[2021] UKFTT 0208 (TC)

TC08158

*SDLT -Arrangement under which house sold to company and then distributed to shareholders on reduction of capital – para 1 Sch4, section 45 (2007 version)(*Vardy *not followed) and s75A FA 2003. Determination - jurisdiction to hear appeal*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/7808

BETWEEN

MICHAEL BROWN
BRIDGET BROWN **Appellant**

-and-

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

TRIBUNAL: JUDGE CHARLES HELLIER

The hearing took place on 22 and 23 April 2021.

With the consent of the parties, the form of the hearing was by video on the Tribunal video platform. A face to face hearing was not held because of the Covid 19 pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Ross Birkbeck instructed by Blackfriars Tax Solutions LLP for the Appellant

David Street for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against an SDLT determination notified to the Appellants in relation to the acquisition of a house in Surrey. The Appellants acquired the house in 2007 pursuant to an arrangement under which the house was first sold to an unlimited company, and then transferred by that company to the Appellants on a distribution in specie by the company. The Appellants assert that this arrangement gave them no liability to SDLT on the acquisition of the house; HMRC argued to the contrary.

The evidence and facts.

2. There was an agreed statement of facts and I was shown a handful of documents relating inter alia to the distribution in specie by the company and correspondence with HMRC. The mutually agreed facts are:

> (1) the company was incorporated as an unlimited company on 2 July 2007. Mr and Mrs Brown each subscribed for 47,751 £1 shares at par, paying £95,502 in total;
>
> (2) On 9 July 2007 the company contracted to purchase the house for £955,000 and paid a deposit of £95,000;
>
> (3) On 8 August 2007 the company issued to each of Mr and Mrs Brown a further 432,250 shares at par. This brought the total nominal value of shares in issue £960,002.
>
> (4) On 15 August 2007 the company resolved to reduce its share capital from £960,002 to £2 by way of a distribution in specie of the house conditional on and simultaneous with the completion of its original house purchase contract.
>
> (5) Also on 15 August 2007 the company used the balance of the money deriving from the share subscriptions to complete the transfer of the house to it and a transfer was executed in its favour.
>
> (6) Also on 15 August 2007 a transfer of the house from the company to the Appellants was executed showing no consideration; and the company's share capital was reduced.
>
> (7) The Appellants made no SDLT return on the basis that none was required because no chargeable consideration had been given for the transfer of the house to them.
>
> (8) On 8 August 2011 HMRC issued a notice of determination to the Appellants in respect of the acquisition of the house setting an SDLT liability of 4% of £955,000.

3. The appellants appeal against the determination so notified.

4. There were a few matters which were not covered by the statement of agreed facts and which had some potential relevance to the application of the relevant provisions.

5. The first was whether, for the purposes of section 45(3) FA 2003 (to which I shall come later) the transfer to the company and the transfer by the company to the Appellants were executed "at the same time". I shall return to the meaning of these words later but I find that it is likely that they were executed on the same day within minutes of each other. I so find because: (i) that is suggested by the terms of the company's resolution, (ii) it is suggested by the description of the proposed transactions in a letter of 7 June 2007 from Premier Strategies Ltd to the Appellants in which Premier describes its "SDLT Strategy", and (iii) representations are made to that effect in a letter to HMRC from the Appellants' previous advisers.

6. I also find that the actions described at paragraph [2(2) to (6)] above were taken in pursuance of a plan (the "SDLT strategy") described to Mr and Mrs Brown in that letter from Premier of 7 June 2007, and that from the time of step (2) onwards there was no practical likelihood that the remaining steps would not be taken unless some problem with the conveyancing occurred such as defect in title.

7. The documents show that the shares subscribed on 8 August were subscribed in return for in return for promissory notes for £432,250 from each of Mr and Mrs Brown. These promissory notes were expressed to be payable on 15 August 2007, the day of completion of the company's purchase. The agreed statement of facts contains no history of these promissory notes, but in the Premier letter it is said that "on the day of completion the mortgage monies will be paid across to the vendor by the conveyancing solicitor thereby satisfying the promissory note". I find that the notes were satisfied by the advance of monies for the account of Mr and Mrs Brown by their mortgagor, paid to their conveyancer for the account of the company and then paid to the original vendor of the house.

8. The documents show that the estate the Appellants acquired in the house was a freehold interest.

The legislative provisions in FA 2003 relevant to substantive liability.

9. The legislation applicable at the relevant time used the phrase "Inland Revenue" to refer to what we now know as HMRC. I have tried to adopt the more modern appellation in this decision, albeit at the expense of historical accuracy

10. At the relevant time Finance Act 2003 ("FA 2003") provided as follows (all legislative references hereafter are to FA 2003). SDLT was to be charged on chargeable transactions. These were "land transactions" (section 43(1)) which were not exempt (s49). A land transaction included the acquisition of a freehold title to a house (section 48). Where a contract to acquire land was completed by a conveyance and not "substantially completed" at an earlier time, the entry into the contract was not a land transaction but on completion, the contract and the conveyance were treated as a single land transaction taking place at the date of completion (section 44(1 to 3)).

11. The tax is charged by reference to the chargeable consideration which is defined by para 1 Sch 4 FA 2003 to be any consideration in money money's worth given for the subject matter of the transaction directly or indirectly by the purchaser or a person connected with him.

12. The purchaser (the person acquiring the land (section 44(4))) is liable for the SDLT on the transaction (section 85) and must deliver an SDLT return to HMRC if the transaction is "notifiable". At the relevant time section 77 provided that the acquisition of a freehold was notifiable unless the transaction was exempt under Schedule 3. Para 1 of that Schedule provided that a land transaction under which the chargeable consideration was nil was exempt.

13. Section 45 (which I shall set out later) made provision for the situation in which land was contracted to be sold by A to B, but there was an assignment, subsale or other transaction as a result of which C became entitled to call for a conveyance. Broadly, in such a case the section provided that SDLT was to be charged only by reference to C's acquisition under a notional ("secondary") contract. This provision could encompass (1) the assignment (whether or not for consideration) by B to C of B's rights under his contract with A so that on completion A would convey the property to C and C would pay C directly and perhaps pay B for the assignment, and (2) the situation where, for example, in a rising market B "turned the property to C for an immediate profit derived from the higher price payable under the second contract" (Lord Bridge in *Project Blue Limited v HMRC* 2018 UK SC 30 at [94] who said (although dissenting on other matters) that such a second contract was usually called a "subsale").

14. Section 75 FA 2003 (which I shall also set out later) is an anti-avoidance provision cast principally in objective terms without regard to purpose or intent. It has the effect that if a number of transactions ("scheme transactions") are "involved" in connection with a disposal of land by a person, V, and an acquisition of the land by another person, P, then SDLT is payable on the higher of (1) the aggregate of that which would otherwise be payable by all the parties in the scheme transactions, and (2) that which would be payable on a notional transfer from V to P for a consideration equal to the largest aggregate amount given by any one person or received by V as consideration under the scheme transactions.

15. In what follows I refer to the original vendor of the house as A, the company as B, and the Appellants together as C.

The parties' arguments in outline.

16. The parties had a number of procedural and jurisdictional arguments to which I shall return later. But in relation to the calculation of the duty payable their arguments were these.

17. Mr Street, for HMRC, argued that section 45 applied and that tax was payable on the payable by the Appellants (C) on the amount of the share subscription monies which were used by the company (B) to purchase the house; namely £955,000, but that if section 45 did not apply the answer was the same.

18. Mr Birkbeck, for the Appellants, argued first, that section 45 should be held not to apply and that no consideration had been given for the distribution of the house in specie by the company so that there was no SDLT liability on the acquisition by C of the house. But second, that if section 45 did apply then properly construed the notional, secondary, contract created by that section was such that the consideration for the transfer was nil.

19. Mr Street then said that if the effect of section 45 is that the consideration for the notional contract was nil, the effect of section 75A was that duty was payable on £955,000, being the amount received by V under the notional contract.

The position if section 45 was not relevant and did not apply.

20. In this case the only land transaction at issue would be the acquisition of the house by the Appellants on its distribution in specie by the company.

21. SDLT is payable on the chargeable consideration for a transaction (section 55). The question that arises is whether there was chargeable consideration for the transaction which

consisted of the distribution of the house by the company. Paragraph 1 (1) schedule 4 provides that 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".

22. Mr Street argued in relation to section 45(3)(b)(i) that, given the preordained nature of the transactions, when viewed realistically "the share capital contribution by the Appellants was consideration given indirectly for the [house] and therefore consideration for the purposes of that subparagraph". That argument, it seems to me, may also be run in the context of para1(1) in circumstances where s45 does not apply.

23. Mr Birkbeck says that no consideration is given for a distribution by a company.

24. Paragraph 1(1) schedule 4 speaks of the "consideration" given "for" the property.

25. As regards the first of these words, I note that the paragraph does not speak simply of money or money's worth given for the property, but of the *consideration* given. That word to my mind requires some form of bargain or arrangement in which the consideration is the quid pro quo for the transfer: thus when I instruct my bank to pay at completion, it is me, and not my bank, who gives "consideration" for the transfer.

26. The monies Mr and Mrs Brown paid (in cash or promissory notes) to the company were not part of a bargain with A or given as consideration for A's transfer, but they were given under a scheme in which plainly the 'deal' was that these monies were the quid pro quo for the house.

27. The use of the word "for" indicates to me a measure of intention or understanding that what is to be given is linked to the land receipt. The object of paragraph 1 seems to me to be to seek to tax the value of what the purchaser has had to provide in order to get the property. Where a series of steps are put in train with the object of getting a property and which involve the purchaser paying out monies with the intention that at the end of the series of having the property, and no other significant rights, it seems to me that for the purposes of paragraph 1 the amount paid is properly described as given "for" the property. The words "directly or indirectly" in para 1 add grist to this mill.

28. It seems to me that when Mr and Mrs Brown paid the initial subscription and gave the promissory note under the scheme there was a sufficient link or form of bargain by virtue of the scheme that the monies and the debt obligation (or the monies paid by their mortgagor at their behest in satisfaction of those promissory notes) were, for the purposes of paragraph 1(1), consideration for the house. I cannot believe that they thought they would get the house if they did not pay these monies, or that when they gave the monies or the notes they did not expect that in consequence they would get the house. The scheme provided the overall bargain or arrangement which made what they paid "consideration" and their obvious intention meant that what they paid was "for" the transfer of house.

29. The total value of Mr and Mrs Brown's payments was £960,002. Only £955,000 of that found its way to A. The completion statement shows that most of the rest was consumed in conveyancing costs leaving only a few tens of pounds in the company. But the £960,002 is

what they paid to get the house and in my judgement was the consideration given for the transfer of the house for the purposes of para 1(1) Sch 4

30. I would therefore find, were the matter to be decided in the absence of section 45 and section 75A, that the consideration given for the transfer of house was £960,002.

Section 45

31. At the relevant time section 45 provided so far as relevant: -

> (1) This section applies where--
>
> (a) a contract for a land transaction ("the original contract") is entered into under which the transaction is to be completed by a conveyance, ...
>
> (b) there is an assignment, subsale or other transaction (relating to the whole or part of the subject-matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him, and
>
> (c) …
>
> References in the following provisions of this section to a transfer of rights are to any such assignment, subsale or other transaction, and refernces to the transferor and the transferee shall be read accordingly.
>
> (2) The transferee is not regarded as entering into a land transaction by reason of the transfer of rights, but section 44 (contract and conveyance) has effect in accordance with the following provisions of this section.
>
> (3) That section applies as if there were a contract for a land transaction (a "secondary contract") under which—
>
> (a) the transferee is the purchaser, and
>
> (b) the consideration for the transaction is—
>
> (i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and
>
> (ii) the consideration given for the transfer of rights.
>
> The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded …"

Two preliminary issues

32. Two preliminary issues arose during the hearing: (i) whether the disregard in 45(2) and the deeming in the first part of 45(3) was (as the disregard in the tailpiece to 45(3) clearly was) subject to the original contract completing "at the same time as" the deemed secondary contract, and (ii) whether "at the same time as" meant at precisely the same millisecond.

33. In relation to the first of these issues my conclusions on the construction of section 45(3) and my findings of fact mean that it does not fall to be decided, grateful though I was for the parties' submissions.

34. In relation to the second issue I do not read "at the same time" as requiring the two actions to take place at precisely the same time. In ordinary parlance two connected actions performed consecutively without any material break between them would be described as taking place at the same time. This impression of their meaning is confirmed by the language used by Lewison LJ in *HMRC v DV3 RS Limited Partnership* [2013] EWCA Civ 907 when he said

> "[35]…Both the contract between L & G [A] and the Company [B] and the contract between the Company[B] and the Partnership [C] were completed on the same day. Thus on the facts of this case completion of the original contract took place at the same time as, and in connection with, completion of the secondary contract. But in those circumstances section 45 (3) says that the completion of the original contract must be disregarded…",

and by Lord Hodge in *Project Blue v HMRC* [2018] UKSC 30 where he described the arrangements which he accepted gave rise to the operation of 45(3) thus:

> [18] Because the arrangements for financing the purchase of the barracks involved PBL [B] completing its purchase and its sale of the barracks to MAR[C] on the same day in a connected transaction, PBL[B], as I have said, claimed sub-sale relief under section 45(3).

35. The FTT in *Vardy v HMRC* [2012] UKFTT 564 (TC) at [69] reached a similar conclusion.

Did section 45 apply?

36. The first condition for the application of the section in (1)(a) was satisfied by the contract made on 9 July 2007 by which the company agreed to purchase the house. The land transaction was the envisaged acquisition by the company (B) of the house.

37. The second condition, that in (l)(b), requires an assignment, subsale or other transaction as a result of which a person other than the original purchaser becomes entitled to call for a conveyance.

38. The arguments of both parties assumed that this condition was satisfied. It seems to me that there had been no assignment which gave rise to an entitlement to a conveyance: the company (B) had not assigned the benefit of its purchase contract to the appellants (C). That left "subsale or other transaction".

39. If subsale means an agreement pursuant to which one party agrees to pay and the other to convey or to procure the conveyance of land which he has contracted to buy then the transactions between the company and the Appellants might, on a broad interpretation, be so called, but it is clear to me that the resolution to reduce the company's share capital was a transaction. That leaves the question whether as a result of that subsale or transaction "a person ([C]) other than the original purchaser became entitled to call for conveyance".

40. I was referred to *Vardy Properties v HMRC 2012* UK FTT in relation to whether or not the (contingent) resolution in that case to make an in specie distribution meant that C became entitled to call for conveyance. That case concerned a similar set of transactions but, rather than a distribution in specie on the reduction of capital, it involved the declaration of a dividend in specie of the relevant property. In that case the FTT concluded that:

> "[51] ... the fact of the matter is that, as both parties seem to agree, once [B] had completed the purchase the property from [A], [C] was entitled to call for a conveyance to it of the property. We consider that entitlement arose from the earlier declaration of the dividend and the fact that it was less than an unconditional and/or immediate entitlement immediately before [B] completed its purchase is... irrelevant".

41. Neither party sought to persuade me that the same reasoning did not apply in the case of the reduction in capital and distribution made by the company. I therefore treat paragraph (1)(b) as satisfied.

42. The third condition (in s45(1)(c)) is irrelevant to this appeal.

43. I therefore conclude that the conditions in paragraph (1) for the operation of section 45 were satisfied.

44. My conclusions as to the meaning of "at the same time" in the tailpiece of section 45(3), and my findings of fact in para [5] above mean that the requirement of simultaneity in the tailpiece is satisfied.

The Effect of section 45 applying

45. The effect of the satisfaction of the conditions in section 45(1) when the A-B and B-C transfers are completed at the same time (as here I have found to be the case) is that the A-B conveyance (and therefore land transaction) is disregarded and there is deemed for the purposes of section 44 to be a notional contract under which C is the purchaser. The actual conveyance to C completes that contract and as a result of section 44(3) the land transaction consists of that ('secondary') contract and its completion by the conveyance. (Thus where s 45 applies it ousts my conclusions in relation to para1(1) Sch4). The consideration for the transaction is that specified in 45(3)(b). It is the application of that paragraph which divides the parties.

46. Mr Street argued that all the consideration for the notional contract arose under (3)(b) (i) alone and none arose under (3)(b)(ii). He argued that the consideration under the original contract was all referable to the transfer of the house and that all that consideration was given directly or indirectly by Mr and Mrs Brown (C). Viewed realistically he said that consideration was given indirectly via the share subscription. He adopts the analysis of the FTT in *Vardy* where when the FTT asked how much of the purchase price was "to be given directly or indirectly by" C, and said:

> [98]. "In relation to this question, in the light of the general scheme and purpose of section 45, we are satisfied that Miss McCarthy's answer is right. A pre-ordained scheme has been established in which C, at an early stage, provides the cash to B which will ultimately be used by B to pay A for the purchase of the property. In those circumstances, we are satisfied that when, as a result of a later step in the scheme, there is a transfer of rights which ultimately entitles C to call for a conveyance of the property, it can be said that A's purchase price, though it will be received from B, is "to be given indirectly" by C within the meaning of section 45(3)(b)(i).
>
> [99]. We recognise that the £7.4 million in this case was subscribed by [C] for shares in [B], but we consider that does not prevent it (or the relevant part of it) from being regarded as also indirectly given as consideration for the purchase of the Property. This is not, as Mr Quinlan asserted, a "reattribution" of consideration from one thing to another; it is a recognition that the direct payment of consideration for an immediate purpose may also amount to the indirect provision of consideration for another."

47. Mr Birkbeck says that the FTT's analysis in *Vardy* is wrong for two reasons. The first relates the Supreme Court's decision in *Project Blue v HMRC* [2018] UKSC 30, and the second

to the interaction between the conclusion in *Vardy* and the purpose of the subsale exemption in section 45.

48. In *Project Blue:* (1) A contracted to sell a property to B for £959 million; (2) B contracted to sell to C for £1.25 billion; (3) C agreed to lease it back to B and entered into put and call options for B's reacquisition of the property.

49. The transactions in (2) and (3) were found by the Supreme Court to lie within the exemption for alternative financing in section 71A, and the Court held that, but for section 75A, the combination of subsale relief under section 45(2) and (3) and the exemption in section 71A relieved the transfer from A to B and exempted the sale by B to C from a charge to SDLT ([35]).

50. The argument in *Project Blue* related principally to the construction and application of section 71A and section 75A. It was common ground that section 45(3) precluded the charge on the A to B transaction [12]. There was no considered evaluation of the language of section 45(3)(b) and the determination of the consideration under that paragraph was not necessary to the Supreme Court's decision which was that section 71A applied to exempt the B to C transaction - in effect no matter what the consideration was to be taken as attributable to it under section 45.

51. Mr Birkbeck says that the ratio of the Supreme Court judgement is that if the B to C transaction is not taxable (because in that case it was relieved under section 71A), then the notional transaction (comprising the 'secondary contract' and the actual conveyance to C) under section 45(3) is relieved; in the instant appeal he says that, as in *Project Blue,* the B to C transaction is not chargeable (this time because it was for no consideration) so that the Supreme Court's reasoning means that the notional section 45(3) transaction is also not chargeable. Thus he implies that whatever consideration is to be attributed to the notional transaction (the second contract) under (3) (b) the transaction is exempt.

52. Mr Birkbeck accepts that this approach means that section 45, in the circumstances of the instant appeal, produces a lacuna but he says the possibility of such lacunae in new legislation was accepted by the Supreme Court in *Project Blue.*

53. I do not consider that the Supreme Court judgement in *Project Blue* has the consequences Mr Birkbeck seeks to draw from it. The effect of section 45(3) is to create a notional contract for a land transaction. That land transaction completes on the transfer of the land to C. That is the transaction to be examined. The consideration for the transfer is determined by (3) (b) and where that is positive the transaction may be taxable. It then falls to be considered whether the nature of the notional transaction (the conveyance for the (3)(b) consideration) is exempt. In *Project Blue* the Supreme Court found that it fell under section 71A and so was exempt. In the instant case Mr Birkbeck says it is exempt because it was a dividend in specie and so for no consideration; but that is not the nature of that the notional transaction (that is to say the actual conveyance to C on the terms of the notional contract): even if C actually received the property as the result of a no consideration dividend in specie, the consideration for the notional contract is different and there is no provision in the legislation which it exempts the notional contract as there was in *Project Blue*. I conclude, therefore, that if (3)(b) means that there is consideration for the notional contract, the transfer pursuant to it will be taxable by reference to that consideration.

54. Mr Birkbeck's second argument relates to the effect of section 45 if the FTT were correct in *Vardy.* He says that it would undermine the intended relief in a case where A agrees to sell

to B for £X, and B agrees to sell to C for £X, and on the simultaneous completion C pays the £X to B who pays it to A. He says that if the tribunal in *Vardy* were right, that acquisition by C would attract duty on £2X: B would be relieved from duty as a result of the tailpiece to section 45(3) (the "completion of the original contract ... shall be disregarded") but the consideration for the notional contract on the *Vardy* analysis would be £X under 45(3)(b)(i) plus a further £X under (3(b)(ii) since that would be consideration for the "transfer of rights" – the sale to C. That was contrary to the intention of the provision which was clearly to limit the SDLT payable to that on the second transfer.

55. The FTT in *Vardy* considered the problems thrown up by Mr Birkbeck's example and said (at [88]) that it was inherent in the dichotomy in (3)(b):

> "that any consideration given by C can only be attributed to one or the other - i.e. there should be no "double counting" of the same consideration as attributable both to the right to acquire the property and to the property itself".

56. Mr Birkbeck criticises this construction: he says it is reading into the legislation something which is not there, and not necessary once it is recognised that the consideration given for the transfer of rights is not consideration given under the original A-B contract.

Section 43(3) - Discussion

57. A number of issues arise in relation to the proper interpretation of section 45(3).

58. The first is the use of the word "consideration" in both (b)(i) and (ii). As I have said in relation to para 1 Sch 4, that word to my mind requires some form of bargain or arrangement in which the consideration is the quid pro quo for the transfer: thus when I instruct my bank to pay at completion, it is me, and not my bank, who gives "consideration" for the transfer.

59. When B gives to A what he has received from C and has promised under the original contract to give to A, it is B, and not C, who is giving consideration "under the original contract". In the case of an assignment of the original contract it will be C who will pay what has been promised under the contract in return for the property and C who therefore gives the quid pro quo under it: what he pays to A is not consideration for the assignment but consideration under the original contract. In the case of a subsale C will pay the consideration for the second transfer to B and B will pay give the consideration for the original contract to A.

60. Seen in that light the double charge anomaly in Mr Birkbeck's example and the need for the no double counting gloss advocated by the FTT in *Vardy* do not arise. In his example money paid by C to B is consideration for the transfer of rights within (b)(ii), but when that money is used by B to pay A it is not "consideration given" by C because it is not given *by C* as "consideration under" the A–B contract. That is the case even though paragraph (b)(i) refers to consideration given directly or indirectly by C. What is given by C must be "*consideration*" for the property whether it is given directly or indirectly.

61. On this basis, subject to what follows, the consideration for the notional, 'secondary', contract in the instant appeal comprises whatever was given for the transfer of rights under (b)(ii) and nothing under (b)(i) because Mr and Mrs B gave no consideration under the A-B contract.

62. The second issue is the reference in (3)(b)(i) to a person connected with C. In *Vardy* [72(4)] those words, read literally, were considered to give rise to an anomaly in "perfectly normal situations which the general policy of section 45(3) ... did not intend to cover", and it was accepted on all sides that what was "to be given" should be tested by reading into this paragraph the words "under the terms of the transfer of rights" after the words "(directly or indirectly)".

63. I find it difficult to understand why considerations of policy should require the use additional words when their addition could produce an anomalous advantage where, for example, B is connected to C, C procures that B pays A and under the transfer of rights agrees to sell to C for £1. Further in an ordinary subsale transaction a well advised party would take care to avoid a connection to B if possible. Lacunae can result in a relief being limited in scope as well as in no tax. A person indulging in a tax planning arrangement cannot complain that the steps he takes result in more tax rather than less on a fair reading of the legislation. The words "is to be given" suggest to me, not something to be given under the limited provisions of the transfer of rights, but as consideration under the A-B contract.

64. In the instant appeal the company (B) was connected with Mr and Mrs Brown (C) so that the consideration given by it under its purchase contract would, on a literal reading, fall within (3)(b)(i) as consideration given by a connected person. Thus, if I am correct I my approach to (3)(b)(i) consideration of £955,000 would arise under the connected party limb of (3)(b)(i) in addition to any arising under (3)(b)(ii).

65. Mr Street did not, however, wish to put HMRC's case on the basis of connection, and Mr Birkbeck argued that it would be anomalous to read the provisions literally.

66. The third issue is the application of the phrase in (b)(ii) “the consideration given for the transfer of rights”. As I have said, Mr Street put his case on the basis that the consideration for the notional contract was under (b)(i) alone and that no consideration arose under (b)(ii). And Mr Birkbeck says that the FTT in *Vardy* was right when it said in relation to (b)(ii) and the question of whether the consideration given for the transfer of rights (the declaration of the dividend dividend in that case) was the share subscription monies:

> “[104]. We can dispose of this point shortly. We consider Miss McCarthy’s arguments (as summarised at [77] to [78] above) to be unsustainable. Section 45(3)(b)(ii) includes no reference to consideration given “indirectly” for the transfer of rights (in contrast to section 45(3)(b)(i)) and there is nothing in the language of the section which in our view displaces the general proposition that the declaration of a dividend is a gratuitous transaction, for which no consideration is given.”

67. Likewise, Mr Birkbeck says, the distribution on the reduction in capital is a transaction for which no consideration is given.

68. I find it difficult to reconcile Mr Street’s submission that, viewed realistically, the contribution paid by the Appellants was consideration given (indirectly) for the property within (b)(i) with his acceptance that it was not (realistically) consideration given for the resolution for the distribution of the property on the reduction of capital. I accept that (b)(ii) refers only to consideration given rather than to consideration "directly or indirectly" given, but in the context of a preplanned scheme if one asks why Mr and Mrs Brown paid £960,000 to the company, the sensible, realistic answer must be "to get the house" pursuant to the planned

arrangement with the company. They may also have paid it to get the shares, but the question is what they paid "for", and that word looks to the reality of the purpose of those who paid it.

69. Mr Birkbeck says that a distribution on a reduction in capital is a gratuitous transaction as a matter of company law, but the reference to the "transfer of rights" in section 45(1) is not of necessity to the actual conveyance but to the transaction which results in the person being entitled to call for a conveyance. The actual distribution may have been for no consideration but the resolution to make it followed from the share subscription, and would not have been possible without the share subscription: realistically the payment for the shares was also the quid pro quo for that resolution.

70. Mr Birkbeck says that in the context of legislation designed to apply objective tests the application of a motive or intention test such as that inherent in treating preplanned transactions as satisfying a statutory concept when the individual transactions would not is inappropriate. I agree that the legislation generally appears to seek to apply objective tests. But the use of the word "for" in (3)(b) is to my mind an exception.

71. I therefore find that the consideration for the land transaction which resulted on the completion of the notional or secondary contract was the amount paid or to be paid on the issue of the shares being the amount under (3)(b)(ii) given by Mr and Mrs Brown in consideration for the resolution to reduce the company's share capital and convey the house.

72. That amount was £960,002, not £955,000. There is to my mind, no anomaly in that conclusion: if on a subsale C pays B £960,002 and B pays A £955,000 the object of section 45 is to tax C on an acquisition for £960,002.

73. This conclusion is not inconsistent with that I reached in relation to para 1 Sch 4 in para [28] above that for those purposes the consideration given for the acquisition of the house was the value given for the share subscription. Para 1(1) asks What consideration was given for the property; section 45(3)(ii) asks what consideration was given for the transaction as a result of which C became entitled to call for a conveyance. The consideration for the resolution was the consideration for the property.

Section 75A.

74. In this section I proceed on the basis that I am wrong in my conclusions in relation to section 45(3)(b), with the result that although section 45 applied the SDLT payable by B was nil (because of the section 45(3) disregard and section 44), and by C was nil because the (3)(b) consideration was nil.

75. Section 75A provides:

> "(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.

(3) The scheme transactions may include, for example -

(a) the acquisition by P of a lease deriving from a freehold owned or formerly owned by V;

(b) a sub-sale to a third person;

(c) the grant of a lease to a third person subject to a right to terminate;

(d) the exercise of a right to terminate a lease or to take some other action;

(e) the variation of a right to terminate a lease…

(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 839 of the Taxes Act 1988) 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.".

Is section 75A(1) satisfied?

76. Taking V in section 75A(1) to be A, and P to be C, Mr Birkbeck says[1] that section 75A has no application for two reasons: (1) the A to B purchase was not "involved in connection with" the acquisition by C; and (2) the effect of section 45(3) is to treat B as not entering into a land transaction with A. As a result there is only one transaction, which is too few transactions

1. [1] Footnote: in his skeleton argument at paragraph 48 (2) Mr Birkbeck says that the effect of section 45 is to disregard the "company distribution", that is to say the B to C transfer, but for this proposition he cited [46] in *Project Blue* in which Lord Hodge refers to the disregard required by section 45(3) which in this case would be the B to C transfer. Also orally Mre Birkbeck said that after the section 45 disregard all that was left was the B to C transfer.

to satisfy the test in section 75A(1)(b) which requires "a number of transactions" including the disposal by V and acquisition by P.

Discussion – s 75A.

77. To my mind[2], the drafting of section 75A permits one to ask of any two persons whether they satisfy (1) (a). If they do then one progresses to ask whether paragraphs (b) and (c) are satisfied. On this basis, in the initial instant appeal one could start by asking if B and C can be V and P respectively for the purposes of section 75A(1) and the answer would be yes, but the scheme transactions on which SDLT could be payable would (if any) be limited to the B to C transaction itself so that condition (c) would not be satisfied.

78. One may also test A and C as potential candidates for V and P. They satisfy that subparagraph (a) because A disposes and B acquires the property. One then goes on to ask whether (b) is satisfied. That involves determining what transactions are "involved in connection with the disposal and acquisition". The use of the conjunction in "disposal *and* acquisition" limits the potential scheme transactions to those which are involved in connection with both.

79. The next issue is what is required by the words "transactions involved in connection with"? Mr Birkbeck says it requires a close connection and must be a transaction which facilitates the acquisition. In *Project Blue* the FTT said it considered "involved" to denote some form of participation: a transaction which was merely part of a series would not be "involved" (in connection with the beginning and end transactions in that sense) simply because it was in a series: the test must be more than 'but for' test. This to my mind introduces an element of intention or motive into the otherwise objective provisions of section 75 FA, but it seems to me that this is a consequence of the language used which cannot have been intended to apply, for example, where X transfers to Y and many years later and for unconnected reasons Y transfers to Z, and for some reason (for example where an exemption applies to one of those transfers) subparagraph (c) is satisfied. To my mind "involvement in connection with" requires some intention, plan, or arrangement that the scheme transactions will serve in connection with the vesting of the property in P and its disposal by V. That is particularly the case when those words are taken with the description of the transactions as "scheme" transactions.

80. In the instant appeal the following five transactions are potential candidates as scheme transactions.

81. First, the contract between A and B; this is not a land transaction, but it is a transaction. Although the completion of that contract is to be disregarded by s45(3), the contract itself is not. Mr Birkbeck says that this transaction was not involved in connection with the "acquisition and disposal" because it was not involved with C's acquisition since A had no involvement with the other arrangements. Mr Street counters that the question is whether the transaction is involved with C's acquisition, not whether a party was involved. I agree, and the preordained steps following the contract between A and B mean in my judgement that the "involved in connection with" test is satisfied.

82. Second, the subscriptions by C for shares in B.

[2]This was not the approach taken by the Supreme Court in *Project Blue* where Lord Hodge seeks to find the only persons who are to be V and P. But the result of my approach and his is the same

83. Whilst section 75C (1) requires a "transfer" of shares to be ignored for the purposes of section 75A, it does not require the same treatment of the issue of shares, and the two are not the same. “Transfer” connotes the movement of something already in existence. Shares issued to a subscriber are not transferred to her. These transactions were plainly involved in connection with the acquisition and disposal.

84. If these transactions are regarded as or as part of the transfer of rights, they are, by section 44(2) to be regarded as not being land transactions, but that does not prevent them from being transactions: the latter is not a necessary consequence of the former.

85. Third, the transfer from A to B. Again Mr Birkbeck says that because A had no knowledge of the latter steps this transaction was not involved with them. Again for the reasons given in "First" above, I disagree.

86. But the tailpiece of section by section 45(3) provides that the completion of the original contract, that is to say that transfer from A to B, is to be disregarded.

87. Section 45(2) provides that where the section 45(1) conditions are satisfied, section 44 has effect in accordance with the provisions of the section which follow. One of those provisions is the disregard in the tailpiece to section 45(3). If that disregard applies only for the purposes of section 44, then for section 75A purposes be A-B transfer can qualify as a scheme transactions; if it applies more widely it cannot.

88. (This question affects the operation of section 75A rather than the results of its operation: if the disregard prevents the transfer being a scheme transaction that it cannot be counted in deciding whether there are "a number" of involved transactions and thus whether section 75A applies; if the disregard does not prevent the transaction from being a scheme transaction, that does not affect the outcome of the operation of section 75A because its disregard for section section 44 purposes means that no SDLT is payable on it, and as a result its inclusion as a scheme transaction will not affect the comparison to be drawn in section 75A(1)(c).)

89. Mr Birkbeck says that this issue was addressed by the Supreme Court in *Project Blue* where in the context of determining who P was for the purposes of section 75A(1), at [46], Lord Hodge said that in the course of these scheme transactions B, [PBL], did not acquire a chargeable interest when the contract with A [MoD] was completed because that transaction fell to be disregarded under section 45(3). I note that Lord Hodge did not discuss whether or not the deeming of section 45(3) applied only for the purposes of section 44 or more widely: but his statement is of high authority.

90. Mr Street says that Lord Hodge came to a different conclusion in [55] of his judgement. There he says that he concludes that "the scheme transactions are those listed in para 5(4) above", and in that paragraph his list comprises (i) the C-B put and call options, (ii) the conveyance by A to B, (iii) the conveyance by B to C, and (iv), the lease back of the property by C to B. Thus he appeared to have accepted that the transfer by A to B, although disregarded by the tailpiece of 45(3,) was nevertheless a scheme transaction for the purposes of section 75A (1)(b). A statement seemingly at odds with that at [46].

91. Section 45(2) provides that the “following provisions” have effect *for the purpose* of section 44. Section 44 provides that a contract to transfer land is not a land transaction but the contract and its completion is such a transaction. The purpose of section 44 appears to be to determine what is a land transaction and what its contractual basis is. The effect of the s 45(3) disregard of the A-B conveyance is that for the purposes of section 44 there is no completion

of the A-B contract and thus no land transaction pursuant to it. This, it seems to me, does not prevent the A-B contract and conveyance from being "transactions" for the purpose of section 75A although it prevents the conveyance (taken with the contract) from being a land transaction.

92. Fourth, the resolution to reduce the company's share capital. This falls not to be treated as a land transaction by section 42(2) but that does not prevent it from being a transaction. It was involved in connection with the disposal by A and the acquisition by C.

93. Fifth the conveyance by B to C in pursuance of that resolution. This was involved in the scheme under which A transferred and C acquired the property. It does not fall to be ignored as a result of s 45.

94. Thus, on Lord Hodge's first approach, and on the basis of my earlier conclusions, there were four scheme transactions - namely the first, second, fourth and fifth of those listed above; but on Lord Hodge's second approach there were five, namely all of those listed above. Mr Birkbeck says that section 75A(1)(b) requires there to be at least three scheme transactions, because the words in parentheses clearly envisage something other than the acquisition and disposal. However, even if Mr Birkbeck is correct (and I do not believe he is) there were at least four transactions in this case and so section 75A(1)(b) is satisfied.

95. The final subparagraph of section 75A(1) is also satisfied on the hypothesis that I am wrong in my conclusions on section 45: the SDLT on the scheme transactions would be less than that on the notional transfer. There would be:

(1) no SDLT charge on the A to B contract (because of section 44),

(2) no SDLT chargeable on the issue of share capital by C as it is not a land transaction,

(3) no SDLT payable on the A to B transfer (because of the tailpiece to section 45(3))

(4) no SDLT payable on the resolution to reduce the company's share capital

(5) no SDLT on the acquisition by C (on the assumption I am wrong in my earlier conclusions on section 45 and para 1(1) Sch4).

96. On the other hand the chargeable consideration for the section 75A(4) notional transaction will be the largest of (i) the amount of consideration given by any one person as consideration for the scheme transactions – this will be £955,000, the amount given by B to A (Mr and Mrs Brown each having given just over half that amount[3]) or (ii) the amount received by A – that will also be £955,000. The SDLT on that amount would, on the basis that I am wrong about the operation of section 45 exceed that on the scheme transactions and s 75A would apply.

97. But if I am correct in my conclusions on section 45, section 75A(1)(c) is not satisfied because the SDLT on the scheme transactions will be that on £960,002 and that on the notional transaction will be less than that.

[3] Although Mr and Mrs Brown gave £960,002 between them each gave only £480,001 and the words "one person" in section 75A(5)((a) cannot in my view be read as "one or more persons"

Summary

98. If I am correct that section 45 applies and C's acquisition is chargeable by reference to consideration of £960,002, section 75A has no application.

99. If I am correct that section 45 does apply but wrong in my conclusion that C's acquisition cost is £960,002, then, if C's acquisition cost is less than £955,000 section 75A applies, all the scheme transactions are ignored and C is chargeable on a notional transaction with consideration of £955,000.

100. If I am incorrect in concluding that section 45 applies, and correct in my interpretation of para 1 Sch 4, section 75A will not apply because the total SDLT on the scheme transactions will be roughly double that on £955,000.

101. If I am incorrect in concluding that section 45 applies and incorrect in my interpretation of para 1 Sch 4 then section 75A may apply.

Procedural issues.

102. Section 76 provides that in the case of a "notifiable transaction" the purchaser must deliver a return to HMRC. Section 77 provided at the relevant time that an acquisition of a major interest in land was notifiable unless the land transaction was exempt. Para 1 Sch provided that a transaction was exempt if there was no chargeable consideration for it.

103. (Section 77 was later amended to provide a list of transactions which were notifiable, and that list specifically included the notional transaction under section 75A.)

104. Paragraph 25 schedule 10 provided that if no return was delivered for a chargeable transaction (a land transaction which was not exempt – s 49) HMRC might make a determination of the tax chargeable in respect of the transaction and that notice thereof should be served on the purchaser. Paragraph 27 provided that if an SDLT return was made after a determination the self-assessment in that return would displace and supersede the determination. By para 26 a determination acts for certain specified purposes as a self assessment unless superseded. Paragraph 35(1)(e) Schedule 10 provides that an appeal may be made against a determination but section 36(5A) limits the grounds on which such an appeal may be made. It provides:

> "(5A) The only grounds on which an appeal lies under paragraph 35(1)(e) are that–
> (a) the purchase to which the determination relates did not take place,
> (b) the interest in the land to which the determination relates has not been purchased,
> (c) the contract for the purchase of the interest to which the determination relates has not been substantially performed, or
> (d) the land transaction is not notifiable (for example, because the land transaction is exempt from charge under Schedule 3)."

105. It is clear to me that the language of paragraph 5A "the only grounds"- is such that the four specified grounds are the only grounds on which an appeal may be brought to this tribunal. If a person receives notification of a determination there are only four courses open to him: he

may pay the amount determined, he may submit a return to displace the determination, he may appeal, but only on one of the grounds in para 5A, or he make seek judicial review.

106. The following questions arise:

> (1) Does a determination under paragraph 25 have to reflect a particular land transaction?
>
> (2) Is the notional transaction under section 75A, under which C acquires the property, different for these purposes from the actual transaction under which C acquired it?
>
> (3) Does the determination made in this appeal relate to the B-C transfer (either for the consideration specified in section 45 or otherwise) or to C's acquisition of the house pursuant to the notional transaction created by section 75A, or to both or either in the alternative?
>
> (4) Do the grounds of appeal against the determination fall within paragraph 36(5A)?

Paragraph 25 schedule 10: a determination

107. Paragraph 25 provides: --

> "25(1) If in the case of a chargeable transaction no land transaction return is delivered by the filing date, the Inland Revenue may make a determination (a "Revenue determination") to the best of their information and belief the amount of tax chargeable in respect of the transaction.
>
> (2) Notice of the determination must be served on the purchaser, stating the date on which it is issued.
>
> (3) [not relevant]"

108. Mr Street says that all that is needed for a determination is a decision that a property was acquired for a chargeable consideration. There is no requirement to indicate in the notification under which statutory provision the tax arises. He says that the determination was made on the basis of section 45 or in the alternative section 75A, and that that is authorised by this paragraph. He says there is nothing in the legislation which prevents a determination being made for more than one reason

109. I start by noting that paragraph 25(2) differentiates between the determination, in other words a decision made by HMRC, and its notification. The latter is merely the recording and giving notice of the former. Plainly the object of that provision in subpara (2) is to give the purchaser sufficient information so that he or she can decide which of the four courses of action described in [106] above to pursue. The notice must therefore specify the land transaction – the land acquisition - which HMRC have decided is taxable as well as the amount of tax they consider is payable in respect of it.

110. The words of paragraph 25(1) "a chargeable transaction" require the identification in the mind of the decision maker of the chargeable transaction in relation to which the decision is made: that is to say a non exempt acquisition of a chargeable interest. The definition is

concerned with the estate acquired, the consideration and the acquiror, and is not concerned with the transferor.

111. The reference to "a chargeable transaction" in paragraph 25(1) suggests to me that a specific transaction is to be the subject of the determination. The scheme of the Act in taxing individual land dealings points away from reading "transaction" in the plural. The focus on a specific transaction is reinforced by the reference to "the filing date" which would have to be read "the *relevant* filing dates" if "transaction" were read to include the plural.

112. I conclude that a determination may be made only in relation to one transaction.

113. That does not prevent more than one determination being notified at the same time under 25(2) but such notification must adequately describe the transactions it is sought to tax.

114. The deeming in section 75A is for the purposes of Part 4 which encompasses section 78 which gives effect to Sch 10. Where section 75A applies the actual transaction is disregarded for the purpose of Sch 10 and replaced by the notional transaction. I see nothing in the legislation which suggests a narrower ambit for the deeming. Despite the focus of section 43 on the acquiror that transaction may have, as it would if it applied in this case, a different Vendor from the vendor in the actual transaction (with different effects in relation to certain reliefs and exemptions) and it is possible (although not the case in this appeal) that the effective date of a notional transaction under section 75A may differ from that of the actual conveyance to P since its effective date is the date of completion of the last of the scheme transactions. That may affect time limits for making the determination. The notice must enable such matters to be ascertained by the purchaser, and that requires that the specific land transaction to which the notice relates to be identified in the mind of the decision maker and then in the notice. I conclude that for the purposes of paragraph 25 a determination based on section 75A is a different determination from one relating to the same acquisition but made on the basis that section 75A did not apply.

115. I agree with Mr Street that there is nothing to prevent a determination being made on the basis of alternative reasons, but that is different from it relating to alternative transactions.

116. Therefore it falls to be decided whether the decision made by HMRC and then notified to the Appellants was in respect of the actual acquisition of the property by C from B (whether for the actual consideration or that deemed to be given under the section 45 notional contract) or the notional transaction under section 75A.

117. I accept that a notice must be read in context in order to determine to what transaction it relates. If it is clear from earlier correspondence between the parties that HMRC are concerned with a particular land transaction then reference in the notice to the estate conveyed may be enough to identify the transaction which is the subject of the determination. Thus for example if section 75A had been the subject of detailed correspondence between the parties a notice of determination may, if it merely refers to the estate concerned, be an adequate notice of a decision in respect of the notional transaction created by that section.

118. HMRC wrote to Mr and Mrs Brown on 8 August 2011. The officer said she had concluded that their acquisition of the house was a chargeable transaction and that he "enclosed [a determination] for the tax payable. The "determination" specified the amount of SDLT she considered was payable by reference to the consideration she considered had passed. Neither the letter nor the "determination" specified the basis on which the officer had calculated concluded the tax payable other than that it was by reference to consideration £955,000.

119. On the same date the officer sent an assessment to the company saying that it was made on the basis of the scheme by which it "sought to exploit section 45 ... [was] ineffective ".

120. In a letter of 23 June 2015 the officer wrote the appellants giving her view of the matter. She said her decision was that SDLT was payable because "the disregard of section 45 ... was engaged" and she considered that the distribution specie was chargeable as a result of section 45(3)(b).

121. Mr Birkbeck says that it is not until much later that HMRC addressed the possibility that section 75A applied or considered the notional transaction created by that section. Thus he says their determination related only to the actual acquisition of the house and not to the notional transaction created by section 75A. In other words there was no determination in relation to any section 75A transaction.

122. That he says is supported by the amount of the determination which is the chargeable consideration £955,000; if the section 75A notional transaction were being considered the consideration would be £960,002, being the aggregate amounts received by B, the company, under the scheme transactions.

123. Mr Street said that a letter of 9 July 2018 from HMRC to the Appellants' accountants indicated that section 75A had been considered and that it was "an alternative argument should our view of the application of section 45 be shown to be incorrect".

124. Whilst I do not agree with Mr Birkbeck's last point in [122] above (because of my conclusion that the relevant consideration was £960,002 not £955,000), the evidence recounted above indicated that it was likely that the determination, the decision, had been made in 2011 in relation to the actual transfer to C and not a notional transfer under section 75A, and that the notice related only to that actual transfer.

125. Mr Birkbeck had one further argument which I must mention because of its ingenuity. He says that the effect of section 77 is that a notional transaction under s75A is not a notifiable transaction. That means that there is no duty to deliver a return and accordingly that there is no filing date. That in turn means that the precondition in para 25 for the making of a determination cannot be satisfied in relation to the notional transaction and no determination can be made. Thus the only transaction to which the determination can relate is the actual transaction (as modified by section 45 if it applies) by which C acquired the property.

126. It seems to me that the words of section 77 before its amendment were sufficient to require a return to be made in respect of a section 75A notional transaction. Section 75A deems the notional transaction to have taken place for the "purposes of this Part". Section 77 lies in the same Part of the Act and provided:

> "77(1) This section specifies what land transactions are notifiable.
> …
> 77(3) Any other acquisition of a major interest in land is notifiable unless–
> (a)the acquisition is exempt from charge under Schedule 3, or
> (b)the land consists entirely of residential property and the chargeable considerationfor the acquisition, together with that of any linked transactions, is less than £1,000."

127. It seems to me that the deeming of section 75A is intended to equate the notional transaction with an actual one for all the purpose of the Part, and that notification is one of those purposes. Thus I would not support my conclusion on this argument.

Jurisdiction: Para 35

128. Mr Street says that some of the Appellants' grounds of appeal are not grounds within para 36(5A), and thus outwith the jurisdiction of this tribunal

129. I take the grounds of appeal from the Amended Grounds of Appeal[4]:

> "5. The Appellants assert that s 45(3) subsale relief applies to the Property purchase by [B] and that its transfer of the Property to the Appellants [C] by way of dividend in specie is exempt from SDLT due to no consideration being paid by the Appellants…"

130. This ground is in effect that the land transaction which was the subject of the determination was not notifiable because the consideration for it was nil. That falls within 36(5A)(a).

> "6.Additionally, assuming s45 is engaged as above, s 75A does not apply…"

131. This ground is part of the argument that the consideration was nil so that the transaction was not notifiable

> "7. Alternatively, the provisions of s 75A(1) may apply to the scheme transactions since the amount of SDLT payable under s 45 is less than it would have been on a notional transaction consisting of the Appellants' acquisition of [A]'s interest direct from him, with the consequence that the Appellants' acquisition of the Property from [B] is disregarded (s 75A(4))."

132. Mr Birkbeck says, if section 75A applies then all the scheme transactions which are land transactions (including the B-C transfer) are disregarded (section 75A(4)(a)). Thus the only land transaction on which duty can be payable is the notional section 75A transaction. Thus if the determination was in relation to the actual B-C transfer, that determination relates to a non-existent transaction: the purchase to which it relates did not take place; and that is one of the specified grounds of appeal in 36(5A); the tribunal has jurisdiction to hear the appeal. I agree.

> "8. HMRC have not issued a determination in respect of any such s 75A notional transaction (as opposed to HMRC's determination issued to the Appellants in respect of their actual purchase from [B]) and HMRC are therefore now time barred from doing so under para 25(3), Sch 10…"

133. This is an argument in relation to the nature of the determination. It must I think be implicit in the FTT's jurisdiction that it has jurisdiction to decide on the nature of a determination as part of its consideration as to whether an appeal lies under 36(5A). If I had concluded that section 75A applied, and concluded that the determination related to the 75A

[4] Mr Birkbeck summarises the grounds differently in para 5 of his skeleton argument but to similar effect: the determination he says related to the actual conveyance and that was not notifiable (para 35(5A)(d)) because there was no consideration; if section 75A applied the determination did not encompass the notional transaction and the actual transaction I to be treated as not occurring (75A(4)(a) and para 35(5A)(a)); and if section 45 and 75A did not apply the actual transaction was exempt and so not notifiable (Para 35(5A)(d), section 77 and para 1 Sch3).

notional transaction then (rather paradoxically) I would have had no further jurisdiction to consider this ground of appeal.

> "9. Alternatively, the Appellants aver that the above SDLT planning was not implemented correctly because there is no evidence to show that the requirements of s45 were met, and in particular there is no evidence to demonstrate/establish that there was no significant delay between the execution of the two TR1 forms."

134. This is an argument that section 45 does not apply and that as a result the tax on C's acquisition was nil. That would make it a non notifiable transaction and an appeal would lie under 36(5A)(d).

135. I conclude that the tribunal has jurisdiction to address the Appellants' grounds of appeal.

The tribunals' powers on an appeal

136. Para 42 Sch11 relates to the tribunal's powers on an appeal under para 35(1). It therefore potentially applies to an appeal against a determination under para 35(1)(d). But the powers accorded to the tribunal under para 42 all relate to the adjustment (up or down) of an assessment or a self assessment, and by para 26 a determination under para 25 takes effect as a self assessment only for prescribed purposes. Those are the purposes of tax related penalties, interest on unpaid tax and the collection and recovery of unpaid tax. Thus for the purposes of the powers given to the tribunal by para 42 a determination is not an assessment or a self assessment and the tribunal is not by that paragraph given any power to adjust it up or down.

137. In the light of the limitation on the grounds of appeal in para 36(5A) against a determination the absence of that power is not surprising. If the purchase did not take place, the contract has not been substantially performed or the transaction was not notifiable (eg because it was exempt), the remedy on an appeal would not be the adjustment, up or down, of the determination. The natural remedy would be the striking out of the determination; and the power so to do seems to me to be implicit in the provision of a right to make an appeal against a determination.

138. As a result, although I have concluded that the tax payable should be based on consideration of £960,002 rather than the £955,000 in the determination, I conclude that I have no power to adjust the determination.

139. I do not conclude that any of the grounds in 36(5A) are made out. I therefore dismiss the appeal.

Conclusions

140. I conclude:

> (1) section 45 applied to the transactions with the result that the acquisition by C is to be treated as having been made for £960,002;
>
> (2) as result section 75A does not apply to the transactions;
>
> (3) the determination was made in respect of the actual acquisition on the terms of the secondary section 45 contract;

(4) The tribunal has jurisdiction to hear the appeal and to allow or dismiss it, but no power to adjust the determination.

I dismiss the appeal.

Rights of Appeal

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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 07 JUNE 2021