[2018] UKFTT 463 (TC)

TC06641

Appeal number: TC/2017/04704

ASSESSMENT – validity of service – discovery – time limits – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ASTAR SERVICES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JENNIFER DEAN

Sitting in public at Manchester on 2 May 2018

Mr R. Bullock on behalf of the Appellant

Mr A. Pellington, officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. By Notice of Appeal dated 5 June 2017 the Appellant appealed against a discovery assessment ("the assessment") issued by HMRC on 1 March 2016. The assessment amended the Stamp Duty Land Tax ("SDLT") return submitted by the Appellant on 31 October 2012. The amendment seeks to recover £14,850 due on the purchase of Lymm Service Centre, Lymm on 8 October 2012.

2. The grounds of appeal can be summarised as follows:

   (a) Whether the discovery assessment was valid and had been duly served;

   (b) Whether the preconditions necessary for HMRC to issue a discovery assessment were met;

   (c) Whether the assessment was out of time;

   (d) Whether the Appellant was denied an alternative avenue for resolution via ADR.

3. Neither party put forward any witness evidence and both made submissions by reference to a bundle of contemporaneous documents.

Background facts

4. In summary the facts giving rise to the appeal are as follows:

5. The Appellant is incorporated in the Bahamas. Mr James Grant Mole, the vendor, is a shareholder of the Appellant Company. The Appellant entered into an agreement with the vendor to purchase the property for consideration of £495,000. On 8 October 2012 the sale contract was completed and the property was transferred from the vendor to the Appellant. On 31 October 2012 HMRC received the Appellant's SDLT1 return for the transaction. No SDLT was assessed as a result of the Appellant's claim for relief under code 28. The SDLT showed the same address for the vendor (Mr Mole) and the Appellant; 107 Macclesfield Road, Dale Brow, Prestbury SK10 4AG ("the Prestbury address").

6. On 1 March 2016 HMRC issued a discovery assessment under paragraph 28, Schedule 10 Finance Act 2003 to the Appellant which was sent to the Prestbury address.

7. On 29 March 2016 the Appellant appealed the assessment to HMRC. On 2 March 2017 HMRC offered an independent review which was accepted by the Appellant on 25 March 2017. On 9 May 2017 HMRC notified the Appellant that, following the review, the decision to make a discovery assessment was unchanged.

8. On 5 June 2017 the Appellant notified its appeal to the Tribunal.

Legislation

9. The relevant provisions are set out in Schedule 10 Finance Act 2003 which provides as follows:

28 Assessment where loss of tax discovered

(1) If the Inland Revenue discover as regards a chargeable transaction that –

(a) an amount of tax that ought to have been assessed has not been assessed, or

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

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

They may make an assessment ('a discovery assessment') in the amount or further amount that ought in their opinion to be charged in order to make good to the Crown the loss of tax.

(2) The power to make a discovery assessment in respect of a transaction for which the purchaser has delivered a return is subject to the restrictions specified in paragraph 30.

30 Restrictions on assessment where return delivered

(1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28...in respect of the transaction -

(a) may only be made in the two cases specified in sub-paragraph (2) and (3) below, and

(b) may not be made in the circumstances specified in sub-paragraph (5) below.

10. The pre-condition in paragraph 30(3) is:

(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)...

11. Paragraph 30(4) provides that:

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

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

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

(c) it is information the existence of which, and the relevance of which as regards the situation mentioned in §28(1)... –

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

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

12. Sub-paragraph (5) deals with restrictions on making an assessment:

(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.

13. Paragraph 32 provides:

(1) Notice of an assessment must be served on the purchaser.

(2) The notice must state—

(a) the tax due,

(b) the date on which the notice is issued, and

(c) the time within which any appeal against the assessment must be made.

(3) After notice of the assessment has been served on the purchaser, the assessment may not be altered except in accordance with the express provisions of this Part of this Act.

(4) Where an officer of the Board has decided to make an assessment to tax, and has taken all other decisions needed for arriving at the amount of the assessment, he may entrust to some other officer of the Board responsibility for completing the assessing procedure, whether by means involving the use of a computer or otherwise, including responsibility for serving notice of the assessment.

14. Section 84 FA 2003 provides as follows:

84 Delivery and service of documents

(1) A notice or other document to be served under this Part on a person may be delivered to him or left at his usual or last known place of abode.

(2) a notice or other document to be given, served or delivered under this Part may be served by post.

(3) For the purposes of section 7 of the Interpretation Act 1978...any such notice or other document to be given or delivered to or served on, any person by the Inland Revenue is properly addressed if it is addressed to that person –

(a) in the case of an individual, at his usual or last known place of residence or his place of business

(b) in the case of a company –

(i) at its principal place of business.

15. The Overseas Companies Regulations 2009 (SI 2009/1801) provides that an overseas company carrying on business in the UK will need to register with Companies House if it has a physical "establishment" in the UK.

HMRC's submissions

16. On behalf of HMRC Mr Pellington made the following submissions.

17. HMRC exchanged correspondence with the Appellant's directors via the UK Prestbury address contained on the return. Mr Mole, the vendor and shareholder in the Appellant Company is believed to reside at that address. The discovery assessment was sent to the directors at the Prestbury address.

18. In response to the Appellant's contention that the relevant enquiries, notices and assessments were not properly served at the Appellant's registered office in the Bahamas, HMRC submit that this would suggest that the Prestbury address is part of the overseas company that is not authorised to accept service. However the Appellant corresponded with HMRC from the Prestbury address and made no attempt to correct HMRC or request that documents be served at the registered office in Nassau.

19. HMRC contend that service need not be directed to a company's registered office but can be sent to a company's principal place of business pursuant to s84(3)(b)(i) FA 2003.

20. The Appellant acknowledged service by responding to HMRC from its UK address nominated in the land transaction return submitted to HMRC. HMRC submit, relying on s1122(3)(a) Corporation Tax Act 2010, that the directors utilised a UK address of a connected party and the Appellant's responses clearly show that the company accepted service through its UK address:

"S 1122(3)(a) Corporation Tax Act 2010:

(1) This section has effect for the purposes of the provisions of the Corporation Tax Acts which apply this section (or to which this section is applied).

(2) A company is connected with another company if—

(a) the same person has control of both companies,

(b) a person ("A") has control of one company and persons connected with A have control of the other company,

(c) A has control of one company and A together with persons connected with A have control of the other company, or

(d) a group of two or more persons has control of both companies and the groups either consist of the same persons or could be so regarded if (in one or more cases) a member of either group were replaced by a person with whom the member is connected.

(3) A company is connected with another person ("A") if—

(a) A has control of the company, or

(b) A together with persons connected with A have control of the company."

21. In the alternative, HMRC contend that the UK address suggests a physical establishment of the company in the UK. The transaction was effected in the Appellant's name using the UK Prestbury address on the return. The Overseas Companies Regulations 2009 (SI 2009/1801) provide that an overseas company carrying on business in the UK will need to register with Companies House if it has a physical establishment in the UK. The Appellant has not registered its UK address as a place of business which could render it liable to a penalty for non-compliance.

22. As the Appellant is an unregistered company HMRC contend that service of all relevant legal and statutory enquiries, notices and assessments were properly effected at its principal place of business pursuant to Regulation 4(a) and Schedule 1, paragraph 5 of the Unregistered Companies Regulations 2009 (SI 2009/2436):

"**Regulation 4(a):**

For the purposes of the application to an unregistered company of the provisions of the Companies Acts applying to it by virtue of these Regulations—

(a) any reference to the company's registered office shall be read as a reference to the company's principal office in the United Kingdom;

Schedule 1 para 5:

Sections 86 and 87 of the Companies Act 2006 (a company's registered office) apply to unregistered companies, modified so that they read as follows—

"86 A company's principal office

(1) Communications and notices may at all times be addressed to a company at its principal office in the United Kingdom.

(2) A company must give notice to the registrar, not later than 15 days after the date of the incorporation of the company, of the address of its principal office in the United Kingdom.

(3) If a company fails to comply with subsection (2) an offence is committed by—

(a) the company, and

(b) every officer of the company who is in default.

(4) A person guilty of an offence under subsection (2) is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale."

23. As regards the time limit for issuing the discovery assessment the power to enquire into a land transaction return is found in paragraph 12, Schedule 10 FA 2003:

"(1) The Inland Revenue may enquire into a land transaction return if they give notice of their intention to do so ("notice of enquiry")—

(a) to the purchaser,

(b) before the end of the enquiry period.

(2) The enquiry period is the period of nine months—

(a) after the filing date, if the return was delivered on or before that date;

(b) after the date on which the return was delivered, if the return was delivered after the filing date;

(c) after the date on which the amendment was made, if the return is amended under paragraph 6 (amendment by purchaser).

[This is subject to the following qualification.]

[(2A) If—

(a) the Inland Revenue give notice, within the period specified in sub-paragraph (2), of their intention to enquire into a land transaction return delivered under section 80 (adjustment where contingency ceases or consideration is ascertained), 81 (further return where relief withdrawn) [, 81A (return or further return in consequence of later linked transaction) or paragraph 6 of Schedule 6B (adjustment for change of circumstances)], and

(b) it appears to the Inland Revenue to be necessary to give a notice under this paragraph in respect of an earlier land transaction return in respect of the same land transaction,

a notice may be given notwithstanding that the period referred to in sub-paragraph (2) has elapsed in relation to that earlier land transaction.]

(3) A return that has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under paragraph 6."

24. The Appellant's return was received on 31 October 2012, 7 days prior to the statutory filing date of 7 November 2012 (calculated as 30 days from the date of transaction, namely 8 October 2012). HMRC had 9 months to give notice of its intention to enquire into the return and the time limit was therefore 7 August 2013,

25. HMRC submits that the Appellant was required by s194 FA 2013 to submit an amendment to the return but failed to do so:

"(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."

26. The letter issued to the Appellant on 28 March 2014 was not formal notification of an enquiry under paragraph 12, Schedule 10 FA 2003. The letter was entitled "Check of Stamp Duty Land Tax (SDLT) return" and explained that a check was being made to establish the amount of tax that should have been paid following the changes to the legislation made by s194 FA 2013 which may have affected the Appellant. The letter requested information and an explanation for the claim for code 28 relief. No information or explanation was received.

27. On 30 April 2015 HMRC explained its belief that an avoidance scheme may have been used and the Appellant was requested to either amend the return and pay the additional tax or to provide documents in support if no avoidance scheme was used. No information was received and the return was not amended.

28. As the Appellant could have amended the return there was no legal gateway or reason for HMRC to open a formal enquiry. The only avenue to recover unpaid tax was if there was a discovery by an officer of HMRC of an insufficiency.

29. HMRC's position was that they were entitled to make a discovery assessment because an officer of HMRC had discovered a potential insufficiency in tax on the following grounds:

- The timing of the transaction fell within the period covered by the retrospective legislation introduced;

- The presence of Robert Meaton & Co as the Appellant's agent which was a firm of solicitors known to implement SDLT avoidance schemes;

- The Appellant's failure to provide any explanation or documentation as to the relief claimed or amend its return.

30. The time limit for issuing a discovery assessment is 4 years after the effective date of the transaction (see para 31(1), Schedule 10, FA 2003). The assessment was issued on 1 March 2016; 3 years and 5 months after the transaction.

31. The use of code 28 relief did not of itself alert the officer to an insufficiency in tax. By no later than 1 March 2016 HMRC became aware of the Appellant's acquisition, having identified the hallmarks of what was by then a widely utilised SDLT avoidance scheme where code 28 relief had been claimed, the transaction date fell within the period covered by the retrospective legislation and no SDLT had been paid.

32. At the time HMRC ceased to be entitled to give notice of enquiry into the return and HMRC submit it could not have been reasonable expected to be aware that an amount of tax that ought to have been assessed had not been. It was the range of factors culminating in the Appellant's failure to respond which led the officer to his conclusion that there was an insufficiency.

33. HMRC highlighted *Langham v Veltema* [2004] EWCA Civ 193 and *Corbally-Stourton v Revenue & Customs Commissioners* [2008] STC (SCD) 907 in which it was said (at [46] & [51]:

> "Thus in my view it is not required that the officer be aware that there was in truth an insufficiency or that he be aware that it was beyond all reasonable doubt that there was an insufficiency, but merely that that information should enable him to conclude on balance that there was an insufficiency. Again a mere suspicion would not be enough, but, a conclusion in relation to which he had some residual doubt may well be sufficient…
>
> …it seems to me that an 'actual insufficiency' is used to describe the complement of 'an awareness that it was questionable', and accordingly embraces a range of conclusions from absolute certainty to on balance probability…"

34. ADR was not an appropriate avenue in this appeal given the absence of any information or clarification from the Appellant in support of its appeal. In the absence of any information or documentation from the Appellant, the discovery assessment was issued in the amount of the liability arising on the transaction, namely £14,850. The Appellant failed to comply with the requirements of s 194 FA 2013 in that it did not submit an amendment to the SDLT return as required.

Appellant's submissions

35. The Appellant contends that as a matter of fact and law the assessment was not issued to the Appellant as required and was not addressed to the Appellant Company nor was it served at the Appellant's registered office. The assessment dated 1 March 2016 is addressed to "The Directors of Astar Services Ltd". No address is set out on the letter and the assessment itself does not properly identify to whom it is addressed. The letter was sent to the Prestbury address which is not that of the Appellant nor is it the principal place of business. The Appellant does not have a UK office or address. It is not accepted that HMRC received correspondence from that address on behalf of the Appellant or that the Appellant accepted service at that address.

36. The return identified the Appellant as the purchaser and that it was a company based and registered overseas. An error on the part of the agent provided the vendor's address instead of the Appellant's registered address in the Bahamas.

37. HMRC's own SDLT Guidance Notes state:

> "If the purchaser is a company the address of the registered office should be shown."

38. HMRC have conceded this point in the past in a letter dated 17 December 2014 which stated:

> "As the company's registered address is overseas the opening notice would have needed to be sent via airmail."

39. The Appellant relies on s84(3)(b)(i) FA 2003 in support of the submission that the assessment was not properly served.

40. The Appellant contend that HMRC's reliance on s1122(2)(a) CTA 2010 is misconceived; it states "this section has effect for the purposes of the provisions of the Corporation Tax Acts" and therefore has no effect in relation to discovery assessments which are governed by FA 2003.

41. The Overseas Companies Regulations 2009 were not enacted as legislation subsidiary to the FA 2003 and do not regulate the application of SDLT or tax law in the UK; they are therefore of no direct effect upon the application or interpretation of FA 2003 Schedule 10. Furthermore the Regulations do not overcome the fact that the Appellant has no UK office or address in Prestbury.

42. The Appellant has provided evidence from Companies House which confirms that registration of an office in the UK was not a requirement.

43. The Appellant submits that HMRC, having failed to open an enquiry within the 9 month period cannot lawfully issue a discovery assessment on the basis of information that was made available to them; the relevant information is limited to the return in which the Appellant had claimed code 28 SDLT relief. Furthermore HMRC was aware of the timing of the transaction which fell within the period covered by the

legislation and the presence of Robert Meaton & Co as the agent shown on the return. All of these facts were provided to HMRC as information contained within the return and HMRC must reasonably be expected to have been aware of them before the expiry of the 9 month enquiry window.

44. In the alternative the Appellant contends that the assessment is stale and unlawful due to it being issued years after the relevant transaction date.

45. The Appellant submits that if, which is not admitted, the return was incorrectly completed by the inclusion of a claim for code 28 relief the alleged error is:

> "…attributable to a mistake in the return as to the basis on which the tax liability ought to have been computed" arising as "the return was in fact made on the basis or in accordance with the practice generally prevailing at the time it was made."

The assessment therefore should not have been made.

46. Under paragraph 7 of Sch 10 FA 2003 HMRC should have amended the return "so as to correct obvious errors or omissions in the return (whether errors of principle, arithmetical mistakes or otherwise)." HMRC are now out of time to do so (see and are thereby precluded from challenging the accuracy or otherwise of the return.

47. In the alternative, should the Tribunal find the assessment valid, Appellant submits that any tax due is less than the amount assessed as the property value should be reduced in accordance with Valuation Office Guidance and to reflect the fact it has been badly contaminated and had a sitting tenant. Furthermore HMRC failed to offer ADR thereby denying the Appellant the appropriate avenue for resolution.

Discussion and decision

Validity of service

48. Before I turn to the issue of whether there was a discovery I will address the Appellant's submission that the notice is invalid as it was not served on the Appellant's registered address in the Bahamas but was sent to the Prestbury address.

49. The starting point is paragraph 32(1) of Schedule 10 FA 2003 which provides that a notice of an assessment must be served on the purchaser. The question for me to consider is whether there was service on the purchaser given that the notice was not sent to the company's registered address in the Bahamas.

50. Section 84 FA 2003 stipulates that a notice "may be delivered" to the usual or last known place of abode and "may be served by post". A notice is properly served if it is addressed, in the case of a company, at its principal place of business: Section 7 Interpretation Act 1978 states:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be

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

51. In my view the use of the word "may" as opposed to "must" in s84 FA 2003 indicates that the provision is not mandatory. I reach that view having considered the provisions relating to an individual which provide that the notice may be served at the usual or last known address. It seems to me that the legislation contemplates situations outside the norm, for instance the possibility that the whereabouts, whether PPOB but more likely an individual's address, is unknown hence the inclusion of a last known address as an acceptable place for service.

52. In *Collier v Williams* [2006] EWCA Civ 20 the Court stated at [100] and [101] (in relation to whether a claim form had been validly served):

> "Service of the claim form is a crucial step in the proceedings. The rules are designed to ensure, so far as possible, that the claim form is brought to the attention of the defendant, and where he is represented, his legal representatives.
>
> If a claimant purports to serve on an address which he mistakenly believes is the last known residence of the defendant, it is therefore necessary to consider the reasonableness of his belief that the address is indeed the defendant's last known residence. If the claimant is misled by the defendant as to his residence, then the court is likely to hold that the claimant had reasonable grounds for his belief. In such circumstances, the court is likely to hold that there is a very good reason for the claimant's failure to serve within the 4 months period and to grant an extension of time under CPR 7.6(2). In such a case the defendant may even be estopped from denying that the address to which the document is sent is his last known residence."

53. In that case the Court held that there was no valid service of the claim form at an address which was not that of the defendant nor did the claimant have any reasonable basis to believe that the defendant resided at the address. It seems clear from the comments of the Court that one of the purposes of the legislation must be to ensure that the relevant person is aware of the notice or document being served.

54. The situation in this case is that the Appellant has no PPOB within the UK; the company is incorporated in the Bahamas. The issue is whether the notice was properly addressed. It seems to me that it cannot be ignored that the address provided on the SDLT return for the purchaser was that which HMRC used, namely the Prestbury address. I considered whether there is an obligation on HMRC to check or verify an address; the legislation places no further obligation on HMRC other than to properly address the notice to PPOB. No authorities were provided which address the situation, as in this appeal, where the taxpayer himself has provided the address used and which he later contends is incorrect and thereby invalidates the service. The accuracy of the return is the responsibility of the taxpayer and I take the view that HMRC are entitled to accept the information provided as accurate. On the information provided in the return the Appellant's transaction was effected using the Prestbury address, and in that context it cannot be said that there was no reasonable basis for HMRC using the

Prestbury address. For that reason I take the view that the notice was properly addressed and validly served.

55. Moreover the Appellant responded to the notice on 29 March 2016 as follows:

> "Your letter dated 1 March 2016 – proposed appeal
>
> The person who will be contacting you in this regard has been absent out of the country…legal advice is being sought…please take this as an appeal in the meantime…PS please advise the nature of your alleged discovery."

56. The letter of 1 March 2016 was addressed to the Directors of Astar Services Ltd at the Prestbury address. It stated:

> "…I now enclose a discovery assessment for the correct amount of Stamp Duty Land Tax that should have been paid on the purchase of the property…"

57. The Discovery Assessment enclosed was addressed to the Directors of Astar Services Ltd and stated that it was a discovery assessment. Given its response on 29 March 2016 the Appellant clearly received and was aware of the notice. As the notice was enclosed with the letter containing the address I am satisfied that the lack of address on the Notice itself does not invalidate the assessment.

58. I did not find that the Corporation Tax Act 2010 or The Overseas Companies Regulations 2009 (SI 2009/1801) assisted in determining the issue relating to service. On the information before me I cannot be satisfied that the Appellant was required to register with Companies House and I make no further comment on that issue.

59. Similarly, in the absence of any authorities provided to me regarding a company's principal office or any evidence on the point I did not find the Unregistered Companies Regulations 2009 (SI 2009/2436) assisted. However I note that the Regulations provide that in the case of an unregistered company "registered office" shall be read as "the company's principal office" to which notices and communications "may at all times be addressed"; it seems to me that the absence of mandatory provisions are designed to take a common sense approach in order to ensure that the purpose of communications, namely to be brought to the company's attention, is met.

60. I considered the guidance in the Civil Procedure Rules relating to service. Although not directly applicable the Rules provide for service by personal service or post in the case of a company not registered in the UK (Rule 6.9):

> "Any place within the jurisdiction where the corporation carries on its activities; or any place of business of the company within the jurisdiction….
>
> Where, having taken the reasonable steps required by paragraph (3), the claimant
>
> (a) ascertains the defendant's current address, the claim form must be served at that address; or

(b) is unable to ascertain the defendant's current address, the claimant must consider whether there is –

(i) an alternative place where; or
(ii) an alternative method by which,

service may be effected."

61. Rule 6.15 provides:

(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.
(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.

62. In my view the relevance of the CPR is in indicating that service must take place, in so far as is possible, at a specified address in order to ensure that the relevant person or company is made aware of the claim. However by the inclusion of Rule 6.15(2) the Rules contemplate the possibility that a service at a specified or identifiable address may not be possible but this does not, of itself, invalidate the service if reasonable steps are taken to ensure the claim is brought to the person or company's attention. In my view this is supported by the judgment in *Smith v Hughes and another* [2003] EWCA Civ 656 at [103]:

> "As we have said, there is no suggestion in this case that 45 Whitworth Close was not Mr Hughes' last known residence. If the MIB had disputed the claimant's claim that this was Mr Hughes' last known residence, then difficult questions might have arisen. In particular, is the rule concerned with the claimant's actual knowledge, or is it directed at the knowledge which, exercising reasonable diligence, he or she could acquire? We incline to the latter view, but, as we have said, the point does not arise on this appeal."

63. Taking into account all of the guidance and the particular circumstances of this case I am satisfied that by sending the discovery assessment to the directors at the address provided by the Appellant as purchaser on the return constitutes valid and proper service.

Whether the assessment is out of time

64. HMRC had nine months to open an enquiry into the SDLT return pursuant to section 12 FA 2003. No enquiry was opened; HMRC wrote to the Appellant on 28 March 2014 and 30 April 2015 raising queries as to why relief was claimed and requesting information and documentation; the questions and requests went, and remain unanswered.

65. Had an enquiry been opened the time limit was nine months after the filing date if the return was delivered on or before that date. In this appeal the return was delivered on 31 October 2012 which was before the filing date of 7 November 2012 (i.e. 30 days from the date of the transaction which took place on 8 October 2012). Therefore the deadline for opening an enquiry was 7 August 2013.

66. The correspondence from HMRC to the Appellant dated 28 March 2014 and 30 April 2015 did not purport to formally open an enquiry. I accept that it was still open to the Appellant at that point to either amend the return to meet the requirements of the Finance Act 2013 or to explain to HMRC why it was not affected by the changes to the legislation.

67. Once the enquiry window expired it was open to HMRC to raise a discovery assessment if the provisions of sections 28 - 31 FA 2003 were met, namely HMRC discovered a loss of tax and at the time they ceased to be entitled to give notice of an enquiry they could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation. I will address the Appellant's submission that the return was made on the basis of generally prevailing practice in due course. The only other relevant limitation is contained in section 31 which provides that, as a general rule, no assessment may be made more than four years after the effective date of the transaction to which it relates. As the discovery assessment was issued on 1 March 2016 I am satisfied that this fell within the four year time limit which expired on 8 October 2016.

68. For the reasons set out above I have concluded that the discovery assessment was issued in time.

Was there a discovery?

69. The validity of the assessment depends on whether it meets the preconditions for a discovery assessment in respect of stamp duty land tax, which are set out in paragraph 28 Sch 10 FA 2003.

70. There is little authority on these provisions. However there are a number of authorities relating to the similar provisions in the Taxes Management Act 1970. I take the view that the authorities on the TMA discovery provisions apply equally to the SDLT discovery provisions (save where the provisions clearly differ). Given the parties' reliance on authorities relating to the TMA discovery provisions I have concluded that this is not a contentious view.

71. In *Langham v Veltema* [2004] EWCA Civ 193, the Court of Appeal considered the scope of s29(5) TMA 1970. It is clear from the Court of Appeal's decision that s29(5) only operates to prevent HMRC from making an assessment if the information "made available" to the hypothetical officer would have made that officer aware of an actual insufficiency of tax (see [80]:

> "More particularly, it is plain from the wording of the statutory test in section 29(5) that it is concerned, not with what an Inspector could reasonably have been

expected to do, but with what he could have been reasonably expected to be aware of. It speaks of an Inspector's objective awareness, from the information made available to him by the taxpayer, of "the situation" mentioned in section 29(1), namely an actual insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an insufficiency…"

72. In *HMRC v Charlton* [2013] STC 866 at [37] the Upper Tribunal said:

"All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight."

73. On 1 March 2016 (by which time the "enquiry window" within which HMRC could open an enquiry into return had closed) HMRC made a discovery assessment. The Appellant submitted that HMRC must have known of or believed in the Appellant's underassessment before the discovery assessment was made. The Appellant further submitted that this belief or knowledge was available to HMRC long before the assessment was issued thereby rendering the assessment stale.

74. I do not accept the Appellant's submissions on this point. HMRC had written to the Appellant requesting clarification as to why relief was claimed. The Appellant failed to provide any information as to whether an avoidance scheme had been used or the basis of the relief claimed. The Appellant also failed to provide the 18 items of documents and information requested on 28 March 2014 which included:

- Copies of all documentation provided to you or others acting on your behalf relating to the methodology used to reduce the charge to SDLT in respect of these transactions, to include, if relevant, copies of any advertising material;

- Where any other entity other than you was a party to the transaction, please provide details of that entity, the role and function it performed in the transaction and the rationale for this;

- Confirmation as to whether the company is connected to the vendor (or any simultaneous purchaser) under s1122-1123 Corporation Tax Act 2010;

- A full explanation of the commercial rationale in purchasing the land/property and any simultaneous sale.

75. At the time of writing to the Appellant HMRC was aware that code 28 relief had been claimed on a land transaction, that the agent acting on behalf of the Appellant was engaged in SDLT avoidance schemes which the Appellant may have been involved in and that legislation newly introduced applied retrospectively to transactions that took place on or after 21 March 2012 and which required taxpayers to amend their returns if caught by the legislation.

76. The lack of any response by the Appellant to HMRC's queries meant that absolutely no information about the transaction and possible scheme used was disclosed to HMRC in the SDLT return. No explanation was provided to HMRC as to the basis of the claim for code 28 relief or to indicate that the figures on the return were correct. I take the view that the facts of this appeal are distinguishable from those in *Charlton*. In the present appeal the return did not put HMRC in a position whereby they could reach an informed view as to whether there was an insufficiency in the SDLT return and therefore they were not prevented from issuing a discovery assessment. As stated by Lord Glennie in *Pattullo v HMRC* [2016] UKUT 270 (TCC) at [44]:

> "The process of discovery, or coming to a realisation, or forming a view, whichever expression one chooses, is not always as simple as is suggested by the metaphor of crossing a threshold. There may be moments when the discovery of new information causes an inspector briefly to form a view that more tax is owing than has been assessed. But then he may reflect that perhaps he has been overhasty in coming to that conclusion, perhaps he needs more information, one more piece of the jigsaw. This may happen a number of times. It may not always involve the acquisition of further information. It may involve legal research, or further reflection on the legal research already carried out. Or it may simply be a question of taking more time to think; of lights coming on one by one until eventually it becomes clear; of weighing the matter up, sometimes coming to one view and sometimes another, until eventually coming down on one side or another. There is, to my mind, some force in Mr Anderson's point about the danger of analysis by metaphor, but if the metaphor of crossing the threshold is to be used, then, while that moment may occur at the end of that process, there will be many points on the way to that threshold when discoveries are made, points become clearer and thoughts become more refined. There may even be hesitation on the doorstep, shifting forwards then back again before finally going in. Crossing the threshold is not like crossing the Rubicon."

77. I am satisfied that HMRC have discharged the burden of demonstrating that the discovery assessment was validly made. The burden then shifts to the Appellant to demonstrate the true amount of the tax liability in relation to the transaction. No evidence was put forward to establish that the liability was lower than HMRC had assessed or that the return was made on the basis of or in accordance with generally prevailing practice at the time. I therefore find that the Appellant has not discharged the burden.

78. The Appellant's submission that HMRC should have amended the return under paragraph 7 Sch 10 FA 2003 is, in my view, misconceived. The Appellant was notified of the change in legislation and given the opportunity to correct the return or explain why it was unaffected by the legislation; it failed to do either. In those circumstances it cannot be said that there was, until the discovery was made, any "obvious errors or omissions"; HMRC was simply trying to ascertain the position. I am satisfied that there was no obligation on HMRC to amend the return and by the time the discovery was made it was out of time to do so in any event.

79. The issue of staleness was considered in *Pattullo* in which it was said at [53]:

> "I do not think it would be helpful to try to define the possible circumstances in which a discovery would lose its freshness and be incapable of being used to justify making an assessment. But I consider that Mr Gordon was right to accept that it would only be in the most exceptional of cases that inaction on the part of HMRC would result in the discovery losing its required newness by the time that an assessment was made."

80. I do not accept the Appellant's submission that the discovery was stale by the time the assessment was made. Following the introduction of s194 FA 2013 (the retrospective legislation) the Appellant had ample time in which to amend the return or explain why no such amendment was necessary. HMRC attempted on numerous occasions to clarify the situation until a view was formed and the discovery made. In my view there was no significant delay between making the discovery and issuing the assessment; the delay was brought about by the Appellant's failure to provide information from the outset which had the consequence of lengthening discovery process. In those circumstances I am satisfied that this is not one of the "exceptional" cases referred to by Lord Glennie in *Pattullo*.

81. As regards the Appellant's submissions in respect of ADR, the Tribunal has no jurisdiction to direct that any particular appeal is subject to the process. It seems to me doubtful whether the process would have led to resolution given the Appellant's refusal to provide information to HMRC throughout the course of their correspondence. However the matter has no bearing on the issues in this appeal which I have determined on the material before me.

82. The appeal is dismissed.

83. 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.

TRIBUNAL JUDGE
RELEASE DATE: 11 July 2018