[2021] UKUT 0300 (TCC)

Appeal number: UT/2020/0094

STAMP DUTY LAND TAX – discovery assessment – paragraph 30(3)(a) of Schedule 10 to the Finance Act 2003 – whether FTT erred in deciding a hypothetical officer of HMRC could not have been reasonably expected to be aware that an assessment to tax was insufficient on the basis of the information made available when the enquiry period closed – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

VICTORIA CARTER & PETER KENNEDY **Appellants**

- and -

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

TRIBUNAL: JUDGE RUPERT JONES
JUDGE ANDREW SCOTT

Sitting in public by way of remote video Microsoft Teams hearing, treated as taking place in London, on 4-5 October 2021

Patrick Cannon, Counsel, instructed by Reynolds Porter Chamberlain, Solicitors for the Appellants

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

DECISION

Introduction

1. The Appellants appeal the preliminary decision of the First-tier Tribunal ('FTT') dated 6 April 2020 ('the Decision'), released under reference [2020] UKFTT 179 (TC).

2. In 2009 the Appellants had participated in a tax avoidance scheme (named "Hummer"). It was designed to take advantage of the rules which applied to sub-sales of property in section 45 of the Finance Act 2003 ('FA 2003'). The Appellants filed a stamp duty land tax ('SDLT') return within the statutory time-limit and, having done so, Her Majesty's Revenue and Customs ('HMRC') had until 22 March 2010 to open an enquiry into the return. They did not open an enquiry but, relying on paragraph 28 of Schedule 10 to FA 2003, they made a discovery assessment on 6 September 2011 in the sum of £32,640 in relation to the property purchase. The Appellants appealed that assessment.

3. Their appeal was joined with other appeals raising similar issues. The FTT decided three preliminary issues in the appeals. In deciding the third of those issues, it found that, when the enquiry window ended on 22 March 2010, an officer of HMRC could not have been reasonably expected to have been aware that an assessment to tax was insufficient on the basis of the information made available to them by that time. Consequently, the officer was entitled under paragraph 30(3) of Schedule 10 to FA 2003 to make the assessment. The FTT found that a hypothetical officer would only have become aware of an actual (as opposed to a possible) insufficiency on 1 April 2010 when advice was received from counsel that the scheme could be successfully challenged.

4. With the permission of the FTT, the Appellants appeal the Decision on the grounds that the FTT erred in law in coming to the conclusion that the test in paragraph 30(3) of Schedule 10 to FA 2003 was met.

The FTT's decision

5. The FTT set out the background facts to the Appellants' appeal at [22]-[25] of the Decision:

> '22. Ms Carter and Mr Kennedy are a married couple. They assert that they have implemented the tax avoidance scheme referred to as "Hummer" in connection with their purchase of 16 Ceylon Road, London, W14 0PY ("16 Ceylon Road") on 22 May 2009.
>
> 23. HMRC received the SDLT1 return for the transaction on 3 June 2009. In that return, Ms Carter and Mr Kennedy declared that the consideration paid by them for the purchase of 16 Ceylon Road was £130,763. This resulted in a charge to SDLT of £nil.

> 24. The period allowed under paragraph 12 Schedule 10 FA 2003 for HMRC to enquire into the return expired on 22 March 2010. HMRC had not issued an enquiry notice by that date.
>
> 25. On 6 September 2011, HMRC issued a discovery assessment to Ms Carter and Mr Kennedy for the amount of £32,640. This was on the basis that Ms Carter and Mr Kennedy had paid a consideration of £816,000 for the property.'

6. At [69] the FTT accepted officer Kane's evidence that 1 April 2010 was the date on which he first became aware that the Hummer tax avoidance scheme might be successfully challenged as ineffective.

7. At [208] it began to consider the application of paragraph 30(3) of Schedule 10 to FA 2003. At [222] the FTT held that: 'on [22 March 2010], the information available to the hypothetical officer as defined by paragraph 30(4) was the information contained in the SDLT1 return and the disclosure note in the form that I have set out above'.

8. The FTT found that the SDLT1 return of the Appellants 'disclosed the consideration, which the Carter/Kennedy appellants regarded as the chargeable consideration for SDLT purposes as £130,763' ([224]).

9. The disclosure note filed with HMRC on behalf of the Appellants stated as follows:

> "The chargeable consideration entered on this return has been calculated in accordance with the provisions of section 45 Finance Act 2003 as, between the exchange of contracts and completion, purchaser 1 executed a gift of a 99% interest in the contract at a time when it was 85% paid. Accordingly, on the advice of Counsel, that resulting percentage of the contract price does not fall to be counted as part of the chargeable consideration because of the "sub-sale".
>
> We are also advised that the provisions of section 75A F. A. 2003 do not apply to this transaction, as when operating a calculation under this provision the resulting chargeable consideration is less than that declared on the return. If you require further information, please contact us." (see [36] & [128] of the Decision).

10. The FTT found 'it was also clear from the disclosure note that some form of sub-sale transaction was involved and that transaction was considered to fall within the provisions of s45 FA 2003' ([224]). The FTT made findings regarding the quality of this disclosure at [225] and [226]:

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

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

11. The FTT considered the level of awareness and knowledge that it should ascribe to the hypothetical officer who was considering the information that was treated as made available ([227]). It held that the focus should be on the adequacy of the disclosure made by the taxpayer ([228]) and that 'an assessment has to be made of the conclusions that it is reasonable to expect an HMRC officer to draw from that information. That assessment will inevitably involve a consideration of the level of awareness and knowledge that inspector is expected to apply to the information; and that level of awareness and knowledge may well change over time.'

12. The FTT accepted the evidence of HMRC officer Kane that before 1 April 2010 'there was considerable debate within HMRC as to whether s.75A [FA 2003] could be applied to counteract these schemes' ([229]).

13. The FTT then applied the test under paragraph 30(3) of Schedule 10 by reference to the hypothetical officer rather than HMRC officer Kane ([230]). It did 'take into account his evidence in considering the general level of awareness that is it reasonable to ascribe to the hypothetical officer when reviewing the information that is treated as available to the officer by paragraph 30(4)'. In doing so, the FTT also took 'into account that Mr Kane is a specialist and was at the forefront of HMRC's efforts to counteract these schemes and so his technical knowledge was likely to be more advanced than might reasonably be expected of officers within HMRC in general. But I also take into account that, as I have mentioned above, the hypothetical officer is not required to resolve all issues or to every question of law. The test is simply whether the information available would justify the HMRC officer in raising an assessment.'

14. The FTT concluded:

> '231. Bearing these issues in mind, I would expect a hypothetical officer of general competence, knowledge or skill at the time who was reviewing the SDLT1 return and the disclosure note to be aware of s75A FA 2003 and of its potential application to counteract tax avoidance schemes. However, at the time, the inspector would be in some doubt about the scope of s75A FA 2003. It was not until some time later (in 2013) that this Tribunal first heard the appeal in the case, which led to the Supreme Court decision in *Project Blue Limited v Revenue and Customs Commissioners* [2018] UKSC 30. The reference in the disclosure note to s75A, it seems to me, would have prompted further investigation, but without further explanation would not have led the inspector to an awareness of a loss of tax.
>
> 232. Having taken into account all of these factors, I come to the view that it was not reasonable to expect an HMRC officer at the relevant time (on 22 March 2010) to be aware of the insufficiency in the return to an extent that would justify him or her making an additional assessment. This was a relatively complex case. An adequate disclosure must clearly alert the hypothetical officer to the insufficiency. In my view, such a

> disclosure would have required a fuller disclosure of the facts and, given the state of the law at the time, a fuller explanation of the views, which were being taken on the application of s45 FA 2003 and s75A FA 2003 in the context of those facts. The information made available to HMRC may have been sufficient to prompt the hypothetical officer to raise an enquiry, but it did not clearly alert the officer to the insufficiency and so did [not] meet the requirements for an adequate disclosure at that time.'

The law

15. Part 4 of FA 2003 contains the law relating to SDLT. At the material time, section 45 of FA 2003 applied where a contract was entered into under which a land transaction was to be completed by a conveyance and "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" (see subsection (1)(b)).

16. Sections 75A to 75C of FA 2003 contain anti-avoidance provisions. They operate where, among other things, one person disposes of a chargeable interest and another person acquires it and a number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition. Those transactions are referred to in the legislation as "the scheme transactions". Section 75A(3) provides that "the scheme transactions may include, for example, […] (b) a sub-sale to a third person".

17. The power of HMRC to make a discovery assessment where a taxpayer has filed a return on time is dealt with by paragraph 30 of Schedule 10 to FA 2003. That paragraph specifies two cases in which HMRC are entitled to make the assessment. For the purposes of this appeal, we are concerned with the second case, which is dealt with by sub-paragraph (3) and is in these terms:

> "(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)."

18. Before the FTT and before us the parties agreed that the case law applicable to this test includes the case law relating to section 29(5) of the Taxes Management Act 1970 ('TMA 1970'). At [219] of the Decision the FTT summarised the relevant principles as follows:

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

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

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

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

19. Mr Cannon agreed that this was an accurate summary of the law and so do we.

Appellant's grounds of appeal

20. In our view the grounds of appeal can be summarised as follows:

(1) the FTT erred in concluding, at [225], that while an HMRC officer could have used the details in the disclosure note – that 85% of the contract was paid before a 99% gift of the benefit of the contract was made – to gross up the consideration declared on the SDLT1 return to find an approximation of the total consideration paid, this calculation could not have been accurately performed with confidence (the calculation ground); and

(2) the FTT erred in referring, at [232], to the state of the law in relation to sections 45 and 75A of FA 2003, as it stood in 2010 when the enquiry window in respect of the Appellants' SDLT1 return closed (the 'state of the law' ground).

21. We address the arguments on behalf of the Appellants in more detail below.

Discussion

Introduction

22. As noted above, it was no part of the Appellants' case that the FTT erred in identifying the law to be applied to the facts. Nor did they seek to disturb (at least directly) any of the factual findings made by the FTT. Instead, they took issue with the FTT's application of the law to the facts.

23. As is well known, there is a high threshold to be met before an appellate court or tribunal can properly interfere with a tribunal's findings of facts (see *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 HL at [36]: 'the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal'). The relevant case law applies equally to inferences from primary findings of fact. In *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 Lewison LJ said this at [114]:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them."

24. It follows from this that the question before an appellate tribunal or court exercising an 'error of law' jurisdiction is not whether it would have made the same decision as the first-instance tribunal. It is not a re-run of the first-instance hearing ("the trial is not a dress rehearsal. It is the first and last night of the show" – per Lewison LJ in *FAGE UK* at [114(ii)]). The test is whether a tribunal's evaluative judgment was within a reasonable range of conclusions that a properly directed tribunal could have made on the evidence before it. Mummery LJ put matters in these terms at [74] of *Proctor & Gamble UK v HMRC* [2009] EWCA Civ 407:

> "I cannot emphasise too strongly that the issue on an appeal from the tribunal is not whether the appellate body agrees with its conclusions. It is this: as a matter of law, was the tribunal entitled to reach its conclusions? It is a misconception of the very nature of an appeal on a point of law to treat it, as too many appellants tend to do, as just another hearing of the self-same issue that was decided by the tribunal."

25. We are satisfied that the FTT was reasonably entitled to find that the disclosure the Appellants provided to HMRC contained insufficient information and was inadequate for the reasons it gave at [225]-[226] and [232] of the Decision. For instance, the FTT was entitled to find that the disclosure failed to detail the steps involved in the scheme, failed to mention the transaction employed the pre-planned Hummer tax avoidance scheme and failed to explain why section 75A should not be applied to tax the total amount of the payments made under the contract. The FTT was therefore entitled to find that the disclosure note failed to alert the hypothetical HMRC officer to the insufficiency of SDLT such that an additional assessment should have been raised in respect of the transaction.

26. Equally, it was entitled to find that an adequate 'disclosure would have required a fuller disclosure of the facts and, given the state of the law at the time, a fuller explanation of the view, which were being taken on the application of s45FA 2003 and s75A FA 2003 in the context of those facts.'

27. We are also satisfied that the FTT was reasonably entitled to accept the evidence of HMRC officer Kane that until the advice from counsel was received on 1 April 2010 neither he, nor HMRC generally, had come to a settled view that section 75A FA 2003 could be applied to counteract this type of transaction such that additional SDLT was

due and the assessment was actually insufficient. The FTT gave sufficient reasons for its findings at [66]-[69] & [229] of the Decision.

28. We consider that it was open to the FTT to find that officer Kane's technical knowledge and expertise regarding the relevant schemes and application of the statutory provisions on SDLT was likely to be more advanced than the hypothetical HMRC officer for the purposes of paragraph 30(3) of Schedule 10 to FA 2003 (see [230]).

29. We are satisfied that the FTT was entitled to find that the hypothetical officer, of reasonable knowledge and competence, having received the Appellants' disclosure regarding the transaction in the SDLT1 return and note, would have been in some doubt as at 22 March 2010 and have decided that there was not an actual insufficiency in the Appellants' assessment for SDLT such that it would justify raising an additional assessment at that time (see [231]-[232]). The FTT was fully entitled to find that the 'information made available to HMRC may have been sufficient to prompt the hypothetical officer to raise an enquiry, but it did not clearly alert the officer to the insufficiency and so did [not] meet the requirements for an adequate disclosure at that time.'

30. We now turn to consider in more detail Mr Cannon's submissions in support of the grounds of appeal.

Ground 1 - the calculation ground

31. Mr Cannon submitted that the FTT fell into error in finding the disclosure note in relation to the transaction was insufficient ([232]) when earlier in its decision it had accepted ([225]) that the disclosure would have enabled HMRC to 'gross up the declared consideration and find an approximation of the total consideration that was paid'. This total price was greater than the declared consideration so that, by applying a basic understanding of section 75A and HMRC's published guidance, the inspector could have applied the then current SDLT rate of 4% to that total price.

32. He further submitted that the FTT was wrong to have raised the hurdle so high when it said at [225] of the disclosure that: "it would be difficult confidently to perform an accurate calculation." This is – so Mr Cannon said - because it is not necessary for the information in the disclosure to enable an accurate calculation to be made. Indeed, Mr Cannon noted that the FTT appeared to accept this elsewhere and referred to the correct test at [219(3)] where it held: *"*if the level of disclosure is to prevent the issue of an assessment by HMRC, the information that is treated as available at the relevant time must be sufficient as to make the hypothetical officer aware of the actual insufficiency to a level that would justify the making of an assessment".

33. We are satisfied that the FTT did not err in finding at [225] that 'without more details of the steps involved in the scheme beyond the limited details provided in the disclosure note, it would be difficult [for HMRC] confidently to perform an accurate calculation' of the total consideration paid for the property so as to precisely quantify the insufficiency of tax.

34. Mr Cannon concedes that the FTT was referring at [219(3)] to the correct test and that it was not there suggesting that it was necessary for the hypothetical officer correctly to quantify the actual insufficiency of tax. Having identified the correct test, did the FTT arrive at a conclusion that was reasonably open to it? In our view, the FTT plainly did.

35. As Ms Lemos submitted on behalf of HMRC, a disparity between an estimated contract price and the consideration declared on the SDLT return could, at most, have alerted the hypothetical officer to a potential use of an avoidance scheme. Without the knowledge that the scheme was susceptible to challenge on technical grounds, the hypothetical officer would not have been alerted to an actual insufficiency of tax. Indeed, without knowledge of what the actual consideration for the acquisition of the property was, which no officer would have had from information provided by the taxpayers, HMRC could not even have checked whether the taxpayer had in fact, as alleged, implemented a tax avoidance scheme or that s/he had paid less SDLT than what was in fact due.

36. Even had the hypothetical officer been alerted to a possible disparity between the actual contract price and the consideration recorded on the SDLT return, that would not have alerted him to an actual insufficiency of tax, for the reasons recorded by the FTT at [84] and [85]:

> '84. In his first witness statement, Mr Kane described his awareness of the loss of tax in each of these appeals (and so his decision to issue discovery assessments) as being driven by his knowledge of the discrepancy between the consideration shown in the SDLT1s and the Land Registry data. Mr Bedenham made much of this statement. However, I am satisfied that the decision to issue assessments was not driven by the discrepancy alone. As Mr Kane explained, there were other reasons – other than the use of one of the Jeepster or Hummer schemes – which might give rise to the discrepancy and it was not until further work had been done that HMRC was in a position to identify cases in which it was likely that one of the schemes had been used.
>
> 85. It was also Mr Kane's evidence that it was not until a member of his team had examined the SIP file that he or she would have been able to determine whether an assessment should be issued in any particular case. I have dealt with this assertion in my discussion below of the issues surrounding the timing of discovery in these cases.'

37. Therefore, the FTT reasonably concluded that even at the point where an officer of HMRC was in possession of both the consideration declared in the SDLT1 return and the consideration actually paid, that officer would not necessarily have concluded that the taxpayer had implemented an avoidance scheme, let alone one which had produced an actual insufficiency of tax.

Ground 2 - the state of the law ground

38. Mr Cannon submitted it was unnecessary for HMRC to consult counsel before concluding that there was an insufficiency of tax in the Appellants' return. It was clear that there was a loss of tax based on the wording of section 75A of FA 2003 and HMRC's published technical guidance when applied to the sub-sale transaction. He

submitted that the hypothetical officer's understanding should be taken to include an awareness that section 75A(3)(b) provided expressly that "the scheme transactions may include, for example – (b) a sub-sale to a third person". Moreover, the pro-forma disclosure of the Appellants expressly stated that part of the contract price was excluded from the chargeable consideration "because of "the sub-sale"".

39. Mr Cannon submitted that the hypothetical inspector's understanding should also be taken to include HMRC's detailed published guidance on section 75A contained in HMRC's Technical News Issue 5 of August 2007. This guidance clearly stated that section 75A was intended to counter certain schemes and contained numerous references to sub-sales as caught by the section: see paras 8 (examples of schemes), 11 (transfers of rights), 12 (transfer of rights) and 14(4) (husband and wife sub-sale). Therefore, a hypothetical inspector should have decided that there was a loss of tax and had sufficient information to make an approximate computation of the tax without having to wait for external advice.

40. According to Mr Cannon, the fact that Mr Kane and his HMRC colleagues were debating internally the precise application of section 75A was neither here nor there. Nor did the fact that the FTT first heard the *Project Blue* appeal in 2013 (*Project Blue Ltd v Revenue & Customs* [2013] UKFTT 378 (TC)) affect the officer's basic understanding.

41. In our view Ms Lemos fairly characterised Mr Cannon's argument as comprising the following steps: (a) the FTT erred in having regard to the evidence of Mr Kane in determining HMRC's actual awareness of the effect of section 75A; and (b) the FTT should instead have had regard to: (i) the wording of the section; and (ii) the 2007 'Technical News' publication by HMRC.

42. We address these steps in turn but, as a preliminary point, agree with HMRC that the focus of the Appellants' appeal was misdirected. The Upper Tribunal in *Hicks v HMRC* [2020] UKUT 12 (TCC), in considering section 29(5) of TMA 1970, emphasised at [193] to [196] the importance of the quality of the taxpayer's disclosure. It also held at [198] that "there may be other cases where the law and the facts (and/or the relationship between the law and the facts) are so complex that adequate disclosure may require more than pure factual disclosure: namely some adequate explanation of the main tax law issues raised by the facts and the position taken in respect of those issues."

43. We are satisfied that the FTT's conclusion at [232] that this was a relatively complex case and the Appellants' disclosure was insufficient was a reasonable conclusion that was open to it on the state of the then law and evidence.

(a) FTT was right to have had regard to the evidence of Mr Kane

44. In reaching its conclusion, the FTT properly and reasonably had regard to the evidence of Mr Kane which it accepted at [229] and [231], as set out above. At [230], the FTT noted that Mr Kane's evidence was not "directly relevant to the paragraph 30(3) issue" but that it would "take into account his evidence in considering the general

level of awareness that it is reasonable to ascribe to the hypothetical officer ...” taking account of the fact that Mr Kane “is a specialist and was at the forefront of HMRC’s efforts to counteract these schemes and so his technical knowledge was likely to be more advanced than might reasonably be expected of officers within HMRC in general.”

45. Mr Cannon submits that the evidence of the understanding of Mr Kane and his colleagues’ understanding of the scope of section 75A cannot affect the understanding of the hypothetical officer, but we do not accept this submission. It has no basis in law. The FTT was entitled to find that Mr Kane’s evidence was relevant and should be taken into account when considering the understanding of a hypothetical officer. In our view, its approach to considering Mr Kane’s evidence cannot reasonably be challenged.

46. In the written grounds of appeal Mr Cannon challenged the FTT having regard to HMRC’s “*subjective state of the knowledge about the law*” and “*confidential*” investigations in determining the knowledge to be attributed to the hypothetical officer as the taxpayer cannot be expected to be privy to this information. However, he cited no authority for the proposition that the hypothetical officer cannot be attributed knowledge of the facts or the law which are “*unlikely*” to be known to the taxpayer. We can detect no error of law in the FTT’s approach.

47. In his written grounds, Mr Cannon also submitted that HMRC’s internal knowledge should not be considered a relevant fact in determining the quality of a taxpayer’s disclosure. However, the hypothetical officer has attributed to him or her a ‘reasonable’ knowledge of tax law, which, depending on the complexity of the law, may not be sufficient to alert him or her to an actual insufficiency even if the taxpayer has disclosed enough factual information: see *Charlton v HMRC* [2013] STC 866, at [58]-[59] and [62]. If taxpayers are in any doubt as to the knowledge of the hypothetical officer, then this can be addressed in the disclosure by including further information.

48. Finally, Mr Cannon’s challenge proceeds on the factual premise that the actual knowledge of HMRC at the relevant time was ‘confidential’ and not known to the taxpayers. This is not an issue on which the FTT made any findings of fact as it was not addressed in evidence. The submission therefore lacks any factual foundation.

49. In any event, the FTT was entitled to find as a fact that there was uncertainty within HMRC about the terms of section 45 FA 2003 and the effectiveness of section 75A in challenging schemes and that this uncertainty was widespread. We note that an (un-named) counsel had apparently advised the Appellants that the scheme was effective despite the enactment of section 75A. We do not think that there was an error of law in the FTT having regard to those matters when making its evaluative judgment.

(b) (i) Allegation that the FTT did not have regard to the wording of section 75A

50. Mr Cannon relies on the wording of section 75A(3)(b), which identifies types of ‘scheme transactions’ to which that section might apply. We are satisfied that the FTT did not suggest that the hypothetical officer would not have been aware that section

75A was capable of applying to sub-sale avoidance schemes. That is as far as the wording of section 75A(3)(b) takes the analysis.

51. As the FTT stated in its summary of the law at [219(3)], the information need not be sufficient to enable HMRC to prove its case but it is not enough that the information might prompt the hypothetical officer to raise an enquiry.

52. The FTT was entitled to find that had the hypothetical officer directed their mind to section 75A(3)(b) as at 22 March 2010, the Appellants' disclosure note would only have prompted the opening of an enquiry rather than the raising of an assessment. The Appellants do not say why the fact that section 75A was capable of applying to avoidance schemes would have done anything more than prompt the opening of an enquiry.

(b) (ii) Not having regard to the 2007 'Technical News' publication - HMRC's Guidance note

53. The heart of Mr Cannon's challenge to the FTT's decision was that it failed to have regard to HMRC's guidance in its Technical News publication from 2007. The essence of the Appellants' case on this ground is that the FTT should have focused on additional evidence and facts – those contained in HMRC's Technical News Issue 5 of August 2007 ('HMRC's Guidance').

54. Mr Cannon relied heavily on this single document to make the submission that it was in fact clear to HMRC prior to 22 March 2010 that the Hummer avoidance scheme (apparently) implemented by the Appellants would fail.

55. HMRC's Guidance addressed the amendment to FA 2003 which had introduced section 75A. The provision was intended to counter certain schemes which had the effect of reducing SDLT. It addressed the commencement of the provision, the definition of scheme transactions (paragraphs 7-8) and what was meant by scheme transactions 'involved in connection with' a disposal and acquisition (paragraphs 9-14).

56. Mr Cannon relied in particular on paragraphs 8, 11, 12 and 14 (example 4) of HMRC's Guidance:

> '**Scheme transactions**
>
> …….
>
> 8. Section 75A(3) gives examples of what may be scheme transactions:
>
> -the acquisition by P of a lease deriving from a freehold owned or formerly owned by V;
>
> -a sub-sale to a third person;
>
> -the grant of a lease to a third person subject to a right to terminate;
>
> -the exercise of a right to terminate a lease or to take some other action;
>
> -an agreement not to exercise a right to terminate a lease or to take some other action;

-the variation of a right to terminate a lease or to take some other action.

Scheme transactions 'involved in connection with' a disposal and acquisition

…….

11. In particular it is unlikely that (except on a transfer of rights, see below) section 75A can apply to a disposal by V and an acquisition by P where neither P nor his associates nor his advisers have had any involvement in or any connection with transactions other than the one by which P acquired the property, and neither P nor his associates obtains any SDLT benefit from the way in which the acquisition is effected.

12. However section 75A will apply where the acquisition by P is effected by a 'transfer of rights' within the meaning of section 45, for example a sub-sale. So if V agrees to sell to X and X agrees to sell on to P section 75A applies to the disposal by V and the acquisition by P whether or not P or his associates or his advisers had any involvement in or connection with the V–X contract.

…….

14. There follow some examples where section 75A does not apply to a disposal by V and an acquisition by P because there are not a number of transactions involved in connection with the disposal and acquisition.

Examples

……

V agrees to sell land to H. H agrees to sell on to his spouse W. These transactions are completed at the same time. At a later stage W sells on to an unconnected third party P. Section 75A does not apply as regards the disposal by V and the acquisition by P (although section 75A will apply as regards the disposal by V and the acquisition by W).”

57. This document was not relied on by the Appellants before the FTT. It was not in evidence and was therefore not put to HMRC’s witnesses.

58. Ms Lemos did not object to the document being admitted before us on appeal pursuant to the test in *Ladd v Marshall* [1954] 1 WLR 1489 as explained in *Donald Graham Ketley v Revenue and Customs* [2021] UKUT 218 (‘*Ketley*’) at [52]-[54]:

> “52. There is no doubt that the Upper Tribunal has power to admit new evidence that was not before the FTT pursuant to the Tribunal Procedure (Upper Tribunal) Rules 2008 (“the Rules”). Rule 15(2)(a)(ii) states that the power should be exercised in accordance with the overriding objective to deal with cases “fairly and justly”.
>
> 53. Both parties referred us to the three-part test for the admission of new evidence on an appeal in the civil courts set out by Denning LJ, as he then was, in *Ladd v Marshall* [1954] 1 WLR 1489 at page 1491:
>
> “… first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if

> given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."
>
> 54. The parties agree that these criteria should be regarded as being of persuasive authority, but should not be applied as strict rules in the exercise of the Tribunal's discretion (see *Anglian Water Services Limited v HMRC* [2018] UKUT 431 ("Anglian Water") at [100])."

59. Nonetheless we are satisfied that we should not admit HMRC's Guidance in this appeal as it would not be just and fair to do so when applying Tribunal Procedure (Upper Tribunal) Rules 2008, Rule 15(2)(a)(ii) and Rule 2(1) – the overriding objective.

60. First, we repeat that the document was not put to HMRC's witnesses in evidence for them to comment upon or explain their understanding of its contents or its relevance (if any) to their assessment of the application of the law to the facts of the case. We are satisfied that this would have had an important effect on the fairness of proceedings and might have necessitated different evidence being called or the appeal being run differently before the FTT. The potential unfairness explained at [73]-[74] of *Ketley* applies to this appeal for similar reasons.

61. Before the FTT, the Appellants did not rely on the Technical News publication as relevant to the question of the knowledge to be attributed to the hypothetical officer. It is unclear to us how the FTT could be said to have erred in failing to reach an alternative conclusion on the basis of evidence that was not relied upon by the Appellants. However, the unfairness of admitting the evidence on appeal before the Upper Tribunal is clear.

62. The Appellants' suggestion that HMRC "*were, much earlier than 2010, in no doubt that these arrangements did not work*" is a collateral attack on the FTT's findings of fact in respect of HMRC's knowledge, contained in the evidence given by Mr Kane and accepted by the FTT:

> (1) The evidence relied on to support this challenge is the limited number of paragraphs from the HMRC's 2007 Technical News publication, which gave an illustrative example, which did not address either of the Jeepster or Hummer schemes.
>
> (2) An earlier version of the publication relied on by the Appellants was referred to in the witness statement of Ms Randall, who gave evidence for HMRC and an earlier draft was exhibited to her statement. It was never put to her in cross-examination that this Technical News publication demonstrated that HMRC were aware that the Jeepster and Hummer schemes did not work because of the operation of section 75A.
>
> (3) Mr Kane, in his first witness statement, gave evidence that at the time the enquiry window closed on 22 March 2010, HMRC "had not formed a view as to the taxation consequences of this type of arrangement" i.e. Jeepster and Hummer type schemes.

(4) Despite having been cross-examined at length by counsel for the Appellants on this point, it was never put to Mr Kane that the 2007 Technical News publication demonstrated that HMRC had formed a view that section 75A could be used to successfully challenge Jeepster and Hummer type schemes.

(5) In any event, though he was challenged on the state of HMRC's knowledge, Mr Kane's evidence under cross-examination was: '…when I started this work, […] everybody, in all honesty, had a view that most of the schemes would succeed in their intention.'

63. Second, HMRC's Guidance was a publicly available document which could have been obtained by the Appellants, who were legally represented, at the time of the hearing before the FTT. HMRC had no obligation to disclose this guidance upon which they did not rely and HMRC had disclosed an earlier version of the document (albeit with different content) as an exhibit to one of its witnesses' statements. There was no convincing or good reason explaining why the Appellants did not identify and rely on this document before the FTT.

64. Third, we are not satisfied that the document would probably have had an important influence on the outcome of the case before the FTT. We are satisfied that the document does not contradict the findings of the FTT. As explained above, Mr Kane's evidence was accepted by the FTT at [66]-[69]. It is not open to the Appellants to seek to challenge the findings made by the FTT, on the basis of generic statements made in a document that was not put to HMRC's witnesses. In any event, it was put to Mr Kane in cross-examination that HMRC knew prior to 1 April 2010 that the schemes were challengeable. Mr Kane denied that and the FTT accepted his evidence. There was sufficient evidence available to support the FTT's conclusion on this issue.

65. Even if the FTT could have taken the document into account there are at least four reasons why we are satisfied it would not have carried great weight nor undermined the evidence given and facts found.

66. First, it can be seen that HMRC's Guidance of 2007 contains broad assertions to the effect that certain transactions involving sub-sales may (rather than inevitably would) be within the scope of section 75A. However, paragraph 8 does no more than re-state section 75A(3). It leaves open the specific application of the subsection to the detailed facts which are to be considered.

67. Second, Mr Cannon relies on example four under paragraph 14 of a transaction caught by section 75A(3) as applying to the Appellants' transaction: 'V agrees to sell land to H. H agrees to sell on to his spouse W….. although section 75A will apply as regards the disposal by V and the acquisition by W'.

68. However, there are significant factual distinctions between the example in HMRC's Guidance and the Appellants' transaction. For instance: (a) the Appellant's disclosure note referred to the transaction as a gift not a sub-sale; (b) it was not obvious that the Appellants were husband and wife because this was not disclosed and they have differing surnames; (c) the disclosure note provides no indication of an onward sale to

a third party (unlike HMRC's Guidance example) and the example is for a transaction between husband and wife being caught by section 75A in the context of a further onward sale; and (d) there was nothing on the face of the disclosure note to say that the transaction between the couple was not a genuine gift.

69. Third, HMRC's Guidance could provide support for concluding that husband and wife sub-sales may meet the test of 'in connection with' condition in section 75A. It does not go so far as to say that all husband and wife sub-sales are caught by section 75A - only that such sub-sales satisfy part of the test within the section and are not excluded from the category of 'in connection with' transactions.

70. Fourth, this technical guidance is from 2007 and so was nearly three years old as at 22 March 2010. The FTT heard evidence as to what HMRC's view was on the effectiveness of section 75A at the relevant time. Thus, any evidence relating to HMRC's Guidance in 2007 would have been superseded by HMRC's understanding of the application of the law to the Hummer scheme in 2010. The FTT was entitled to accept the evidence that there was debate within HMRC as to the effectiveness of the Hummer Scheme in March 2010 and their position only became settled following advice from counsel on 1 April 2010.

71. Therefore, we are satisfied that it would not be just and fair to admit this evidence on this appeal. Further, even if the evidence had been admitted, we are satisfied that for all these reasons, HMRC's Guidance would not have made any material difference to the factual findings of the FTT or to its evaluative judgment. There is nothing express in the disclosure note to suggest the consideration was artificially suppressed or it was not a genuine gift. Nor was it obvious that the transaction was part of an avoidance scheme. It might have been sufficient to alert HMRC to make further enquires. But that is not enough.

72. In conclusion, we reject the Appellants' case that a specialist tribunal that heard evidence, made careful findings of fact and correctly directed itself on the law could not have reached the findings and conclusions that it did. In particular, the Appellants are not entitled to rely on general statements contained in a document about the sorts of transactions to which section 75A might apply, which was a document that was not before the FTT and which was not put to HMRC's witnesses.

73. Mr Cannon accepts the FTT applied the correct legal principles and we are satisfied that it was open to the FTT to apply those principles in the way that it did to the facts that it found (which were not challenged by the Appellants). HMRC's guidance document from 2007 upon which the Appellants now attempt to rely was not introduced before the FTT and is not admissible. In any event it does not assist the Appellants because it did not confirm that the Jeepster and Hummer schemes were known by HMRC to be ineffective at the relevant time in March 2010.

Respondent's notice

74. In light of our conclusions there is no need to consider the Respondent's Notice.

Disposal

75. For the above reasons, the appeal is dismissed.

Signed on Original

JUDGE RUPERT JONES **JUDGE ANDREW SCOTT**

UPPER TRIBUNAL JUDGES
RELEASE DATE: 01 December 2021