[2017] UKFTT 0667 (TC)

TC06094

Appeal number: TC/2015/02314
TC/2015/04800
TC/2015/04802
TC/2015/04807
TC/2015/04810

VAT – Article 90 Principal VAT Directive – Regulation 38 VAT Regulations 1995 - whether price reduced after supply by contractual obligation to refund fees and credit note where no amount repaid and impossible to ascertain amount that will be repayable if any – what conditions must be satisfied to create entitlement to refund of fees - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BETWEEN

INVENTIVE TAX STRATEGIES LIMITED (IN ADMINISTRATION)
PROFESSIONAL ADVICE BUREAU LIMITED (IN ADMINISTRATION)
STERLING TAX STRATEGIES LIMITED (IN LIQUIDATION)
BELL STRATEGIES LIMITED (IN LIQUIDATION)

Appellants

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Greg Sinfield

Sitting in public at the Royal Courts of Justice, Strand, London on 22 and 23 May 2017

Peter Mantle, counsel, instructed by Pinsent Masons LLP, solicitors, for the Appellants

Hui Ling McCarthy, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellants are four companies: Inventive Tax Strategies Ltd ('ITS'); Professional Advice Bureau Ltd ('PAB'); Sterling Tax Strategies Limited ('STS'); and Bell Strategies Limited ('Bell'). ITS and PAB are in administration. STS and Bell are in liquidation. The joint administrators and joint liquidators are Mr Finbarr O'Connell and Mr Henry Shinners of Smith & Williamson LLP. They were appointed as administrators in October 2013 (for ITS) and December 2013 (for the other Appellants).

2. Before becoming insolvent, the Appellants had sold tax avoidance, in particular Stamp Duty Land Tax ('SDLT') avoidance, schemes mainly to individuals. The Appellants provided or procured a number of services, including advice and implementation services, relating to the schemes which it is not necessary to describe in detail for the purposes of this decision. The relevant contractual arrangements between the Appellants and their customers took various forms but all included an undertaking, subject to conditions, to refund the fee charged for the SDLT avoidance scheme if it proved to be unsuccessful. It is common ground that all the schemes were unsuccessful in the sense that none of them achieved their desired outcome of reducing the SDLT payable on the customers' acquisitions of property. It was the looming obligation to repay all the fees charged to customers that caused the Appellants to become insolvent and enter into administration and, in the case of STS and Bell, liquidation.

3. The Appellants, at the direction of the joint administrators/liquidators, issued credit notes to the customers as evidence of each customer's entitlement to a refund of the fee charged for the SDLT avoidance scheme services. No amount was paid to the customers at the time of the issue of the credit notes or has been paid subsequently because the Appellants are insolvent and do not have the funds to settle the amounts owed to their various creditors such as the customers. Taking the view that there had been a "decrease in consideration" after the end of the prescribed accounting periods in which those supplies took place for the purposes of regulation 38 of the VAT Regulations 1995 (SI 1995/2518) (the '1995 Regs'), the Appellants made adjustments to the VAT payable portion of their VAT accounts and claimed repayments of the output tax accounted for on the supplies under section 80 of the Value Added Tax Act 1994 from the Respondents ('HMRC').

4. HMRC paid (they say in error) some of the amounts claimed by the Appellants. Having realised their mistake, HMRC issued assessments to recover those amounts and refused all outstanding claims. The Appellants appealed and those appeals were joined and heard together. At the hearing, HMRC contended that the Appellants are not entitled to the repayment of VAT claimed for two reasons. First, a price reduction or decrease in consideration requires and is limited to the amount of the consideration for the supply actually repaid to the customer ('the price reduction issue'). Secondly, some of the customers did not have a contractual right to a refund and, as the joint administrators/liquidators cannot make ex gratia payments out of the assets of the Appellants, no question of a price reduction or decrease in consideration arises in those cases ('the contractual liability issue').

5. For the reasons set out below, I have decided that a legal entitlement to a refund is not sufficient to reduce the taxable amount and create a right to a repayment of VAT

until the refund is paid to the customer or credit given is used by the customer. Accordingly, the Appellants' appeals are dismissed.

Evidence

6. Mr Finbarr O'Connell, one of the joint administrators/liquidators was the only witness. He provided two witness statements and was cross-examined by Ms McCarthy who appeared for HMRC, more by way of clarification than challenge. I found Mr O'Connell to be a credible witness and fully accept his evidence. There were bundles of contractual and related documents between the Appellants and their customers including four representative versions of the Letter of Instruction used by the Appellants to set out the fee agreements with their customers which are discussed below. On the basis of the witness evidence and documents, I find the facts to be as set out in the following section.

Factual background

7. The relevant facts were not disputed and can be stated quite shortly.

8. Between 2008 and 2013, the Appellants all carried on a tax consultancy business selling tax avoidance schemes to customers, with particular emphasis on SDLT avoidance schemes, and certain other tax mitigation schemes. The SDLT avoidance schemes were based on interpretations of the sub-sale relief provisions in section 45(3) of Finance Act 2003 ('FA 2003'). They were designed to ensure that little or no tax was paid in circumstances where, *inter alia*, there was no genuine commercial sub-sale. From around 2010, all four Appellants were managed as a single unit (with shared office space and staffing) and sold some schemes in common. Neither party suggested that there was any material difference, for the purposes of these appeals, in the way that the Appellants operated so it is not necessary to distinguish between them.

9. The Appellants supplied the SDLT tax avoidance services that form the subject of these Appeals to more than 3,000 customers, most of whom were individuals, in return for a specified fee set down in a contract, called a Letter of Instruction, between the Appellant and the customer. The fee was a percentage of the SDLT saving intended to be achieved by the scheme or a percentage of the purchase price of the property. The Appellants charged VAT at the standard rate on the fees and accounted for output tax to HMRC in the normal way.

10. The Letters of Instruction took various forms but all included an undertaking, subject to conditions, to refund the fee charged for the SDLT avoidance scheme if it proved to be unsuccessful. The parties agreed that I should consider four versions of the Letter of Instruction used by the Appellants to set out the fee agreements with their customers. Each version used different wording to provide for a refund of fees which is set out below in my discussion of the contractual liability issue.

11. In the event, all the SDLT avoidance schemes failed to achieve their desired result of saving the customers an amount of SDLT for one or more of the following reasons:

> (1) legislative changes to section 45 FA 2003 in 2013 which applied to transactions on or after 21 March 2012;
>
> (2) flawed technical analysis underlying the schemes; and/or
>
> (3) incorrect implementation of the schemes.

12. The Appellants took out two insurance policies in relation to their obligation to refund the fees if the SDLT avoidance schemes failed to achieve their aim. The policies were issued by the International Insurance Company of Central America ('IICCA') which was established in Belize. Under the policies, the Appellants (and not the customers) were entitled to any insurance monies. The first policy provided cover for a period of nine months and 30 days from the date on which an individual transaction was completed. The cover in relation to the latest relevant transaction expired on 29 April 2013, ie before the administrators were appointed. None of the Appellants made any claims under the first policy. Mr O'Connell agreed, when it was put to him by Ms McCarthy, that there was no realistic prospect of any claims ever being made under the first policy because of the limited period of cover. The second policy provided insurance cover for a period of four years from the date on which an individual transaction was completed and was in place from 1 July 2012. I was not provided with any details of the cover provided by the second insurance policy. I was told, however, that neither policy covered the failure of the SDLT avoidance schemes as a result of retrospective legislation.

13. Mr O'Connell said that he understood that the IICCA had been dissolved and, accordingly, there was no prospect of the insurer meeting any claim that could have been made under the insurance policies. His evidence was that the directors of the Appellants had confirmed to him that they did not believe that the circumstances had arisen under the insurance policies that would enable such a claim to have been made before they entered into administration. He also said that researches had been carried out into whether the joint administrators/liquidators could make claims under the policies and it had been concluded that they could not. On the basis of Mr O'Connell's evidence, I find that there was never any realistic prospect that the Appellants would be able to obtain funds under the two insurance policies to refund the fees charged to the customers because the policies did not cover, adequately or at all, the risk that the Appellants would become liable to refund the fees to customers. Mr O'Connell said that he was considering bringing claims against the directors of the Appellants and/or the insurance brokers but it was not possible, at this stage, to say whether any amount would be recovered as a result of such claims.

14. Following the legislative changes to section 45 FA 2003 in 2013, the Appellants sought legal advice in relation to the effectiveness of the SDLT avoidance schemes and the circumstances in which refunds would be payable. The Appellants also sought financial and insolvency advice from Smith & Williamson LLP. Failure of the SDLT schemes on a large scale would mean that the Appellants would have insufficient funds to refund the fees to all the customers who were due them and would render the Appellants insolvent which, in due course, is what happened.

15. Although the Appellants were insolvent and were not able to refund fees to customers, the joint administrators/liquidators issued credit notes to the customers in respect of the refunds of fees to which, in the view of the joint administrators/liquidators, they were entitled. Following the issue of the credit notes, the joint administrators/liquidators, on behalf of the Appellants, submitted claims to HMRC for repayment of the output tax which had been declared and accounted for on the fees received by the Companies. The basis of the claim was that the credit notes evidenced an obligation to refund the fees which was a decrease in the consideration and gave rise to a right to a refund of the output tax previously accounted for by the Appellants.

16. Mr O'Connell said that the intention is that, once all assets and any claims in the relevant estates had been realised, the joint administrators/liquidators would be in a position to assess the funds available to the insolvent estate of each of the Appellants and, in due course, declare and distribute dividends to unsecured creditors appropriately. He accepted that the customers are unlikely to receive the full value of the credit note as there will not be sufficient funds but instead will receive a proportion of the amount shown on their credit note determined by the dividend rate in the relevant estate.

17. In reply to Ms McCarthy, Mr O'Connell said that there is a possibility that, absent any VAT refund, there will be no dividend for unsecured creditors but that he was hopeful that there will be dividends as a result of other, non-VAT, claims to recover monies, e.g. from some £20 million paid by the Appellants to service companies owned and controlled by the shareholders and directors of the Appellants. His evidence was that the joint administrators/liquidators were currently unable to pursue other litigation to recover amounts because the funds required to pursue such litigation are tied up in the current appeals. Mr O'Connell acknowledged that, at the present time, there is no way of knowing how much might be available to pay to unsecured creditors. If the Appellants are unsuccessful in their VAT claims then Mr O'Connell accepted that it is possible that the customers would not receive anything by way of refund. In that event, he said that he would then consider approaching litigation funders to enable the Appellants to pursue the other claims.

18. HMRC paid several amounts in response to claims by the Appellants for repayments. HMRC subsequently considered that these amounts had been paid in error. and issued assessments to recover them. HMRC assessed ITS for £577,892, PAB for £1,573,862, STS for £776,877 and Bell for £180,710. HMRC also refused two claims by ITS for repayments of £1,511,823 and £614,371. The Appellants appealed against the refusals of their claims and the assessments.

Price reduction issue

19. The issue is whether, in the circumstances of these appeals, the price of the Appellants' services was reduced by the contractual obligation to refund the fees if the SDLT avoidance schemes turned out to be unsuccessful and the issue of the credit notes notwithstanding that no amount was paid to customers by way of refund and it was not possible to determine what amount, if any, might be payable.

20. The submissions and discussion in this section assume that the customers are entitled to a refund of the fees paid by them for the SDLT avoidance scheme services supplied by the Appellants. I discuss whether they are, in fact, so entitled when I consider the contractual liability issue below.

Legislation

21. The Appellants' case is that there has been a decrease in consideration within regulation 38 of the 1995 Regs which implements Article 90 of Council Directive 2006/112/EC (the Principal VAT Directive or 'PVD'). It was common ground that regulation 38 should be construed to give effect to Article 90 and neither party suggested that there was any material difference between the two provisions. Accordingly and as most of the authorities cited to me refer to Article 90 or its predecessor which was in identical terms, I confine myself to consideration of the provisions of the PVD.

22. Article 73 of the PVD defines, so far as relevant, the taxable amount as follows:

> "In respect of the supply of goods or services … the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party …"

23. Article 79 provides that:

> "The taxable amount shall not include the following factors:
>
> (a) price reductions by way of discount for early payment;
>
> (b) price discounts and rebates granted to the customer and obtained by him at the time of the supplies;
>
> …"

24. Article 90(1) provides that:

> "In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States."

Submissions on price reduction issue

25. It was common ground that the taxable amount in Article 73 cannot exceed the consideration actually paid by the final consumer, which is the basis for calculating the VAT ultimately borne by him. This is clear from the judgment of the Court of Justice of the European Union ('ECJ') in Case C-317/9*4 Elida Gibbs Ltd v CCE* [1996] STC 1387 *('Elida Gibbs'*), referring to the predecessor provisions in the Sixth VAT Directive, at paragraphs 18 to 24. The ECJ also held in *Elida Gibbs* that, according to settled case law, the consideration which has been or is to be obtained by the supplier from the purchaser for the purposes of what is now Article 73 is the 'subjective value', that is to say the value "actually received" by the supplier in each case and not a value estimated according to objective criteria (see at paragraphs 26 to 28). The principle that the taxable amount, on which VAT is calculated and payable to the tax authorities, cannot exceed the amount actually received by the supplier from the final consumer underlies both Article 73 and Article 90 (see *Elida Gibbs* at paragraphs 30 and 31).

26. Both parties referred to Case C-86/99 *Freemans plc v Customs and Excise Commissioners* [2001] STC 960 ('*Freemans'*). Freemans was a catalogue mail order business which sold goods to customers through agents who could also order goods for themselves. The agents paid for the goods ordered by them for themselves and on behalf of others in instalments. In its accounts, Freemans maintained a separate credit account for each agent to which was credited an amount equal to 10% of each payment made by an agent, being a 10% discount in respect of the agent's own purchases and a 10% commission in respect of purchases made for other customers. The agent could withdraw the amount credited to her account at any time or use it to reduce amounts owed to Freemans for past purchases or to reduce the cost of new purchases. The agents could not, however, choose to pay the catalogue price less the 10% discount when ordering goods for themselves. The question for the ECJ was what was the taxable amount on which Freemans was required to account for VAT. The ECJ rejected the EC Commission's argument that the taxable amount was from the outset the catalogue price less the discount and held, in paragraphs 24 and 25, that the amounts

credited to the agent's account as and when payments are made by the agent do not constitute discounts within the meaning of what is now Article 90 because, in order for that provision to be applicable, it is not enough that the customer acquires a legal entitlement to receive a discount at the time of purchase. The ECJ further held at paragraph 31 that:

> "[Article 90] must be interpreted as meaning that, in a sales promotion scheme such as that at issue in the main proceedings, the taxable amount constituted by the full catalogue price must be reduced as soon as the agent withdraws or uses in another way the amount with which her separate account has been credited."

27. In paragraph 35, the ECJ explained that, at the time when it credited the amount of the discount to the agent's account, Freemans had not actually paid the discount to the agent and it was only when the agent used that amount that the discount was actually paid and had the effect of reducing the taxable amount for the corresponding purchase for the purposes of what is now Article 90.

28. Mr Mantle, who appeared on behalf of the Appellants, submitted that the interpretation of 90 must be consistent with Article 73 which is concerned with liability to pay and Article refers to consideration "to be obtained". Mr Mantle acknowledged that the Appellants did not treat the fees as client money but treated it as their own so there was no dispute that the Appellants had actually received the full amount of the fees. Mr Mantle's primary contention was that Article 90 does not only apply to amounts that have been paid. He submitted that Article 90 applies to, among other things, changes in what the customer is liable to pay the supplier for a supply and that included any liability of the supplier to make a refund to its customer.

29. Mr Mantle argued that an actual repayment was not required in order for there to be a price reduction within Article 90. He submitted that it is not only what has been paid as cash and received by the Appellants that matters but also what the customer is liable to pay and in this case that was nothing. In his submission, the fact that the refund could not be made, because the Appellants are insolvent, did not mean that there should not be an Article 90 refund. For VAT purposes, it was necessary to take into account that the customers were entitled to receive a refund of 100% of the fees notwithstanding that they received less than a full refund. That meant that the Appellants were entitled to receive a repayment of 100% of the VAT. In essence, Mr Mantle's submission was that, just as Article 73 looks forward to what is to be obtained by the supplier, Article 90 looks at what is to be refunded even where the customer has not received the refund and might never receive it (or, at least, not in full).

30. In relation to *Elida Gibbs*, Mr Mantle submitted that, in paragraphs 30 to 31, the ECJ was not saying that Article 90 has no regard to a liability to make a refund. Mr Mantle submitted that *Elida Gibbs* concerned a different factual scenario where the manufacturer was offering a moneyback coupon to the final consumer and it was not analogous to the situation in these appeals.

31. Mr Mantle submitted that in *Freemans*, the agent had to apply to Freemans to receive payment or otherwise use the discount. Mr Mantle submitted that until the agent took that step no liability had crystallised. He contended that *Freemans* is not authority for saying that there is no reduction in the price unless there is an actual payment by the supplier. Mr Mantle submitted that it was important to look at the

circumstances in which a refund has arisen. In *Freemans*, liability was contingent on something further being done by the agent and, that having been done, Freemans was required to pay or give credit for the discount. In this case, there was nothing further that the customers had to do: the Appellants were liable to make the refund.

32. Ms McCarthy submitted that HMRC's primary case was that there was no reduction in the taxable amount of the supplies made by the Appellants because no refund had been paid. On the authorities, consideration is the amount obtained or to be obtained and that means the consideration actually received by the supplier which should be the same as the amount paid by the consumer. It follows that a reduction in the price for the purposes of Article 90 is the amount that reduces the amount paid by the consumer.

33. Article 73 of the PVD shows the consideration obtained or to be obtained means a consideration actually received and at the free disposal of the taxable person. Article 79 refers to rebates "obtained by the customer" at the time of supply. The *Freemans* case shows that a legal entitlement to a rebate is not enough to reduce the taxable amount. In Article 90, "price reduced" means the amount must actually be received as only that way can Articles 73, 79 and 90 work together. Ms McCarthy submitted that Article 90 was merely an application of Article 73.

34. In summary, Ms McCarthy submitted that Article 73 PVD refers to consideration obtained or to be obtained. Article 79 requires a rebate to be paid at the time of supply. Article 90, she contended, must be consistent with the other events in Article 90 (cancellation, refusal and total or partial non-payment) and with the ECJ's decision in *Freemans*. Ms McCarthy submitted that the Appellants were wrong to try and distinguish *Freemans* on the basis that the agent needed to take a further step before the discount reduced the price of the supply. Ms McCarthy maintained that, in *Freemans*, the ECJ held that a mere legal entitlement to a discount was not a reduction in price for the purposes of what is now Article 90 until the amount was actually received by the customer as a payment or credit against an amount owed. Ms McCarthy submitted that the key point was that the amounts were never out of Freeman's control until they were actually paid or credited to the agent. In relation to these appeals, Ms McCarthy submitted that there was no realistic prospect that the Appellants could make good their promise to refund the fees because the insurance policies would not pay out any amounts and the funds paid to the service companies might not be recovered. Unlike the agents in *Freemans*, the Appellants' customers did not have the ability to obtain a full refund of the fees as that was dependent on the ability of the joint administrators/liquidators to realise sufficient assets in the insolvent estates. In this case, it is very unlikely that the customers will receive anything like 100% of the refund as claims must be financed and, in any event, it is uncertain how much will be recovered.

35. For completeness, I mention that Ms McCarthy also referred to Case C-38/93 *Glawe Spiel- und Unterhaltungsgerate Aufstellungsgesellschaft mbH&Co. KG v Finanzamt Hamburg-Barmbek-Uhlenhorst* [1994] ECR-I 1679 [1994] STC 543 and Case C-377/11 *International Bingo Technology SA v Tribunal Economico-Administrativo Regional de Cataluna* [2012] STC 661. Those cases concerned the question of whether amounts required by law to be paid as winnings to players of gaming machines and bingo games must be included as part of the consideration received by the suppliers. The ECJ held, in both cases, that such winnings did not form

part of the taxable amount. I did not find these two cases of any particular assistance in this case because, as the ECJ observed in paragraph 30 of *Freemans* (although in rather more words), gambling is a special case.

Conclusion on price reduction issue

36. In my view, paragraphs 33 to 36 of *Freemans* show that a legal entitlement to a refund is not sufficient to reduce the taxable amount and create a right to a repayment of VAT until the refund is paid to the customer or credit given is used by the customer. In paragraph 33, the ECJ states that what is now Article 90 "… requires the member states to reduce the taxable amount whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person". That paragraph shows that the focus in determining whether there has been a cancellation, refusal and total or partial non-payment or price reduction is what has been received by the supplier. That is consistent with the ECJ's approach to the meaning of consideration for the purposes of Article 73 in paragraph 27 of *Elida Gibbs*, namely that it is "the value actually received in each case". In this case, the Appellants have received the full amount of the fees and no amounts have been refunded to the customers. The need for there to be an actual repayment, as opposed to merely conferring an entitlement to one, is clearly seen in paragraph 35 of *Freemans* where the ECJ held that "[i]t is only when the customer uses the … [discount] that the discount is actually paid, so that … the taxable amount for the corresponding purchase must be reduced accordingly." It follows that actual payment of a refund is required, in which case there will be a reduction in the price only to the extent of the amount actually refunded. This is consistent with common sense and commercial reality. It cannot be right that the Appellants receive a repayment of 100% of the VAT where the customers receive a refund of less than 100% of the fees.

37. For the reasons given above, I have decided that, where a supplier has received consideration in return for a supply, the price of that supply is not reduced after the supply takes place unless and until the customer actually receives a refund, whether in the form of a payment or by way of credit against an obligation to make a payment. In the absence of such a refund or credit, there is no reduction in the price or decrease in consideration and the taxable amount of the original supply is not reduced. As no payment has been made or credit given in the case, the Appellants are not entitled to any refund of VAT.

Contractual liability issue

38. In view of my decision in relation to the price reduction issue, it is not strictly necessary for me to consider whether the companies are contractually liable to make refunds of the fees to the customers under the contracts. However, as the parties made detailed submissions on the point and in case the Appellants subsequently find themselves in a position to pay amounts to the customers by way of refund, I deal with the issue below.

39. In relation to the contractual liability issue, HMRC's position was that whether a customer was entitled to a refund of fees depended on the wording used and the particular customer's circumstances. As stated above, the parties agreed that I should consider four versions of the Letter of Instruction which each used different wording to provide for a refund of fees. Ms McCarthy invited me to determine the conditions that would have to be satisfied in each case before the Appellants are contractually obliged

to make a refund. Both parties agreed that, in the event that a materially different form of the refund wording was found in other contracts and the parties are unable to agree whether a refund is contractually due, then the matter may have to come back to the Tribunal for a further determination.

General approach to contractual interpretation

40. Regulation 7(2) of the Unfair Terms in Consumer Contracts Regulations 1999 SI 1999/208397 (the '1999 Regs') provides:

> "If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail but this rule shall not apply in proceedings brought under regulation 12."

41. Regulation 7(2) of the 1999 Regs applies to contracts concluded between a "seller or supplier" and a "consumer" (see regulation 4(1). Regulation 3 defines "seller or supplier" as "any natural or legal person who, in contracts covered by these Regulations, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned". It also defines "consumer" as "any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession".

42. The joint administrators/liquidators currently estimate that fewer than 100 of the total of more than 3,000 customers were limited companies or other legal persons. Mr Mantle submitted that where regulation 7(2) does not apply, the contra proferentem rule applies.

43. I accept that most of the customers were consumers for the purposes of regulation 7(2) which accordingly applies to those contracts. Where regulation 7(2) does not apply, I also accept that I should construe the relevant provision applying the contra proferentem rule under which a term, especially in a standard contract, which is ambiguous or unclear is to be construed against the person who drafted it. Both regulation 7(2) and the contra proferentem rule only operate where there is some doubt about the meaning of a term.

Type 1 Agreement

44. The Type 1 Agreement is believed to have been used more frequently than any other type. The Agreement states:

> "The client understands that HMRC has a 9 month enquiry window from submission of SDLT1, in which to query the SDLT paid on any transaction.
>
> …
>
> The client accepts that if the planning is unsuccessful, then the full SDLT may become payable. In this event ITS undertakes to refund its fees for the transaction to the client in full. The client will then use such refund, together with the original saving made, to pay the full SDLT originally payable."

45. There is no definition of "unsuccessful" in this agreement. In the skeleton arguments, there appeared to be some disagreement between the parties as to when a scheme could be regarded as unsuccessful and thus a customer would become entitled to a refund of fees. At the hearing, however, Ms McCarthy told me that HMRC accept

that where the customer has paid the SDLT and there is no challenge or appeal then the scheme is unsuccessful and the customer is entitled to a refund of fees. Mr Mantle submitted that the final sentence of the clause envisaged that the client would be entitled to a refund before paying the SDLT. He accepted, however, that HMRC's view that the relevant criteria are that the SDLT had been paid and there was no appeal or challenge should, in practice, lead to a straightforward resolution of the entitlement to a refund of fees under this type of agreement. I agree that the parties' interpretation of the Type 1 Agreement is both sensible and correct. It seems to me that the scheme could not be regarded as unsuccessful, absent some specific definition of the term, while the customer has not been found liable to pay the full SDLT or, without being found so liable, had actually paid the full SDLT without making any appeal or other challenge.

Type 2 Agreement

46. The Type 2 Agreement provides:

> "- [The client] understands that under normal procedure the HM Revenue & Customs (HMRC) has a 9-month period in which to query the amount of SDLT paid on any transaction.
>
> - [The client] also accept[s] that should HMRC raise a query during that time, then the full SDLT may become payable. In that event, ITS will refund all of its Fees to [the Client].
>
> - [The client] will then use the Fees and the saving together with accrued interest to pay to HMRC towards the amount notified by them as being payable by [the client]."

47. The reference to accrued interest in the clause above refers to the fact that the client had an option of asking that the saving and the fees owed to the Appellant, which together equalled the SDLT otherwise payable, be held by the solicitor in client account where interest would accrue under the Solicitors Account Rules.

48. Ms McCarthy submitted that the clause should be interpreted to mean that a refund is only due if HMRC raised an enquiry within nine months of the transaction and the full SDLT became payable. She argued that if HMRC instead issued a determination or discovery assessment more than nine months after the transaction (for example, because returns were not filed when they should have been and/or no proper disclosure was made), no refund will be due notwithstanding that the SDLT avoidance scheme was unsuccessful. Accordingly, whether a refund is due will need to be determined on a case by case basis depending on whether and when HMRC raised an enquiry.

49. Mr Mantle submitted that HMRC's interpretation is too narrow. He contended that the words "in that event" should be interpreted as referring to the words "the full SDLT may become payable" so that the customer is entitled to a refund if the full SDLT became payable. He contended that this was a reasonable interpretation as it makes no practical difference whether HMRC raise a query within nine months or take some other step later. The only meaningful condition is whether the SDLT becomes payable. He submitted that HMRC's interpretation was not reasonable as it would exclude a customer from the right to a refund if HMRC do not raise an enquiry within nine months. Mr Mantle also reminded me that if there is any doubt then regulation 7(2) of the 1999 Regs applies and the refund provision should be construed in favour of the customers.

50. I consider that HMRC's interpretation is correct and that, in order for a refund to be due under the Type 2 Agreement, HMRC must have raised an enquiry within nine months with the result that, possibly later than nine months after the transaction, the full SDLT became payable. I do not consider that there is any doubt about the meaning of the provision in the Type 2 Agreement. The interpretation that I favour is supported by the ability of the customer to require the saving and the fee will be held in the solicitors' client account for nine months which shows that the provision was time limited.

Type 3 Agreement

51. The Type 3 Agreement provides:

> "Planning will be unsuccessful if HMRC succeed in any claim in the First Tier Tax Tribunal or upon Inventive Tax Strategies receiving Counsel's instructions to settle.
>
> The client acknowledges that HMRC has a 9 month enquiry window from submission of the SDLT1, together with an option to raise a 'discovery assessment' within 4 years.
>
> …
>
> The client accepts that if the planning is unsuccessful as defined above, the SDLT will become payable in full together with interest at the prevailing rate accrued thereon. In the event of this happening, [ITS] undertakes to refund its fees for the transaction to the client in full. …
>
> The client acknowledges that if the scheme is unsuccessful as defined above as a result of incorrect implementation following negligence, mistake or failure to implement by the Panel Solicitor, the client's only claim will be against the Panel Solicitor.
>
> The client acknowledges that [ITS] will not refund fees, nor be liable to do so, in circumstances where the client decides to pay SDLT to HMRC against [ITS's] advice. Receiving an enquiry from HMRC will not constitute making the tax planning being unsuccessful."

52. HMRC had originally taken the position that a refund would only be due to a customer under a Type 3 Agreement where the customer had made an appeal to the First-tier Tribunal and either the appeal was dismissed or the customer withdrew the appeal because an Appellant had received counsel's advice to settle. At the hearing, Ms McCarthy stated that HMRC accepted that counsel's advice to settle did not have to be given in relation to an existing appeal by a customer. She stated that customers who were told by the joint administrator/liquidators that they had been advised that the SDLT avoidance scheme does not work would be entitled to a refund. However, if a customer had settled a claim by HMRC for the SDLT without any advice from counsel then that customer has no right to a refund of the fees. Ms McCarthy also contended that the exclusion of the right to claim a refund of the fees where the scheme is unsuccessful as a result of incorrect implementation by the Panel Solicitor requires an analysis of the implementation in each individual case.

53. Mr Mantle said that the Appellants accepted that the advice of counsel, on the basis of which the customers take the view that there should be a settlement, must precede the settlement/payment of the SDLT. In relation to the incorrect implementation exclusion, Mr Mantle submitted that the failure to implement properly must cause the scheme to fail and if there is another reason that the SDLT avoidance

scheme was unsuccessful, for example it was fatally flawed from the outset, then incorrect implementation is irrelevant. He pointed out that HMRC's case was that all the schemes were unsuccessful in that they did not achieve their desired outcome and thus would have failed regardless of how they were implemented. He also relied on the fact that if there is any doubt about whether the incorrect implementation provision applies in the case of schemes which were flawed from the outset then regulation 7(2) of the 1999 Regs applies and the interpretation most favourable to the customer should prevail.

54. I understand that none of the Appellants' SDLT avoidance schemes have been the subject of decisions by First-tier Tribunal. It follows, in my view, that a customer would only be entitled to a refund of fees where HMRC have claimed, by assessment or otherwise, payment of the SDLT and the customer has agreed to pay the SDLT as a result of counsel's advice to settle which was received by an Appellant and communicated to the customer before the customer paid the SDLT to HMRC. I accept Mr Mantle's submissions in relation to the incorrect implementation exclusion but it seems to me that it will still be necessary to examine each type of scheme sold using these clauses to determine whether it was flawed from the outset so that it would have been unsuccessful no matter how it was implemented. If the scheme would have been successful but for a failed implementation then the customer has no right to a refund.

Type 4 Agreement

55. The Type 4 Agreement provides:

> "The client acknowledges that [the Appellant] will not refund fees, nor be liable to do so, in circumstances where the client decides to pay SDLT to HMRC against [the Appellant's] advice. Receiving an enquiry/assessment from HMRC will not constitute the planning being defined as unsuccessful.
>
> …
>
> The Client acknowledges that in the event Retrospective legislation is introduced at a date following the date of this agreement [the Appellant] will be under no obligation to repay any fees payable under the terms of this agreement for the implementation of SDLT planning which at the date of this agreement was lawfully effective."

56. Both parties agreed that the only additional point in relation to the Type 4 Agreement was the exclusion of a right to a refund in the event of retrospective legislation. Ms McCarthy submitted that such legislation was introduced by the Finance Act 2013. Where the effect of such legislation was that a SDLT avoidance scheme was unsuccessful then the customer has no right to a refund of the fees. Mr Mantle submitted that the clause excluded the right to a refund of fees where legislation having retrospective effect is enacted after the date of the Letter of Instruction between the Appellant and the customer and the relevant SDLT avoidance scheme would have been effective but for that legislation. He said that HMRC's case was that none of the schemes had any realistic prospects of success from the outset. It followed that a clause referring to retrospective legislation was of no effect in this case.

57. It seems to me that the reference to retrospective legislation does not materially change the approach to claims for refunds of fees under Type 4 Agreements from the approach under Type 3 Agreements. I consider that it will still be necessary to examine

each type of scheme sold using these clauses to determine whether it was flawed from the outset so that it would have been unsuccessful whether retrospective legislation had been introduced or not. If the scheme would have been successful but for the retrospective legislation then the customer has no right to a refund. If the introduction of retrospective legislation made no difference and the scheme would have failed anyway, subject to the other conditions being met, then the customer should be entitled to a refund.

Disposition

58. For the reasons set out above, the Appellants' appeals are dismissed.

Right to apply for permission to appeal

59. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's 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.

GREG SINFIELD
TRIBUNAL JUDGE

RELEASE DATE: 5 September 2017