facts of the Carter/Kennedy appeal.

222. On the facts of the Carter/Kennedy appeal, the relevant date at which the objective awareness test has to be applied is 22 March 2010. This is the date on which HMRC ceased to be entitled to enquire into the return. On that date, the information available to the hypothetical officer as defined by paragraph 30(4) was the information contained in the SDLT1 return and the disclosure note in the form that I have set out above.

223. The question for me is whether, on the basis of that information, a hypothetical officer could not have been reasonably expected to be aware of the insufficiency in the return. In my view, that condition is satisfied. I have set out my reasons below.

224. The SDLT1 return disclosed the consideration, which the Carter/Kennedy appellants regarded as the chargeable consideration for SDLT purposes as £130,763. It was also clear from the disclosure note that some form of sub-sale transaction was involved and that transaction was considered to fall within the provisions of s45 FA 2003.

225. Those details together with the other details provided by the disclosure note – that the contract was 85% paid before a gift of 99% of the benefit of the contract was made – should have enabled an HMRC officer who was looking at the return and the disclosure note to gross up the declared consideration and find, at the very least, an approximation of the total consideration that was paid. However, without more details of the steps involved in the scheme beyond the limited details provided in the disclosure note, it would be difficult confidently to perform an accurate calculation. On the other hand, it would have been relatively straightforward for the appellants to provide HMRC with the total amounts paid under the contract so as to enable an accurate calculation to be made relatively easily.

226. The disclosure note also refers to s75A FA 2003 and gives a reason why the provision might not apply to require any additional amount to be brought into charge to tax. However, the disclosure note does not contain any indication that the transactions involved form part of a pre-planned tax avoidance scheme; there is no technical explanation as to why s75A was considered to produce the result outlined in the disclosure note; and there are no reasons given as to why 75A should not be applied to tax the total amount of the payments made under the contract.

227. This brings me to the question of the level of awareness and knowledge that I should ascribe to the hypothetical officer who is considering the information that is treated as made available under paragraph 30(4).

228. I am aware of some of the comments in recent cases[1] criticising the focus in some of the earlier cases on the level of awareness and technical skill that should be ascribed to the hypothetical officer when applying the objective awareness test. As I have mentioned, the

[1] See for example, *Hicks v Revenue and Customs Commissioners* [2020] UKUT 12 (TCC), to which I was not referred by the parties

focus of the test is on the adequacy of the disclosure made by the taxpayer. However, in determining whether it is reasonable to expect a hypothetical officer to be aware of an insufficiency in the return from the information, which is treated as available to him or her at the time, an assessment has to be made of the conclusions that it is reasonable to expect an HMRC officer to draw from that information. That assessment will inevitably involve a consideration of the level of awareness and knowledge that inspector is expected to apply to the information; and that level of awareness and knowledge may well change over time.

229. In this context, I should deal briefly with the relevance of the evidence of Mr Kane. I have accepted the evidence of Mr Kane that he was not aware that the Jeepster and Hummer schemes could be successfully challenged until his office received the challenge letters from counsel's chambers on 1 April 2010. I have also accepted his evidence that, until they received the advice from counsel, there was considerable debate within HMRC as to whether s75A could be applied to counteract these schemes.

230. The evidence of Mr Kane is not directly relevant to the paragraph 30(3) issue. The test is performed by reference to a hypothetical officer not an actual HMRC officer such as Mr Kane. That having been said, I do take into account his evidence in considering the general level of awareness that it is reasonable to ascribe to the hypothetical officer when reviewing the information that is treated as available to the officer by paragraph 30(4). In doing so, I take into account that Mr Kane is a specialist and was at the forefront of HMRC's efforts to counteract these schemes and so his technical knowledge was likely to be more advanced than might reasonably be expected of officers within HMRC in general. But I also take into account that, as I have mentioned above, the hypothetical officer is not required to resolve all issues or to every question of law. The test is simply whether the information available would justify the HMRC officer in raising an assessment.

231. Bearing these issues in mind, I would expect a hypothetical officer of general competence, knowledge or skill at the time who was reviewing the SDRT1 return and the disclosure note to be aware of s75A FA 2003 and of its potential application to counteract tax avoidance schemes. However, at the time, the inspector would be in some doubt about the scope of s75A FA 2003. It was not until some time later (in 2013) that this Tribunal first heard the appeal in the case, which led to the Supreme Court decision in *Project Blue Limited v Revenue and Customs Commissioners* [2018] UKSC 30. The reference in the disclosure note to s75A, it seems to me, would have prompted further investigation, but without further explanation would not have led the inspector to an awareness of a loss of tax.

Conclusion

232. Having taken into account all of these factors, I come to the view that it was not reasonable to expect an HMRC officer at the relevant time (on 22 March 2010) to be aware of the insufficiency in the return to an extent that would justify him or her making an additional assessment. This was a relatively complex case. An adequate disclosure must clearly alert the hypothetical officer to the insufficiency. In my view, such a disclosure would have required a fuller disclosure of the facts and, given the state of the law at the time, a fuller explanation of the views, which were being taken on the application of s45 FA 2003 and s75A FA 2003 in the context of those facts. The information made available to HMRC may have been sufficient to prompt the hypothetical officer to raise an enquiry, but it did not clearly alert the officer to the insufficiency and so did meet the requirements for an adequate disclosure at that time.

DECISION

233. In summary, therefore, on the issues that are before me, my conclusions are as follows:

(1) the assessments in each of the appeals were not "stale";

(2) in each of the appeals, the disclosure notes were "notified" to HMRC for the purposes of paragraph 30(4)(c)(ii) Schedule 10 FA 2003;

(3) in relation to the Carter/Kennedy appeal, at the time at which HMRC ceased to be entitled to enquire into the return, HMRC could not reasonably have been expected to be aware of the insufficiency in the return on the basis of the information made available to them before that time.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

234. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ASHLEY GREENBANK
TRIBUNAL JUDGE

Release date: 06 April 2020

APPENDIX

Extracts from s29 TMA in force at 6 September 2011

29.— Assessment where loss of tax discovered.

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a [year of assessment]2 —

(a) that any income, unauthorised payments under section 208 of the Finance Act 2004 or surchargeable unauthorised payments under section 209 of that Act or relevant lump sum death benefit under section 217(2) of that Act which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment , and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquires into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer [...]8 ; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) …