Procedure – SDLT – withdrawal of appeals – HMRC informing Tribunal of objection – Tribunal informing Appellants – no direct notification – whether dispute treated as settled under Sch 10 para 37 – held, no – appeals remain to be determined by Tribunal

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2015/07309
TC/2016/06307
TC/2016/06309

BETWEEN

ALBERT HOUSE PROPERTY FINANCE PCC LTD
(IN LIQUIDATION)
VALE PROPERTY FINANCE PCC LTD
(IN LIQUIDATION) **Appellants**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at Taylor House, Rosebery Avenue, London on 16 October 2019

Mr Julian Hickey of Counsel, instructed by Cornerstone Tax, for the Appellants

Mr Ben Elliott of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This case is brought by Albert House Property Finance Protected Cell Company Limited ("Albert House") and Vale Property Finance Protected Cell Company Limited ("Vale"), together "the Appellants". The Appellants are in liquidation, but I was informed by Mr Hickey at the beginning of the hearing that the liquidators had agreed to the Appellants participating in these proceedings and were content that the case proceed in their absence.

2. Both Appellants had participated in tax planning arrangements ("the Arrangements") with the aim of avoiding Stamp Duty Land Tax ("SDLT"). The relevant SDLT legislation is in Finance Act 2003. In this Decision Notice, all references to legislation are to that Act, unless otherwise specified, and all legislative provisions are cited only so far as relevant to the issues raised by the appeal.

3. Each of the Arrangements involved one of the Appellants and a purchaser who was seeking to avoid SDLT. HM Revenue & Customs ("HMRC") decided that the Arrangements did not succeed, and assessed the Appellants and the purchasers in the alternative to the SDLT that would have been due had they not entered into the Arrangements.

4. On 22 December 2015, Albert House notified an appeal to the Tribunal against an assessment issued under Sch 10, para 28 (a "discovery" assessment), and on 15 November 2016, Vale notified two appeals to the Tribunal, one against a closure notice issued under Sch 10, para 23, and one against a discovery assessment.

5. In February 2018, the Appellants wrote to HMRC withdrawing their appeals; they copied the Tribunal. The Tribunal informed HMRC within 30 days of that notification, and HMRC wrote to the Tribunal, objecting to the withdrawals, but did not write to the Appellants.

6. Sch 10, para 37(4) states that a withdrawal is treated as if the parties have agreed that the decision under appeal should be upheld without variation. However, that deemed agreement only takes effect if HMRC "do not, within 30 days after that notification, give the appellant notice in writing indicating that they are unwilling that the appeal should be withdrawn".

7. The Appellants' case was that their withdrawals were effective in creating those deemed agreements, because HMRC had failed to give them notice in writing within 30 days. HMRC's case was that the legislation did not require an objection to be delivered directly to the Appellants; indirect communication was sufficient. The reasons HMRC did not want the Appellants to withdraw their appeals are explained at §§78-80.

8. On 13 September 2018, Judge Poole directed a preliminary hearing to decide whether the withdrawals were effective in creating deemed agreements.

9. For the reasons explained in the main body of this decision, I decided that HMRC's objections, which had been communicated in writing to the Appellants within the specified 30 day period, had satisfied the relevant statutory provisions, and that the withdrawals had therefore not been effective in bringing the Appellants' appeals to an end. The ongoing case management of their appeals is considered at the end of this Decision.

FAILURE TO ATTEND

10. The Appellants are in liquidation, but as already noted, I was informed by Mr Hickey at the beginning of the hearing that the liquidators had agreed to the Appellants participating in these proceedings and were content that the case proceed in their absence.

11. I considered Rules 2 and 33 of the Tribunal (First-tier Tribunal) (Tax Chamber) Rules 2009. The liquidators were aware of the hearing and I decided it was in the interests of justice to proceed.

THE LEGISLATION AND TRIBUNAL RULES RELATING TO WITHDRAWING AN APPEAL

12. The main provision with which this appeal was concerned is at Sch 10, para 37. It is headed "settling appeals by agreement" and reads:

> "(1) If, before an appeal under paragraph 35 is determined, the appellant and the Inland Revenue agree that the decision appealed against
>
> (a) should be upheld without variation,
>
> (b) should be varied in a particular manner, or
>
> (c) should be discharged or cancelled,
>
> the same consequences shall follow, for all purposes, as would have followed if, at the time the agreement was come to, the tribunal had determined the appeal and had upheld the decision without variation, varied it in that manner or discharged or cancelled it, as the case may be.
>
> (2) Sub-paragraph (1) does not apply if, within 30 days from the date when the agreement was come to, the appellant gives notice in writing to the Inland Revenue that he wishes to withdraw from the agreement.
>
> (3) Where the agreement is not in writing
>
> (a) sub-paragraphs (1) and (2) do not apply unless the fact that an agreement was come to, and the terms agreed, are confirmed by notice in writing given by the Inland Revenue to the appellant or by the appellant to the Inland Revenue, and
>
> (b) the references in those provisions to the time when the agreement was come to shall be read as references to the time when the notice of confirmation was given.
>
> (4) Where
>
> (a) the appellant notifies the Inland Revenue, orally or in writing, that he does not wish to proceed with the appeal, and
>
> (b) the Inland Revenue do not, within 30 days after that notification, give the appellant notice in writing indicating that they are unwilling that the appeal should be withdrawn,
>
> the provisions of sub-paragraphs (1) to (3) have effect as if, at the date of the appellant's notification, the appellant and the Inland Revenue had come to an agreement (orally or in writing, as the case may be) that the decision under appeal should be upheld without variation.
>
> (5) References in this paragraph to an agreement being come to with an appellant, and to the giving of notice or notification by or to the appellant, include references to an agreement being come to, or notice or notification being given by or to, a person acting on behalf of the appellant in relation to the appeal."

13. Rule 17 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") is headed "withdrawal" and reads:

> **"** (1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case—
>
> (a) at any time before a hearing to consider the disposal of the proceedings (or, if the Tribunal disposes of the proceedings without a hearing, before that disposal), by sending or delivering to the Tribunal a written notice of withdrawal; or
>
> (b) orally at a hearing.
>
> (2) The Tribunal must notify each other party in writing of a withdrawal under this rule.
>
> (3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.
>
> (4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after—
>
> (a) the date that the Tribunal received the notice under paragraph (1)(a); or
>
> (b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b)."

THE EVIDENCE

14. The Tribunal was provided with several bundles of documents ("the Bundle"), setting out some of the background to the SDLT arrangements, the communications between the parties and between the parties and the Tribunal.

15. Mr Geraint Williams, the solicitor with HMRC's Solicitor's Office who received and sent the communications at issue in this case, had filed and served a witness statement. However, on 14 October 2019, HMRC wrote to the Tribunal, copying the Appellants, saying that Mr Williams would not be giving evidence, for reasons which were currently confidential but which HMRC hoped they would shortly be able to explain. A witness statement from Miss Victoria Turner, who had adopted Mr Williams' witness statement, was attached to that email. Ms Turner is a solicitor in HMRC's Solicitor's Office and worked with Mr Williams in relation to the Appellants' appeals.

16. Mr Hickey submitted that Mr Williams' witness statement should be withdrawn, because Ms Turner could not give reliable evidence about what Mr Williams had done or intended to do. Mr Elliott suggested that if Mr Hickey took issue with any points in Mr Williams' witness statement, HMRC would be prepared to make concessions as to the weight to be attached to those passages. I agreed this was a sensible approach.

17. Ms Turner's witness statement was therefore admitted. Most of Mr Williams' witness statement, which she had adopted, set out the outline facts and exhibited the correspondence; none of this was in dispute. I return to the question of the reliability of her evidence at §33 and §95.

THE FACTS

18. On the basis of the evidence summarised above, I find the following facts, which were not in dispute.

The Arrangements

19. The Arrangements were marketed by Cornerstone Tax Advisers ("Cornerstone") and involved the following steps:

(1) a purchaser ("P") purchased a property ("the Property") from an independent third-party vendor ("V") and paid the full purchase price on completion;

(2) P agreed to sell the Property to the Appellants, who were stated to be finance companies;

(3) the Appellants agreed to lease the property back to P under what was said to be an alternative finance arrangement;

(4) the Appellants gave P an option to acquire the Property at a later date;

(5) the purchase of the Property from V was carried out at the same time as the sale and leaseback/option arrangement; and

(6) P occupied the Property from the date of completion of the contract with V.

20. The Arrangements were substantially similar to those litigated in *Project Blue v HMRC* [2018] UKSC 30 ("*Project Blue*").

The facts relating to Albert House

21. In the Arrangements relating to Albert House with which this case is concerned, P was a company called Milltown Limited ("Milltown"). The Property was 12 Montpelier Mews, and the consideration £3.9m. No SDLT was paid.

22. HMRC opened an enquiry into Albert House's SDLT return in relation to the Property, and on 17 April 2014, issued a closure notice and in the alternative, a discovery assessment. These decisions were issued in the alternative because there was some uncertainty at HMRC as to whether the closure notice provisions were applicable to the case. The assessments and the closure notice both charged Albert House with SDLT of £156,000.

23. Also on 17 April 2014, HMRC issued Milltown with two closure notices (on different bases) and a discovery assessment for the same SDLT. Each of these decisions was made in the alternative. HMRC have undertaken to collect the SDLT from only one of the participants. They assessed both parties because there was uncertainty as to whether Albert House or Milltown was liable.

24. On 22 December 2015, Albert House notified its appeal to the Tribunal against the discovery assessment[1]. Milltown also notified appeals to the Tribunal against the discovery assessment and closure notices; those appeals remain to be decided by the Tribunal under references TC/2015/0334 to 03376.

[1] There was some brief discussion at the hearing as to why there was no record of an appeal being notified to the Tribunal against the closure notice, and it was suggested that the closure notice may not have been valid because no enquiry had been opened. That issue is not a matter I can resolve in this Decision Notice, but I noted that the closure notice (at Tab 1 of Part A of the Bundle) begins by referring to an opening letter having been issued on 1 October 2010.

25. On 5 February 2018, Cornerstone emailed a letter on behalf of Albert House to the Tribunal and copied Mr Williams of HMRC. It was headed "Notification that Appeal TC/2015/07309 is to be withdrawn on behalf of Albert House Property Finance Ltd – the Brawn Cell", and it said:

> "We wish to inform you of our intention to withdraw the above appeal on behalf of [Albert House] on the below terms and to concede liability for the SDLT HMRC assert to be due."

26. It also said:

> "We agree with HMRC's conclusions [in the review letter] and consider that…the consequence is that the underlying transactions between [Milltown] and the appellant fall to be disregarded when considering any SDLT liability…we have copied this letter to HMRC for their information and consideration, as the withdrawal of this appeal will save costs on both our parts."

27. On 12 February 2018, the Tribunal replied, acknowledging the notification and referring to the 28 day time limit for a reinstatement application in Rule 17(3) and (4), as follows:

> "Thank you for notifying the Tribunal of your withdrawal of your appeal in this case, which has been referred to the respondent. You have the right to apply in writing within 28 days from the date of this letter for reinstatement of your appeal. If the Tribunal hears nothing to the contrary within 28 days, the file will be closed."

28. On the same day, the Tribunal emailed a letter to HMRC; it was addressed to Mr Williams and read:

> "the appellant has informed the Tribunal that it has withdrawn its appeal in this case. If you have any further application with regards to this appeal it should be made within 28 days of the date of this letter, in the absence of which the file will be closed."

29. It was common ground that the mention of HMRC needing to respond within 28 days was an incorrect reference to Rule 17(3); in fact that Rule applies only to the party withdrawing the appeal.

30. On 27 February 2018, Mr Williams emailed the Tribunal, but did not copy Cornerstone. His letter pointed out that the assessment on the Appellant was in the alterative to those issued to Milltown, and then said :

> "HMRC objects to the withdrawal of the appeal as the liability to the tax remains to be determined by the Tribunal, and, in accordance with HMRC's primary and alternative arguments, the taxpayer [Milltown] or the Financial Institution [Albert House] may be found to be liable to the tax. Furthermore the taxpayer's appeal remains extant."

31. On 28 February 2018, the Tribunal emailed Cornerstone, attaching the letter from Mr Williams, and asking for representations in response.

32. In his witness statement, Mr Williams said:

> "Given that the Tribunal had written directly to HMRC asking for our representations on the letter from the Appellants, I responded to the Tribunal directly, assuming that the Tribunal would also pass on HMRC's response to

> the Appellants. This was the ordinary course of action for the Tribunal to pass on correspondence in this way."

33. Ms Turner was taken to this paragraph by Mr Elliott during evidence-in-chief, and she said she understood Mr Williams to have made that assumption. Although Mr Hickey did not challenge that evidence in cross-examination, he submitted that Ms Turner's adoption of parts of the witness statement was nothing more than hearsay. I make no finding as to Mr Williams' intentions, because I agree with Mr Hickey that one person cannot give reliable evidence as to another's intentions. I return to this issue at §95.

34. On 9 April 2018, Cornerstone emailed the Tribunal attaching a letter which said "it is not clear to us on what statutory basis the Respondents consider they are able to prevent the withdrawal of the appeals".

35. Cornerstone's letter also said that the Tribunal's email of 28 February 2018 "appears to have been sent to the email box of an ex-employee who is no longer with the firm…we were not aware of the correspondence until today". However, at the Tribunal Mr Hickey said Cornerstone now accepted that the Tribunal's letter of 28 February 2018 had been received by them on the day it had been sent. He confirmed he was not making a submission that the Appellants had not been notified within the time limit of 30 days provided for in para 37(4).

36. On 3 May 2018, HMRC wrote to the Tribunal, copying Cornerstone, drawing attention to Rule 17 and Sch 10, para 37.

37. On 4 May 2018, Milltown's solicitors, Reynolds Porter Chamberlain LLP ("RPC"), wrote to HMRC, stating that as Albert House had withdrawn its appeal, it followed that Milltown had no SDLT liability. HMRC responded on 16 May 2018, saying that their position remained unchanged and they would "continue to seek to establish the correct tax treatment of the transactions undertaken by Milltown Ltd".

38. On 13 June 2018, the Supreme Court released its judgment in *Project Blue* in favour of HMRC.

39. On 25 June 2018, RPC sent HMRC a judicial review pre-action protocol letter on behalf of Milltown, on the basis that HMRC's refusal to withdraw the closure notices and discovery assessments was "irrational and/or an abuse of law" and "conspicuously unfair" because Albert House had accepted that liability for the SDLT. However, no judicial review claim was in fact issued.

40. At some subsequent point, but before this hearing, Albert House entered liquidation.

Fact about Vale

41. In the Arrangements relating to Vale with which this case is concerned, P was an individual, Ms Sophie Fitzgerald.

42. HMRC opened an enquiry into Vale's SDLT return in relation to the Property, and on 18 April 2016, issued a closure notice and, in the alternative, a discovery assessment charging SDLT of £240,000. On the same day, HMRC also issued, again in the alternative, a discovery assessment and two closure notices to Ms Fitzgerald.

43. On 16 November 2016, Vale notified its appeals to the Tribunal against the closure notice and the discovery assessment. Ms Fitzgerald also notified appeals to the Tribunal against her

closure notices and discovery assessment; those appeals remain to be decided by the Tribunal but are currently stayed.

44. On 2 February 2018, Cornerstone emailed a letter on behalf of Vale to the Tribunal and copied Mr Williams, notifying the withdrawal of its appeals. The letter was in the same terms as that set out above in relation to Albert House.

45. On 9 February 2018, the Tribunal replied, acknowledging the notification, and on the same day informed HMRC that Vale had notified its withdrawal of the appeals.

46. On 27 February 2018, Mr Williams emailed the Tribunal attaching a letter in the same terms as already set out in relation to Albert House. He did not copy Cornerstone. His witness evidence was that he had assumed his letter to the Tribunal would be passed to the Appellants (as discussed at §§32-33).

47. On 28 February 2018, the Tribunal emailed Cornerstone, attaching the letter from Mr Williams, and asking for representations in response. That letter was received by Cornerstone on the same day.

48. On 13 March 2018, Cornerstone wrote to the Tribunal asking for clarification of the legal basis on which HMRC were objecting to the appeals.

49. At some subsequent point, but before this hearing, Vale entered liquidation.

MR HICKEY'S SUBMISSIONS IN OPENING

50. Mr Hickey submitted that HMRC's objection to the withdrawals was invalid, because the Sch 10 para 35 requires that HMRC "within 30 days after that notification, give the appellant notice". HMRC had not given notice to Cornerstone, instead they had written only to the Tribunal. He said that:

(1) although the Tribunal had passed on that information to Cornerstone within the 30 days, the Tribunal has no authority to receive notifications on behalf of either Appellant;

(2) para 37(4) is to be read in the context of the rest of that paragraph, which is headed "settling of appeals by agreement"; its focus is therefore on direct discussions between HMRC and an appellant; and

(3) para 37(5) explicitly extends the scope of the provision to include "notification being given by or to, a person acting on behalf of the appellant", but no equivalent provision allows HMRC to give notification to anyone other than the appellant or his agent.

51. Although Rule 17(2) requires that "the Tribunal must notify each other party in writing of a withdrawal", that Rule was explicitly "subject to any provision in an enactment relating to withdrawal". The Tribunal had notified the Appellants, as required by Rule 17, but that did not displace the obligation in para 37(4) for HMRC to "give" the Appellants notice of withdrawal.

52. He acknowledged that HMRC had objected to the withdrawals so that the Tribunal had the appeals on the table at the same time, so that if there was an SDLT liability, the Tribunal could determine which of the parties was liable. However, he said that this was entirely beside the point. The only question for determination was whether HMRC had made an in-time objection: the reason for their objection was irrelevant. The answer to that single question

was clear: the Appellants had been notified *by the Tribunal* in accordance with Rule 17(2); they had not been notified *by HMRC* within the 30 day period prescribed by para 37, as required by pars 37(4).

MR ELLIOTT'S SUBMISSIONS

53. Mr Elliott submitted that notice had been given to the Appellants via the Tribunal; nothing prevented notice being given indirectly, as had happened here. He relied on the wording of the provision, and on case law.

The statutory provision

54. In relation to the wording of para 37(4), Mr Elliott said:

> (1) its only requirement was that the notice of objection be given "in writing", and this had happened: Mr Williams had written to the Tribunal setting out HMRC's objections and the reasons why they were being made, and the Tribunal had forwarded those letters to the Appellants; and
>
> (2) there was no requirement that notice be given directly to the appellant: in other words, there was no bar on notice being given indirectly.

55. He submitted that the Tribunal had to construe para 37(4) by reference to its purpose, which was, he said:

> (1) to ensure that an appellant was informed in clear written terms that HMRC was not willing to agree that the decision under appeal was final, with the result that the appeal would proceed and be decided by the Tribunal;
>
> (2) the appellant must receive that notice; and
>
> (3) having received it, he will know he has not achieved the finality he had hoped for by notifying withdrawal.

56. Thus, as long as an appellant received the notice in writing and in clear terms within the 30 days, the statutory requirement was met.

The case law

57. Mr Elliott accepted that there was no case law on the giving of notice for the purposes of para 37. He relied on the following case law about the giving of notice in other statutory contexts, and submitted that the same principles applied.

Hastie

58. Mr Elliott placed considerable weight on *Hastie & Jenkerson v McMahon* [1990] 1 WLR 1575 in which the Court of Appeal accepted that fax was a valid means of service. This case was decided before the Civil Procedure Rules imposed specific requirements in relation to service, and he submitted that it could be relied on to provide helpful guidance in relation to the issue before the Tribunal.

59. In *Hastie* the plaintiffs were required to serve a list of documents on the defendants by a specified date. The defendants accepted that they had received the list "by fax before the time under the order expired and that it was perfectly legible and in the proper form", but submitted that:

> (1) service by fax was not referred to in the Rules of the Supreme Court as a valid method of service, and so service had not taken place; and

(2) service of a document in connection with legal proceedings requires a formal step, and the mere production of the document by the recipient's own machine lacks the necessary degree of formality.

60. Woolf LJ held (at p 1579) that the purpose of service was to ensure that the contents of the relevant document were available to the recipient. He said:

> "There can be situations where a certain degree of ceremony is required for service…for example under the Sheriff Courts (Scotland) Act 1907, which provides that notices 'may be given' by 'a messenger-at-arms'[2]. However, in the ordinary case, in order to comply with an order such as was made by Master Hodgson in this case, what is required is that a legible copy of the document should be in the possession of the party to be served."

61. Woolf LJ also cited with approval the judgment of O'Connor LJ's in *Ralux N.V./S.A. v. Spencer Mason*, The Times, 18 May 1989, who had said "if a party can prove that a legible copy of the document which otherwise meets the rules is in the hands of the party to be served, that is good service".

62. Giving a concurring judgment in *Hastie,* Glidewell LJ held (at p 1585):

> "I emphasise that if a document is served by a means for which neither the rule nor statute provides, there will only be good service if it be proved that the document, in a complete and legible state, has indeed been received by the intended recipient."

Spring Salmon

63. In *R (oao Spring Salmon and Seafood Ltd) v IRC* [2004] STC 444, the Outer House of the Court of Session considered whether the requirements of Finance Act 1998, Sch 18, para 24 had been met, so that the appellant had received a valid notice of enquiry. The relevant words were (emphasis added):

> "The Inland Revenue may enquire into a company tax return <u>if they give notice to the company of their intention to do so</u> ("notice of enquiry") within the time allowed."

64. The appellant relied on Companies Act 1985 s 725, which stated that that a document "may be served" on a company at its registered office, and submitted that, as HMRC had not so served the notice of enquiry, it was invalid.

65. Smith LJ found for HMRC on the basis that the notice was validly served because it had been delivered in accordance with Taxes Management Act 1970 ("TMA") s 115 which provides that any notice or document may be delivered to a person "at his usual or last known place of business"; she found that the word "person" included a company and that the Companies Act provision was not mandatory. She also said at [32]:

> "I also agree [with HMRC] that service or intimation of a notice of inquiry does not appear to be a step that calls for special formality but rather falls into the category of cases where it is recognised that the purpose of service of a notice is to see to it that the recipient is informed."

[2] I note from the website of the Society of Messengers-at-Arms that a Messenger-at-Arms is an officer of the Court of Session; they are empowered to serve documents and enforce orders of that Court throughout Scotland.

Flaxmode

66. *Flaxmode v HMRC* [2008] STC (SCD) 666 concerned TMA s 12AC, which provides:

> "An officer of the Board may enquire into a partnership return if he gives notice of his intention to do so ("notice of enquiry")—
>
> (a) to the partner who made and delivered the return, or his successor,
>
> (b) within the time allowed."

67. HMRC had sent the notice of enquiry to a Mr Gibbins, who they thought was the nominated partner of the partnership. In fact, the nominated partner was Flaxmode. HMRC had informed Flaxmode of the enquiry by sending a "courtesy letter" which read:

> "I am writing to tell you that I intend enquiring into the Tax Return for the year ended 5 April [2004–05] of [J & A Gibbins] of which [you] are a member. I will write to Mr J C M Gibbins, as nominated partner to ask separately for the information needed…if we decide to make enquiries into any non-partnership aspects of [your] return we shall write separately to tell you."

68. The appellant argued that this letter was not a notice of enquiry within the meaning of s 12AC. Special Commissioner Hellier said at [27]:

> "It does not seem to me that s 12AC requires particular formality about the giving of notice. *Chambers English Dictionary* (7th edn) defines 'notice' as intimation, announcement, information, warning. It seems to me that the purpose of the notice to be given is to warn the taxpayer that an enquiry is underway so that he knows questions may be asked and that time limits may be affected, and to provide a mechanical activation of the enquiry procedure. This does not require something formal: all that is needed is something in writing which informs the taxpayer that an enquiry is underway. It seems to me therefore that a letter which announces that 'I intend enquiring into' a tax return is sufficient to be a notice for the purposes of s 12AC."

69. At [29] he said that the HMRC Officer had understood that the 12AC enquiry had been opened as the result of the letter he sent to Mr Gibbins, and that his letter to Flaxmode was not an enquiry letter. The passage reads:

> "But would the officer's understanding that he was not delivering a notice within s 12AC mean that although it was sufficient to be a notice it could not be one? It certainly appeared that the officer thought it was not a s 12AC notice: he refers in his letter to West Tax to the letter to Mr J P M Gibbins as the 'notice'…"

70. He continued at [30]:

> "Section 12AC is designed to provide the nominated partner with a warning or intimation of an enquiry: what he receives must be looked at from the recipient's (or at least a reasonable recipient's) perspective not the inspector's. If, despite an officer's understanding that he was giving notice of intention, his letter was so vague that it could not be taken by the recipient to be such a warning or intimation, then in my judgment it would not be a notice within s 12AC. But the notice Flaxmode received was quite clear: Flaxmode could not have been in doubt that the officer intended to enquire into its returns."

Sword Services

71. The case of *R(oao Sword Services) v HMRC* [2016] EWHC 1473 (Admin) concerned the issuance of partner payment notices under Finance Act 2014 in relation to planning arrangements entered into by a number of partnerships.

72. HMRC had delivered enquiry notices to the wrong nominated partner for some of the partnerships, but had sent "courtesy letters" to all the other partners. The true nominated partner did not receive any direct communication about the issuance of the enquiry notices.

73. The passage from *Flaxmode* at [27] set out above was cited with approval by Cranston J see [44] and [71] of the judgment. In that latter passage, Cranston J said:

> "…there is section 12AC(1)(a) and its requirement that a notice of enquiry into a tax return is to be given to the partner who made and delivered the return. To my mind, the Parliamentary intention behind that provision is to ensure that the taxpayer knows in writing of the enquiry and so has the opportunity to put its case. There is no particular form prescribed for a notice of enquiry and so long as the taxpayer knows of HMRC's decision to conduct an enquiry that is sufficient. In this regard *Flaxmode Ltd v. Revenue and Customs Commissioners* [2008] STC (SCD) 666 is, in my view, correct."

74. At [73] he held that the nominated partners knew of the enquiries. The passage reads::

> "As the result of these contacts and the correspondence over a number of years, it simply is not open to the [partnerships] to deny reality: they knew of HMRC's enquiries and of the section 12AC(1)(a) notices"

75. At [75] he concluded that the nominated partners:

> "…did not receive formal notices of the enquiry, but since they knew of the enquiry that is sufficient for the purposes of the legislation."

Principles to be derived from the case law

76. Mr Elliott said that the following principles could be derived from the case law:

(1) A statutory provision about the giving of notice to a taxpayer must be interpreted so as to give effect to its purpose, namely whether the taxpayer has been notified.

(2) When considering whether this is the , it is necessary to look at the question from the perspective of the taxpayer, see *Flaxmode* and *Sword Services*

(3) The intention of the sender is irrelevant; it doesn't matter if they think they are doing something else, see *Flaxmode.*

(4) What is important is the reality of the situation, not compliance with some formal requirement.

(5) As a result, actual notice and/or knowledge of HMRC's decision is sufficient for notice to have been given, even if the notice or information has not been given directly to the taxpayer, see *Sword Services.*

(6) None of the case law states that a notice is invalid if it is delivered by someone else or indirectly. Instead, the cases give a consistent message: look at the effect.

Applying those principles to the facts

77. Mr Elliott acknowledged that the case law he had cited was not binding on me, but submitted that it was highly persuasive. He said that when the Appellants' facts were

considered in the light of those principles, the position was clear: they had received unequivocal written notice within the statutory time limit, and they knew HMRC had objected to the withdrawals.

Reasons why HMRC object to the withdrawals

78. Mr Elliott said that HMRC had assessed the Appellants and Milltown/Ms Fitzgerald in the alternative, because there had been a lack of clarity as to the legal position as to liability.

79. He drew attention to RPC's JR pre-action letter, and said that the Appellants were in liquidation and had no way of meeting the SDLT liabilities to which they had been assessed. Thus, it appeared to HMRC that the Appellants were withdrawing from the appeals so that they would bear a liability (which they could not pay) instead of it being borne by Milltown/Ms Fitzgerald.

80. Mr Elliott accepted, as Judge Poole had pointed out in directions, that the Tribunal would not necessarily find that Milltown/Ms Fitzgerald were not liable, simply because the Appellants had withdrawn. Nevertheless, he said that HMRC objected to the withdrawals because it wanted the Tribunal to consider both possibilities before deciding which party should pay the SDLT.

MR HICKEY'S SUBMISSIONS IN REPLY

81. Mr Hickey emphasised that none of the case law set out above was binding on me. He observed that most concerned notices of enquiry, and submitted that there was a difference between a notice of enquiry and a notice of objection to a withdrawal. In the latter situation the requirement to give notice should be "construed very tightly" because the consequences of HMRC making a valid in-time objection are very severe: the appellant will be required to continue possibly costly litigation against his will.

82. Mr Hickey also submitted that the intention of the sender was relevant. Here, he said, there was no reliable evidence that Mr Williams had intended to communicate with the Appellants via the Tribunal.

DISCUSSION

83. It is now well-established that all statutory provisions, including tax statutes, must be construed purposively: see *Collector of Stamp Revenue v. Arrowtown* [2003] HKCFA 46 at [35] *per* Ribeiro PJ, cited recently in *Ingenious v HMRC* [2019] UKUT 0226 (TCC) at [36].

84. I agree with Mr Elliott that the purpose of para 37(4)(b) is that an appellant who seeks to withdraw his appeal should know within 30 days whether HMRC are objecting to that withdrawal and he should be told this in writing so that there is a record. That reading is consistent with the emphasis elsewhere in the paragraph on the need for the appellant's position to be certain:

> (1) para 37(2) provides that the appellant who has decided to settle, can change his mind within 30 days, but must do so *in writing;* and
>
> (2) para 37(3) provides that if the settlement was oral, it is not binding *unless it is confirmed in writing*; it is the timing of that written confirmation which fixes the settlement date.

85. Para 37(4) is entirely consistent with those provisions in that it provides that HMRC's objection to a withdrawal must be made in writing and within 30 days.

86. Although the case law cited was not binding on me, I agree with Mr Elliott that it gives a consistent and compelling message, namely that as long as the statutory purpose has been achieved, failure to follow the literal wording of the provision does not invalidate the notices. I note the following passages in particular:

(1) Woolf and Glidewell LJJ in *Hastie*: "what is required is that a legible copy of the document should be in the possession of the party to be served" and "there will only be good service if it be proved that the document, in a complete and legible state, has indeed been received by the intended recipient".

(2) O'Connor LJ in *Ralux*: "if a party can prove that a legible copy of the document which otherwise meets the rules is in the hands of the party to be served, that is good service"

(3) Special Commissioner Hellier in *Flaxmode*: "all that is needed is something in writing which informs the taxpayer that an enquiry is underway".

(4) Cranston J in *Sword Services*: "there is no particular form prescribed for a notice of enquiry and so long as the taxpayer knows of HMRC's decision to conduct an enquiry that is sufficient".

87. The case law does recognise that formal adherence to the literal wording is required in some situations, although not where a list of documents had to be sent to a party (*Hastie*) or when issuing notices of enquiry (*Spring Salmon, Flaxmode, Sword Services*).

88. I considered Mr Hickey's submission that there was a difference between the situations considered in the case law, and the communication of an objection to an appellant's withdrawal under para 37. It is true that objecting to a withdrawal means that an appellant remains in litigation against his wishes, so there are consequences in terms of ongoing legal costs, as well as continuing stress and uncertainty. There is also a risk that the Tribunal will increase the assessment to a higher figure than that in HMRC's decision notice. I also accept that this is different to the position in *Hastie,* which involved the transmission of a document list.

89. But it seems to me that there is a valid parallel with enquiry notices. If HMRC have issued a notice of enquiry within the time limit, this opens up a taxpayer's return to scrutiny, and raises questions about his liability. He may need to pay for professional assistance to help him respond to HMRC's questions, and the enquiry may stretch over several years, during which there will be uncertainty about his final liability. When the enquiry is closed, he has the burden of defending the figures in his return.

90. In contrast, if the enquiry notice was not served, or was not served in time, HMRC are on the back foot. They can deploy information notices and discovery assessments, but the burden of proof in a discovery assessment is on HMRC, and the same is probably true of most information notices (see the discussion in *Cliftonville Consultancy v HMRC* [2018] UKFTT 0231 *per* Judge Nicholl). The taxpayer may still need professional assistance, but HMRC's powers are more circumscribed, so the costs are likely to be less.

91. In short, the consequences of delivering, or not delivering, an in-time enquiry notice are serious, arguably more serious than remaining a party to an appeal which a taxpayer had previously made, but from which he now wishes to withdraw. Yet the case law on enquiry notices consistently states that "service or intimation of a notice of inquiry does not appear to be a step that calls for special formality" (*Spring Salmon*) and "does not require something formal" (*Flaxmode*, approved in *Sword Services*).

92. Mr Hickey also argued that the statutory context of para 37 was to set out how the parties might come to an agreement, and that subpara (4) must similarly require that HMRC communicate their objection directly to the appellant. But subpara (5) expressly allows that communication to occur via a "person acting on behalf of the appellant in relation to the appeal". Thus, there can be no reasonable inference that all communication between HMRC and the appellant must be carried out directly.

93. It is true that the Tribunal was not appointed by the Appellants to act on their behalf, so it does not fall within subpara (5). Instead, the Tribunal was notifying HMRC of the withdrawal in accordance with its duties under Rule 17. But that does not matter. The purpose of subpara (5) is simply to provide that settlement negotiations and withdrawal discussions may be carried out by an appellant's agent, as often happens. That subparagraph does not affect the purpose of subpara (4)(b), namely that an appellant must be left in no doubt, after having received a written communication within the time limit, that HMRC objected to the withdrawal.

94. Finally, I considered Mr Hickey's submission that the HMRC officer must have intended to give the objection to the Appellants, and there was no reliable evidence that this was the position here.

95. Although Mr Hickey had not challenged Ms Turner's evidence during cross-examination, I have agreed with him that she could not give reliable evidence about Mr Williams' intentions, because one person cannot know what another intended. However, that makes no difference to the outcome, because I also agree with Special Commissioner Hellier when he said in *Flaxmode* that "what [an appellant] receives must be looked at from the recipient's (or at least a reasonable recipient's) perspective not the inspector's". That is because the purpose of the provision is that the appellant should know, in clear terms, that HMRC had objected. It does not matter what the HMRC officer intended: what matters is whether the message has been received by the appellant.

96. On the facts of this case it is clear that HMRC had objected, and it is also clear that the Appellants had been told of that objection within the time limit. The reality of the situation is that the Appellants were left in no doubt, see the parallels with *Flaxmode* and *Sword Services.*

DECISION ON THE ISSUE BEFORE THE TRIBUNAL

97. For the reasons set out above, I find that the statutory conditions in para 37(4)(b) were met, and that HMRC gave notice to the Appellants that they were objecting to the withdrawal of their appeals, and did so within the 30 day time limit. It follows that there is no deemed agreement between the parties that the decision under appeal has become final; it thus remains to be determined by the Tribunal.

OTHER ISSUES

98. There were two other issues. The first was whether the Tribunal had the discretion to allow the withdrawal under Rule 17, and the second was the provision of directions relating to the procedure to be followed by the parties in relation to the continuing appeals.

Tribunal's discretion?

99. Mr Elliott's skeleton argument ended by considering whether the Tribunal retained a discretion whether or not to allow the Appellants to withdraw an appeal, even where HMRC had made a valid in-time objection under para 37(4)(b). Mr Elliott submitted that if the Tribunal decided it had that discretion, I should not be exercise it, for the reasons set out at §§78-80.

100. However, Mr Hickey made no submissions on this issue, either in his skeleton argument or orally. As a result, Mr Elliott said in his oral submissions that as this was an adversarial jurisdiction, and as the Appellants had not asked me to decide (a) that the Tribunal had the discretion to allow the withdrawal even if HMRC had made a valid objection, or (b) to exercise that discretion in their favour, this issue was not properly before the Tribunal.

101. I noted that when Judge Poole directed that this hearing take place, he said that its purpose was to determine "the single issue of the validity or otherwise of the purported withdrawal by both…the Appellants of their respective appeals". He did not suggest that if (as has now happened) the Tribunal decided HMRC had made a valid in-time objection, it would then hear and decide an application from the Appellants that they should nevertheless be allowed to withdraw their appeals under Rule 17.

102. Of course, the Appellants could have asked that the scope of the hearing be extended to cover such an application. Had that happened, I would have gone on to decide whether the Tribunal has any residual discretion, given that Rule 17 begins by stating that the Tribunal's power to allow the withdrawal of an appeal is "subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings". But as no such application has been made, there is nothing for me to determine.

Case management directions

103. On 13 September 2018 Judge Poole directed that the Appellants appeals "shall until further notice be joined (but not consolidated) case managed and heard together".

104. On 30 October 2018, he issued further guidance clarifying those earlier directions. He said that once it was clear whether or not the Appellants' appeals were withdrawn, his intention was "that the appeals of the individual users of the arrangements …should be combined with any continuing appeal of the…Appellants and progressed to a final overall decision".

105. Mr Elliott asked that, if I found for HMRC, I should go on to direct that "the present appeals are joined to the Individual's appeals [ie the appeals of Milltown and Ms Fitzgerald] so that the Tribunal can consider the tax treatment of the entire arrangement together". Mr Hickey said that if the Appellants still had live appeals, he would need to take further instructions, as he had been informed that they had no funds to continue their appeals, whether joined or otherwise.

106. It is clear to me that the Milltown appeal should be joined with that of Albert House, because they were both participants in the same transaction. For the same reason, Ms Fitzgerald's appeal should be joined with that of Vale. The Appellants' funding issues are not a reason to come to a different conclusion.

107. I next considered whether the two "pairs" of cases should also be joined. The parties were in agreement that the Arrangements were the same in both cases. On that basis, it would therefore be in the interests of justice for the joinder directed by Judge Poole between Albert House and Vale to continue, with the addition of Milltown and Ms Fitzgerald.

108. However, I did not hear full submissions on this matter, and there may be a difference of fact or law of which I am unaware between the transaction entered into by Albert House/Milltown and that entered into by Vale/Ms Fitzgerald, which would make that continuing joinder inappropriate. Alternatively the parties may agree that one of the pairs of cases should be stayed behind the other.

109. I was also informed of other cases involving the same Arrangements, in which HMRC had failed to give notice objecting to the withdrawals within the 30 day time limit. However, I was not provided with any information about the "Individuals" in those other appeals who were connected to the withdrawn appellants. I decided I was not in a position to give even tentative directions involving these other parties.

110. I therefore direct as follows:

(1) The appeals of Milltown, Albert House, Ms Fitzgerald and/or Vale will be joined but not consolidated so that they will proceed together and be heard and determined by the same Tribunal, UNLESS within 28 days from the date of issue of this Decision:

(a) one or more of those Appellants object to the joinder by setting out their reasons in writing to the Tribunal and copying HMRC; or

(b) all of the parties agree that one of the two "pairs" of cases should proceed and the other be stayed, and the parties jointly apply to the Tribunal for these directions to be varied to that effect.

(2) By 14 January 2020, the parties are to co-operate in seeking to agree directions for the onward progress of the appeals, and provide draft directions to the Tribunal. If the parties cannot come to an agreement they are each to provide their own directions for consideration by the Tribunal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 03 DECEMBER 2019