[2017] UKFTT 0223 (TC)

TC05713

Appeal number: TC/2014/06023

VAT – MTIC fraud – preliminary issue – whether assessment in time - whether assessment less than one year after evidence of facts sufficient in the opinion of HMRC to justify the assessment comes to their knowledge – assessment in time

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE ROYAL BANK OF SCOTLAND GROUP PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at the Royal Courts of Justice, Strand, London on 19-21 September 2016

Mr D Scorey QC, instructed by Pinsent Masons LLP, for the Appellant

Mr R Atkins QC, Mr J Puzey, Counsel, and Ms J Goldring, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

PRELIMINARY DECISION

1. HMRC assessed the appellant for £86,434,398 on 20 September 2012 on the basis that in HMRC's opinion the appellant had claimed repayment of, and been repaid, input tax on trades in European Emissions Allowances ('carbon credits') in VAT periods 06/09 and 09/09 to which it was not entitled. The trading was actually undertaken by RBS Sempra Energy Europe Ltd, which was then a subsidiary of the Royal Bank of Scotland PLC ('RBS') and in RBS' VAT group, but as the assessment was of RBS as representative member of the group, I will refer to the appellant as 'RBS' or 'the bank'.

2. The reason HMRC said that RBS was not entitled to the input tax was that HMRC considered that the deals (some 536 in total) were connected to fraudulent evasion of VAT, namely MTIC fraud, and the bank knew or should have known this.

3. The assessment only covered trading in the period 8 June to 21 July 2009. The assessment was from 8 June because that was the date on which the French carbon credits exchange closed down resulting, in HMRC's view, general knowledge amongst carbon credits traders of the risk of MTIC fraud. The end date for the assessment was 21 July because RBS ceased to trade in carbon credits on that day, although the bank was later to recommence trading in them once the reverse charge was introduced.

4. This hearing was called to determine a preliminary issue which was whether the assessment was made in time. If it was not, the appeal must be allowed.

Disclosure

5. In Mr Scorey' skeleton at least, although he did not really pursue it in the hearing, were complaints of how HMRC had gone about the disclosure exercise for this preliminary issue. HMRC had served Officer Williams' witness statement together with exhibits; later they had separately disclosed information held by other officers of HMRC, but without witness statements. Some of the information had only been disclosed after the bank had applied for disclosure. In all, the bank complained, there had been five tranches of disclosure from HMRC, and Mr Scorey said it was difficult in these circumstances to be satisfied that HMRC had truly disclosed all relevant material. Indeed, a number of times during the hearing Mr Scorey complained that a MOK submission on another trader had not been disclosed to RBS.

6. The concerns with disclosure led RBS to colour code the documents in the hearing bundle with different colours to indicate in which tranche of disclosure RBS received each document. In the event, however, nothing turned on which date the document was disclosed to RBS.

7. HMRC reject the criticism of their disclosure, stating they complied with the disclosure order and thereafter kept it under review, disclosing more information as it came to the attention of those responsible for disclosure.

8. And as RBS made no application, either for further disclosure or otherwise, it seems to me that I am not called on to make any determination over the matter of disclosure and I do not do so.

The law

9. There are various time limits applicable to VAT assessments. Section 73(6) Value Added Tax Act 1994 ('VATA') provides:

> An assessment under subsection (1), (2), or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following –
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge....

10. S 73 is how in VAT matters Parliament has chosen to weigh the competing interest of the state and taxpayers in general that tax believed to be underpaid (or over-reclaimed) should be assessable against the interest of the particular taxpayer concerned to be protected against unnecessarily extended investigations into its affairs. A different solution to the similar problem in direct tax was resolved by giving taxpayers the right to apply for closure notices in enquiries, but the structure of assessment of indirect and direct taxes remains very different and there is no comparison possible or intended between the two very different systems.

11. I am concerned only with s 73(6)(b). The assessment was raised on 20 September 2012 and related to periods, as I have said, of 06/09 and 09/09. It was therefore clearly out of time under s 73(6)(a).

12. The question under s 73(6)(b) is whether the assessment was made within one year of evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, coming to their knowledge. What that meant as a matter of law was largely agreed between the parties: their dispute was over the facts. I will therefore consider the law first and move on to the facts.

Evidence of facts

13. There was little dispute on the meaning of 'evidence of facts'. Case law shows that the 'facts' referred to are the basic facts, being the facts directly proved by evidence. It does not refer to the date on which HMRC made factual inferences from other facts. See *DFS Furniture co Plc* [2004] STC 559 at [44-45] and the earlier case of *Mervyn Conn Organisation Ltd* VTD 5205 (1990) (on the earlier but virtually identical provision) where the chairman said

> The 'evidence of facts' to which the sub-paragraph refers can be regarded as being the 'basic facts' in contradistinction to 'inferences of

> fact', those being deductions of facts from basic facts directly proved by the evidence. (page 4 of 5)

This is entirely logical; the evidence of both the primary and secondary (or inferential) facts is the same; and the object of the legislation was to provide a cut off point for an assessment a year after HMRC had sufficient evidence to assess, whether or not they had at that point put two and two together. There was in any event no dispute about this in the hearing: some new evidence of basic facts did come to light within the one year before the date of assessment. The dispute was over whether this evidence did, or ought reasonably, justify the assessment.

14. However, it seems to me that there is one relevant point worth mentioning about evidence of facts. On a number of occasions, the assessing officer (Officer Williams) stated that even though the information was already known to HMRC from one source, although he had not known it at the time, he would have wanted confirmation of it from RBS rather than rely on the other source. The appellant's view was that obtaining confirmation of the fact from RBS was irrelevant: HMRC had evidence of the fact once they had it from any source.

15. But a fact is a fact: evidence is what tends to prove (or disprove) the alleged facts. S 73 does not refer to 'facts' but to 'evidence of fact', reflecting that whether or not something actually is a fact can only be ascertained by evidence and some evidence is stronger than other evidence. HMRC might think in some cases that a particular fact is only evidenced to the degree necessary to justify an assessment if it is confirmed from more than one source: whether that is a reasonable view will depend on the circumstances. But having evidence of a fact from one source is not necessarily sufficient evidence of that fact to justify an assessment. It must depend on the exact circumstances and in particular the reliability of the source.

Knowledge

16. The evidence of fact must come to HMRC's actual knowledge. This is clear from *Post Office* [1995] STC 749 at 755D:

> 'the reference....to evidence of facts coming to [HMRC's] 'knowledge', in my judgment, means what it says; the word does not encompass constructive knowledge.

There was no dispute over this in the appeal. However, s 73 referred to HMRC's actual knowledge and not the assessing officer's actual knowledge: it was accepted that there was some evidence of facts known to HMRC but not to Officer Williams at the time he asked for the additional information at issue in this appeal, and it is what HMRC knew and not merely what Officer Williams knew, which matters.

The assessment

17. It is also well established (*Post Office*, at 754) that the evidence of facts must be sufficient to justify the assessment that was actually made: an assessment is not out of

time simply because a different assessment could have been made on what was known to HMRC more than one year before the actual assessment was made.

18. Mr Scorey criticised HMRC for referring to the concept of best judgment because he viewed it as irrelevant. The requirement under section 73(1) VATA for assessments to be to best judgement does not obviously have any link with the requirement under s 73(6) for them to be in time.

19. But I do not think it is entirely irrelevant. The rules on VAT assessments were no doubt intended by Parliament to form a coherent whole and should be interpreted to produce a coherent scheme. VAT assessments must not be made more than one year after evidence of facts sufficient to justify it comes to HMRC's knowledge but an assessment must also be made to best judgment.

20. An assessment to best judgment may be made on scanty material because the taxpayer will not cooperate with the enquiries made by HMRC; it can amount to little more than a best judgment guestimate. Had the same taxpayer instead eventually cooperated and handed over his business records, HMRC would have been able to make a much more precise assessment. The two assessments would not be the same; the one year time limit would run from when the material relied on to make each of the best judgement assessment came to HMRC's knowledge. An assessment against the belatedly cooperative taxpayer would not be out of time simply because HMRC knew enough to make a guestimate type assessment more than a year before they made the more refined assessment based on later provided information.

21. Nevertheless, as has been pointed out in other cases, if HMRC waits too long for further information which is not forthcoming, and makes a 'guestimate' best judgement assessment based on what they held from the start, they risk being out of time.

22. Here it is clear that Officer Williams knew the precise figure of the amount of VAT allegedly over-reclaimed well over a year before the date of the assessment. None of the extra information received within the one year period before the assessment related to the amount of the assessment. The extra information related to the question of alleged knowledge and means of knowledge.

23. And while it was clear that the Officer was considering assessing the bank for 3 periods (03/09 as well as 06/09 and 09/09) and in the event only assessed the last two, there was no suggestion by HMRC that the decision not to assess 03/09 was as a result of the new information learnt within the one year before the assessment. It was just a different view taken on information already held.

24. Nevertheless, the point about 'the assessment' referred to in S 73(6) being the actual assessment made is not entirely irrelevant. Mr Scorey's view was that, assuming HMRC proved the alleged connection to fraud, the bank would be liable to the assessment if HMRC could prove either the bank knew or should have known of that connection. Both were alleged and pleaded but only one had to be proved for HMRC to win the appeal.

25. Therefore, said Mr Scorey, if the new information (if there was any at all) related only to, say, *actual knowledge*, then HMRC could have made the same assessment based solely on *means of knowledge* without the new information and therefore the assessment was out of time as made more than one year after knowledge of facts sufficient to justify it were known to HMRC.

26. I am unable to agree with this, for two reasons.

27. As a matter of pure law, the assessment made was an assessment on the basis of knowledge or means of knowledge. If the scenario put by Mr Scorey was correct, then the assessment which could have been made earlier would have been a *different* assessment as it would have been based solely on an allegation of means of knowledge.

28. The second reason is that knowledge and means of knowledge are not mutually exclusive: the logic is that if a person had means of knowledge, then that is a factor relevant to the assessment of actual knowledge. So a single new piece of evidence could be relevant to both knowledge and means of knowledge. Mr Scorey, for instance, suggested that the experience of the traders who actually undertook the deals was relevant to *means of knowledge*: the more experienced, the more likely to realise there was a problem. Yet, that information is also therefore relevant to *knowledge*. An experienced trader may be thought more likely to realise there is a problem: therefore, if an experienced trader carried on regardless, that might indicate *actual* knowledge.

29. In practice, therefore, nothing really turned on this and the new information referred to below did relate to both knowledge and means of knowledge. But my conclusion is that as a matter of law it would not matter if the new information related only to either knowledge or means of knowledge, as the actual assessment was on the basis of both, so if that new information was sufficient in the opinion of the Commissioners to justify the making of the assessment, the assessment would be in time.

The three stage test

30. There was little dispute on the law, as I have said. The test to be applied was set out in *Royal College of Peadiatrics and Child Health* [2015] STC 1243 at [47] where Birss J said:

> The principles to be applied under s 73(6)(b) are set out in the judgment of Dyson J in *Pegasus Birds*...The correct approach is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of [HMRC], justified making the assessment and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to [HMRC]. The one year period runs from the date in (ii). The reference to [HMRC] in (ii) refers to [HMRC] collectively. The burden is on the taxpayer to show that the assessment was out of time.

31. Much the same was said earlier by the Court of Appeal in *Pegasus Birds* [2000] STC 91, upholding Dyson J. Aldous LJ also said:

> An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on *Wednesbury* principles, or principles analogous to *Wednesbury*....

32. Dyson J had said:

> The question for the Tribunal on an appeal, therefore, is whether [HMRC's] failure to make an earlier assessment was perverse or wholly unreasonable. [1999] STC 95 at 104d

33. The Tribunal said much the same in *Joseph Samuel Developments* VTD 7177:

> 'In order to succeed the Appellant must satisfy us that [the HMRC officer at an earlier date] had actual knowledge of sufficient basic facts as to these matters for it to be unreasonable of him not to believe that they would justify the making of an assessment' (page 4 of 5)

34. In a recent case, *Carbondesk Group plc* [2015] UKFTT 367 (TC) at §20, the FTT summarised the test as follows:

> "..the question can be determined by identifying of the additional pieces of evidence received by HMRC within one year of the date of the assessment which the officer considers to have justified the assessment. It is then necessary to consider whether the additional material is of sufficient weight to justify the making of the assessment that was actually made. ...the tribunal is not to apply its own view to that question. Rather it must consider whether it was perverse or wholly unreasonable of the officer to treat the further material as the last piece of evidence of sufficient weight justifying the making of the assessment.

35. Mr Scorey points out that in some formulations of the test, such as Dyson J's, 'unreasonable' is qualified by the word 'wholly'. Mr Scorey's view as that this adjective added nothing to the test. The question was whether the officer acted in a *Wednesbury* unreasonable manner. I accept that 'wholly' adds nothing to the test of 'unreasonable'.

36. While explained as a two stage test, it is really a three stage test as it requires the Tribunal to:

(a) Identify the last discovered evidence of facts which, in the opinion of the officer making the assessment on behalf of HMRC, actually justified making the assessment;

(b) To decide whether that opinion was perverse or otherwise *Wednesbury* unreasonable; and if not, to

(c) identify when that evidence was communicated to HMRC.

37. The parties agreed that there was a three stage test although they each set this out differently. Properly analysed, I do not think, and I do not think that the parties thought, that there was any difference between them on the correct legal test:

38. The appellant stated that the three stage test was:

(a) Did HMRC discover anything new within last 12 months?

(b) If they did, did the officer who made assessment actually rely on any of these new factors in reaching his decision to assess?

(c) And even if he did, did the officer act unreasonably in not making the assessment on the information held before?

39. HMRC's formulation of the test was:

(a) Decide if officer did rely on any facts discovered in last 12 months when making assessment?

(b) Decide if any of these new facts were new to HMRC and of sufficient weight to justify assessment?

(c) Decide if officer unreasonable in not making assessment on information already held.

As can be seen the tests are really the same, just with (a) and (b) reversed.

Silver bullets and jigsaw puzzles

40. There was some reference in the hearing to a silver bullet. No one suggested that the new information received by HMRC in the last year amounted to a smoking gun or silver bullet, but none is required. The question is whether the evidence of facts in HMRC's possession before the year preceding the assessment reached a point at which waiting for further evidence of facts before assessing became *Wednesbury* unreasonable.

41. Another expression used in the hearing was 'last piece in the jigsaw puzzle' and that was a much more representative of a slow revelation of a picture which justifies assessment. The last piece may not be enormously significant by itself; it is simply the last piece.

42. But again the metaphor may be inaccurate as it gives the impression that the officer is entitled to piece together the whole picture before assessing whereas it is clear that HMRC must assess within a year of having sufficient evidence to justify the assessment made. HMRC may well have enough to justify the assessment without having the full picture: that is the point.

43. So perhaps the best metaphor is to imagine an incomplete jigsaw puzzle which would when finished would show what had happened, and to ask when did HMRC acquire sufficient of the pieces in that puzzle to justify the assessment. It would probably be unreasonable to wait until the puzzle was completed in order to assess, but just how complete could it be before waiting for more pieces would be

unreasonable? Were the pieces acquired in the last year before the assessment pieces, which, while they did add to the picture possessed by HMRC that little bit more, were nevertheless superfluous to the decision to assess? Or were those extra pieces reasonably considered by the assessing officer to be enough to justify the assessment where it was reasonably considered not to be justified before?

Burden of proof

44. It is clear that the burden of proof is on the appellant to show that the assessment was out of time. Mr Scorey said in his skeleton that the assessment, having been outside the two-year time limit in s 73(6)(a) was 'prima facie out of time' but I agree with Mr Atkins that this is wrong. The assessment is to be treated as in time unless the appellant can prove that it was out of time. See *Royal College of Peadiatrics and Child Health* [2015] STC 1243 at [47] cited at §30 above.

The appellant's case

45. It was agreed that the only 'new' information which came to HMRC's knowledge after May 2011 was the information contained in RBS' letter of 5 October 2011 ('the Reply') replying to HMRC's letter of 14 July 2011 ('the Letter')

46. The appellant's case is, as it says, three-fold:

(a) HMRC discovered nothing new from the Reply: HMRC, if not Officer Williams, already knew everything contained in the Reply.

(b) Even if that is not so, to the extent that there was anything new in the Reply, Officer Williams, who made the assessment, did not rely on any of these new factors in reaching his decision to assess;

(c) And even if the bank is wrong on that, to the extent that there was anything new in the Reply, it was not sufficient to justify the assessment; the officer had acted unreasonably in not making the assessment on the information held before the Letter was sent and the Reply received.

The facts

Fact finding

47. Mr Scorey was concerned that the Tribunal should not make findings of fact which are for the substantive appeal should the appellant lose this preliminary hearing. But I do not see any danger of this Tribunal straying into the territory of finding facts which will be an issue in the substantive hearing (if any): this Tribunal is required to consider whether *evidence* of facts which relate to RBS' knowledge and means of knowledge was reasonably relied on by HMRC. I am not called on to make actual findings of fact relating to RBS' alleged knowledge and means of knowledge: my findings of fact are limited to the process by which HMRC came to make the assessment, which is not relevant to a substantive hearing (if any) where the question will be whether the assessment was right.

48. I will refer to evidence of various facts relating to RBS' alleged knowledge and means of knowledge: I make no findings as to whether those facts are made out and am in no position to do so as I have not heard that evidence.

The evidence

Officer Christopher Williams

49. Officer Williams has been an HMRC officer since 1987; he has been a member of HMRC's MTIC team since 2006. In July 2010 he took over the extended verification of claims made by and paid to RBS in periods 03, 06 and 09 in 2009 in respect of carbon credit trading.

50. Officer Williams answered questions carefully; while he sometimes took his time to reply, it seemed to me that that was because he wished to be sure he had understood the question and answered it accurately. He appeared to be a painstaking and thorough person, if very quiet in the witness box, and I considered his evidence reliable and accepted it.

51. I explain below that in giving one of his answers (as it became apparent later) he misunderstood the question: see §73. This does not detract from his reliability as it seems to me that it easy for a non-lawyer to be confused between a skeleton argument and a statement of case.

The enquiry

52. I accept his evidence that the outcome of an extended verification is not predetermined: this is not only logical but consistent with what actually happened in respect of RBS. An email from him dated before the assessment makes it clear he was not certain there were grounds to assess at all; and in the event he was persuaded there was not sufficient grounds to assess the 03/09 period so the assessment he raised only covered 06/09 and 09/09.

53. I accept his evidence that his method of undertaking verification was to establish in so far as possible which deals traced back to a fraud and, only having finished that exercise, did he start investigation of whether RBS knew or ought to have known of the fraud. The last tax loss letter was sent to RBS in December 2010 and it was only following that that Mr Williams requested RBS to provide him with its due diligence on the five suppliers identified as making the tax loss supplies.

54. The due diligence and other commercial documents were received in tranches from RBS. RBS were rather slow in providing information because the bank had sold RBS SEE (the company which undertook the deals at root of this appeal) to Morgan Stanley in 2010 and RBS therefore needed to request the information from Morgan Stanley before they could reply to HMRC. Information was received by HMRC under this process up to May 2011, as I have already mentioned. If that information was the last piece of evidence which HMRC, acting reasonably, ought to considered

sufficient to justify the assessment actually made, then the assessment would be out of time, as the assessment was made more than a year later.

55. At May 2011, however, RBS had not provided all the information requested by HMRC. What was not provided by RBS at that point included:

(a) Names of traders involved in carbon credit trades

(b) The details of its contracts with suppliers;

(c) Information about EUA certificate numbers; and

(d) Settlement details on sales and purchases of carbon credits

56. As I have said, Officer Williams asked RBS for more information in his Letter dated 14 July 2011 and to which he received the Reply on 5 October 2011. If the information contained in the Reply was the last piece of evidence sufficient in HMRC's opinion to justify the assessment, the assessment would be in time as it was made on 20 September 2012.

57. I accept his evidence that he was always conscious of time limits for assessments.

Was the new information relied upon?

58. Before considering the Letter and Reply in detail, I consider RBS' general case that Officer Williams did not in fact rely on some or all of the new information contained in the Reply when making his assessment on the grounds the decision to assess had already been taken.

The means of knowledge submission

59. The Tribunal had in evidence Officer Williams' final means of knowledge submission ('MOKS') as well as various earlier drafts of it. It comprised a long series of questions which officers, conducting an extended verification on a company suspected of being a broker in an MTIC fraud, were required by HMRC to complete and circulate to superior officers in VAT policy and other teams, with a view towards advice being received on whether or not it was appropriate to assess. I find Mr Williams commenced completion of his MOKS on RBS from July 2010 onwards.

60. I accept his explanation that he was required to make a MOKS on completion of an investigation, and the information in the MOKS was used to decide whether or not to assess. The preparation of a MOKS did not mean a decision to assess had been taken; the completion of a MOKS similarly did not mean a decision to assess had been or would be made, although the officer completing the MOKS might well indicate whether he considered an assessment should be made.

61. Mr Williams accepted in cross examination that he would have made a MOKS even if RBS had not replied to the Letter, and that is entirely consistent with his evidence that a MOKS would be made on completion of an investigation. It does not

tell me what the conclusion following the MOKS would be as completion of a MOKS did not necessarily lead to an assessment. In closing, Mr Scorey said Mr Williams had accepted that he would have *assessed* whether or not RBS replied to the Letter, but Mr Williams did not accept that: he only accepted that he would have made a MOKS irrespective of the Reply.

62. I find that in August 2011, Mr Williams considered the draft MOKS was as ready as it could be without the Reply; on receipt of the Reply, Officer Williams incorporated information from the Reply in the MOKS and submitted the MOKS to his superiors in November 2011 with his view that RBS should be assessed.

Was the decision to assess already taken before the Letter?

63. I was referred to a good number of internal HMRC emails between Officer Williams and other officers in mid-2011. The impression I formed is that Officer Williams had not at this point reached a decision to assess but thought that there might be a case to answer: he wanted further information before he decided.

64. The appellant's version of what the emails showed was different. The appellant relied particularly on an email of 12 July from Officer Williams to a superior officer in which Officer Williams said:

> I believe we already have enough to make a submission [MOKS] but I want to address a few details like what they did re the [EUA] numbers.

I do not accept that this shows Officer Williams had decided to assess before sending the Letter or receiving the Reply. Firstly, as I have said, making a MOKS was not the same as deciding to assess. Secondly, the email needs to be seen in its context. An email the following day described the MOKS as needing more work; and a much longer email only 6 days earlier explains his plan (at that point) to make the MOKS while waiting for the Reply because he was anticipating that his superiors might consider that HMRC held enough information to decide <u>not</u> to assess.

65. I reject the appellant's case that Mr Williams had decided to assess RBS before receiving the Reply. Mr Scorey put it to him that he had already decided to raise the assessment before receiving the Reply. I accept Mr Williams' denial. It is consistent with internal documentation which shows he had not made up his mind at the time the Letter was sent and before the Reply was received.

Was the Letter an attempt to extend time?

66. Mr Scorey suggests that Officer Williams, as the end two year time limit to assess under s 73(6)(a) approached, issued the Letter in a cynical attempt to elicit more evidence of facts to bring HMRC within the s 73(6)(b) time limit.

67. Mr Williams denied this and I accept that denial. The internal emails are inconsistent with the appellant's case on this: the emails show that Mr Williams considered he needed the information requested in the Reply. Further, as Mr Williams pointed out, it would have been a foolish way of behaving as evidence of

facts which were used in the decision to assess had been received up to May 2011, giving HMRC as at the date of the Letter another 10 months in which to raise an assessment. If HMRC had not really needed any reply to the Letter, it would have been more sensible as at July 2011 to make the MOKS and assess within the next 10 months. There was sufficient time to do so and the evidence shows that Mr Williams was aware of the time limits.

Was the purpose of the Letter to complete the MOKS rather than Officer Williams considering whether he already had enough information to decide on assessment?

68. Mr Williams' evidence was that he considered he required the information which he sought in the Letter before he was in a position to decide on whether or not to assess and I accept it. This was supported by internal contemporaneous documentation which showed that not long before writing the Letter Mr Williams had informed a supervising officer that his MOKS on RBS was far from ready; by July 2011 he indicated that he might make the MOKS without the information from RBS but the email showed that he still considered he needed the information in order to decide whether to assess.

Did Officer Williams in fact rely on the information in the Reply?

69. The appellant's case was that the MOKS could have been completed without the Reply. Logically the appellant is right in that the MOKS would have been completed with or without the Reply: and Officer Williams agreed to that in cross examination. But, as a MOKS would be made whether or not a decision to assess was made, that does not answer the question whether Officer Williams actually relied on the information in the Reply in making his decision to assess.

70. Did Officer Williams in fact rely on the Reply in reaching his decision? His evidence is that he did and I accept that. The contemporaneous evidence supports what he says: before sending the Letter, as I have said above, internal emails show that he considered he needed the requested information. The MOKS was finalised shortly after receiving the Reply and contained reference to all six of the items, set out below at §77, about which the Letter asked questions and the Reply gave answers. He also sent the appellant on 29 March 2012 a letter ('the precursor letter') to the assessment, which contained the reasons on which his later letter of assessment relied. Of those six items, while they were by no means the only reasons given for the assessment, I find that the first three of them were expressly mentioned in the precursor letter and that the last three were indirectly mentioned in that reference was made to alleged inadequate due diligence and RBS's alleged failure to question how its suppliers were able to fund the deals.

71. For these reasons, I find as a matter of fact that Officer Williams did rely on the information in the Reply when making the assessment that was made.

Statement of case

72. The statement of case was very long; there was a short section which dealt with assessment time limits and which mentioned the six matters referred to in the Letter and Reply. The section that dealt with alleged knowledge and means of knowledge, however, which relied on a number of factors to prove knowledge and means of knowledge, did not expressly refer to any of those six matters other than two, namely (3) the circularity revealed by the EUA certificate numbers and (2) the process by which RBS and its suppliers came into contact.

73. At the very start of his cross-examination, Mr Scorey asked Officer Williams if the statement of case represented a complete and accurate reflection of his decision making process and Mr Williams agreed that it did. The appellant in closing claimed this meant that the officer had not relied on the other four matters in the Reply in reaching his decision to assess because they were not contained in the statement of case. However, that submission entirely overlooked Mr Williams' evidence, given near the end of the same day, that he had made a mistake and had misunderstood this reference to the statement of case as a reference to the skeleton argument filed by HMRC's counsel for this hearing. That skeleton argument referred to all six matters. Understanding Mr Williams' original answer as relating to the skeleton argument, and taking into account his oral and written evidence as a whole, I find his evidence was that he considered all six matters as relevant to his decision to assess for the reasons given in the skeleton argument. I note that that evidence is also consistent with the MOKS and precursor letter.

74. It leaves me unclear what if any involvement Mr Williams had in the drawing up of the statement of case. While he said he was involved, I can't rely on that evidence as it was given when he was labouring under the misapprehension that Counsel was referring to the skeleton argument for this hearing. It was, on the contrary, evidence he was involved with the drawing up of the skeleton argument for this hearing.

75. The statement of case is therefore irrelevant for these purposes: it reflects the views of the writer on why he believed RBS had either knowledge or means of knowledge of the alleged frauds. But I need to consider Officer Williams' decision making process and whether it was within the bounds of reasonableness. The fact that the HMRC lawyer drawing up the statement of case had a different view to Mr Williams on what was the significant evidence is neither here nor there.

76. I move on to consider the Reply in detail and whether

(a) HMRC discovered anything new from the Reply;

(b) Whether, to the extent that there was anything new in the Reply, Officer Williams, who made the assessment, relied on any of these new factors in reaching his decision to assess;

(c) Whether, to the extent that there was anything new in the Reply, it was sufficient to justify the assessment or whether the officer had acted

unreasonably in not making the assessment on the information held before the Letter was sent and the Reply received.

Was new information contained in the Reply?

77. The Letter asked for information in relation to six matters, and the Reply dealt with each of these six matters:

(1) Information about the RBS employees in the team which conducted the carbon credits trading;

(2) How RBS came to be in contact with the suppliers in the impugned deals;

(3) A sample of the serial numbers of the carbon credits in which the bank traded;

(4) Bank account statements

(5) Contracts with suppliers

(6) Rejected counterparties.

78. As each matter, with the exception of (4) and (5) which were linked, was discrete, I will deal with the three questions set out at §76 above in respect of each item of information (1), (2), (3) and (6) but deal with (4) & (5) as a single item.

(1) the Traders – was any information new?

79. The Letter asked for the names of the RBS employees who undertook the deals in carbon credits, their roles and start dates. The information contained in the Reply was:

(a) Names of individuals in team who carried out the trading

(b) Their job title and brief description of roles

(c) Their start date

(d) The date the employment ceased (save for 4 out of 7 who remained employed)

80. What information was already known to HMRC?

(a) HMRC already knew the names; indeed the Letter listed them, seeking confirmation of the information from RBS. The original source of HMRC's information was social media ('Linkedin') and, for some of the names, the deal documentation.

(b) HMRC already knew the job titles from Linkedin and, for some, from the deal documentation, although the Reply clarified confusion over exactly who was in charge of the deal team at the critical time.

(c) Officer Williams used the information to check the PAYE information held by HMRC for those individuals, from which he

ascertained that none of the individuals concerned left employment with RBS immediately after the end of the deals connected to fraud.

81. What was new information to HMRC?

(a) HMRC discovered the start dates of employees which meant they were able to judge to some extent the experience of the team;

(b) HMRC also discovered that no one was dismissed from the team consequent on the trades which HMRC considered to be fraudulent

82. As I have said above, the question is when evidence of fact comes to HMRC's attention: HMRC are not fixed with constructive knowledge (§16). HMRC had knowledge of the persons in RBS' trading team before the Reply, but it was only when this knowledge was confirmed and expanded that Officer Williams used the PAYE system to check their employment end dates.

83. No one suggested to me that the information about the RBS trading team on the PAYE system was information known to HMRC until Officer Williams matched the names to the PAYE system. HMRC hold the entire nation's PAYE details and therefore in one sense 'know' the employment end dates for everyone. However, no one in HMRC actually knew the end dates of employment of the RBS trading team until Officer Williams ran his checks, so I do not consider that there was actual knowledge of the fact that no one was dismissed from that team until he did so.

84. The new information which came out of the Reply, therefore, was that the team was experienced and that no one was dismissed from the team consequent on the trades which HMRC considered to be fraudulent.

(1)The traders – did Officer Williams rely on the new information?

85. Officer Williams referred to the trading team's experience in the MOKS and his precursor letter. He also inferred from the fact that no one was dismissed that RBS did not consider that any of the individuals in the trading team had acted beyond their authority or otherwise were rogue or fraudulent traders. He considered that that meant that RBS ought to bear legal responsibility for their employees' acts. This information and his conclusion was inserted by him into his draft MOK submission.

86. The appellant's case was that he did not rely on this information in deciding to assess RBS: his MOKS was more focussed on RBS's VAT team than the trading team and a contemporaneous email from him had said that while he wanted the information about the trading team, he was not hopeful of RBS providing it as they had been asked before and refused, and the information was not vital to HMRC's case.

87. However, that email must be seen in context with other emails at the same time which show Officer Williams at the time the Letter was sent had decided it was relevant to establish the experience of RBS' trading team. It is also clear that he would have been concerned whether it was appropriate to assess RBS if the team had been acting beyond its authority. I note that in the precursor letter, which contained

the reasons on which his letter of assessment relied, he referred to the fact that he considered RBS had an experienced team in place January-July 2009. I accept his evidence and find he did rely on the new information in reaching his decision to assess.

88. At the hearing it was pointed out that the Upper Tribunal decision in *Greener Solutions* [2012] UKUT 18 (TCC) meant that RBS would be very likely held accountable for the actions of their traders even if rogue and acting beyond their authority. However, the appellant also accepted that at the time of the Reply the law was less than clear on this (the first instance decision having allowed an innocent trader to escape the consequences of its agent's knowledge of fraud) and HMRC had a discretion not to assess in any event. The appellant accepted that Officer Williams may have decided not to assess if satisfied the trades were undertaken by rogue traders.

89. As I have already said, Officer Williams agreed with Mr Scorey in cross examination that he would have made the MOKS with or without an answer from RBS to the questions on staff. Mr Scorey chose to submit to the Tribunal that that was an admission the officer would have assessed with or without the answer. But it was not. As I have said (§§59-61), it was clear that a MOKS would not necessarily lead to an assessment. I find, as I have said, he had an open mind at the time he sent the Letter and until he considered the information in the Reply. And the reply on the staff questions led him, together with other information referred to below, for the reasons explained above, to assess RBS.

(1)the traders – was the new information sufficient to justify the assessment?

90. Was any of this new evidence of fact about the trading team sufficient to justify the assessment? Was it perverse or unreasonable of Officer Williams to treat this further material as the last piece of evidence of sufficient weight justifying the making of the assessment, rather than making the assessment on what he had known before?

91. I do not think Officer Williams' decision to see this information as of sufficient weight to justify an assessment as unreasonable. Previously he had concerns whether it was appropriate to assess RBS for the tax loss (§§62-64), and the knowledge that RBS had taken no action against the traders involved, and that the trading team was experienced, were factors which led him to conclude it was appropriate to assess RBS for the loss. I am satisfied that Officer Williams was acting reasonably when he considered that this information, together with other new information, justified the assessment.

92. Mr Scorey pointed out that experience could only be relevant to knowledge and not means of knowledge, but, as I have said, the assessment was on the basis of both knowledge and means of knowledge, and so it does not matter if one piece of evidence of fact related only to one or other of the alternatives. The assessment was in the alternative.

(2) Contact with suppliers – was any information new?

93. What information was contained in the Reply?

(a) Suppliers contacted the bank, often the trading desk or the team member responsible for 'onboarding' (an expression used to indicate the bank's due diligence and client acceptance process); and

(b) The suppliers were prone to do this particularly 'after we found the fraud'

94. What information was already known to HMRC?

(a) It was known to HMRC (through officers undertaking verification of the suppliers but not known to Officer Williams) that some suppliers had said they made the contact with RBS. The suppliers were K O Brokers, GW Deals and CarbonDesk, who together made about 80% of the impugned trades.

95. What information was new to HMRC?

(a) that the suppliers approached RBS in <u>*all*</u> the impugned deals;

(b) That the approach was made by the suppliers to the bank was not a general approach, but an approach to the 'right' people within the organisation, indicating that the suppliers knew who to contact even before having had any prior contact with RBS.

(c) That RBS had 'found the fraud'

(2)- contact with suppliers: did officer Williams rely on the new information?

96. I accept Officer Williams evidence that he did rely on the information which was new to him in making his decision to assess. Of course, unknown to him, HMRC already possessed some of the information, and the question is whether he relied on the information which was new to HMRC.

97. It was his evidence that, even if he had known that some of the suppliers had stated they approached RBS direct, he would not regard the suppliers in MTIC deal chains as a reliable source of information and would have wanted RBS' version of events in any event. Moreover, he also regarded it as significant that new suppliers knew the right person in RBS to approach, and that piece of information was not previously known to HMRC.

98. I accept his evidence that he did consider the manner in which the trading relationship had come into existence relevant and did rely on the information about contact with suppliers which was new to HMRC in reaching his decision to assess RBS.

99. I move on to consider the comment 'found the fraud'. The appellant's case was that Officer Williams did not think it referred to anything other than suspicious

activity reports ('SARS') which were filed by the bank in July 2009 and of which he was already well aware.

100. Officer Williams did not agree; he said he considered it significant and more significant than the SARS, albeit he did not think it an admission of guilt; he referred to it word for word in the MOKS and speculated RBS found the fraud in July 2009. It was a factor in his decision to assess.

101. It was pointed out to him that at the start of his cross examination he had said the statement of case reflected his thinking on the case yet this 'admission' was not referred to in the statement of case; but it was at this point in the cross examination that he realised that he had been mistaken in the reply he had given at the outset where counsel had referred to the statement of case but he had understood the question to refer to the skeleton argument (see §73-75).

102. The finding of the fraud was mentioned in the skeleton argument. As I have said, Mr Williams was involved in the drafting of the skeleton but there was no evidence of the extent if any he was involved in the drafting of the statement of case. Therefore, I do not accept the appellant's case that Officer Williams did not rely on this statement when deciding to assess. The contemporaneous evidence was that he did; his evidence both written and oral in this hearing was that he did. Its absence from the statement of case was not significant as that may be explained simply by the author's taking a differing view to Mr Williams of the relative importance of various pieces of evidence.

103. I accept that he relied on this comment by RBS that they found the fraud when making the assessment.

(2)-contact with suppliers - was the new information sufficient to justify the assessment?

104. That the suppliers approached RBS with proposed trades at attractive prices was a relevant factor to knowledge and means of knowledge. It ought reasonably lead HMRC to ask why RBS had gone ahead with deals rather question why suppliers were choosing to approach RBS and offer attractive prices rather than trade on Bluenext directly themselves thus cutting out a middleman.

105. It is not surprising that Officer Williams chose to ask RBS this question and RBS does not suggest he acted unreasonably in doing so. But s 73 VATA is concerned with what was known to HMRC, rather than what was known to Officer Williams.

106. And, to a large extent, HMRC already knew by May 2011 that the suppliers contacted RBS direct; so the question is, had Officer Williams known that, was the additional information found from the Reply of sufficient weight to justify the assessment or was it unreasonable not to have assessed on the information already known?

107. As I have already said, the question concerns 'evidence of fact' and evidence varies in reliability. The mere fact that HMRC had evidence of fact from one source does not mean evidence of the same fact from another source is necessarily irrelevant: it depends on whether it was reasonable not to put much weight on the evidence from the original source.

108. While I see force in Mr Scorey's view that it would have been enough to reach a decision to assess RBS based on evidence from 80% of the suppliers that they approached RBS direct, I do not consider it would have been unreasonable to decide it was not sufficient to assess without RBS' version of events. RBS' version of events in any event did contain some new information and I am satisfied that Officer Williams was acting reasonably when he considered that this information, together with other new information, justified the assessment.

109. I move on to consider the comment about finding the fraud. Was it sufficient to justify the assessment? I agree with Mr Scorey that its exact meaning is open to question: when did RBS discover the fraud? What did they mean by 'discover the fraud'? It is unlikely that that sentence was intended as an admission of knowledge of MTIC fraud in RBS's deal chains at the time the deals took place because, if so, why would RBS continue to defend the appeal?

110. Mr Scorey indicated it was not reasonable to rely on the comment without asking RBS what they meant by it; but I cannot agree. Bearing in mind how the legislation works (see comment at §21), asking further questions is a luxury HMRC do not have where it would be unreasonable not to assess on what evidence they already have.

111. The comment could reasonably be taken to indicate that at some point, perhaps around the time they ceased trading in carbon credits, RBS actually knew the trades it was offered were fraudulent. That could reasonably be thought relevant to its knowledge or means of knowledge in the weeks before it (apparently) admits that it did know of the fraud.

112. I am satisfied that Officer Williams was acting reasonably when he considered that this information, together with other new information, justified the assessment.

(3): EUA serial numbers– was any information new?

113. The Letter asked for a sample of carbon credit reference numbers. The Reply enclosed the requested sample.

114. What information was already known to HMRC?

(a) HMRC already knew the serial numbers of the credits traded by RBS. They also knew that Barclays Bank and some suppliers had been able to obtain this information in 2009. HMRC knew this as HMRC had given joint presentation with Barclays Bank in July 2009 at which

Barclays said they had analysed certificate numbers on trades they had undertaken.

115. What information if any was new to HMRC?

116. There was some dispute over this. On the one hand, it was the appellant's case that HMRC discovered nothing because it ought to have been obvious to HMRC that as both Barclays and some suppliers in the market had been able to obtain the information in 2009, RBS ought to have been able to obtain the information in 2009. On the other hand, the appellant's case was that HMRC had discovered nothing other than that the appellant could obtain this information in 2011.

117. I think these points go to whether HMRC did rely on the new information and/or whether it was reasonable to rely on this new information as justifying an assessment. The new information was that RBS had access to the serial numbers in 2011.

(3): EUA serial numbers– did officer Williams rely on the new information?

118. Officer Williams' evidence is that he did rely on this information in making the decision to assess. It is clear that he inferred from the fact that RBS could access in 2011 the serial numbers of the carbon credits traded by them in 2009, that they recorded that data in 2009. As I have said, HMRC are entitled to make inferences from basic facts when making a decision to assess, and I accept Officer Williams' evidence that he did make this inference. Apart from anything else, it is a logical inference.

119. In so far as it was the appellant's case that he did and/or could have made the same inference from his prior knowledge that Barclays and others had contemporaneous access to the serial numbers of the carbon credits in which they traded, I accept his evidence that he chose not to make the inference on the basis of the information about other traders because he did not know for certain RBS would have known how to access the information.

120. The significance of the serial numbers was that they showed that the same units were traded repeatedly within a very short time frame, which HMRC considered indicated the transactions were orchestrated. The circularity in carbon credit trading as revealed by the EUA serial numbers recorded by RBS at the time was in fact referred to in the precursor letter as showing that RBS should have known of the fraud at the time.

121. I find that Officer Williams did rely on this new information when making his decision to assess.

(3): EUA serial numbers– - was the new information sufficient to justify the assessment?

122. The appellant's case, as I have said, was that HMRC didn't really learn anything new, and in the appellant's view the knowledge that RBS had access to the serial

numbers in 2011 was not sufficient to justify the assessment in 2012. In the appellant's view, HMRC knew enough about the serial numbers to assess no later than May 2011.

123. What this really comes down is saying that, if it was reasonable for Officer Williams to infer from RBS providing the serial numbers in 2011 that that meant they had accessed and recorded them in 2009, then (says the appellant) it must follow he ought to have made that inference from HMRC's knowledge that Barclays and some suppliers could access that information in 2009.

124. The question is whether Officer Williams acted unreasonably: I do not consider that he did. While it might well have been reasonable to make the inference based on what other traders knew in 2009, it was also within the ambit of reasonable conduct for the Officer to decide not to make that inference because he could not be certain *RBS* knew how to access the information on serial numbers, but to seek to verify this by asking RBS if they could provide him with a sample of serial numbers.

125. Therefore, I find that the new information was reasonably sufficient to justify the assessment.

(4)&(5): bank account statements and contracts- was any information new?

126. The Letter asked for copies of bank statements for the relevant period. The Reply enclosed copies of them, as agreed, relating only to the counter parties specified by HMRC.

127. What information was contained in the statements?

(a) The statements showed when RBS paid its suppliers and when it paid its customers. HMRC already knew the date on which the bank acquired the carbon credits. This information on payment dates showed that there was a delay of a few days between receiving the supply and the bank actually paying for it.

128. What information was already known to HMRC?

(a) HMRC already had the bank account statements for two of RBS' suppliers, Carbondesk and K O Traders (accounting for a major part of the deals in question). These necessarily contained the same information as the statements provided by RBS.

129. What information was new to HMRC?

(a) The new information was that the delay between receipt and payment applied in all the deals and not just those with Carbondesk and K O Traders.

(b) The information on the customers' settlement dates was new.

130. The Letter also asked for copies of the contracts between RBS and its suppliers.

131. What information was contained in the Reply?

(a) RBS provided three contracts. A Master contract (MTA) which covered all their deals with CarbonDesk, and two single trade agreements ('STAs') which covered a single transaction, one with STX and one with K O Brokers (both before the impugned deals).

(b) They showed that both the MTA and STA provided for payment by RBS after delivery of the carbon credits.

132. What information was already known to HMRC?

(a) HMRC (although not Officer Williams) already had STAs between RBS and SVS, GW Deals and Universal Management. HMRC also had evidence from CarbonDesk that it entered into STAs with RBS (this evidence was of course contradicted by the evidence actually obtained from RBS of the MTA with CarbonDesk)

133. What new information was therefore provided by the Reply?

(a) The MTA with Carbondesk was new to HMRC.

134. HMRC makes point that statements and contracts allowed HMRC to form a view on whether terms of contracts were adhered to. They were in that the contracts allowed a delay between supply and settlement, and that delay is reflected in the bank statements.

(4)&(5): bank account statements and contracts -did officer Williams rely on the new information?

135. Officer Williams' evidence is that he did rely on this information. It is certainly summarised at some length in his MOKS. It is logical that he should rely on a delay between supply and the payment for it as indicative of knowledge or means of knowledge because, where very large sums were concerned, the purchaser ought to have asked itself how its suppliers were funding the transactions. Moreover, he does refer to the deals being on credit as a reason justifying assessment in his precursor letter. Therefore, I accept that he did rely on this information.

136. In reality, although not known to Officer Williams, HMRC already knew from the suppliers' records of this delay in payment in respect of most of RBS' transactions. I accept that even if Officer Williams had known this, he would have wanted to know the position with the remainder of the suppliers as HMRC were considering RBS' liability in respect of all the tax loss deals in the period in question. The precursor letter refers to whether RBS asked itself how Carbondesk and GW deals funded the deals: the delay in payment with GW Deals was new information from the Reply.

137. In conclusion, in respect of the (alleged) delay in payment, I find Officer Williams did rely on information that was new to him and on some information that was new to HMRC.

(4)&(5): bank account statements and contracts- was the new information sufficient to justify the assessment?

138. While HMRC are no doubt right to say that Officer Williams reasonably wanted both the statements and contracts in order to compare the two and to see if contractual terms were adhered to, in reality the contracts permitted the delay in payment shown on the statements. The relevance of the information was therefore what could be gleaned from either and that was that the suppliers provided RBS with title to the carbon credits normally a few days before they required payment for them. Particularly bearing in mind the sums of money involved, it was reasonable for HMRC to consider this a factor indicating that because RBS traded in such circumstances, it knew or ought to have known of the connection to fraud. This is because it ought to have been asking itself why its suppliers were in a position to fund the transactions.

139. New knowledge of such a delay in payment would in my view be sufficient to justify the assessment: it was significant information in relation to knowledge and/or means of knowledge.

140. However, the only information new to HMRC in this respect gleaned from the Reply was that this delay in payment affected all of RBS' trading in carbon credits: HMRC already knew that it affected the substantial part of it.

141. However, as I have said, the question is whether the new information was sufficient to justify the assessment that was actually made. The actual assessment related to all of RBS' trading in carbon credits after 8/6/9. It did not merely relate to the trading with Carbondesk and K O Traders after that of 8/6/9. It would in my view have been reasonable for Officer Williams, even if he had known of the position with Carbondesk and K O Traders before the Letter, nevertheless to have decided that he could not assess all of the trades until he knew about the funding position on all of them.

142. I find therefore that the new information from the Reply on the payment position did justify the assessment that was made.

(6)due diligence for rejected counterparties - was any information new?

143. The letter asked for copies of emails sent to would-be suppliers with whom RBS decided not to trade. The Reply was that RBS would not normally explain the reason for a refusal to trade; it went on to identify companies with which RBS had refused to trade and others it was in the process of 'on-boarding' by which they meant being accepted as a supplier.

144. What information was new to HMRC?

(a) HMRC had not previously known it was RBS' policy not to give reasons for rejection;

(b) AH Marketing and Kaplan had passed RBS' vetting system and, at the time RBS pulled out of the market, it had been ready to trade with

these companies. They were companies HMRC considered to be involved in MTIC fraud.

(6)due diligence for rejected counterparties -did officer Williams rely on the new information?

145. Officer Williams had been trying to understand RBS' due diligence processes. So he asked a question intended to elicit information on why RBS rejected some companies as trading partners. He did not really find out the information he sought.

146. What he did discover was further evidence (in his mind) of failings in RBS' vetting process in that companies which he considered actively involved in the fraud had passed RBS' due diligence procedures.

147. Did he rely on this when forming his decision to assess? It was his evidence that he did but the appellant did not accept it. Mr Scorey pointed out that it was not mentioned in the MOKS itself but was 'buried' in a spreadsheet attachment to the MOKS. Officer Williams did not accept it was buried.

148. I found Officer Williams a careful and reliable witness and I accepted his evidence: the spreadsheet formed part of the MOKS and the information was not buried. His precursor letter refers to inadequate due diligence. It was, in my view, relevant information, and therefore reasonable and believable that he had relied on it, at least together with other information, when forming his decision to assess.

(6)due diligence for rejected counterparties - was the new information sufficient to justify the assessment?

149. The appellant's case was not that the information already in HMRC's possession justified the assessment, but that the new information was not of sufficient significance to convert to certainty an uncertainty about whether it was right to assess.

150. I do consider it reasonable for HMRC to conclude that the fact companies which HMRC believed were vehicles for fraud passed RBS' due diligence relevant to the question of RBS' knowledge and means of knowledge of the fraud: it was reasonable for Officer Williams to consider it significance such that he changed from the position he was in at the time the Letter was sent of being uncertain whether it was right to assess to his decision to assess.

151. I am satisfied that Officer Williams was acting reasonably when he considered that this information, together with other new information, justified the assessment.

Conclusion

152. For the reasons explained above I find that there was information new to HMRC contained in the Reply which was received by HMRC within the last 12 months before the assessment; Officer Williams, to the extent found above, did rely on that new information when making his decision to assess; and I find for the reasons given he was not acting unreasonably in not making the assessment on the information

already held before the Reply was received, and was acting reasonably in treating the new information as sufficient to justify the assessment.

153. The preliminary issue is therefore decided in favour of HMRC and the substantive appeal remains outstanding and must now be prepared for hearing.

Footnote - Relevance of Pinsent Mason's view expressed in July 2012

154. HMRC's case is that in July 2012, after the assessment was raised, RBS legal advisers', Pinsent Masons, queried with HMRC whether HMRC actually had enough information to assess. Mr Atkins' point is that RBS was now adopting the contrary position by suggesting that HMRC had enough to assess in early 2011.

155. Mr Scorey said Pinsent Mason's view expressed in July 2012 was irrelevant and I agree. I do not know why they expressed the view that they did: I do not need to know as their opinion is irrelevant.

156. What I would say is that a taxpayer is entitled to take what appears to be mutually inconsistent positions in defending an assessment: a taxpayer is entitled to test whether an assessment is made on time even though, as in the case of VATA s 73, that means putting forward a case that HMRC had enough information to assess more than a year before the date of the assessment; and then to go to challenge the assessment on the basis that the evidence does not justify it and it is wrong. I attached no importance to Pinsent Mason's view whatsoever.

157. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 20 JANUARY 2017