STAMP DUTY LAND TAX-tax avoidance scheme-sub-sale relief-discovery assessment-whether HMRC had made a discovery-whether understatement of tax caused by taxpayers or person acting on their behalf-whether taxpayers or person acting on their behalf was careless

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2018/06225
TC/2018/ 06227
TC/2019/06234
TC/2019/06235
TC/2019/06236
TC/2019/06340
TC/2018/06235
TC/2019/05552

BETWEEN

G C FIELD & SONS LTD
GEOFFREY BARWELL FIELD
BARWELL CHARLES FIELD
G C FIELD & SONS (FELTWELL ESTATE) LTD
SIMON SHAW
LISA SHAW **Appellants**

-and-

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

TRIBUNAL: JUDGE MARILYN MCKEEVER

The hearing took place on 20 and 21 July 2021. The form of the hearing was V (video) held on the Tribunal's VHS video platform. All parties attended remotely. A face to face hearing was not held because of the Covid-19 pandemic and the need for social distancing and it was considered that it was appropriate for the hearing to be held remotely. The documents to which I was referred are a digital Hearing Bundle, divided into six "tabs" having respectively 48, 28, 317, 121, 10 and 27 pages, an Authorities Bundle of 524 pages and a further authority provided before the hearing, the client care letters issued by the Appellants' advisor to the Appellants, a Notice of Amendments to Finance Bill 2013 and the Skeleton Arguments of the Appellants and the Respondents.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Thomas Chacko, counsel, instructed by Spector Constant and Williams Ltd. for the Appellants

Mr Steve Goulding, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is a joined appeal by G C Field & Sons Ltd., Geoffrey Barwell Field, Barwell Charles Field, G C Field & Sons (Feltwell Estates) Limited ("the Field Appellants"), and Simon Shaw and Lisa Shaw ("the Shaw Appellants"). The Field Appellants and the Shaw Appellants entered into identical tax avoidance schemes based on Stamp Duty Land Tax ("SDLT") sub-sale relief. The Field Appellants and the Shaw Appellants submitted SDLT returns but HMRC failed to open enquiries into them within the "enquiry window". HMRC subsequently raised discovery assessments against both groups of Appellants on the basis that sub-sale relief was not due. As an alternative, HMRC also made determinations on the basis that if sub-sale relief was due, SDLT would be payable on notional transactions under section 75A Finance Act 2003 ("section 75A"). Following the decision in *David Simbarasha Newton and Elizabeth Newton-Young* [2019] UK FTT 0688 TC which found that a very similar scheme failed, HMRC considered that it was clear that sub-sale relief was not due and the Appellants, in their amended grounds of appeal and in Mr Chacko's Skeleton Argument, no longer contend that it is due.

2. It is common ground that the planning was not effective and that SDLT should have been paid on the market value of the respective properties.

3. As a result, HMRC no longer rely on the determinations relating to section 75A and the sole issue to be determined is whether the discovery assessments made under paragraph 28 of Schedule 10 Finance Act 2003 are valid.

4. In this decision, all statutory references are to Finance Act 2003 unless otherwise specified and references to paragraph numbers are to paragraphs in Schedule 10 Finance Act 2003 unless otherwise specified.

THE LEGISLATION

5. SDLT is chargeable on land transactions. Under section 44, in the normal case, where a contract is followed by completion of the contract, the effective date of the transaction is the date of completion. Where the contract is substantially performed without being completed, the effective date of the transaction is when the contract is substantially performed.

6. Section 45 provides for "sub-sale relief" where a purchaser sells a property to someone else after the contract to purchase but before completion. At the time of the transactions in question, section 45 provided, so far as material, as follows:

> **"45 Contract and conveyance: effect of transfer of rights**
>
> (1) This section applies where—
>
> (a) a contract for a land transaction ("the original contract") is entered into under which the transaction is to be completed by a conveyance, . . .
>
> (b) there is an assignment, subsale or other transaction (relating to the whole or part of the subject-matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him …
>
> References in the following provisions of this section to a transfer of rights are to any such assignment, subsale or other transaction [, and references to the transferor and the transferee shall be read accordingly]….
>
> (2) The transferee is not regarded as entering into a land transaction by reason of the transfer of rights, but section 44 (contract and conveyance) has effect in accordance with the following provisions of this section.

(3) That section applies as if there were a contract for a land transaction (a "secondary contract") under which—

(a) the transferee is the purchaser, and

(b) the consideration for the transaction is—

(i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and

(ii) the consideration given for the transfer of rights.

The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded …

…

The substantial performance or completion of the secondary contract arising from an earlier transfer of rights at the same time as, and in connection with, the substantial performance or completion of the secondary contract arising from a subsequent transfer of rights shall be disregarded.

…

[(5A) In relation to a land transaction treated as taking place by virtue of subsection (3)—

(a) …

(b) other references in this Part to the vendor shall be read, where the context permits, as referring to either the vendor under the original contract or the transferor.]

(6) …

(7) In this section "contract" includes any agreement and "conveyance" includes any instrument."

7. In other words, where the first purchaser sold the property to be acquired after entering into the contract but before completion to a "transferee", the original purchase is disregarded and there is no SDLT on it. The transferee pays SDLT by reference to the consideration they pay.

8. Section 52 provides that, where the consideration takes the form of an annuity or similar instrument, the deemed consideration for SDLT purposes is, not the capital value of the instrument, but twelve years' annual payments.

"**52 Annuities etc: chargeable consideration limited to twelve years' payments**

(1) This section applies to so much of the chargeable consideration for a land transaction as consists of an annuity payable—

(a) for life, or

(b) in perpetuity, or

(c) for an indefinite period, or

(d) for a definite period exceeding twelve years.

(2) For the purposes of this Part the consideration to be taken into account is limited to twelve years' annual payments.

(3) Where the amount payable varies, or may vary, from year to year, the twelve highest annual payments shall be taken.

No account shall be taken for the purposes of this Schedule of any provision for adjustment of the amount payable in line with the retail price index.

(4) References in this section to annual payments are to payments in respect of each successive period of twelve months beginning with the effective date of the transaction.

(5) For the purposes of this section the amount or value of any payment shall be determined (if necessary) in accordance with section 51 (contingent, uncertain or unascertained consideration).

(6) References in this section to an annuity include any consideration (other than rent) that falls to be paid or provided periodically.

References to payment shall be read accordingly.

(7) Where this section applies—

(a) section 80 (adjustment where contingency ceases or consideration is ascertained) does not apply, and

(b) no application may be made under section 90 (application to defer payment in case of contingent or uncertain consideration)."

9. Section 75A is an anti-avoidance provision which applies (irrespective of motive) in a situation where there are a number of "scheme transactions" as a result of which the SDLT payable is less than it would be had the property been sold by the Vendor to the Purchaser. In this case, HMRC may charge SDLT on a notional land transaction being a straightforward sale from Vendor to Purchaser. Section 75A provides as follows:

"[75A Anti-avoidance]

[(1) This section applies where—

(a) one person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it,

(b) a number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition ("the scheme transactions"), and

(c) the sum of the amounts of stamp duty land tax payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V.

(2) In subsection (1) "transaction" includes, in particular—

(a) a non-land transaction,

(b) an agreement, offer or undertaking not to take specified action,

(c) any kind of arrangement whether or not it could otherwise be described as a transaction, and

(d) a transaction which takes place after the acquisition by P of the chargeable interest.

(3) The scheme transactions may include, for example—

(a) the acquisition by P of a lease deriving from a freehold owned or formerly owned by V;

(b) a sub-sale to a third person;

(c) the grant of a lease to a third person subject to a right to terminate;

(d) the exercise of a right to terminate a lease or to take some other action;

(e) an agreement not to exercise a right to terminate a lease or to take some other action;

(f) the variation of a right to terminate a lease or to take some other action.

(4) Where this section applies—

(a) any of the scheme transactions which is a land transaction shall be disregarded for the purposes of this Part, but

(b) there shall be a notional land transaction for the purposes of this Part effecting the acquisition of V's chargeable interest by P on its disposal by V.

(5) The chargeable consideration on the notional transaction mentioned in subsections (1)(c) and (4)(b) is the largest amount (or aggregate amount)—

(a) given by or on behalf of any one person by way of consideration for the scheme transactions, or

(b) received by or on behalf of V (or a person connected with V within the meaning of [section 1122 of the Corporation Tax Act 2010]) by way of consideration for the scheme transactions.

(6) The effective date of the notional transaction is—

(a) the last date of completion for the scheme transactions, or

(b) if earlier, the last date on which a contract in respect of the scheme transactions is substantially performed.

(7) This section does not apply where subsection (1)(c) is satisfied only by reason of—

(a) sections 71A to 73, or

(b) a provision of Schedule 9.]"

10. HMRC considered that if the scheme had been effective, section 75A would have applied, although they no longer pursue this argument.

11. On 28 March 2013 (after the completion of the transactions in this case and after the land transaction returns had been submitted) the Finance Bill, which received Royal Assent as the Finance Act 2013 on 17 July 2013, was introduced. Section 194 Finance act 2013 ("Section 194") amended section 45 with retrospective effect. The amendments were specifically aimed at certain sub-sale relief avoidance schemes. Whilst the present scheme was not one of those specified in the Ministerial Statement which accompanied the Bill, it is common ground that section 194 applies to it. Finance Act 2013 inserted sub-sections (3A)-(3C) and consequential amendments into section 45. The amended version of section 45 provides:

"45 Contract and conveyance: effect of transfer of rights

(1) This section applies where—

(a) a contract for a land transaction ("the original contract") is entered into under which the transaction is to be completed by a conveyance, . . .

(b) there is an assignment, subsale or other transaction (relating to the whole or part of the subject-matter of the original contract) as a result of which a

person other than the original purchaser becomes entitled to call for a conveyance to him [, and

(c) paragraph 12B of Schedule 17A (assignment of agreement for lease) does not apply].

References in the following provisions of this section to a transfer of rights are to any such assignment, subsale or other transaction [, and references to the transferor and the transferee shall be read accordingly].

[(1A) The reference in subsection (1)(b) to an assignment, subsale or other transaction does not include the grant or assignment of an option [or an agreement for the future grant or assignment of an option].]

(2) The transferee is not regarded as entering into a land transaction by reason of the transfer of rights, but section 44 (contract and conveyance) has effect in accordance with the following provisions of this section.

(3) That section applies as if there were a contract for a land transaction (a "secondary contract") under which—

(a) the transferee is the purchaser, and

(b) the consideration for the transaction is—

(i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and

(ii) the consideration given for the transfer of rights.

The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded [except [in a case excluded by subsection (3A) or] in a case where the secondary contract gives rise to a transaction that is exempt from charge by virtue of] [any of sections 71A to 73 (which relate to alternative property finance)].

[(3A) A case is excluded by this subsection from the second sentence of subsection (3) if—

(a) the secondary contract is substantially performed at the same time as, and in connection with, the substantial performance or completion of the original contract but is not completed at that time ("the relevant time"),

(b) the original purchaser or a person connected with the original purchaser is in possession of the whole, or substantially the whole, of the subject-matter of the transfer of rights at any time after the relevant time, and

(c) having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage for the original purchaser was the main purpose, or one of the main purposes, of the original purchaser in entering into the transfer of rights.

(3B) In subsection (3A)—

"possession" has the same meaning as in section 44(5)(a);

"tax advantage" means—

(a) a relief from tax or increased relief from tax,

(b) a repayment of tax or increased repayment of tax, or

(c) the avoidance or reduction of a charge to tax.

(3C) Nothing in subsection (3A) or (3B) affects the breadth of the application of sections 75A to 75C.]

(4) Where there are successive transfers of rights, subsection (3) has effect in relation to each of them [except in a case excluded by subsection (4A)].

The substantial performance or completion of the secondary contract arising from an earlier transfer of rights at the same time as, and in connection with, the substantial performance or completion of the secondary contract arising from a subsequent transfer of rights shall be disregarded.

(4A) Subsection (3A) applies for the purposes of subsection (4) as if—

(a) the reference to subsection (3) were a reference to subsection (4),

(b) a reference to the original contract were a reference to the secondary contract arising from the earlier transfer of rights,

(c) a reference to the original purchaser were a reference to the transferee under the earlier transfer of rights, and

(d) a reference to the transfer of rights were a reference to the subsequent transfer of rights."

[(5) Where a transfer of rights relates to part only of the subject-matter of the original contract ("the relevant part")—

(a) subsection (8)(b) of section 44 (restriction of charge to tax on subsequent conveyance) has effect as if the reference to the amount of tax chargeable on that contract were a reference to an appropriate proportion of that amount, and

(b) a reference in the second sentence of subsection (3) above [or in subsection (3A) above] to the original contract, or a reference in subsection (4) [or (4A)] above to the secondary contract arising from an earlier transfer of rights, is to that contract so far as relating to the relevant part (and that contract so far as not relating to the relevant part shall be treated as a separate contract).]

[(5A) In relation to a land transaction treated as taking place by virtue of subsection (3)—

(a) references in Schedule 7 (group relief) to the vendor shall be read as references to the vendor under the original contract;

(b) other references in this Part to the vendor shall be read, where the context permits, as referring to either the vendor under the original contract or the transferor.]

(6) [Section 1122 of the Corporation Tax Act 2010] (connected persons) applies for the purposes of subsection (3)(b)(i).

(7) In this section "contract" includes any agreement and "conveyance" includes any instrument."

12. Section 194 Finance Act 2013 provides:

194 Pre-completion transactions: existing cases

(1) Section 45 of FA 2003 (contract and conveyance: effect of transfer of rights)—

(a) has effect subject to the amendment in subsection (2) below in relation to agreements for the grant or assignment of an option that are entered into during the period beginning with 21 March 2012 and ending immediately before the day on which this Act is passed, and

(b) has effect subject to the amendments in subsections (3) to (7) below in relation to transfers of rights (see subsection (1) of that section) entered into during that period.

(2) At the end of subsection (1A) insert "or an agreement for the future grant or assignment of an option".

(3) In subsection (3), in the second sentence, after "except" insert "in a case excluded by subsection (3A) or".

(4) After subsection (3) insert—

"(3A) A case is excluded by this subsection from the second sentence of subsection (3) if—

(a) the secondary contract is substantially performed at the same time as, and in connection with, the substantial performance or completion of the original contract but is not completed at that time ("the relevant time"),

(b) the original purchaser or a person connected with the original purchaser is in possession of the whole, or substantially the whole, of the subject-matter of the transfer of rights at any time after the relevant time, and

(c) having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage for the original purchaser was the main purpose, or one of the main purposes, of the original purchaser in entering into the transfer of rights.

(3B) In subsection (3A)—

"possession" has the same meaning as in section 44(5)(a);

"tax advantage" means—

(a) a relief from tax or increased relief from tax,

(b) a repayment of tax or increased repayment of tax, or

(c) the avoidance or reduction of a charge to tax.

(3C) Nothing in subsection (3A) or (3B) affects the breadth of the application of sections 75A to 75C."

(5) In subsection (4), at the end insert "except in a case excluded by subsection (4A)".

(6) After subsection (4) insert—

"(4A) Subsection (3A) applies for the purposes of subsection (4) as if—

(a) the reference to subsection (3) were a reference to subsection (4),

(b) a reference to the original contract were a reference to the secondary contract arising from the earlier transfer of rights,

(c) a reference to the original purchaser were a reference to the transferee under the earlier transfer of rights, and

(d) a reference to the transfer of rights were a reference to the subsequent transfer of rights."

(7) In subsection (5)(b)—

(a) after "subsection (3) above" insert "or in subsection (3A) above", and

(b) after "subsection (4)" insert "or (4A)".

(8) Subsections (10) to (12) apply where—

(a) as a result of subsection (2) of this section, section 45 of FA 2003 does not apply in relation to a contract of the kind mentioned in subsection (1)(a) of that section ("the original contract"),

(b) the original contract was substantially performed or completed (or, in a case that would have fallen within subsection (5) of that section, substantially performed or completed so far as relating to the relevant part of the subject-matter of the original contract) at the same time as, and in connection with, the substantial performance or completion of an agreement for the grant or assignment of an option, and

(c) that time fell before the day on which this Act is passed.

(9) Subsections (10) to (12) also apply where—

(a) section 45 of FA 2003 applies in relation to the contract for a land transaction ("the original contract"),

(b) as a result of subsections (1) to (7) above, the substantial performance or completion of the original contract (or, in a case within subsection (5) of that section, its substantial performance or completion so far as relating to part of the subject-matter of the original contract) is not disregarded, and

(c) the relevant time referred to in subsection (3A)(a) of that section fell before the day on which this Act is passed.

(10) Section 76 of FA 2003 (duty to deliver land transaction return) is to be regarded as requiring the purchaser under the original contract to deliver a land transaction return relating to the land transaction not later than 30 September 2013.

(11) Accordingly, 30 September 2013 is for the purposes of Part 4 of FA 2003 the filing date for the land transaction return relating to the transaction.

(12) If the purchaser under the original contract ("P") has delivered a land transaction return relating to the land transaction before the day on which this Act is passed, P must not later than 30 September 2013 give notice under paragraph 6 of Schedule 10 to FA 2003 amending the return, but this does not prevent P from making subsequent amendments within the time allowed by sub-paragraph (3) of that paragraph.

13. By virtue of section 194(1)(b), the amendments to section 45 have effect in relation to sub-sales effected in the period 21 March 2012 and ending on 16 July 2013 (the day before Royal Assent). This period includes the dates of the transactions in the current appeals.

14. The effect of new sub-section (3A) in section 45 is that sub-sale relief is denied in cases such as those of the Appellants and the taxpayer is therefore liable for the full SDLT on the market price.

15. Section 194(12) imposes an obligation on a purchaser who has delivered an SDLT return in relation to the original purchase to deliver an amended return, giving effect to section 194 by 30 September 2013.

16. In short, as a result of the introduction of section 194 the Field Appellants and the Shaw Appellants were under an obligation to file amended SDLT returns and pay the full amount of the SDLT which should have been paid on the purchase from the third party. They did not do so.

17. Under paragraph 12 of Schedule 10, HMRC may enquire into a land transaction return before the end of the enquiry period. The enquiry period is nine months from the "filing

date" where the return was filed on time. The filing date at the time was 30 days from the effective date of the transaction, essentially completion.

18. Once the "enquiry window" has closed, HMRC can only raise an assessment under the discovery provisions in paragraph 28 of Schedule 10. Paragraph 30 sets out the conditions which must be satisfied where, as in this case, an SDLT return has been submitted, before HMRC can raise a discovery assessment. Those paragraphs provide:

> **"Assessment where loss of tax discovered**
>
> 28
>
> (1) If the Inland Revenue discover as regards a chargeable transaction that—
>
> (a) an amount of tax that ought to have been assessed has not been assessed, or
>
> (b) an assessment to tax is or has become insufficient, or
>
> (c) relief has been given that is or has become excessive,
>
> they may make an assessment (a "discovery assessment") in the amount or further amount that ought in their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) The power to make a discovery assessment in respect of a transaction for which the purchaser has delivered a return is subject to the restrictions specified in paragraph 30."
>
> **"Restrictions on assessment where return delivered**
>
> 30
>
> (1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28 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. Although HMRC do not necessarily accept that the Appellants made adequate disclosure, they do not now argue that paragraph 30(3) applied. The question in the present cases is whether HMRC are entitled to raise discovery assessments by virtue of paragraph 30(2), that is, on the basis that the underpayment of tax was attributable to negligence on the part of the Appellants and/or the advisors whom HMRC say were acting on their behalf.

THE BACKGROUND AND FACTS

20. I had before me the bundles of documents mentioned above. I also heard oral evidence from Mr Barwell Field on behalf of the Field Appellants and from Mr Simon Shaw on behalf of the Shaw Appellants. Mr Jason Price, who made the discovery on which HMRC rely also gave oral evidence.

21. The Field Appellants and the Shaw Appellants entered into an SDLT avoidance scheme marketed by ELS Legal LLP (ELS) which, broadly, was supposed to work as follows:

(1) The taxpayer would buy a property from a third party vendor at the market value.

(2) The tax payer would incorporate a new company.

(3) Before completion of the purchase from the third party, the taxpayer would sell the property to the company in return for a perpetual bond; effectively an annuity.

(4) The purchase from the third party would be ignored, as sub-sale relief under section 45 was claimed to apply, so no SDLT would be charged on that transaction.

(5) The consideration for the purchase by the company was limited to twelve annual payments under the perpetual bond, by virtue of section 52, which were far below the actual market value.

(6) SDLT would be paid on the annual payment consideration.

(7) It was never intended that the company would occupy the property and property would be used/occupied by the taxpayer.

22. It is now common ground that the scheme was ineffective in any event and that the amendments made to section 45 by section 194 Finance Act 2013 applied to the scheme and imposed an obligation on the Field Appellants and the Shaw Appellants to submit an

amended SDLT return, on the basis of market value, by 30 September 2013, and to pay the appropriate SDLT.

23. On 25 February 2013, the Field Appellants purchased farmland, known as the Feltwell Estate in Feltwell, Norfolk from Farmland Reserve UK Ltd, for £32,873,911. They sold other farmland to Farmland Reserve UK Ltd. This was part of a commercial plan to consolidate the family holdings into a larger, single unit and to dispose of some of their units which had been up to 40 miles away from their main holdings. On the same date, they sold the Feltwell Estate to their newly incorporated company, G C Field & Sons (Feltwell Estate) Limited. The consideration was a perpetual bond.

24. Twelve years' payments under the bond amounted to £996,080 and SDLT was paid of £39,843.

25. ELS, as agent of the Field Appellants, submitted an SDLT return in relation to the sale from Farmland Reserves UK Limited to the Field Appellants which was received by HMRC on 26 February 2013. It stated that the effective date of the transaction was 25 February 2013 and that cash consideration of £32,873,911 had been paid. The return stated that this transaction was not linked to any other transaction. In box 9 of the return, relief was claimed under "code 28" which is the code for "other relief". The amount of SDLT self-assessed in box 14 was zero.

26. Also on 26 February 2013, ELS sent a second land transaction return to HMRC relating to the sale of the same properties by the Field Appellants to G C Field & Sons (Feltwell Estate) Limited. The effective date of the transaction was also shown as 25 February 2013. No relief was claimed. It was stated that the transaction was not linked to any others. The consideration was stated to be £996,080 and the form of consideration was code 34 which stood for "other". The SDLT due was stated to be £39,843.

27. Also on 26 February 2013, ELS sent a letter to HMRC in the following terms:

> "On 25 February 2013 GC Field & Sons Ltd, Geoffrey Barwell Field and Barwell Charles Field acquired the above Property for the price of £32,873,911.00 including VAT (VAT of £5,237,319.00 on the non-residential element) from Farmland Reserve UK Ltd. Simultaneous to the purchase of the Property by GC Field & Sons Ltd, Geoffrey Barwell Field and Barwell Charles Field, GC Field & Sons (Feltwell Estate) Ltd substantially completed on a contract to purchase the Property from GC Field & Sons Ltd, Geoffrey Barwell Field and Barwell Charles Field for the price of £33,202,650.21 including VAT. We have advised our clients of the following:
>
> > 1. There will be no tax due on the first transfer because, in our view, sub-sale treatment will apply under section 45 Finance Act 2003.
> >
> > 2. The consideration for the second transfer took the form of a perpetual bond. Therefore, we have advised our client that the chargeable consideration for stamp duty will take the form of the first twelve payments due under the bonds as set out at section 52 Finance Act 2003. The total chargeable consideration on this transaction is £996,080.00 and we therefore enclose a cheque in the sum of £39,843.00 as the Stamp Duty payable on this transaction.
>
> Please note that we do not consider this to be a tax avoidance scheme but the purpose of this letter is to ensure that you are made aware that HMRC may consider that insufficient tax may have been paid so that your power to make a discovery assessment under paragraph 28, Schedule 10 Finance Act 2003 will not arise following the end of the 9 month enquiry period."

28. Although ELS dealt with all the tax aspects and implementation of the scheme, it seems that the actual conveyancing work was carried out by another firm.

29. The documentation and process in relation to the Shaw Appellants was identical in all material respects to those of the Field Appellants. Mr and Mrs Shaw purchased a residential property on 19 February 2013 from a third party vendor for the price of £1,175,000. On the same date, they sold the property to a company they had recently incorporated in return for a perpetual bond. The company was dissolved on 23 September 2014. The two SDLT returns were completed in a similar manner to those for the Field Appellants and were submitted by ELS on behalf of the Shaw Appellants on 19 February 2013. In the return for the sale to the Shaw Appellants, the consideration was stated to be £1,175,000 in cash and no SDLT was said to be due as a result of a claim for "other" relief. The return for the sale to the company stated that the form of the consideration for the purchase was "other", that the amount was £35,602 and, as that was below the SDLT threshold, the amount of SDLT was zero.

30. On 20 February 2013, ELS wrote a letter to HMRC on behalf of the Shaw Appellants in identical terms to the letter at [27] save for the names, property and values.

31. HMRC had until 24 November 2013 to open an enquiry in the case of the Field Appellants and until 18 November 2013 to open an enquiry into the Shaw Appellants' return.

32. No enquiry was opened in either case.

33. Mr Jason Price who, at the time, was a Technical Lead in HMRC's Counter Avoidance team in SDLT cases and who made the alleged "discovery", gave evidence that it had been intended to open enquiries into these, and other sub-sale relief schemes disclosed by ELS, but owing to errors in HMRC's risk team they were not "packaged" in time and the enquiry window expired.

34. ELS did not inform either the Field Appellants or the Shaw Appellants about the retrospective legislation introduced by Finance Act 2013 amending section 45.

35. On 5 September 2013, HMRC wrote to Mr Shaw. The letter referred to an earlier letter, but Mr Shaw denied having received the earlier letter. The letter said:

> "I wrote to you earlier to let you know about retrospective changes to the law that affect your SDLT return. I am writing to you again because you have not contacted me about your return.
>
> In this year's budget the Chancellor of the Exchequer announced changes to the legislation to close down a number of SDLT avoidance schemes including the one you used. He also announced that this legislation would apply retrospectively to all transactions which took place on or after 21 March 2012.
>
> The Finance Bill became law on 17 July 2013.
>
> **What you need to do now**
>
> **By 30 September 2013** you must:
>
> • Amend your return
>
> • Pay the SDLT…"

36. Mr Shaw stated that he sent a copy of the letter to Mr Spector, whose firm is now called Spector, Constant and Williams Ltd, but was then, ELS and asked him to deal with it. He claims that there was no correspondence or discussion between him and Mr Spector at the time. He further stated that "there would have been no point because I did not understand

what was going on". I do not accept this and, indeed, Mr Shaw said in his witness statement that following receipt of the letter ELS advised him that the scheme had not been caught by the legislation. In any event, on 8 October 2013, ELS wrote to HMRC on behalf of Mr and Mrs Shaw saying:

> "We write further to your letter to our client dated 5th September 2013 in which you stated you had written to the client previously about retrospective changes to the law. Our client has confirmed that he has not received any previous correspondence from you.
>
> We have considered your letter but note that our client's purchase was not one of the two schemes affected by the retrospective changes to the law. Therefore, our client does not need to amend his SDLT return."

37. Mr Chacko submitted that the reference to "the two schemes affected" may be explained by the Ministerial Statement contained in a Notice of Amendments to the Finance Bill 2013 tabled on 4 June 2013. The Minister said:

> "… it was announced at Budget 2013 that legislation will be introduced in the Finance Bill to close down two schemes, which use the transfer of rights rules, with effect from the date of the Chancellor's warning, 21 March 2012. …
>
> Given the Chancellor's clear warning last year and the announcement at Budget 2013 of retrospective legislation to close down similar transfer of rights schemes, it should have been obvious to both promoters and users of this scheme that it could be subject to retrospective action."

38. The amendments tabled were what became section 194. The accompanying explanatory notes describe two sub-sale relief schemes, one involving delayed completion and the other involving the grant of an option. Neither of these is the scheme in question in this case.

39. As Mr Goulding points out, what matters is what section 194 actually says, not what the targets stated in the explanatory note were, and it is common ground that section 194 applies to the scheme used in the present case.

40. However, ELS denied that it did apply in their 8 October 2013 letter, which was after the deadline for submitting an amended return. It was also several months after Royal Assent, when they would have had the opportunity to consider the legislation itself.

41. HMRC did not respond to ELS's letter.

42. It seems that no such letter was sent to the Field Appellants and they had no communication with either ELS or HMRC until the Discovery Assessment was raised on 12 September 2014.

43. The Witness Statements of Mr Field and Mr Shaw were virtually identical and each stated that their understanding was that following the submission of the two SDLT returns and the disclosure letter, their retainer with ELS came to an end, save that ELS would continue to correspond with HMRC if there were enquiries that arose from the transaction.

44. At my request, copies of ELS's Client Care Letters were produced (in redacted form) as they were not part of the original bundles.

45. The letters were in similar form and stated:

> "As discussed, we will undertake all the arrangements for establishing the Stamp Duty Strategy including completing all the necessary paper work. In addition to the above we will also ensure that full disclosure is made to the Stamp Taxes Office on all transactions on which we have advised."

46. The letter set out the substantial fees which ELS charged and continued:

> "We will not charge any additional fees for negotiating with HMRC should they raise enquiries. This does not include work in respect of any court/tribunal action or pre-court/tribunal action. We would be happy to carry out such work should the need arise but it will be subject to further instructions being given an a further retainer being agreed."

47. The letter went on to highlight the risks of the tax planning and to say that despite a favourable opinion from counsel, there was no guarantee that the "strategy" would achieve the desired tax saving and that it involved a high degree of risk. It also set out the likely consequences if HMRC challenged the arrangements.

48. The letters were consistent with the scope of the services stated in the Witness Statements. That is, ELS would advise on and implement the scheme, but once they had submitted returns and made disclosure, there was no ongoing retainer except in relation to any enquiry.

49. It is unclear whether the correspondence between ELS and HMRC following the letter to Mr Shaw about the retrospective legislation came under the heading of dealing with enquiries, but it was accepted that they were acting on behalf of the Shaw Appellants in writing to HMRC.

50. HMRC, having realised they were out of time to raise enquiries into the returns, put the cases to one side. Nothing further happened until July 2014.

51. Mr Price's role included reviewing SDLT avoidance schemes assigned to him and, where relevant, directing officers of HMRC to issue assessments and determinations.

52. In May 2013 the First Tier Tribunal issued its decision in *Project Blue Limited v the Commissioners for Her Majesty's Revenue and Customs* [2013] UKFTT 378 (TC) ("*Project Blue*"|). *Project Blue* concerned an SDLT avoidance scheme which HMRC sought to counteract under section 75A. Mr Price and his colleague, Mr Kane decided that *Project Blue* gave clarity on how section 75A operated and who was liable to pay the SDLT in section 75A cases and they considered that this amounted to a "new view of the law" which would entitle them to make a "discovery".

53. Towards the end of July 2014, Mr Price reviewed a number of sub-sale relief cases where disclosure had been made but no enquiry had been opened within the time limit. These included a number of cases where ELS had made disclosures including the Appellants' cases. This resulted in Mr Price and Mr Kane seeking authorisation from their operational lead to issue discovery assessments in these cases. Authorisation was granted. The basis of the discovery was that ELS did not refer to section 75A in their disclosure, the HMRC officer reviewing the disclosure could not have been aware of the *Project Blue* decision as it had not yet been issued and *Project Blue* gave clarity on how section 75A operated in relation to schemes similar to that implemented by the Appellants.

54. Mr Price wrote to ELS on 12 September 2014 in relation to the various clients for whom ELS had implemented the scheme, including the Appellants. The letter stated that, having reviewed the 2013 disclosure letters he had "concluded that the amount of SDLT that ought to have been assessed has not been assessed or a relief has been given that is or has become excessive. This means I have made a discovery by virtue of paragraphs 28 to 30 of Schedule 10 to the Finance Act 2003." The explanation of the discovery relates to non-disclosure of the application of section 75A. Mr Price acknowledged that he did not directly refer to a challenge to section 45 although section 75A was raised in relation to avoidance using section 45, and that he did not refer to the application of the retrospective legislation introduced by section 194 Finance Act 2013. At this stage the discovery was on the basis on section 75A only.

55. Also on 12 September 2014, on the instructions of Mr Price, another HMRC officer, Mr Wilson issued notices of discovery assessments to the Field Appellants and the Shaw Appellants and sent copies to ELS. The terms of the discovery assessment letters were the same in each case although, of course, they referred to the different properties and the assessments were for different amounts. All the letters stated:

> "I am writing to you regarding the Stamp Duty Land Tax (SDLT) return that you submitted in respect of the above property.
>
> I have examined the SDLT return and concluded that there is an insufficiency of tax. I believe that you have used an SDLT mitigation scheme which sought to exploit S45 Finance Act 2003 in order to reduce the charge to SDLT. It is my view that the scheme is ineffective and SDLT should have been paid on the full purchase price of the property.
>
> The information recorded at Land Registry/Companies House has led to HMRC making a discovery that an insufficient amount of SDLT has been paid.
>
> I enclose a discovery assessment for the correct amount of Stamp Duty Land Tax that should have been paid on the purchase of the property. …"

56. I note that the assessments did not refer to section 75A, nor to section 194, but referred to section 45 and concluded that the scheme was ineffective.

57. Also on 12 September 2014 HMRC requested certain information and documents.

58. On 10 October 2014 ELS appealed against the discovery assessments on behalf of the Field Appellants and the Shaw Appellants.

59. As an alternative to the discovery assessments, HMRC also issued notices of determination in relation to the section 75A notional transaction which they argued would be deemed to take place if the scheme was effective.

60. HMRC do not now rely on the determinations. In the course of the correspondence on the case HMRC changed the basis of their discovery from section 75A to a discovery that tax had been understated owing to the introduction of section 194 and the failure of the Appellants to submit amended returns as required by section 194 and pay the correct amount of tax.

61. The Appellants did not wait for HMRC to respond to ELS's appeal letter; they appealed directly to the Tribunal. The Notices of Appeal of all the Appellants were submitted on 2 October 2018.

BURDEN OF PROOF

62. The onus of proof to show that there has been a discovery is on HMRC. It is also for HMRC to show that the conditions for raising a discovery assessment are satisfied, in these cases, that the understatement of tax is attributable to the negligent conduct of the Appellants or someone acting on their behalf.

63. The standard of proof is the normal civil standard, on the balance of probabilities.

DISCOVERY ASSESSMENTS

64. HMRC contend that they made a valid discovery that there had been an understatement of SDLT. Initially, the discovery was based on a new view of the law following the First Tier Tribunal decision in *Project Blue* and on paragraph 30(3) of schedule 10 i.e. on a lack of disclosure. Whilst HMRC do not accept that there was full disclosure, they do not now pursue this point. Their present position is that the reasons for the discovery changed. The current discovery is that there was an understatement of SDLT by virtue of the introduction

of section 194 and the failure of the Appellants to submit amended returns and pay the tax. HMRC further submit that they are entitled to raise the discovery assessment because the understatement is attributable to the negligent conduct of the Appellants in not submitting the amended returns and/or to the negligent conduct of ELS who were "acting on their behalf" in not advising the Appellants that they should submit amended land transaction returns in the light of section 194.

65. Mr Chacko, for the Appellants contend that HMRC have not made a discovery because their alleged discovery related to the notional transaction under section 75A and not to the actual land transaction being the purchase of the respective properties from the third party vendors. The understatement of tax discovered related to the wrong transaction. Even if there was a discovery, Mr Chacko submits that HMRC have not discharged the burden of showing that the Appellants were careless/negligent, that ELS were not "acting on behalf of" the Appellants and that the understatement of tax was not attributable to their negligence. It was not their action that caused it.

66. Initially, the Appellants also contended that the discovery had become "stale" so that the assessments were not valid. The Supreme Court decision in *HMRC v Tooth* [2021] 1 WLR 2811 decided, among other things, that there is no concept of "staleness" in relation to discovery and Mr Chacko does not now pursue that argument.

67. Discovery assessments have been the subject of many decisions of the courts and tribunals. Although most of the authorities relate to the discovery provisions in section 29 Taxes Management Act 1970 ("TMA") the wording of section 29 TMA and the SDLT provisions are largely duplicates and it was accepted in *Lloyd v HMRC* [2017] UKFTT 0820 (TC) at [57] that the authorities on section 29 TMA apply equally to the SDLT provisions in paragraphs 28 and 30, except to the extent of any actual differences. Mr Chacko argues that there are material differences applicable to these cases, but in general, both sides relied on cases relating to section 29 TMA.

68. It was accepted that "negligent" is the equivalent of "careless" which paragraph 31A(2) defines as a "failure to take reasonable care".

69. When self-assessment was introduced, the enquiry and discovery provisions were intended to strike a balance between the taxpayer's right to obtain certainty as to his tax treatment within a reasonable time limit and HMRC's duty to ensure that a taxpayer pays the right amount of tax. If a taxpayer submits a return, HMRC has a period during which they may open an enquiry into that return and challenge the taxpayer's self-assessment. If HMRC do not open an enquiry within the time limit, in principle, the self-assessment become final and can no longer be challenged. A taxpayer who takes reasonable care in submitting his return and who makes full disclosure of any doubtful position ought to achieve certainty once the enquiry window has closed. If, on the other hand, the taxpayer or his agent has not taken reasonable care or if HMRC could not have been aware at the time that the tax position was doubtful, and this leads to an underpayment of tax, HMRC have further periods of time, depending on the culpability of the taxpayer, to make a "discovery assessment". Discovery assessments are intended to be the exception rather than the rule. This was emphasised by Moses LJ in *Tower MCashback LLP 1 v Revenue and Customs Commissioners* [2010] EWCA Civ 32 where he said at [24]:

> "These provisions [section 29 TMA] underline the finality of the self-assessment, a finality which is underlined by strict statutory control of the circumstances in which the Revenue may impose additional tax liabilities by way of amendment to the taxpayer's return and assessment."

DID HMRC MAKE A DISCOVERY?

70. There are many cases, including *Charlton and others v Revenue and Customs Commissioners* [2013] All E R (D) 154, *Cenlon Finance Co Ltd v Ellwood* (1962) 40 TC 176 and *Jonas v Bamford* [1973] STC 519, both cited in *Allan v HMRC* [2016] UKFTT 0504 and *Corbally-Stourton v HMRC* [2008] STC (SCD) 907, which make it clear that the threshold for making a discovery sets a low bar. For example, in *Allan*, quoting *Cenlon*, the Tribunal said:

> "In the words of Viscount Simonds:
>
> > 'I can see no reason for saying that a discovery of undercharge can arise only where a new fact has been discovered. The words are apt to include any case in which it newly appears that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation.'
>
> The threshold for there being a discovery is therefore low, as stated by Walton J in the High Court decision of *Jonas v Bamford*: 'In law, indeed, very little is required to constitute a case of "discovery".'

71. It is clear from HMRC's memorandum of 28 August 2014 and from Mr Price's evidence that the original basis of the "discovery" was the correct application of section 75A following the First Tier Tribunal's decision in *Project Blue*. The legal basis for the discovery assessment subsequently changed. HMRC ceased to rely on section 75A. Section 75A applies where the SDLT payable on the actual transaction in less than the SDLT which would be payable on a notional transaction consisting of the sale by the Vendor to the Purchaser (in this case, the purchasers under the first sale from the third party seller). As section 194 had the effect that SDLT was chargeable in full on that sale, section 75A was no longer relevant. HMRC then relied on a discovery that the understatement of tax was caused by the retrospective introduction of section 194 and the failure of the Appellants to submit an amended return and pay the tax as they were required to do. In addition, HMRC's view was that the scheme was ineffective in any event and the Appellants subsequently acknowledged this.

The Appellants' submissions

72. Mr Chacko acknowledged that a change in the reasons for a discovery did not matter in relation to direct taxes, but submitted that it did matter in relation to SDLT. Section 29 TMA applies "if an officer of the Board or the Board discover as regards any person and a *year of assessment*…" (emphasis added) that there is an insufficiency of tax. Paragraph 28 applies "if the Inland Revenue discover as regards a *chargeable transaction*…" (emphasis added) that there is an insufficiency of tax.

73. He argues that for direct taxes, HMRC only need to discover an understatement of tax for the tax year in question and if the reasons for that understatement change, the discovery assessment remains valid. He submits that the test is different for SDLT as HMRC have to discover an understatement of tax in relation to a specific chargeable transaction. In this case, the chargeable transactions were respectively the sales from the third party to the Fields and the third party to the Shaws; that is, it was claimed that no tax was payable on the actual transactions because sub-sale relief under section 45 applied. Those are the chargeable transactions from which the understatement of tax arose.

74. However, Mr Price discovered an understatement of tax in relation to the notional transaction posited by section 75A. That is a different chargeable transaction from the actual sale. In other words, HMRC's discovery relates to the wrong transaction and they have not shown what discovery they made in relation to the actual transaction nor when they made

it. Although the barrier for making a discovery is low, the onus is on HMRC to prove that they have made an in time discovery and they have not done so.

The Respondents' submissions

75. Mr Goulding submits that HMRC have made a discovery within paragraph 28. Following the claim for relief in the SDLT returns Mr Price and Mr Kane, on reviewing these and other similar cases concluded that amounts of tax which ought to have been assessed had not been assessed and/or that relief had been given which was or had become excessive.

76. He commented that HMRC had never accepted ELS's disclosure letters as making full disclosure and referred to the case of *Bertelsen v HMRC* [2021] UKFTT 76 which also concerned a sub-sale scheme, where the Tribunal indicated that it would have expected an analysis of the application or non-application of section 75A in a disclosure letter. HMRC do not now rely on inadequate disclosure, but only on negligence.

77. As regards the discovery itself, HMRC submit that the relevant discovery was that made by Mr Price. On the basis of the case law, which I consider below, one must consider the "factual matrix" associated with the loss of tax which gave rise to the assessment and if the legal basis of the discovery alters that does not prevent the original discovery remaining a valid discovery.

Discussion

78. The Court of Appeal case of *Fidex Ltd v The Commissioners for HMRC* [2016] STC 1920 concerned a tax avoidance scheme designed to give rise to losses which could be surrendered to other group companies. HMRC opened an enquiry and issued a closure notice reducing the amount of losses available. Before the First-tier Tribunal (FTT) HMRC raised a different argument (relating to unallowable purpose) as to why the losses should not be allowable. Fidex argued that the terms of the closure notice precluded HMRC from raising the unallowable purpose argument. The Court of Appeal held that it is the conclusions set out in the closure notice which are relevant and not the process of reasoning by which HMRC reached those conclusions. The Court said, at [45]:

> "45. In my judgment the principles to be applied are those set out by Henderson J as approved by and elaborated upon by the Supreme Court in [*Tower MCashback*]. So far as material to this appeal, they may be summarised in the following propositions:
>
> i) The scope and subject matter of an appeal are defined by the conclusions stated in the closure notice and by the amendments required to give effect to those conclusions.
>
> ii) What matters are the conclusions set out in the closure notice, not the process of reasoning by which HMRC reached those conclusions.
>
> iii) The closure notice must be read in context in order properly to understand its meaning.
>
> iv) Subject always to the requirements of fairness and proper case management, HMRC can advance new arguments before the FTT to support the conclusions set out in the closure notice."

79. *Fidex* was referred to in *Gareth Clark v Revenue and Customs Commissioners* [2020] 1 WLR 3354 which concerned a discovery assessment under section 29 TMA, also a Court of Appeal case. Henderson LJ at [103] considered that the approach set out in *Fidex*, quoted above, was also the correct approach to a discovery assessment.

80. *Clark* concerned an attempt to extract funds from a pension scheme. Mr Clark transferred funds from his pension scheme into a second scheme, a "pension freedom" scheme (the "first transfer") and then surrendered his benefits under the pension freedom scheme to the employer leading to the transfer of the funds to the employer (the "second transfer"). HMRC raised a discovery assessment charging Mr Clark to income tax on the basis that the second transfer was an unauthorised member payment. The FTT found that the pension freedom scheme was void but that the first transfer was an unauthorised member payment. The taxpayer argued, among other things that the scope of the discovery assessment was not broad enough to encompass the first transfer. Mr Clark argued that the scope of the original discovery assessment could not be enlarged to make it encompass something that was never in the mind of the officer who made the discovery.

81. The Court of Appeal found that the assessment was wide enough to include any unauthorised member payment in respect of Mr Clark in the tax year arising out of the series of transactions including the second transfer. Henderson LJ set out his reasons at [106]-[107]:

> "106. In the first place, I agree with Mr Jones that the scope of the assessment, and of any appeal from it, must be defined by the subjective discovery that the assessing officer has made. That is the only assessment which the officer has jurisdiction to make, and the scope of the assessment, as opposed to the arguments which may be used to support it, cannot in my view be extended by virtue of the appeal process. The correct approach was in my judgment that stated by Kitchin LJ (as he then was) in the *Fidex case [2016] 4 All ER 1063* , para 45, in the context of an appeal from a closure notice:
>
> "In my judgment the principles to be applied are those set out by Henderson J [in the *Tower MCashback* case, at first instance] as approved by and elaborated upon by the Supreme Court." [He then quoted the principles set out above.]
>
> 107. I draw attention in particular to the third of the principles stated by Kitchin LJ, namely that the closure notice (or, in the present case, the discovery assessment) must be read in context in order properly to understand its meaning."

82. It is clear from these cases that what is important is the conclusions set out in the closure notice and not the process of reasoning by which HMRC arrived at those conclusions. HMRC can change the basis on which they arrive at their conclusion without compromising the validity of the discovery assessment. Further, whilst one must define the scope of the assessment by reference to the subjective discovery of the relevant officer, the assessment must be read in its factual context.

83. The discovery assessments sent to the Field Appellants and the Shaw appellants respectively on 12 September 2014 were in similar terms. They were addressed to the people who were the purchasers, that is, the actual purchasers from the third parties and they said:

> "I am writing you regarding the Stamp Duty Land Tax (SDLT) return that you submitted in respect of the above property.
>
> I have examined the SDLT return and concluded that there is an insufficiency of tax. I believe that you have used an SDLT mitigation scheme which sought to exploit S45 Finance act 2003 in order to reduce the charge to SDLT. It is my view that this scheme is ineffective and SDLT should have been paid on the full purchase price of the property.

> The information recorded at Land Registry/Companies House has led to HMRC making a discovery that an insufficient amount of SDLT has been paid."

84. The notice of assessment was enclosed.

85. This letter was written by Mr Wilson, the officer who made the assessments on the instructions of Mr Price.

86. Also on 12 September, Mr Price wrote to ELS stating that he had made a discovery. It stated that the discovery was made on the basis that there had not been disclosure concerning the application of section 75A and that the FTT decision in *Project Blue* had changed HMRC's opinion of how section 75A applied to the transactions. This explanatory letter was not part of the discovery assessments.

87. It is the discovery assessments which set out HMRC's conclusions. Mr Price's letter set out the reasons for arriving at that conclusion and it was the reasons which changed. The conclusion was that the sub-sale relief scheme which sought to exploit the provisions of section 45 was ineffective and SDLT should have been paid on the full value of the property. I infer that the reference to "the information recorded at the land registry/Companies House" is alluding to the fact that the original purchasers were on the title at the Land Registry and the use of the specially formed company to act as the onward purchaser was recorded at Companies House.

88. Looking at the terms of the discovery assessment in context, it seems to me that the scope of the discovery was that there had been an underpayment of SDLT as a result of the use of a sub-sale relief scheme which was ineffective. This is wide enough to encompass a change in reasoning that the scheme was ineffective, not because of the application of section 75A but because of the retrospective application of section 194 and/or because it failed on technical grounds.

89. Mr Chacko also submitted that even if a change of legal basis for the discovery was, in general, permitted, it did not assist HMRC in the present case because they had made a discovery in relation to the wrong transaction i.e. the notional section 75A transaction and not the actual third party to Fields/Shaws transaction which is now in issue.

90. A similar point was considered by the Supreme Court in *Project Blue* [2018] 1 WLR 3169. In that case, the taxpayer argued that HMRC had amended the wrong return. HMRC, on conclusion of its enquiry, had amended the return submitted in relation to the actual third party to purchaser sale and the taxpayer argued that HMRC could not amend that return to impose a liability under the section 75A notional transaction. Lord Hodge said, at [81] to [84]:

> "81. PBL [the Purchaser] submits that HMRC are in any event not entitled to pursue their claim for the SDLT because they had no power to amend the SDLT return, lodged on its behalf, relating to the completion of the contract of 5 April 2007 between the MoD [the third party Vendor] and PBL (para 7 above), because it was not a return relating to the notional transaction under section 75A .
>
> 82. PBL argues that the return, which referred to the section 45(3) disregard, was not strictly necessary but was submitted on its behalf in order to have the purchase of the barracks entered onto the Land Register. It submits that HMRC, while entitled to inquire into that return under section 76 of and paragraph 12 of Schedule 10 to the FA 2003 in relation to the sale by the MoD to PBL, had no power to amend the return in order to impose a liability to SDLT on the separate, notional transaction. The only avenues which had

been open to HMRC to impose a liability to SDLT on the notional transaction, it submits, were to make a determination under paragraph 25 of Schedule 10 , because no return had been lodged in respect of the notional transaction, or to make a discovery assessment under paragraph 28 of that Schedule. As the six-year time limit for either the determination or the assessment had now expired, HMRC could no longer seek payment of any SDLT due on a notional transaction.

83. I do not accept that submission. The answer lies in the terms of paragraph 13 of Schedule 10 , which sets out the scope of the inquiry which HMRC can make under paragraph 12 of that Schedule, and HMRC's powers on completion of the inquiry under paragraph 23. Paragraph 13 provides so far as relevant:

"(1) An inquiry extends to anything contained in the return, or required to be contained in the return, that relates -

(a) to the question whether tax is chargeable in respect of the transaction, or

(b) to the amount of tax so chargeable. …"

The relevant information contained in the return included information about the sale of the barracks by the MoD to PBL. To my mind, the fact that the information in the return was provided to HMRC in relation to a transaction (the MoD-PBL sale), which was to be disregarded under both section 45(3) and section 75A(4) , does not limit the scope of the inquiry. HMRC were entitled to inquire into the tax consequences of that sale. The powers of HMRC on completion of the inquiry are set out in paragraph 23 of Schedule 10 which provides:

"(1) An inquiry under paragraph 12 is completed when [HMRC] by notice ('a closure notice') inform the purchaser that they have completed their inquiries and state their conclusions.

(2) A closure notice must either -

(a) state that in the opinion of [HMRC] no amendment of the return is required, or

(b) make the amendments of the return required to give effect to their conclusions. …"

HMRC were entitled to inquire into that sale and, on ascertaining that it was a part of a series of transactions which gave rise to a section 75A charge, to amend the return to reflect the tax due on the notional freehold acquisition under section 75A(5) . Any obligation on PBL to submit a return in relation to the notional transaction does not limit the scope of HMRC's power to inquire into the MoD-PBL sale or their power to amend the return under paragraph 23.

84. I therefore reject this procedural challenge."

91. Whilst Lord Hodge was considering the scope of an enquiry into an SDLT return and not a discovery assessment, he took a wide view of what could be included in an enquiry relating to a return in relation to a particular transaction, in this case, the actual sale transaction. He concluded that an enquiry into whether tax was chargeable on the actual transaction and the amount of tax chargeable enabled HMRC to enquire into the actual transaction and upon finding that it was part of arrangements giving rise to a charge on a

notional transaction, HMRC could amend the return relating to the actual transaction to reflect the tax due on the notional transaction. This suggests that a broad view can be taken of what constitutes the "chargeable transaction".

92. In the present cases, the *terms* of the discovery assessment refer to the actual transaction and an insufficiency of tax arising from the use of a sub-sale scheme, albeit that the *reasons* for the discovery focussed on the notional section 75A transaction. Paragraph 28(1) entitles HMRC to make a discovery assessment "If the Inland Revenue discover as regards a chargeable transaction that… (b) an assessment to tax is or has become insufficient, or (c) relief that has been given is or has become insufficient…".

93. In my view, HMRC did not make a discovery in relation to the "wrong transaction". They made a discovery that insufficient tax had been paid on the purchases by the Fields/Shaws of their respective properties. In coming to that conclusion, HMRC considered the application of section 75A in the factual context of the actual chargeable transaction and the wider scheme transactions. Applying section 75A would give rise to an SDLT charge higher than that which had been paid on the actual transaction. The substitution of the notional transaction enables HMRC to compute the correct amount of tax which should have been charged on the transactions which took place. It does not affect their discovery that there was an insufficiency of tax in relation to the actual transaction. The expression "chargeable transaction" in paragraph 28 is wide enough to allow HMRC to look at all the facts and circumstances surrounding that transaction, including the "scheme transactions" and the notional land transaction and to conclude that insufficient tax was paid on the actual sale.

Conclusion on the discovery issue

94. For the reasons set out above I have concluded that HMRC have made a valid discovery under paragraph 28(1) that there was an insufficiency of SDLT on the purchases by the Fields and the Shaws of their respective properties.

WERE THE TAXPAYERS OR A PERSON ACTING ON THEIR BEHALF NEGLIGENT?

95. It is not enough for HMRC to have made a valid discovery. They can only raise an assessment if one of the conditions in paragraph 30(2) or (3) is satisfied. As noted, HMRC do not contend that paragraph 30(3) applies, so the question is whether "the situation mentioned in paragraph 28(1)…is attributable to…negligent conduct on the part of (a) the purchaser or (b) a person acting on behalf of the purchaser…". The "situation" mentioned in paragraph 28(1) is that tax due has not been assessed or excessive relief has been given, that is that there is an insufficiency in the tax paid or assessed.

96. HMRC submit that both the Field Appellants and the Shaw Appellants and ELS, who HMRC say were acting on their behalf, were negligent.

97. In HMRC's view, the failure by the Appellants to amend their respective SDLT returns as required by section 194 constitutes negligence within paragraph 30(2)(b).

98. HMRC further submit that ELS were acting on behalf of the Appellants and were careless. Their carelessness consisted in not informing the Appellants that section 194 applied to them and that they should submit amended SDLT returns.

99. The burden is on HMRC to prove, on the balance of probabilities that the taxpayers, or a person acting on their behalf was negligent.

Were the Appellants negligent?

100. The meaning of "negligence" was considered in the Upper Tribunal case of *Atherton v Revenue and Customs Commissioners* [2019] UKUT 41 (TCC). At [37] the Tribunal said:

> "37. A loss of tax or an insufficiency in an assessment is brought about carelessly if the taxpayer or a person acting on his behalf "fails to take reasonable care to avoid bringing about the loss or situation": section 118(5) TMA. The reasonable care which should be taken by a taxpayer is assessed by reference to a prudent and reasonable taxpayer in the position of the taxpayer in question."

101. This means that the Tribunal has to take account of the knowledge and experience of the taxpayer in question. Mr Atherton was a partner in a hedge fund and his background gave him a good lay understanding of tax returns and tax matters. He had participated in a tax avoidance scheme. He was introduced to the promoters of the scheme by his accountant who submitted his tax returns. With advice from his accountant, he completed his tax return in a particular way which involved making a claim for an employment loss by entering the loss in a box on the return for partnership losses. It was held that the incorrectly completed return caused the insufficiency in the assessment. The question was whether the insufficiency was caused by the carelessness of Mr Atherton or someone acting on his behalf. The Tribunal said at [61] to [63]:

> "61. The reference to the bringing about of a situation carelessly is apt to include the provisions of section 29(4) [TMA] relating to carelessness of the taxpayer or someone acting on his behalf. Accordingly, the relevant question is not that which would arise under the general law, nor whether the tax return was carelessly submitted, but whether the taxpayer and those acting on his behalf took reasonable care to avoid creating the insufficiency in the assessment.
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> 62. When the question is asked in that way, the answer becomes clear. The duty of the taxpayer is to take reasonable care to avoid bringing about an insufficiency and if he does not do so then the insufficiency is brought about carelessly. Mr Atherton could readily have avoided the insufficiency by not using box 20 in the way that he did. Although he wished to use box 20 in that way, to try to "force" a year 2 loss into his assessment for year 1, he was under a duty to take reasonable steps to avoid the consequences of doing so. Despite his objective, he was bound not to use box 20 in that way. He could reasonably have avoided the insufficiency by confining himself to a standalone claim for relief using box 3.
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> 63. It does not follow that "forcing" a claim into a tax return will necessarily be careless. If a taxpayer were advised by an adviser who was not someone "acting on his behalf" to make use of box 20 in the way that Mr Atherton did, and if reliance on the advice given was reasonable in the circumstances, the taxpayer may well then not have been in breach of his duty to take reasonable care to avoid bringing about an insufficiency. However, on the unimpeachable findings of the FTT, Mr Atherton was not given that advice by anyone who could be argued to be acting otherwise than on his behalf (i.e. NTA or Leading Counsel advising NTA[the promoter of the scheme]) and it was unreasonable of Mr Atherton and F&L [the accountant] to act in the way that they did. Since F&L were undoubtedly "acting on behalf of" Mr Atherton for the purpose of section 29(4), the implied advice of F&L cannot avail Mr Atherton because F&L were also under a duty to take reasonable care to avoid the insufficiency."

102. This case highlights three points. First, that one must take account of the taxpayer's particular circumstances when assessing carelessness.

103. Secondly, the test is whether the taxpayer and those acting on his behalf have taken reasonable care to avoid the insufficiency.

104. Thirdly, if the taxpayer receives advice from an external adviser, that is, someone who is not acting on his behalf, and he reasonably relies on that advice he is likely to have taken reasonable care to avoid the insufficiency. Where the taxpayer acts on the advice of a person acting on his behalf and that person is careless, the condition in paragraph 30(3) is satisfied.

105. The Upper Tribunal case of *Revenue and Customs Commissioners v Bella Figura Ltd* [2020] UKUT 120 (TCC) also addresses the question of when a taxpayer may reasonably rely on advice. This case concerned a company which set up a registered pension scheme and wanted the pension scheme to make loans to an associated company. The director of the company, after carefully considering a number of pension practitioners appointed PPCL who, he believed, were experts in self-administered pension schemes, to assist in establishing and running the scheme. PPCL drafted the loan agreements and all the other relevant documentation. The director of the company was not a pensions expert but was aware of the concept of "unauthorised payments" and that loans to employers from a pension scheme had to meet certain conditions. PPCL failed to meet one of those conditions which meant that the loans were not "authorised employer loans" but were unauthorised payments which gave rise to penal charges. One of the issues in the case was whether the company had acted carelessly.

> "61. We do, however, consider that in reaching its conclusions on carelessness, the FTT ignored two relevant considerations:
>
> (1) The FTT had made detailed findings at [81] as to the care that Mr Wightman took to select an appropriate practitioner to prepare documentation in full knowledge that the documentation would need to meet specific requirements. The FTT should have gone on to consider, when formulating its conclusions at [88], whether even in the absence of specific advice, BFL obtained implicit reassurance that the loans would qualify which was enough to amount to the taking of reasonable care. By analogy, a person who instructs a lawyer to act on the purchase of a house might be said to obtain implicit advice to the effect that the documents will operate to convey title simply from the fact that the lawyer prepares those documents and identifies no problem with them.
>
> (2) Second, it did not take into account the fact that s36 of TMA is concerned with the question of whether a failure to take reasonable care causes a loss of tax. The FTT identified the failure to obtain advice as a careless omission. However, it did not go on to consider what would have happened if BFL had asked PPCL if the Falken 1 loan qualified. That was a relevant consideration because, if PPCL would have replied that it believed the documentation it had drafted would be effective, that might well have demonstrated that BFL's carelessness did not cause the loss of tax.
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> …
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> 63. Mr Bradley also submitted that there was no sufficient evidential basis for the FTT to conclude that PPCL would have confirmed that the Falken 1 loan was a qualifying employer loan if asked. BFL had not, for example, put in evidence of the terms of its retainer with PPCL. It was, Mr Bradley argued, perfectly possible that, if asked, PPCL would have told BFL that they were just providing administrative support and that if BFL needed advice, it would need to consult a lawyer separately.
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> 64. However, that submission overlooks the fact that the burden is on HMRC to show that BFL was careless for the purposes of s36 of TMA. HMRC had

> certainly shown a prima facie case of carelessness since the Falken 1 loan was not a qualifying employer loan. However, BFL had produced evidence to rebut the prima facie case of carelessness by showing that at least some steps had been taken to ensure that the Falken 1 loan met the relevant statutory requirements. In our view, had the FTT turned its mind to the question of causation, it would have been open to it to conclude, even without knowing the terms of the retainer with PPCL, that BFL had done enough to rebut the allegation of carelessness on which HMRC bore the burden of proof."

106. Mr Chacko submitted that *Bella Figura* establishes two points. The first is that when considering whether a taxpayer has acted reasonably one can take account of implicit advice. If one appoints an expert to carry out a task, one does not have to seek specific advice as to whether the documents were effective or the statutory requirements were complied with. One can assume that the expert has carried out the work correctly. I accept that in general, this is right.

107. Mr Chacko also submitted that it is necessary to identify the careless act that causes the loss of tax and that the negligent conduct must be the cause of the insufficiency.

108. Mr Goulding understood Mr Chacko to contend that a failure to take action could not be careless conduct when considering the cause of the insufficiency. He submits that one must identify the failure to take reasonable care which causes the loss and that can include an omission. In this case, it is the failure to amend the SDLT returns which, he says, constitutes the negligence. In *Bella Figura* itself, the careless conduct identified was an omission; the failure to take advice (at [61(2)]). It is clear that a failure to take action is capable of being the negligent conduct required by paragraph 30(3). Mr Chacko did not dispute this, but argued that if the negligent act which caused the insufficiency was omitting to submit amended SDLT returns, ELS could not be acting on behalf of the Appellants in not making amendments to the SDLT returns.

109. Mr Goulding submits that the Field Appellants and the Shaw Appellants failed to take reasonable care because they did not submit amended returns and pay the tax as required by section 194. Both Mr Field and Mr Shaw said in their witness statements that once the original return and the disclosure letter had been submitted, their understanding was that their retainer with ELS came to an end save that ELS would continue to correspond with HMRC if there were enquiries that arose from the transaction. This is consistent with the scope of the work set out in the Client Care Letters.

110. No enquiry was opened and the Field Appellants received no other correspondence from HMRC concerning the arrangements.

111. Mr Goulding submits that, given that this was an acknowledged attempt at tax avoidance it was not reasonable for the taxpayers or their advisors to assume that would be the end of the matter and to absolve themselves of any responsibility for monitoring developments during the enquiry window. He argued that Parliament cannot have intended that a taxpayer could circumvent the requirements of section 194 by failing to take the action the legislation required them to take.

112. Further, the Shaw Appellants were made aware of their obligations to amend the returns as HMRC wrote to them to tell them this and, he suggests, they chose not to do so.

113. Mr Chacko drew a distinction between the Field Appellants and the Shaw Appellants.

114. The Field Appellants received no correspondence from HMRC about section 194, nor did ELS tell them about it. Mr Chacko submits that the Fields had no obligation to ask for advice or to check whether the law had changed after the transactions had been completed.

The High Court case of *Neal v Customs and Excise Commissioners* [1988] STC 131 concerned a 19 year old model who failed to register for VAT. In considering whether she had a "reasonable excuse" the court considered the aphorism that "ignorance of the law is no excuse" and drew a distinction between basic ignorance of primary law and issues arising out of difficult questions of law. A lack of knowledge of the latter might constitute a reasonable excuse.

115. Referring to *Neal,* Mr Chacko submits that it is not reasonable to expect an ordinary person to be aware of retrospective changes in the law. The Field Appellants took advice in relation to the transactions and once the transactions were completed, they were under no obligation to ask at intervals whether there had been any changes to the law. They knew that HMRC had nine months to enquire into the return and it was reasonable of them to expect that HMRC would raise an enquiry if something new happened.

116. He argued that the Fields had not fallen below the reasonable standards of a lay person who was not a tax specialist.

117. The Shaws were in a different position. HMRC had written to them to say that they were affected by the retrospective legislation and should submit amended returns. They were advised by ELS that the legislation did not apply to them and they did not need to amend their returns. They had no reason to doubt the advice and acted reasonably in following it. ELS wrote to HMRC setting out their advice and HMRC did not respond.

118. Mr Field and Mr Shaw both gave oral evidence. Unusually, Mr Goulding requested that while Mr Field, who gave evidence first, was being cross-examined, Mr Shaw should leave the hearing. After hearing submissions, I agreed to this.

119. Mr Field and Mr Shaw were both unsatisfactory witnesses. Mr Shaw's oral evidence was inconsistent with his witness statement. His witness statement said that when he received the 5 September 2013 letter from HMRC saying that they had to pay the SDLT because of retrospective legislation, he forwarded this to ELS and "they advised me that the scheme had not been caught by the legislation". In cross-examination he denied that he had had any advice asserting that he had simply asked ELS to deal with it and there had been no discussions at all between them. I do not accept that and consider it is more likely that the witness statement set out the correct position and that he had had advice. In his witness statement he refers to the discovery assessment and what happened after it was issued. In cross-examination he claimed that "discovery" meant nothing to him in this context.

120. Mr Field's oral evidence failed to provide any information at all.

121. Both Mr Field and Mr Shaw claimed not to remember whether there was any paperwork between themselves and ELS, which I do not find credible.

122. They both denied even knowing what the purpose of the arrangements was. It was put to them that the purpose of the arrangements was to reduce the amount of SDLT on the purchase and each of them indicated they had no idea what it was all about. This also is not credible. Taking into account all the evidence including their witness statements, the Client Care Letters and their evasive answers in cross-examination, I consider that they were both well aware that they were entering into a high risk SDLT avoidance scheme.

123. Having said that, I accept that they had no specific expertise in tax or law and that they relied on their advisors.

124. Whilst I have concluded that the Appellants were aware of the "primary law"; that SDLT was chargeable on purchases of property, and that they were aware that they were entering into a scheme to avoid all or most of the SDLT which should have been paid, there

is no evidence that they understood the technical detail of how the scheme was supposed to work. Nor would one normally expect a layman to be aware of the introduction of retrospective legislation or to be able to analyse its legal effects. A lay person who is unaware of retrospective legislation and/or who fails to realise the retrospective legislation applies to them cannot be regarded as failing to take reasonable care in failing to do what the legislation requires.

125. In the case of the Shaw Appellants, HMRC informed them about the retrospective legislation but they were advised by ELS that it did not apply to them. A person who relies on the advice of someone they reasonably believe to be competent to give advice will normally be regarded as taking reasonable care (see *Atherton* above). The question whether the individual is liable because of a failure to take reasonable care by the advisor is a separate issue, which I consider below.

126. In any event, the burden lies on HMRC to prove, on the balance of probabilities that the Appellants were negligent. Mr Goulding has produced no evidence to this effect. He asserts that the Appellants ought to have been monitoring the position after completion and the fact that the Appellants failed to file amended returns amounts to acting in a negligent way.

127. I prefer Mr Chacko's contentions. Using the distinction in *Neal*, this is not a case of basic ignorance. The possibility that retrospective legislation might require you to revisit a transaction that had been returned under advice and disclosed is not something that a reasonable lay taxpayer would reasonably be expected to be aware of.

Conclusion on taxpayer negligence

128. For the reasons set out above, I have concluded that HMRC have not discharged the burden of proving that the Appellants themselves were negligent in failing to submit the amended returns.

WERE ELS "ACTING ON BEHALF OF" THE APPELLANTS

129. Before turning to the question of whether ELS was negligent, I must consider whether they were "acting on behalf of" the Appellants.

130. The Upper Tribunal considered when an advisor will be "acting on behalf of" a taxpayer in *HMRC v Hicks* [2020] STC 254. In that case, Mr Hicks was a derivatives trader who entered into a marketed tax avoidance scheme designed to generate a trading loss which could be set against other trading income. Mr Hicks' accountant, Mr Bevis, attended a meeting with the promoter of the scheme and advised Mr Hicks that he had formed the view that the scheme had "the best possible chance of success". Mr Bevis was a "one man band" who did not have the expertise or experience to advise on the merits of the scheme. He failed to tell Mr Hicks that he was not qualified to advise in that respect. He made other errors in relation to the deductibility of the losses. Mr Bevis prepared Mr Hicks' self-assessment tax returns for the relevant years. In relation to the scheme, he relied entirely on input from the promoter which provided the figures and information to be included in the return. Following a review by Mr Hicks and the promoter the return was finalised by Mr Bevis and Mr Hicks in a meeting and then submitted by Mr Bevis.

131. The Upper Tribunal found that in his role as tax adviser, Mr Bevis fell below the standard of a reasonably competent tax adviser and Mr Bevis' actions in completing the relevant assessments were not actions which ought to have been carried out by tax advisor of reasonable competence. It followed from that that the insufficiency in the assessments was brought about by Mr Bevis' failure to take reasonable care. The question arose whether Mr Bevis was "acting on behalf of" Mr Hicks. The Upper Tribunal set out the test at [122]:

> **"[122]** There is an issue in the present case as to the application of the phrase 'a person acting on his behalf' in s 29. The FTT considered the decisions in *Trustees of the Bessie Taube Discretionary Settlement Trust v Revenue and Customs Comrs* [2010] UKFTT 473 (TC) (Judge Berner and Mrs Stalker) and *Atherton v Revenue and Customs Comrs* [2017] UKFTT 831 (TC) (Judge Mosedale and Mr Barrett). Earlier in our decision, we have described the approach of the FTT in relation to these two cases. We agree with the FTT that the legal test to be applied is the test stated in *Bessie Taube* at [93]:
>
> '… In our view, the expression "person acting on … behalf" is not apt to describe a mere adviser who only provides advice to the taxpayer or to someone who is acting on the taxpayer's behalf. In our judgement the expression connotes a person who takes steps that the taxpayer himself could take, or would otherwise be responsible for taking. Such steps will commonly include steps involving third parties, but will not necessarily do so. Examples would in our view include completing a return, filing a return, entering into correspondence with HMRC, providing documents and information to HMRC and seeking external advice as to the legal and tax position of the taxpayer. The person must represent, and not merely provide advice to, the taxpayer.'"

132. In *Hicks*, Mr Bevis was both providing advice and, in preparing and submitting Mr Hicks' tax returns, acting on his behalf.

133. Mr Chacko submits that in the present case, ELS were providing advice to the Appellants. They were not "standing in the taxpayers' shoes". They had been acting for the Appellants in submitted the original SDLT returns, but once they had done that and written the disclosure letter, their retainer came to an end (unless HMRC opened an enquiry).

134. The alleged negligence is in failing to inform the Appellants about the retrospective legislation and in failing to submit an amended return. Mr Chacko submits that ELS cannot have been acting on the Appellants' behalf in not submitting an amended return. Not doing something cannot be an action on someone's behalf.

135. The giving of advice is not acting on a person's behalf and Mr Chacko argues that a failure to volunteer advice which the adviser is under no obligation to give and which has not been asked for cannot constitute "acting on behalf of" for the purposes of paragraph 30(2).

136. On this basis, Mr Chacko submits that ELS were not advising the Field Appellants at the time and had no obligation to advise them of the change in the law. Even if they had, the failure to give advice was not something done on behalf of the Field Appellants which caused the loss of tax.

137. Mr Goulding acknowledged that *Hicks* indicated that "acting on behalf of" included steps which a taxpayer could take themselves or would be responsible for taking. This included such matters as submitting returns, corresponding with HMRC and submitting information to HMRC. He submits that ELS were doing that in the present case. They had submitted the SDLT returns and corresponded with HMRC about them.

138. Although ELS had been acting on behalf of all the Appellants in relation to the scheme up to and including submitting the returns and sending the disclosure letter, there was no ongoing retainer and I conclude that ELS was not advising the Appellants or acting on behalf of the Appellants when the retrospective legislation was introduced.

139. ELS did however advise the Shaw Appellants about the need (or lack of need) to submit amended returns and corresponded with HMRC on behalf of the Shaws who were described

in the 8 October 2013 letter as "clients". I consider that ELS was acting on behalf of the Shaw Appellants when they corresponded with HMRC about HMRC's 5 September 2013 letter. It is therefore relevant to consider the issue of whether ELS were negligent in advising there was no need to amend the returns and whether that caused the insufficiency.

WERE ELS NEGLIGENT?

140. Mr Goulding submits that both the Appellants and ELS were negligent and that the negligence consisted of the failure to amend the SDLT returns and pay the additional tax as required by section 194. He also takes the view that ELS was acting on behalf of the Appellants.

141. Mr Goulding points to HMRC's letter to Mr Shaw of 5 September 2013, requiring him to amend his SDLT return and pay the tax and ELS' letter to HMRC of 8 October 2013 stating that their client does not need to amend his SDLT return as evidence that ELS were aware of the retrospective changes. Clearly, that was the case. He goes on to contend that any adviser of reasonable competence would alert all their clients to the impact of section 194.

142. Mr Goulding contends that it was not reasonable for the Appellants and their advisors to absolve themselves of responsibility during the enquiry window. It was not reasonable of them to assume that the submission of the return and disclosure letter would be the end of the matter and it was unrealistic to say they did regard it as the end of the matter. The onus was on ELS to advise their clients about section 194.

143. The Shaw Appellants were made aware of their obligations by HMRC and were advised by ELS not to amend the returns (despite Mr Shaw's denial in evidence that he had not received any advice). ELS did not explain why they thought that section 194 did not apply to the scheme implemented by the Appellants.

144. Mr Goulding contends that there was an obligation on ELS or at least a reasonable expectation that they would advise properly on section 194 and its application to the scheme and the basis on which they formed the opinion it did not apply is unclear. Section 194 was introduced specifically to counter this type of scheme.

145. Mr Chacko referred to the Ministerial Statement (see [37]). He acknowledged that section 194 did catch the present scheme, but the Statement indicated that it was not specifically targeted. This would explain ELS' statement in their 8 October 2013 letter that "our client's purchase was not one of the two schemes affected by the retrospective changes to the law". Mr Chacko submitted that HMRC cannot say there was no explanation for ELS's view. Further HMRC would need to show that ELS's view was not just wrong, but that it was negligent; that the meaning of section 194 was so obvious that it was careless of ELS to take a different view.

146. It is also relevant that HMRC failed to respond to the 8 October 2013 letter, so there was no assertion by HMRC at the time that ELS were wrong.

147. The present scheme was not referred to in the Statement, but as Mr Goulding contends, what matters is what section 194 actually says and the wording did in fact cover this scheme. Mr Goulding argues that it would have been reasonable for ELS to review the schemes they had implemented to see if Finance Act 2013 applied to them. In HMRC's view it was obvious that the schemes fell within section 194. It followed that ELS was careless in not telling the Appellants of the need to amend their returns.

148. Mr Chacko submits that HMRC have not discharged the burden of proving negligence on the part of ELS. HMRC would have to show that the generality of tax advisors would

inform their clients of changes to the law after completion of the transaction even if this was outside the scope of the services to be provided.

149. Further the question is not whether ELS was wrong to say (in 2013) that the scheme was not caught and there was no need to amend the SDLT returns but whether, in October 2013, that was not a view which reasonable tax adviser could have taken.

150. If ELS was negligent in advising the Shaws that they did not need to amend their return, in my view, the loss of tax would have been caused by the negligence of a person acting on behalf of the Shaws.

151. HMRC asserted that ELS was negligent in not advising the Appellants to amend their returns, but as Mr Chacko said, they have not provided any evidence as to what a reasonably competent tax adviser would have done or whether a reasonably competent tax adviser would have taken the view, at the time, that section 194 applied to this scheme. HMRC have not discharged the burden of proving on the balance of probabilities that ELS were negligent.

DECISION

152. I have concluded that HMRC made a discovery that there was an insufficiency of tax within paragraph 28 Schedule 10 to the Finance Act 2003.

153. I have, however, concluded that HMRC have not discharged the burden of proving that the Appellants negligently caused that insufficiency.

154. I have found that ELS were not acting "on behalf of" the Field Appellants at the time when they should have amended their SDLT return but that they were acting on behalf of the Shaw Appellants when they corresponded with HMRC and advised that section 194 Finance Act 2013 did not apply to the Shaw Appellants' scheme and they did not need to amend their return.

155. I have decided that HMRC have not proved, on the balance of probabilities, that ELS was negligent.

156. HMRC has not therefore satisfied the condition set out in paragraph 30(2) of schedule 10 to the Finance Act 2003.

157. Accordingly, and for the reasons set out above, I must allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 19 AUGUST 2021