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'THE DRAFT FINANCE BILL: STATUTORY RESIDENCE TEST'

THE DRAFT FINANCE BILL

The draft Finance Bill which was published on 11th December contains updated draft legislation (the "New Draft") to implement the Statutory Residence Test (the "SRT"). It supersedes the last draft which was published last June (the "June Draft") together with a Consultation Document (the "June Condoc"). The draft legislation has swollen from 39 to 55 pages but the changes are primarily of detail rather than of structure and principle. Indeed, what is most important is what has not been changed rather than what has.

This article concentrates on the first two parts of the draft schedule which implements the SRT which contain the fundamental principles of the new test with Part 1 (all references in this Article are to the New Draft unless otherwise stated) being headed "The Rules" and Part 2 "Key Concepts".

A DISAPPOINTING OUTCOME

Although it has been recognised for many years that the lack of an exhaustive statutory definition of residence for tax purposes is highly unsatisfactory it was only in November 2007 that the pressure for reform began to build. At that time the taxation profession hoped that the test would be a simple, objective test based on days of presence in the United Kingdom probably following the US model (see CIOT letter to HMRC 14 November 2007). That hope has been disappointed. The draft legislation is complex and in parts highly uncertain in its scope. The reason for that is that the Government has chosen to use concepts which are incapable of precise definition instead of finding arithmetical tests which can stand as reasonable proxies for them.

A HOME

The most important of these is the use of the concept of a "home" in the Second Automatic UK Test (para 8), the Accommodation Tie (para 32) and the Split Year provisions (Part 3). Home is a word of broad and imprecise meaning. The professional bodies strongly criticised its use in the SRT as undermining the aim of the new legislation to provide a "clear, objective and unambiguous" test of residence (Foreword to June Condoc). At the very least, they said that the legislation should combine an exhaustive definition of what is a home. In spite of this, the new draft legislation does not contain one. A new paragraph 24 slightly expands paragraph 14 of the June Draft but does not change its approach of avoiding definition. So for example sub-section (1) now says:-

> "A person's home can be a building or part of a building or, for example, a vehicle, vessel or structure of any kind."

That says no more than that it is possible for the items enumerated to be a home but not how one determines whether they are a home or not. A new sub-section (2) provides that:-

> "Whether, for a given building, vehicle, vessel, structure or the like, there is a sufficient degree of permanence or stability about P's arrangements there for the place to count as P's home (or one of P's homes) will depend on all the circumstances of the case."

This assumes that to be a home P's arrangements must have a 'sufficient degree of permanence or stability'. It does not even say that the arrangements which must have permanence or stability are arrangements in relation to the building etc which may or may not be P's home but only that the arrangements must be "there". It is as if the draftsman has had the elements of a definition in the back of his mind but could not bring himself to set it down expressly.

The June Condoc which accompanied the June Draft said that:-

> "… the Government does not consider a holiday home, weekend home or temporary retreat should count as a 'home'. (June Condoc para 3.89)"

The New Draft has now included this in a modified form in a new sub-section (3) which provides:-

> "But somewhere that P uses periodically as nothing more than a holiday home or temporary retreat (or something similar) does not count as a home of P's."

That raises more uncertainties than it settles. For it implies that without this specific provision a 'temporary retreat' might be a home which suggests that 'home' in the SRT should be interpreted widely rather than narrowly. What is more, it requires the taxpayer to be able to determine what is a "holiday home or temporary retreat (or something similar)".

The Second Automatic UK Test

The Second Automatic UK Test, which utilises the concept of a home, has been substantially recast (para 8). It is now a condition of the Test that P must be present at the home (whilst it is his home) for at least 30 separate days in the year (para 8(1)(b)). This does not mean that a place cannot be one's home for the purposes of the legislation if one never enters it at all during the fiscal year. It merely means that in those circumstances one would not satisfy the Second Automatic Residence Test.

Another change to the Second Automatic UK Test makes it easier for one to be resident here. In the June Draft one could only satisfy the Automatic Residence Test by reference to a period or periods of at least 91 days in which one's only home was in the UK. Under the new Draft, it will be possible to pass the test in respect of a period of more than 90 days in which one has a home in the UK and also overseas if one is present in the overseas home on fewer than 30 separate days in the year (para 8(3)).

THE ACCOMODATION TIE

As we have seen, the concept of home is also relevant to the Accommodation Tie. The draft of the Accommodation Tie contained in the June Draft had also been

severely criticised for it's imprecision. Only one minor change has been made to it. It still contains a host of concepts of uncertain meaning for which no statutory definition has been provided. Most importantly it preserves the concept of available accommodation (para 32(3)(c)) which has always caused immense problems in respect of the existing concept of residence.

OTHER AREAS OF DIFFICULTY

Days Spent

The Exceptional Circumstances Exception

Another area of difficulty which has not been addressed is the Exceptional Circumstances Exception in determining the days spent in the UK. Paras 21(4) & (5) have been taken over unchanged, but renumbered, from the June Draft. They provide that a day does not count as a day spent in the UK where:-

> "…
>
> (a) [the individual] would not be present in the UK at the end of that day but for exceptional circumstances beyond [this individual's] control that prevent [him] from leaving the UK, and
> (b) [he] intends to leave the UK as soon as those circumstances permit.
>
> (5) Examples of circumstances that may be 'exceptional' are:
> (a) national or local emergencies such as war, civil unrest or natural disasters, and
> (b) a sudden or life-threatening illness or injury."

One of the difficulties of this provision is that exceptional circumstances must "prevent [the individual] from leaving the UK" rather than prevent him from going to his intended destination. If an individual is in London and had intended to return to a Near Eastern country suddenly engulfed in civil war he would not be prevented from leaving the UK and travelling to a peaceful country such as France. Of course, the Courts might repair the legislation's deficiency through a radical purposive construction but the whole point of the SRT is that the taxpayer should be able to determine his residence status with certainty without having to guess how the Courts will repair the inadequacies of the Government's legislation.

Another anomaly which survives from the June Draft is the provision that the maximum number of days which will be treated as days which are not spent in the UK because of the Exceptional Circumstances Exception is sixty (para 21(6)). It is not clear why it is necessary to place a maximum here. The most likely circumstance in which a person will be prevented from leaving the UK for more than two months is where they are either seriously ill themselves or are caring for somebody who is seriously ill.

Unlikely Avoidance

In the June Condoc the Government suggested that a special rule would be required for those who regularly move in and out of the UK on the same day in order to

manipulate the residence rules (June Condoc para 3.153). This would either seem to require a taxpayer to fly in and out of the country on a large number of days or else to be based in Northern Ireland and to regularly walk across the border with the Irish Republic and back shortly before and after midnight. It is difficult to believe that the population of people sufficiently rich to make that worthwhile and sufficiently indifferent to their own comfort to be willing to do so will be large enough to justify the complication caused by specific provisions to frustrate such behaviour. Nonetheless such provisions have been introduced in paragraph 22 modifying the general rule, stated in paragraph 22(1), that if a person is not present in the UK at the end of the day, that day does not count as a day spent by the individual in the UK. The new rule will apply if:-

(a) the individual has at least three UK Ties for a tax year;
(b) the number of days in that tax year when the individual is present in the UK at some point in the day but not at the end of the day is more than 30; and
(c) the individual was resident in the UK for at least one of the three tax years preceding the tax year concerned.

Where these conditions are satisfied and the number of such qualifying days in the tax year reaches 30, each subsequent qualifying day in the tax year is to be treated as a day spent by the individual in the UK.

"Living Together As Husband And Wife, Or If They Are The Same Sex, As If They Were Civil Partners"

The New Draft utilises, in the Family Tie (para 30(2)(b)) and in the Split Year Provisions (para 42(9)), the phrase "living together as husband and wife or, if they are the same sex, as if they were civil partners …".

The phrase "living together as husband and wife" is found elsewhere in tax and other legislation and has been considered judicially on a number of occasions. A civil partnership is a creation of statute and the Civil Partnership Act 2004 does not limit civil partnerships to any particular form of relationship between two persons entering into such a partnership. It is difficult to see, therefore, how two people can live together as civil partners who are not civil partners. The phrase is used in a number of other statutory contexts, but in those contexts it is invariably used subject to a statutory definition usually providing that two people of the same sex are to be treated as living together as if they were civil partners if, and only if, they would be treated as living together as husband and wife were they of the opposite sex. There is no such deeming provision in the new draft legislation and no indication why the draftsman has not followed the normal statutory form.

BOTH AN IMPROVEMENT AND A WASTED OPPORTUNITY

An Improvement

It is clear that the SRT has now almost reached the form in which it will be enacted. The Government has made only minor changes to the most important provisions of the Test and has largely ignored the fundamental criticisms of structure and of definition which were made by the professional bodies. The new Test, when it is

enacted, will be an improvement on the current situation but it will be very far from fulfilling the aims for the draft legislation set out in the June 2012 Condoc that it should:-

> "Be transparent, objective and simple to use".

A Wasted Opportunity

Once enacted the SRT is unlikely to be recast significantly for many years. It will no doubt provide, in the future, considerable occupation for advisers and the Courts but the Government has wasted an opportunity for significant and cost free simplification of a key element of the tax code.

'A WHIFF OF GRAPESHOT'

This article arose from some SDLT advice that we have recently given to a client. The situation outlined in this article is not the same situation as that on which we advised but our client's situation highlighted the width of s.75A and suggested the possibility that it would apply in the most unexpected of situations.

INTRODUCTION

FA 2003 s.75A was introduced by the Finance Act 2007 to combat certain SDLT tax planning techniques. Like much modern tax legislation, it was deliberately widely drafted in order to catch planning techniques unknown at the time but which might be invented in the future.

In this article, we test the scope of s.75A against an example[1] of transactions entered into with no tax avoidance purpose whatsoever in order to explore its limits, its uncertainties and anomalies and to show how taxpayers, while undertaking quite straightforward transactions, might fall within a provision which many assume applies only to highly complex and artificial tax planning.

Considered individually both the First and Second Transfers in our example, although they are land transactions[2] because they involve the acquisition of chargeable interests in the Property, are exempt transactions because they are gifts.[3] They are not therefore subject to Stamp Duty Land Tax.[4] Does s.75A apply to impose a charge to SDLT? Section 75A(1) provides that s.75A 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.

We shall take each sub-sub-section in sub-section 1 in turn.

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1 See the example at the end of this article
2 Section 43. All references in this article are to the Finance Act 2003 as amended unless otherwise stated
3 FA 2003 Sch 3 para 1
4 Hereafter referred to as SDLT

SUB-SUBSECTION 1(a)

One person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it

Read literally, this section is satisfied in relation to the Property Transactions. Mrs A disposes of a chargeable interest (the freehold of the Property) and Miss C acquires that chargeable interest.

That disposal and that acquisition take place under separate transactions separated by six months and are not contractually inter-dependant. They are, however, planned together.

It might be argued that sub-subsection 1(a) only applies where the disposal and acquisition take place under the same transaction. The legislation does not say so, however, and construing the legislation in this way would surely prevent the legislation from applying to the very sorts of transactions which are its target. In *Revenue & Customs Commissioners v DV3RS Limited Partnership*[5] for example, Mr Justice Henderson said that if the transactions in the case "had taken place a few months later, they would probably had been caught by anti-avoidance provisions in ss.75A to 75C of FA 2003 …" If however, sub-subsection 1(a) applies only in relation to a disposal and acquisition under the same transaction it is difficult to see how the transactions in DV3 would have been caught because they were deliberately structured to achieve a sale and acquisition of the freehold through a number of pre-arranged but individual transactions in the property concerned or in interests derived from it.

So we shall assume that sub-subsection 1(a) can apply to the Property Transactions.

SUB-SUBSECTION 1(b)

A number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition ("the scheme transactions")

The legislation does not define the phrase 'in connection with'[6] for this purpose. It is plainly a phrase of wide meaning. The most apposite meaning of 'connection' given in the SOED is 'a contextual relationship'. That highlights the difficulty for a taxpayer dealing with the phrase in sub-section 1(b). The relationships which it covers are to be determined from its context but how the legislative context restricts the relationships to which it applies is difficult to determine in the absence of case authority. The least one can say is that it is likely that Mrs B's transfer to Miss C and

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5 *Revenue and Customs Commissioners v DV3RS Limited Partnership* [2012] UKUT 399 (TCC)

6 Phillip Ridgway writing in the *Tax Journal* of 26th November 2007 cited Lord Hope's discussion of the phrase in *Coventry Waste Ltd v Russell* (1999) 1 WLR 2093 at 2015, in respect of the Electricity Generators (Rateable Values) Order 1989 Lord Hope concluded that although in some statutory contexts the phrase might mean "having to do with", the phrase is "a protean one which tends to draw its meaning from the words which surround it." Mr Ridgway goes on to conclude that "the phrase [in Section 75A] is coloured by the use of the word "involved" and requires something more than a "but for" causal link; it requires some contractual or conditional link or some connection between the parties." That may be correct but it does not get us much further in defining the nature of the conditional link or connection between the parties which is required.

the provision of conveyancing services to Mrs A are transactions connected with the First Transfer and that Mrs A's transfer to Mrs B and the provision of conveyancing services to Mrs B are transactions in connection with the Second Transfer.[7]

Another interesting question is whether the subsection can be satisfied where there are no other transactions involved other than the transaction under which there is a disposal of the chargeable interest and the transaction under which there is an acquisition of it. It would surely be an awkward use of English to refer to the acquisition and disposal as being 'in connection' with themselves. [8]

Finally, is the phrase 'disposal and acquisition' disjunctive or conjunctive? That is, must there be a number of transactions in connection with the disposal and a number of transactions in connection with the acquisition (disjunctive) or must there be a number of transactions which are in connection with both the disposal and the acquisition (conjunctive)?

If the phrase is conjunctive, then one might say that the condition is not satisfied in relation to the Property Transactions because there are no transactions which are connected both with the First Transfer and the Second Transfer. On the other hand, it might be argued that because the arrangements were discussed and agreed by Mrs A and Mrs B before they took place all the transactions are connected both with the First Transfer and the Second Transfer.

If the phrase is disjunctive, clearly the provision of conveyancing services by the solicitors to Mrs A in respect of the First Transfer is in connection with that transfer, and the provision of such services to Mrs B is in connection with the Second Transfer. So if the phrase is disjunctive the condition of sub-section 1(b) is met that "a number of transactions … are involved in connection with the disposal and acquisition." We shall assume in the rest of this article that the conditions of sub-section 1(b) are met in respect of the Property Transactions.

SUB- SUBSECTION 1(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

One might think that sub-sub-section 1(c) would not be satisfied in our example on the basis that if Mrs A had made a gift to Miss C (the "Notional Land Transaction") no SDLT would be chargeable and therefore the SDLT in respect of the scheme transactions would not be less than the amount which would be chargeable on the Notional Land Transaction.

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7 Section 75A provides that for the purposes of s.75A a 'transaction' includes:-
(a) a transaction which is not a 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

8 The question may be of small practical importance. It must be unusual for a land transaction to take place without some other connected transactions for, as in our example, there will normally, as a minimum, be transactions with conveyancing solicitors

The Terms of the Notional Land Transaction

In order to make the comparison required by sub-sub-section 1(c), however, one needs to know, not only that there is a notional land transaction between Mrs A and Miss C, but also its terms.

Its Date

The notional land transaction is deemed to take place on:-

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

So the Notional Land Transaction between Mrs A and Miss C is deemed to take place on the date when the Property was transferred to Miss C.

Consideration

Two rules govern the consideration deemed to be given under the Notional Land Transaction. Section 75A(5) provides that:-

> "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."

The second provision which is relevant to the deemed consideration on the Notional Land Transaction is s.75C(6) which provides that "Section 53 applies to the notional transaction under Section 75A". Most advisers seem to assume that s.75C(6) can only apply to Notional Transactions involving an acquisition by company.

The structure of s.53, however, is that sub-section (1) sets out to what transactions it applies. Under s.53(1) it applies only to transactions where the purchaser is a company. Section 53(1A) then gives the consequence of the section applying. That is that the:-

> "chargeable consideration for the transaction shall be taken to be not less than the market value of the subject-matter of the transaction as at the effective date of the transaction."

Section 75C(6), read literally extends the transactions to which s.53 applies beyond transactions involving corporate purchasers to all notional land transactions within s.75A because it expressly says that "section 53 applies to the notional transaction under section 75A". Section 53(1A)(1) then imposes a minimum level of consideration on the notional land transaction equal to the market value of the

chargeable interest at the effective date of the transaction. Now this construction of the effect of ss.53 and 75C(6) is certainly not accepted by advisers and commentators but it seems to follow from a close reading of the relevant legislation.

It might be argued that the purpose of s.75C(6) is merely to provide that s.53 can govern a notional land transaction that involves a hypothetical acquisition by a company from a person connected with it. The trouble with that construction is that it makes s.75C(6) redundant. The application of s.53 in such circumstances would follow from the hypothesis in s.75A(1)(c), with or without s.75C(6).

How then do s.75A(5) and s.75C(6) interact? Section 75C(6) imposes a minimum value ("… the chargeable consideration for the transaction shall be taken to be not less than …") on the consideration deemed to be given under the notional transaction so that it ensures that the consideration deemed to be given under the notional land transaction is the higher of the amounts determined under s.75A(5) and s.75C(6).

So for the purposes of s.75A, the consideration for the Notional Land Transaction in our example cannot be less than the market value of the Property at the time that it was transferred to Miss C.

That would result in an SDLT charge at 7% of £3 million on the Notional Land Transaction. The aggregate SDLT charge arising on the actual scheme transactions would be nil and so the condition of sub-section 1(c) would appear to be satisfied. So s.75A applied to Mrs A's disposal of the property and Miss C's acquisition of it some six months later.

THE EFFECT OF SECTION 75A APPLYING

Where s.75A 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.

The effect therefore is to deem there to be a disposal of the Property by Mrs A to Miss C for a consideration equal to its market value at the time of the completion of the transfer to Miss C (that is £3 million) on which SDLT at 7% is chargeable. Section 75A has increased the SDLT chargeable from nothing to £210,000 on two gifts without any tax avoidance purpose at all.

That is plainly an anomalous result. We are sure that most advisers, presented with the conclusion without the argument on which it is based, would say that it couldn't possibly be right. It may be that the courts, applying an extreme form of purposive interpretation, would agree. On a close analysis of the provisions, however, that does seem to be their result.

CAN SECTION 75A APPLY WHERE TAX IS NOT AVOIDED?

In their 'guidance' on Section 75A, HMRC say:-

> "Section 75A is an anti-avoidance provision. HM Revenue & Customs (HMRC) therefore takes the view [sic] that it applies only where there is avoidance of tax. On that basis, HMRC will not seek to apply s.75A where it considers transactions have already been taxed appropriately."

In a loose sense, s.75A is an anti-avoidance provision. It was introduced by the Government with the aim of frustrating certain forms of tax planning. But nothing in its terms restricts its application to transactions which have a tax avoidance motive, or which have a main purpose of conferring a tax advantage or which actually do confer a tax advantage. Philip Ridgway writing in the *Tax Journal* on 26th November 2007, argues that the references to anti-avoidance in the headings to Sections 75A-75C indicate that the sections are anti-avoidance provisions and that they should be interpreted purposively as such. He cites *Bennion on Statutory Interpretation* as follows:-

> "A heading within an Act, whether contained in the body of the Act or a Schedule, is part of the Act. It may be considered in construing any provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief, and therefore necessarily inaccurate guide to the material to which it is attached."

He also cites the comments of Lord Reid in *R v Schildkamp*[1971] AC 1 in which he said:-

> "A cross-heading ought to indicate the scope of the sections which follow it but there is always the possibility that the scope of one of the sections may have been widened by amendment"

He goes on to say that the form of s.75A(1) indicates that it is concerned with tax avoidance schemes and that the use of the phrase 'scheme transactions' in s.75A(1)(b) provides a further such indication.

In *Page (Inspector of Taxes) v Lowther* [1987] STC 799 the Court considered ICTA 1970 s.488 (legislation which has been rewritten in ITA 2007 Part13 Chap 3). That section appeared in part XVII of the 1970 Act which was headed "Tax Avoidance," and the section had a side note reading "Artificial Transactions in Land". Section 488(1) read "This section is enacted to prevent avoidance of tax by persons concerned with land or the development of land". In spite of that, the Court of Appeal declined to restrict its ambit to transactions where tax was avoided. Delivering the leading judgment, Slade LJ said (at p.807):-

> "…I think there is no room for construing the phrases [at issue in the case] in the very restricted sense which [Counsel for the Taxpayer] suggests. While Sub-s (1) may be regarded as being of the nature of a preamble stating in general terms the nature of the mischief at which the section is aimed, its wording is not, in my opinion, sufficiently clear to enable the court to give a construction to [the

> main charging sub-section of s.488] which would enable the trustees to escape the net of taxation under s 488… If it had expressly limited the operation of the section to transactions specifically designed to avoid tax, the position might have been quite different."

Slade LJ in support of this conclusion then went on to refer to a further passage in the case cited by Mr Ridgway, *R v Schildkamp* as follows:-

> "I must accept that, on my construction of the section, the sidenote reading 'Artificial transactions in land' may, in some cases, be somewhat misleading. I would accept that the transactions involved in the present case cannot on the evidence fairly be described as artificial. Nevertheless, as Lord Upjohn pointed out in *R v Schildkamp* [1971] AC 1 at 28, 'A side-note is a very brief précis of the section and therefore forms a most unsure guide to the construction of the enacting section ...'"

Section 75A has no reference within it to Tax Avoidance at all. It would surely be open to a Court to take the view that although Parliament's purpose in introducing the provision was to prevent tax avoidance the means which it took to do so was to define a class of transactions likely to include transactions resulting in the avoidance of taxation but which was not wholly confined to such transactions.

Section 75A has been briefly judicially considered in one case, *Pollen Estate Trustee Company Ltd and another v Revenue & Customs Commissioners* [2012] UKUT 277 (TCC),[9] an Upper Tribunal decision in which Mr Justice Warren and Judge Herrington said that s.75A is an "anti-avoidance provision".[10] That comment, however, came in the context of their consideration of an anomaly which Counsel for HMRC said would arise from the construction of provisions relating to the application of SDLT to joint purchasers contended for by the taxpayers' Counsel. The remark was an obiter dictum as the Court said that its conclusion on the matter was a "point on which it is unnecessary to rely in reaching our decision."[11] In any event the judgement does not say that the consequences of s.75A being an "anti-avoidance provision" is that it cannot apply to transactions in which tax is not avoided.

Unless and until there is unequivocal judicial authority that s.75A cannot apply where tax is not avoided, it would be a brave taxpayer who relied on HMRC recognising that his transactions have not been undertaken for tax avoidance purposes and applying the practice set out in their guidance which has no express statutory authority; particularly as the guidance does not define either 'avoidance of tax' or the circumstances in which 'transactions have already been taxed appropriately'. It may be that in the light of the Supreme Court's decision in *Gaines-Cooper*[12] the taxpayer, if he could persuade the court that his transactions did not involve tax avoidance, could establish that he had a legitimate expectation that HMRC would assess in accordance with their guidance. No prudent taxpayer, however, will plan his

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9 It is also referred to but not considered in *Revenue and Customs Commissioners v DV3 RS Limited Partnership* [2012] UKUT 399 (TCC) at para 67

10 At para 14

11 At para 63 ibid

12 *R (on the application of Davies and another) v Revenue & Customs Commissioners, R (on the application of Gaines-Cooper) v Revenue & Customs Commissioners* [2011] UKSC 47

transactions on the basis that he can enforce inaccurate guidance in judicial review proceedings.

It is clear that s.75A causes major uncertainty in the application of SDLT. It should be repealed and replaced by a more exactly targeted provision. No experienced tax commentator will expect the Government to do so.

Example

Mrs A owns the freehold of a large let residential property (the "Property"). She wished to make a gift of the property to her daughter, Mrs B. She engages the services of a solicitor to provide advice on the effects of the transaction and to draft the relevant documentation and register the transfer. She paid a normal fee for these services. The Property was transferred to Mrs B, (the "First Transfer").

Six months later, Mrs B made a gift of the property to her daughter, Miss C on the occasion of her twenty-fifth birthday. She engaged similar services from the same solicitor and the transfer by way of gift was made (the "Second Transfer").

Mrs A was aware of her daughter's intention to make a gift of the property at the time that she made her gift and, indeed, the two ladies planned the transactions together, although the First Transfer was in no way conditional on the Second Transfer proceeding. Neither gift was made in order to avoid tax.

At all relevant times, the market value of the Property was £3,000,000.

The First and Second Transfers together are referred to in this article as the "Property Transactions."