



[2019] UKFTT 541 (TC)

TC07335

STAMP DUTY LAND TAX – whether two transactions between connected parties constitute an exchange – whether market value provisions of s53 Finance Act 2003 apply in precedence to the valuation of annuity provisions of s52 Finance Act 2003 – whether transactions caught by anti-avoidance provisions of s75A Finance Act 2003 – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/05965

BETWEEN

M & M BUILDERS (NORFOLK) LTD

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE AMANDA BROWN
IAN ABRAMS**

Sitting in public at The Court House, Bridge Street, Peterborough on 6 August 2019

Mr Graham Callard, of Counsel, instructed by Cornerstone Tax Limited, for the Appellant

Mr Stephen Goulding, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. M & M Builders (Norfolk) Ltd (“**the Appellant**”) appeals against a closure notice (“**the Closure Notice**”) dated 16 April 2018 and issued by HM Revenue & Customs (“**HMRC**”) pursuant to paragraph 23 Schedule 10 Finance Act 2003 (“**FA 2003**”) amending the Appellant’s Land Transaction Return (“**the Return**”) for its purchase of a residential property at 8 Old Railway Yard, Burnham (“**the ORY Transaction**”).
2. By the Closure Notice HMRC increased the stamp duty land tax (“**SDLT**”) due on the ORY Transaction, from the vendors, Mr and Mrs Flowerdew (“**the Flowerdews**”).
3. As rendered the Return declared that the total consideration payable on the transaction was £36,000 thus falling under the minimum value in respect of which SDLT is payable. By the Closure Notice HMRC amended the Return assessing the transaction to SDLT in the sum of £180,000.
4. As set out in paragraphs 47 - 51 below, despite the property having a market value of £1,200,000 the Appellants contended that the chargeable consideration, and therefore the sum assessable to SDLT, was limited, in accordance with s52 FA 2003, to the first twelve annual payments due on an annuity contract pursuant to which the consideration for the ORY Transaction was payable to the Vendors.
5. As the Vendors and the Appellant are connected parties, pursuant to section 1122 Corporation Tax Act 2010 HMRC considered that the provisions of s53 FA 2003 applied and that the chargeable consideration was £1,200,000 being the market value of 8 Old Railway Yard (“**ORY**”).
6. When the Closure Notice was reviewed HMRC additionally asserted that the SDLT anti avoidance provisions of s75A would apply resulting in a SDLT charge again determined by reference to market value.
7. In their Statement of Case, for the first time, HMRC raised an alternative but logically antecedent argument that the ORY Transaction was assessable by reference to a transaction on the same day pursuant to which the Appellant transferred to the Vendors a second property. HMRC contended that the two transactions represented, for SDLT purposes, an exchange falling within s47 FA 2003.

FACTUAL FINDINGS

8. The principal facts and chronology were not in dispute and the Tribunal accepts them.
9. The summary below is taken from HMRC’s Statement of Case and repeated in their skeleton argument. At paragraphs 10 and 11 below the facts and matters not agreed and not subject to any evidence are addressed.
 - (1) According to Companies House information the Appellant was incorporated on 31 July 2002.
 - (2) According to Companies House information Mr Martin John Flowerdew was appointed as a director of the Appellant Ltd on 31 July 2002 and Mrs Wendy May Flowerdew was appointed as a director of the Appellant on 11 December 2002.
 - (3) HMRC received the Return in respect of the purchase of the ORY Transaction on 17 August 2016 showing the purchaser as the Appellant and the vendors as the Flowerdews.

(4) The Return showed the effective transaction date as being 31 March 2016, and a consideration figure in the sum of £36,000. Though not relevant for the purposes of the appeal the Return was delivered later than the 30 days from the effective date of transaction required by section 76 FA 2003.

(5) In response to the question box 59 of the Return ‘Are the purchaser and vendor connected?’ the answer given was ‘No’.

(6) The return showed code 01 against ‘type of property’. The guidance on completing a SDLT1 return states for code 01: **Type of property** - Residential (not including additional residential properties); **Description** - A building used or suitable for the use of a dwelling, or is in the process of being constructed to use as a dwelling. The garden or grounds of such building, including structures on the garden or grounds. An interest or right in or over land that benefits a dwelling, for example a right of way to access the dwelling.

(7) The Land Registry transfer of title deed (form TR1) dated 31 March 2016 confirms the transferor and transferee details as at (3) above. Box 8 of the title deed ‘Consideration’ shows £Nil as having been received by the transferor of the property. But also shows other receipts as being ‘an annuity of £3,000 per annum’.

(8) On 17 August 2016 HMRC also received a second land transaction return SDLT1 (“**the Second Return**”) in respect of a transaction between the same parties in relation to a second property, Galen House, Church Walk, Burnham Market, Kings Lynn (“**the GH Transaction**”).

(9) The Second Return showed the vendor as the Appellant and the purchasers as the Flowerdews. It also showed the effective transaction date as being 31 March 2016 and a consideration figure in the sum of £30,000. Again, the Second Return was delivered later than 30 days from the effective date of transaction required by Section 76 FA 2003.

(10) In response to the question box 59 of the second return ‘Are the purchaser and vendor connected?’ the answer given was ‘No’.

(11) The second return also showed code 01 against ‘type of property’ (residential).

(12) HMRC opened an enquiry under Paragraph 12 of Schedule 10 to FA 2003 into the Return on 28 April 2017. No enquiry was opened into the Second Return.

(13) Under the enquiry HMRC requested information and documents in respect of the ORY Transaction, including a copy of the purchase contract/agreement and a copy of the completion statement. HMRC also requested confirmation as to whether the Appellant is, or was, in any way, connected with the Flowerdews.

(14) On 10 July 2017 HMRC sent the Appellant a Notice to provide information and documents pursuant to Paragraph 1 Schedule 36 Finance Act 2008. The Notice again requested documents including a copy of the purchase contract/agreement, a copy of the completion statement and confirmation as to whether the Appellant is or was in any way connected with the Flowerdews.

(15) By way of letter dated 7 August 2017 the Appellant’s advisers, informed HMRC that there was no contract in place for the ORY Transaction. The advisers provided copies of the completion statement and client ledger.

(16) By way of letter dated 29 August 2017 the Appellant’s advisers sent HMRC a copy of a letter from Sowerbys property agents to the Flowerdews dated 15 February 2016 placing a valuation on the property in the sum of £1,200,000.

(17) By way of e-mail, on 12 January 2018 the Valuation Office Agency Statutory Valuation Team sent HMRC its valuation of the property also in the sum of £1,200,000.

(18) By way of letter to HMRC dated 25 January 2018 the Appellant's advisers stated that an administrative error had been made in the Return on the part of the solicitors and that the vendor and purchaser were indeed connected.

(19) HMRC issued the Closure Notice with the amendment which is subject to this appeal on 16 April 2018.

(20) The Appellant appealed the Closure Notice on 16 May 2018 with a request for a Statutory Review.

(21) HMRC issued a view of matter letter on 4 June 2018.

(22) HMRC issued a Conclusion of Statutory Review letter on 16 August 2018. The Statutory Review upheld the conclusions of the Closure Notice.

(23) The Appellant notified its appeal to the Tribunal on 10 September 2018.

(24) An official copy of an H M Land Registry register of title confirms the Appellants as being the proprietors of the property at Old Railway Yard as at 14 November 2018.

(25) An official copy of an H M Land Registry register of title confirms the Flowerdews as being the proprietors of the Galen House as at 14 November 2018.

10. Despite there being no formal valuation of Galen House it is understood that the parties agree that, at the time of its transfer, Galen House was valued at £1,000,000.

11. The Tribunal were informed that there was no written contract for the sale of either property, the Land Registry TR1 documents being the only record of transfer. It is asserted that the consideration for the ORY Transaction was by way of an annuity contract providing for the payment of £3,000 in perpetuity; that sum potentially subject to an annual RPI increase and an encashment value of £1,200,000. The Appellant's representative purported to have a draft copy of the annuity contract but had not included it on their list of document. The Tribunal were not therefore provided with a copy of the contract. The Tribunal is unable therefore to find any facts as they relate to the annuity contract nor reach any conclusion as to its legal efficacy.

12. It is also understood that the consideration for the sale and purchase of Galen House was also by way of a perpetual annuity of £2,500. No copy of that annuity contract was provided to the Tribunal which is therefore similarly unable to find any facts as they relate to that annuity contract and its efficacy.

13. There is no evidence that the annuity payments have been paid either by the Appellant or by the Flowerdews.

RELEVANT LEGISLATION

14. An annex attached to this judgement contains an extract of all the relevant statutory provisions relevant to this appeal. Paragraphs 15 - 26 below summarise the provisions which lie at the heart of the dispute.

15. SDLT is charged on land transactions (section 42 FA 2003). There is no dispute in the present case that the ORY Transaction is a land transaction falling within the definition set out in section 43 FA 2003.

16. SDLT is charged by reference to the chargeable consideration on the land transaction. Section 50 states that "Schedule 4 makes provision as to the chargeable consideration for a transaction".

17. Schedule 4 essentially sets the framework by reference to which a chargeable consideration is determined and, where necessary, valued. Paragraph 1 Schedule 4 provides:

“The chargeable consideration for a transaction is, *except as otherwise expressly provided*, any consideration in money or money’s worth given for the subject matter of the transaction ...” (emphasis added)

Exchange

18. Section 47(1) FA 2003 provides that where a land transaction is entered into by a party as purchaser wholly or partly in consideration of another land transaction where that party acts as vendor for SDLT purposes the transactions are treated as distinct and separate from one another.

19. By reference to section 47(2) FA 2003 a transaction is treated as having been entered into in consideration for another land transaction where the exchange arises under an obligation between the parties.

20. In accordance with paragraph 5 to Schedule 4 FA 2003 where the consideration payable on any particular land transaction is by way (in whole or in part) of another land transaction by way of exchange the chargeable consideration for each of the transactions is determined at its market value.

Annuity

21. Section 52 applies to “*so much* of the chargeable consideration for a land transaction as consists of an annuity payable” (emphasis added) inter alia, in perpetuity. Section 52(2) limits the consideration payable under an annuity to twelve years’ annual payments.

Connected parties

22. Pursuant to section 53 where a vendor and purchaser are connected “the chargeable consideration for the transaction *shall* be taken to be not less than” (emphasis added) inter alia the market value of the subject matter of the transaction.

Anti-avoidance

23. Section 75A FA 2003 applies where:

- (1) A vendor disposes of a chargeable interest in land to a purchaser
- (2) There are a number of transactions of which the land transaction is one together forming a scheme; and
- (3) The amount of SDLT under the scheme of transactions is less than would be payable on a “notional transaction” effecting the acquisition of the vendors interest in the land by the purchaser.

24. Where s75A FA 2003 applies the transaction which is liable to SDLT is the notional transaction effecting the sale and purchase of the land interest between vendor and purchaser.

25. The chargeable consideration of the notional transaction is the largest aggregate amount given by any one person, or received by the vendor by way of consideration for the scheme transactions.

26. By virtue of s75C(3) FA 2003 the provisions of s53 FA 2003 explicitly apply where the purchaser and the vendor are connected.

APPLICATIONS MADE DURING THE HEARING

27. At the hearing two applications were made on behalf of the Appellant. The first was an application to admit a letter of evidence from the Appellant’s conveyancing solicitor. The

second was for an adjournment of the hearing in order for the Appellant to obtain further evidence relating to the annuity contract.

Application to admit late evidence

28. This appeal was subject to directions made by the Tribunal on 7 January 2019. Direction 2 provided:

“Not later than 15 March 2019 each party shall send or deliver to the other party statements from all witnesses on whose evidence they intend to rely at the hearing setting out what that evidence will be (“witness statements”) and shall notify the Tribunal that they have done so.”

29. The notes issued by the Tribunal with the directions provide:

“Witness statements: Direction 2 requires the parties to exchange witness statements. In order to ensure that the parties can prepare properly for the hearing, it is important that they know in advance the case that the other side will put at the hearing. For this reason the Tribunal requires both sides to submit in advance written statements from every person (called a witness) that they will call upon at the hearing to give evidence of what happened. The main witness is often the appellant. The witness statement should be written by the witness setting out the true facts in so far as he knows them. The witness may find this easiest to do by looking at the statement of case and the statements provided by HMRC’s witnesses and then setting out his own version of events.”

30. By email dated 15 March 2019 the Appellant’s representatives notified HMRC and the Tribunal that they did not intend to serve witness evidence.

31. The Appellant’s skeleton argument, dated 24 July 2019, then referenced a witness statement of Jeremy Kotze. On 26 July 2019 HMRC made an application to the Tribunal inviting the Appellant to make a formal application for the late introduction of the witness statement with grounds addressing the reason for failure to have complied with the Tribunal’s directions dated 7 January 2019. By that application HMRC sought, by reference to the overriding objective contained in rule 2 First Tier Tribunal (Tax Chamber) (Procedure) Rules 2009, an unless order that the Appellant be debarred from relying on the witness statement unless prior application be made and consented to by HMRC.

32. At 15:54 on 5 August 2019 the Tribunal office received an application for the admission of what was described as the witness statement of Jeremy Kotze. The grounds for the application were that the Appellant had recently appointed Counsel who considered the statement would assist the Tribunal and that the statement sought to address the s47 FA 2003 exchange argument raised by HMRC for the first time in the Statement of Case.

33. The application was provided to the Tribunal panel on the morning of the hearing. In his oral application to admit the statement Mr Callard indicated that Mr Kotze was not present to be cross examined.

34. In reaching the conclusion that the application should be refused the Tribunal considered the guidance provided by the Upper Tribunal in *Data Select Ltd v HMRC* [2012] UKUT 187 and *William Martland* [2018] UKUT 0178.

35. In *Data Select Morgan J*, on considering a late appeal set out a 5 tiered approach to the question of out of time applications:

- (1) What is the purpose of the time limit? – in this case the 30 day time limit for making an appeal

- (2) How long was the delay?
- (3) Is there a good explanation for the delay?
- (4) What will be the consequences for the parties of an extension of time?
- (5) What will be the consequences for the parties of a refusal to extend time?

36. Most recently in the case of *William Martland* the Upper Tribunal gave further consideration to the approach to be adopted by the Tribunal in out of time applications. That Tribunal has indicated that the more formulaic checklist approach adopted by Morgan J in *Data Select* should be viewed as the means for undertaking an assessment of all the circumstances. The Tribunal states:

“44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton* [*Denton and others v TH White Limited and others* [2014] EWCA Civ 906]:

- (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being “neither serious nor significant”), then the FTT “is unlikely to need to spend much time on the second and third stages” – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
- (2) The reason (or reasons) why the default occurred should be established.
- (3) The FTT can then move onto its evaluation of “all the circumstances of the case”. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting for refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT’s deliberations artificially by reference to those factors. The FTT’s role is to exercise judicial discretion taking account of all relevant factors, not follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant’s case; this goes to the question of prejudice – there is obviously much greater prejudice for an appellant to lose the opportunity of putting forward a really strong case than a very weak one.”

37. In giving an extempore decision on the application the Tribunal applied the three stage process identified in paragraph 36 above:

- (1) The delay in making an application was significant. The directions provided for the provision of witness statements by 15 March 2019. On 24 July 2019 the Appellant referenced the statement of Mr Kotze but did not, at that time, make an application to admit it. On 26 July 2019 HMRC invited such an application and that application was not made until 5 August 2019.

(2) The reasons given were substantially that the evidence addressed an issue not raised by HMRC until their statement of case. However, the statement of case was served on 28 November 2018 and therefore 3½ months before the direction to serve witness statements. The Appellant has, throughout, been professionally advised and the representatives had confirmed on 15 March 2019 that no evidence was required. The instruction of counsel at a late stage was a decision taken by the Appellants.

(3) In terms of the balancing exercise to be undertaken by the Tribunal: the Appellant has given no substantive reason for the delay. Further, Mr Kotze's evidence was not accepted by HMRC, he was not available for cross examination and the prejudice to HMRC in admitting the witness statement would have been significant.

38. The application was therefore refused.

Application for adjournment

39. Counsel for the Appellant consistently asserted that the annuity contract represented market value i.e. that the value of the Annuity Contract was £1,200,000. The member of the Tribunal is an actuary and challenged Mr Callard on this assertion which was not substantiated by any evidence.

40. Upon such challenge the Appellant sought an adjournment of the hearing in order that the competed annuity contract relevant to the ORY Transaction be produced such that the member could consider it. HMRC objected to the application.

41. On the basis that such application was effectively a second application for late admission of evidence, and for the reasons set out in respect of the late service of Mr Kotze's witness statement, the application was refused.

SUBSTANTIVE ISSUES IN THE CASE

42. The parties were agreed that the issues in the case were:

- (1) Whether section 47 FA is applicable
- (2) Whether the provisions of section 52 apply when calculating the chargeable consideration on which SDLT is levied despite the provisions of section 53 FA 2003
- (3) Whether section 75A FA 2003 applies.

SUBMISSIONS

Appellant's submissions

Issue 1 – application of section 47 FA 2003

43. The Appellant contended that the ORY Transaction and the GH Transaction did not amount to an exchange on the basis that there was no obligation pursuant to which one of the transactions became the consideration for the other and vice versa and no net payment was due reflecting the difference in value between the properties.

44. The Appellant denied that the circumstance that the two transactions took place on the same day and between the same parties was sufficient to conclude that the transactions contain the mutual obligations justifying a conclusion that there was an exchange.

45. The Appellant made reference to HMRC guidance as to the circumstance in which an exchange were to occur as corroborating its contention that there could be no exchange.

46. It was further submitted that in the event that the provisions of s47 FA 2003 were applicable the effect is only to input the market value of the properties being exchanged in order to ensure that there is no loss of SDLT where a property of a higher value is exchanged for a property of a lower value. As, in the Appellant's submission, the consideration actually

given was an annuity/bond equal to market value the market value provisions were met. The Appellant then relied on s52 FA 2003 as the appropriate provision by reference to which the bond should be valued (see paragraphs 47 - 51 below)

Issue 2 – relationship between sections 52 and 53 FA 2003

47. In this regard the Appellant submitted that the method for calculating chargeable consideration of an annuity under s52 FA 2003 applies despite the market value provisions of s53.

48. The Appellant referred the Tribunal to the history of the annuity provisions which were first introduced in the Stamp Act 1891. The Appellant sought to rely on the relevant Hansard debate of s52 when introduced and the rationale for the limit on the number of annuity payments included when determining a liability to SDLT.

49. On the basis that Counsel for the Appellant could not identify any ambiguity in the statutory language of s52 FA 2003 justifying reference to Hansard (as required by reference to the House of Lords judgement in *Pepper v Hart* [1992] STC 898) the Tribunal did not receive his submissions in this regard.

50. The Appellant, by reference to the recent judgment of Judge Nicolls in *David Hannah and others v HMRC* [2019] UKFT 0342 further contended that the annuity provisions in s52 FA 2003 do not constitute a relief from SDLT but rather provides the administrative basis on which the chargeable consideration payable under an annuity/bond is valued.

51. It was submitted that the market value provisions contained in s53 FA 2003 were inapposite where s52 FA 2003 applies because:

“(1) Section 53 FA 2003 determines the quantum of the chargeable consideration and where the purchaser is a company in connection to the vendor, this is equal to the market value;

(2) Section 52 FA 2003 contains specific caveats of which s53 FA 2003 is not one;

(3) Section 53 can be overridden by other sections specified in s54 and those listed in Paragraph 1 of Schedule 3 FA 2003

(4) Section 53 can also be overridden by other provisions not explicitly stated, such as reliefs relating to partnerships incorporating their business into a company which is connected to them;

(5) HMRC’s contention that s52 FA 2003 envisages that there may be other chargeable consideration alongside the annuity is unsubstantiated.”

Issue 3 – application of s75A FA 2003

52. The Appellant contends that in order for s75A FA 2003 to apply, not only must there be less SDLT payable on the scheme of transactions than on the notional transaction, there must be a number of transactions.

53. It was contended by the Appellant that the ORY Transaction did not comprise a number of transactions and was not part of a scheme of transactions.

54. Essentially the Appellant’s response to HMRC’s contention that s75A FA 2003 was applicable, was to articulate that:

(1) there was no relationship save circumstance between the ORY Transaction and any other transaction, including the GH Transaction;

(2) the annuity was not a separate transaction capable of forming part of a scheme of transactions because it was the consideration payable on the ORY Transaction; and

(3) the ORY Transaction itself was valued by reference to market value, for the reasons set out in paragraphs 47 - 51 above.

HMRC's submission

Issue 1 – application of section 47 FA 2003

55. HMRC's principal contention regarding the existence of an exchange was that as both the ORY Transaction and the GH Transaction occurred between the same parties on the same day and were both transactions where the consideration was apparently provided by way of a perpetual annuity.

56. If, as HMRC contend, the ORY Transaction and GH Transaction amount to an exchange, HMRC contend that the provisions of paragraphs 5(3) and (3A) of Schedule 4 require that the chargeable consideration shall be the market value of the subject matter of the acquisition i.e. the market valuation of the Old Railway Yard property - £1,200,000.

Issue 2 – relationship between sections 52 and 53 FA 2003

57. HMRC contend that there is no dispute as to the market value of ORY nor that the Appellant and the Flowerdews are connected parties. In such circumstances, HMRC submit, the market value provisions of s53 FA 2003 apply, assimilating the market value of "the subject matter of the transaction" - i.e. ORY - as the deemed chargeable consideration.

58. In response to the Appellant's assertion that s52 FA 2003 applies to limit chargeable consideration of a market value annuity to twelve annual payments HMRC contend that the language of s52(1) FA 2003 is clearly limited to "so much" of the consideration as is represented by the annuity. HMRC contend that it is therefore necessary to bring into account an additional sum of £1,164,000 chargeable consideration under the s 53 FA 2003 deeming provision.

59. HMRC rely on the status of s53 FA 2003 as an anti-avoidance provision requiring a purposive interpretation and that s53 FA 2003 is not subject to s52 FA 2003.

60. By reference to the case of *David Hannah*, HMRC agree that s52 FA 2003 does not represent a relief but contend that the judgment in that case is entirely supportive of their contention as to the relationship between sections 52 and 53 FA 2003.

61. As to the Appellant's reliance on HMRC guidance, HMRC contend that the guidance supports their contention and not that of the Appellant.

62. The Appellant's reliance on paragraph 1 of Schedule 3 FA 2003 is, on HMRC's submission, misguided as s53(4) FA 2003 specifically disapplies paragraph 1 Schedule 3 where s53 FA 2003 applies.

63. The Tribunal has considered the guidance relied on by the Appellant and consider that it does not support their position.

Issue 3 – application of s75A FA 2003

64. HMRC relied on paragraph [45] of the judgment in *David Hannah* to assert that the annuity and the ORY Transaction together represented a number of transactions forming part of a scheme and since the amount of SDLT arising under the scheme of transactions was nil and the chargeable consideration under any notional transaction between the Appellant and the Flowerdews would be the market value of ORY the conditions of s75A FA 2003 were met.

DISCUSSION

Issue 1 – application of section 47 FA 2003

65. As set out above, s47 and paragraph 5 Schedule 4 FA 2003 require that if the ORY Transaction and the GH Transaction represent consideration for one another in consequence of

obligations arising under the respective transactions then each transaction will be assessed distinctly and independently by reference to the market value of the subject matter of the acquisition.

66. The Tribunal accepts the contention on behalf of the Appellant that in order to fall within s47 FA 2003 one land transaction must represent the consideration for the other – in a true sense where a part exchange happens.

67. HMRC sought to rely on the circumstances of the timing and parties to assert that there must have been an obligation that the ORY Transaction was the consideration for the GH Transaction and vice versa thereby bringing them within s47 FA 2003.

68. The difficulty in the present appeal is that the Appellant asserts there was no written contract for the sale and purchase of either property and has not provided copies of the annuity contracts/bonds.

69. HMRC have been placed in the almost impossible position of running an argument on the basis of an hypothesis which cannot be substantiated by reference to the evidence but only because of the Appellant's failure to produce the evidence both before the Tribunal and in response to an Information Notice issued pursuant to Schedule 36 Finance Act 2008 in circumstances in which the burden of proof rests with the Appellant to show that the amendment in the Closure Notice is incorrect.

70. The Tribunal has considered whether to assume an obligation in the absence of evidence that no such obligation arises. However, after some considerable deliberation the Tribunal has concluded, on the basis of the Return, the Second Return and the TR1 in respect of the ORY that it is more likely than not that the obligations arising under the ORY Transaction were that the chargeable interest was transferred in consideration for the benefit of the related annuity and similarly that the obligations under the GH Transaction were for the transfer of the chargeable interest in consideration for the benefit of the related annuity and not by reference to any obligation arising between the two transactions.

71. On that basis the ORY Transaction and the GH Transaction do not represent an exchange for the purposes of s47 FA 2003.

Issue 2 – relationship between sections 52 and 53 FA 2003

72. The Tribunal considers that the relationship between section 52 and 53 FA 2003 can be readily determined by reference to an approach which deals firstly with the determination/identification of chargeable consideration and then its valuation.

73. Section 50 FA 2003 requires that the chargeable consideration be determined by reference to Schedule 4 FA 2003. Paragraph 1 Schedule 4 FA 2003 provides “the chargeable consideration for a transaction is, except as otherwise provided, any consideration in money or money's worth given for the subject matter of the transaction”. Paragraphs 2 – 17 do not apply to the ORY Transaction.

74. The Tribunal has determined, in connection with issue 1 (and in the Appellant's favour) that the consideration under the ORY Transaction is the annuity contract entered between connected parties.

75. Section 53 applies where the purchaser and the vendor are connected and provides that the chargeable consideration *shall* be taken to be not less than the market value of the subject matter of the transaction.

76. The subject matter of the ORY Transaction is the property and not the money's worth consideration payable for that property. The market value of the property is agreed as

£1,200,000 with the consequence that that sum *shall* be taken as the chargeable consideration. No question of valuation of the annuity therefore arises.

77. In the Tribunal's view s52 FA 2003 applies to determine the value of an annuity where the annuity represents the basis by reference to which the chargeable consideration is to be valued and applies to so much of the consideration as is represented by the annuity (i.e. where there is other consideration in addition to the annuity). In the present case there is no need to value the annuity because it does not form the basis by reference to which the chargeable consideration is to be valued.

78. Such an interpretation is entirely consistent with the structure of the provisions of Part 4 and the relevant Schedules of FA 2003 and with the obvious and unambiguous purpose of s53 FA 2003 to eliminate the possible influence of connection as between vendor and purchaser in respect of determining and valuing chargeable consideration.

79. On the basis of the interpretation of the provisions applied by the Tribunal the unsubstantiated assertion by the Appellant that the annuity/bond was market value consideration becomes an irrelevance as the annuity in and of itself is not used as the basis of valuation of the chargeable consideration in a connected party land transaction – the property itself is the sole basis of valuation.

80. As is apparent HMRC's argument that s53 FA 2003 operates in some way so as to top up the s52 FA 2003 valuation is not accepted by the Tribunal. That construction does not, in the Tribunal's view, fit with the language or structure of the legislation and, in any event, is unnecessary.

Issue 3 – application of s75A FA 2003

81. If the Tribunal is wrong on Issue 2 it becomes necessary to consider the application, or otherwise, of s75A FA 2003.

82. In the case of *David Hannah* Judge Nicholl was faced with a land transaction granted in return for an annuity contract. However, in circumstances in which the structuring was significantly more complex. In that case, the purchaser (Mr Hannah one of the proprietors of Cornerstone Tax Advisers and his wife) paid a deposit on the purchase of a residential dwelling. The purchase contract provided that the balance of the purchase price could be satisfied by the issuance and delivery of an annuity contract which could be issued prior to completion and then held on trust for the purchasers. However, the vendor then had right, under the annuity contract, to encash it prior to completion and for the proceeds of encashment to be used for the purposes of completion.

83. The chronology in that case saw the purchasers issuing the annuity; the annuity was then assigned by them and the assignees accepted all benefits but agreed to assume all liabilities. After assignment the vendors gave notice to encash the annuity, the annuity was duly redeemed and the assignee released with completion of the land transaction then taking place essentially for cash.

84. Like the Appellant Mr Hannah sought to contend that the land transaction was substantially complete prior to completion such that they could then say that the chargeable consideration for SDLT purposes was limited to twelve annual payments under the annuity and did not include the encashment value.

85. There were a number of issues arising in relation to that appeal not arising in the present appeal. However, the Tribunal considered the application of s75A FA 2003. In that regard, on behalf of Mr Hannah it was contended:

“43. ... section 75A has no application because the tax saving test will not be met as reference to “consideration” in section 75A(5)(a) and (b) must be read in light of section 52, with the result that the value of the annuity must be restricted to the twelve annual payments as require by s52(2). This is because section 75C provides that “the notional transaction under s75A attracts any relief under this Part which it would attract of it were an actual transaction (subject to the terms and restrictions of the relief)”.

86. At [44] Judge Nicholl notes the guidance given by the Supreme Court in *Project Blue Ltd v HMRC* [2018] UKSC 30 as to the purposive construction to be applied when interpreting s75A and proceeds:

“45. Applying the tests in section 75A(1)(a), (b) and (c) to the facts of this case, I agree that section 75A is in point because: (a) the Appellants’ acquisition is of a chargeable interest, being the Property; (b) there are a number of scheme transactions (the issue, assignment, notice to redeem and release of the Annuity) in connection with the disposal and acquisition of the Property; and (c) the amount of SDLT payable in respect of the scheme transactions (nil) is less than the amount that would be payable on a notional land transaction effecting the acquisition of the Property by the Appellants on its disposal by the Vendors (£30,600).

46. The next step is that sections 75A(4)-(5) require all of the scheme transactions to be disregarded and a notional land transaction is created by reference to the “real world” nature of the transaction for a chargeable consideration equal to the largest aggregate amount given by any one person, or received by the Vendors, by way of consideration for the scheme transactions. This results in the notional transaction being the acquisition of the Property by the Appellants on its disposal by the Vendors for a chargeable consideration of £38,250 (the deposit) plus £772,267.50 (the payment made on the assignment of the Annuity).

47. Finally, if the test is met, the SDLT is calculated by reference to the chargeable consideration for the notional transaction, subject to section 75C(2) which provides that the notional transaction under section 75A attracts any relief which it would attract if it were an actual transaction. The Appellants claim that this means that section 52 must applied in the calculation of the SDLT as, instead of valuing an annuity in general, the provision affords “relief” by stipulating how the value of the annuity is computed.

48. This analysis does not reflect the drafting of the anti-avoidance provisions in Part 5 of the Finance Act 2003. The charge under Part 5 is on the notional transaction, being the acquisition of the Property by the Appellants on its disposal by the Vendors for the chargeable consideration of £810,517.50. It is not by reference to the scheme transactions including an annuity. Therefore even if section 52 were a relief despite not being drafted or expressed as such, section 75C(2) only ensures that the notional transaction attracts reliefs that it would if that notional transaction had been the actual transaction, and so section 52 does not apply. ...”

87. Having given due consideration to the analysis provided by Judge Nicholl, with which the Tribunal entirely agrees, (though the Tribunal were informed that the case is under appeal) the Tribunal considers that section 75A FA 2003 requires there to be a number of transactions comprising a scheme. It is clear from *David Hannah* that there were a number of transactions in addition to the land transaction itself: the assignment, encashment and release of the annuity were all separately identifiable transactions.

88. In the present case HMRC have only asserted that the scheme comprises the transfer of land and the annuity contract.

89. Examining the language of s75A FA 2003 the Tribunal has formed the view that it cannot be said that the annuity contract and the transfer of ORY can comprise a number of transactions. The Tribunal accepted the Appellant's submission that the annuity contract is the consideration for the transfer of the chargeable interest and therefore from both a land law and contract law perspective together they comprise a single transaction.

90. The Tribunal has briefly considered whether the ORY Transaction and GH Transaction could be said to comprise a scheme (clearly constituting a number of transactions). However, there is simply insufficient evidence of the GH Transaction and the relationship with the ORY Transaction to legitimately form a view that they comprised a scheme of transactions. Their temporal proximity to one another, the fact that the parties were the same and that the Flowerdews presumably needed somewhere to live might indicate that they were all part of a scheme despite not meeting the statutory definition of an exchange. However, on the basis that the Appellant's appeal is disposed of on the grounds that s53 FA 2003 provides the correct basis of taxation the Tribunal has determined not to explore this issue any further.

91. However, it should be noted that the Tribunal considers that its conclusion in relation to Issue 2 is reinforced by the analysis of Judge Nichol and the provisions of s75C(6). It is clear that had s75A FA 2003 applied the "real world" notional transaction would nevertheless have been one between connected parties to which s53 would then have explicitly applied.

DISPOSITION

92. For the reasons set out above the Appellant's appeal is dismissed and the amendment to the Return is maintained.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

93. 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.

**AMANDA BROWN
TRIBUNAL JUDGE**

RELEASE DATE: 19 AUGUST 2019

SCHEDULE
RELEVANT EXTRACTS FROM LEGISLATION
Stamp duty land tax (SDLT)

Finance Act 2003

Section 42

(1) A tax (to be known as “stamp duty land tax”) shall be charged in accordance with this Part on land transactions.

(2) The tax is chargeable—

- (a) whether or not there is any instrument effecting the transaction,
- (b) if there is such an instrument, whether or not it is executed in the United Kingdom, and
- (c) whether or not any party to the transaction is present, or resident, in the United Kingdom.

(3) The tax is under the care and management of the Commissioners of Inland Revenue (referred to in this Part as “the Board”).

Section 43

(1) In this Part a “land transaction” means any acquisition of a chargeable interest. As to the meaning of “chargeable interest” see section 48.

(2) Except as otherwise provided, this Part applies however the acquisition is effected, whether by act of the parties, by order of a court or other authority, by or under any statutory provision or by operation of law.

(3) For the purposes of this Part—

- (a) the creation of a chargeable interest is—
 - (i) an acquisition by the person becoming entitled to the interest created, and
 - (ii) a disposal by the person whose interest or right is subject to the interest created;
- (b) the surrender or release of a chargeable interest is—
 - (i) an acquisition of that interest by any person whose interest or right is benefitted or enlarged by the transaction, and
 - (ii) a disposal by the person ceasing to be entitled to that interest; . . .
- (c) the variation of a chargeable interest [(other than a lease)] is—
 - (i) an acquisition of a chargeable interest by the person benefitting from the variation, and
 - (ii) a disposal of a chargeable interest by the person whose interest is subject to or limited by the variation;
- (d) the variation of a lease is an acquisition and disposal of a chargeable interest only where—
 - (i) it takes effect, or is treated for the purposes of this Part, as the grant of a new lease[, or
 - (ii) paragraph 15A of Schedule 17A (reduction of rent or term) applies.

(4) References in this Part to the “purchaser” and “vendor”, in relation to a land transaction, are to the person acquiring and the person disposing of the subject-matter of the transaction.

These expressions apply even if there is no consideration given for the transaction.

(5) A person is not treated as a purchaser unless he has given consideration for, or is a party to, the transaction.

(6) References in this Part to the subject-matter of a land transaction are to the chargeable interest acquired (the “main subject-matter”), together with any interest or right appurtenant or pertaining to it that is acquired with it.

Section 47

(1) Where a land transaction is entered into by the purchaser (alone or jointly) wholly or partly in consideration of another land transaction being entered into by him (alone or jointly) as vendor, this Part applies in relation to each transaction as if each were distinct and separate from the other [(and they are not linked transactions within the meaning of section 108)].

(2) A transaction is treated for the purposes of this Part as entered into by the purchaser wholly or partly in consideration of another land transaction being entered into by him as vendor in any case where an obligation to give consideration for a land transaction that a person enters into as purchaser is met wholly or partly by way of that person entering into another transaction as vendor.

(3) As to the amount of the chargeable consideration in the case of exchanges and similar transactions, see—

paragraphs 5 and 6 of Schedule 4 (exchanges, partition etc), . . .

[paragraph 17 of that Schedule (arrangements involving public or educational bodies)].

Section 50

(1) Schedule 4 makes provision as to the chargeable consideration for a transaction.

(2) The Treasury may by regulations amend or repeal the provisions of this Part relating to chargeable consideration and make such other provision as appears to them appropriate with respect to—

(a) what is to count as chargeable consideration, or

(b) the determination of the amount of chargeable consideration.

(3) The regulations may make different provision in relation to different descriptions of transaction or consideration and different circumstances.

Section 52

(1) This section applies to so much of the chargeable consideration for a land transaction as consists of an annuity payable—

(a) for life, or

(b) in perpetuity, or

(c) for an indefinite period, or

(d) for a definite period exceeding twelve years.

(2) For the purposes of this Part the consideration to be taken into account is limited to twelve years' annual payments.

(3) Where the amount payable varies, or may vary, from year to year, the twelve highest annual payments shall be taken. No account shall be taken for the purposes of this Schedule of any provision for adjustment of the amount payable in line with the retail price index.

(4) References in this section to annual payments are to payments in respect of each successive period of twelve months beginning with the effective date of the transaction.

(5) For the purposes of this section the amount or value of any payment shall be determined (if necessary) in accordance with section 51 (contingent, uncertain or unascertained consideration).

(6) References in this section to an annuity include any consideration (other than rent) that falls to be paid or provided periodically. References to payment shall be read accordingly.

(7) Where this section applies—

(a) section 80 (adjustment where contingency ceases or consideration is ascertained) does not apply, and

(b) no application may be made under section 90 (application to defer payment in case of contingent or uncertain consideration).

Section 53

(1) This section applies where the purchaser is a company and—

(a) the vendor is connected with the purchaser, or

(b) some or all of the consideration for the transaction consists of the issue or transfer of shares in a company with which the vendor is connected.

(1A) The chargeable consideration for the transaction shall be taken to be not less than—

(a) the market value of the subject-matter of the transaction as at the effective date of the transaction, and

(b) if the acquisition is the grant of a lease at a rent, that rent.

(2) Section 1122 of the Corporation Tax Act 2010] (connected persons) has effect for the purposes of this section.

(3) In this section—

“company” means any body corporate;

“shares” includes stock and the reference to shares in a company includes a reference to securities issued by a company.

(4) Where this section applies paragraph 1 of Schedule 3 (exemption of transactions for which there is no chargeable consideration) does not apply.

But this section has effect subject to any other provision affording exemption or relief from stamp duty land tax.

(5) This section is subject to the exceptions provided for in section 54.

Section 54

(1) Section 53 (chargeable consideration: transaction with connected company) does not apply in the following cases.

In the following provisions “the company” means the company that is the purchaser in relation to the transaction in question.

(2) Case 1 is where immediately after the transaction the company holds the property as trustee in the course of a business carried on by it that consists of or includes the management of trusts.

(3) Case 2 is where—

(a) immediately after the transaction the company holds the property as trustee, and

(b) the vendor is connected with the company only because of [\[section 1122\(6\)\]](#) of the Corporation Tax Act 2010].

(4) Case 3 is where—

(a) the vendor is a company and the transaction is, or is part of, a distribution of the assets of that company (whether or not in connection with its winding up), and

(b) it is not the case that—

- (i) the subject-matter of the transaction, or
- (ii) an interest from which that interest is derived,

has, within the period of three years immediately preceding the effective date of the transaction, been the subject of a transaction in respect of which group relief was claimed by the vendor.

Section 55A

Schedule 4A provides for the calculation of the tax chargeable in respect of certain transactions involving higher threshold interests in dwellings

Section 75A

(1) This section applies where—

- (a) one person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it,
- (b) a number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition (“the scheme transactions”), and
- (c) the sum of the amounts of stamp duty land tax payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V.

(2) In subsection (1) “transaction” includes, in particular—

- (a) a non-land transaction,
- (b) an agreement, offer or undertaking not to take specified action,
- (c) any kind of arrangement whether or not it could otherwise be described as a transaction, and
- (d) a transaction which takes place after the acquisition by P of the chargeable interest.

...

(4) Where this section applies—

- (a) any of the scheme transactions which is a land transaction shall be disregarded for the purposes of this Part, but
- (b) there shall be a notional land transaction for the purposes of this Part effecting the acquisition of V's chargeable interest by P on its disposal by V.

(5) The chargeable consideration on the notional transaction mentioned in subsections (1)(c) and (4)(b) is the largest amount (or aggregate amount)—

- (a) given by or on behalf of any one person by way of consideration for the scheme transactions, or
- (b) received by or on behalf of V (or a person connected with V within the meaning of [section 1122 of the Corporation Tax Act 2010) by way of consideration for the scheme transactions.

(6) The effective date of the notional transaction is—

- (a) the last date of completion for the scheme transactions, or
- (b) if earlier, the last date on which a contract in respect of the scheme transactions is substantially performed.

(7) This section does not apply where subsection (1)(c) is satisfied only by reason of—

- (a) sections 71A to 73, or
- (b) a provision of Schedule 9.

Section 75C

(1) A transfer of shares or securities shall be ignored for the purposes of section 75A if but for this subsection it would be the first of a series of scheme transactions.

(2) The notional transaction under section 75A attracts any relief under this Part which it would attract if it were an actual transaction (subject to the terms and restrictions of the relief).

(3) The notional transaction under section 75A is a land transaction entered into for the purposes of or in connection with the transfer of an undertaking or part for the purposes of paragraphs 7 and 8 of Schedule 7, if any of the scheme transactions is entered into for the purposes of or in connection with the transfer of the undertaking or part.

(4) In the application of section 75A(5) no account shall be taken of any amount paid by way of consideration in respect of a transaction to which any of sections 60, 61, 63, 64, 65, 66, 67, 69, 71 [and 74]3, or a provision of Schedule 6A[, 7A]4 or 8, applies.

(5) In the application of section 75A(5) an amount given or received partly in respect of the chargeable interest acquired by P and partly in respect of another chargeable interest shall be subjected to just and reasonable apportionment.

(6) Section 53 applies to the notional transaction under section 75A.

(7) Paragraph 5 of Schedule 4 applies to the notional transaction under section 75A.

(8) For the purposes of section 75A—

(a) an interest in a property-investment partnership (within the meaning of paragraph 14 of Schedule 15) is a chargeable interest in so far as it concerns land owned by the partnership, ...

(b) ...

[(8A) Nothing in Part 3 of Schedule 15 applies to the notional transaction under section 75A.]

(9) For the purposes of section 75A a reference to an amount of consideration includes a reference to the value of consideration given as money's worth.

(10) Stamp duty land tax paid in respect of a land transaction which is to be disregarded by virtue of section 75A(4)(a) is taken to have been paid in respect of the notional transaction by virtue of section 75A(4)(b).

(11) The Treasury may by order provide for section 75A not to apply in specified circumstances.

(12) An order under subsection (11) may include incidental, consequential or transitional provision and may make provision with retrospective effect.

Section 76

(1) In the case of every notifiable transaction the purchaser must deliver a return (a “land transaction return”) to the Inland Revenue before the end of the period of [14 days] after the effective date of the transaction.

(2) The Inland Revenue may by regulations amend subsection (1) so as to require a land transaction return to be delivered before the end of such shorter period after the effective date of the transaction as may be prescribed or, if the regulations so provide, on that date.

(3) A land transaction return in respect of a chargeable transaction must—

(a) include an assessment (a “self-assessment”) of the tax that, on the basis of the information contained in the return, is chargeable in respect of the transaction, . . .

...

Schedule 4

Money or money's worth

- 1 (1) The chargeable consideration for a transaction is, except as otherwise expressly provided, any consideration in money or money's worth given for the subject-matter of the transaction, directly or indirectly, by the purchaser or a person connected with him.

...

Exchanges

- 5 (1) This paragraph applied to determine the chargeable consideration where one or more and transactions are entered into by a person as purchaser (alone or jointly) wholly or partly in consideration of one or more other land transactions entered into by him (alone or jointly) as vendor.

- (2) In this paragraph—

- (a) “relevant transaction” means any of those transactions, and
- (b) “relevant acquisition” means a relevant transaction entered into as purchaser and “relevant disposal” means a relevant transaction entered into as vendor.

- (3) The following rules apply if the subject-matter of any of the relevant transactions is a major interest in land—

- (a) where a single relevant acquisition is made, the chargeable consideration for the acquisition is—

- (i) the amount determined under sub-paragraph (3A) in respect of the acquisition, or
- (ii) if greater, the amount which would be the chargeable consideration for the acquisition ignoring paragraph 5;

- (b) where two or more relevant acquisitions are made, the chargeable consideration for each relevant acquisition is—

- (i) the amount determined under sub-paragraph (3A) in respect of that acquisition, or
- (ii) if greater, the amount which would be the chargeable consideration for that acquisition ignoring paragraph 5.

- (3A) The amount mentioned in sub-paragraph (3)(a)(i) and (b)(i) is—

- (a) the market value of the subject-matter of the acquisition, and
- (b) if the acquisition is the grant of a lease at a rent, that rent.

Schedule 4A

1 Meaning of “higher threshold interest”

- (1) In this paragraph “interest in a single dwelling” means so much of the subject-matter of a chargeable transaction as consists of a chargeable interest in or over a single dwelling (together with appurtenant rights).

- (2) An interest in a single dwelling is a higher threshold interest for the purposes of this Schedule if chargeable consideration of more than [£500,000] is attributable to that interest.

...

3 Amount of tax chargeable: higher rate for certain transactions

- (1) Where this paragraph applies to a chargeable transaction—

- (a) the amount of tax chargeable in respect of the transaction is 15% of the chargeable consideration for the transaction, and

- (b) the transaction is not taken to be linked to any other transaction for the purposes of section [55(1B), (1C) and (4)].
- (2) This paragraph applies to a chargeable transaction if—
 - (a) the transaction is a high-value residential transaction, and
 - (b) the condition in sub-paragraph (3) is met.
- (3) The condition is that—
 - (a) the purchaser is a company ...
- (7) In relation to an event that is a chargeable transaction by virtue of paragraph 17A(4) of that Schedule, sub-paragraph (3) has effect as if the following were substituted for paragraph (b) of that sub-paragraph—
 - (b) the purchasers (see paragraph 17A(5) of Schedule 15) include a company, or

Schedule 10

- 23 (1) An enquiry under paragraph 12 is completed when the Inland Revenue by notice (a “closure notice”) inform the purchaser that they have completed their enquiries and state their conclusions.
- (2) A closure notice must either—
 - (a) state that in the opinion of the Inland Revenue no amendment of the return is required, or
 - (b) make the amendments of the return required to give effect to their conclusions.
- (3) A closure notice takes effect when it is issued.
- 35 (1) An appeal may be brought against—
 - (b) a conclusion stated or amendment made by a closure notice