[2019] UKFTT 342 (TC)

TC07170

STAMP DUTY LAND TAX – whether the chargeable consideration consists of an annuity - whether section 52 Finance Act 2003 applies - whether the Ramsay principle or section 75A Finance Act 2007 apply – whether the discovery assessment and penalty notices are valid

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/03043
TC/2017/00059
TC/2017/00060

BETWEEN

DAVID HANNAH & CARLA HODGSON
DAVID HANNAH
CARLA HODGSON **Appellants**

-and-

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

TRIBUNAL: JUDGE VICTORIA NICHOLL

Sitting in public at Taylor House, London on 28 and 29 January 2019

Julian Hickey, counsel, instructed by Levy & Levy, for the Appellants

Elizabeth Wilson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns the question of whether the consideration given for the purchase of a residential property was the grant of an annuity chargeable to stamp duty land tax ("SDLT") under section 52 Finance Act 2003 ("section 52"). The decision considers whether the consideration was substantially paid prior to completion, the application of the *Ramsay* principle and the provisions of section 75A Finance Act 2007. The decision then considers whether the conditions for the issue of the discovery assessment for £30,600 SDLT and penalty notices by the Respondents ("HMRC") were satisfied and concludes that they were. The appeal against the discovery assessment is refused but the penalty notice issued to the Second Appellant is cancelled.

AGREED STATEMENT OF FACTS AND THE TRIBUNAL'S FINDINGS OF FACT

2. The parties have agreed the following Agreed Statement of Facts:

> (1) The First Appellant (also referred to as "Mr Hannah") and Second Appellant (also referred to as "Mrs Hodgson") were married at the time of their purchase of The White House, Welford Road, Arnseby ("the Property").
>
> (2) On 26 September 2011 the First Appellant and Second Appellant (collectively "the Appellants" or "the Buyer") entered into a sale contract to acquire the Property from unconnected vendors, Mr. M. Robinson and Mrs. C. Robinson ("the Vendors" or "the Seller") who are also referred to below as "the Annuitant". The material terms of the sale contract were:
>
> > (a) A completion date for the purchase of the Property was stated as 12 October 2011;
> >
> > (b) A purchase price of £765,000 for the Property was to be paid as to (i) a deposit of £38,250 (held to order), (ii) a balance of £726,750;
> >
> > (c) The purchase was subject to special conditions, which incorporated the following clause 14:
> >
> > "14.1 Notwithstanding anything in this Agreement, the Buyer shall be entitled to satisfy the balance of the Purchase Price (as exceeds the Deposit) by the issuance and delivery to the Seller of an annuity contract ("Annuity Contract") issued by either or both of the persons comprising the Buyer.
> >
> > 14.2 The Buyer shall be entitled to delivery such Annuity Contract before the Completion Date but shall not by virtue of such early delivery be entitled to call for any earlier completion of this Agreement than the Completion Date.
> >
> > 14.3 If the Buyer does make delivery of such Annuity Contract before the Completion Date, the Seller shall hold such Annuity Contract in trust for the Buyer pending completion.
> >
> > 14.4 The Seller shall be entitled to encash the Annuity Contract for not less than the balance of the Purchase Price (as exceeds the Deposit) in accordance with clause 3.1 of the Annuity Contract and provided that the full proceeds of encashment ("the Encashment Proceeds") shall be held by the Seller's Solicitors (as the Seller hereby authorises and directs) for the purposes of completion of the sale and purchase of the Property in terms of this Agreement. Notice of encashment shall be given by the Seller not less than seven days before completion… To the extent that the encashment proceeds fall short of the

balance of the purchase price required for completion, the seller shall have recourse to the buyer for the shortfall.

14.5 If for any reason whatsoever this Agreement is rescinded such that completion of the transfer of the Property following hereon shall not occur, the Buyer shall be entitled to demand repayment of the Encashment Proceeds and the same (without any deduction) shall be paid to the Buyer's solicitors within three days of notice of such rescission having been given."

(3) On 5 October 2011 the Appellants (as "the Grantor") and Mr. M. Robinson and Mrs. C. Robinson, who were the Vendors, signed a deed ("the Annuity") in respect of the Appellants purchase of the Property. The material terms of the Annuity stated:

"Clause 2 Covenant to Pay Annuity

2.1 In consideration for the transfer ("the Transfer") of the estate and interest in the property known as The White House, Welford Road, Arnesby, Leicester, LE8 5WA as is registered with the Land Registry under title number LT261071 by the Annuitant to the Grantor, the Grantor covenants with the Annuitant that the Grantor will pay to the Annuitant in perpetuity an annuity of three hundred and eighty three pounds eighty four pence (£383.84) (the "Annuity Amount") free of all deductions (other than income tax where such tax is authorised or required by law to be deducted) each calendar year, with the first yearly annuity payment to be made on the first anniversary of this Deed and each subsequent yearly annuity payment (each a "Subsequent Annuity Payment") to be made on each subsequent anniversary of this Deed.";

Clause 5.1 of the Annuity stated that the perpetuity period was fixed at 125 years;

Clause 3 the Annuitant was granted a power to redeem the Annuity:

"Clause 3 Power to Redeem

3.1 If the Annuitant at any time after the Date of this Deed wishes to redeem the annuity granted by this Deed and gives the Grantor not less than seven days' written notice of such wish then the Grantor shall redeem the annuity granted by this Deed by paying to the Annuitant on or before such completion, the sum of Seven hundred and twenty six thousand seven hundred and fifty pounds (£726,750) and on the Grantor making such payment and paying the annuity granted by this Deed up to the date of redemption the annuity granted by this Deed shall cease to be payable.

3.2 If the annuity granted by this Deed has been redeemed in terms of clause 3.1 of this Deed, the Annuitant shall fully release the Grantor and any assignee or assignees of the Grantor by delivering to the Grantor and such assignee or assignees a Deed of Release …".

Clause 4 the Grantor was permitted without the consent of the Annuitant to assign the rights and benefits under the Annuity, provided that the assignee assumed all of the liabilities and obligations of the Grantor under the Annuity.

(4) On 5 October 2011 the Appellants entered into a Deed of Assignment with AD Alta Advisors Limited ("the Assignee") pursuant to which the Appellants assigned all their rights and benefits under the Annuity to the Assignee in consideration of £1; and the Assignee agreed with the Appellants to assume all of the liabilities and obligations

of the Appellants under the Annuity in consideration of the payment of £734,017.50 to the Assignee.

(5) On 5 October 2011 an SDLT1 return was filed electronically with HMRC in relation to the purchase of the Property. The SDLT return stated that the consideration was £42,610. No SDLT was said to be payable on the basis that the chargeable consideration was restricted to the sum of 12 instalments of the annuity plus the deposit, and that the aggregate sums were under the SDLT threshold. The Form SDLT1 filed, at Box 12, in answer to question "12" "What form does the consideration take?" states codes "30" and "34".

(6) On 6 October 2011 the Annuitant was notified that the Annuity had been assigned to the Assignee. This notice was headed "Notice of Assignment", addressed to the Vendors, and signed by the Appellants.

(7) On 7 October 2011 the Vendors gave notice to redeem the Annuity. The notice is given on their behalf by Equitas Law. No objection was raised to the notice.

(8) On 12 October 2011 the completion statement prepared by Equitas Law, acting on behalf of the Vendors shows that (a) deposit on exchange of £38,250 held to order from 26 September 2011, (b) value of the Annuity as at 5 October 2011 of £726,750, and (c) encashment proceeds for Annuity of £726,750 on 12 October 2011.

(9) On 12 October 2011 the Appellants, the Assignee and the Annuitant entered into a deed of release in respect of the Annuity. Pursuant to Clause 2.1:

"… in consideration of the sum of £726,750 now paid by the Assignee to the Annuitant (the receipt of which the Annuitant acknowledges) the Annuitant releases and assigns to the Assignee all that the said annuity of Three hundred and eight three pounds eighty four pence (£383.84) payable in perpetuity to hold unto the Assignee absolutely freed and discharged from all claims and demands of the Annuitant in respect of it to the intent that the annuity may merge with and be extinguished and released the Grantor from their obligations and liabilities arising under such deed."

(10) On 14 October 2011 the Appellants were registered with title absolute to the Property.

(11) No SDLT enquiry was opened into the SDLT return filed in respect of the Property within the 9-month enquiry window provided by FA 2003, Sch. 10, para. 12.

(12) HMRC issued a joint discovery assessment on 5 August 2015 imposing a Stamp Duty Land Tax ("SDLT") charge of £30,600 plus interest, in relation to the acquisition of the Property.

(13)The Appellants appealed ("the Appeal") to HMRC by letter dated 2 September 2015 and by notice of appeal dated 1 June 2016.

(14)On 3 April 2017 HMRC issued a joint penalty under Schedule 24 of the Finance Act 2007 ("FA 2007") to the Appellants in the amount of £17,136 ("the Penalty Notice").

(15)The Appellants appealed against the Penalty Notice to HMRC by letter dated 25August 2015 and subsequently by notice of appeal dated 6 December 2016.

(16) HMRC's guide[1] for completing SDLT1 returns was issued in July 2006 states in respect of question 12 that code 30 (as referred to above) relates to cash, and that code 34 relates to "Other". The cross-reference against this line in the guidance notes is to HMRC's internal manual reference SDLTM06010, which is headed Scope:

> How much is chargeable: Annuities as consideration: General FA03/S52. It states:
>
> > "Where the chargeable consideration for a land transaction is in the form of an annuity, which is
> >
> > • payable for life
> >
> > • in perpetuity
> >
> > • for an indefinite period
> >
> > • for a period which exceeds twelve years
>
> the chargeable consideration will be taken to be a one-off payment comprising twelve year's payments. Where the payments vary, the twelve highest payments will be taken into account and Stamp Duty Land Tax (SDLT) will accordingly be payable as a single payment. This does not apply where the variation relates only to inflation."

3. I have found the following additional facts from the evidence in the Tribunal's bundles, the further evidence produced at the hearing (including HMRC's chronology of their enquiry and the opinion of Patrick Way QC on Project Purity in respect of which legal professional privilege was waived by the Appellants) and the witness evidence of Mrs Robinson (as a Seller of the Property) and Mr Mark Hadley, an investigator in HMRC's Fraud Investigation Service:

(1) The Vendors of the Property were selling in order to make a new start financially. Mrs Robinson confirmed that they had lost two buyers and were therefore very keen to sell to the Appellants. The Appellants told the Vendors that they would pay their solicitors' fees if they used the firm that they nominated. The Vendors were satisfied that a solicitor would point out anything that was not in their best interests and agreed to use Equitas Law.

(2) Mrs Robinson was aware that the arrangements involved the grant of an annuity. Mrs Robinson wrote to her solicitor, Ms Patel of Equitas Law, prior to exchange to say that the Vendors agreed to "accommodating their requirements by allowing them to pay us in a way that allows them to save approx £40,000 on stamp duty! Again also relying upon trust as we would rather just proceed in a straight forward sale with normal cash funds on completion not annuities and swapping of names on bonds etc." There is no suggestion that Equitas Law or Ms Patel was negligent in the standard of advice delivered to the Vendors, but Mrs Robinson has no recollection of signing a notice to redeem the Annuity or indeed of having explained to her why it was necessary. The notice to redeem the Annuity was sent "on behalf of our client" by Equitas Law and was not signed by, or under power from, the Vendors. Mrs Robinson did not consider that there was any chance that they could complete the sale without receiving the full consideration of £765,000 on completion to repay a mortgage, purchase their new home and repay debts.

(3) Payment of the Annuity was not guaranteed by a charge or otherwise and yet it was payable in perpetuity. Further, the Appellants as grantors of the annuity were entitled

[1] It is common ground that this guidance is not binding on the tribunal on an appeal on a point of law, but it is relevant to HMRC practice.

to assign it to any other party without requiring the consent of the Vendors or any financial covenant, even as regards payment of the redemption proceeds of £726,750. The Annuity amount of £383.84 per annum was calculated by Mr Hannah (as referred to in his email of 28 September 2011). The annuity would have to be paid for over 1,893 years to pay the principal amount, ignoring interest. The terms of the Annuity were not commercial consideration for the sale a family home or even comparable with the example given by Mr Hickey (to explain the operation of section 52) in which a consideration of £1million is paid by an annuity of £10,000 pa for 100 years. It was commercially necessary, and a preordained step by those who understood the tax planning, that the Annuity should be redeemed.

(4) It is notable that the amount of chargeable consideration as submitted by the Appellants, twelve times £383.84 pursuant to section 52, plus the deposit of £38,250, was calculated to be just in excess of £40,000 as transactions for a chargeable consideration below this amount are not notifiable land transactions (pursuant to the exception in section 77A(1) FA 2003). The completion of this land transaction return assisted the Appellants to obtain a TR1 for the registration of their title and they also rely on the return as evidence of their disclosure of the arrangements. In the absence of oral evidence from Mr Hannah or any another explanation for the amount of the annuity payments, I accept HMRC's submission that it was fixed in an amount that was sufficient to trigger the requirement to file a SDLT 1 return without also triggering a liability to SDLT.

(5) The timing of the issue and delivery of the Annuity seven days prior to completion reflected the timing provisions in clause 3.1 of the Annuity that allowed the Vendors to redeem the annuity by giving not less than seven days' notice.

(6) Clause 14.3 of the special conditions to the sale contract sought to protect the Appellants in respect of these arrangements by providing that if the Annuity was delivered prior to completion it was to be held by the Vendors "in trust" for the Appellants pending completion. This drafting was reflected in clause 14.5 of the special conditions which provided that if completion of the sale and purchase did not occur the Appellants would be entitled to demand the encashment proceeds. Mr Hickey submits that these references to the Appellants should be read as references to the Assignee following the assignment of the Annuity, but the relevant provisions in the sale contract between the Vendors and the Appellants were not addressed to this effect in the drafting of the Annuity or the deed of assignment of the Annuity to the Assignee. Clause 4 of the Annuity only construes references to the Grantor as references to the Assignee for the purpose of the deed of Annuity, and the deed of assignment of the Annuity is only of their rights and obligations under the Annuity deed, as opposed to both the Annuity deed and the sale contract. The nature of the trust is not specified, but the drafting and context of these provisions is sufficient to establish that the Vendors held their interest in the Annuity in trust for the Appellants pending completion of the sale of the Property.

(7) Clause 14.4 of the sale contract binds the exercise of the right of redemption to the payment of the purchase price on completion in three ways. First, it states that the proceeds of encashment shall be held by the Vendors' solicitor for the purpose of completion of the sale and purchase of the Property. Second, even though the right to redeem is pursuant to clause 3.1 of the Annuity, it purports to limit this right as it states that notice of encashment shall be given "not less than seven days before completion". Third, it states that "[to] the extent that the encashment proceeds fall short of the balance of the purchase price required for completion, the [Vendors] shall have recourse to the [Appellants] for the shortfall." These provisions are not consistent with the Appellants'

submission that the issue and delivery of the Annuity, together with the deposit, satisfied the consideration as it makes clear that it was the balance of the purchase price that was required to be paid on completion.

(8) Once the Annuity had been issued and delivered to be held "in trust" for the Appellants, the Appellants assigned their rights and obligations to the Assignee. The assignee is a BVI company. The Appellants paid the Assignee £734,017.50 to assume the liabilities and obligations under the Annuity, being £7,267.50 more (a 10% fee) than the £726,750 required to be paid to the Vendors if they redeemed the Annuity. Mr Craig Ferguson of Craig Ferguson & Co LLP was appointed to act for both the Appellants and the Assignee. The assignment is relied upon by the Appellants to show that the cash payment to the Vendors on completion came from the Assignee rather than the Appellants, but it has not been established that the funds were held for the Assignee rather than the Appellants pending completion. Further, the Appellants' solicitor prepared a completion statement that shows the purchase price of £765,000, the net sum due on completion as £726,750 (after payment of the 5% deposit) and stamp duty of £30,600 that is crossed through in manuscript. Read with condition 14.4 that says that the £726,750 payment was "for the purposes of completion of the sale and purchase of the Property" (clause 14.4), I conclude that the payment on completion came at the direction of, if not from, the Appellants.

(9) Notice to encash the Annuity was given less than the 7 days required prior to the completion date, but this breach was waived by the solicitor acting for the Appellants and Assignee. If the delivery of the Annuity had satisfied the purchase consideration as claimed by the Appellants, this delay would not have prevented completion taking place on 12 October and the Vendors would have had to seek the redemption payment from the Assignee on the day following completion. The waiver of the breach and the early payment of the encashment proceeds on completion reflects the arrangement between the parties and their solicitors, as set out in clause 14.4, that the cash was to be paid "for the purposes of completion of the sale and purchase of the Property".

(10) The drafting of the deed of release of the annuity executed on completion includes a recital that the Appellants had "agreed with the Annuitant for the redemption and release of the annuity in consideration of the payment of £726,750 to the Annuitant" rather than referring to the Assignee. This is notwithstanding that it is the Assignee who had received and waived the breach in respect of the notice to redeem as it had assumed the liabilities and obligations under the Annuity some seven days earlier and was a party to the deed.

(11)The Vendors did not receive a single annuity payment as the Annuity was "extinguished" pursuant to the deed executed by the Vendors, the Appellants and the Assignee on the completion date. The first payment was not due until the first anniversary of the issue of the Annuity. The Appellants and Assignee were released from the liability to make any annuity payment on the same day as the Vendors ceased to hold it on trust for the Appellants.

(12) SDLT 1 form was completed by Craig Ferguson & Co LLP under instructions from Mr Hannah (by email on 28 September 2011). It states that the contract was dated 26 September 2011 (incorrectly entered on the form as 6 September 2011) and that the effective date of the transaction was 5 October 2011, being the date on which the Annuity was issued. It states that there is no linked transaction. It does not refer to the date of completion of the purchase of the Property on 12 October 2011.

(13)HMRC opened a Code of Practice 8 enquiry on 27 November 2012 into Mr Hannah's tax affairs because his trade, known as Cornerstone Advisory Services, had ceased and was now trading as Cornerstone International Advisory Services, registered in the British Virgin Islands with a head office in Guernsey. As part of this investigation Mr Hadley, an investigator in HMRC's Fraud Investigation Service, checked Mr Hannah's SDLT 1 return as compared to the price paid by the Vendors for the Property and the amount of the Appellants' mortgage charge dated 12 October 2011. Mr Hadley met with the Appellants in May 2013 and was given basic details about the use of an annuity in the purchase. Mr Hadley then arranged for another HMRC officer who knew more about SDLT, Mr Kane, to become involved in the investigation by June 2013. Mr Hadley wrote to HMRC on 1 July 2013 asking whether the encashment took place and for a copy of correspondence between the parties.

(14)Mr Hadley and Mr Kane arranged to meet with the Vendors of the Property in August 2013. HMRC took a witness statement from Mrs Robinson on 20 August 2013. This was taken on criminal procedure paper in error and so Mrs Robinson was asked to sign the statement again, printed on plain paper, on 7 August 2017. The terms of the statement remain as given less than two years after the relevant events.

(15)Following the meetings with the Vendors, HMRC sought documents relating to the sale and purchase of the Property from Ms Zaida Patel of Equitas Law (with the Vendors' consent) and this was provided in May 2014. Mr Hadley of HMRC then sought and obtained further information from the Appellants and met with Mr Hannah on 5 December 2014. On 24 December 2014 Mr Hadley wrote to the Appellants' agent, Accountability gb Limited, setting out HMRC's interim analysis of the arrangements. Mr Hannah responded on 27 February 2015.

(16) On 5 August 2015 HMRC issued a SDLT discovery assessments jointly to the Appellants in the sum of £30,600, plus accruing interest. Mr Hadley then decided, having taken advice, to issue a penalty to Mr Hannah and Mrs Hodgson jointly as they were jointly liable for the SDLT on their purchase of the Property. The penalty in the sum of £17,136 was notified on 9 August 2016. Mr Hadley acknowledges that HMRC had no contact with Mrs Hodgson.

SUMMARY OF SUBMISSIONS

4. The Appellants submit that they entered into a contract to purchase the Property that included the right to pay the balance of the consideration by the issue and delivery of an annuity. As they chose to pay in this way section 52 applies to determine the chargeable consideration. The SDLT explanatory notes are prescriptive about the codes to be entered on SDLT 1 and full disclosure was made of the consideration paid.

5. The Appellants submit that they had no control over the actions of the Vendors following the delivery of the Annuity and they were separately advised. Section 75A cannot reconstitute the transaction as the Annuity was the consideration given for the purchase of the Property.

6. The Appellants submit that HMRC did not act expeditiously once they became aware of the SDLT arrangements. It is submitted that by the date of HMRC's letter of 1 July 2013 they had made their discovery about the facts of these arrangements and, following their meeting with the Vendors in August 2013, they had passed over the discovery threshold. As the discovery assessment was not issued until August 2015, some two years later, it had lost its 'newness', making the assessment invalid.

7. HMRC submit that the consideration for the purchase of the Property was £765,000 and that this was paid on completion. Section 44 (8) makes clear that both the early performance and completion are notifiable transactions. The SDLT 1 did not disclose the arrangements relating to the purchase and HMRC were entitled to issue the discovery assessment. The premature filing of the SDLT 1 and the failure to return details of completion of the transaction was deliberate.

THE LEGISLATION AND ITS INTERPRETATION

8. The relevant parts of sections 42, 43, 44, 50, 52 and 55 Finance Act 2003, sections 75 A-C Finance Act 2007 and paragraphs 1 and 3 of schedule 24 Finance Act 2007 are set out in the Schedule to this decision. I have cited the caselaw relied upon by the parties in the context of the submissions in which they were raised.

9. The burden of proof in this appeal is for the Appellants to establish that the consideration for the purchase of the Property was the issue of the deed of annuity. HMRC bear the legal burden of proof in relation to validity of the discovery assessment and the penalty notices.

DISCUSSION

10. The parties have agreed that the following are the issues for determination by the Tribunal in this case:

> (1) Is the chargeable consideration for the Property calculated solely by reference to the Annuity Consideration (applying solely section 52 Finance Act 2003 to determine the chargeable consideration)?
> (2) Is the Discovery Assessment valid?
> (3) Are the Penalty Notices valid?

(1) Chargeable consideration

11. I have addressed the first issue by considering five questions: is the Annuity an annuity capable of coming within section 52; when was the contract substantially performed; what was the chargeable consideration; does *Ramsay* affect the chargeable consideration; and, does section 75A affect the chargeable consideration?

Is the Annuity an annuity capable of coming within section 52?

12. Section 52(6) defines "annuity" as:

> "(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."

13. The Appellants claim that the Annuity is capable of coming within this definition in section 52. Mr Hickey referred me to definitions and commentary on annuities in The Shorter Oxford English Dictionary, Jowitt's Dictionary of English Law, Halsbury's Laws of England, the Encyclopedia of Forms and Precedents and *Coverley v Burrell* (1821) 5 B&Ald 257 to support his submission that an annuity is simply a yearly payment of a sum of money granted to another and that it can be redeemable by express provision in the deed or by subsequent agreement of the parties.

14. I have found that the terms on which the Annuity was granted were not commercial for the sale of a home (paragraph 3(3) above) and that Mrs Robinson did not understand the arrangements for its issue and redemption (paragraph 3(2) above) but, in terms of its nature as a legal instrument, I conclude that it was capable of coming within section 52. The drafting of the Annuity provides that the Appellants covenant to pay £383.84 annually to the Vendors in perpetuity. The Annuity was granted by deed to create an enforceable instrument. The inclusion

of a power to redeem the annuity for a payment of £726,750 was an agreed term of the legal instrument. The next question is if, as stated by the Appellants, the consideration consisted of the Annuity, when was the contract was substantially performed or completed?

When was the contract substantially performed?

15. The Appellants' case is that the contract to purchase the Property was 'substantially performed' for the purposes of section 44(4) Finance Act 2003 on 5 October 2011 when the Annuity was created. This claim forms the basis on which the Appellants claim that the SDLT should be calculated and reported by reference to this date rather than completion on 12 October 2011.

16. Section 44 Finance Act 2003 determines the effective date of a transaction for the purpose of the SDLT charge where a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance. It ensures that SDLT is charged on the land transaction whether the parties complete the transaction or choose rest on contract, and that the SDLT charge takes account of the consideration given at the effective date and completion, as follows:

> "…
> (2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.
> (3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction.
> In this case the effective date of the transaction is the date of completion.
> (4) If the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract.
> In this case the effective date of the transaction is when the contract is substantially performed.
> (5) A contract is "substantially performed" when—
> (a) the purchaser [, or a person connected with the purchaser,] takes possession of the whole, or substantially the whole, of the subject-matter of the contract, or
> (b) a substantial amount of the consideration is paid or provided.
> …
> (7) For the purposes of subsection (5)(b) a substantial amount of the consideration is paid or provided—
> (a) if none of the consideration is rent, where the whole or substantially the whole of the consideration is paid or provided;
> …
> (8) Where subsection (4) applies and the contract is subsequently completed by a conveyance—
> (a) both the contract and the transaction effected on completion are notifiable transactions, and
> (b) tax is chargeable on the latter transaction to the extent (if any) that the amount of tax chargeable on it is greater than the amount of tax chargeable on the contract."

17. I have considered the findings of fact set out in paragraphs 2 and 3 above in order to determine whether section 44(4) applies to bring forward the effective date from completion to 5 October 2011. The relevant facts are that Mrs Robinson told her solicitor that the Vendors would not agree to exchange and complete on the same day as they wanted "to know at least a week before moving whether it is definitely happening". The Vendors also required a deposit to be paid on exchange to assist with their purchase, and the balance of the cash on completion. The drafting of the special condition 14 to the contract therefore reflects a gap between

exchange and completion, and it provides that the Appellants "shall be entitled" to satisfy the consideration by the delivery of the Annuity prior to completion.

18. Mr Hickey stops at this point in clause 14 and submits that this is what the Appellants chose to do as the Annuity was signed and dated 5 October. The Annuity states that "in consideration for the transfer" of the Property to the Appellants, they covenanted to pay the annuity to the Vendors. But the drafting in the sale contract does not stop there. It goes on to provide protection for the Appellants following the delivery of the Annuity prior to completion. Clause 14.3 provides that the Vendors shall hold the Annuity "in trust" for the Appellants pending completion and clause 14.4 provides that, in the event that the Annuity is encashed prior to completion, the encashment proceeds shall be held for the purposes of completion of the sale and purchase of the Property. Interestingly, this drafting would not have been required if exchange and completion had occurred at the same as requested by the Appellants (and as described in the Project Purity opinion as noted in paragraph 60 below).

19. I concluded in paragraph 3(6) above that the drafting and context of these provisions was sufficient to establish that the Vendors held their interests in the Annuity for the Appellants pending completion. If completion had not taken place for any reason, the Vendors would have continued to hold the Annuity "in trust" for the Appellants and the encashment proceeds would have been retained by or returned to the Appellants' solicitor (clause 14.5). The effect of the provisions is that the Annuity was not paid or provided to the Vendors until completion, if at all. Section 44 (4) does not apply to bring forward the effective date.

What was the chargeable consideration?

20. Paragraph 1(1) of schedule 4 Finance Act 2003 ("paragraph 1(1) schedule 4") makes provision as to the chargeable consideration for a transaction, as provided in section 50 Finance Act 2003 as follows:

> "(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."

21. Section 52 Finance Act 2003 "applies to so much of the chargeable consideration for a land transaction as consists of an annuity". The Appellants submit that this an exception to paragraph 1(1) schedule 4 and therefore applies to the exclusion of paragraph 1(1) schedule 4.

22. The Appellants submit that the only consideration given for the Property (other than the deposit) was the issue of the Annuity and that section 52 expressly provides, to the exclusion of paragraph 1(1) schedule 4, the method of calculating the chargeable consideration where the consideration consists of an annuity. Applying section 52(2) to the Annuity, the chargeable consideration to be taken into account is limited to twelve years' annual payments.

23. HMRC's case is that section 52 only applies to "so much of the chargeable consideration for a land transaction as consists of an annuity…". In this case the consideration consisted of the deposit of £38,250 plus the cash sum of £726,750 that was paid on completion. And so section 52 is not in point.

24. The parties have agreed a list of facts that are relevant to the question of whether the Annuity was the consideration for the Property. These include the facts that:

> (1) the Annuity was signed as a deed on 5 October 2011and that it included the terms set out in paragraph 2(3) above;
> (2) the deed of Assignment was entered into on the same date as the deed of Annuity and the Vendors were notified of the assignment on the following day;

(3) the Vendors' solicitor gave notice to redeem the Annuity on 7 October 2011 and the Vendors, Appellants and Assignee signed and dated a deed of release of the Annuity on 12 October 2011; and
(4) the sale contract includes a special condition 14 (paragraph 2(2) above).

25. The parties agree that it is for the Tribunal to determine the legal characterisation or consequences arising from the matters referred to above and, in doing so, I have made the additional findings set out in paragraphs 3 and 19 above. These include my conclusions that the sale contract was not substantially performed prior to completion, that the balance of the purchase price was required to be paid on completion and that this came from, or on behalf of or at the direction of the Appellants for the purposes of completion.

26. These findings reflect the reality of the transactions entered into by the parties, as evidenced by the drafting put in place by the solicitors concerned to protect their respective clients' positions. The Vendors were assured that their solicitor would receive cash "for the purpose of completion of the sale and purchase of the Property" (clause 14.4) and the Appellants were assured that they would retain the cash if completion did not occur (clause 14.5).

27. The Annuity may have been issued in a form capable of coming within section 52, but it was held in suspense, "in trust", until it was released by deed on completion. During this period of suspension, the Vendors did not understand that they had redeemed an annuity and the notice of redemption was signed by their solicitor. The payment of the balance of the purchase price completed the transaction (see paragraph 3(7) above) and, although the Annuity was then to be held for the Vendors, it was released by deed at the time of that payment. When the Vendors received the proceeds on completion it was not pursuant to the Annuity or the exercise of the right of redemption in the Annuity; the Annuity had been held "in trust" until the payment had been made, the Vendors did not knowingly give the notice to redeem and the payment on release is expressed to have been by agreement with the Appellants rather than the Assignee (see paragraph 3(10) above). At best, the payment was attributed to both the payment of the balance of the purchase price and the release of any interest that the Vendors may have held in the Annuity following completion. In any event, the consideration paid on completion did not consist of an annuity within section 52 but the payment of £726,750 given directly or indirectly by the Appellants for the purposes of paragraph 1(1) schedule 4.

28. The solicitors completed the sale and purchase when the cash consideration was transferred by the solicitor who was appointed by the Appellants (see paragraph 3(8) above) to the Vendors' solicitor in the standard way. The Vendors and their solicitor understood (see paragraphs 2(8) above) that the transaction was the sale of the Property for £765,000 to be satisfied by the payment of cash proceeds on completion and this was the chargeable consideration. Applying paragraph 1 schedule 4 and section 52 to these facts, the chargeable consideration is the deposit of £38,250 plus £726,750 paid for the purpose of completion.

29. I note for completeness that, in addition to the £38,250 plus the £726,750 referred to in the conclusion in paragraph 28 above, the completion statement prepared by the Vendors' solicitor also includes the "value of the Annuity as at 5 October of £726,750" (see paragraph 2(8) above). HMRC have not sought to argue that both the annuity and the cash paid on completion were chargeable consideration.

Does Ramsay affect the chargeable consideration?

30. If I am wrong in my finding that there is no chargeable consideration within section 52, or in the alternative, I have considered whether a *Ramsay* analysis applies.

31. The facts of this case in relation to the legal steps taken by the parties are agreed and set out in paragraph 2 above and my additional findings are set out in paragraph 3. In deciding whether section 52 or paragraph 1(1) schedule 4 applies to determine the SDLT the parties agree that a purposive approach should be taken to the interpretation of the legislation. I was referred to this approach as enunciated in *WT Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] STC 174 ("*Ramsay*"), and as subsequently expressed by Lord Nicholls of Birkenhead in *Barclays Mercantile Business Finance Ltd v Mawson* (Inspector of Taxes) [2004] UKHL 51 at [32] ("*BMBF*"), Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] 6 ITLR454 ("*Arrowtown*") and Lord Reed in *UBS AG v HMRC* [2016] STC 934 ("*UBS*").

32. Mr Hickey submits that the relevant statutory provisions should be construed purposively but that, in doing this, the Tribunal may take into account explanatory notes and headings in an Act. He suggests that where the statute contains no explanation of the purpose of the provision on which a purposive interpretation might be based, the historical background to and development of the legislation by reference to, among other things, explanatory notes should be examined. This is supported by references to *Stephens v Cuckfield Rural District Council* [1960] 2 QB 373 and the statement by Lord Reed in *UBS* (at [72]):

> "…it seems to me to be preferable to begin with the interpretation of the legislation, and the fundamental question whether it can be given a purposive interpretation going beyond its literal terms: that is to say, whether a "Ramsay" approach is possible at all, and if so, the purposive construction on which it is to be based. …the question next arises how, on its proper interpretation, the legislation is to be applied to the facts."

33. Mr Hickey's submission continues that, applying this guidance, it is clear that section 52 is prescriptive and that it applies to the exclusion of any other provision in this case because a valid and binding annuity document was entered into by the parties as consideration for the Property. In particular, the drafting of the heading of section 52 states "Annuities etc: chargeable consideration limited to twelve years' payments" (emphasis added) and the explanatory notes to the Finance Bill 2003 state that the section determines how stamp duty land tax will apply where the chargeable consideration is in the form of an annuity.

34. Mr Hickey also referred me to *Drummond v HMRC* (2009)79 TC 793 as the Court of Appeal agreed in that case that life policies, which were acquired on one day and surrendered the following day as part of a tax scheme, were in every respect real. The question was the consideration that they had been acquired and disposed of for. I was also referred to the House of Lords' statement in *BMBF* about the "need to avoid sweeping generalisations about disregarding transactions undertaken for the purpose of tax avoidance" and to focus on the requirements of the statute. Mr Hickey concludes that section 52 is prescriptive and must be applied to the real Annuity.

35. Ms Wilson submits that the Annuity should be disregarded as it "has no purpose whatsoever other than the obtaining of the exemption itself" (Lord Reed at [77] in *UBS*). She also referred me to passages at [64] and [78] that included the following guidance:

> "Accordingly, …where schemes involve intermediate transactions inserted for the sole purpose of tax avoidance, it is quite likely that a purposive interpretation will result in such steps being disregarded for fiscal purposes. But not always."
>
> "The context was one of real world transactions having a business or commercial purpose."

36. In determining whether, and if so how, the *Ramsay* principle applies to transactions the Tribunal is guided by the House of Lords and Supreme Court's decisions, beginning with Lord Wilberforce's statement in *Ramsay* (at [182]);

> "To force the courts to adopt, in relation to closely integrated situations, a step by step, dissecting approach which the parties themselves may have negated, would be a denial rather than an affirmation of the true judicial process. In each case the facts must be established, and a legal analysis made: legislation cannot be required or even be desirable to enable the court to arrive at a conclusion which corresponds with the parties' own intentions."

37. Some twenty years later, the committee of the House of Lords in *BMBF* summarised the position at [32]:

> "the essence of the new approach was to give the statutory provision purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description…"

38. *BMBF* followed a number of cases that had, in the view of the committee of the House of Lords, gone too far in as they gave rise to a view that "in the application of *any* taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded" (at [36]). Instead, the two steps which are necessary in the application of any statutory provision are:

> "first, to decide, on a purposive construction, exactly what transaction will answer the statutory description and secondly, to decide whether the transaction in question does so. As Ribeiro PJ's said in [*Arrowtown* at [35]]:
>
> "the driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions construed purposively, were intended to apply to the transaction, viewed realistically."

39. In 2016 Lord Reed clarified how the transaction should be viewed realistically in *UBS* (at [68]) as follows:

> "The point is that the facts must be analysed in the light of the statutory provision being applied. If a fact is of no relevance to the application of the statute, then it can be disregarded for that purpose. If, as in *Ramsay*, the relevant fact is the overall economic outcome of a series of commercially linked transactions, then that is the fact upon which it is necessary to focus. If, on the other hand, the legislation requires the court to focus on a specific transaction, as in *MacNiven* and *Barclays Mercantile*, then other transactions, although related, are unlikely to have any bearing on its application."

40. The statutory provision on which the Appellants seek to rely is section 52. The explanatory notes and context of section 52 make clear that its purpose is to fix the amount of the chargeable consideration where the consideration consists of an annuity. It is not a relief or exemption, but a method of calculating the fixed amount on which SDLT should be charged. A purposive construction is that it would apply where the issue of an annuity to the Vendors in consideration of the transfer of the Property to the Appellants. In considering whether the transactions in this case "answer the statutory description" it is important to note that section 52 only applies to the consideration for the land transaction and therefore only concerns the consideration that is given and received for the Property. The section therefore requires me to focus on, and therefore identify, "so much" of the consideration "as consists of" the Annuity

before applying its terms. Accordingly, applying Lord Reed's analysis, it would be wrong to focus on the Annuity in isolation as the related transactions are relevant to the determination of whether section 52 applies to the transaction viewed realistically.

41. Applying "an unblinkered approach to the analysis of the facts" the first point to note is that the issue of the Annuity was subject to the specific terms of clause 14 of the sale contract and that it was then assigned, redeemed and released by three further documents that were executed on or before the completion date. The findings about these documents and arrangements are set in paragraphs 3(1)-(11) above and these demonstrate that, viewed realistically, the facts of this case are that Appellants acquired the Property on completion for the cash consideration that was transferred to the Vendors "for the purposes of completion of the sale and purchase of the Property". The issuance, assignment, redemption and release of the Annuity were inserted in order to bring the transaction within section 52 and executed in preordained steps by those who understood the transactions, but they were gone by conclusion of the completion date on which the Property was transferred to the Appellants, and the Annuity had been held "in trust" for the Appellants throughout these transactions until completion. The Vendors understood that they would receive cash on completion to redeem their mortgage and pay for their new home and that was what they received. The Annuity was not the chargeable consideration and so the *Ramsay* principle confirms that the transactions fall outside the intended scope of section 52.

Does section 75A affect the chargeable consideration?

42. Ms Wilson submits that if the use of the Annuity does not fall outside the provisions of section 52 on the facts or because of the application of the *Ramsay* approach, it is caught by the provisions of section 75A.

43. Mr Hickey submits that section 75A has no application because the tax saving test will not be met as references 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 required by section 52(2). This is because section 75C(2) provides that "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)."

44. The decision of Lord Hodge in the Supreme Court in *Project Blue* (at [44]) provides guidance on the purposive approach to be taken in applying this legislation:

> "[the] mischief which the provision addresses and the context of the provisions within Pt 4 of the FA 2003 provide the answer. The court adopts the purposive approach which the House of Lords sanctioned in *Barclays Mercantile Business Finance Ltd*, to which I have referred [above]. The explanatory notes on cl 70 of the Finance Bill 2007 explained that the provision was introduced to counter avoidance schemes which have been developed to avoid payment of SDLT. It appears to be drafted in deliberately broad terms to catch a wide range of arrangements which result in tax loss. … The task is to identify where the tax loss has occurred as a result of the adoption of the scheme transactions in relation to the disposal and acquisition of the relevant interest or interests in land."

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. Accordingly, if my conclusions on chargeable consideration and the application of *Ramsay* are incorrect, or in the alternative, section 75A provides for a charge to SDLT on the chargeable consideration of £810,517.50.

(2) Discovery assessment

49. HMRC submit that they were entitled to make an assessment under paragraph 28 schedule 10 Finance Act 2003 ("paragraph 28") because the SDLT paid was insufficient and they could not have been reasonably expected, on the basis of the information made available to them in the SDLT 1 return, to be aware of the situation.

50. Paragraph 28 provides that if HMRC discover as regards a chargeable transaction that an amount of tax that ought to have been assessed has not been assessed, they may make an assessment (a "discovery assessment") in the amount that ought in their opinion to be charged in order to make good to the Crown the loss of tax. The assessment must be made within the time limits set out in paragraph 31. Paragraph 30 Finance Act 2003 ("paragraph 30") then sets out restrictions on discovery assessments where a return has been delivered as follows:

> "(1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28 or 29 in respect of the transaction—
> (a) may only be made …
> (3) … [Where HMRC], at the time they—
> (a) ceased to be entitled to give a notice of enquiry into the return, or
> (b) completed their enquiries into the return,
> could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation…"

51. HMRC submit that the condition in paragraph 30(3)(a) was satisfied because the 'discovery' was of information which they could not reasonably be expected to know from the SDLT 1 return. In the words of the Upper Tribunal in *Charlton & others v HMRC* [2013] STC 866 ("*Charlton*") it "newly appeared to an officer acting honestly and reasonably that there is an insufficiency in an assessment."

52. The assessment was made by Mr Hadley within the standard four-year time limit in paragraph 31(1) schedule 10. This is not disputed by the Appellants. It is noted that there was no need for HMRC to rely on a longer time limit and to assert the higher behaviour hurdles in paragraph 31(2) and (2A).

53. The Appellants claim that the SDLT 1 return was completed correctly and in accordance with HMRC's guidance and, as it discloses both the consideration in the form of an annuity (code "34") and the total chargeable consideration payable (£42,610), it put HMRC on notice of the relevant information. Mr Hickey submits that as HMRC's Statement of Case alleges that "in the absence of a disclosure by the taxpayer the position was such that a hypothetical officer could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware..", it is for HMRC to establish that the return was not made in accordance with practice generally prevailing at the time (paragraph 30(5) schedule 10).

54. Mr Hickey also submits that if there was a discovery, it was "stale" as it had lost its "newness" as described in *Charlton* and the later case of *Tooth v HMRC* [2018] UKUT 38 (TC) ("*Tooth*") concerning the question of whether a 'discovery' by an officer can lose its 'newness' and no longer satisfy the test (in section 29(1) Taxes Management Act 1970 on which the wording in paragraph 28 is based). He submits that the 'discovery' does not meet the requirement of "newness" as HMRC discovered the insufficiency (if there is an insufficiency) in July 2013 and so the assessment is therefore "stale" and invalid.

55. Dealing first with the question of whether the assessment was "stale", I have considered the chronology and timing of the meetings and correspondence that led to this 'discovery' set out in paragraphs 3(13)-(15) above. Mr Hadley opened the enquiry into Mr Hannah's tax affairs on 27 November 2012. Mr Hadley and Mr Hannah met in May 2013 and Mr Hannah provided basic details about the use of an annuity. Mr Hadley then wrote to request further information on 1 July 2013. HMRC met with the Vendors in August 2013 and it is clear that they had a copy of the sale contract and deed of annuity by that time, but it is also clear (from Mrs Robinson's witness statement that was prepared after these meetings) that she was not able to explain to HMRC how the transactions were effected. HMRC had to wait until May 2014 before they received information requested from the Vendors' solicitor and then they requested further information from Mr Hannah that was provided in September 2014. On 5 December 2014 there was a meeting between Mr Hadley and Mr Hannah when a detailed analysis of the transactions was discussed. This meeting was followed by HMRC's letter, dated 24 December 2014, setting out HMRC's position and further information was requested by HMRC. The letter includes the statement "[my] analysis of the transactions are contained in my letter of 9 May 2014." On 5 August 2015 HMRC issued the discovery assessment.

56. These timings make two points clear. First, there was no point at which the Appellants had reason to believe that HMRC had closed their review of the transactions as they continued to take steps to understand the transactions until the issue of the assessment. Second, HMRC acted expeditiously in deciding to issue the assessment on 5 August 2015, rather than waiting until they had received all of the outstanding information that had been requested. It appears from the facts that HMRC's concerns turned into their initial conclusion in May 2014 when they put forward their analysis of the transactions and that they crossed the discovery threshold following the meeting on 5 December, as evidenced by their letter of 24 December 2014. The discovery was ongoing as a result of the continuing collection of information in an attempt to resolve how the transactions had been effected with the Appellants. HMRC were not sitting on their hands and the assessment was made whilst the 'discovery' remained "new".

57. Turning to the question of whether the 'discovery' was of information which HMRC could not reasonably be expected to know from the SDLT 1 return, I note first that the Land

Transaction Return Notes state that the code 34 is for "any other consideration, in money's worth, not listed here, or, as noted above, the market value of the interest in land acquired should be notified using code 34…". I accept that code 34 includes "an annuity" and that the heading is "Other (such as an annuity) – Code 34", but Other might be used more commonly used where SDLT is charged on the market value of a property rather than the actual consideration. In any event, the use of code 34 did not disclose to HMRC that the Appellants claimed that the consideration consisted of an annuity notwithstanding the arrangements on completion.

58. The Appellants have suggested that no assessment may be made because the return was made on the basis of prevailing practice. Paragraph 30(5)(a) provides that no assessment may be made where "the situation mentioned in paragraph 28(1) or 29(1) [that the amount of tax that ought to have been assessed has not been assessed] is attributable to a mistake in the return as to the basis on which the tax liability ought to have been computed" and "the return was in fact made on the basis or in accordance with the practice generally prevailing at the time it was made." The Appellants do not admit that they made a mistake as to the basis on which they completed the return or computed the liability. They rely on the fact they completed the return on the basis of a sale for the grant of an annuity within the guidance for code 34. It is HMRC who submit that an error was made, but this is not because it was made on the basis of prevailing practice but because the Appellants failed to return the transaction that took place on completion. Paragraph 30(5)(a) is not applicable.

59. HMRC have established that they made a 'discovery' within paragraph 28, that they met the condition in paragraph 30(3) and that the assessment was issued within the time limit in paragraph 31.

(3) Penalty Notices

60. HMRC's penalty notices were issued under paragraph 1 Schedule 24 FA 2007 on 9 August 2016 on the basis that the Appellants' behaviour, in deciding to submit the SDLT 1 return prematurely and without amendment to refer to refer to the cash paid on completion, was "deliberate but not concealed". Ms Wilson referred me to cases in which Mr Hannah had been involved as an adviser on SDLT planning. In *Frosh & Joyce and Goring-Thomas v HMRC* [2017] UKUT 0320 (TCC) he represented clients who had entered into SDLT planning arrangements similar to those considered in *Project Blue* and he instructed the same counsel as in this case, Mr Hickey. In *Coolatinney & others v HMRC* [2011] UKFTT 252 (TC) Mr Hannah made the submissions on behalf of his clients.

61. The Appellants challenge this and put HMRC to strict proof with regard to the allegation of deliberate wrongdoing. Mr Hannah waived legal professional privilege in respect of an opinion given by Patrick Way QC on Project Purity for the purpose of supporting their reporting position. Project Purity is an SDLT planning proposal based on satisfying the consideration for the purchase of a property by the transfer of the benefit of an annuity to the vendors to which section 52 applies. Patrick Way QC concludes, in relation to the reporting position, that where all that has occurred is a simple purchase and the use of an annuity rather than cash to access a relief, the purchasers using the planning may simply claim the relief in the relevant land transaction return. Mr Hickey referred me to the decision in *Patrick Cannon v HMRC* [2017] UKFTT 0859 (TC) ("*Patrick Cannon*") as support for his submission that as Counsel was acting in "a truly professional advisory capacity", Mr Hannah relied on his advice.

62. It is not for this Tribunal to decide if the SDLT reporting might have been correct if the transactions had been implemented as described to Patrick Way QC for the purposes of Project Purity. No doubt the implementation of the arrangements with real vendors who required a gap

between exchange and completion and cash on completion to purchase another property complicated the planning. Solicitors for the Vendors were chosen and paid for by the Appellants, and guidance about completion of the SDLT 1 was given to the Appellants' solicitor by Mr Hannah, but his guidance did not result in the transaction coming within the terms of the opinion given for the purposes of Project Purity. The Tribunal in *Patrick Cannon* added a caveat that a taxpayer acts reasonably relying on such professional advice "absent reason to believe that [the advice] is wrong". Applying this to the facts of this case, Mr Hannah cannot rely on advice that is not applicable to the transactions as they were effected.

63. Mr Hannah did not provide witness evidence, but he must have considered what the effect of the early issuance of the Annuity and the redemption of the Annuity for cash paid on completion had on the reporting as he sought to rely on section 44(4) to file the return as at 5 October even though the Annuity was to be held "in trust" until the Property was transferred on completion. As Mr Hannah must have been aware given his expertise, the transaction documents took the implementation further and further away from Project Purity and to an arrangement which was in fact, or under Ramsay or section 75A, for cash to be paid to the Vendors to complete the sale and purchase of the Property. Even on Mr Hannah's analysis sections 44(8), 76 and 77 Finance Act 2003 required a further return to be delivered when the contract that was substantially completed prior to completion was subsequently completed by a conveyance. Where the second return is required, the SDLT is chargeable on the later transaction to the extent that it is greater than the tax chargeable by reference to the first notifiable event.

64. The correspondence in this case illustrates Mr Hannah's central role in the tax planning. As a principal consultant with Cornerstone he was experienced in developing and advising on SDLT planning and he had instructed Patrick Way QC on Project Purity on 12 July 2011, well before the Appellants entered into the transaction documents. He orchestrated the reporting, emailing his solicitor what codes to use in the SDLT 1 return and he chose to report the transaction only as a sale and purchase in consideration of the Annuity issued on 5 October. The failure to make complete the second return, make a disclosure or to amend the return by reference to the transactions on completion resulted in an inaccuracy in the document as filed. Applying the meaning of "deliberate" as set out in a summary of First-tier Tribunal cases referred to in *Carter v HMRC* [2018] UKFTT 0729 (TC) Mr Hannah knowingly provided HMRC with a document that contained an error with the intention that HMRC should rely upon it as an accurate document. The failure to notify the full chargeable consideration of £765,000 was an inaccuracy that led to an understatement of tax and it was deliberate on Mr Hannah's part. The conditions for the imposition of the penalty under paragraph 1 schedule 24 on Mr Hannah were satisfied.

65. HMRC have not put forward evidence to support the penalty charged to Mrs Hodgson on the basis of her deliberate actions, as a joint purchaser or otherwise. It was only noted that she discussed using an annuity to pay for the Property with the Vendors. HMRC have not established that the inaccuracy was careless or deliberate on her part, or even that she played any part in the SDLT reporting. I conclude that the penalty issued to Mrs Hodgson should be cancelled, leaving the full amount of the penalty payable by Mr Hannah.

DECISION

66. For the reasons set out above the appeals are refused, other than the appeal against the penalty issued to Mrs Hodgson as that penalty should be cancelled.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

67. 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 30 MAY 2019

SCHEDULE

RELEVANT EXTRACTS FROM LEGISLATION

Stamp duty land tax (SDLT)

Section 42 Finance Act 2003 introduces stamp duty land tax in the following terms:

(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) Finance Act 2003 sets out the meaning of a land transaction as follows:

(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 44 Finance Act 2003 determines the effective date of a transaction as follows:

(1) This section applies where a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance.

(2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.

(3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction.
In this case the effective date of the transaction is the date of completion.
(4) If the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract.
In this case the effective date of the transaction is when the contract is substantially performed.
(5) A contract is "substantially performed" when—
(a) the purchaser [, or a person connected with the purchaser,] takes possession of the whole, or substantially the whole, of the subject-matter of the contract, or
(b) a substantial amount of the consideration is paid or provided.
(6) For the purposes of subsection (5)(a)—
[(a) possession includes receipt of rents and profits or the right to receive them, and]
(b) it is immaterial whether [possession is taken] under the contract or under a licence or lease of a temporary character.
(7) For the purposes of subsection (5)(b) a substantial amount of the consideration is paid or provided—
(a) if none of the consideration is rent, where the whole or substantially the whole of the consideration is paid or provided;
(b) if the only consideration is rent, when the first payment of rent is made;
(c) if the consideration includes both rent and other consideration, when—
(i) the whole or substantially the whole of the consideration other than rent is paid or provided, or
(ii) the first payment of rent is made.
(8) Where subsection (4) applies and the contract is subsequently completed by a conveyance—
(a) both the contract and the transaction effected on completion are notifiable transactions, and
(b) tax is chargeable on the latter transaction to the extent (if any) that the amount of tax chargeable on it is greater than the amount of tax chargeable on the contract.
(9) Where subsection (4) applies and the contract is (to any extent) afterwards rescinded or annulled, or is for any other reason not carried into effect, the tax paid by virtue of that subsection shall (to that extent) be repaid by the Inland Revenue.
Repayment must be claimed by amendment of the land transaction return made in respect of the contract.
…
(10) In this section—
(a) references to completion are to completion of the land transaction proposed, between the same parties, in substantial conformity with the contract; and
(b) contract" includes any agreement and "conveyance" includes any instrument.

Section 52 Finance Act 2003 applies where the chargeable consideration includes an annuity:
Annuities etc: chargeable consideration limited to twelve years'
payments
(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 55 Finance Act 2003 provides for the amount of tax chargeable as follows:
(1) The amount of tax chargeable in respect of a chargeable transaction [to which this section applies] is [determined in accordance with subsections (1B)] [and (1C)].
…
(1B) If . . . the transaction is not one of a number of linked transactions, the amount of tax chargeable is determined as follows—
Step 1
Apply the rates specified in the second column of [the appropriate table] below to the parts of the relevant consideration specified in the first column of [the appropriate table]. [The "appropriate table" is—
(a) Table A, if the relevant land consists entirely of residential property, and
(b) Table B, if the relevant land consists of or includes land that is not residential property.]
Step 2
Add together the amounts calculated at Step 1 (if there are two or more such amounts).

TABLE A: RESIDENTIAL

Part of relevant consideration	Rate
So much as does not exceed £125,000	0%

Section 76 Finance Act 2003 sets out the obligation to deliver land transaction return
(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, . . .
(b) . . ..

Section 77 Finance Act 2003 provides that a land transaction is notifiable if it is an acquisition of a major interest in land.

Schedule 4 Finance Act 2003 makes provision as to the chargeable consideration for a transaction, as provided for in section 50 Finance Act 2003. Paragraph 1(1) provides:

(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.

…

SDLT Anti-avoidance provisions

Section 75A Finance Act 2007 sets out anti-avoidance provisions in relation to SDLT as follows:

(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 75B provides for the consideration for incidental transactions to be ignored as follows:

(1) In calculating the chargeable consideration on the notional transaction for the purposes of section 75A(5), consideration for a transaction shall be ignored if or in so far as the transaction is merely incidental to the transfer of the chargeable interest from V to P.
(2) A transaction is not incidental to the transfer of the chargeable interest from V to P—
(a) if or in so far as it forms part of a process, or series of transactions, by which the transfer is effected,
(b) if the transfer of the chargeable interest is conditional on the completion of the transaction, or
(c) if it is of a kind specified in section 75A(3).
(3) A transaction may, in particular, be incidental if or in so far as it is undertaken only for a purpose relating to—
(a) the construction of a building on property to which the chargeable interest relates,
(b) the sale or supply of anything other than land, or
(c) a loan to P secured by a mortgage, or any other provision of finance to enable P, or another person, to pay for part of a process, or series of transactions, by which the chargeable interest transfers from V to P.
(4) In subsection (3)—
(a) paragraph (a) is subject to subsection (2)(a) to (c),
(b) paragraph (b) is subject to subsection (2)(a) and (c), and
(c) paragraph (c) is subject to subsection (2)(a) to (c).
(5) The exclusion required by subsection (1) shall be effected by way of just and reasonable apportionment if necessary.
(6) In this section a reference to the transfer of a chargeable interest from V to P includes a reference to a disposal by V of an interest acquired by P.]

Section 75C Anti-avoidance: supplemental
(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.

SDLT Return and Discovery provisions

Part 1 of Schedule 10 Finance Act 2003 ("Schedule 10") sets out the provisions relating to land transaction returns. Paragraph 6 provides that a purchaser may amend a land transaction return given by him within twelve months after the filing date.

Part 3 of Schedule 10 provides for enquiries into returns. Paragraph 12 states that the enquiry period is the period of nine months after the filing date.

Part 5 of Schedule 10 provides for HMRC assessments. Paragraph 28 Schedule 10 Finance Act 2003 provides for discovery assessments to be made in the following circumstances:

(1) If [HMRC] discover as regards a chargeable transaction that—
(a) an amount of tax that ought to have been assessed has not been assessed, or
(b) an assessment to tax is or has become insufficient, or
(c) relief has been given that is or has become excessive,
they may make an assessment (a "discovery assessment") in the amount or further amount that ought in their opinion to be charged in order to make good to the Crown the loss of tax.
(2) The power to make a discovery assessment in respect of a transaction for which the purchaser has delivered a return is subject to the restrictions specified in paragraph 30."

Paragraph 30 Schedule 10 then sets out restrictions on discovery assessments where a return has been delivered as follows:
(1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28 or 29 in respect of the transaction—
(a) may only be made in the two cases specified in sub-paragraphs (2) and (3) below,
…
(3) The second case is where [HMRC], at the time they—
(a) ceased to be entitled to give a notice of enquiry into the return, or
(b) completed their enquiries into the return,
could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 28(1) or 29(1).
(4) For this purpose information is regarded as made available to [HMRC] if—
(a) it is contained in a land transaction return made by the purchaser,
(b) it is contained in any documents produced or information provided to [HMRC]for the purposes of an enquiry into any such return, or
(c) it is information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 28(1) or 29(1)—
(i) could reasonably be expected to be inferred by [HMRC] from information falling within paragraphs (a) or (b) above, or
(ii) are notified in writing to [HMRC] by the purchaser or a person acting on his behalf.
...
(5) No assessment may be made if—

(a) the situation mentioned in paragraph 28(1) or 29(1) is attributable to a mistake in the return as to the basis on which the tax liability ought to have been computed, and
(b) the return was in fact made on the basis or in accordance with the practice generally prevailing at the time it was made.

Penalty provisions

Schedule 24 Finance Act 2007 provides for the imposition of penalties for errors in a taxpayer's document, including an SDLT 1, as follows:
Paragraph 1 provides that a penalty is payable by a person (P) where—
(a) P gives HMRC a document of a kind listed in the Table below, and
(b) Conditions 1 and 2 are satisfied.
(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—
(a) an understatement of [a] liability to tax,
(b) a false or inflated statement of a loss . . ., or
(c) a false or inflated claim to repayment of tax.
(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

Paragraph 3 sets out the degrees of culpability as follows:
(1) [For the purposes of a penalty under paragraph 1, inaccuracy in] a document given by P to HMRC is—
(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,
(b) "deliberate but not concealed" if the inaccuracy is deliberate [on P's part] but P does not make arrangements to conceal it, and
(c) deliberate and concealed" if the inaccuracy is deliberate [on P's part] and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).
(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate [on P's part] when the document was given, is to be treated as careless if P—
(a) discovered the inaccuracy at some later time, and
(b) did not take reasonable steps to inform HMRC.