FIELD COURT TAX CHAMBERS

Carter: discovery assessments and HMRC awareness[1]

The Upper Tribunal suggests a new dimension to the awareness issue

A recent decision of the Upper Tribunal in the Stamp Duty Land Tax case of *V Carter and another v HMRC* [2021] UKUT 300 (TCC) (reported in *Tax Journal*, 7 January 2022) raised some interesting issues of wider application.

SDLT has its own legislative framework but the relevant test for discovery assessments is the same as for the main taxes. The power of HMRC to make a discovery assessment for SDLT where a taxpayer has filed a timely return, is found in FA 2003 Sch 10. This provides (in very similar terms to TMA 1970 s 29(5)) that an assessment can be made if at the relevant time: 'the officer 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.'

The Upper Tribunal referred to the general principle set out in *Langham v Veltema* [2004] EWCA Civ 193 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'.

Pausing there for a moment, and recognising that this is a decision of the Court of Appeal, I would very respectfully suggest that this is an impossible test. If a taxpayer makes an honest and accurate return believing that his return is correct and accurate, he could not possibly be expected (indeed it would be absurd) for him to alert HMRC to an insufficiency of his self-assessment. The whole premise upon which he has submitted his honest and accurate return is that it is complete and accurate. So a taxpayer making an honest return could never be protected from the issue of a discovery assessment.

Conversely, if the taxpayer knows that his self-assessment is insufficient and fails to alert HMRC to that insufficiency, then HMRC need not be concerned about any of this; this would be careless conduct and they would have six years in which to issue an assessment.

For these reasons, it is respectfully suggested that the test – or at least this phrase in the judgment of the Court of Appeal – should be interpreted in a different manner, or possibly restricted to a particular set of circumstances. As it stands, it can be argued that this formulation renders the information awareness test completely redundant.

The taxpayer had entered into a tax scheme and provided details in a disclosure note which explained the transaction, including the provisions upon which it relied, and confirmed that they did not consider FA 2003 s 75A applied to the transaction.

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The FTT said that a judgment had to be made about the conclusions which it would be reasonable to expect HMRC officers to draw from the disclosure made by the taxpayer.

It confirmed that the hypothetical officer of general competence, knowledge and skill would be expected to be aware of s 75A and its potential application to counteract tax avoidance schemes. However, although HMRC was fully aware of the scheme, it was not until the officer (the real officer!) had received advice from Counsel, neither he nor HMRC had come to a settled view about whether Section 75A could apply to this transaction.

This brings in a whole new dimension to the awareness issue. The suggestion here is that even though HMRC may have all the information that they need to be aware of the transaction and its implications, it should not be regarded as being aware of a possible insufficiency until they had received counsel's opinion on whether the scheme worked or not.

Can this really be the right test? As the FTT noted, the hypothetical officer is not required to resolve all issues, or every question of law, or to have enough information to enable HMRC to prove that their view is right. The test is simply whether the information available would justify him in raising an assessment, even though the tax cannot be precisely quantified.

The whole point of the available awareness test is to see whether HMRC has been given sufficient information from which they can make the relevant judgment. If the rule is that HMRC are not considered to have had sufficient information until such time that it actually gets round to making that judgment, then the time limit provided by Sch 10 – or s 29(5) – does not really exist. On this basis, if the officer (the hypothetical officer) fails to give adequate consideration to the matter before the expiration of the time limit, they would then be allowed four years in which to do so.

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