[2018] UKFTT 0680 (TC)

TC06826

Appeal number: TC/2017/07893

STAMP DUTY LAND TAX – tax paid on substantial performance of contract which was subsequently rescinded – section 44 FA 2003 – late filing of amended return – whether or not within jurisdiction of FTT – whether or not HMRC had opened an enquiry – held yes and therefore decision appealable to FTT – whether or not relief available under para 34 Sch 10 FA 2003 – held yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DEREK AND SUSAN SMALLMAN **Appellants**

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT

Sitting in public at Taylor House, London on 15 November 2018

Ximena Montes Manzano, counsel, for the Appellants

Sade Ajose, officer of HMRC, for the Respondents

DECISION

1. This is an appeal against two closure notices issued by the HMRC on 20 June 2017 pursuant to para 11(1) of Schedule 11A to the Finance Act 2003 in respect of a claim for recovery of Stamp Duty Land Tax in the sum of £13,500.

2. It is common ground that the Appellants, Mr and Mrs Smallman, submitted a tax return and paid Stamp Duty Land Tax ("SDLT") upon the substantial performance of a contract for the purchase of a residential property. It is also common ground that the contract for purchase was rescinded and the land transaction at which SDLT is aimed did not in fact take place.

3. This appeal is therefore concerned with whether or not a repayment of SDLT is due in circumstances where a contract for the purchase of a property was rescinded or annulled due to events outside the appellants' control, and an application for repayment was made more than 12 months after the filing date.

The Facts

4. The underlying facts of this case are not in dispute. I received a witness statement and heard oral evidence from Mrs Smallman, whom I found to be a reliable and accurate witness, and I find the following as matters of fact.

5. Mr and Mrs Smallman rented The Timbers, Rudge Court, Rudge Road, Pattingham, WV6 7EA ("the Property") from August 2013;

6. On 5 February 2014 Mr and Mrs Smallman entered into a contract for the purchase of the Property for consideration of £450,000. On the same date a deposit of £112,500 was paid to the vendors. Completion of the sale was expected to take place on 1 May 2015. This delayed completion was agreed with the vendors to accommodate the wishes of Mr and Mrs Smallman, who continued to pay rental to the vendors in the meantime.

7. An SDLT Return was duly submitted on 5 February 2014, because the contract was deemed to have been substantially performed, and £13,500, being 3% of the agreed purchase price of £450,000, was paid.

8. In July 2014 Mr and Mrs Smallman started to encounter serious difficulties with their neighbours. The two adjacent properties were occupied by members of the same family and they were involved in a family dispute. Mr and Mrs Smallman were inadvertently affected. Due to these issues with their neighbours (which came to head on Boxing Day 2014), Mr and Mrs Smallman decided to abandon the purchase of the Property and informed the vendors of their decision in January 2015.

9. The vendors agreed to remarket the Property, and it was eventually sold to another couple for £417,500. The original contract to purchase the Property was rescinded and a new contract was executed between the vendors and the new

purchasers and this transaction was completed on 22 May 2015. Mr and Mrs Smallman were obliged under the terms of the new agreement to reimburse the vendors for the difference between the consideration they had agreed and the new sale price (£32,500).

10. Following the completion, Mr and Mrs Smallman came to the conclusion that it was unfair that they had paid SDLT of £13,500 when the contract had not in fact been completed. They considered that HMRC had received two payments of SDLT when in fact only one transaction had taken place. This was not based on any knowledge of SDLT but was simply a common sense reaction to what had happened. They therefore spoke to their conveyancing solicitors, Bennetts Solicitors, about this and, on 25 June 2015, Bennetts submitted an amended SDLT Return on behalf of Mr and Mrs Smallman to reflect the fact that the original contract had been rescinded and that completion did not take place. The accompanying letter applied for a repayment of SDLT under s44(9) Finance Act 2003.

11. I note that Bennetts had not previously brought the possibility of recovering the SDLT which they had paid to the attention of Mr and Mrs Smallman.

12. After extensive correspondence, HMRC rejected the amendment of the SDLT return on 15 December 2016 on the basis that it was made out of time, and invited Mr and Mrs Smallman to make a claim under paragraph 34 of Schedule 10 FA 2003, although they stated that such a claim "will be challenged".

13. Importantly, one of the letters sent by HMRC, on 21 March 2016, requested further information and also contained the unusual words at the end:

> "Based on the above, refund of SDLT is not due, however, if you still disagree, please advise and I will open **a compliance check** to give your clients an **appealable decision**."

14. Bennetts duly objected to the decision and sent in further information which had been requested on 30 March 2016. The letter from HMRC in response however, on 2 June 2016, came from a more senior HMRC officer. It repeated the earlier grounds of rejection, ie that the amended return had been submitted out of time, but also stated that the officer was "consulting with colleagues."

15. The next letter from HMRC, dated 26 August 2016, rejected Mr and Mrs Smallman's claim and repeated the grounds for rejection as being that the amended return was made out of time.

16. The Appellants then made a claim for relief for overpaid SDLT under para 34(2) Sch 10 FA 2003 on 9 January 2017.

17. HMRC opened enquiries in to the Appellants' claim for relief for overpaid SDLT on 10 February 2017 but, on 20 June 2017, HMRC issued closure notices to both Appellants rejecting their claim on the basis that "tax paid was due on substantial performance of the contract on the above property" and "relief is not applicable under Para 34 Schedule 10".

18. The Appellants appealed against the decision on 3 July 2017 and HMRC offered a statutory review of their decision on 18 August 2017. On review, HMRC upheld their previous decision on 29 September 2017.

The Law

19. The prime charging provisions are set out in s44 of FA 2003, which provides, as far as is relevant:

> **"44 Contract and conveyance**
>
> (1) This section applies where a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance.
>
> (2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.
>
> (3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction.
>
> In this case the effective date of the transaction is the date of completion.
>
> (4) If the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract.
>
> In this case the effective date of the transaction is when the contract is substantially performed.
>
> (5) A contract is "substantially performed" when–
>
> (a) the purchaser, or a person connected with the purchaser, takes possession of the whole, or substantially the whole, of the subject-matter of the contract, or
>
> (b) a substantial amount of the consideration is paid or provided.
>
> (6) For the purposes of subsection (5)(a)–
>
> (a) possession includes receipt of rents and profits or the right to receive them, and
>
> (b) it is immaterial whether possession is taken under the contract or under a licence or lease of a temporary character.
>
> (7) ...
>
> (8) Where subsection (4) applies and the contract is subsequently completed by a conveyance–

(a) both the contract and the transaction effected on completion are notifiable transactions, and

(b) tax is chargeable on the latter transaction to the extent (if any) that the amount of tax chargeable on it is greater than the amount of tax chargeable on the contract.

(9) Where subsection (4) applies and the contract is (to any extent) afterwards rescinded or annulled, or is for any other reason not carried into effect, the tax paid by virtue of that subsection shall (to that extent) be repaid by the Inland Revenue.

Repayment must be claimed by amendment of the land transaction return made in respect of the contract."

20. I understand that s44(4) was introduced as an anti-avoidance measure in order to prevent avoidance of SDLT by use of a suspended contract, which was never completed, even though the purchasers might have possession of the property or have paid substantially the whole of the purchase price. Nevertheless I believe that the words must be interpreted as they are and that there is no requirement for any tax avoidance motive on the part of the taxpayers in order to engage the provisions.

21. Schedule 10 FA 2003 contains the administrative provisions related to returns, enquiries, assessments and appeals. Paragraph 6 of Sch. 10 provides:

"**6 Amendment of Return by Purchaser**

(1) The purchaser may amend a land transaction return given by him by notice to the Inland Revenue.

(2) The notice must be in such form, and contain such information, as the Inland Revenue may require.

(2A) If the effect of the amendment would be to entitle the purchaser to a repayment of tax, the notice must be accompanied by–

(a) the contract for the land transaction; and

(b) the instrument (if any) by which that transaction was effected.

(3) Except as otherwise provided, an amendment may not be made more than twelve months after the filing date."

22. Paragraph 12 Sch 10 contains provisions which are of relevance as to HMRC enquiries into SDLT returns:

"**12 Notice of enquiry**

(1) The Inland Revenue may enquire into a land transaction return if they give notice of their intention to do so ("notice of enquiry")—

(a) to the purchaser,

(b) before the end of the enquiry period.

(2) The enquiry period is the period of nine months—

(a) after the filing date, if the return was delivered on or before that date;

(b) after the date on which the return was delivered, if the return was delivered after the filing date;

(c) after the date on which the amendment was made, if the return is amended under paragraph 6 (amendment by purchaser)."

23. Part 6 of Schedule 10 is entitled Relief in Case of Overpaid Tax or Excessive Assessment and, as its heading suggests, deals with cases where SDLT has been overpaid or over assessed. In so far as is relevant para 34 Sch 10 allows for a claim for repayment as follows:

"**34 Claim for relief for overpaid tax etc**

(1) This paragraph applies where–

(a) a person has paid an amount by way of tax but believes that the tax was not due, or

(b) a person has been assessed as liable to pay an amount by way of tax, or there has been a determination to that effect, but the person believes that the tax is not due.

(2) The person may make a claim to the Commissioners for Her Majesty's Revenue and Customs for repayment or discharge of the amount.

(3) Paragraph 34A makes provision about cases in which the Commissioners for Her Majesty's Revenue and Customs are not liable to give effect to a claim under this paragraph.

(4) The following make further provision about making and giving effect to claims under this paragraph–

(a) paragraphs 34B to 34D, and

(b) Schedule 11A.

…

(5) The Commissioners for Her Majesty's Revenue and Customs are not liable to give relief in respect of a case described in sub-paragraph (1)(a) or (b) except as provided–

(a) by this Schedule and Schedule 11A (following a claim under this paragraph), or

(b) by or under another provision of this Part of this Act."

24. Paragraph 34A then sets out the relevant circumstances in which HMRC are **not** liable to give effect to a claim under para 34. Paragraph 34A, as far as is relevant, provides as follows:

"**34A Cases in which Commissioners not liable to give effect to a claim**

(1) The Commissioners for Her Majesty's Revenue and Customs are not liable to give effect to a claim under paragraph 34 if or to the extent that the claim falls within a case described in this paragraph.

…

(4) Case C is where the claimant–

(a) could have sought relief by taking such steps within a period that has now expired, and

(b) knew, or ought reasonably to have known, before the end of that period that such relief was available."

25. Paragraph 34B provides that a claim may not be made more than 4 years after the effective date of the transaction. It also provides (at para 34B(2)) that a claim under para 34 may not be made by being included in a land transaction return.

26. Schedule 11A deals with claims made outside a SDLT return. Paragraph 6(1) provides that as soon as practicable after a claim is made, HMRC shall give effect to the claim by discharge or repayment of tax. Paragraph 7 grants HMRC a power to enquire into a claim and paragraph 11 enables HMRC to conclude an enquiry by issuing a closure notice. Taxpayers may appeal against the conclusions stated in a closure notice pursuant to para 14, and in particular, para 14(6) provides:

"On an appeal against an amendment made by a closure notice, the tribunal may vary the amendment appealed against whether or not the variation is to the advantage of the appellant."

Discussion

27. There were two potential avenues for relief for Mr and Mrs Smallman. They could either file an emended return and claim a refund under the provisions of s44(9) FA 2003 or they could make a claim under para 34 Sch 10 FA 2003. I will therefore look at the position under s44(9) first.

Relief under s44(9) FA 2003

28. As set out above, s44(9) provides relief "where subsection (4) applies and the contract is (to any extent) afterwards rescinded or annulled, or is for any other reason not carried into effect." In other words if the original charge to SDLT has been occasioned by the substantial performance of the contract but the contract has not for some reason been completed then s44(9) provides a mechanism for the repayment of that tax. It is common ground that this is what happened in this case. The contract was deemed to have been substantially performed because Mr and Mrs Smallman were already tenants in the Property such that when they entered into the contract they were already in possession of the Property and the contract was therefore deemed to

have been substantially performed on the date of the contract. Subsequently, due to events outside their control, they decided that they could not complete the purchase, and instead they entered into alternative arrangements with the vendors such that their original contract was rescinded and the Property was sold to new purchasers.

29. Unfortunately, s44(9) provides that repayment of any tax due must be claimed by amendment of the SDLT return. It undoubtedly states that the Inland Revenue "**shall**" repay the tax but it also states equally clearly that the repayment must be claimed by amending the original SDLT return.

30. The process for amending the return is then set out in para 6 Sch 10 FA 2003 and this provides equally clearly, in sub-para (3), that:

> "Except as otherwise provided, an amendment may not be made more than twelve months after the filing date."

31. If therefore the return is not amended within 12 months of the filing date it is not possible to amend the return after that date. In this case the contract was deemed to have been substantially performed on 5 February 2014 and an SDLT return was made on that date. Section 76 (1) FA 2003 provides that an SDLT return must be made within 30 days of the effective date of the transaction, which in this case means that the return was required to be made before 7 March 2014, which was therefore the filing date, and therefore an amended return, in order to be validly made, would need to be made before 7 March 2015.

32. Miss Manzano, for Mr and Mrs Smallman, submitted that I should read the words in s44(9) stating that the Inland Revenue **shall** repay the tax as somehow over-riding the equally clear words in that sub-section that the repayment must be claimed by amending the return. On this interpretation therefore the time limit for amending the return would not be relevant. This seems to me to involve simply ignoring the second sentence in s44(9) and I do not understand how I can do this. I therefore reject this submission. In my opinion, the attempt to amend the return was out of time.

33. Miss Ajose, on behalf of HMRC, argued that there was no appeal to this tribunal against this because no provision for such an appeal was contained in the legislation. In that case I would not have the jurisdiction to consider an appeal on this issue. Subject to the arguments examined in the paragraphs below I agree with this analysis. It may have been possible to challenge HMRC's refusal to use their discretion on this point pursuing judicial review proceedings in the Administrative Courts but I suspect the time limits required for making such a claim have long since expired.

34. Miss Manzano did however put forward an alternative approach and argued that the HMRC letter of 21 March 2016 in effect opened an enquiry into the return and that therefore, HMRC's letter of 26 August 2016 was in effect a closure notice, against which an appeal could be made to this tribunal.

35. In support of this approach, Miss Manzano referred me to the case of *Portland Gas Storage Ltd v HMRC* [2014] UKUT 0270 (TCC), which concerned essentially similar facts.

36. In that case, at [46], the tribunal states:

> "However, in our view HMRC's subsequent actions following receipt of Portland's solicitors' letter of 23 August 2012 do demonstrate that it opened an enquiry into the return. In particular, HMRC's letter of 6 September 2012 notes that Portland wished to proceed with its claim and therefore it notified Portland that it was seeking policy advice on the time limit in the light of Portland's arguments. It is therefore clear that at that stage HMRC had determined to examine the claim in further detail. In our view the further steps that it took, namely to seek legal advice on the arguments raised by Portland, did amount to an enquiry within the ordinary meaning of that term. In essence, the question is one of degree and in our view the further steps taken indicate the undertaking of an "examination", "investigation" or "scrutiny" of the return."

37. Further, at [48] the tribunal states:

> "In our view this reasoning is clearly based on the principle that a notice of enquiry need not be in any particular form, the only requirement being that it gives notice of an intention to enquire into a land transaction return. In our view the letter of 6 September 2012 achieved that. In our view consistent with the policy in section 20 83(2) FA 2003, a communication should be regarded as giving notice of an intention to enquire provided the intended effect is reasonably ascertainable by the person to whom it is directed. In our view Portland would clearly ascertain from HMRC's letter that there was an intention to enquire further into the return in the light of the further submissions made by Portland's solicitors."

38. *Portland Gas* was not in the event considered by higher courts because the underlying transaction was changed before the appeal could be properly considered and the Court of Appeal therefore decided that it was unnecessary to consider the appeal by HMRC.

39. I was however also referred to *HMRC v Vasiliki Raftopoulou* [2018] EWCA Civ 818, which concerned a claim for the repayment of income tax, but which did consider the judgement in *Portland Gas* in some detail.

40. Miss Manzano submitted that *Raftopoulou* supported *Portland Gas* whereas Miss Ajose, for HMRC, suggested that it limited the effect of *Portland Gas.* In that case, at [38] to [40] Richards LJ said:

> [38] I agree with the approach taken by the UT in *Portland Gas* to the equivalent letter in that case, dated 15 August 2012. In that case, a claim for repayment of SDLT was made in a letter dated 18 July 2012. HMRC replied on 15 August 2012, rejecting the claim on two grounds, one of which was that

it was out of time. The taxpayer's solicitors replied, taking issue with the time limit point, to which HMRC replied that they were taking advice from their policy team and would revert once it was received. There was further correspondence and communications in November 2012 which concluded with a letter dated 23 November 2012 from HMRC, confirming their original position.

[39] I have earlier cited the passage at [44] in the Decision in *Portland Gas* in which the UT decided that the letter dated 15 August 2012 did not give notice of an intention to enquire into the claim or otherwise evidence an enquiry. As the UT said at [45], no reference had been made by or on behalf of the taxpayer to the time limit and therefore at that stage "HMRC had no argument before it that would cause it to examine the claim in any further detail beyond establishing that the claim was made more than twelve months before it was submitted". However, the UT concluded that HMRC's subsequent actions demonstrated that it had opened an enquiry, the question being essentially one of degree. HMRC does not accept that the UT was correct as regards these subsequent actions, but that raises further questions which do not fall for decision on this appeal. Ms McCarthy correctly submitted that the decision in *Portland Gas* as regards the letter dated 15 August 2012 supports HMRC's case as regards the letter dated 9 November 2011 in the present case. As I have said, I consider that the UT was correct in their approach to the letter dated 15 August 2012.

[40] In my judgment, in common with the view of the UT in *Portland Gas*, a rejection by HMRC of a claim on the grounds that it is out of time, by reference to no more than the claim itself and a calculation of the applicable time limit, does not involve any use by HMRC of their statutory powers to enquire into the claim nor does it constitute notice of an intention to do so. On the facts of this case, it is unnecessary to go further and consider what additional actions on the part of HMRC would constitute an enquiry. As earlier mentioned, HMRC does not accept that the UT was right in *Portland Gas* to hold that HMRC's subsequent actions did constitute an enquiry. I express no view on that question."

41. The words of David Richards LJ at [39] above address, almost verbatim, the words in the HMRC letter of 2 June 2016 and he comes to the clear conclusion that this letter did not constitute the opening of an enquiry. I can only agree.

42. I must however still consider the HMRC letter of 21 March 2016 which contains the words:

"I will open **a compliance check** to give your clients an **appealable decision**."

43. I cannot interpret these words as saying anything other than that HMRC are opening an enquiry. Subsequent letters come from a more senior HMRC Officer, and it seems highly likely that the more senior officer considered that a mistake had been made in the letter of 21 March, but nevertheless its words are clear. The officer concerned intended to open an enquiry.

44. There is a potential problem with this in that HMRC may only open an enquiry into an SDLT return within the prescribed enquiry window. The notice period is prescribed in para 12 Sch 10, as set out above. This would normally be nine months after the filing date for the return but if the return in question is a return which has been amended under para 6 Sch 10 then the enquiry window runs for nine months after the date on which the return was amended, in accordance with para 12(2)(c).

45. In my view therefore, however unintentionally or unwittingly, HMRC opened an enquiry into the amended return within the required time limit. This enquiry seems to have been closed down fairly rapidly, by the letter of 26 August 2016, but that letter must I think be treated as a closure notice, against which a valid appeal can be made.

46. I have examined the question as to whether or not an enquiry had been opened because this was a major part of Miss Manzano's submissions. However, all this means is that there is a decision in respect of which an appeal can be made to this tribunal.

47. The reason given for the rejection of the amended return in the letter of 26 August 2016, which I have decided I should treat as a closure notice, was that the amended return was made out of time and, as I have already explained at [32] above, I have decided that the amendment to the return was made out of time and that therefore any claim under s44(9) fails.

Relief under para 34 Sch 10 FA 2003

48. Paragraph 34 seems to offer a lifeline, with an extended time limit, to those unable to take advantage of the amended return route offered under s44(9) and in particular provides relief where:

> "a person has paid an amount by way of tax but believes that the tax was not due."

49. HMRC are not obliged to give such relief in cases which fall within para 34A. This sets out a number of circumstances in which no repayment is to be made, including para 34A(4) which states:

> "(4) Case C is where the claimant–
>
> (a) could have sought relief by taking such steps within a period that has now expired, and
>
> (b) knew, or ought reasonably to have known, before the end of that period that such relief was available."

50. HMRC's letter of 29 September 2017, the review conclusion letter, states quite clearly:

> "None of the cases under paragraph 34A apply to automatically reject the claim"

51. Nevertheless, Miss Ajose said that HMRC no longer took that view and believed that Mr and Mrs Smallman's case fell under Case C as set out above. She submitted that Mr and Mrs Smallman either knew or ought to have known, before the time for submitting a revised return expired, that an alternative form of relief was available under s44(9) by filing an amended return. I have already considered the circumstances whereby Mr and Mrs Smallman decided to apply for repayment of SDLT, as set out at [10] above.

52. Mr and Mrs Smallman were not tax specialists who might be considered to have a working knowledge of SDLT. They came to the conclusion that they should try to recover the SDLT they had paid on the basis of common sense and the belief that it was unfair that they should pay the SDLT. This is not the same as knowing that relief was available by filing an amended return but missing the appropriate deadline.

53. Miss Ajose accepted this but suggested that since Mr and Mrs Smallman had used the same firm of solicitors throughout the process then that firm of solicitors, Bennetts Solicitors, should have known about this form of relief. This is not an unreasonable position, and I think it may be true that Bennetts Solicitors ought to have known about this process. However, they did not inform Mr and Mrs Smallman of this opportunity and I do not therefore consider that this means that Mr and Mrs Smallman ought to have known about the process of filing an amended return.

54. In my view therefore I do not consider that Mr and Mrs Smallman fall within Case C of para 34A.

55. HMRC's review letter came to the conclusion that the SDLT should not be repaid not because the review officer considered that Mr and Mrs Smallman fell within Case C of para 34A but because the officer considered that the tax had become payable in accordance with s44(4) and that no subsequent developments could change that fact. This is essentially the case put to me by Miss Ajose. Miss Manzano did not agree with this analysis so I must therefore examine the structure and operation of s44.

56. Section 44(4) is undoubtedly a deeming provision, which deems the transaction to have taken place at the time when it is substantially performed, either by the purchaser taking possession of the property, as in this case, or by the payment of a substantial proportion of the purchase price. It is an anti-avoidance provision, designed to prevent the avoidance of SDLT by the permanent deferral of completion. There is of course no suggestion of any tax avoidance motive in this case but that does not prevent the application of the words in the statute.

57. Section 44(9) states that if the contract is afterwards rescinded or annulled the tax paid by virtue of s44(4) shall be repaid by the Inland Revenue. HMRC then come to the conclusion that because such a repayment can only be made by filing an amended return within the required time limit, s44(4) still holds sway. I cannot read s44(9) in that way.

58. In my view it is important to note that s44(9) is drafted in two separate paragraphs. The second paragraph, which sets out the requirement to file an amended return is not a sub-paragraph of the first paragraph. It is a standalone paragraph which is on a par with the first paragraph and is in no way subordinated to it. It does not in my view therefore mean that the first paragraph falls away if the second paragraph is not fulfilled. They are written as two separate provisions, albeit in the same sub-section.

59. Miss Manzano referred me to the case of *DV3 RS LP v HMRC* [2013] EWCA Civ 907, which I understand is regarded as a leading case on the interpretation of SDLT legislation.

60. At [13] Lewison LJ said:

> "Sections 44 and 45 [Finance Act 2003] are what are sometimes called "deeming provisions". The Upper Tribunal referred to the discussion of such provisions by Peter Gibson J sitting in this court in *Marshall v Kerr* [1993] STC 360. After citation of well-known authorities, including the speech of Lord Asquith in *East End Dwellings Co Ltd v Finsbury BC* [1952] AC 109, 132, Peter Gibson J said:
>
> > "For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.""

61. At [15] Lewison J made further comments on the interpretation of these provisions:

> "Although sections 44 and 45 are "deeming provisions" the fact that we are concerned with such provisions does not displace the ordinary principles of statutory interpretation: *HMRC v DCC Holdings (UK) Ltd* [2010] UKSC 58. In my recent judgment in *The Pollen Estate Trustee Company Ltd v HM Revenue and Customs* [2013] EWCA Civ 753 I set out what I believe to be those principles. Mr Gammie placed some reliance on the relevant passage, and Mr Thomas did not say that it was wrong. I repeat it here for convenience:
>
> > "The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. This

> approach applies as much to a taxing statute as any other: *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991; *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51. In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole: *WT Ramsay Ltd v Commissioners of Inland Revenue* [1982] AC 300; *Barclays Mercantile Business Finance Ltd v Mawson* at [29]. The essence of this approach is to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found: *Barclays Mercantile Business Finance Ltd v Mawson* at [32].""

62. When interpreting ss44(4) and 44(9) I should therefore look to the purpose of these two provisions in the context of the SDLT provisions as a whole and interpret their provisions in a way which, as far as is possible, gives best effect to those provisions. In seeking the purpose of a statutory provision therefore, I should not be "confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant [Act] as a whole."

63. In my view the intentions of ss44(4) and 44(9) are quite clear that:

(1) If a contract for the purchase of land is substantially performed, either by the purchaser taking possession of the property or by the payment of substantially the whole of the purchase price, then the transaction is deemed to have been completed at that time and SDLT is payable accordingly, s44(4).

(2) If the contract concerned is subsequently rescinded or annulled, or is for any other reason not carried into effect, the tax paid by virtue of that subsection shall (to that extent) be repaid, s44(9).

64. I do not therefore accept HMRC's interpretation that once the deeming provisions of s44(4) have come into operation then the tax is, and remains, due, no /matter what happens subsequently. This simply does not make sense.

65. I therefore consider that the provisions of s44(9) mean that once the contract was rescinded then the tax became repayable. There is an administrative problem in doing this because repayment under s44(9) requires the filing of an amended return within 12 months of the filing date of the original return. Fortunately however para

34 provides a backstop in cases such as this and in my view permits Mr and Mrs Smallman to obtain a refund of the SDLT overpaid.

Decision

66. For the above reasons therefore I have decided that the appeal of Mr and Mrs Smallman should be ALLOWED.

67. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 19 November 2018