IN THE TAXATION DISCIPLINARY BOARD
(TDB/2018/17)

Between

THE TAXATION DISCIPLINARY BOARD ("TDB")

Vs

David HANNAH
(Cornerstone Tax Advisers)
CIOT membership number 135863

DECISION

Present:

Dr Jonathan Page (Tribunal Chair, Lay member)

Mr Peter Cadman (Lay member)

Mr Ian Luder (CIOT member)

Mr David Hannah

Mr Julian Hickey – Counsel for David Hannah

Mr Jonathan Levy – Solicitor to David Hannah

Mr Roger Bindschedler – witness called on behalf of David Hannah

Mr David Yates QC – Counsel for the TDB

Mr Christopher Eames – Mr Yates' pupil

Mr Nigel Bremner (Clerk to the TDB)

(A loggist was present to record the proceedings)

HEARINGS

1. This matter was heard on 5th and 6th February 2020 in London. The Tribunal considered its decision on the charges on 17th February in camera. The parties were

informed of the Tribunal's decision in writing on 18th February. Sanction was considered in camera on 17th March 2020 following the receipt of full written submissions from both parties.

BACKGROUND

2. Mr Hannah has been a member of the Chartered Institute of Taxation ("CIOT") since 24th May 1988. Mr Hannah was also (and remains) a member of the Institute of Chartered Accountants of England and Wales (ICAEW). He was the founder and principal consultant of Cornerstone Tax Advisers ("CTA") throughout the relevant period. CTA was a specialist taxation advisory service dealing with Stamp Duty Land Tax ("SDLT"). This business was subsequently sold by way of an asset sale and the business was transferred on 2nd April 2008.

3. He faced three charges which are set out in full at Appendix 1. The relevant regulations that are applicable to the charges are contained at Appendix 2.

PRELIMINARY POINT

4. Before the charges were formally put to Mr Hannah, a preliminary point was raised on his behalf.

5. Mr Hickey submitted that the 'last incident' as set out in Regulation 3.3 of the TDBSR[1] occurred on 11th October 2011 when HMRC sent the complainant (Cyril Thompson of Ambitions Equestrian Centre Ltd ("AEC")) a 'discovery assessment notice' and a determination letter; because the complaint was not made until 9th April 2018 (more than 24 months after the 'last incident') the allegation was out of time.

6. It was necessary to determine, therefore, whether the 'last incident' occurred before or after 10th April 2016.

[1] Taxation Disciplinary Board Scheme Regulations 2014 as amended on 29th November 2016

7. Mr Hickey submitted that by 11th October 2011, there were clear signs that the ULRICA scheme would potentially be challenged by HMRC and therefore clear signs that Mr Hannah had a reason to complain about the advice he had received from Mr Hannah. He submitted that 11th October 2011 (or within 24 months thereof) was the point in time at which his complaint ought to have been made to CIOT or the TDB.

8. Mr Yates QC submitted that there were a number of later events (or 'incidents') which could have given rise to a complaint; an incident should not be restricted to the point in time when the complainant first had suspicions that the risk associated with the ULRICA scheme may have been mis-described by Mr Hannah.

9. He submitted that the problem with restricting the date to 11th October 2011 was that at this point in time it may not have been apparent to Mr Thompson that the scheme had been mis-described. He submitted that the letter dated 11th October 2011 came at the very end of the 4-year time period in which HMRC could raise a 'discovery assessment notice' and a determination. Because the letter was sent so close to this deadline, it may well have been seen by Mr Thompson as HMRC adopting a 'holding position', as opposed to the start of a concerted challenge to the ULRICA scheme by it. It is clear from Mr Thompson's subsequent behaviour in 2013 and 2014 that he continued to accept advice from CTA that the scheme would be successful.

10. Mr Yates submitted that Mr Thompson's settlement correspondence with HMRC in March and in May 2017, was also an 'incident' for the purposes of these regulations. May 2017 Mr Thompson had reached a settlement agreement with HMRC which involved him paying all of the stamp duty owed, plus interest.

11. On 2nd May 2017, Mr Thompson complained to Mr Hannah.

12. Having heard these competing submissions, the Tribunal determined that it was clear by May 2017 that the complainant had decided that the scheme presented an unacceptable risk and it had been mis-described by Mr Hannah in September 2007.

It was far from clear before 2017 whether it would have been apparent to Mr Thompson that the advice he received had potentially misled him.

13. The Tribunal concluded that the regulations would be frustrated if the making of a complaint was restricted in the way suggested by Mr Hickey; it was in the public interest for complaints to be considered if they were validly brought, when the complainant had formed the view that he had received advice about which he wished to complain. Here there was clear evidence of when Mr Thompson had formed that view, and that represented an 'incident' for the purposes of the regulations. The correspondence with HMRC in March and May 2017 were 'incidents' for the purposes of these proceedings.

14. The Tribunal then went on to consider the allegations themselves which were all formally denied by Mr Hannah at the start of the hearing.

THE STANDARD OF CARE TO BE EXPECTED OF A TAX ADVISOR

15. The case of Langsam and Beachcroft LLP [2012] EWCA Civ 1203 sets out the principles concerning a solicitor's duties where that solicitor had received advice from Counsel. Notwithstanding that Mr Hannah is a tax advisor and not a solicitor, the principles have application in his case. At paragraph 85 The Court of Appeal agreed with Roth J (the Judge at first instance). Arden LJ stated:

> *As to reliance on counsel, [Roth J] held that a solicitor does not abdicate his responsibility when he instructs counsel. He could thereafter advise jointly with counsel. Alternatively he must carry on in what [counsel for Langsam] calls a "whistleblower role". That means he must apply his mind to the advice received. The authorities showed that a solicitor will be liable if the advice from counsel is "obviously or glaringly wrong". This appeared from the three principles laid down by Taylor LJ in [two further authorities were then cited]. The three principles were as follows:*

"(1) In general a solicitor is entitled to rely upon the advice of counsel properly instructed

(2) For a solicitor without specialist experience in a particular field to rely on counsel's advice is to make normal and proper use of the Bar.

(3) However he must not do so blindly but must exercise his own independent judgment. If he reasonably thinks counsel's advice is obviously or glaringly wrong, it is his duty to reject it."

16. In Barker v Baxendale Walker Solicitors and another [2017] EWCA Civ 2056, (another appeal from Roth J at first instance), Asplin LJ said:

61. It seems to me that the following principles are likely to apply:

(i) The question of whether a solicitor is in breach of a duty to explain the risk that a court may come to a different interpretation from that which he advises is correct is highly fact-sensitive …

(ii) If the construction of the provision is clear, it is very likely that whatever the circumstances, the threshold of "significant risk" will not be met and it will not be necessary to caveat the advice given and explain the risks involved;

(iii) However, depending on the circumstances, it is perfectly possible to be correct about the construction of a provision or, at least, not negligent in that regard, but nevertheless to be under a duty to point out the risk involved and to have been negligent in not having done so …

(iv) It is more likely that there will be a duty to point out the risks, or to put the matter another way, that a reasonably competent solicitor would not fail to point them out when advising, if litigation is already on foot or the point has already been taken, although this need not necessarily be the case … ; and

(v) The issue is not one of percentages or whether opposing possible constructions are 'finely balanced' but is more nuanced.

…

> *64. In this case, legal advice was the very service which was being provided and which was being relied upon. There can be no separation between the advice and any appropriate caveats as to risk. They are one and the same. The lawyer as part of the legal advice he is providing, must evaluate the legal position and determine whether in all of the circumstances, he should advise his client that there is a significant risk that the view he has taken about the substantive matter in question may be wrong …*
>
> *65. When determining whether a reasonably competent adviser would have advised that there was a significant risk that a contrary view would be taken in relation to section 28(4) and that the post-death exclusion construction might well be correct, the relevant facts included the fact that this was a very aggressive tax avoidance scheme which was marketed to Mr Barker on the very basis that his family would be able to benefit from the property within the EBT at the date of his death free of Capital Gains Tax and Inheritance Tax, an outcome which might appear on the face of it to be too good to be true.*

LEGISLATIVE BACKGROUND TO THE ULRICA SCHEME

17. The background to the allegations concerned the use of a scheme that sought to avoid a liability of Stamp Duty Land Tax (SDLT) arising out of an interpretation of the provisions of the Finance Act 2003 (“the Act”), as originally drafted.

18. A scheme was devised whereby an unlimited company would be formed. That unlimited company would then be capitalised to the sum of the value of a property. The unlimited company would then contract to purchase the property, from the vendor. The Directors of the unlimited company would resolve that the unlimited company would reduce its share capital at the time of the completion of the purchase, by way of a distribution in specie of the property, to its limited company parent. Because this distribution was not a transfer of property for consideration (see section 45(3)(b)(ii)), SDLT was not payable. As a result, SDLT did not fall to be paid by the ultimate acquirer of the property (the limited Company).

19. The scheme (amongst others) was considered by HMRC to represent aggressive tax avoidance and so on 6th December 2006 at 2pm, The Stamp Duty Land Tax (Variation of the Finance Act 2003) Regulations 2006 SI number 3237 proposed a new section 75A to be inserted into the Act. This new section was to have immediate effect. A Pre-Budget Report (PBRN 17), accompanied the notice that made it clear that the purpose of the new section was to prevent the avoidance of SDLT, and various examples were given which appeared to include the ULRICA scheme. It was clear that the trend of cases and legislation aimed at countering tax avoidance significantly pre-dated September 2007.

20. Section 75A was subsequently amended, and 2 further sections (75B and 75C) were inserted into the Act, in addition to an amended 75A (by the Finance Act 2007, at clause 70). These 3 new sections were put before parliament in March 2007 and received Royal Assent in July 2007. However, the new sections were all given retrospective effect, from the 6th December 2006.

21. On 15th August 2007, HMRC released SDLT Technical News 5. Again, examples were given of the type of schemes, including the ULRICA scheme, that were the proposed targets of HMRC.

22. At the time with which these allegations are concerned, there is no suggestion that there had been any judicial or First Tier Tax Tribunal determinations of the correct interpretation of section 75A. W.T. Ramsay v IRC [1982] A.C. 300 provided extensive judicial guidance upon the correct approach that ought to be taken when considering the interpretation of legislation. This was further clarified in Barclays Mercantile Business Finance Ltd v Mawson [2005] STC 1 ("BMBF").

23. Since then, section 75A has been extensively litigated and the Tribunal was taken to three decisions of the First Tier Tribunal (Vardy Properties v HMRC [2012] SFTD 1398, Crest Nicholson v HMRC [2017] SFTD 481 and Geering v HMRC [2018] UKFTT 233 (TC)).

24. In <u>Project Blue Ltd v Revenue and Customs Commissioners [2018] 1 WLR 3169</u>, the Supreme Court considered the scope and effect of 75A. As a result of this litigation, it is now clear that Section 75A had the effect of preventing the ULRICA tax avoidance scheme from operating to avoid the incidence of SDLT.

EVIDENTIAL BACKGROUND

25. There was extensive written material before the Tribunal. There was a substantial 'Hearing Bundle', as well as an 'Authorities Bundle' that contained the relevant legislation, Technical Notes, Briefing Notes and authorities.

26. The non-contentious evidence can be summarised as follows:

27. At the relevant time, Mr Hannah was the sole Tax Adviser for a firm, Cornerstone Tax Advisors ("CTA"), which specialised in giving tax advice.

28. In August 2006, Mr Hannah commissioned an opinion from Counsel (Patrick Cannon) concerning the ULRICA scheme. Patrick Cannon was regarded as a leading authority on SDLT. That opinion, dated 9th August 2006, contained a generic view of how the ULRICA scheme could work. It included a number of caveats. The relevant passages are included below:

> *1. I am asked by my instructing solicitors to advise on the SDLT implications of purchasing a commercial property using the SDLT subsale structure discussed in conference on 8th August 2006. My advice is set out below but in summary, I confirm that subject to the matters discussed below, in my opinion no SDLT will be payable in relation to an acquisition that correctly implements the structure.*
>
> *…*
>
> *25. In my opinion the decisions of the House of Lords in [BMBF] suggest that this strategy is vulnerable to the Ramsay principle of positive*

purposive statutory interpretation. However, there are two reasons why in my opinion a successful Ramsay attack on the structure is unlikely to occur. First, from a practical perspective HMRC appear to be reluctant for whatever reason to invoke Ramsay in the context of SDLT. Instead, HMRC seem content to enact extra statutory anti-avoidance whenever they encounter "unacceptable" SDLT avoidance. Realistically, however, it should also be recognised that if HMRC were to attack this strategy through the Commissioners and the courts they might do so by asserting that section 45(3)(b)(i), Finance Act 2003 does not include consideration payable by ULC under the original contract without asserting the Ramsay principle…

26. Second, the SDLT statutory provision are perhaps less susceptible to a Ramsay approach than some other taxes because of the highly particularised drafting of the relevant provisions. In other words the rules are extremely detailed and drafted with very specific results in mind. It follows that such provisions are less open to the sort of sweeping purposive interpretation than some other taxes where Ramsay has been applied by the courts. In the context of the highly articulated drafting of section 45(3)(b)(i) Finance Act 2003 plus HMRC's published interpretation of it in example 3 …, ***it is my opinion more likely that HMRC would enact an anti-avoidance measure to deal with the strategy rather than challenge the strategy under Ramsay*** [Tribunal's emphasis].

29. In May 2007, during the Parliamentary passage of what became the inserted section 75A, Mr Hannah commissioned an opinion from Patrick Way (now QC), another leading authority on SDLT. This opinion was directed at a 'Husband and Wife' arrangement. In order to protect client confidentiality, some paragraphs of his opinion were put before the Tribunal, but redacted; others were not reproduced for the Tribunal at all. The relevant sections that were disclosed to the Tribunal are included below:

INTRODUCTION

1. The strategy described in this opinion is intended to facilitate the purchase of a property, free of … SDLT. The transaction is assumed to be of a residential property, and involves a two-step process being (1) the acquisition of the property by one spouse for full consideration which may be funded by a mortgage followed by (2) an immediate gift of the property to the other spouse. In my opinion, for the reasons mentioned at length and subject to the caveats contained herein, this transaction results in no SDLT arising.

…

4. I have considered [the] Finance Act 2003 s. 75A which could potentially tax a scheme of this nature specifically but in my opinion, for the reasons mentioned at length subsequently, s. 75A does not result in SDLT falling due. I draw attention, however, to the caveats which I make subsequently in relation to s. 75A.

…

30. The opinion then discusses the 'husband and wife' scheme. It then continues:

17. Consequently, having regard to s. 45(3) in my opinion there is no SDLT to pay in relation to the transaction between the vendor and the husband on the one hand, nor in relation to the transaction, effected by gift, between the husband and the wife. So, in my opinion, and subject to the caveats found in this opinion, the entire transaction takes place free from SDLT.

18. It is of course the case that the position is not clear beyond all doubt because some commentators have said in similar circumstances, that the consideration deemed to be given by the wife in relation to the transfer of rights effected by deed of gift does extend to so much consideration under the original transaction as is to be given by the husband. If this were correct then

the scheme would not work because there would be SDLT to pay after all on the balance of the consideration payable after exchange of contract between the vendor and the husband.

31. The opinion then discusses section 75A in detail, in the context of the "planning now under review" (i.e. the husband and wife situation). He summarises, at paragraphs 33 and 34 of his opinion, that there is no consideration for the property passing to the wife (as a gift) and therefore no SDLT to pay.

32. The next paragraphs are of some import:

> *FAULT LINES*
>
> *35. It is, of course, unlikely that this state of affairs was intended by the draftsman. So anyone choosing to adopt the strategy should be put on notice that the scheme is not guaranteed to be successful. Although I repeat that it is my opinion, particularly when adopting an intellectually honest approach to the legislation, that the steps envisaged should result in no SDLT being due.*
>
> *36. It is, however, appropriate to draw attention to the following "fault lines" which I have identified.*
>
> *37. First, as mentioned, the legislation produces a result which is unlikely to have been intended.*
>
> *38. Secondly, it is clearly a "fault line" that in [the] definition of "scheme transactions" there are included items which are clearly land transactions such as a sub-sale. It is likely to be the case that the draftsman did intend to catch therefore a sub-sale and yet the precise wording of the legislation, on my analysis, operates to mean that a subsale is not chargeable in the way in which it was presumably intended. So a court might "do damage to the legislation" to make it work.*

39. Thirdly, it may be that a court would say that the relevant wording was just a mistake and that a court might determine to correct the mistake in its judgment in whatever way it thought fit.

40. Finally as already mentioned and very importantly, the legislation is in draft form and susceptible to retrospective change prior to Royal Assent.

41. Accordingly anybody entering into the scheme should be aware of these fault lines.

WARNING

42. It has to be appreciated that notwithstanding my honest opinion mentioned above, this is a scheme and it is designed exclusively to reduce the rate of SDLT from 4% to nil in circumstances where undoubtedly, notwithstanding the way in which I have interpreted the legislation, HMRC would be likely to say they never intended it to apply to this situation under review. Accordingly this is not a scheme for the "faint-hearted". It is, by contrast, a scheme for people who are prepared to enter into a tax avoidance scheme with their eyes open. The scheme must be disclosed in the returns that are made in a thoroughly open and candid fashion.

CONCLUSION

43. Notwithstanding the above I repeat that in my opinion the better view is that the planning does result in no SDLT being payable.

GENERALLY

44. My lay client is Cornerstone Tax Advisors. Whilst this opinion contains an honest expression of my views, I undertake no duty of care to any third party

who may come to read it. Any such third party should take his own independent advice in the light of his personal circumstances.

33. On 18th July 2007 Mr Hannah was referred a client of Hazlewoods Accountants, Cyril Thompson, who was seeking to purchase a riding stables called Hillside Stud.

34. On 8th August 2007, Chris Mattos, the Tax Manager at Hazlewoods emailed Mr Hannah stating that:

    The client has come under increased pressure to exchange on Friday, this has got a little aggressive as the vendor is close to Bankruptcy.

35. On 9th August 2007 both Ambitions SD Unlimited ("ASD") and AEC were formed. Cyril Thompson was the point of contact for ASD and AEC although Mr Hannah did not personally meet Mr Thompson at any stage.

36. On 16th August 2007, ASD entered into an agreement to purchase Hillside Stud from the vendor (Mr Williams).

37. Mr Hannah commissioned a further opinion from Patrick Cannon. This opinion is undated, however, it cannot have pre-dated 15th August 2007 as it refers to HMRC's 'SDLT Technical News 5' of the same date. Mr Cannon's opinion was directed towards a specific case and so it was not before the Tribunal in its entirety. Extracts taken from the opinion were put before the Tribunal. The relevant paragraphs (from those that were before the Tribunal) are included below:

Anti-Avoidance Legislation

12. The Stamp Duty Land Tax (Variation of the Finance Act 2003) Regulations 2006 SI number 3237 introduced a new anti-avoidance rule effective from Wednesday 6th December, 2006 in the form of a new section 75A Finance Act

2003 which was intended among other things to block SDLT sub-sale schemes of the type considered herein. Modified and expanded provision in the form of sections 75A to 75C … were introduced by the Finance Act 2007 with retrospective effect back to 6th December 2006. However, in my opinion the anti-avoidance rule will not apply in the circumstances of the proposed transaction for the reasons I shall explain below.

[Paragraph 13 is heavily redacted]

38. Paragraphs 14 to 17 contain a detailed technical argument setting out how Mr Cannon was of the opinion that the new section 75A had failed to have had the effect of amending section 45 to include all sub-sale transactions and that there would be sub-sales that would continue to qualify for the relief available where completion or substantial performance of both sub-sales occur at the same time. Paragraph 18 then continues:

18. The issue will be identifying which sub-sales are caught by the new rule and which are not. This task is not helped by the examples given in the current HMRC official guidance contained in SDLT Technical News issue 5 of 15th August 2007, as to when in HMRC's view, the anti-avoidance rule will or will not apply…..

39. It is clear from paragraphs 18 to 23 of Mr Cannon's opinion, that he is of the view that the guidance notes were unclear and that section 75A did not cover all sub-sale transactions. He wrote this in respect of the guidance:

23. … The status of official guidance as to the meaning of the statutory wording which is at variance with the actual meaning of the statutory wording concerned was considered in detail by Lord Steyn in his speech in R (Westminster City Council) v NASS [2002] 4 All ER 654 at 658 where he held that the meaning of the statutory wording prevailed over the official guidance.

24. Accordingly, in my opinion (but subject to the caveat below) the transaction contemplated here will not be caught by section 75A. If the original sale transaction is not part of 'the scheme transactions' then any consideration paid for that transaction cannot be treated as consideration for the notional land transaction and is ignored. The caveat mentioned above relates to the <u>*Ramsay*</u> *principle of statutory interpretation by the courts. It has been said that the new anti-avoidance rule is HMRC's attempt to write a statutory Ramsay principle into SDLT legislation. It is certainly true that the new rule appears to have eschewed the traditional approach of a highly targeted statutory provision …*

40. On 3rd September, Mr Hannah sent AEC two letters, to which these charges relate. They are both entitled ENGAGEMENT LETTERS and both are signed by Mr Hannah. It is these letters that form the basis of all of the TDB charges.

41. Letter 1 (the ADVICE letter) includes the following passages:

I understand that you wish us to assist in mitigating the SDLT on your proposed purchase.

...

I understand that the transaction needs to proceed as soon as possible, and as a result, it may not be possible to meet you in person prior to implementing the strategy, but I will, in any event, be available to discuss this letter and the planning via telephone.

The tax mitigation planning called "ULRICA" may best be described as follows:

[The scheme is then described]

Counsel has confirmed that the sub-sale provisions in section 45 FA 2003 provide that the original contract (purchase by the unlimited company) is to be disregarded, even if completed, where this is sub sold or assigned "at the same time and as in connection with "the performance of the sub-sale contract (the distribution of the assets).

Accordingly, the original contract purchase falls to be disregarded as it is not a land transaction. The chargeable consideration for the secondary contract (the distribution in specie) is nil. Accordingly no SDLT is payable on the purchase.

To summarise, the tax risks involved are that HMRC may seek to litigate to challenge this strategy (although in our experience they have not yet done so) and that there is a probability, albeit a low one, that they may be able to successfully challenge the strategy using the principles developed in the tax avoidance case of IRC v. Ramsay or under current anti avoidance legislation. Whilst this is a low probability I am duty bound to draw this to your attention, however, the downside risk for yourselves is merely that you would end up paying the SDLT that would have been due plus a small amount of interest at the official rate calculated from the date the tax should have been paid to the date it actually was paid. In our view the probability of the penalties being applied are very small. In the event that HMRC were to successfully challenge the arrangement the balance of our fee would be waived.

Finally, I am obliged to bring to your attention the possible reputational risk that you run with the HMRC in implementing any form of aggressive tax planning. Your involvement in legal avoidance may cause a deterioration in your relationship with HMRC and may make your tax affairs subject to close scrutiny in the future beyond the remit of SDLT. If you are at all uncomfortable with the thought of this you should not proceed with the planning.

I hope that the above warnings haven't made you unduly nervous – they are something that I am bound to give under my code of professional ethics.

….

42. Letter 2 (the TERMS letter) includes the following passages:

Our Services

….

We do not guarantee that we will be able to mitigate the entire liability that would otherwise arise but we will make our best endeavours to do so. You should be aware that entering into a Stamp Duty Land Tax mitigation arrangement may result in your affairs being scrutinised more closely by the Stamp Office.

…

Fees

We agree to provide the services set out above for a total fee of £12,000 (plus VAT), which will be rendered as follows:

a) A fixed fee of £4,000 (plus VAT) on implementation of the strategy due and payable on presentation

b) The balance of the fee up to the amount specified above which will be payable nine months following submission of the SDLT1 return or on successful conclusion of any HM Revenue & Customs enquiry.

Our Advice

…

Our advice will be based on our understanding of the statute, case law and practice as at the time of its issue and is conclusions may, therefore, be affected by any subsequent changes in such law and practice.

A summary of the overall conditions, steps and associated risks will be/have been supplied to you. You are strongly advised to consider these before entering into any tax planning arrangements.

…

43. A copy of the TERMS letter, signed by 'C. Thompson' and dated 11th September 2007 was faxed back to CTA.

44. The scheme was then put into place and AEC acquired sufficient shares in ASD to cover the value of the property. The directors of ASD resolved that the company would reduce its share capital by way of a distribution in specie of the property.

45. The purchase was completed on 15th October 2007. The Land Registry title number BK277416 shows AEC as the final owner of the property. An SDLT1 form was filed for the transaction between the Vendor and ASD. No SDLT1 form was filed for the second transaction. No discovery assessment was issued within 9 months of completion and so the balance of the fee of £12,000 + VAT was paid by AEC to CTA.

46. HMRC issued a discovery assessment notice dated 11th October 2011 to ASD, as well as a determination to AEC Ltd (4 days before the statutory deadline) and started the process by which the use of the scheme and the avoidance of SDLT was ultimately challenged. Initially AEC, through Mr Thompson, resisted HMRC's request for payment of the SDLT.

47. On 16th January 2017, HMRC wrote to AEC and set out their view concerning the discovery assessment and their determination. This was reviewed and re-affirmed by March 2017. In a letter dated 30th May 2017 HMRC confirmed their acceptance of AEC's offer to pay the full amount of SDLT plus interest. As part of the settlement, HMRC did not impose a penalty.

LIVE EVIDENCE BEFORE THE TRIBUNAL

48. Mr Hannah adopted his two written statements and gave evidence to the Tribunal. He said that he had advised clients about the ULRICA scheme prior to December 2006. He said that the tax environment was wholly different to the anti-tax avoidance environment that developed after 2007.

49. In relation to the ULRICA scheme, prior to 6th December 2006, Hr Hannah had relied on the opinion drafted by Patrick Cannon (dated 9th August 2006). As a result of that opinion, he had considered that the scheme represented a 'low risk'.

50. Mr Hannah stated that he had given a pack of documents to Hazlewoods. This pack included a 2-page document called 'ULRICA FAQs', a 2-page entitled 'Project ULRICA – SDLT Mitigation', a 2-page document called 'The Who and Why of SDLT Planning – A Guide to the Methods of Cornerstone Tax', a 2-page document called 'SDLT and Tax Planning', a 3-page document entitled 'TAX PLANNING – THE CLIENT'S CONCERNS' and a 2-page document called "WHAT ARE THE RISKS?". This last document was dated 10th March 2006.

51. He accepted that the entire pack of documents was drafted prior to the proposal to insert section 75A into the Finance Act 2003 on 6th December 2006 and that he had not updated or changed any of the pack of documents afterwards. He said that he had read PBRN 17, HMRC's Technical Note and SDLT Technical News 5 when they had been published.

52. The pack of document contained the following sections that were relevant to the question of risk:

    a. Within the ULRICA FAQ's document:

       6. Do I have any liability or exposure after nine months? Providing the planning steps are followed, particularly the recommendations of Counsel on the submissions of Returns, then there should be no realistic prospect of an Enquiry being opened after nine months. However, following the decision in

Langham v Veltema the possibility of the Revenue attempting to open an Enquiry after the nine months cannot be ruled out. Counsel has advised us that they believe the probability of the success of such a challenge is remote on technical grounds and should this be attempted we will resist it on your behalf.

b. Within the 'Project ULRICA – SDLT Mitigation' document:

Technical Analysis

The sub-sale provisions in section 45 FA 2003 provide that the original contract (purchased by the unlimited company) is to be disregarded even if completed where this is sub sold or assigned "at the same time and as in connection with" the performance of the sub-sale contract (the distribution of the assets BC). Accordingly the original contract purchase wants to be disregarded as it is not a land transaction. The chargeable consideration for the secondary contract (the distribution of specie) is nil. Accordingly no SDLT is payable on the purchase.

c. Within the 'The Who & Why of SDLT Planning – A Guide to the Methods of Cornerstone Tax' document:

Who are Cornerstone Tax Advisors?

Cornerstone Tax Advisers was established in March 2006 by David Hannah ACA CTA who decided to form a practice specifically focussed on property taxes planning and, more immediately, in his own specialist area of SDLT planning. David is an experienced Chartered Accountant (1984) and Chartered Tax Advisor (1987) who has, since the introduction of SDLT, specialized in producing planning strategies for the mitigation of this tax, and bespoke advice, for clients of Solicitors, Accountants, and Banks across the UK.

…

So how do you plan SDLT?

…

A careful study of the provisions of part 4 of Finance Act 2003 reveal that, far from being a well drafted and thorough piece of anti-avoidance legislation (as advertised by HMRC), there were in fact a considerable number of drafting defects in the statute. These centred either on unwitting omissions from the charging clauses, unwitting inclusions in the exemption clauses, and the law of unintended consequences applying to certain of the calculative charging provisions.

Cornerstone Tax Advisors has developed and implemented a number of strategies based on these defects since 2003, and continues to explore new ways of producing legal tax avoidance structures that will successfully mitigate SDLT.

What Planning can achieve

As a result of three years work and well over 250 cases implemented Cornerstone is now able to offer SDLT Planning strategies both involving and not involving the vendor. These strategies are generally designed for specific client groups, i.e. individuals, married couples, co-habiting couples, partnerships, companies and pension schemes. Most planning implementations need to take place pre-exchange, but can be implemented post exchange if re-issue of contracts not problematic. Reductions of 85% to 100% of the tax can be achieved with a high probability of success.

d. Within the 'SDLT and Tax Planning' document:

How Binding is the Planning?

In order to ensure that an enquiry cannot be raised after nine months due to fraudulent activity, your tax advisor gains a favourable opinion from counsel.

As you sought advice from the bar regarding the strategy, you cannot be accused of fraud or negligence, so an enquiry cannot be raised after nine months. However, counsel will not give favourable opinion if they believe the planning will not stand up in a court of law if challenged.

So, the opinion serves to state that, the planning is both legitimate and will, in all probability, also succeed if challenged in court.

Therefore after expiry of the enquiry window the planning is successful and the SDLT paid is the required amount.

Potential Loss: Through Enquiry?

If HMRC make a successful challenge (although unlikely in the opinion of counsel), you would have to pay the SDLT that would be charged without planning and any interest for late payment.

e. Within the 'TAX PLANNING – THE CLIENT'S CONCERNS' document:

This guidance note is intended to assist you in answering clients' questions about the risks, rewards, upsides and downsides and general background of tax planning services under current UK legislative environment.

What is Tax Planning?

…

Tax planning might be considered as getting the best possible deal available inside the law. It is a highly specialised area mainly practised by specialised firms of tax consultants and members of the bar in the UK. Tax avoidance

may be deemed unacceptable by the Inland Revenue. Recent public pronouncements by the government have branded tax avoidance in certain circumstances as "immoral" but this has largely been a propaganda campaign by the government to prevent taxpayers doing what they are permitted to do under current UK legislation.

How Is Tax Planning Different From Tax Evasion?

Tax planning uses techniques which are, based on the advice of Counsel, inside the law. Quite often these tax planning techniques are viewed by HMRC as being acceptable. Sometimes they are not. The acceptability or otherwise to HMRC of a particular piece of tax planning does not affect its legality and indeed a system exists for resolving disputes over technicalities or interpretations of the law which, ultimately, end up with a question being referred to the House of Lords or indeed the European Court.

If you are involving yourself in any programme of tax planning then you will only do so on the advice of a tax advisor, accountant or other suitably qualified professional. Should the planning be deemed novel or aggressive it is quite normal for your advisors to seek the advice of Counsel … and the mere fact of taking Counsels advice and, assuming Counsel advise that the proposed approach is legal, means that you cannot be committing tax fraud.

However, the mere holding of a Counsel's opinion does not necessarily mean that the advice is guaranteed to succeed. Counsel have merely expressed their view that, on the balance of probabilities, the proposed planning should succeed before the court if challenged.

f. Within the "WHAT ARE THE RISKS?" document:

What Happens If The Inland Revenue Challenge This?

…

Most cases are decided at Special Commissioners level …. However it is open for HMRC or the taxpayer to take the matters to a higher court. Both sides take cases all the way to the House of Lords where they feel there is an important point of principle which needs clarification… The other avenue open to the government in the event of a loss is simply to make a parliamentary statement and then amend the law in the next budget.

Both these routes have been used extensively by the government and taxpayers over the years. Recent decisions in the House of Lords …. have gone in favour of the government but others … have gone in favour of the taxpayer. When cases have been referred to the European Court of Justice … the decision has gone in favour of the taxpayer in the vast majority of cases.

CONCLUSION

Tax planning is not for everyone. Persons of a nervous disposition, who are relatively unsophisticated in their Tax affairs, or hold strong views about the morality of Tax Planning are almost certainly best advised not to proceed with it.

For those persons who are, or have been, used to taking measured risk and judging this against likely returns then Tax Planning is another judgment call and they are more than likely to proceed.

Simply put you cannot predict which potential client will, or will not, be one who will proceed, but a good knowledge of their background and attitude to life will give a strong indicator of their likely approach.

…

10 March 2006

53. Mr Hannah said that he had not updated this pack of documents to include what he said were “complicated explanations” about section 75A in circumstances where it would “just lead to further explanations”. He said that in his view there was no need to so do.

54. In short, he said that his view as to risk had not changed and that, after the announcement to implement section 75A, there remained a ‘low’ risk, albeit a slightly increased one. He said It may have increased the probability, but it would still have been within the bracket of “low”. When asked, “What did you mean by low probability?” he said: “I meant less than 51%, 20 to 25% at most”. He said that in light of the opinion Cornerstones had received from counsel, they did not think that this technical material needed to be brought up-to-date.

55. The Tribunal also heard evidence from Roger Bindschedler, who was a solicitor who specialised in taxation and in particular SDLT. He was as a member of the SDLT Group (a group of practitioners who would communicate in order to bounce ideas off one another). He described his “shock” reaction to the introduction of section 75A in the pre-budget briefing in December 2006. He said: ‘When it first came out, the reaction of myself initially was “Back Off!”, but then we looked at it.’

56. Mr Bindschedler said that a round robin e-mail was circulated and in early 2007 members of the SDLT Group had had 3 meetings with Crispin Taylor (HMRC’s head of SDLT) to discuss the legislation. He said that the group ‘took apart the legislation’. He also said that “The Revenue were not going to ‘OK’ or formally approve the ULRICA scheme – they were applying their interpretation to defeat it”.

57. Mr Bindschedler gave evidence that the company he then worked for stopped offering the scheme when section 75A was initially proposed. The pre-budget proposals came as a complete shock; and then, when they re-started offering the scheme, they only offered it to “big commercial organisations”, on an “eyes-wide-open” basis.

58. Mr Hannah accepted that the arrival of section 75A was “a big step change” and it was a problematic issue.

59. Mr Hannah sought a further opinion, this time from another leading authority on SDLT (Mr Patrick Way) in respect of a ‘husband and wife’ case in May 2007. He accepted that the facts were different, but considered that the opinion had application insofar as the effect of section 75A was concerned generally.

60. Mr Hannah said that it was not his practice to hand out counsels’ opinions to his lay clients but he would have given the opinions to Hazlewoods along with the full pack of documents. Mr Hannah said that he expected Hazlewoods to pass on the pack of documents to clients. He said that Mr Thompson might have seen the opinions of counsel, but would not have been given a copy.

61. He accepted that he had no knowledge of what discussions took place between Hazlewoods and AEC and Mr Thompson but he had assumed that Hazlewoods had gone through the FAQs and other advisory documents with the client. He had not given Hazlewoods any formal instructions as to what advice had to be given to the client.

62. Patrick Cannon’s second opinion (undated, but post 15th August 2007) had been obtained by Mr Hannah. Mr Hannah’s solicitor (Jonathan Levy) had contacted Mr Cannon by email in January 2020, however Mr Cannon declined to provide a witness statement, on the advice of his senior clerk. Further, when asked for disclosure of documents relating to the ULRICA scheme, Mr Cannon did not respond. In any event, the date of that opinion remained unclear at the time of the tribunal hearing. It was unclear whether this opinion existed at the date the two letters (the ‘ADVICE’ and ‘TERMS’ letters) were drafted and sent to AEC on 3rd September 2007.

63. In any event, at that time (August 2007) Mr Hannah said that he was in Lincolns Inn weekly or fortnightly and so would regularly speak to Patrick Cannon “over coffee”. He said that whether this opinion was received before or after the date that The

Letters were drafted, it reflected Mr Cannon's opinion as to risk at that time of The Letters. Mr Cannon's was an opinion that he felt entitled to place great reliance upon, as Mr Cannon had written several respected books and articles on the subject and was recognised as a Stamp Duty expert in his field.

64. Mr Bindschedler confirmed that both Mr Cannon and Mr Way were pre-eminent in their fields. He confirmed that from mid 2007 he had worked with Mr Hannah and was aware that Mr Hannah would frequently be in Lincolns Inn and at Mr Cannon's chambers.

65. Mr Hannah said he placed reliance on the informal opinions of other tax practitioners, who all shared a general view as to the low level of risk presented by the introduction of section 75A, although there was no evidence, other than Mr Bindschedler's, from any other tax practitioners. He said that he had had discussions during the period about what weight you could give to Revenue announcements, whether there was a probability of success.

66. Mr Hannah was also of the view that Mr Thompson was financially sophisticated because he was the director of a limited company (AEC was to be run as a business by his daughter) and would therefore have his own appreciation of the risk inherent in the scheme. He accepted that he had no reason to think that Mr Thompson had any specialist knowledge of SDLT, the case of Ramsay or the introduction of Section 75A.

67. Mr Hannah relied on the delay in Mr Thompson making his complaint in support of his contention that Mr Thompson had not thought that the Advice had shortcomings.

68. Mr Hannah was asked extensively about the two Letters. The Letters had only been "slightly changed" from the versions that were used prior to December 2006. He said that the two letters were template letters and were not specifically designed for

AEC. He conceded that identical letters were sent to all other prospective clients at around that time. He said that at this time, CTA had 40 to 50 clients per week.

69. He said that he had not mentioned section 75A or the case of Ramsay (and the doctrine of purposive interpretation) because that may have 'befuddled' ordinary people, including the client. The letters had been drafted in an effort to boil the advice down in a way that was understandable. He said that he had not repeated Patrick Way's 'Fault Lines" for similar reasons.

70. Although Mr Thompson had been referred to CTA by Hazlewoods, Mr Hannah accepted that he had responsibility for advising on 'Tax matters', as Hazlewoods had only been paid a fee of £500 + VAT for advising the client. Mr Hannah was to be paid £12,000 if the scheme succeeded and £4,000 if HMRC launched a discovery enquiry within 9 months of the property transactions. He said that if the client did not take CTA's advice and walked away from the proposed scheme, CTA would take no fee at all.

71. He stated that AEC had paid £12,000 + VAT, as the scheme had not been challenged within 9 months of the property transaction. He had not subsequently refunded the fee, once a challenge had been instigated by HMRC in 2011, and the SDLT (plus interest) had been paid in 2017.

THE TRIBUNAL'S DECISION

72. The Tribunal reminded itself that the TDB had the burden of proving its case to the civil standard and that Mr Hannah did not have to prove anything.

73. The Tribunal took account of Mr Hannah's near-unblemished history (he disclosed that he had received a fine resulting from the firm's administrative failure to submit an anti-money laundering return on time. This was disregarded by the Tribunal).

74. Mr Hannah was an experienced and well-respected Tax Adviser. Mr Bindschedler wrote in his witness statement in positive terms about Mr Hannah's integrity and professional standing. The Tribunal took Mr Hannah's positive character into account, both in terms of his propensity not to breach Regulations and also in terms of his credibility as a witness.

75. It was clear that section 75A was proposed in order to stop schemes such as the ULRICA scheme.

76. The Tribunal sought to put themselves in the position of a reasonably competent tax advisor armed with the information that was readily available at the time the letters were drafted, 3rd September 2007. At that time the new proposed legislation could not have been litigated.

77. Further, there was nothing in the Tribunal's view to give rise to an inference that Mr Thompson was experienced in tax affairs.

78. In those circumstances, the Tribunal were of the view that the ADVICE letter should have included:

    a. A reference to section 75A, which had been recently proposed and enacted,
    b. That HMRC in PRBN 17 (6th December 2006) and HMRC's Technical Note 5 (15th August 2007) had stated their aim was to prevent schemes of this type
    c. A distillation of the "Fault Lines" identified by Patrick Way,
    d. A distillation of the caveat mentioned in the (undated) opinion of Patrick Cannon
    e. The fact that the new legislation had never been tested
    f. That the risk involved in entering into this scheme was at best unknown because the scheme was being specifically attacked by HMRC

79. The Tribunal noted the contention in the defendant's closing submissions (paragraphs 56-58) that the FTT and the courts do not attribute weight to HMRC

"guidance" when interpreting legislation. However, section 75A was very new legislation, and in the absence of any Judicial interpretation, a reasonably competent tax practitioner should have taken note of the published views of HMRC, when advising a client of the amended risk profile of the proposals.

80. The ADVICE letter stated that "HMRC may seek to challenge this strategy (although in our experience they have not yet done so)". In so doing, the letter would have provided reassurance to Mr Thompson that there was a relatively low level of risk inherent in adopting the scheme.

81. The ADVICE letter also stated that there was a low risk probability, which (according to Mr Hannah) was a summation of the advice he had received from Counsel. Having read the opinions from Counsel, the Tribunal did not agree with that risk assessment, especially when those opinions were viewed against the backdrop of the HMRC publications.

82. In addition, use of the terms in the final three paragraphs of "I am obliged to bring to your attention" and, "they are something that I am bound to give under my code of professional ethics" had the effect of further undermining the limited warnings contained in the letter. In the Tribunal's view, adequate risk warnings should have been a far more prominent feature of the ADVICE letter.

83. The Tribunal considered that the TERMS letter failed to set out which firm (Hazlewoods or CTA) was advising upon which aspects of Mr Thompon's affairs. Mr Hannah conceded in evidence that he was instructed as the tax advisor, and that Hazlewoods were offering far more limited tax planning advice. Where the TERMS letter referred to the client being made aware of the 'associated risks' that will be/will have been brought to Mr Thompson's attention, the PACK had not been updated to include any reference to section 75A. In addition, Mr Hannah had no way of knowing whether the opinions of Messrs Way and Cannon had actually been shown to Mr Thompson at any stage.

84. The Tribunal was of the view that the pack of documents was too comforting and encouraging in favour of the scheme, noting in particular the "high probability of success" mentioned in the "WHO & WHY OF SDLT PLANNING – A GUIDE TO THE METHODS OF CORNERSTONE TAX". Again, there was no mention of the fundamental alteration to risk created by HMRC changes and their untested nature. Mr Hannah's reasons for not including the section 75A changes ("they would be befuddling for the client") were not ones that the Tribunal accepted; the pack was very technical in parts and there was no logical reason for its non-inclusion.

85. The Tribunal was concerned that the ADVICE and TERMS letters, as well as the PACK of documents had not been significantly updated to take account of the seismic shift in risk occasioned by the introduction of section 75A and the 'fault lines' expressly included in Mr Way's May 2007 opinion.

86. The Tribunal also noted the evidence of Mr Bindschedler, who said he had stopped advising upon the scheme immediately after the 6th December publication and when he re-started, he only offered the scheme to commercial clients on an "eyes-wide-open" basis.

87. In the context of the Tribunals conclusions above, the Tribunal considered the three charges in turn.

88. Charge 1 concerned the adequacy of the advice about the routes and means of challenge to the ULRICA scheme by HMRC, including the proper interpretation of s. 45 and the use of s. 75A of the Finance Act 2003. The Tribunal found that this was a matter that ought to have been advised upon by Mr Hannah, in breach of PRPG Rules 5.6.1 to 5.6.3, including specifically "the technical complications presented" (5.6.1) and "the need to seek other professional advice" (5.6.1). Having appropriately sought advice from specialist counsel, Mr Hannah failed to adequately to pass on the clear 'fault lines' guidance received in this regard.

89. Charge 2 concerned the failure to highlight the fact that the ULRICA scheme had been expressly targeted by HMRC with the introduction of s.75A as was apparent

from both the Pre-Budget Report (PBRN 17) and HMRC's Technical Note (both being released on 6 December 2006). The Tribunal was entirely satisfied that there had been such a failure by Mr Hannah which breached PRPG Rules 5.6.1 to 5.6.3 and specifically 5.6.3. It did not matter whether the intended effect of the new legislation was as desired by HMRC, the requirements of the PRPG state that the client needs to be informed of "the technical complications presented" (5.6.1), "the existence of authorities and precedents" (5.6.1), "the risks associated with the advice" (5.6.2), and "… the relevant taxation legislation and the practice of HMRC…" (5.6.3).

90. Charge 3 concerned the failure to properly assess and communicate in the ADVICE letter the risk of a successful challenge by HMRC. In particular, to describe such a risk as a "low probability" was not an assessment that any reasonably competent tax advisor could have reached in the circumstances. The Tribunal was entirely satisfied that the risk must have significantly increased after the proposed introduction of section 75A. This failure by Mr Hannah to adequately reflect the risk represented a breach of PRPG 5.6.1 to 5.6.3. It specifically included a failure to take account of the "the tax sophistication of the taxpayer" (5.6.1), "the risks associated with advice" (5.6.1) and "the intended practice of HMRC" (5.6.3). It mattered not whether HMRC had successfully targeted the ULRICA avoidance scheme in the past, or would do so in the future.

91. In the circumstances, the Tribunal found all three charges proved.

SANCTION

92. The Tribunal took into account the written submissions of both parties, as well as the sanctions guidance.

93. These charges related to inadequate client service; the Tribunal was satisfied that Mr Hannah had not behaved dishonestly.

94. Mr Hannah had told the Tribunal in evidence that he had provided the same advice to up to 40 or 50 clients each week in September 2007. It follows that his advice in

this case cannot be regarded as isolated, but the Tribunal was mindful that it was concerned with only one complainant for the purposes of sanction.

95. The loss to AEC was £12,000 in fees in addition to the interest charged to AEC by HMRC of £11,828 because of their late payment of the SDLT that fell due in 2007.

96. (It is right to note that AEC had the use of this interest between 2007 and May 2017 so this head of loss is not accurately quantifiable. In addition, the Tribunal recognised that it could not possibly know whether AEC would have behaved differently had Mr Hannah's advice more accurately reflected the risk that existed in September 2007).

97. The Tribunal concluded that the relevant aggravating features concerning the charges were these:
    a. This was not a minor misjudgement by Mr Hannah but a failure to appreciate the way in which HMRC were seeking to prevent tax avoidance schemes like the ULRICA scheme that features in this case.

    b. Mr Hannah's advice to AEC appeared to the Tribunal to be contrary to the spirit of the Opinions that Mr Hannah had relied upon. For example, Mr Way's 'fault lines' were ostensibly ignored when Mr Hannah advised AEC of the risks and potential risks inherent in adopting the scheme; he had ignored Mr Way's advice that "anybody entering into the scheme, should be aware of these fault lines".

98. In short, the Tribunal were of the view that Mr Hannah's advice fell well below the standard expected of a reasonably competent chartered tax adviser.

99. Mr Hannah told the Tribunal in evidence that he remained of the view that his advice was accurate, notwithstanding the Project Blue Supreme Court decision in 2018. In this way, the Tribunal was of the view that he lacked insight into his failings at the time that the advice was given, and has continued so to do.

100. In the Tribunal's view, the relevant mitigating feature was Mr Hannah's effective good character, over many years of professional practice and regulatory membership both before his advice to AEC in September 2007 and thereafter.

101. In addition, Mr Binschedler spoke highly of Mr Hannah in evidence to the Tribunal.

SANCTION IMPOSED

102. The Tribunal reminded itself that the purpose of sanctions was not simply to punish the member, although a punitive effect may result.

103. The Tribunal had very much in mind the public interest, namely protecting the public, upholding the proper standards of conduct in the profession and maintaining the reputation of the profession.

104. The Tribunal considered all of the available sanctions, starting with the least onerous. It considered that taking no action, lying on file, an apology or a warning would not mark this transgression. However, a censure was the minimum sanction that was necessary in the circumstances. Only a censure would mark the seriousness of the conduct found proved. It would send a clear message to the profession and the public that such behaviour was unacceptable.

FINE

105. The Tribunal considered whether a fine should be imposed in this case. The Tribunal concluded that a fine of £5,000 would send a clear deterrent message to the profession and would also maintain public confidence in the regulatory process.

COMPENSATION

106. The Tribunal also considered whether a payment of compensation would be appropriate. Regulation 25 provides:

Compensation

25.1 If a finding of Inadequate Professional Service is made by the Disciplinary Tribunal or the Appeal Tribunal, the Tribunal may consider compensation as a remedy in respect of such inadequate service. The Tribunal may direct the Defendant to pay compensation in such sum as was the result of the Inadequate Professional Service rendered by the defendant.

25.2 In determining whether any sum is to be paid, or in fixing the amount of such sum, the Tribunal shall in particular have regard to any loss suffered as a result of the Inadequate Professional Service, the availability of other forms of redress, the gravity of the conduct complained of and the amount of any fee claimed by or paid to the Defendant for that Inadequate Professional Service.

25.3 Any sums awarded under Regulations 25.1 and 25.2 above shall be subject to the limit [of £5,000] *specified in Regulation 20.6 (f) (viii) above.*

107. Mr Hannah's failings plainly reflected "Inadequate Professional Service" as defined in Regulation 2.1(p).

108. AEC was out of pocket to the sum of at least £12,000. Applying regulation 25.1, the Tribunal ordered compensation, payable to AEC, in the sum of £5,000.

COSTS

109. Costs were agreed between the parties in the sum of £49,013.12.

PUBLICATION

110. In accordance with Regulations 28.1 and 28.5 of the Taxation Disciplinary Scheme Regulations 2014 (as amended), the Tribunal ordered publication of its order and reasons, without restriction.

Dr Jonathan Page 22nd March 2020

APPENDIX 1

Charge 1

Allegation

In contravention of rules 5.6.1 to 5.6.3 of the Professional Rules and Practice Guidelines 2006, Cornerstone Tax Advisors failed to adequately set out and describe in sufficient detail the potential routes and means challenge to the ULRICA scheme by HMRC, including the proper interpretation of s.45 and the use of s.75A of the Finance Act 2003.

Particulars of Allegation

In a letter dated 3 September 2007, Cornerstone provided advice to the Complainant in respect of the ULRICA scheme. The letter advised that "there is a probability, albeit a low one, that they may be able to successfully challenge the strategy using the principles developed in the tax avoidance case of IRC v Ramsay or under current anti-avoidance legislation". The letter failed to provide adequate advice to how HMRC might go about challenging the ULRICA scheme such that the Complainant could have been in a position to properly judge the risk and rewards of the ULRICA scheme on an informed basis.

Charge 2

Allegation

In contravention of rules 5.6.1 to 5.6.3 of the Professional Rules and Practice Guidelines 2006, Cornerstone Tax Advisors failed to highlight the fact that the ULRICA scheme had been expressly targeted by HMRC with the introduction

of s.75A as was apparently from both the Pre-Budget Report (PBRN 17) and HMRC's Technical Note (both being released on 6 December 2006).

Particulars of Allegation

Cornerstone do not appear to have considered the guidance notes given by HMRC at the time s.75A was released and in any event these were not mentioned in Cornerstone's letter of 3 September 2007. In particular:

(4) The 2006 Pre-Budget Report Notes. In PBRN 17 at paragraph 7, the following example was given of a scheme to which s.75A would apply:

> *"A agrees to sell property to B Ltd, a company. Upon completion B Ltd transfers the property to its parent, C Ltd, by way of a dividend in specie."*

(5) HMRC's Technical Note in relation to the 2006 Regulations where, in Example 5 at paragraph 16, the following was stated:

> *"The following examples illustrate the application of section 75A on the assumption that the tax saving test is satisfied. HM Revenue & Customs does not accept that the tax saving test is necessarily satisfied in any of these examples.*

…

> *(5) V agrees to sell property to N Ltd for £10 million. N Ltd declares a dividend in favour of P, its sole shareholder, the dividend to consist of the property and to be paid at the same time as completion of the V-N Ltd contract. The contract is completed and the property transferred to P."*

Cornerstone either was aware or ought to have been aware of these examples. They showed that it was at least intended by HMRC that s.75A of

Finance Act 2003 could be used to challenge the ULRICA scheme or schemes similar to it.

In addition, given that such material was published when the 2006 Regulations were laid before Parliament and would have been available when Finance Act 2007 was passed, there was a real risk that they could be taken into account when considering whether s.75A applied to ULRICA.

Further, the Technical Note at least highlighted the fact that HMRC did not necessarily accept that any saving was achieved under s.45 of Finance Act 2003.

In light of the above, a reasonable tax advisor acting in the position of Cornerstone should have drawn the above to their client's attention.

Charge 3

Allegation

In contravention of rules 5.6.1 to 5.6.3 of the Professional Rules and Practice Guidelines 2006, Cornerstone Tax Advisors failed to properly assess and communicate in their letter of 3 September 2007 the risk of a successful challenge by HMRC. In particular, to describe such a risk as a "low probability" was not an assessment that any reasonable tax advisor could have reached in the circumstances.

Particulars of Allegation

In light of the material set out in the Particulars to Charge 2 and more generally the known attitude of HMRC to such forms of planning, no reasonable tax advisor could have advised that the risk of a successful challenge was a "low probability".

APPENDIX 2

RULES 5.6.1 to 5.6.3 OF THE PROFFESIONAL RULES AND PRACTICE GUIDELINES 2006 ("PRPG") provide:

5.6 Form and content of advice

5.6.1 On deciding on the form of advice provided to a taxpayer, a member should exercise professional judgement and should consider such factors as the following:

- *the importance of the transaction and amounts involved*
- *the specific or general nature of the taxpayer's enquiry*
- *the time available for development and submission of the advice*
- *the technical complications presented*
- *the existence of authorities and precedents*
- *the tax sophistication of the taxpayer*
- *the need to seek other professional advice*

5.6.2 An advice communication should normally set out:

- *the purpose for which the advice is required and the client's objectives*
- *the background facts and assumptions on which the advice is based*
- *the alternatives open to the client*
- *the risks associated with the advice*
- *relevant caveats and exclusions*

5.6.3 When formulating advice the member should refer to the relevant taxation legislation and the practice of HMRC. Due regard should also be given to case law.