Analysis
Examining the scope of FA 2003 s 75A

SPEED READ **HMRC takes the view that the SDLT anti-avoidance provision in FA 2003 s 75A applies only where there is avoidance of tax and, on that basis, HMRC will not seek to apply s 75A where it considers transactions have already been taxed appropriately. However, in this article, the author argues that s 75A could apply to transactions entered into with no tax avoidance purpose. In the absence of unequivocal judicial authority to the contrary, a taxpayer could therefore be left in the unenviable position of relying on HMRC applying the practice set out in its guidance.**

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FA 2003 s 75A was introduced by FA 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; to frustrate, to use Donald Rumsfeld's much-quoted phrase, 'unknown unknowns'.

In this article, I test the scope of s 75A against an example (below) 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. (All statutory references are to FA 2003 as amended, unless otherwise stated.)

Considered individually, both the first and second transfers in our example, although they are land transactions (within s 43) because they involve the acquisition of chargeable interests in the property, are exempt transactions because they are gifts (Sch 3 para 1). They are not, therefore, subject to SDLT.

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 SDLT 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.'

I shall take each para of sub-s (1) in turn.

Sub-s 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 interdependant. They are, however, planned together.

It might be argued that sub-s 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 *HMRC v DV3 RS Limited Partnership* [2012] UKUT 399 (TCC), for example, Mr Justice Henderson said that if the transactions in the case 'had taken place a few months later, they would probably have been caught by anti-avoidance provisions in ss 75A to 75C'. If, however, sub-s 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; they were deliberately structured to achieve a sale and acquisition of the freehold through a number of prearranged but individual transactions in the property concerned or in interests derived from it.

So we shall assume that sub-s 1(a) can apply to the property transactions.

Sub-s 1(b)

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

Example

Mrs A owned 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 engaged the services of a solicitor to provide advice on the effects of the transaction, to draft the relevant documentation and to 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 25th 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; 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 £3m.

The first and second transfers together are referred to in this article as the 'property transactions'.

Like much modern tax legislation, s 75A was widely drafted to catch the 'unknown unknowns' [of SDLT planning]

The legislation does not define the phrase 'in connection with' for this purpose. It is plainly a phrase of wide meaning. The most apposite meaning of 'connection' given in the *Shorter Oxford English Dictionary* is 'a contextual relationship'. That highlights the difficulty for a taxpayer dealing with the phrase in sub-s 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 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 (by virtue of s 75A(2)).

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.

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 solicitor 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. If the phrase is disjunctive, the condition of sub-s 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-s 1(b) are met in respect of the property transactions.

Sub-s 1(c)

The sum of the amounts of SDLT 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-s 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 have been 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.

The terms of the notional land transaction: In order to make the comparison required by sub-s 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: A 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.

Therefore, 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 a notional land transaction. Section 75A(5) provides that:

'The chargeable consideration on the notional transaction mentioned in sub-ss (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 [CTA 2010 s 1122]) by way of consideration for the scheme transactions.'

The second provision which is relevant to the deemed consideration on a notional land transaction is s 75C(6), which provides that 's 53 applies to the notional transaction under s 75A'. Most advisers on these sections seem to assume that s 75C(6) can only apply to notional land transactions involving an acquisition by a company.

The structure of s 53, however, is that sub-s (1) sets out to which transactions it applies. Under s 53(1), it applies to transactions where the purchaser is a company and certain other conditions are satisfied. Section 53(1A) then provides 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 's 53 applies to the notional transaction under s 75A'. Section 53(1A), read subject to s 75C(6), then applies to transactions meeting the description in s 53(1) by virtue of the express words of that provision and to notional land transactions under s 75A(1) by virtue of the express words of s 75C(6). Section 53(1A)(a) then imposes a minimum level of consideration on transactions to which it applies, equal to the market value of the chargeable interest at the effective date of the transaction.

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 (and certain analogous transactions within s 53(1)(b)). One might argue further that all that s 75C(6) does by providing that s 53 is to apply to notional land transactions under s 75A(1), is to make it clear that s 53(1A) can apply to the notional land transaction if it falls within s 53(1).

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). It also ignores the wording of s 75C(6) which does not provide that s.53 can, but may not, apply to transactions within s 75A, but rather provides that 's 53 *applies* [emphasis added] to the notional transaction under s 75A', just as s 53(1) provides that s 53 applies to transactions which meet its description.

HMRC does not appear to accept this construction. It appears that HMRC considers that s 53(1A) can only apply to a notional land transaction under s 75A(1) if the notional land transaction meets the description in s 53(1). HMRC's notes on the Finance Bill 2007 (which introduced s 75A) said: 'Sub-s (5) [which became sub-s (6) in the enacted legislation] provides that s 53 (which provides for a market value charge on a transfer to a company connected with a transferor) applies to the 'notional transaction under s 75A.'

In HMRC's guidance note on s 75A, under the heading 'Other provisions', it is said that: 'the notional transaction will be subject to the market value rule in s 53 if P is a company connected with V.'

It is a reasonable reading of these statements that HMRC thinks that the effect of s 75C(6) is that s 53(1A) will apply to a notional land transaction under s 75(1) only if it is a transaction which falls within the terms of s 53(1). HMRC's view, however, does not determine the law. If it was to resile from its published view, a taxpayer would only be protected if he were able to establish in judicial review proceedings that he had a legitimate expectation that HMRC would apply its published view of the construction of the law to the taxpayer's transaction, regardless of whether or not that view were correct. HMRC's published comments cited above are not absolutely unambiguous. They do not expressly say that s 53 does not apply to notional land transactions under s 75A(1) which do not meet the description in s 53(1). It may be, therefore, that they are not sufficient to establish that a taxpayer has a legitimate expectation that HMRC will only apply s 53(1A) to notional land transactions under s 75A(1) which satisfies the description in s 53(1).

If the construction which I have suggested is correct, how 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 land 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).

Therefore, 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 £3m on the notional land transaction. The aggregate SDLT charge arising on the actual scheme transactions would be nil and so the condition of sub-s 1(c) would appear to be satisfied. So s 75A would apply to Miss A's disposal of the property and, Miss C's acquisition of it some six months later.

The effect of s 75A applying

According to s 75A(4), where s 75A applies:

- any of the scheme transactions which is a land transaction shall be disregarded for the purposes of this Part; but
- 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. Section 75A would have 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. I am 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.

It may be, also, that, if HMRC was to apply the provisions in the way I have suggested, a taxpayer could make a judicial review application on the basis of the disappointment of his legitimate expectation that it would apply the treatment set out in its published statements which I have cited above. As those statements, however, do not say unambiguously that s 53(1A) cannot impose a market value charge on notional land transactions under s 75A(1) which do not meet the description in s 53(1), one would have to be a brave individual to rely on being successful in such an application.

Can s 75A apply where tax is not avoided?

In its 'guidance' on s 75A (at www.hmrc.gov.uk/so/advice75a.htm), HMRC says:

'Section 75A is an anti-avoidance provision. HMRC therefore takes the view 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.'

Section 75A should be repealed and replaced by a more exactly targeted provision

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 this journal (see 'Section 75A', *Tax Journal*, dated 26 November 2007), argued that the references to anti-avoidance in the headings to ss 75A–75C indicate that the sections are anti-avoidance provisions and that they should be interpreted purposively as such. He cited *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 cited 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.'

Ridgway went 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 yet another such indication.

In *Page (Insp of Taxes) v Lowther* [1983] STC 799, however, the court considered ICTA 1970 s 488 (legislation which has been rewritten in ITA 2007 Part 13 Chap 3). That section appeared in ICTA Part XVII, 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 the 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 senses 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, nearly sufficiently clear to enable the court to give a construction to [the main charging subsection 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.

Consideration by the courts

Section 75A has been briefly judicially considered in one case, *Pollen Estate Trustee Company Ltd and another v HMRC* [2012] UKUT 277 (TCC), an Upper Tribunal decision in which Mr Justice Warren and Judge Herrington said (at para 14) that s 75A is an 'anti-avoidance provision'. 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 (at para 63) that its conclusion on the matter was a 'point on which it is unnecessary to rely in reaching our decision'. In any event, the judgment 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.

In the absence of unequivocal judicial authority that s 75A cannot apply where tax is not avoided, a taxpayer might be left in the unenviable position of relying on HMRC recognising that his transactions have not been undertaken for tax avoidance purposes and applying the practice set out in its guidance which has no express statutory authority. That reliance would be particularly risky, 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* [2011] UKSC 47, 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 its guidance. No prudent taxpayer, however, should plan his transactions on the basis that he can enforce inaccurate guidance in judicial review proceedings.

Where does this leave us?

It is clear that s 75A can cause significant 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.

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