Land tax lottery?

SIMON MCKIE and SHARON MCKIE consider whether the stamp duty land tax anti-avoidance provisions work logically.

Widely phrased provisions to combat stamp duty land tax (SDLT) avoidance are contained in FA 2003, s 75A to s 75C. But, although headed "anti-avoidance", they are not expressly restricted to tax avoidance transactions. Their scope was considered by the Upper Tribunal in *Project Blue Ltd v CRC* [2013] UKFTT 378 (TC).

FA 2003, s 75A details the relevant parts of s 75A as it was at the time and the transactions themselves are summarised in "Relevant facts" below.

Statutory references are to FA 2003 unless otherwise stated.

Relevant facts

Project Blue concerned the acquisition for development of Chelsea Barracks in London (the property), which was financed by sharia-compliant arrangements known as ijara financing.

The parties to the transactions in the case were:

- the Secretary of State for Defence (SSD);
- the appellant company, Project Blue Limited (PBL); and
- the Qatari Bank Masraf al Rayan (MAR).

The sale of the freehold of the barracks by SSD took place in seven steps as follows.

- *Step 1 – 5 April 2007*. PBL contracted to purchase the freehold of the property from the SSD for £959m.
- *Step 2 – 29 January 2008*. PBL sub-sold the freehold to MAR. The consideration for this sale was:
  - (a) US$1,893,353,700.
  - (b) The amount of any SDLT liability arising on PBL.
  - (c) An additional amount quantified by reference to the rent payable under the superior lease.

  It was accepted that the sterling equivalent of the aggregate of these amounts was £1.25bn.
- *Step 3 – 29 January 2008*. MAR agreed to grant a 999-year lease (the superior lease) of the property back to PBL.
- *Step 4 – 31 January 2008*. MAR and PBL entered into put-and-call options respectively requiring and entitling PBL to repurchase the freehold at the end of the finance period.
- *Step 5 – 31 January 2008*. The SSD conveyed the freehold to PBL.
- *Step 6 – 31 January 2008*. At the same time as, and in connection with Step 5, PBL conveyed the freehold to MAR.
- *Step 7 – 31 January 2008*. Immediately after Step 6, MAR granted the superior lease to PBL.

On 22 February 2008, five land transaction returns were submitted to HMRC for these transactions. All five showed no SDLT payable.

HMRC amended one return to increase the SDLT payable to £38.4m on chargeable consideration of £959m on the basis that this was the effect of s 75A.

KEY POINTS

- The SDLT anti-avoidance provisions are not restricted to tax avoidance transactions.
- The Project Blue land transactions consisted of seven separate steps.
- The difficulties of identifying the vendor and purchaser.
- The approach adopted by the First-tier Tribunal and the Upper Tribunal to identify the relevant parties.
- Could there be scenarios where there are multiple possible purchasers and vendors related to the same land transaction?

Operation of FA 2003, s 75A

It can be seen that ***FA 2003, s 75A*** operates by identifying a vendor (V), a purchaser (P) and a set of "scheme transactions" by reference to an actual disposal and acquisition. It then posits a notional land transaction between V and P for a hypothetical consideration as to which is the highest amount of consideration under the scheme transactions. If the SDLT on this is greater than the SDLT that would otherwise be paid, the scheme transactions are disregarded and SDLT is charged on the notional land transaction.

FA 2003, S 75A

Anti-avoidance

(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.

(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 TA 1988, s 839) by way of consideration for the scheme transactions.

If s 75A is read literally, even in straightforward arrangements, there might well be more than one person who "disposes of a chargeable interest" and who is, therefore, a vendor (V) and more than one person who "acquires either ... [that interest] ... or a chargeable interest deriving from it" and who, therefore, is a purchaser (P).

If it were possible for there to be more than one P, more than one person could be chargeable to SDLT in relation to a single notional land transaction. The section provides no apparatus for choosing which person is to be subject to taxation or of allocating the liability among the persons who are P within its terms. Indeed, on a literal reading, multiple charges to SDLT might arise, each charged on the largest amount of consideration arising under any of the scheme transactions.

First-tier Tribunal's approach

PBL argued that, to construe s 75A within reasonable bounds so that there should not be multiple persons who are V and P in the same transactions, the section must be restricted to situations where P is a person who has a motive of avoiding SDLT in the scheme transactions. The tribunal, in effect, accepted that the scope of s 75A had to be restricted to tax avoidance transactions. However, it defined the necessary element of avoidance, not by reference to motive, but to whether tax had objectively been avoided. This was to be determined by comparing the SDLT that would have been charged on the scheme transactions with the tax that would have been charged on a hypothetical set of comparative transactions.

The First-tier Tribunal, having allowed HMRC to amend its statement of case to assert that SDLT of £50m was due, increased the assessment on PBL to that amount. It did so on the basis that:

- s 75A applied;
- the disposal within s 75A(1)(a) was the disposal by the SSD of the freehold;
- the acquisition within that subsection was the grant to PBL of the superior lease;
- V was, therefore, the SSD for the purposes of s 75A(1)(a);
- P was PBL for the purposes of s 75A(1)(a);
- the scheme transactions under s 75A(1)(b) were Steps 1 to 7;
- the notional land transaction was a sale of the freehold by the SSD to PBL; and
- the consideration for that notional transaction was £1.25bn.

Upper Tribunal's approach

The Upper Tribunal consisted of Mr Justice Morgan and Judge Howard Nowlan. Their conclusions differed and as the presiding judge, Mr Justice Morgan's view prevailed. His conclusions differed from the First-tier Tribunal (FTT) only in deciding that the consideration for the notional transactions under s 75A(1)(c) was £959m, not £1.25bn. He found that the SDLT assessed should, accordingly, be reduced from £50m to £38.36m.

> ***"The Upper Tribunal consisted of Mr Justice Morgan and Judge Howard Nowlan. Their conclusions differed."***

Mr Justice Morgan regarded "the possibility of there being more than one person who is V and more than one person who is P as being unsatisfactory and would be reluctant to accept that interpretation of s 75A to s 75C". He did not find the First-tier Tribunal's approach to be appropriate, but he did not substitute any other principle by which the construction of the section might be constrained. Instead, he began his analysis with the identification of V and P made by the parties in the case.

In respect of the identity of V he said:

> "Before the FTT, both sides proceeded on the basis that SSD was V. Accordingly, the FTT held that SSD was V ... I am prepared to proceed on the basis of this common ground that SSD is V. I would not do so if I considered that the parties were wrong about this but, due to the difficulty in applying s 75A in this case, I cannot say that I consider the parties are wrong ... although I would have preferred to have been able to identify in the statutory provisions themselves a convincing reason for this choice of V."

On the approach of the FTT to the identity of P he said:

"The FTT thought that one should identify the party who was otherwise avoiding tax. The FTT was also influenced by an approach which distinguished between the party who was acquiring the property and the funder of that party ...

"As regards the suggestion that one should select the party who is avoiding tax, I have already held that the section is not restricted to a case where it is the purpose of any party to avoid tax. Therefore, this approach does not help where (as may be the case) no party has the purpose of avoiding tax; further, this approach does not help where two or more persons have the purpose of avoiding tax. As regards the suggestion that one can distinguish between a party acquiring the property and the funder of that party, there is no support in the statutory wording for making that distinction when identifying P."

Mr Justice Morgan did not examine the possibility that PBL was P by virtue of its acquisition of the freehold from the SSD (a possibility which he refers to as "P1") because "there appears to have been common ground [between the parties] that PBL (as a possible P1) was not P. I will therefore continue my analysis on the basis that this approach is correct."

> ***"Mr Justice Morgan, however, adopted two approaches put forward by PBL."***

In this way, Mr Justice Morgan could consider only the possibilities that MAR was P and that PBL was P by virtue of the grant to it by MAR of the superior lease.

Deemed consideration

Mr Justice Morgan then turned to the deemed consideration for the notional land transaction. It can be seen from ***FA 2003, s 75A*** that the legislation provided that:

(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 TA 1988, s 839) by way of consideration for the scheme transactions.

The FTT agreed with HMRC that this resulted in SDLT being charged on £1.25bn, the consideration given by MAR for the freehold. If P was PBL, it would seem peculiar that it should be taxed by reference to the larger amount of consideration given by MAR rather than by reference to the consideration that it had given. Judge Nowlan was uncomfortable with his conclusion in agreeing with the FTT on this issue.

Mr Justice Morgan thought that the way out of this difficulty was to be found in s 75B which provided that:

(1) In calculating the chargeable consideration on the notional transaction for the purposes of s 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 s 75A(3)...
(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.

Incidental transactions

Mr Justice Morgan pointed out that s 75B(1) on its terms applies to transactions that are "incidental to the transfer of the chargeable interest from V to P". This is extended by s 75B(6) to transactions that are "incidental to a disposal by V of an interest acquired by P". Where, as in the transactions at issue in *Project Blue,* P does not acquire the same interest as is the subject of V's disposal, the transaction is neither a transfer of the chargeable interest from V to P nor a disposal by V of an interest acquired by P.

What is the result of that? Surely, it is that the transaction is not merely incidental to a transfer of the chargeable interest from V to P or to a disposal by V of an interest acquired by P; it has no relationship to it whatsoever. The use of the definite article in the reference to "the transfer" in s 75B(1) must indicate that it refers back to the "notional transaction" referred to in the opening line of that sub-section.

Mr Justice Morgan, however, adopted two approaches put forward by PBL.

The first was "to seek to find in the scheme of transactions, if possible, a transaction which involved a disposal of the freehold by V and the acquisition of the freehold by PBL. Such a transaction did indeed occur; it was the transfer from SSD to PBL for £959 million. Then one asks if the other parts of the scheme of transactions were merely incidental to that actual transaction."

This enabled him to regard the acquisition of the freehold by MAR as incidental with the result that the largest amount given under those scheme transactions which he did not consider to be incidental was the consideration of £959 million given by PBL.

Misconception?

The search for an actual transaction to which the scheme transactions might be incidental, however, was surely misconceived. There is nothing in s 75B which suggests that the transfer (or, applying s 75B(6), the disposal) referred to is not the notional land transaction. If the notional land transaction is neither the transfer of a chargeable interest from V to P nor a

disposal by V of an interest acquired by P, it surely follows that s 75B does not apply so that the transaction concerned is not to be ignored. Even if in some way s 75B did have some application in these circumstances, it is still clear that the transaction by reference to which one determines whether a scheme transaction is incidental is the notional land transaction.

Mr Justice Morgan went on to reach the same conclusion as to the amount of the consideration by an alternative route:

> "PBL's second approach relies on the words 'in so far as' in s 75B(1). PBL submits that, even if it is not possible to say that the transactions between PBL and MAR were merely incidental to the acquisition by PBL of the freehold, then the transactions between PBL and MAR can be apportioned. One can, and should, divide the transactions so that one separates the part of the transaction whereby MAR provided consideration to reimburse PBL for its acquisition of the freehold from the parts of the transaction whereby MAR provided consideration to PBL in relation to SDLT and by way of further funding. One could then hold that the part of the transaction whereby MAR paid £959 million to PBL was not incidental to PBL acquiring the freehold but that the parts of the transaction whereby MAR agreed to pay to PBL the sum which PBL was liable to pay by way of SDLT and to provide further funding were merely incidental to PBL's acquisition of the freehold."

Identifying the purchaser

The difficulty here is that the transaction under which consideration of £1.25bn was payable by MAR was the sale to it of the freehold. There was not one part of the transaction which was a sale of the freehold and another part which was something else. The consideration given under that transaction might have been calculated by reference to SDLT and by way of further funding, but all of it was given in consideration of the freehold. There is nothing in the FTT's finding of facts to suggest that the FTT had found that the reality of the situation was that MAR was paying a part of its consideration for something other than the freehold.

Having decided that PBL could be P by virtue of being the lessee under the superior lease and that in that case the consideration for the actual land transaction was £959m, Mr Justice Morgan was still left with the difficulty that both PBL and MAR could be P.

> "In view of my reasoning in relation to MAR as P, I have revisited my reasoning in relation to PBL as P. I am unable to find any false step in that reasoning. I consider that I should give effect to that reasoning in relation to PBL even though I have separately reached the conclusion that MAR could also be P.
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> "I now must reach a decision on the appeal before the Upper Tribunal. HMRC has not sought to levy tax on MAR. MAR is not a party to this appeal. Neither the FTT nor the Upper Tribunal is required to make any formal determination of the position in relation to MAR. What is before the Upper Tribunal is an appeal by PBL. Both members of the Upper Tribunal are of the view that PBL is P; accordingly, I will apply s 75A to s 75C to PBL on the basis that it is P."

Abdication of responsibility?

By confining his consideration to the identities of V and P, for which the parties contended, Mr Justice Morgan was able to avoid dealing with s 75A's difficulties of construction. The logical result of his conclusion, however, is that HMRC could have assessed MAR or PBL, or indeed both of them, on different notional transactions but in respect of the same set of actual scheme transactions. He failed, therefore, to provide a construction of s 75A which dealt with his own objection, on a literal reading, that the section has the result that:

- multiple parties could be V and P;
- it provides no express priority of one identification of V or P over another;
- if there are multiple Vs and Ps, there will also be multiple notional transactions; and
- that this will result either in multiple assessments or in some arbitrary decision to assess one notional transaction and not another or to allocate a single assessment between multiple persons identified as P.

This is surely an abdication of the responsibility to construe the provisions rather than an exercise in their construction. To construe a legislative provision is to decide what it means. That certainly involves taking account of its context and its meaning, once determined, may well apply in different ways to different facts. If, however, the same words are construed in a sense at which the court would baulk in another case, their meaning will, in effect, change from case to case according to some principle which cannot be articulated. The statutory provision would then, in effect, be meaningless for there would be no way of determining what was its meaning save by the exercise by the tribunal and the court of an arbitrary discretion in respect of each case.

A lottery?

Section 75A is extremely unsatisfactory legislation. It surely requires repeal and replacement by a more exactly drafted provision. In the meantime, unsatisfactory though the FTT's decision was and although it led to an arbitrary result which was grossly unfair to the taxpayer concerned, it at least provided a principle which taxpayers could apply in making their self-assessments. The Upper Tribunal has made the application of s 75A a lottery and left the taxpayer with no option but to make his self-assessment as best he may at the risk of being penalised for making an incorrect return.

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