TC07652

STAMP DUTY LAND TAX – paragraph 25 of schedule 10 to Finance Act 2003 - whether Revenue determination made, issued and served - paragraph 35(1)(e) and paragraph 36(5A) of schedule 10 to Finance Act 2003 – whether the Tribunal has jurisdiction to consider an appeal against a Revenue determination based on procedural defects - whether the concept of staleness applies to a Revenue Determination - proceedings struck out on the basis that the Tribunal has no jurisdiction

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/02429

BETWEEN

SAID MASHOOF **Appellant**

-and-

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

TRIBUNAL: JUDGE ROBIN VOS

Sitting in public at Taylor House, London on 26 February 2020

Michael Avient, Counsel, instructed by Guy Smith of inTax Limited, both acting on a pro bono basis for the Appellant

David Street, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. In August 2011, the appellant, Mr Mashoof purchased a house in Hornsey, London jointly with Ms Bajelvand.

2. Mr Mashoof and Ms Bajelvand used a Stamp Duty Land Tax ("SDLT") savings scheme which was popular at the time which involved structuring the purchase through an unlimited company which then distributed the property to them.

3. HMRC however purported to issue a Revenue determination in order to collect the SDLT of £33,200 which they say is due.

4. Although the determination relates to both Mr Mashoof and Ms Bajelvand, this appeal only relates to Mr Mashoof. It is however common ground that, if Mr Mashoof is successful in his appeal, the Revenue determination will also fall away as far as Ms Bajelvand is concerned.

5. The original notice of determination which HMRC say was sent out in July 2015 was never received by Mr Mashoof. He only became aware of it when HMRC notified him in April 2017 that they were proposing to collect the SDLT which was due. In separate proceedings, Mr Mashoof applied for, and was granted, permission to notify his appeal to HMRC outside the statutory time limit (see appeal number TC/2017/06071). As part of those proceedings, the Tribunal found as a fact that Mr Mashoof did not receive the original notice of determination dated 1 July 2015. HMRC do not challenge that finding in these proceedings.

6. Although Mr Mashoof in his notice of appeal to the Tribunal effectively reserved his position in relation to the underlying merits of the SDLT scheme, he failed to provide any details in relation to this aspect and so, in December 2018, the appeal was struck out to the extent that it related to the question as to whether or not the underlying SDLT scheme worked.

7. The remaining grounds of appeal put forward by Mr Mashoof relate to the question as to whether the Revenue determination was made, issued and served in accordance with the requirements of the relevant legislation.

8. HMRC say that the Tribunal has no jurisdiction to entertain an appeal based on these grounds and that, as a result, the appeal must be struck out in accordance with Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

REVENUE DETERMINATIONS – THE STATUTORY FRAMEWORK

9. A Revenue determination is an estimate of the tax liability which is made by HMRC where no tax return has been delivered. The Revenue determination takes effect as if it were a self-assessment by the taxpayer but can be displaced by the taxpayer filing his own tax return as long as this is done within a specified time limit.

10. The provisions relating to the issue of a Revenue determination in relation to income tax have been in place since the introduction of self-assessment. A similar provision was included for SDLT when it was introduced in 2003.

11. Given that a Revenue determination takes effect as a self-assessment by the taxpayer, there has never been any right of appeal against a Revenue determination as far as income tax is concerned. This was also the case for SDLT when the provisions were introduced in 2003. However, in 2004, a limited right to appeal against a Revenue determination was introduced for SDLT purposes to reflect the fact that there are circumstances in which no land transaction return is required to be submitted.

12. Turning now to the statutory provisions relating to SDLT notices of determination, these are all contained in Finance Act 2003. The starting point is paragraphs 25-27 of schedule 10 to Finance Act 2003 ("schedule 10") which provide as follows:

> "**Determination of tax chargeable if no return delivered**
>
> 25(1) If in the case of a chargeable transaction no land transaction return is delivered by the filing date, the Inland Revenue may make a determination (a "Revenue determination") to the best of their information and belief of the amount of tax chargeable in respect of the transaction.
>
> 25(2) Notice of the determination must be served on the purchaser, stating the date on which it is issued.
>
> 25(3) No Revenue determination may be made more than 4 years after the effective date of the transaction.
>
> **Determination to have effect as a self-assessment**
>
> 26(1) A Revenue determination has effect for enforcement purposes as if it were a self-assessment by the purchaser.
>
> 26(2) In sub-paragraph (1) "**for enforcement purposes**" means for the purposes of the following provisions of this Part of this Act-
>
> (a) the provisions of this Schedule providing for tax-related penalties;
>
> (b) section 87 (interest on unpaid tax);
>
> (c) section 91 and Schedule 12 (collection and recovery of unpaid tax etc.).
>
> 26(3) Nothing in this paragraph affects any liability of the purchaser to a penalty for failure to deliver a return.
>
> **Determination superseded by actual self-assessment**
>
> 27(1) If after a Revenue determination has been made the purchaser delivers a land transaction return in respect of the transaction, the self-assessment included in that return supersedes the determination.
>
> 27(2) Sub-paragraph (1) does not apply to a return delivered-
>
> (a) more than 4 years after the day on which the power to make the determination first became exercisable, or
>
> (b) more than twelve months after the date of the determination,
>
> whichever is the later.
>
> 27(3) Where-
>
> (a) proceedings have been begun for the recovery of any tax charged by a Revenue determination, and
>
> (b) before the proceedings are concluded the determination is superseded by a self-assessment,
>
> the proceedings may be continued as if they were proceedings for the recovery of so much of the tax charged by the self-assessment as is due and payable and has not been paid."

13. As can be seen from paragraph 25(3), HMRC have four years from the effective date of the transaction in which to make a determination. It is agreed in this case that the four year period expired on 12 August 2015.

14. Paragraph 25(2) requires notice of the determination to be served on the purchaser. Section 84(1) Finance Act 2003 contains supplementary provisions in relation to the service of documents:

> "**84 Delivery and Service of Documents**
>
> 84(1) A notice or other document to be served under this Part on a person may be delivered to him or left at his usual or last known place of abode."

15. The rights of appeal against a Revenue determination are contained in paragraphs 35 and 36 of schedule 10. So far as material, they provide as follows:

> "**Part 7 – Reviews and Appeals**
>
> **Right of appeal**
>
> 35(1) An appeal may be brought against-
>
> …
>
> (e) a Revenue determination under paragraph 25 (determination of tax chargeable if no return delivered).
>
> …
>
> **Notice of appeal**
>
> 36(1) Notice of an appeal under paragraph 35 must be given-
>
> (a) in writing
>
> (b) within 30 days after the specified date,
>
> (c) to the relevant officer of the Board.
>
> …
>
> 36(4A) In relation to an appeal under paragraph 35(1)(e)-
>
> (a) the specified date is the date on which the Revenue determination was issued, and
>
> (b) the relevant officer of the Board is the officer by whom the determination was made.
>
> 36(5) The notice of appeal must specify the grounds of appeal.
>
> 36(5A) The only grounds on which an appeal lies under paragraph 35(1)(e) are that-
>
> (a) the purchase to which the determination relates did not take place,
>
> (b) the interest in the land to which the determination relates has not been purchased,
>
> (c) the contract for the purchase of the interest to which the determination relates has not been substantially performed, or
>
> (d) the land transaction is not notifiable (for example, because the land transaction is exempt from charge under Schedule 3)."

16. As can be seen, it is clear that a taxpayer has a right to appeal against a Revenue determination (paragraph 35(1)(e)). However, paragraph 36(5A) limits the grounds on which an appeal may be made. It is accepted by Mr Mashoof that none of these grounds apply.

17. The first issue which I must determine is therefore whether the Tribunal has any jurisdiction to consider an appeal against the Revenue determination which is not based on any of the grounds set out in paragraph 36(5A) but which instead questions whether the determination was validly made, issued or served.

THE JURISDICTION OF THE TRIBUNAL

18. It was common ground that, as a result of s 3 Tribunals, Courts & Enforcement Act 2007, the First-tier Tribunal only has the powers given to it by statute. It has no inherent jurisdiction (see, for example, *HMRC v Noor* [2013] UKUT 071 (TCC) at [25]). In this case, any jurisdiction for the Tribunal to consider the validity of the Revenue determination must be found within the provisions of Finance Act 2003.

19. Mr Avient, appearing on behalf of Mr Mashoof, agrees that the limited grounds of appeal contained in paragraph 36(5A) of schedule 10 do not extend to an appeal against the validity of the determination. However, he submits that, taking into account the purpose of a Revenue determination, such a right of appeal must be inferred.

20. Expanding on this, Mr Avient explained that, in his view, the purpose of a Revenue determination is to encourage a taxpayer to submit a land transaction return so that the correct amount of SDLT can be established. The determination provides both a carrot and a stick. The carrot is the incentive to submit a land transaction return which may show a lower amount of SDLT. The stick is that the taxpayer will have to pay the amount of SDLT shown on the determination if he fails to submit his own land transaction return.

21. Mr Avient says that this legislative purpose would be defeated if a determination which did not comply with the statutory requirements (and which was therefore invalid) were allowed to stand. For example, as in this case, if the taxpayer does not become aware of the determination until it is too late for him to submit his own land transaction return, the carrot is removed and the legislation fails to achieve its objective. In these circumstances, Mr Avient submits that if the Tribunal has no jurisdiction to consider the validity of the determination, the taxpayer is denied a remedy.

22. Mr Avient acknowledges that the Tribunal in *Crest Nicholson (Wainscot) & Others v HMRC* [2017] UKFTT 134 (TC) concluded at [114] that:

> "With the exception of the matters referred to in para 36(5A) Sch 10, there is no reason for any right of appeal against a determination made under para 25 Sch 10."

23. However, he submits that *Crest Nicholson* can be distinguished on the basis that the challenge to the determination in that case centred on the question as to whether HMRC had made the determination "to the best of their information and belief" in accordance with paragraph 25(1) of schedule 10 whereas the challenge in this case is more fundamental in that it is alleged that HMRC never in fact made the determination and, if it did, it was not properly issued or served.

24. Mr Avient acknowledges that the Tribunal has limited scope for considering public law issues given that its jurisdiction only extends to that which is conferred on it by statute. The public law issue which he identified was any decision by HMRC to try to enforce the SDLT liability which they say is due if there is in fact no valid determination and therefore no SDLT liability.

25. To the extent that there is a public law issue to be considered, Mr Avient relies on the comments of the Upper Tribunal in *Noor* and in *HMRC v Hok Limited* [2012] UKUT 363 (TCC).

26. As far as *Hok* is concerned, Mr Avient refers to paragraph [52] in which the Upper Tribunal distinguished two other cases on the basis that:

> "What was in issue in both of those cases was not whether the Council's actions were fair or reasonable, or indeed any general principle of the common law, but whether the actions they had taken had the effect for which they argued."

27. This, says Mr Avient, is exactly the position in relation to the Revenue determinations – i.e. do they have the effect of creating a liability to SDLT.

28. Turning to the decision of the Upper Tribunal in *Noor*, Mr Avient relies on paragraph [73] where the Upper Tribunal suggests that it might be appropriate for a Tribunal to consider public law issues:

> "in the context of either (i) an issue which clearly fell within its jurisdiction and to which it was necessary to know the answer before that jurisdiction could properly be exercised or (ii) whether it had jurisdiction in the first place."

29. Mr Avient submits that the question as to whether or not there is a valid determination in existence is clearly something which must be established before a Tribunal can then go on to consider any appeal which falls within paragraph 36(5A) of schedule 10.

30. Mr Avient went on to submit that, having established that it is necessary to consider whether there is valid determination in existence, the Tribunal, being the specialist Tax Tribunal is the most appropriate jurisdiction to decide this issue. In support of this, Mr Avient referred to the decision of the High Court in *R on the application of Derrin Brother Properties Limited v HMRC & Others* [2014] EWHC 1152 (Admin) where Mrs Justice Simler stated at [15] in the context of a third party information notice that:

> "A number of further matters in relation to third party notices of this kind are well established by reference to the predecessor s 20 TMA 1970 scheme and apply with equal force to Schedule 36 notices, as the parties agreed. First, and significantly, as held in *R v Commissioners of Inland Revenue Ex Parte T C Coombs & Company* [1991] 2 AC 283, 300C-F, 302E-F (Lord Lowry) the Tribunal is the independent person designated by Parliament with the duty of supervising the exercise of HMRC's intrusive powers. Parliament designated the officer as the decision maker and the Tribunal as the monitor of the decision. A presumption of regularity applies to both, and is strong in relation to the Tribunal in particular."

31. Mr Street, who appeared for HMRC, stressed that HMRC believe that the determinations have been validly made, issued and served. Nonetheless, he submits that the grounds of appeal in paragraph 36(5A) of schedule 10 are exhaustive so that a taxpayer has no right to ask the Tribunal to rule on the validity of a Revenue determination.

32. In support of this, he drew attention to the similarities between the statutory provisions relating to Revenue determinations for income tax purposes contained in s 28C Taxes Management Act 1970 and the provisions relating to SDLT contained in paragraph 25 of schedule 10 as well as the history of the SDLT legislation.

33. As far as the income tax legislation is concerned, Mr Street's point is that this contains no right of appeal for a taxpayer against a Revenue determination.

34. Mr Street went on to explain that when Finance Act 2003 was originally enacted, this also contained no right of appeal against a Revenue determination. The rights contained in paragraph 36 of schedule 10 were only introduced in 2004 when it was realised that there may be circumstances where there is no liability to SDLT and, as a result, no ability for a purchaser to file a land transaction return. In those circumstances, the Revenue determination could not be displaced by filing a land transaction return, hence the creation of a specific right of appeal against the determination itself in these circumstances.

35. This would not be the case in relation to income tax as s 28C Taxes Management Act 1970 only allows a Revenue determination to be made in circumstances where HMRC have issued a notice requiring the taxpayer to submit a tax return.

36. Mr Street also drew support from the decision of the Tribunal in *Crest Nicholson* at [114] (mentioned above) that there is no right of appeal against an SDLT Revenue determination.

37. As far as public law issues are concerned, Mr Street does not accept that there is any public law issue which is relevant to the current appeal. In any event, he notes that the Upper Tribunal in *Hok* commented at [55] that:

> "We do not accept the Judge's view that the First-tier Tribunal is able to give effect to common law principles in order to override the clear words of a statute."

38. Mr Street submits that Finance Act 2003 is clear in giving a right of appeal in certain limited circumstances and that any suggestion that the Tribunal has jurisdiction to consider an appeal on other grounds would override that restriction.

39. In relation to the question as to whether the Tribunal is the appropriate forum for any such issue to be determined, Mr Street drew attention to the fact that the issue in *Derrin* related to a third party information notice which could only be issued with the approval of the Tribunal. In that case it was therefore clear that Parliament has specifically conferred this jurisdiction on the Tribunal and is therefore different to Finance Act 2003 where no clear jurisdiction is given to the Tribunal to consider an appeal against a Revenue determination based on the validity or existence of that determination.

40. Whilst I find it an unsatisfactory conclusion, it is clear to me that the Tribunal does not have jurisdiction to consider Mr Mashoof's appeal based, as it is, on the existence or validity of the determination.

41. The reason I find this conclusion unsatisfactory is that, unlike in the case of income tax, there clearly is a right for a taxpayer to appeal against an SDLT Revenue determination, albeit on limited grounds. If a taxpayer were to make an appeal based on one of those grounds but also challenged the validity of the determination, he will be left in a position where the Tribunal can only consider the appeal based on one of the grounds in paragraph 36(5A) of schedule 10 and would be forced to challenge the validity of the determination in another court on a different occasion which is not a particularly efficient way of dealing with the matter.

42. The reasons for my conclusion that the Tribunal has no jurisdiction are essentially those put forward by Mr Street.

43. When Finance Act 2003 was originally enacted, there was no right of appeal against a Revenue determination at all. This reflected the position for income tax and it can fairly be assumed that Parliament modelled the provisions relating to SDLT Revenue determinations on the equivalent income tax provisions which had already been in place for some years and which

themselves contained no right of appeal against a Revenue determination. In these circumstances, it seems unlikely that Parliament intended that the Tribunal should have any jurisdiction to consider an appeal against an SDLT Revenue determination.

44. In 2004, Parliament changed its mind as there was a good reason why an appeal against an SDLT Revenue determination should be considered by the Tribunal. As explained above, this was that, unlike the equivalent income tax provisions, there could be circumstances in which a taxpayer had no ability to submit a land transaction return and so displace the Revenue determination. Limited grounds of appeal (paragraph 36(5A)) were therefore introduced to deal with this particular problem. Given the particular reason for introducing this right of appeal, it again seems very unlikely that Parliament intended that there should be any right of appeal going beyond these limited grounds. Had Parliament intended to introduce a right to appeal to the Tribunal against the validity of a Revenue determination as a necessary consequence of the introduction of a right of appeal on other (limited) grounds, I would have expected Parliament to provide for this specifically rather than leaving it as something to be inferred from the legislation.

45. It is also not a necessary inference. Although, as I have said, I consider the conclusion that I have come to be unsatisfactory, it does not leave the taxpayer without any remedy at all. If there has indeed been no valid determination, this must provide a defence against any attempt by HMRC to enforce any alleged liability. Indeed, as Mr Avient himself accepts, an attempt by HMRC to try to collect SDLT based on an invalid Revenue determination is likely to be susceptible to judicial review.

46. I should stress that, in my view, this appeal does not raise any public law issues and so the question as to the Tribunal's ability to consider public law arguments simply does not arise. Mr Mashoof's complaint is that HMRC did not follow the correct statutory process for making, issuing and the service of a Revenue determination. He makes no complaint about the way in which HMRC made or purported to make the decision represented by the determination.

47. I accept that a public law issue could arise if HMRC were to try to enforce an alleged liability to SDLT which is based on an invalid determination but that is not the decision which Mr Mashoof is asking the Tribunal to review.

48. My decision that the Tribunal does not have jurisdiction in relation to Mr Mashoof's appeal is therefore based solely on my conclusion that schedule 10 contains no implied jurisdiction for the Tribunal to determine whether a Revenue determination has been validly made, issued and served.

49. Given my conclusion that the legislation confers no such jurisdiction on the Tribunal, the question as to whether the Tribunal is the most suitable place to determine issues relating to the validity of a Revenue determination does not arise. For what it is worth however, I agree with Mr Street that the case relied on by Mr Avient (*Derrin*) does not support his case given that it was clear in that case that the legislation specifically conferred jurisdiction on the Tribunal to monitor the relevant decision of HMRC.

50. For the reasons set out above, my conclusion is that the Tribunal does not have jurisdiction to consider Mr Mashoof's appeal and so the proceedings must be struck out in accordance with Rule 8(2)(a) of the Tribunal Rules.

51. However, in case I am wrong and as I heard full argument on the question as to whether the Revenue determination had been validly made, served and issued, I will go on to consider these questions.

Findings of fact

52. It was not necessary for me to make any findings of fact in order to consider the purely legal question as to whether the Tribunal has jurisdiction to consider an appeal against an SDLT Revenue determination on the basis that the determination has not been validly made, issued or served.

53. However, I do of course need to make findings of fact in order to decide whether the determination was in fact validly made, issued and served.

54. As well as a bundle of correspondence and documents, I also heard evidence from the HMRC officer in charge of the team which produced the determination, Jason Price. Mr Avient complemented Mr Price for being very straightforward and honest in the answers he gave to the questions put to him by Mr Avient in cross-examination. There is no doubt that he was a model witness and I happily accept everything which he said at face value.

55. The background facts can be stated briefly.

56. On 12 August 2011, an unlimited company, Mashoof Bagelvand, acquired a property in Hornsey, North London and immediately transferred it to Mr Mashoof and Ms Bagelvand.

57. On 2 April 2012, HMRC issued a notice of enquiry to the company in respect of the land transaction return which it had submitted in relation to the purchase.

58. On 5 July 2012, HMRC wrote to the company requesting additional documents. No further information was provided.

59. HMRC wrote to Mr Mashoof and Ms Bagelvand on 21 May 2014 offering them the opportunity to settle without any penalties being charged. Mr Mashoof responded on 30 May 2014 confirming that he and Ms Bagelvand did not wish to settle but instead wished to proceed to litigation.

60. HMRC say that on 1 July 2015 they made a Revenue determination in respect of the SDLT of £33,200 which they considered to be due in respect of the transaction and that they sent this determination with a covering letter of the same date to each of Mr Mashood and Ms Bagelvand. Mr Mashoof disputes whether a determination was made and, if it was made, whether it was sent. I will address this below.

61. Mr Mashoof did not receive the covering letter and the notice of determination which HMRC say was sent on 1 July 2015.

62. Nothing further happened until 21 April 2017 when HMRC wrote to Mr Mashoof and Ms Bagelvand stating that, as no appeal had been made against the determination, they were now proposing to collect the SDLT which they said was due.

63. As Mr Mashoof had not received the determination in July 2015, this was the first he heard about it. He called HMRC on 3 May 2017 to find out what was going on. As a result of this, HMRC emailed Mr Mashoof on the same day requesting authority to correspond with him by email. Mr Mashoof confirmed on the same day that he was happy to communicate with HMRC by email.

64. As part of their response to Mr Mashoof's assertion that he had not received any notice of determination, on 28 June 2017, HMRC emailed Mr Mashoof and attached to that email a copy of the covering letter and the Revenue determination, both dated 1 July 2015.

65. Mr Mashoof applied to the Tribunal on 8 August 2017 for permission to make a late appeal against the determination. The hearing took place on 10 November 2017. At the

hearing, Mr Mashoof was handed by the HMRC presenting officer a bundle which included a copy of the covering letter and the determination dated 1 July 2015.

HMRC's process for making, issuing and serving determinations

66. In order to examine Mr Avient's submissions in relation to the making, issuing and service of any determination, it is necessary to consider in some detail the evidence relating to HMRC's process for making determinations generally and also the evidence relating to Mr Mashoof's specific determination. The majority of this evidence was given by Mr Price in his witness statement and in his oral evidence but with some additional documentary evidence.

67. Mr Price was, at the relevant time, responsible for a team of 4-8 people who were all dealing with the particular SDLT scheme which had been used by Mr Mashoof. In total, there were about 3,000 users of the scheme although the numbers were lower from 2014 onwards as many taxpayers had taken advantage of HMRC's settlement opportunity.

68. The process to be followed by the team had been devised by Mr Price and a colleague (Rachel).

69. Mr Price had an excel spreadsheet on which he entered details of all of the taxpayers in respect of which he concluded a determination would need to be made. This spreadsheet then informed the team which files they needed to work on. Each time a step in process was completed, this would be recorded on the spreadsheet. However, the spreadsheet only showed the most recent action which had been taken as, once the latest action was recorded, this would delete the information about the preceding step.

70. As part of the process, a team member would produce a batch of determinations together with covering letters. These would be passed to Mr Price who would check a sample to ensure that they were correct. If he found any mistakes, he would check the whole batch and give it back to the team member to correct. If there were no mistakes, he would pass the batch to a member of the team with instructions that the batch should be posted. This was done by handing the batch to the post room for the letters to be put in envelopes and sent via courier to HMRC's central postage centre in Newcastle. The postage centre in Newcastle pass the letters on to Royal Mail for delivery. A check was made at the end of each day at the offices where the determinations were produced to ensure that no unposted items were left behind.

71. Mr Price freely accepted that he would have no knowledge at the time these processes were carried out of any particular case and cannot say whether he saw or checked Mr Mashoof's determination in June/July 2015. Instead, his only knowledge of Mr Mashoof's determination derives from the records created by his team, including the entries on his spreadsheet and the hard copy file which he reviewed before preparing his witness statement.

72. The relevant part of Mr Price's spreadsheet was part of the evidence before the Tribunal. This records that a determination was issued and that the tracking spreadsheets were updated on 1 July 2015 by the relevant team member whose name appears on the determination. Mr Price was unable to say whether the entry on the spreadsheet was in fact made on 1 July 2015 as his evidence was that the spreadsheets were sometimes updated after the date of the relevant determination.

73. In terms of other documentary evidence, Mr Price referred to a printout of the properties (metadata) of the Word document which comprised the covering letters and the determination. This shows that they were sent to a printer on 2 June 2015 by the relevant member of Mr Price's team.

74. Mr Price also confirmed that Mr Mashoof's hard copy file contained a copy of the letter and the determination both dated 1 July 2015.

75. The letter/determination which HMRC say were sent to Mr Mashoof were not returned to HMRC undelivered.

Did HMRC make a determination

76. Both parties accept that HMRC has the burden of showing that a determination was made, issued and served.

77. Mr Avient submits that, based on the evidence before the Tribunal, HMRC have not satisfied the burden of showing that a determination was made.

78. Mr Avient referred to the decision of the Tribunal in *Kothari & Others v HMRC* [2019] UKFTT 423 (TC) in relation to what is required for an assessment to be made by HMRC. Neither party suggested that the principles relating to the making of a determination are any different to those which apply to the making of an assessment and I would accept that this is the case.

79. Having reviewed a number of authorities including *Honig v Sarsfield* [1986] BTC 205, *Burford v Durkin* [1991] BTC 9, *Corbally-Stourton v HMRC* [2008] UKSPC SPC00692 and *Tutty v HMRC* [2019] UKFTT 3 (TC) (all of which were also referred to by Mr Street and Mr Avient), the Tribunal concluded at [64] that:

> "The making of an assessment does logically have an irreducible minimum of requirements: an HMRC officer acting as an HMRC officer must decide to make an assessment; he must then note the necessary details of the assessment in some form of reasonably permanent record held by HMRC. That appears to have happened in *Honig, Corbally-Stourton and Tutty*. And the Court of Appeal appears to have reached this conclusion in *Burford v Durkin* where Nicholls LJ said:
>
> > '… It seems to me that in this context making an assessment will normally involve (a) a decision to make an assessment in a particular amount; and (b) an appropriate documentary record being made of that decision with the intention that the document shall take effect as an assessment.'"

80. The principle which Mr Avient draws from this is that a determination is only made when no further steps are necessary. For example, a decision to make a determination is not enough.

81. The Tribunal in *Kothari* also addressed the question as to what the situation is where an assessment is post-dated – i.e. it is produced before the date contained on the assessment itself. On the basis of Mr Price's evidence, this was what happened with the SDLT Revenue determinations. Mr Avient notes that the conclusion of the Tribunal in *Kothari* at [73-75] was that the assessment is only made on the date which is stated on it even though the decision to assess and the permanent record may have been made at some earlier point.

82. Mr Avient submits that, on this basis, a hard copy of the Revenue determination must be in existence in order for the determination to have been made.

83. Turning to the evidence, Mr Avient submits that Mr Price, by his own admission, can give no first-hand evidence that any determination in relation to Mr Mashoof was made. He can only give evidence of the process and the record of the process.

84. As far as the process itself is concerned, Mr Avient suggests that there are numerous flaws in the process including:

(1) The written instructions do not cover a number of the parts of the process in respect of which Mr Price gave evidence such as collating the determinations into batches, the batches being checked by Mr Price, handed back to the relevant member of the team and then dispatched for posting.

(2) Mr Price's spreadsheet does not contain any fields to record whether these parts of the process were followed.

(3) No part of the process would identify whether a particular determination was mistakenly omitted from a batch.

(4) The fact that a document was sent to a printer does not mean that it was actually printed. For example, the printer could have jammed or somebody else could have picked up the document accidentally.

85. Mr Avient also cast doubt on the entry in Mr Price's spreadsheet showing that the determination had been issued given Mr Price's inability to say precisely when that entry had been made on the spreadsheet.

86. In summary, Mr Avient submits that any evidence that a determination was made is based solely on Mr Price's instructions and his expectation of what should happen based on those instructions. This, he says, is no guarantee that the determination was in fact made. The team were dealing with a large number of cases and human error can occur. The processes put in place would not necessarily prevent those errors from occurring.

87. Although the burden of proof is on HMRC, the Tribunal does not have to be certain that Mr Mashoof's determination was made by HMRC. It is enough that, based on the evidence, the Tribunal is satisfied that it is more likely than not that the determination was made.

88. Despite the possible flaws in the process identified by Mr Avient, I am satisfied that HMRC did make the determination.

89. Mr Price's evidence was that the hard copy file would be given to the case worker whose job it was to create the determination. The case worker would only update the spreadsheet to show that the determination had been issued once it had been produced and a copy placed on the file.

90. Mr Price clearly confirmed that he had reviewed the file and that it contained a copy of the determination. Although he could not say that his spreadsheet had been updated to show the issue of the determination on 1 July 2015, the fact that this was noted on the spreadsheet corroborates the fact that the determination had been made with an effective date of 1 July 2015. Mr Price's instructions to his team specifically required them to add to the spreadsheet "the date that we sent the determination" which I take to mean the date which was placed on the determination and the covering letter.

91. Looking at the test in *Kothari*, an HMRC officer had decided to make a determination and the details of the determination were recorded in some form of reasonably permanent record held by HMRC – in this case HMRC's hard copy file.

92. Both parties agreed that the time limit for making the determination was 12 August 2015, being four years after the effective date of the relevant transaction. There is therefore no doubt that the determination was made within the statutory time limit.

Service of the determination

93. Mr Avient submits that, although there is no specific time limit within which the determination must be served (see *Honig* at [250a]), there must still be some nexus or proximity

between the making of the determination and the service of the determination (see *Kothari* at [83-85]) and that, in this case, any such nexus was broken by the passage of time.

94. The earliest date on which service might have been effected was on 28 June 2017 when HMRC sent a copy of the determination to Mr Mashoof by email. Mr Street relies on the Stamp Duty Land Tax (Electronic Communications) Regulations 2005 in support of his argument that this constitutes service. In broad terms, the regulations allow HMRC to use electronic communications if the recipient has indicated that he consents.

95. The regulations apply to certain specific matters including the delivery of a land transaction return. Mr Avient points out that a Revenue determination is not a land transaction return and so the regulations are inapplicable. Mr Street however suggests that correspondence relating to a Revenue determination is "in connection" with the delivery of a land transaction return given that a Revenue determination can only be made where no land transaction return has been delivered.

96. Mr Avient also objects on the basis that the regulations only apply to "communications" and that this cannot have been intended to include the service of documents.

97. Mr Avient therefore submits that, if the determination was served at all, it was only served on 10 November 2017, being the date of the hearing of Mr Mashoof's application for permission to make a late appeal when a copy of the determination was handed to him personally by HMRC.

98. I accept Mr Avient's submission that the service of a Revenue determination is not within the scope of the Stamp Duty Land Tax (Electronic Communications) Regulations 2005. However, he did not refer me to any provision which actually prohibits HMRC from serving a document by email, even in the absence of enabling regulations. As he points out, one reason for not serving documents by email is that emails are not secure and can go astray. However, it is clear in this case that Mr Mashoof did receive HMRC's email of 28 June 2017.

99. Mr Avient also referred to the Civil Procedure Rules which contain specific provisions relating to service of documents by email. This is permitted subject to certain conditions being satisfied. However, the Civil Procedure Rules do not apply to the service of documents by HMRC.

100. There is in my view no reason why a document cannot be served by email. All that is required is that the document is sent to and is received by the recipient. Whilst s 84 Finance Act 2003 permits a document to be served by post, it does not require service by post.

101. Although my conclusion is that the determination was served on 28 June 2017, I still have to address the question as to whether this constitutes service for the purposes of paragraph 25(2) of schedule 10. It does not seem to me that the answer to that question is impacted greatly by the question as to whether service took place on 28 June 2017 or 10 November 2017. In either case, there was clearly a significant delay between the date the determination was made and the date on which it was served.

102. Mr Street accepts that, in *Kothari*, the Tribunal decided that a delay of three years between the making of the assessments and service of the assessments meant that there was insufficient proximity or nexus between these two events and so, although notice of the assessments had been served, this was not effective to comply with the requirement of the legislation that the assessments should be made and served.

103. However, he submits that *Kothari* can be distinguished on the basis that, in *Kothari*, the Tribunal found that the notices of assessment had never in fact been posted whereas HMRC's case is that the determination was posted to Mr Mashoof but was simply not received by him. As soon as they became aware in 2017 that he had not received it, they promptly sent him a copy. This, he argues, is more similar to the situation in *Honig* where HMRC posted notices of assessment which were twice returned undelivered and which were only successfully delivered on the third attempt. He admits that the gap between making and serving the determination in this case (either 2-2½ years depending on when service took place) is much longer than the time frame in *Honig* but submits that the relevant nexus between making and serving the determination still existed given that HMRC had no way of knowing that Mr Mashoof had not received the determination.

104. Although *Kothari* and the cases discussed by the Tribunal in *Kothari* all dealt with the making and service of assessments rather than determinations, I accept that the same principles apply. I note that paragraph 32 of schedule 10 sets out a specific "assessment procedure" in the case of assessments and that there is no equivalent provision in relation to a determination. However, the assessment procedure simply confirms that notice of an assessment must be served on the purchaser which is in substance no different to the requirement in paragraph 25(2) of schedule 10 that notice of a determination must be served on the purchaser.

105. Mr Street did not try to argue that there is no requirement for some sort of proximity or nexus between the making of a determination and the service of the determination. For the reasons set out in *Kothari* at [77-90], in my view he was right not to do so. It would make no sense if HMRC could validly serve a determination more than a year after it had been made given that the time limit for submitting a land transaction return to displace the Revenue determination runs from the date of the determination and not from the date the determination is served (paragraph 27(2)(b) schedule 10).

106. I have not made any finding of fact as to whether or not the determination was in fact posted to Mr Mashoof on 1 July 2015. The reason for this is that, even if it was, I do not accept that there was a sufficient nexus between the making of the determination and its service in order for the service of the determination to comply with the requirement of paragraph 25(2) of schedule 10.

107. Although HMRC did not receive any notice that its original letter of 1 July 2015 had been undelivered and so could not have known that Mr Mashoof had not received it, HMRC took no action at all between July 2015 and April 2017. Given that the time limit for appealing against the notice of determination is 30 days from the date when the determination is issued and that the reason given in HMRC's letter of 21 April 2017 for releasing the SDLT for collection was that no appeal had been received, it is extraordinary that HMRC did not follow up the determination much sooner than they did. Had they done so, they would of course have discovered much sooner that Mr Mashoof had not received the determination and would have been able to serve the determination by sending him another copy.

108. Like the Tribunal in *Kothari*, I cannot say precisely when the nexus or proximity between the making of the determination and its service is broken. It will depend in each case upon the facts. I would however venture to suggest that service of the determination more than one year after it is made may well break the nexus given that this could prevent the purchaser from submitting a land transaction return in order to displace the Revenue determination.

109. If, contrary to my conclusion, the Tribunal has jurisdiction to consider Mr Mashoof's appeal against the validity of the Revenue determination, I would, for this reason, allow his appeal.

Was the determination stale

110. Although it is unnecessary for me to do so given my decision that notice of the determination was not validly served in accordance with paragraph 25(2) of schedule 10, I should address one other argument put forward by Mr Avient on behalf of Mr Mashoof which is that, at the time the determination was made, it was stale.

111. Mr Avient is looking here at the period between the date when HMRC had all the information which it needed in order to make a determination (which in this case was 5 July 2012 when it wrote to the company asking for further information but received nothing in response) and the date when the determination was made, almost three years later.

112. Although there is a separate provision in paragraph 28 of schedule 10 allowing HMRC to make a discovery assessment where they discover that an amount of SDLT which ought to have been assessed has not been assessed, Mr Avient submits that the requirement for a discovery is implicit in paragraph 25(1) of schedule 10. This is because a Revenue determination can only be made where no land transaction return has been submitted. HMRC will therefore only be able to make a Revenue determination where they have somehow discovered that a transaction has taken place in respect of which they believe that SDLT should have been paid. Given this requirement for there to have been a discovery, Mr Avient argues that the same principles apply as in the case of a discovery assessment. This, he says, includes the requirement for an assessment to be made within a reasonable period after the discovery (see *HMRC v Charlton & Others* [2012] UKUT 770 (TCC) at [37], approved by the Court of Appeal in *HMRC v Tooth* [2019] EWCA Civ 826 at [60-61].

113. Mr Street stated that HMRC's position is that the concept of staleness does not exist in relation to discovery assessments. However, he accepts that the Tribunal is bound by the various decisions of the Upper Tribunal and Court of Appeal to the contrary.

114. In any event, he submits that the concept has no relevance to the making of a Revenue determination under paragraph 25 of schedule 10. The reason for this is that, whilst the making of a discovery assessment is conditional on HMRC discovering a loss of tax, the only condition for making a Revenue determination is that the purchaser has not submitted a land transaction return.

115. In my view, Mr Street's submission is clearly correct. Although, in some sense, HMRC must have made a discovery in order to have the information to make a Revenue determination, this is not a pre-condition to the making of a determination in the same way as it is for the making of a discovery assessment. The concept of staleness in relation to discovery assessments is controversial but in any event is clearly predicated on the use of the word "discover" in the legislation. As that word is not used in paragraph 25 of schedule 10, there is no room for any argument that HMRC must act promptly in making a Revenue determination once they find out about a transaction which might justify them in doing so.

CONCLUSION

116. The Tribunal has no jurisdiction to consider Mr Mashoof's appeal and so the proceedings are struck out in accordance with Rule 8(2)(a) of the Tribunal Rules.

117. 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.

ROBIN VOS:

TRIBUNAL JUDGE

RELEASE DATE: 25 MARCH 2020