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First-tier Tribunal (Tax)

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Case Number: TC 09854
Appeal reference: TC/2025/02328

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London
Heard On: 12 March **2026**
Judgment Date: 21 April **2026**

B e f o r e :

TRIBUNAL JUDGE KEITH GORDON
MEMBER NOEL BARRETT

Between:
RUNE MADSEN **Appellant**
- and -
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS **Respondents**

Representation:
For the Appellant: The Appellant represented himself
For the Respondents: Ms Rachel Benson, litigator of HM Revenue and Customs' Solicitor's Office

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HTML VERSION OF DECISION

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Keywords: ***SDLT*** *avoidance; grant of call option prior to completion; Finance Act 2003, section 45 (as it stood in 2011); discovery assessment; knowledge of hypothetical officer; appeal allowed*

DECISION

Introduction

1. The documents provided to the Tribunal before the hearing were as follows:

    (1) a hearing bundle (containing documents and authorities) (567 pages);

    (2) skeleton arguments from each of the parties.

2. We were also provided with an agreed pre-hearing reading list which we considered in advance of the hearing.

Outline

3. The Appellant has appealed against an **SDLT** discovery assessment made on 15 July 2014 under the Finance Act 2003, Schedule 10, paragraph 28. The tax sought by HMRC under the assessment is £32,480.00.

4. The Appellant had acquired the freehold interest in a residential property in the SW6 area of London for £812,000 in 2011 and participated in an arrangement that sought to eliminate the **SDLT** payable on such an acquisition. HMRC have since concluded that the arrangement did not achieve its intended tax saving and have charged the Appellant with **SDLT** at the rate of 4%.

5. The quantification of the **SDLT** charge was not in dispute.

6. The Appellant has appealed to the Tribunal citing the following grounds of appeal (as paraphrased by us) in his notice of appeal:

    (1) A disclosure of the arrangement was made by letter sent to HMRC's Stamp Taxes Office on 31 January 2012.

    (2) HMRC had sufficient information during the enquiry window and, so, the discovery assessment is invalid.

    (3) Taxpayers should not be penalised if HMRC lose correspondence – the relevance of this ground is that HMRC have no record of the 31 January 2012 disclosure.

    (4) HMRC's technical position in relation to the **SDLT** payable is based on subsequent case law developments and did not reflect the commercially-accepted view at the time that the **SDLT** return was made.

    (5) The Appellant engaged transparently, acted in reliance on legal advice and made a good faith disclosure, whereas HMRC are imposing a tax liability 13 years after the event; HMRC's approach "breaches fundamental principles of fairness and legal certainty".

7. In his skeleton argument dated 23 February **2026,** the Appellant's grounds were distilled as follows:

    (1) the assessment is invalid by operation of FA 2003, Schedule 10, paragraph 30(3); and

    (2) only if that is resolved in HMRC's favour, "does the Tribunal need to consider section 45 and section 75A [of Finance Act 2003]".

8. The 23 February **2026** skeleton expressly replaced two previous versions of the skeleton argument being relied upon by the Appellant, who confirmed to us that we need not consider those two earlier versions.

9. At the beginning of the hearing, the Appellant made clear that the essence of his challenge was the validity of the discovery assessment in light of the material disclosed to HMRC during the enquiry window relating to his **SDLT** return.

10. For the reasons that follow, we allow the appeal and set aside the assessment.

The facts of the case

The witness evidence

11. We had witness statements from the following individuals:

    (1) The Appellant (two statements);

    (2) Mr Jonathan Robert Roy Walker (who provided two statements in support of the Appellant's case);

    (3) Mr Sam Brown, an officer of HMRC.

12. We were initially concerned about potential inconsistencies between the statements provided by the Appellant and Mr Walker in relation to a letter said to have been sent from Mr Walker to HMRC on 31 January 2012.

13. In the Appellant's written evidence, he said as follows:

> Mr Walker reviewed and was involved in the preparation and sending of the disclosure letter.

14. Mr Walker's written evidence contained the following:

> 4. On 31 January 2012, a letter was prepared, reviewed, and sent by Mr Madsen to HMRC's Stamp Taxes Office in Birmingham, outlining the **SDLT** mitigation scheme.
>
> 5. I was present at the time the letter was finalized and posted, and I can attest that the letter was sent with the intention of making full disclosure to HMRC, which I believe was done within the statutory enquiry window.

15. As the status of this letter was likely to be of significant importance to the outcome of the appeal, we thought that there was a risk that the oral evidence of one of these two witnesses could be unfairly influenced if one witness had previously heard the oral evidence (and, in particular, the cross-examination) of the other. We therefore proposed to the parties that the second of the Appellant's witnesses wait outside the hearing room during the oral evidence of the first of his witnesses. The parties expressed no problem with that course of action.

16. It was then suggested by the Appellant that Mr Walker should give his evidence first as he wanted to go (or return) to his place of work at the earliest opportunity. Whilst we were sympathetic to that and noted that this was a request being made by the Appellant himself, we felt that we should try to avoid the scenario if at all possible whereby the Appellant was not actually present during a part of his own appeal. Having obtained from Ms Benson an indication as to the timing of her questions, it was agreed that the Appellant would after all give his evidence first, with Mr Walker remaining outside during that stage of the hearing.

17. In the end, the Appellant's and Mr Walker's evidence could be fully reconciled and we have no hesitation in describing them both (and Mr Brown as well) as very credible witnesses who tried their best to help the Tribunal. Indeed, whilst we accept that HMRC were unable to trace any record of Mr Walker's letter, the fact of such a letter being prepared and its timing were entirely consistent with the pattern identified by Mr Brown in many of the similar cases he had looked at in the course of his work reviewing old cases where this type of scheme had been entered into with a view to reducing or eliminating the **SDLT** liability on the acquisition of a residential property.

18. It was inevitable that the passage of time affected the Appellant and Mr Walker's ability to recall certain precise facts concerning the case. However, these were minor matters and not material to our decision.

19. Based upon the oral and written evidence, we find the following facts.

The property transaction

20. On 29 November 2011, HMRC received an **SDLT** tax return (**SDLT1**) containing the following information:

    (1) Reference number: 504293982MT;

    (2) Date of contract: 23 November 2011;

    (3) Date of transaction: 28 November 2011;

    (4) Type of property: 01 (which signifies residential property);

    (5) Address of property: [Not for publication], London SW6 ("the property");

    (6) Total consideration: £812,000;

    (7) Relief claimed: Code 28 (which signifies "other relief");

    (8) **SDLT** due on the transaction: £0;

    (9) That the transaction is not linked with another;

    (10) Purchaser's name: Mr Rune Madsen;

    (11) Agent: Stratega Law, 33 Cavendish Square, London W1.

21. We find that the **SDLT1** was correct in that it stated that:

    (1) the property was conveyed to the Appellant on 28 November 2011 under a contract dated 23 November 2011;

    (2) it was a residential property; and

    (3) the consideration for the transaction was £812,000.

22. The Appellant's interest in the property was recorded by the Land Registry on 8 December 2011.

The option

23. On 28 November 2011 (i.e. on the same day as the conveyance to the Appellant), the Appellant granted a call option over the property to Mr Walker.

24. The Appellant and Mr Walker were work colleagues.

25. The consideration given to the Appellant by Mr Walker for the option was £100.

26. The option period was for ten years.

27. Under the option, Mr Walker had the right to acquire the property at its market value (as at the time of the exercise).

28. Mr Walker's interest in the property (via the option) was not registered with the Land Registry.

29. The option was not exercised and has since lapsed.

The additional disclosure

30. The Appellant and Mr Walker were both at work on 31 January 2012. They were both employed by a major banking business at the time. Their desks were in close proximity to each other.

31. The Appellant had been advised by his lawyer that a letter be sent to HMRC and he was keen to ensure that this was done. The main text of the letter had been drafted by the lawyer, but it was Mr Walker who printed the letter using the lawyer's template and put it into an envelope. The then address of the Birmingham Stamp Office (as shown on the letter itself) was handwritten on the envelope by Mr Walker.

32. The Appellant was keen to ensure that the lawyer's advice was being followed and therefore observed Mr Walker during the process up to the placing of the envelope (containing the letter) in the out-tray near their desks. The Appellant also took a scanned copy of the letter before it was put into the envelope for his records.

33. The principal details of the letter were as follows:

    (1) Sender: Mr Jonathan Walker;

    (2) Sender's address: A different address in London SW6;

    (3) Addressee: Birmingham Stamp Office;

    (4) Date of letter: Tuesday 31st January 2012;

    (5) Return reference: 504293982MT;

    (6) Subject matter of the letter: "Acquisition of [the property]"[1];

    (7) The text of the letter is set out in full:

> I, Jonathan Robert Roy Walker, am writing to notify you that section 75A FA 2003 applies to my acquisition of a call option in respect of the above property.
>
> On 28th November 2011 I was granted the option to acquire the above property from Mr Rune Madsen ("the Purchaser") who acquired his interest in the Property described above on the same date.
>
> The consideration given for the option was £100.00 and allows me to call for the Property at any time during the option period. I am writing to you in accordance with the published guidance on the anti-avoidance rule in section 75A FA 2003 in HMRC's Stamp Taxes Bulletin of November 2010 because, in my opinion, this section now applies to me. I note that the most recent version of HMRC's guidance on section 75A published on 28th February 2011 omits guidance on compliance and so I am following the November 2010 guidance on that.
>
> The details are as follows:
>
> 1. I entered into the option with the Purchaser, simultaneously with his completion of the purchase, for a consideration of £100.00
>
> 2. The original acquisition by the Purchaser, the grant of the option and its subsequent exercise are all scheme transactions within section 75A (l)(b) FA 2003. Section 45 FA 2003 applies to the simultaneous grant of the option because as a result of this transaction APM has become "entitled to call for a conveyance to him" in consequence of it.
>
> 3. As a result, the amount of tax to be paid under section 45 FA 2003 could be less than would have been on a notional transaction consisting of APM's acquisition of the original vendor's interest directly from him. Accordingly, the provisions of section 75A (1) may apply to the scheme transactions.

I am not submitting a detailed calculation because an effective date for the notional transaction under section 75A FA 2003 has not yet arisen under section 75A (6). This is because the last of the scheme transactions, the exercise of the option, has not yet been completed or substantially performed.

Accordingly, I am writing this letter to you to notify you of this transaction and will, on completion or substantial performance of the last scheme transaction, write again with a calculation of the liability due.

Please treat this letter as notification on behalf of all the parties to the scheme transactions under SP 1/06 that a scheme has been entered into so that you can decide if you wish to enquire into the scheme transactions. The purpose of this letter is to ensure that you are made aware that HMRC may consider that insufficient tax may have been paid.

Please let me have your agreement or comments

Yours faithfully

Jonathan Robert Roy Walker

34. The employer's post room staff collected post from this out-tray several times during the day. At some point during 31 January 2012, we find that the letter was duly collected by an individual from the employer's post room staff.

35. We consider on the balance of probabilities that:

    (1) the letter was taken to the post room in its envelope;

    (2) the envelope showed the then correct address for the Birmingham Stamp Office;

    (3) the envelope was franked and put into the postal system (with the letter inside);

    (4) the envelope and letter were duly delivered to the Birmingham Stamp Office, arriving in the first few days of February 2012 and, therefore, the contents of the letter were notified to HMRC at that time.

36. We recognise that the preceding findings need to be reconciled with the fact that HMRC's case is that no trace could be found of Mr Walker's letter on their files. Accordingly, we accept that at some stage in the process something went wrong. Either:

    (1) the letter was not actually written or put into the out-tray;

    (2) the letter did not make its way to the employer's post-room;

    (3) the envelope was not franked or was not put into the postal system;

    (4) the envelope was not delivered to the Birmingham Stamp Office; or

    (5) it was lost and/or misfiled upon receipt by HMRC.

37. In reaching our conclusion on this point, we take into account:

    (1) our assessment of the credibility of the Appellant and of Mr Walker;

    (2) the fact that this type of disclosure letter was typical in cases such as this and that taxpayers, such as the Appellant, would have been advised of the advantages of such letters being sent within the enquiry window relating to their **SDLT** returns;

(3) the very low likelihood of the letter going astray between the out-tray and the employer's post room;

(4) the likely attitude of the employer (as expressed to us by the Appellant and Mr Walker) in permitting the occasional personal correspondence passing through their post room (and via their franking machine) – as the employer would much rather keep their workers at or near their desks than require them to go to the Post Office;

(5) whilst it is undoubtedly the case that post occasionally goes astray in the Royal Mail, we consider (from our professional experience) that the risk of misfiling by HMRC is the more likely cause of something going wrong on the particular facts of this case. We say that notwithstanding the **SDLT** reference being correctly stated on the letter. Furthermore, we make the observation (from the timing outlined below) that HMRC do not appear even to have looked for the letter until the autumn of 2024 (i.e. over 12½ years after the letter was sent). That delay further increases the likelihood that any record of its receipt by HMRC would have been inadvertently destroyed in the interim.

HMRC's investigation into the transaction

38. HMRC did not open an enquiry into the **SDLT** return within the statutory 9-month period (which expired on 29 September 2012).

39. Instead, the first correspondence received by the Appellant in relation to the transaction was a letter dated 15 July 2014 which contained an assessment for £32,480 ("the discovery assessment"), representing a 4% **SDLT** charge in relation to the Appellant's acquisition of the property.

40. The letter explained that the officer concluded that the code 28 relief claimed on the **SDLT1** had been "incorrectly claimed" and that "**SDLT** should have been paid on the full purchase price of the property".

41. The HMRC letter included a list of information that HMRC would have wanted to see concerning the transaction, although it was made clear that that information did not need to be sent to HMRC if the Appellant accepted that the **SDLT** was payable.

42. On 24 July 2014, the Appellant appealed against the assessment and sought clarification of HMRC's statutory basis for making such an assessment.

43. On 11 August 2014, another HMRC officer responded and set out the basics of the law concerning discovery assessments, including extracts of case law concerning the protections given to taxpayers who make a full disclosure on their tax returns or within the enquiry window.

44. The next correspondence was a chaser letter from HMRC dated 10 June 2015, seeking a clarification of the Appellant's position in relation to his appeal.

45. On 30 June 2015, the Appellant apologised, saying that he thought he had previously collated the information sought in the 15 July 2014 letter. He said that this information would follow within 30 days.

46. Nothing was sent by the Appellant and a chaser letter was sent by HMRC on 7 September 2015.

47. The Appellant responded on 17 September 2015.[2] He referred to the case law cited in HMRC's letter of 11 August 2014 and attached a copy of the letter sent on 31 January 2012.

48. HMRC replied over nine years later, by letter dated 11 November 2024. The letter started with an apology "for the significant length of time since you last had contact regarding this matter".

49. The letter stated that a review had been undertaken and that "HMRC has no record of the claimed disclosure ever being received".

50. The letter also made reference to HMRC's success in defeating such schemes:

> **HMRC's litigation of SDLT avoidance schemes utilising Options**
>
> Although you have not provided any documents showing the exact steps you have taken, based on the contents of the disclosure letter claimed to have been sent on 31 January 2012, I believe that you implemented an SDLT avoidance scheme which utilised an Option (or an Option Agreement), in order to target the sub sale provisions contained at Section 45 Finance Act 2003.
>
> HMRC has been extremely successful in securing decisions in the courts and tribunals that confirm our view that these schemes were never effective in achieving the intended reduction or avoidance of SDLT. As a result, a large number of other users of these schemes have, or are currently in the process of, settling their use of these schemes with HMRC, bringing finality to their use of these schemes and avoiding potential litigation costs.
>
> You may wish to note the decision in Court of Appeal case of Oisin Fanning v HMRC [2023] EWCA Civ 263, which was the lead case for these types of avoidance arrangements.
>
> HMRC's view that such schemes were not effective was upheld, with the Court of Appeal's decision being final and binding.

51. The Appellant telephoned HMRC (apparently on 22 November 2024) to confirm that he wished to pursue an appeal. He asked the HMRC officer to clarify some matters regarding the costs of the process. The officer did not know the answer but provided a link to the open.gov.uk website by letter dated 24 March 2025.

52. On the same day, the officer offered the Appellant an internal review of HMRC's assessment. That offer was accepted by e-mail on 8 April 2025. The acceptance included a further copy of the 31 January 2012 letter and arguments supporting the Appellant's view that there had been sufficient disclosure so as to preclude HMRC's later discovery assessment.

53. The review was concluded by letter dated 20 May 2025. The review upheld HMRC's assessment.

54. The Appellant notified the appeal to the Tribunal on 3 June 2025.

The underlying law

55. In this section of the decision, all statutory references are to the Finance Act 2003, unless otherwise stated.

The SDLT liability

56. Although the Appellant is not challenging that, on a correct reading of the SDLT legislation, he was liable to pay the SDLT charged by the discovery assessment, it is nevertheless helpful to set out the statutory basis for this charge.

57. SDLT is payable on land transactions (section 42).

58. Under section 43, a land transaction is any acquisition of a chargeable interest.

59. Section 48 defines chargeable interest and provides (except in cases of exempt interests, which are not relevant in this case) that "an estate, interest, right or power in or over land in the United Kingdom" come within the definition of chargeable interest. Accordingly, the Appellant's acquisition of a freehold interest in the property amounts to a land transaction on which SDLT is *prima facie* payable.

60. However, that then has to be read in conjunction with section 44. That is a section which applies if, as here, "a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance" (section 44(1)).

61. In such cases, the entering into the contract is not treated as entering into a land transaction (section 44(2)). Focusing on the circumstances of the present case, section 44(3) provides that, instead, the completion of the contract (which took place on 28 November 2011) together with the preceding contract "are treated as parts of a single land transaction", with the effective date of the transaction being the date of completion.

62. The arrangements entered into by the Appellant, however, sought to take advantage of a further provision, section 45. At the relevant time, that section read (so far as is relevant):

> (1) This section applies where—
>
> (a) a contract for a land transaction ("the original contract") is entered into under which the transaction is to be completed by a conveyance,
>
> (b) there is an assignment, subsale or other transaction (relating to the whole or part of the subject-matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him, and
>
> (c) paragraph 12B of Schedule 17A (assignment of agreement for lease) does not apply.
>
> References in the following provisions of this section to a transfer of rights are to any such assignment, subsale or other transaction, and references to the transferor and the transferee shall be read accordingly.
>
> (2) The transferee is not regarded as entering into a land transaction by reason of the transfer of rights, but section 44 (contract and conveyance) has effect in accordance with the following provisions of this section.
>
> (3) That section applies as if there were a contract for a land transaction (a "secondary contract") under which—
>
> (a) the transferee is the purchaser, and
>
> (b) the consideration for the transaction is—
>
> > (i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and
> >
> > (ii) the consideration given for the transfer of rights.
>
> The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded except in a case where the secondary contract gives rise to a transaction that is exempt from charge by virtue of any of sections 71A to 73 (which relate to alternative property finance).

63. By granting an option to Mr Walker, the Appellant (by entering into the arrangements) sought to trigger the words in subsection (1)(b) by creating another "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".

64. On the assumption that section 45(1) was engaged, section 44 was to have effect in accordance with the rest of the section. In particular:

> (1) the subsequent completion of the Appellant's purchase of the property was arranged to be in connection with the substantial performance of the grant of the call option (by the payment of the £100 premium);
>
> (2) this then triggered the tailpiece of section 45(3) which then statutorily disregards the completion of the Appellant's purchase of the property.

65. The arrangements were, however, found to be ineffective by the Court of Appeal in *Oisin Fanning v HMRC* [2023] EWCA Civ 263. The leading judgment was given by Lady Justice Falk, with whom Lords Justices Lewis and Peter Jackson agreed. The key part of Lady Justice Falk's judgment can be found at [34] to [57].

66. In summary:

> (1) at [46], she noted that the key to getting within the terms of section 45 is to have a transaction under which the third party "becomes entitled to call for a conveyance";
>
> (2) that phrase was to be read in light of the wording in section 44(1) which requires there to be a contract "under which the transaction is to be completed by a conveyance";
>
> (3) options are not to be treated in the same way as subsales; in particular, as Lady Justice Falk continued (at [49]):
>
> > Unless and until it is exercised it cannot be described as a contract which "is to be" completed by a conveyance, within s.44(1) …
>
> (4) There can be some situations where an option will satisfy requirements in section 45(1)(b), for example, an option exercised prior to the completion of the original contract (at [51]);
>
> (5) however, concluding at [52]:
>
> > a natural interpretation of the statutory language leads to the conclusion that the grant of an option does not, without more, answer the statutory description in s.45(1)(b). It is not an "other transaction" as referred to in that provision.

67. In the circumstances, we agree that the arrangement was ineffective.

HMRC's statutory power to make a discovery assessment

68. HMRC's assessment was made under Schedule 10, paragraph 28 which reads:

> 28(1) If the Inland Revenue discover as regards a chargeable transaction that —
>
> (a) an amount of tax that ought to have been assessed has not been assessed, or
>
> (b) an assessment to tax is or has become insufficient, or
>
> (c) relief has been given that is or has become excessive,
>
> they may make an assessment (a "discovery assessment") in the amount or further amount that ought in their opinion to be charged in order to make good to the Crown the loss of tax.

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

69. The restrictions referred to in paragraph 28(2) are as follows:

> 30(1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28 or 29 in respect of the transaction—
>
> (a) may only be made in the two cases specified in sub-paragraphs (2) and (3) below, and
>
> (b) may not be made in the circumstances specified in sub-paragraph (5) below.
>
> (2) [*Not relevant in this case*]
>
> (3) The second case is where the Inland Revenue, at the time they—
>
> (a) ceased to be entitled to give a notice of enquiry into the return, or
>
> (b) completed their enquiries into the return,
>
> could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 28(1) or 29(1).
>
> (4) For this purpose information is regarded as made available to the Inland Revenue if—
>
> (a) it is contained in a land transaction return made by the purchaser,
>
> (b) it is contained in any documents produced or information provided to the Inland Revenue for the purposes of an enquiry into any such return, or
>
> (c) it is information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 28(1) or 29(1)—
>
> > (i) could reasonably be expected to be inferred by the Inland Revenue from information falling within paragraphs (a) or (b) above, or
> >
> > (ii) are notified in writing to the Inland Revenue by the purchaser or a person acting on his behalf.
>
> (5) [*Not relevant in this case*]

Case law relevant to paragraph 30(3)

70. The wording and purpose of paragraph 30(3) and (4) are (so far as is relevant to this case) materially identical to that in section 29(5) and (6) of the Taxes Management Act 1970, on which a considerable amount of case law has developed. (In that case law, the references to section 29(1) relate to the equivalent of paragraph 28 of Schedule 10.)

71. In *Sanderson v HMRC* [2016] EWCA Civ 19 at [17] to [25], Lord Justice Patten (with whom Lord Justice Briggs (as he then was) and Lord Justice Simon agreed) set out the following principles for determining whether a discovery assessment could overcome the restriction found in section 29(5)/paragraph 30(3):

17. The power of HMRC to make an assessment under s.29(1) following the discovery of what, for convenience, I shall refer to as an insufficiency in the self-assessment depends upon whether an officer "could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the insufficiency". It is clear as a matter of authority:

(1) that the officer is not the actual officer who made the assessment (for example Mr Thackeray in this case) but a hypothetical officer;

(2) that the officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law: see *HMRC v Lansdowne Partners LLP* [2012] STC 544;

(3) that where the law is complex even adequate disclosure by the taxpayer may not make it reasonable for the officer to have discovered the insufficiency on the basis of the information disclosed at the time: see *Lansdowne* at [69];

(4) that what the hypothetical officer must have been reasonably expected to be aware of is an actual insufficiency: see *Langham v Veltema* [2004] STC 544 per Auld LJ at [33]-[34]:

"33. 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, as suggested by Park J. If he is uneasy about the sufficiency of the assessment, he can exercise his power of enquiry under section 9A and is given plenty of time in which to complete it before the discovery provisions of section 29 take effect.

34. In my view, that plain construction of the provision is not overcome by Mr. Sherry's argument that it is implicit in the words in section 29(5) "on the basis of the information made available to him" (my emphasis) and also in the provision in section 29(6)(d) for information, the existence and relevance of which could reasonably be inferred from information falling within section 29(6) (a) to (c), that the information itself may fall short of information as to actual insufficiency. Such provision for awareness of insufficiency "on the basis" of the specified information or from information that could reasonably be expected to be inferred therefrom does not, in my view, denote an objective awareness of something less than insufficiency. It is a mark of the way in which the subsection provides an objective test of awareness of insufficiency, expressed as a negative condition in the form that an officer "could not have been reasonably expected … to be aware of the" insufficiency. It also allows, as section 29(6) expressly does, for constructive awareness of insufficiency, that is, for something less than an awareness of an insufficiency, in the form of an inference of insufficiency."

(5) that the assessment of whether the officer could reasonably have been expected to be aware of the insufficiency falls to be determined on the basis of the types of available information specified in s.29(6). These are the only sources of information to be taken into account for that purpose: see *Langham v Veltema* at [36]:

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

18. Where there is more scope for argument is in relation to the level of awareness that the relevant information needs to create in order for the condition to bar the right to raise a s.29(1) assessment. In the present context, for example, is it necessary for the information disclosed to lead the notional officer to conclude on the balance of probabilities that there is an insufficiency or must he be satisfied beyond reasonable doubt? Alternatively is some quite different test to be applied? The balance of probabilities test had found support in *Corbally-Stourton* and has been adopted in the Scottish case of *R (on the application of Pattullo) v Revenue and Customs Commissioners* [2010] STC 107.

19. But in *Lansdowne* at first instance Lewison J (at [48]) preferred to take a different and more general approach:

"Mr Coleman said that this was the wrong test. HMRC had to know with reasonable certainty of the insufficiency in question otherwise the office could not have been 'aware' of it. There is, no doubt, an epistemological debate to be had about whether you can discover or be aware of something that does not in fact exist. In the present case, for example, the commissioners decided that there was no insufficiency. Had HMRC discovered or been aware of an insufficiency before their decision that there was in fact no insufficiency? Or had they been aware of it, but then ceased to be aware of it? And now that I have disagreed with the commissioners on one of the points, are HMRC aware of it again? Or have they been aware of it throughout? But I do not consider that I need to enter into this debate. In the present case the commissioners asked whether HMRC had sufficient information to make a decision whether to raise an additional assessment. That seems to me to be the right test."

20. A not dissimilar test was applied in the Court of Appeal. The Chancellor said (at [56]):

"I do not suggest that the hypothetical inspector is required to resolve points of law. Nor need he forecast and discount what the response of the taxpayer may be. It is enough that the information made available to him justifies the amendment to the tax return he then seeks to make. Any disputes of fact or law can then be resolved by the usual processes. For these reasons I would dismiss the appeal of HMRC."

21. To the same effect, Moses LJ said (at [69]-[70]):

"… As the Chancellor points out (at [56]), awareness of an insufficiency does not require resolution of any potential dispute. After all, once an amendment is made, it may turn out after complex debate in a succession of appeals as to the facts or law, that the profits stated were not insufficient. I have dwelt on this point because I wish to leave open the possibility that, even where the taxpayer has disclosed enough factual information, there may be circumstances in which an officer could not reasonably be expected to be aware of an insufficiency by reason of the complexity of the relevant law.

[70] I also wish to express polite disapproval of any judicial paraphrase of the wording of the condition at s 30B(6) or s 29(5). I think there is a danger in substituting wording appropriate to standards of proof for the statutory condition. The statutory condition turns on the situation of which the officer could reasonably have been expected to be aware. Awareness is a matter of perception and of understanding, not of conclusion. I wish, therefore, to express doubt as to the approach of the Special Commissioner in *Corbally-Stourton v Revenue and Customs Comrs* [2008] STC (SCD) 907 and of the Outer House in *R (on the application of Pattullo) v Revenue and Customs Comrs* [2009] CSOH 137, [2010] STC 107, namely that to be aware of a situation is the same as concluding that it is more probable than not. The statutory context of the condition is the grant of a power to raise an assessment. In that context, the question is whether the taxpayer has provided sufficient information to an officer, with such understanding as he might reasonably be expected to have, to justify the exercise of the power to raise the assessment to make good the insufficiency."

22. It is important to emphasise that the decision in *Lansdowne* did not involve any qualification of what Auld LJ in *Langham v Veltema* identified as the question posed by the second s.29(5) condition. The hypothetical officer must, on an objective analysis, be made aware of an actual insufficiency in the assessment by the matters disclosed in the s.29(6) information. This is made clear by the Chancellor at [55] of his judgment in *Lansdowne*. The sole dispute in that case was whether the disclosures made by the taxpayer's accountants were sufficient to cause the hypothetical officer to conclude that there was an insufficiency.

23. The passages in the judgments of the Chancellor and Moses LJ as to the level of the officer's awareness were directed to the Revenue's argument that the disclosures made required inferences to be drawn about the accuracy of the self-assessment based on certain legal assumptions and that the officer could not be expected to resolve issues of law in determining the impact of the information supplied. In the face of such uncertainties, the officer could not be taken to be "aware" of an insufficiency. The decision in *Lansdowne* confirmed that the officer was not required to resolve (or even be able to assess) every question of law (particularly in complex cases) but that where, as Moses LJ expressed it, the points were not complex or difficult he was required to apply his knowledge of the law to the facts disclosed and to form a view as to whether an insufficiency existed. That is a matter of judgment rather than the application of any particular standard of proof. And the reference to the

officer needing to reach a conclusion which justified the making of a discovery assessment has to be read in that context.

24. Mr Sanderson's case is that the Upper Tribunal over-stated the level of knowledge which needs to be imputed to the officer under s.29(5) in order to justify the making of a discovery assessment. The threshold is said to be a relatively low one and merely requires the officer to be able to justify his belief that further tax is due. Part of [Mr Sanderson's Counsel's] argument rests on eliding the requirement in s.29(1) for an officer to "discover" that there is an insufficiency in the return with the condition in s.29(5) that the notional officer could not have been reasonably expected, on the information available, to be "aware" of that insufficiency. Unless, it is said, the threshold of knowledge is set relatively low it would be difficult, if not impossible, in most cases for the Revenue to be able to raise an assessment under s.29(1).

25. I do not accept that ss.29(1) and (5) import the same test and that the Revenue's power to raise an assessment is therefore directly dependent on the level of awareness which the notional officer would have based on the s.29(6) information. The exercise of the s.29(1) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on all the available information at the time when the discovery assessment is made. Section 29(5) operates to place a restriction on the exercise of that power by reference to a hypothetical officer who is required to carry out an evaluation of the adequacy of the return at a fixed and different point in time on the basis of a fixed and limited class of information. The purpose of the condition is to test the adequacy of the taxpayer's disclosure, not to prescribe the circumstances which would justify the real officer in exercising the s.29(1) power. Although there will inevitably be points of contact between the real and the hypothetical exercises which ss.29(1) and (5) involve, the tests are not the same.

72. It will be seen that one aspect of the Court of Appeal's decision focused on the question as to how much information needs to be before the hypothetical officer if the taxpayer is to obtain the benefit that the relevant statutory provision is intended to confer.

73. This was one of the issues considered in *Hicks v HMRC* [2018] UKFTT 22 (TC) and on HMRC's subsequent appeal to the Upper Tribunal (*HMRC v Hicks* [2020] UKUT 12 (TCC)).

74. In this Tribunal, the *Sanderson* judgment was considered thus at [77]*ff*:

The level of awareness

77. One of the thorniest issues in relation to section 29(5), which arises in this appeal, is the level of awareness of the insufficiency which the hypothetical officer must reasonably be expected to have at the relevant time.

78. Section 29(5) refers to awareness of the situation mentioned in subsection (1). That situation is an insufficiency of tax for the year of assessment. The necessary awareness is therefore more than a mere suspicion that there might be an insufficiency, and more than a realisation that the assessment raises issues to be followed up by HMRC.

79. That much is uncontroversial. But how certain does the hypothetical officer have to be for it to be unreasonable for him not to be "aware" of the insufficiency? Is it enough if the hypothetical officer could have concluded on the basis of the information then available that HMRC would have a good case in proving an insufficiency? Does awareness mean that HMRC would be more likely than not to succeed if the matter were contested, or some other

level of certainty? Further, is awareness of an insufficiency different from the real HMRC officer crossing the threshold in a discovery and if so how?

80. I confess that I do not find the Court of Appeal's analysis of these issues in *Sanderson*, which is of course binding on me, entirely easy to understand or apply in practice. In particular, I do not find the phrase "actual insufficiency" helpful as a measure of awareness, because the natural reading of those words in my view is that awareness of an actual insufficiency would (save perhaps for a glaring error or omission) be established only when a matter had been tested or settled.

81. I have considered the passages in *Sanderson*, at [18] to [28], which review and comment on the authorities regarding the requisite level of awareness. Those authorities include *Corbally-Stourton v HMRC* [2008] STC (SCD) 907, *Lansdowne*, and *Langham*. Two propositions are clear from the Court's analysis. First, the tests in subsections (1) and (5) are not the same: [25]. Secondly, the conclusion in *Langham* that the awareness must be of an actual insufficiency is correct: [22].

82. In my respectful opinion, the issue which *Sanderson* leaves opaque is the validity of the pronouncements at first instance and in the Court of Appeal in *Lansdowne*, set out at [19] and [20] in *Sanderson*. At first instance in *Lansdowne*, Lewison J formulated the level of awareness as "whether HMRC had sufficient information to make a decision whether to raise an additional assessment." In the Court of Appeal, Sir Andrew Morrit[t] C stated, at [56]:

"…I do not suggest that the hypothetical inspector is required to resolve points of law. Nor need he forecast and discount what the response of the taxpayer may be. It is enough that the information made available to him justifies the amendment to the tax return he then seeks to make. Any disputes of fact or law can then be resolved by the usual processes…"

83. Moses LJ in *Lansdowne* expressed a more nuanced view. He drew a distinction between perceiving or understanding a situation and drawing a conclusion that it is more probable than not. He stated, at [70]:

"…Awareness is a matter of perception and understanding, not of conclusion…The statutory context of the condition is the grant of a power to raise an assessment. In that context, the question is whether the taxpayer has provided sufficient information to an officer, with such understanding as he might reasonably be expected to have, to justify the exercise of the power to raise the assessment to make good the insufficiency."

84. The Court of Appeal in *Sanderson* sets these comments in *Lansdowne* in the context of the dispute in that case about what was required of the hypothetical officer in terms of drawing inferences or resolving points of law. It states (at [23]):

"…The decision in *Lansdowne* confirmed that the officer was not required to resolve (or even be able to assess) every question of law (particularly in complex cases) but that where, as Moses LJ expressed it, the points were not complex or difficult he was required to apply his knowledge of the law to the facts disclosed and to form a view as to whether an insufficiency existed. That is a matter of judgment rather than the application of any particular standard of proof. And the reference to the officer needing to reach a conclusion which justified the making of a discovery assessment has to be read in that context."

85. One merit of the formulations proposed by Lewison J and Sir Andrew Morrit[t] C is that they can be readily understood, and applied to the facts in

any particular case. However, I read the conclusion at [23] of *Sanderson* as a caution against adopting these formulations as implying any particular standard of proof. The difficulty which that produces in my judgment is that while there is guidance as to what the necessary level of awareness is not there appears to be no clear guidance as to what it is.

86. I have concluded that the practical effect of *Sanderson* is to require the exercise to focus on the level of disclosure in any particular case, and the extent to which that disclosure arms the hypothetical officer with sufficient information to justify the making of an assessment. As is stated in Sanderson (at [25]), "[t]he purpose of the condition is to test the adequacy of the taxpayer's disclosure…"

87. Subsection (5) is all about disclosure by the taxpayer (as defined by section 29(6)). The more extensive the taxpayer's disclosure by the closure of the enquiry window, the more difficult it would be for HMRC to establish that the hypothetical officer could not reasonably have been expected to be aware of the insufficiency. The taxpayer is incentivised by the legislation to place HMRC in a position where he can put them to proof at the close of the enquiry window with the question "what more need I have disclosed to have placed the officer in a position to be justified in raising an assessment?"

75. The Upper Tribunal upheld the First-tier's approach to section 29(5):

193. The FTT at [86]-[87] emphasised the importance in the application of section 29(5) of the quality of the taxpayer's disclosure. As the FTT said: "Subsection (5) is all about disclosure by the taxpayer (as defined by section 29(6))." We consider this to be a correct statement and it discloses no error of law. If we may respectfully make a criticism of some of the earlier case-law it is that there has been an undue focus on the expertise, the technical knowledge of, the availability of HMRC Manuals to and the availability of specialist advice to the hypothetical inspector. That represents a misunderstanding of the purpose of section 29(5).

194. In our judgment, section 29(5) requires that a taxpayer should make sufficient disclosure in order to enable an officer to make an informed decision whether an insufficiency existed sufficient to justify, in the words of Moses LJ [in *Lansdowne* at [69]], the exercise of the power to make an amendment to the return. We respectfully agree with Moses LJ that the possibility should remain open that mere factual disclosure may not, in some cases involving complex issues of law, be sufficient.

195. The purpose of section 29(5) is to strike a balance between the protection of the revenue, on the one hand, and the taxpayer on the other. The taxpayer is protected against a discovery assessment provided adequate disclosure has been made. The disclosure must be from the sources referred to in section 29(6) (as amplified by section 29(7)). HMRC are protected because they can raise a discovery assessment if adequate disclosure has not been made.

196. It seems to us that section 29(5) focuses primarily on the adequacy of the disclosure by the taxpayer. What constitutes adequate disclosure for the purposes of section 29(5) will vary from case to case. It depends on the nature and tax implications of the arrangements concerned and not on the assumed knowledge (or lack of knowledge) of the hypothetical officer. The obligation is on the taxpayer to make the appropriate level of disclosure as befits a self-assessment system.

197. In a relatively simple case, where the legal principles are clear, it would be sufficient for a taxpayer simply to give a full disclosure of the factual

position. The return must also make clear what position the taxpayer is adopting in relation to the factual position (e.g. whether a receipt was not taxable or whether a claim for relief was being made).

198. But 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.

199. Plainly, the greater the level of disclosure, the greater the officer's awareness can reasonably be expected to be. If a disclosure on a tax return includes all material facts and, in complex cases, an adequate explanation of the technical issues raised by those facts and the position taken in relation to those issues, it would be reasonable to expect an officer to be aware of an insufficiency. What constitutes reasonable awareness is linked to the fullness and adequacy of the disclosure – the expertise of the hypothetical officer remains that of general competence, knowledge or skill which includes a reasonable knowledge and understanding of the law.

200. In argument before us [Counsel for HMRC] came close to suggesting, as we understood it, that a hypothetical officer could not be expected to understand complex or specialist areas of tax law. We disagree. If the disclosure (factual and technical) is adequate in the circumstances of the case, a hypothetical officer can reasonably be expected to be aware of an insufficiency even in a complex case or one involving specialist technical knowledge. If the disclosure is inadequate then it is fair that a hypothetical officer could not reasonably be expected to be aware of an insufficiency in such a case. That is the balance that section 29(5) strikes.

Analysis

76. We have concluded at ¶67 above that the scheme was ineffective and, therefore, subject to our discussion on the validity of the discovery assessment, the **SDLT** remains payable.

77. In addition, we accept Mr Brown's evidence that shows that a discovery was made in 2014 that an amount of tax that ought to have been assessed had not been assessed (as required by paragraph 28 of Schedule 10). As Mr Brown acknowledged, he was not directly involved in the process in 2014 but he gave evidence as to the processes that would have taken place. In any event:

    (1) it is clear that the Appellant self-assessed a nil liability because of his understanding that he was entitled to relief; and

    (2) it is similarly clear that, amongst the officers of HMRC, a decision was made that schemes of this nature were ineffective; and

    (3) it is further clear that a review was undertaken of **SDLT** returns which *inter alia* included a code 28 claim, particularly those returns that had been submitted by Stratega Law; and

    (4) it is more likely than not that the Appellant's return came to the attention of HMRC as a result of that review; and

    (5) given the contents of the Appellant's return, it was concluded by at least one officer (and it was an HMRC officer who made the assessment) that **SDLT** had been under-assessed.

78. In our view, the only scope of any debate was whether the Appellant was protected by the restrictions in paragraph 30 (or, to put it more strictly, whether HMRC could overcome one of the two hurdles in

paragraph 30). HMRC rightly limited themselves only to paragraph 30(3).

79. On behalf of HMRC, Ms Benson put forward two principal arguments in relation to paragraph 30(3):

> (1) First, the only relevant document before the so-called hypothetical officer is the **SDLT** return.
>
> > (a) Accordingly, the very limited information before the hypothetical officer falls short of that with which the hypothetical officer could reasonably be expected to be aware of the insufficiency.
>
> (2) Secondly, even if the 31 January 2012 letter were also before the hypothetical officer, that would still be insufficient to give the hypothetical officer enough information to be aware of the insufficiency.

80. So far as the first argument is concerned, we agree that the return on its own would not be anywhere near enough to alert the hypothetical officer to the insufficiency. It undoubtedly gives enough information that should have triggered an enquiry: in particular, the purchase of a residential property for £812,000, on which no **SDLT** was payable. However, when setting the balance in paragraph 30(3), Parliament has made it clear that more information needs to be provided if there is to be any protection for the taxpayer.

81. As a matter of fact, the officer making the discovery had little more concrete information about the Appellant's case, yet still felt able to authorise an assessment. However, this is an example of what Lord Justice Patten said in *Sanderson* at [25] (see ¶71 above) of being where (to use the **SDLT** legislation) the paragraphs 28 and 30(3) tests diverge. In particular, the real officer (paragraph 28) had additional information (being the involvement of Stratega in schemes of this nature) which could inform a real life decision to assess in 2014 – that information is not something that comes within the exhaustive list of information which is treated as being before the hypothetical officer as at 28 September 2012, as set out in paragraph 30(4).

82. However, we must first consider whether or not Ms Benson was correct to say that it was only the **SDLT** return that was before the hypothetical officer. In particular, as it was the only other candidate of material before the hypothetical officer, we had to consider whether the 31 January 2012 letter fell within the list of documents within paragraph 30(4). In particular, were the contents of that letter:

> information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 28(1) or 29(1)—
>
> …
>
> (ii) are notified in writing to the Inland Revenue by the purchaser or a person acting on his behalf[?]

83. Ms Benson argued that:

> (1) the letter was not received by HMRC (and therefore the information therein could not be said to have been notified in writing); and
>
> (2) even if that was wrong, it was sent by Mr Walker who was neither the purchaser (i.e. the Appellant) nor a person acting on the Appellant's behalf.

84. It was Ms Benson's further argument that, even if we placed the 31 January 2012 letter before the hypothetical officer, its contents (even when read with the **SDLT** return) would still not have been enough to allow the hypothetical officer to reasonably be expected to be aware of the insufficiency.

85. For the reasons we explain below, we respectfully disagree with Ms Benson.

86. In addition, although the point was not expressly argued by Ms Benson, we also note that the letter (not only gave further information about the option acquired by Mr Walker but also) expressly alerted the

reader to:

(1) the fact that a scheme has been entered into (involving the Appellant); and

(2) the purpose of the letter being to alert HMRC to the possibility that, were they to look at the scheme more closely, they might consider that insufficient tax has been paid.

Was the letter notified to HMRC?

87. For the reasons summarised at ¶¶30 to 37 above, we conclude that the letter was sent to, and received by, HMRC.

Was the notification by the purchaser or a person acting on his behalf?

88. We agree with Ms Benson that the letter did not purport come from the Appellant: it was ostensibly signed by Mr Walker. And, indeed, it was Mr Walker's evidence (and we duly find) that it was he who printed off the letter.

89. We recognise that the Appellant, in conjunction with Mr Walker, ensured that the letter was placed in the out-tray near their desks at work. However, we consider that being a person who takes part in the process of conveying a document to HMRC cannot without more be said to have notified HMRC of the contents of the document in question.

90. For these reasons, we conclude that the Appellant was not a person who notified the contents of the letter to HMRC. To put it another way, the notification was made by Mr Walker and by Mr Walker alone.

91. It was Ms Benson's argument that Mr Walker was not the Appellant's registered agent: that was Stratega Law; nor was he a person recognised by HMRC as acting on the Appellant's behalf. However, the statute does not require the other person to be the same person who filed the relevant return on the taxpayer's behalf; nor does the legislation require that person to be "recognised" by HMRC in any capacity in relation to the taxpayer. The statutory test "or a person acting on his behalf" involves ordinary English words in an ordinary English phrase and we see no justification to give those words any broader or narrower meaning than the ordinary meaning of the phrase.

92. Furthermore, we consider that that natural meaning was reflected by the Upper Tribunal in the *Hicks* case at [122].

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

93. The context of the Upper Tribunal's analysis was the Taxes Management Act 1970, section 29(4) and whether there had been careless conduct by a person acting on behalf of the taxpayer (in that case, by the promoter of the scheme undertaken by Mr Hicks). The **SDLT** equivalent of section 29(4) is paragraph 30(2). We see no reason why the phrase should be given any different meaning in different parts of paragraph 30 and, indeed, we consider that it is beyond doubt that, by using the same phrase in different parts of that paragraph, Parliament intended the meaning to be same in the different contexts.

94. We agree with Ms Benson that, in many ways, Mr Walker was describing his own acquisition of his option and, accordingly, much of the letter was written for his own benefit. However, it is clear on the face of the letter that Mr Walker was writing not only on his own behalf.

    (1) The final paragraph expressly stated that it should be treated as a notification on behalf of all the parties to the scheme.

    (2) The word "scheme" had already been used in the letter to cover *inter alia* the Appellant's purchase of the property and the acquisition of the call option.

95. We consider that this wording alone creates a rebuttable presumption that the letter was, at least in part, written on behalf of the Appellant. Rather than rebut that presumption, the close involvement of the Appellant in his supervision of the letter going into the out-tray reinforces the position. This reinforcement is further strengthened by the fact that the letter cites the Appellant's own **SDLT** reference.

96. Following *Hicks*, "entering into correspondence with HMRC, providing documents and information to HMRC" are paradigm examples of acts that are carried out by a person on behalf of a taxpayer.

97. It is thus our conclusion that the letter was written (at least in part) on the Appellant's behalf.

Was the disclosure enough to give the Appellant protection under paragraph 30(3)?

98. We now have to apply the balancing exercise that paragraph 30(3) requires. To do so, we take the following three steps:

    (1) We identify the information that is proverbially placed before the hypothetical officer.

    (2) From the basis of that information, we identify the technical knowledge and skills that can be attributed to the hypothetical officer.

    (3) We then decide whether that officer with that information "[could or] could not have been reasonably expected … to be aware of [the under-assessment in the **SDLT** return]".

What information is placed before the hypothetical officer?

99. There are just two documents before the hypothetical officer: the **SDLT** return and the 31 January 2012 letter. Placed together, they tell the hypothetical officer that:

    (1) The Appellant acquired a residential property for £812,000 on 28 November 2011.

    (2) No **SDLT** was thought to be payable on the purchase, because of a relief (unspecified).

    (3) The Appellant, on the same day as the completion of his purchase, granted a call option to Mr Walker over the property.

    (4) It was being asserted that the option engaged the rule in the Finance Act 2003, section 45.

100. We reach that conclusion from our own reading of those two documents. However, we note that this broadly coincides with HMRC's own summary of the facts that could be deduced from those

documents as summarised in HMRC's letter of 11 November 2024 and, in particular, the first paragraph as cited at ¶50 above.

What technical knowledge can be attributed to the hypothetical officer?

101. It is our view that, faced with this disclosure, the hypothetical officer would have the following knowledge and skills.

102. From the disclosure itself (without attributing any particular skill to the officer):

> (1) To recognise that the references in Mr Walker's letter to "APM" were clearly erroneous and that they should relate to Mr Walker.
>
> (2) That, ordinarily, a residential property purchase for £812,000 would give rise to a **SDLT** charge of £32,480.
>
> (3) To be able to infer that the unspecified relief claimed by the Appellant was the relief conferred by section 45.

103. Given that the disclosure made clear reference to the Appellant's purchase being within the scope of section 45, the officer (again without any specialist knowledge) would be able to understand that:

> (1) the basis of the section 45 claim was the belief that the call option was a transaction "as a result of which a person other than the original purchaser [had become] entitled to call for a conveyance to him" within section 45(1)(b).
>
> (2) if section 45(1)(b) so applied, this would exempt the Appellant from liability for **SDLT.**

104. However, as was made clear in *Lansdowne*, the officer is imbued "with such understanding as he might reasonably be expected to have" and, to use the wording from *Sanderson*, "to apply his knowledge of the law to the facts disclosed and to form a view as to whether an insufficiency existed". And, as the Upper Tribunal said in *Hicks*, "the greater the level of disclosure, the greater the officer's awareness can reasonably be expected to be".

105. This is consistent with the earlier case law that demonstrates that the skills and knowledge of the hypothetical officer will depend on the content and quality of the information deemed to be before that officer. For example, in *HMRC v Charlton* [2013] STC 866, the Upper Tribunal observed:

> 54. [Counsel for the taxpayer] submitted an alternative analysis[3] of s 29(5) which, whilst not requiring any assumption of what a hypothetical officer might do, would nonetheless imbue that officer with all the necessary expertise to be able to deal with any (or perhaps any but the most complex) of returns. He argued that s 29(5) referred only to an officer, and did not specify the nature or characteristics of that officer. The officer in question is thus a truly hypothetical officer, and not a typical or average officer.
>
> 55. As a matter of statutory construction, we consider an approach along these lines has considerable merit. The officer referred to in s 29(5) is a legal fiction. He does not require to be imbued with personality or any particular characteristics. To do so inevitably involves seeking some form of typical or average officer, the search for which, in our view, is futile. …

106. Similarly, in *Beagles v HMRC* [2018] UKUT 380 (TCC) (a case where the disclosure made reference to the relevant discounted securities rules), the Upper Tribunal observed:

> The hypothetical officer is an officer of general competence, knowledge or skill with a reasonable knowledge and understanding of the law. In our view, that would encompass a knowledge of the legislation relating to relevant

> discounted securities … and even if he or she did not, we would expect the officer to acquire that knowledge, given that the officer is directed to the legislation by the appendix to the return.
>
> We would expect the hypothetical officer to be reasonably acquainted with the status of the case law on the *Ramsay* approach … We would also expect the officer to have a reasonable degree of commercial awareness (and, for example, to be aware, in broad terms, of the commercial level of interest rates at the time).
>
> … the test does assume that the hypothetical officer will apply the appropriate level of knowledge and skill to the information that is treated as being available before the level of awareness is tested.

107. And, as noted above, in *Hicks*, the Upper Tribunal confirmed:

> 200. … If the disclosure (factual and technical) is adequate in the circumstances of the case, a hypothetical officer can reasonably be expected to be aware of an insufficiency even in a complex case or one involving specialist technical knowledge.

108. Accordingly, the hypothetical officer will be imbued with the specialist knowledge about the meaning, scope and effect of section 45.

Could the officer have been reasonably expected to be aware of the under-assessment?

109. In our view, once one attributes to the hypothetical officer a reasonable working understanding of section 45, this case becomes relatively straightforward. In any event, it is not one so complex that, even full disclosure would be insufficient to protect a taxpayer from a discovery assessment. (As noted in *Charlton* at [59]: "complexity or difficulty should not routinely present an obstacle (as they would if all specialist knowledge had to be assumed away) from the fact that Moses LJ considered this only to be a mere possibility, and thus at most an exception and not the rule".)

110. The hypothetical officer would then see that:

> (1) an option was granted at the same time as (or a scintilla before[4]) conveyance to the Appellant;
>
> (2) that option had not been exercised and there had been no substantial performance of any agreement to convey the property to Mr Walker;
>
> (3) it was being suggested that that option holder had become "entitled to call for a conveyance to him" so that no **SDLT** was payable on the Appellant's purchase of the property; and
>
> (4) there was no other apparent basis to justify the Appellant's claim for full relief of the **SDLT** payable on his purchase.

111. As at 28 September 2012, the hypothetical officer would not have known the outcome of the *Fanning* case (or even the outcome of earlier stages of the *Fanning* litigation): the First-Tribunal's decision in that case ([2020] UKFTT 292 (TC)) did not get released until July 2020. Whilst it is undoubtedly the case that knowledge of relevant developments in case law will be imputed to the hypothetical officer (given that officer's knowledge of the legislation in question), it cannot be the case that the hypothetical officer's skills and knowledge are dependent on such case law developments. Indeed, as noted by the Chancellor in *Lansdowne*: "the hypothetical inspector is [not] required to resolve points of law … It is enough that the information made available to him justifies the amendment to the tax return he then seeks to make. Any disputes of fact or law can then be resolved by the usual processes."[5]

112. It is our view, therefore, that the hypothetical officer would realise that, contrary to the intentions of the scheme, section 45 would not apply to relieve a purchaser from liability to **SDLT** in cases where the purchaser of land had granted a call option that had not been exercised by the time of the completion of the purchaser's contract (or, at the very least, recognise that there was a reasonable prospect of the scheme being successfully challenged in the tribunals or courts and so the reversal of the relief claim would be justified).

113. For these reasons, the condition in paragraph 30(3) is not met and the assessment is therefore not valid.

Right to apply for permission to appeal

114. 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.

Release date:
21 April 2026

Note 1 The letter did not specify the postcode (or even the area within London). However, given that the **SDLT** reference was correctly cited and that (per Google Maps) there appears to be only one street in the whole of London with this name, we conclude that the letter has sufficiently identified the property. [Back]

Note 2 The letter was dated 17 September 2014. However, given its reference to HMRC's letter of 7 September 2015 and the fact that it was received by HMRC on 21 September 2015, we conclude that the Appellant simply misstated the year when preparing the letter. [Back]

Note 3 The approach taken by the First-tier had been to assume an average officer but to treat that average officer as having the ability to "phone a friend" (i.e. to have access to a suitable expert based upon the contents of the disclosure). [Back]

Note 4 The disclosure stated "simultaneous". However, for the scheme to have had any prospect of succeeding, it would have needed to have effect in a way that the conveyance to the Appellant was subject to the option. We consider that the hypothetical officer would have read the disclosure in this way. If not, the scheme was bound to fail and the hypothetical officer would then have known that the £32,480 **SDLT** was due. [Back]

Note 5 Indeed, otherwise, the objective test becomes dependent on external factors such as the speed of the investigation and litigation processes. Furthermore, there would in that situation be a perverse incentive for HMRC to delay the resolution of tax disputes so as to keep to a minimum the hypothetical officer's knowledge for as long as possible. [Back]

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