[2021] UKFTT 0443 (TC)

TC 08327A/V

STAMP DUTY LAND TAX – sub-sale relief – s45(3) FA2003 – retrospective amendment to s 45(1A) by s 194 FA 2013 – whether the scheme effective pre-amendment for the original contract to be disregarded to render the return 'voluntary' – whether valid enquiry opened – whether the closure notice invalid consequent on a return being 'voluntary' – whether closure notice in any event subject to a four-year time limit – s 75A FA 2003 anti-avoidance provisions – whether discovery assessment valid and within the time limit – ***appeals dismissed***

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/02759
TC/2019/01306

BETWEEN

REDMOUNT TRUST COMPANY LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE HEIDI POON

The hearing took place on 14-15 January and 15-16 April 2021 by video.

A face-to-face hearing was not held because of the coronavirus pandemic. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. The hearing was therefore held in public.

Rory Mullan QC, instructed by Justin Bryant of Blackfriars Tax Solutions LLP, for the Appellant

Elizabeth Wilson QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. Redmount Trust Company Ltd ('the appellant') implemented a 'subsale relief' scheme which was blocked by retrospective amendments by virtue of s 194 Finance Act 2013. The matters in the conjoined appeals subsequently brought by the appellant are the following:

(1) Appeal TC/2017/02759 is against the closure notice issued by the respondents ('HMRC') on 7 September 2016 on the basis that £294,000 SDLT was due (the 'Closure Notice appeal');

(2) Appeal TC/2019/01306 is against the discovery assessment issued by HMRC on 25 September 2018 (the 'Discovery Assessment appeal').

APPEAL HISTORY

2. On 12 December 2016, the appellant wrote to HMRC to request a review of the closure notice decision issued on 7 September 2016, which was upheld on review by letter dated 27 February 2017. The appellant notified its appeal against the closure notice on 29 March 2017.

3. On 29 January 2018, the appellant filed its skeleton argument by former counsel. However, the appellant soon changed its counsel to Mr Mullan, and then filed a 'Replacement Skeleton Argument' by Mr Mullan on 1 February 2018, which introduced a new ground of appeal that the closure notice was invalid because it was founded on a 'voluntary' return: ('the voluntary return argument').

4. On 7 February 2018, the Tribunal granted an adjournment of the hearing in the Closure Notice appeal, and then a stay on 13 April 2018.

5. By letter dated 25 September 2018, HMRC issued a discovery assessment as an alternative to the closure notice, and in the event that the appellant succeeded in the Closure Notice appeal.

6. The appellant appealed the discovery assessment and requested a review on 23 November 2018. The review officer upheld the discovery assessment by letter dated 1 February 2019. The appellant notified its appeal against the discovery assessment by notice dated 1 March 2019.

ISSUES FOR DETERMINATION

7. The closure notice and discovery assessment relate to the same underlying transactions. It is not contended by the appellant that as a result of the retrospective amendment to s 45(3) FA 2003 introduced by FA 2013, those transactions give rise to a charge to SDLT. The appeals are not staked on substantive grounds as concerns the chargeability of SDLT, but on procedural grounds that neither of the assessments were validly issued.

8. In relation to the Closure Notice appeal, the issues arise for determination are:

(1) Whether the closure notice is invalid because the appellant's SDLT return is 'voluntary', as said by the appellant;

(2) Whether the closure notice is subject to the same time limits as discovery assessments, and whether as a result of those time limits, it has been issued out of time.

9. In relation to the Discovery Assessment appeal, the issues arise are:

(1) Whether the discovery assessment is invalid because it was raised outside the normal 4-year time limit; in particular, whether the 20-year time limit in para 31(2A) of Sch 10 to FA 2003 applies because there has been non-compliance with s 76(1) FA 2003.

(2) Whether the discovery assessment is invalid due to its being 'stale'.

EVIDENCE

10. The parties have produced a joint bundle of documents in four PDF files designated as Bundle A, B, C, and D. The appellant would appear to have had Counsel's Opinion on the Scheme, as per its letter dated 11 March 2013 in reply to HMRC's enquiry wherein the appellant stated that the 'documents in relation to which legal professional privilege is asserted include communications and written advice with Counsel and Solicitors, including Counsel's Opinion'. The documents produced by the appellant are understood to be those that are no subject to legal professional privilege.

11. A Statement of Agreed Facts dated 4 December 2017 was lodged before the appellant changed counsel in February 2018. Subsequently, HMRC also changed counsel to Ms Wilson, who has made one qualification to para 11 of the Statement, which is in square brackets in the appended Statement as Annex 1.

12. The first diet of hearing was taken up by hearing counsel's submissions for the respective parties in relation to the Closure Notice appeal; neither party led any witness evidence.

13. The second diet was taken up by hearing the Discovery Assessment appeal, with Officer Christopher Barlow appearing as a witness for HMRC. Officer Barlow has worked for HMRC and formerly Inland Revenue since 1985. He joined the SDLT channel in the Counter Avoidance Directorate in 2017, and has been the Delivery Lead for the SDLT channel. He has the responsibility for overseeing the investigation of SDLT returns where it is believed that an avoidance scheme has been used by the property purchasers, and for ensuring appeals are progressed to a Tribunal hearing where appropriate. I find Officer Barlow to be credible and reliable, and accept his evidence as to matters of fact.

LEGISLATIVE FRAMEWORK

14. Sections 44 and 45 FA 2003, before and after amendment by s 194 FA 2013, are relevant to the issues in these appeals. In summary:

(1) Section 44 applies where a contract for a land transaction is to be completed by conveyance, with sub-ss 44(3), (4) and (5) being provisions for determining 'the effective date' of substantial performance or completion of a land transaction.

(2) Section 44(5) provides that a contract is substantially performed when the purchaser takes possession of the subject matter of the contract, or a substantial amount of the consideration is paid.

(3) Section 45 modifies the operation of s 44, and s 45(1) applies where –

> '(1) (a) a contract for a land transaction ("the original contract") is entered into under which the transaction is to be completed by a conveyance', …
>
> (b) there is an assignment, subsale or other transaction (relating to the whole or part of the subject-matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him, …'

(4) Section 45(1A) *before the amendment* provided as follows:

> '(1A) The reference in subsection (1)(b) to an assignment, subsale or other transaction does not include the grant or assignment of an option , …

(5) Section 45(1A) *after the amendment* includes the insertion in bold as follows:

> '(1A) The reference in subsection (1)(b) to an assignment, subsale or other transaction does not include the grant or assignment of an option, [**or an agreement for the future grant or assignment of an option**].'

(6) Section 45(2) provides that s 44 is to have effect in accordance with the provisions set out in section 45.

(7) Section 45(3) applies 'as if there were a contract for a land transaction (a "secondary contract")' when certain conditions are met. The statutory wording of '*as if*' and the subjunctive '*there were*' indicate the statutory deeming pertaining to the 'secondary contract'. The tailpiece of s 45(3) provides for the relief in terms as follows:

> 'The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded except in a case where the secondary contract gives rise to a transaction that is exempt from charge by virtue of any of sections 71A to 73 (which relate to alternative property finance).'

15. Section 194 FA 2013 applies retrospectively to transactions entered into on or after 21 March 2012 to give effect to the amendment made to s 45(1A) under s 194(2), so that s 45(3) relief shall not apply to '*an agreement for the future grant or assignment of an option*'. The relevant parts of s 194 are as follows.

> '**194 Pre-completion transactions: existing cases**
>
> (1) Section 45 of FA 2003 (contract and conveyance: effect of transfer of rights) –
>
> (a) has effect subject to the amendment in subsection (2) below in relation to agreements for the grant or assignment of an option that are entered into during the period beginning with 21 March 2021 and ending immediately before the day on which this Act is passed, …
>
> […]
>
> (2) *At the end of subsection (1A) insert "or an agreement for the future grant or assignment of an option".* (italics added)
>
> […]
>
> (8) Subsections (10) to (12) apply where –
>
> (a) as a result of subsection (2) of this section, section 45 of FA 2003 does not apply in relation to a contract of the kind mentioned in subsection (1)(a) of that section ("the original contract"),
>
> […]
>
> (10) Section 76 of FA 2003 (duty to deliver land transaction return) is to be regarded as requiring the purchaser under the original contract to deliver a land transaction return relating to the land transaction not later than 30 September 2013.
>
> (11) Accordingly, 30 September 2013 is for the purposes of Part 4 of FA 2003 the filing date for the land transaction return relating to the transaction.
>
> (12) If the purchaser under the original contract ("P") has delivered a land transaction return relating to the land transaction before the day on which this Act is passed, P must not later than 30 September 2013 give notice under paragraph 6 of Schedule 10 to FA 2003 amending the return, but this does not prevent P from making subsequent amendments within the time allowed by sub-paragraph (3) of that paragraph.'

16. Sections 76-78 and Schedule 10 to FA 2003 are provisions governing the returns, enquiries, assessments and appeals relating to SDLT, whereby:

(1) Para 1 of Sch 10 provides that a land transaction return must be in a prescribed form, and contain the prescribed information and include a declaration by the purchaser that the return is to the best of his knowledge correct and complete.

(2) Para 1A of Sch 10 sets out the requirements in respect of declarations made by the purchaser's agent.

(3) Para 2(1) Sch 10 defines 'filing date', in relation to a land transaction return, for the purposes of Part 1 of Sch 10 to FA 2003 as 'the last day of the period within which the return must be delivered'.

(4) Para 2(2)(a) Sch 10 provides that references in Part 1 of Sch 10 to FA 2003 to the delivery of a land transaction return are to the delivery of a return that complies with the requirements of para 1.

(5) Para 3 Sch 10 provides that a person who is required to deliver a land transaction return but fails to do so by the filing date is liable to a tax-related penalty under para 4.

(6) Where no land transaction return is delivered by the filing date in respect of a chargeable transaction, para 25 of Sch 10 provides for HMRC to make a determination of the amount of tax chargeable within 4 yeas after the effective date of the transaction.

(7) Where an officer of the Board discovers that an amount of tax that ought to have been assessed as regards a chargeable transaction has not been assessed, para 28 of Sch 10 allows HMRC to make a discovery assessment in the amount that ought, in their opinion, to be charged in order to make good the loss of tax.

17. Schedule 10 to FA 2003 sets out the provisions for returns, enquiries, assessments and appeals into parts, with the first five parts being:

(1) Part 1 on Land Transaction Returns (paras 1-7; para 8 repealed);

(2) Part 2 on Duty to Keep and Preserve Records (paras 9-11);

(3) Part 3 on Enquiry into Return (paras 12-24);

(4) Part 4 on Revenue Determination if No Return Delivered (paras 25-27);

(5) Part 5 on Revenue Assessments (paras 28-32).

18. Para 6 of Sch 10 FA 2003 provides for the 'Amendment of Return by Purchaser' in terms:

> '(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) […] –
>
> (3) Except as otherwise provided, an amendment may not be made more than twelve months after the filing date.'

19. In relation to 'Notice of Enquiry', para 12 of Sch 10 FA 2003 provides as follows:

> '(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).

This is subject to the following qualification [i.e. under sub-para (2A)]

(2A) […]

(3) A return that has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under paragraph 6.'

20. The powers of HMRC on completion of the enquiry are set out in para 23 of Sch 10.

'(1) An enquiry under paragraph 12 is completed when [HMRC] by notice ("a closure notice") inform the purchaser that they have completed their enquiries and state their conclusions.

(2) A closure notice must either –

(a) state that in the opinion of [HMRC] no amendment of the return is required, or
(b) make the amendments of the return required to give effect to their conclusions.

(3) A closure notice takes effect when it is issued.'

21. The relevant statutory time limits are the following:

(1) Para 31(1) of Sch 10 provides for the general rule that no assessment may be made more than 4 years after the effective date of the transaction to which it relates.

(2) Where an assessment involves a loss of tax attributable to a failure by the taxpayer to comply with an obligation under s 76(1) of FA 2003, para 31(2A)(b) allows HMRC to make an assessment 'at any time not more than 20 years after the effective date of the transaction to which it relates'.

AUTHORITIES

22. The authorities are set out in Annex 2; additional authorities lodged by the appellant between the two diets and during the second hearing are marked with an asterisk.

THE FACTS

The Scheme

23. The transactions were related to the acquisition of a freehold property at 9 Fernshaw Road, London SW10 0TB ('the Property') by the appellant on 14 June 2012. In outline, the Scheme being implemented took place with the following key events.

(1) On 1 May 2012, the appellant as trustee of the Nanu Trust ('Redmount-Nanu') entered into a contract ('the Original Contract') for the purchase of the Property from the vendors (Mr and Mrs Vahan Eminian) for £4.2m with a completion date of 14 June 2012.

(2) On 13 June 2012, the appellant entered into a contract ('the Option Agreement') with Redmount acting as trustee of the Marian Trust ('Redmount-Mariant'). Under the terms of the Option Agreement, the appellant agreed to grant a call option ('the Option') to Redmount-Mariant to purchase the Property upon payment by Redmount-Mariant of the 'Grant Price', being either £127,000 or (if the Grant Price was paid within 2 months of completion of the Original Contract) £1,000.

(3) On 14 June 2012, the Original Contract was completed, and the Property was transferred to the appellant. The transfer was registered with the Land Registry on Form TR1. The appellant was a cash buyer.

(4) On 14 June 2012, the appellant granted the Option. Under its terms, the Option can be exercised by the grantee (Redmount-Mariant) at any time during the 'Option Period', being the period between 30 and 35 years after the date of the Option Deed, (or earlier by mutual agreement) for a price equal to the market value of the Property at that time less a discount.

(5) The Option has not been exercised by Redmount-Mariant.

24. The Form TR1 was for the transfer of the whole of registered title pertaining to the Property, and the name of the Transferee for entry in the register is 'Redmount Trust Company Limited', and the Transferee's intended address for service for entry in the register was at 235 Main Street, Gibraltar.

The Option Agreement and the Option Deed

25. The Option Agreement was made on 13 June 2012 between Redmount Trust Company Ltd (as trustees of the Nanu Trust) and named as '*the Promisor*' and Redmount Trust Company Ltd (as trustees of the Marina Trust) and named as '*the Promisee*', with its principal term as:

> 'This Agreement is supplemental to a contract ("the Sale Contract") made 1st May 2012 between [Mr and Mrs Eminian] as vendors and the Promisor as purchaser, whereby the Promisor contracted for the purchase of the Property on terms that completion of the contract was to take place on 14th June 2012.
>
> The Promisor has agreed that at the same time as completion of the Sale Contract as the completion of the Sale Contract he will enter into a deed granting the Promisee an option for the purchase of the Property.'

26. The Deed was made on 14 June 2012 between Redmount Trust Company Ltd (as trustees of the Nanu Trust) and named as '*the Owner*' and Redmount Trust Company Ltd (as trustees of the Marina Trust) and named as '*the Grantee*'.

(1) The Deed is stated to be 'supplemental to':

(a) The Sale Contract made on 1 May 2012 between Mr and Mrs Eminian as vendor and 'the Owner' (i.e. the appellant) as purchaser, and

(b) The Option Agreement made on 13 June 2012 between the Owner and the Grantee whereby the Owner agreed to enter into this Deed at the same time as completion of the Sale Contract.

(2) Pursuant to the Option Agreement the Owner grants by this Deed an option to purchase the Property to the Grantee.

(3) This Deed takes effect at the same time as completion of the Sale Contract.

27. The Deed includes the following 'Definitions':

(a) '"the Market Value" means the market value (as that term is applied in the Taxation of Chargeable Gains Act 1992) of the Property on the date of exercise of the Option and if not agreed between the parties shall be determined by a surveyor …' (clause 1.1.7)

(b) '"an Option Notice" means a written notice exercising the Option in accordance with the terms of this Deed …' (clause 1.1.8)

(c) '"an Option Period" means the period beginning 30 years after the date of this Deed and ending 35 years after the date of this Deed or such earlier period as the Owner may agree to' (clause 1.1.9)

28. Clause 16 of the Deed set out the restrictions on 'Assignment', whereby:

> '16.1 The Grantee may assign the benefit of the Option only where it has obtained the consent in writing of the Owner to such assignment.
>
> 16.2 Subject to that, the Option is personal to the Grantee. The Grantee may not assign, sublet, share or part with the benefit of this agreement or any part of it.'

29. The Option is unregistered on the Land Register.

Returns and enquiries

30. The Land Transaction Returns filed for the relevant transactions to implement the Scheme were the following:

(1) On 25 June 2012, the appellant filed a Land Transaction Return in respect of its acquisition of the Property; no SDLT was assessed by that Return.

(2) On 5 July 2012, the appellant (as trustee of the Mariant Trust) filed a Land Transaction Return in respect of its acquisition of the Option. The chargeable consideration for this Land Transaction Return was treated as the maximum possible Grant Price at that time (£127,000) in accordance with s 51(1) FA 2003, and so £1,270 of SDLT was paid (at the 1% rate applicable at the time).

31. Entries on the appellant's Land Transaction Return include the following:

(1) Box 2 Description of transaction: 'F' for Conveyance/Transfer

(2) Box 3 Interest transferred or created: 'FP' for 'Freehold with vacant possession'

(3) Box 8 Is the transaction pursuant to a previous option agreement? No

(4) Box 9 Are you claiming relief? Yes, code 28 for 'Other relief'

(5) Box 10 What is the total consideration in money or money's worth, including any VAT actually payable for the transaction notified? £4,200,000.00

(6) Box 54 Purchaser (1) is named as 'Remount Trust Company Limited'

(7) Box 56, the same address entered as on TR1

(8) Box 57 Is the purchaser acting as a trustee? Yes

(9) Boxes 61 to 65 concern the authority for the conveyancing solicitor to act on the purchaser's behalf; full details of the agent as Leelanes Solicitors LLP ('Leelanes').

(10) Box 73 for 'Declaration' states:

> 'The purchaser(s) must sign this return. Read the guidance notes in booklet SDLT6, in particular the section headed "Who should complete the Land Transaction Return*?"*
>
> If you give false information, you may face financial penalties or prosecution.
>
> "*The information I have given on this return is correct and complete to the best of my knowledge and belief*" [being inserted text as stated on the form]

32. As to the Land Transaction Return for the acquisition of the Option, the relevant entries include: (i) Description of transaction 'O' for 'Any other interest'; (ii) Interest transferred or created 'OT' for 'anything else'; (iii) effective date of transaction: 14 June 2012; (iv) no relief

was claimed; (v) Name of vendor: Redmount Trust Company Limited; (vi) Name of purchaser: Redmount Trust Company Limited; (vii) inserted text identical at Box 73 for Declaration.

33. By letter dated 13 September 2012, HMRC wrote to the appellant at its address in Gibraltar that they 'intend to make some enquiries' into the return relating to the Property under Code of Practice 8, and enclosed a copy of the letter sent to Leelanes. The letter to Leelanes stated that the enquiry was opened under para 12 of Sch 10 FA 2003, and was accompanied by a schedule of documents and information to be provided. The enquiry was therefore opened within the normal 9-month and 30-day post completion enquiry period provided by para 12.

Retrospective amendment to s 45 FA 2003

34. Sections 194(1)(a) and 194(2) FA 2013 amend s 45(1A) FA 2003 with retrospective effect from 21 March 2012; the provisions in s 45 FA 2003 no longer apply to 'an agreement for the future grant or assignment of an option'.

35. Section 194(8) and (12) of FA 2013 require that where the effective date of the transaction was before the passing of FA 2013, and a return has already been filed by the purchaser, the purchaser is required to give notice under para 6, Sch 10 FA 2003 by amending a return by 30 September 2013. Where no return has been filed, HMRC may raise an assessment under para 28, Sch 10 FA 2003 within the time limit specified by para 31(2A)(b) Sch 10 FA 2003.

36. Excerpts from HMRC's Tax Information and Impact Note ('TIIN') for Budget 2013 on 'Stamp Duty Land Tax Avoidance' published on 20 March 2013 are as follows:

> 'From 21 March 2013, the Finance Act 2003 is amended to ensure a certain type of Stamp Duty Land Tax (SDLT) avoidance scheme is ineffective. The schemes involve an onward sale (a 'subsale' or 'transfer of rights') which is not to be completed for a number of years.'
>
> '**The proposed change**
> Legislation will be introduced in Finance Bill 2013 to amend FA 2003, s 45 to provide that the original contract will not be disregarded where [the amendment to s 45(1A)]
>
> The purchaser under the original contract is required to notify HMRC of any SDLT due by 30 September 2013.'

37. The TIIN published on 20 March 2013 was later revised, with some of the details being:

> '**Operative date**
> This measure has effect where the transfer of rights takes place on or after 21 March 2012 and before Royal Assent of the Finance Bill 2013.'
>
> '**Proposed revisions**
> Legislation will be introduced in Finance Bill 2013 to amend section 45 to provided that:
>
> - The original contract will not be disregarded where:
> - the transfer of rights contract is substantially performed but not completed at the same time as the completion or substantial performance of the original contract;
> - the purchaser under the original contract is in possession of the property after the date of completion or substantial performance; and,
> - the main purpose or one of the main purposes of the transfer of rights contract is the obtaining of a tax advantage by the purchaser under the original contract.
> - An agreement to grant or assign an option is not a transfer of rights.

> The purchaser under the original contract is required to notify HMRC of any SDLT due by 30 September 2013, by either submitting a land transaction return (where no return has previously been submitted) or making an amendment to their return. …'

HMRC published Guidance Note

38. HMRC published Guidance Note on the retrospective changes to s 45 FA 2003, and the version included in the bundle was updated on 3 June 2013. Chapter 4 is entitled '*Notifying HMRC by delivery of a land transaction return*' wherein scheme users were advised: 'You must submit a land transaction return to HMRC no later than 30 September 2013', either online or by a paper return (to a designated address, and a phone number was provided).

39. Chapter 5 is entitled '*Notifying HMRC by making an amendment to a land transaction return*', and sets out the necessary guidance through a series of Q&As:

> 'Q2. I have used one of these schemes and I have already submitted a return on which I claimed a relief from SDLT. What do I need to do now?
>
> A2. You must notify HMRC, no later than 30 September 2013, that you wish to make an amendment to your return.'

40. The guidance continues by giving detailed instructions on how to notify HMRC of an amendment to a land transaction return already submitted with a relief claim: (i) the heading to use, (ii) the property details to include, (iii) a statement beginning with: '*I wish to amend my self assessment return*' followed by the correct figures of consideration and tax, (iv) contact details of lead purchaser, (v) designated email and postal addresses for notifying amendment.

Judicial review proceedings

41. Judicial review proceedings challenging the above retrospective legislation were commenced on 3 September 2013.

42. The Court of Appeal refused the judicial review challenge to the retrospective amendment to s 45(1A) in *R (*oao St Matthews*)*. On 23 December 2015 the Supreme Court refused permission for the taxpayers to appeal the order made by Court of Appeal. The taxpayers lodged an appeal at the European Court of Human Rights (within the 6-month appeal deadline), and that appeal was declined by ECHR by letter dated 15 September 2016.

Appellant's letter regarding 'Amendment of return'

43. On 27 September 2013, the appellant wrote to HMRC referring to the judicial review proceedings, and that 'the outcome of a successful judicial review will be a declaration of incompatibility followed by the withdrawal of the retrospective amendment'. The letter continued as follows with the heading in bold being original.

> '**Amendment of return**
>
> Section 194(8) and (12) FA 2013 requires that where section 45 FA 2013 no longer applies to a taxpayer, the effective date of the transaction was before the passing of FA 2013; and the taxpayer has already submitted a land transaction return, then the taxpayer is required to give notice under paragraph 6, Schedule 10 FA 2003 amending a return which has been filed.
>
> However, in light of the outstanding proceedings an amendment of the land transaction return to show SDLT as being due would be premature at this time.
>
> Please take this letter as an amendment to the limited extent of asserting the Purchaser's rights under the Human Rights Act 1998 and as stating the SDLT due as nil, provisionally and subject to the outcome of the above judicial review proceedings.'

The Closure Notice

44. On 7 September 2016, HMRC issued a closure notice to the appellant under para 23 Sch 10 FA 2003. The closure notice stated the conclusion that £294,000 SDLT was due on the transaction effected on 14 June 2012.

45. On 4 October 2016, MacIntyre Hudson acting for the appellant, wrote to HMRC to appeal the closure notice. On 15 November 2016, HMRC wrote to MacIntyre Hudson to advise that the grounds of appeal were rejected and offered an independent review, which was accepted by letter dated 12 December 2016.

46. On 27 February 2017, the review officer upheld the conclusion stated in the closure notice, and on 29 March 2017, the appellant appealed the closure notice to the Tribunal.

The Discovery Assessment

47. From 13 September 2021, when HMRC commenced the enquiry into the appellant's SDLT return, the enquiry had proceeded on the basis that a valid self-assessment land transaction return had been submitted, and a valid enquiry had been opened. The appellant had likewise proceeded on that basis until 1 February 2018, eight days before the first scheduled hearing, when the appellant filed a revised skeleton argument introducing a new ground of appeal pertaining to the return being 'voluntary', and that HMRC had no power to open an enquiry into such a return, with the result that the enquiry and closure notice were invalid.

48. The matter was referred to Officer Barlow on 1 February 2018 as the Technical and Litigation Lead of the option scheme used by the appellant. Officer Barlow reached the conclusion on 1 February 2018 that if the appellant's 'voluntary return' argument was correct, (and if the appellant was allowed to run the argument), then an amount of tax which ought to have been assessed had not been assessed.

49. HMRC sought an adjournment of the hearing listed for 9 February 2018 to consider the new ground of appeal, and a further adjournment on 13 April 2018. The proceedings were stayed until 30 June 2018. On 25 June 2018, Officer Barlow concluded that there was no merit in the voluntary return argument, and applied to the Tribunal that the appellant be requested to apply for permission to revise its grounds of appeal. The Tribunal refused the application.

50. Officer Barlow described the refusal by the Tribunal to require the appellant to make an application to amend its grounds of appeal as the 'catalyst' for arranging to have the discovery assessment issued. The Tribunal's refusal meant that the voluntary return argument was 'in play', and if the argument was correct, then Officer Barlow reasoned that 'an amount of tax that ought to have been assessed had not been assessed'.

51. On 24 September 2018, Officer Barlow instructed for a discovery to be raised. The discovery assessment, accompanied by Officer Barlow's covering letter, was issued on 25 September 2018. Officer Barlow stated that the assessment was issued to protect HMRC's position should the voluntary argument succeed.

THE CLOSURE NOTICE APPEAL

The appellant's case

The 'voluntary return' argument

52. Mr Mullan's submissions started with the operation of the Scheme with reference to the provisions under s 45 FA 2003 that were in force at the time. He said, for the purposes of this appeal, 'the relevant point is that when the Nanu SDLT1 was sent to HMRC, s 45 FA 2003 applied to disregard the land transaction under the Original Contract'. ('Nau SDLT1' is the designation in Mr Mullan's skeleton argument for the Land Transaction Return submitted on 25 June 2012 by the appellant as the trustee for the Nanu Trust.)

The effectiveness of the Scheme for the Original Contract to be disregarded

53. The 'voluntary return' argument is staked on the premise that s 45 FA 2003 (as was in force at the time) applied to disregard the Original Contract. To make good that premise, Mr Mullan said that the conditions under s 45(1) were met because:

(1) The Original Contract was a contract for a land transaction: s 45(1)(a);

(2) The Option Agreement was an '*other transaction*' within the meaning of s 45(1)(b), which is a term intended to cover a wide range of possible transactions, subject to certain transactions being expressly excluded from its ambit by s 45(1A). Until the retrospective change introduced by s 194 FA 2013, an agreement to grant an option was not excluded by s 45(1A).

(3) The Option Agreement is a transaction '*relating to the whole or part of the subject-matter of the original contract*': s 45(1)(b). The language of the section contemplates that the interests under the two transactions need not be the same, but must 'relate' to the same subject matter. The condition is satisfied as the subject matter of the Original Contract is the Property; the Option Agreement is a transaction relating to the Property.

(4) As to the requirement that the transfer of rights should have the result that '*a person other than the original purchaser becomes entitled to call for a conveyance to him*' (s 45(1)(b)), it is relevant to consider what is meant by 'entitled to call for a conveyance' in this context.

(5) The conveyance is the instrument whereby the contract for the land transaction is to be completed: s 44(1). A land transaction for these purposes is any acquisition of a chargeable interest: s 43(1). A contract is defined to include any agreement, and conveyance to include any instrument: s 45(7). Completion takes place when the land transaction contemplated is completed in substantial conformity with the contract: s 44(10). These terms are given a wide definition to capture the widest range of transactions.

(6) The grant of an option to acquire land creates an interest in land: *London and SW Railway* and *Armstrong & Holmes*. It therefore creates a chargeable interest within the meaning of s 48 FA 2003.

(7) While a purely personal right will not be a chargeable interest, it is incorrect that an unregistered option creates a personal right (as suggested by HMRC's Statement of Case). Whether an option contains a personal right is a matter of construction of the relevant agreement: *Sainsbury's v Olympia* at [64(d)].

(8) Although it is accepted that the Option Agreement on its own created merely personal rights (and so was not itself a land transaction), it was an agreement to enter into the Option Deed. The Option Deed created rights which were not merely personal, but rather an equitable interest in the Property. As such, the Option Agreement was an agreement to enter into a land transaction (the grant of option binding on the land by the way of the Option Deed). It was completed when the land transaction in contemplation (i.e. the grant of the option) took place.

(9) Accordingly, the Option Agreement was a contract to be completed by a conveyance (in the wider sense used in the legislation): under it Redmount-Mariant was entitled to call for a conveyance to it in the form of the grant of the Option Deed. The requirement for the right to be vested in another person is met because the Option Deed was acquired by the appellant in its capacity as a trustee of a different settlement (para 4, Sch 16 FA 2003).

(10) In this respect, the position is different from that in *Fanning* where there was no agreement for the grant of an option which was to be completed by a conveyance. In *Fanning*, the only possible conveyance was on exercise of the option and since this would inevitably have taken place later than completion of the original contract, s 45 cannot possibly have been engaged.

(11) The grant of the option by way of the Option Deed was completed at the same time and was in connection with completion of the Original Contract. The completion of the Original Contract is therefore disregarded for SDLT purposes: s 45(3) and *DV3*.

(12) It was not necessary for the option to be exercised for this consequence to follow: the grant of the Option Deed effected completion of the 'transfer of rights' provided for in the Option Agreement.

No obligation to deliver a return

54. The appellant's position is that there was no land transaction return within the meaning of para 12 Sch 10 FA 2003. It is accepted that a document was filed which on its face appeared to be a land transaction return (the Nanu SDLT1), that document was not filed pursuant to any statutory obligation for reasons as follows.

(1) The duty to deliver a land transaction return is contained in s 76 FA 2003, which applies where there is a notifiable transaction.

(2) When the Original Contract was entered into, s 45 applied to the appellant's acquisition of the Property. This had the consequence that for SDLT purposes, there was no transaction at all, much less a notifiable one.

(3) Section 45(3) has the effect that the 'substantial performance or completion of the original contract … shall be disregarded'; thus the acquisition by the appellant was disregarded for SDLT purposes (until the retrospective legislation applied).

(4) Per Maurice Kay LJ in *DV3* at [35]-[37], the consequence of the fiction is that the intermediary sub-seller (i.e. the appellant) did not enter into a land transaction, which meant that he did not acquire a chargeable interest (i.e. the land subject to the subsale); and that the sub-seller did not dispose of a chargeable interest, and is to be treated as not having acquired the interest. (See to like effect *Project Blue* at [46] and [50].)

(5) Notably, this is consistent with the approach of the Supreme Court in *Cotter* at [24] to [28] that a return in the statutory context may differ from what might appear to be a return in the physical sense. The relevant issue is the legal obligation.

No legal consequences to be founded on a voluntary return

55. Mr Mullan submits that since there was no obligation to file a return, the Nanu SDLT1 was not a land transaction return for the purposes of FA 2003, and it did not attract the legal consequences which follow from a land transaction return (including protection against a discovery assessment: para 30 Sch 10 FA 2003).

(1) It is averred that the Nanu SDLT1 was entirely voluntary (and unsolicited) in nature, and had no legal consequence for the purposes of FA 2003, in like manner as held in *Bloomsbury* and *Patel* in the context of TMA 1970.

(2) Further, while the position on voluntary returns for direct tax purposes has been retrospectively overturned by the introduction of s 12D TMA 1970, there is no equivalent provision in Sch 10 FA 2003.

(3) This conclusion is confirmed when the time limit for HMRC to open an enquiry is considered by reference to the 'filing date' under para 12(2) Sch 10, which is in turn defined under sub-para 2(1) as follows:

> '(1) References in this Part of this Act to the filing date, in relation to a land transaction return, are to the last day of the period within which the return must be delivered.' (emphasis original)

(4) If there is no date on which a return ***must*** be delivered, then there can be no filing date. This has significant consequences, namely:

(a) There can be no enquiry period (para 12(2) Sch 10 FA 2003);

(b) There is no obligation to pay tax (s 86(1) FA 2003).

(5) The notion of a date on which a return ***must*** be delivered is entirely at odds with the possibility of a filing date for a return where there is no obligation to make in the first place. This wording confirms that, as with a corporation tax return or a personal return, a voluntary return does not have the legal consequences which the legislation attaches to a land transaction return.

(6) The obligation to pay SDLT is also intimately tied in with the obligation to make a land transaction return: s 86(1) FA 2003 makes this clear:

> 'Tax payable in respect of a land transaction must be paid not later than the filing date for the land transaction return relating to the transaction.'

(7) If no land transaction return is required, then the obligation to pay tax cannot have arisen. That obligation and the legal consequences which follow from it are at the centre of the administrative machinery of SDLT and cannot be simply disregarded.

The retrospective legislation

56. The appellant accepts that the consequence of the amendment to s 45(1A) FA 2003 under s 194(2) FA 2013 to be applied retrospectively to 'agreements for the grant or assignment of an option that are entered into during the period beginning with 21 March 2012' is that s 45 FA 2003 was retrospectively treated as not applying to the Original Contract. However, Mr Mullan submits that '[a]assessment does not follow automatically on chargeability' because:

(1) HMRC's assessment of the SDLT due could not be a closure notice, as there was no land transaction return for FA 2003 purposes, and therefore no valid enquiry was opened into the return.

(2) A closure notice is issued on completion of an enquiry under para 12 Sch 10 FA 2003. By the very provisions of para 12, Mr Mullan avers that a number of points follow:

(a) There must be a land transaction return;
(b) HMRC must give notice of an enquiry;
(c) That notice must be given before the end of the enquiry period; and
(d) There must be a filing date for there to be an enquiry period.

(3) The retrospective amendment to s 45 FA 2003 undoubtedly changed the legal position as regards the taxation of the transactions to which the appellant was party. That retrospectivity did not, however, impact upon HMRC's administrative machinery.

57. For the reasons explained, Mr Mullan submits that there was no enquiry on foot before the retrospective changes took effect, and there is nothing in those changes which could operate to deem an enquiry to have commenced, nor did HMRC do anything to open an enquiry subsequently. Furthermore, *Lauri v Renad* and *Yew Bon Tew* by the Privy Council show that

rights that have expired cannot be revived. The extent of retrospection in the amendment is not wide enough to set things afresh as regards the filing obligations.

The 'time limit' argument

58. The appellant's second argument is that even if HMRC succeed in ascertaining that there was a valid enquiry which was concluded by a closure notice (within the meaning of para 23 Sch 10), that closure notice was in any event invalid as it was outside the 4-year time limit prescribed by para 31 Sch 10 FA 2003.

(1) A closure notice takes effect by making amendments to a land transaction return and the assessment which is required to be contained in that return.

(2) That amendment requires the taxpayer to account for tax on the basis of the new amended assessment. It would be an abuse of language to describe the assessment contained in the closure notice as a self-assessment. It is an assessment by HMRC which is effected by means of amendment to the taxpayer's self-assessment.

(3) The reference to an assessment in para 31 Sch 10 FA 2003 is to be given its plain meaning. If there is no assessment (as HMRC suggest) there can be no obligation on the appellant to account for the SDLT which HMRC are seeking.

59. The argument that statutory time limits apply to enquires was rejected by the High Court by Patten J in *Morris*. Mr Mullan submits that *Morris* cannot be binding on this Tribunal as it concerned different legislation. Nonetheless, Mr Mullan acknowledges that given the 'superficial similarities' in the taxing regimes, *Morris* carries 'some persuasive weight', but it would be 'quite wrong' for the Tribunal to follow the approach in *Morris* because:

(1) In Mr Mullan's view, 'Patten J was clearly influenced by the fact that s 34 TMA 1970 predated the introduction of self-assessment and that it was in effect a relic of the prior regime which had no relevance to the new one (see [35] of *Morris*). Mr Mullan argues that in contrast, 'the SDLT code is a single coherent whole'. Unlike the position for income tax self-assessments and closure notices thereto, Mr Mullan submits that 'there is no historical basis within FA 2003 (or otherwise) for distinguishing between the assessments to which para 31 Sch 10 FA 2003 relates'.

(2) There are relevant differences in the wording of the legislation under consideration.

(a) Section s 34(1) TMA expressed a time limit in permissive terms: '*an assessment to income tax or capital gains tax may be made at any time not later than'* the specified date. One of the issues in *Morris* was that if this applied to self-assessments, then read literally it would mean that a self-assessment could be made at any time within an almost 6-year period, which would be contrary to the express provisions for such an assessment to be made earlier, and that was an indication that assessments in the context of s 34 TMA did not include self-assessments: [31].

(b) That issue does not arise in the SDLT code. Para 31 Sch 10 simply imposes an external limit on when an assessment could be made: '*no assessment may be made more than 4 years after the effective date of the transaction to which it relates*.' That sets 'an outer limit' which is entirely consistent with the provisions requiring a land transaction return to be filed earlier.

(3) This difference, Mr Mullan argues, 'is directly relevant to much of the reasoning of Patten J which turned on the apparent inconsistency in TMA 1970 identified above'. This aspect of Patter J's reasoning can have no application in the instant case because of the different statutory code.

(4) The construction of FA 2003 turns on the content of that statute and not on the correct construction of TMA 1970.

(5) The two regimes are not identical despite their similarities. Parliament, by Schedule 15 FA (No. 2) 2017 created a substantial difference in the two regimes by allowing the possibility of applying for partial closure notices in relation to enquiries under TMA 1970 and Sch 18 FA 1998. Such partial notices, Mr Mullan submits, are needed to offer certainty where there is no time limit to an enquiry. It is not necessary in the SDLT context where the overarching 4-year time limit (with longer time limits in specific circumstances) necessarily applies.

HMRC's case

In reply to the 'voluntary return' argument

60. Ms Wilson submits that this argument is 'wholly misconceived'. It wrongly assumes that the avoidance scheme implemented by the appellant is effective; when that is not the case.

(1) Section 194 FA 2013 amends the provisions on which the Scheme is said to depend with retrospective effect, with the result that the appellant's acquisition of the freehold property on 14 June 2012 is a 'notifiable transaction' as a matter of law.

(2) It follows that the return made by the appellant and submitted on 25 June 2012 was required under s 76 FA 2003.

(3) No practical difficulties arise out of this retrospective change to the substantive law. Section 194(12) required a taxpayer to amend an already filed 'nil' return by 30 September 2013. Section 194(10) required the taxpayer to file a fresh return within an extended time limit where no return was filed. That should be the end of the matter.

61. There are further and alternative reasons why the appellant's argument is wrong.

(1) Whether the avoidance scheme used by the appellant was in any event ineffective is an issue in this hearing, as stated at para 7(3) of the Statement of Agreed Facts. In *Fanning* the FTT concluded that a like option scheme was ineffective. If this tribunal (and/or any appellate court) reaches the same conclusion, the appellant's land transaction return is 'required' on any view. HMRC submit that the scheme implemented by the appellant is ineffective.

(2) Insofar as HMRC must rely on s 75A FA 2003 to counteract the tax scheme, the Supreme Court decision in *Project Blue* at [81] to [84] confirms that where a taxpayer returns a true 'subsale' and thus might be said to make a return which is '*not strictly necessary*', HMRC have power to amend that return to charge the separate, notional transaction arising under s 75A FA 2003.

(3) Thirdly, and more generally, the duty to make a land transaction return arises with immediate effect notwithstanding that the true tax consequences of the underlying sale might only be ascertained following an enquiry and an appeal. In this context, and as *Project Blue (SC)* confirms at [83], there is no limit on HMRC's power to enquire into any return, which follows from para 13 of Sch 10. Indeed, the present case is stronger than *Project Blue* because s 194 FA 2013 relates to the very transaction returned.

62. *Bloomsbury* and *Revell* relied upon by the appellant concern different statutory regimes to be found in the TMA 1970 and are irrelevant. The legislation there contains a different set of rules for the making of a return, including that the taxpayer is obliged to give notice to HMRC of chargeability to tax, and HMRC is authorised to serve a notice on the taxpayer requiring the delivery of a return. There is no corresponding notice procedure for SDLT, which operates differently and places the initiative on the taxpayer in the first instance.

In reply to the 'time limit' argument

63. This argument only arises if the closure notice is valid in principle. It does not arise if the appellant is liable under the protective assessment. HMRC say the argument has no merit.

(1) Para 23 does not lay down any time limit on the issue of a closure notice by HMRC; nor does it incorporate para 31 (nor paras 31A and 32) of Part 5 by reference.

(2) The taxpayer is afforded protection from an unnecessarily prolong enquiry by the fact that the enquiry itself and the subsequent closure notice must relate to the matters prescribed (para 13 Sch 10), and the taxpayer may apply to the FTT for a direction that HMRC issue a closure notice (para 24 Sch 10).

(3) HMRC's approach is supported by *Morris* where the High Court held that an equivalent limitation rule for discovery assessments (s 34 TMA) did not apply to a self-assessment contained in a personal tax return, with the result that a closure notice amending the return could not be an 'assessment' for the purposes of s 34.

In reply to the 'wrong person' argument

64. At one point, the appellant was pursuing a third argument in the Closure Notice appeal. HMRC submit that the appellant is the relevant trustee for the purposes of para 6(1) Sch 16 FA 2003, and the responsible trustee pursuant to para 5(1)(a) Sch 16 FA 2003.

DISCUSSION

65. On the face of it, the 'voluntary return argument' appears to be an argument staked on procedural grounds as concerns the validity of the closure notice. However, the 'voluntary return' argument as advanced for the appellant, is entirely founded on the Scheme being effective in engaging s 45(3) FA 2003 for the Original Contract to be disregarded. For this reason, the efficacy of the Scheme falls to be determined as a preceding issue in order to assess whether the 'voluntary return' argument is well founded.

The Scheme in outline

66. The Scheme comprises the following steps:

(1) A vendor ('V') and a third-party purchaser ('P') enter into a contract for the sale of a chargeable interest in land to be completed by a conveyance ('the V-P contract').

(2) P agrees to grant another person ('O') a call option over the chargeable interest, and the option is to be granted on the date of completion of the V-P contract of sale ('the option agreement').

(3) At the same time as the completion of the V-P contract of sale, P grants O a call option over the chargeable interest. The option exercise price is the market value of the chargeable interest at the date of the exercise, less any amounts and interest already paid.

(4) P occupies or otherwise uses the property, having paid the full consideration under the V-P contract of sale.

(5) The option is not exercised by O (save possibly as part of an onward sale to some other person). O co-operates in the Scheme.

67. The Scheme is said to be under the terms of ss 44 and 45 FA 2003 as follows:

(1) The V-P contract of sale is a 'contract for a land transaction ("the original contract") under which the transaction is to be completed by a conveyance': s 45(1)(a).

(2) The grant of the option is 'an assignment subsale or other transaction (relating to the whole or part of the subject matter of the original contract) as a result of which a

person other than the original purchaser becomes entitled to call for a conveyance to him': s 45(1)(b).

(3) Section 44 applies as if there was a 'contract for a land transaction (a "secondary contract")' under which O is the deemed purchaser and the consideration payable for the option agreement is the deemed consideration.

(4) Section 45(3) is said to be engaged whereby:

(a) The original contract is said to be completed simultaneously with the completion of the secondary contract (i.e. the option grant).

(b) Alternatively, the original contract is completed simultaneously with the substantial performance of the secondary contract by the payment of the option fee.

(c) As such, the original contract is disregarded for SDLT purposes.

(5) Therefore, unless and until the option is exercised, SDLT is chargeable on the *deemed* consideration for the secondary contract, (i.e. £1,000 or £127,000 in the present case). The original contract completed on 14 June 2012 with the transfer of title of the Property to the appellant for consideration in the sum of £4.2m is said to be disregarded.

Statutory construction

The context of the SDLT legislation

68. Part 4 of FA 2003 is entitled '*Stamp Duty Land Tax'*, and the SDLT code within the Finance Act starts at section 42, wherein s 42(1) defines SDLT as a tax '*on land transaction*'. Section 43(1) states: '*a "land transaction" means any acquisition of a chargeable interest*'. Section 48(1) defines 'chargeable interest' to include '*an estate, interest, right in or over land in the United Kingdom*' other than an exempt interest.

69. Lewison LJ in *DV3* highlighted the contrast between SDLT and the former stamp duty at [6]. While stamp duty was 'a tax on documents', SDLT is chargeable on land transactions, whether or not there is any instrument effecting the transaction: s 42(2)(a) FA 2003. In *DV3* the taxpayer's arguments would have the consequence of rendering SDLT a tax on documents. Lewison LJ observed at [18] that taxpayer's argument 'runs against the grain of the legislation': 'the whole point of SDLT was to get away from a tax on documents'.

The operation of s 44

70. Section 44 is headed '*Contract and Conveyance*', and is to be construed in the context of the SDLT legislation being a tax on land transactions. As a starting point, s 44 contains the general rules to dealing with transactions to be completed by a conveyance. In the context of a land transaction, the meaning of 'completion' is as stated by Buckley LJ in *Quadrangle* at p72:

> '… the word of "completion" may be capable of different meanings in different contexts, but prima facie completion of the contract must be a mutual operation by both parties to the contract, for until each party has fully discharged his obligations under the contract it has not been completed.'

71. The statutory wording of s 44(1) envisages a contract for a land transaction 'to be completed by a *conveyance*'. In practical terms, the Form TR1 is the deed of transfer of title to complete the contract for the sale and purchase of a freehold or leasehold estate, whereby the purchaser upon meeting the obligation to pay the full consideration under the contract calls for the transfer of ownership, and the vendor meets his corresponding obligation to transfer title to the purchaser on completion.

Section 45 modifies the operation of s 44

72. Section 45 is headed 'Contract and conveyance: effect of transfer of rights', and modifies the operation of s 44, to deal with '[t]he special situation' of 'subsales and similar transactions': [16] of *DV3*. The narrow temporal window when s 45 comes into play to modify the operation of s 44 is after exchange of contracts but before completion. The Upper Tribunal's (reversed) decision in *DV3* 'was to fasten on the words of s 45(2)' (at [19] of *DV3*). Section 45(2) states:

> '… section 44 (contract and conveyance) has effect in accordance with the following provisions of this section …'

73. In response to the statutory wording in s 45(2) that became the crux of the Upper Tribunal's decision, Lewison LJ observed at [20]:

> 'This showed that the deeming provisions in s 45 had a limited purpose. Its sole purpose was to modify the operation of s 44. Thus far I agree [with the Upper Tribunal]. But s 44 is one of a group of sections (ss 43-47) which define what is (and what is not) a land transaction. A land transaction is the acquisition of a chargeable interest. Thus s 44 is a key provision of the SDLT code which is applied generally to identify a land transaction; in other words what counts as the acquisition of a chargeable interest. In my judgment the Upper Tribunal did not give sufficient weight to the importance and centrality of s 44. The real question, in my judgment, is how s 44 operates, when you have made the modifications required by s 45.'

74. The way that s 45 modifies s 44 is when a person '*other than the original purchaser*' (i.e. of the 'original contract') becomes entitled to call for the subject matter of the contract to be conveyed to him, with the result that when the original contract is completed by a conveyance, title passes to that '*other*' person (as the 'transferee' in the deed of transfer) who thereby becomes the owner of the subject matter of the original contract.

75. When s 45(1) refers to 'the original contract', it is a reference to '*a contract for a land transaction … under which the transaction is to be completed by a conveyance*' as provided under s 44(1). Lodge Hodge in *Project Blue* summarised the effect of s 44 and its interaction with s 45 in the following terms:

> '[11] When persons enter into a contract for a land transaction under which the transaction is to be completed by a conveyance, section 44(2) provides that they are not regarded as entering into a land transaction by reason of entering into the contract. … Instead, 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, whose effective date is the date of completion (section 44(3)). If the contract is not completed but is substantially performed (for example, if the purchaser takes possession of the subject matter of the contract or a substantial amount of the consideration is paid) the contract is treated as if it were the transaction provided for in the contract and its effective date is when the contract is substantially performed (section 44(4) and (5)).
>
> [12] … section 45, which creates sub-sale relief by modifying the operation of section 44, applies in relation to the completion of the two contracts …'

76. By way of illustration, the original purchaser ('P') assigns to a third party ('T') the benefit and burden of his rights and obligations under a contract of sale with the vendor ('V'). On completion of the original contract, T pays the purchase price direct to V's solicitors, thereby releasing P from any obligation under the original contract. V transfers title directly to T (or through P as nominee if the conveyancing machinery so requires). Under s 45, the SDLT liability falls on T on an amount of deemed chargeable consideration equal to the purchase

price paid by T under the original contract *plus* any amount paid to P (see as regards the quantum issue in *Project Blue*). By way of modifying the operation of s 44, P is relieved from any SDLT liability because immediately following the completion of the original contract, he is not the owner of the subject matter of the original contract.

Section 45(3) relief applies by way of 'substantial performance or completion'

77. Given that s 45 modifies the operation of s 44, s 45 is to be construed in conjunction with s 44. In relation to the conditions for the subsale relief to apply as provided at the tailpiece of s 45(3), the qualifying conditions are references to the specific provisions under s 44:

> '*The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded …*'

78. The conditions in s 45(3) must be construed in terms of s 44 provisions, such as:

(1) Section 44(5) provides that a contract is 'substantially performed' when:

(a) 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'.

(2) Section 44(6)(a) provides that 'possession includes receipt of rents and profits or the right to receive them'.

(3) Section 44 (10)(a) provides that 'references to completion are to completion of the land transaction proposed, between the same parties, in substantial conformity with the contract'.

79. The machinery for giving the relief under s 45(3) relief must also be consistent with the application of other provisions, and the purpose of the SDLT code as a whole, so that:

(1) Section 45(1)(b) requires the subsale or similar transaction to be one '*relating to the whole or part of the subject matter of the original contract*'; the 'subject matter' is the freehold or leasehold estate, the ownership of which is to be transferred on completion: s 43(6) and s 45(1)(a).

(2) Section 45(3) ensures that the SDLT rules continue to operate in accordance with the ordinary principles, namely, that tax is due and payable on the full purchase price for the acquisition of freehold or leasehold estate by the new owner.

(3) Section 45 also anticipates that relief may apply to a subsale which relates to only '*part*' of the subject matter of the original contract. The word 'part' denotes a slice or percentage of the *same* chargeable interest, not a distinct property interest conferring some future contingent or conditional right such as an option or right of pre-emption.

(4) The language of a 'transfer of rights' and 'transferee' is apt in the context of s 45(1)(a). The statutorily relevant 'rights' are those rights which make the 'original contract' a transaction which is to be completed by a conveyance. The tailpiece to s 45(1) reads as follows:

> 'References in the following provisions of this section to a transfer of rights are to any such assignment, subsale or other transaction, and references to the transferor and the transferee shall be read accordingly.'

(5) Section 45(3) provides for a notional 'secondary contract' in relation to which the transferee (T) is the purchaser. The secondary contract is a deemed 'contract for a land transaction' mirroring 'the original contract' in s 45(1)(a), which is a real-world contract

for a land transaction. It is this deemed secondary contract for a land transaction which must be completed (or substantial performed) 'at the same time as, and in connection with' the substantial performance of completion of the original contract: *DV3* at [35].

Purposive construction of the deeming provisions

80. Both sections 44 and 45 are deeming provisions. The proper approach to the construction of such provisions is summarised by Lewison LJ in *DV3*:

> '[15] Although ss 44 and 45 are "deeming provisions" the fact that we are concerned with such provisions does not displace the ordinary principles of statutory interpretation: *DCC Holdings (UK) Ltd v Revenue and Customs Comrs* [201] UKSC 58, … In my recent judgment in *Pollen Estate Trustee Co Ltd v Revenue and Customs Comrs* [2013] EWCA Civ 753, … I set out what I believe to be those principles. … I repeat it here for convenience.
>
> "[24] 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: see *IRC v McGuckian* [1997] … *Barclays Mercantile Business Finance Ltd v Mawson* (*Inspector of Taxes*) [2004] UKHL 51 at [28], ... 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 … 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: see *Barclays Mercantile Business Finance Ltd v Mawson* at [32]."'

81. The approach stated in *DV3* was reinforced by the Supreme Court (by a majority) in *Project Blue* where the Court adopted a purposive approach to the interpretation of the SDLT code, (including the anti-avoidance provision under s 75A) to address the lacunas in the statutory regime. The lacunas had enabled the avoidance of SDLT in the acquisition of the Chelsea Barracks by Project Blue due to the use of alternative Shari'a compliant property finance arrangements which engaged both s 45(3) and s 71A of the Act, leading to what Lord Briggs (dissenting) described as 'an unintended tax holiday'.

Whether the sub-sale Scheme effective

82. Applying the purposive construction of the SDLT code as a whole, and s 45 specifically, I conclude that the Scheme is ineffective in avoiding the SDLT chargeable on completion of the Original Contract between the appellant (on trust of the Nanu trust) as the Purchaser and Mr and Mrs Eminian as the Vendors. The Scheme fails for the following reasons:

(1) There is no 'secondary contract' for the purposes of s 45(1);

(2) Even if there were a secondary contract as asserted, that secondary contract was not substantially performed or completed at the same time as the Original Contract;

(3) In the alternative, s 75A anti-avoidance provision applies in respect of the chargeable consideration placed on the notional transaction.

No secondary contract

83. In construing whether a secondary contract can be deemed, the real question to ask is '*how s 44 operates*' in the light of the transactions. For the purposes of s 45(1), a secondary contract is one '*as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him*'. As a matter of fact, the Option granted does not confer any relevant entitlement to call for a conveyance on a person other than the appellant. Following the grant of the option, the appellant remained the person entitled to all for a conveyance of the subject matter of the original contract. It had no contractual or other right to put the title on itself as trustee of the Mariant Trust on 14 June 2012. The Grantee of the Option did not stand in the shoes of the appellant as purchaser and had no present right to call for a conveyance.

84. I accept Ms Wilson's submission that all that was granted was an Option to call for a conveyance, and the option could only be exercised on or after 14 June 2042 pursuant to the definition of Option Period under clause 1.1.9. The Option Agreement and the Deed that followed were not sufficient for a secondary contract to be deemed whereby the Grantee '*becomes entitled to call for a conveyance*' for the purposes of s 45(1).

An option a 'distinct' land transaction

85. Further, and as a matter of law, the Option grant is not capable of being deemed as a secondary contract for the purposes of s 45, since by virtue of s 46(1), the grant of an option is a land transaction '*distinct*' from the land transaction resulting from the exercise of that option.

> '46(1) The acquisition of –
>
> (a) an option binding the grantor to enter a land transaction, or
> (b) a right of pre-emption preventing the grantor from entering into, or restricting the right of the grantor to enter into, a land transaction,
>
> is a land transaction <u>distinct</u> from any land transaction resulting from the exercise of the option or right.' (emphasis added)

86. As set out earlier, s 45(1)(b) requires the subsale or similar transaction to be one '*relating to the whole or part of the subject matter of the original contract*'. I find therefore that the grant of the Option to Redmount-Mariant was a '*distinct*' land transaction by virtue by s 46(1), and is not an '*assignment, subsale or other transaction*' pursuant to s 45(1)(b). The grant of the Option is a land transaction which cannot be deemed as relating to the *same* subject matter of the Original Contract for s 45 to be engaged.

87. In construing whether a secondary contract can be deemed, the real and important question is to ask how s 44 operates, and to 'give sufficient weight to the importance and centrality of s 44' (*DV3* at [20]). In the light of s 44, the Grantee of the Option did not become entitled to call for a conveyance of the subject matter of the Original Contract. Regardless of the retrospective amendment to s 45(1A), the Scheme as implemented was ineffective for a secondary contract to be deemed for the purposes of s 45 because the Option grant did not confer on the Grantee the entitlement to call for a conveyance of the Property at Fernshaw Road, which was the subject matter of the Original Contract.

No substantial performance or completion on the same date

88. Even if the Option Agreement was capable of being a secondary contract for the purposes of s 45, it is not sufficient for the subsale relief to apply. To obtain the subsale relief, there must be substantial performance or completion of the secondary contract *at the same time* as the Original Contract was completed. 'The question of the effective date of completion of the secondary contract is key to the availability of the relief': *Fanning* at [30].

89. The secondary contract is a deemed contract for a land transaction, the subject matter of which is the freehold property at Fernshaw Road. On no view was this secondary contract (i.e.

if the Option Agreement were the secondary contract) being completed on 14 June 2012. There was no conveyance to the appellant as trustee of the Marian Trust; the appellant did not become registered proprietor of the Property on 14 June 2012 in that capacity.

90. Neither was there any substantial performance as defined by s 44(5), which requires either: (a) 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.

91. On the facts, the appellant is the person in 'possession' of the subject matter of the Original Contract for the purposes of s 44 and s 45. In terms of consideration, the Grantee must pay the open market value of the subject matter of the secondary contract (if one were to be deemed) at the date of the exercise. As HMRC submit, 'it is unreal to suggest that £1,000 or even £127,000 will be a "*substantial amount*" of a market value consideration'.

92. HMRC also submit that it would be absurd if the mere grant of a £1,000 option (to buy a £4.2m property in 30 years at its then market value) could relieve the appellant form SDLT on its £4.2m purchase. It renders SDLT on freehold and leasehold land transactions a 'voluntary tax', and that could not have been Parliament's intention in enacting s 45.

93. I agree that there is no reason to construe s 45 to reach such an 'unprincipled result' with the absurdity that a purchaser can simply determine the level of 'voluntary tax' he is prepared to pay by setting an option price at will and grant a call option in the hope of engaging s 45.

94. There was substantial performance, let alone completion, of the Option Agreement, even if the appellant were to argue that the secondary contract (if there were one) is 'substantially performed' because the consideration for the secondary contract is prescribed by s 45(3) and is the £1,000 or at best the £127,000. If the Option Agreement is within s 45(1) at all (and it is not), it must be because it is a transaction which confers an entitlement to call for a conveyance. In other words, the Option had to entitle the Grantee to stand in place of the Original Purchaser as legal owner, and nothing less that the payment of the full price would secure title to the subject matter of the Original Contract.

95. For there to be completion of the secondary contract, the transaction that needed to have taken place would have been the *exercise* of the Option whereby the Grantee paid the full exercise price (i.e. open market value of the Property at the option exercise date) at the same time as the Original Contract was completed. The appellant does not dispute that the Option has not been exercised, then as now. It follows that there could be no substantial performance or completion of the secondary contract, even if one could be deemed to have existed.

Counter arguments for the appellant

96. Mr Mullan has sought to distinguish the Scheme implemented by Redmount from the scheme in *Fanning*, which had the same step for the grant of a call option by agreement but without the corresponding step of executing an Option Deed as in the present case. In his submission, the execution of the Option Deed made the Redmount Scheme effective for s 45(3) where the *Fanning* scheme failed.

97. Specifically, Mr Mullan submits that unlike *Fanning* where the grant of option is not 'other transaction' under s 45(1)(b), clause 2 of the Option Agreement saves the Scheme:

> '**2. Agreement to enter into a deed granting an option**
>
> 2.1. In consideration of the payment of the Grant Price the Promisor agrees that it will enter into the Option Deed with the Promisee.
>
> 2.2. In consideration of the Promisor entering the Option Deed, the Promisee agrees to pay the Grant Price.'

98. In his submission, the rights promised by clause 2 of the Agreement were 'transferred' to the Grantee by the very act of the parties executing the Deed, and that the Grantor being bound by the Deed with the result that the Grantee became entitled to call for a conveyance to him, making the Option that of 'other transaction' for the purposes of s 45(1)(b).

99. In this respect, Mr Mullan's analysis is at odds with Andrews J's observation at [54] of *R (St Matthews)(Admin Court)*, wherein she stated:

> '… I cannot help but observe that in seeking to cure the fatal flaw in the original option schemes by interposing an intermediate agreement, those who devised this variant may have created a different, but equally fundamental, problem. The agreement by the purchaser B, to grant an option gives rise to no right on the part of the grantee, C, to call for a conveyance of the property to him, as required by s 45(1)(b). That is put beyond doubt by the express prohibition on seeking specific performance of the grant of the option. C derives any rights over the property from the third agreement in the chain, the option deed, which does not qualify as an "other transaction". At the very least, those factors severely undermine the argument that there has been a "transfer of rights" from B to C in consequence of the completion or substantial performance of the intermediate transaction. …'

100. The observation by Andrew J at [54] of *R (St Matthews)(Admin Court)*, according to Mr Mullan, should not be taken as referring to whether a 'contractual right' is being conferred on the grantee; that the SDLT code is concerned with 'rights', and the observation by Andrews J is about 'specific performance', which is a discretionary remedy.

101. In Mr Mullan's submission, the Option Agreement is the 'secondary contract', and the execution of the Option Deed is the 'completion' of the secondary contract. By virtue of the Option Deed, it is argued that there was not only substantial performance, but indeed 'completion' of the secondary on the same date as the Original Contract. Furthermore, it is submitted that 'the transfer of rights' was effected upon the execution of the Deed, and not by reference to the exercise of the Option.

102. On one interpretation, and as I understand it, Mr Mullan is making the point that the extra step of executing the Option Deed in the Scheme saves the Scheme where the *Fanning* scheme fails. It means that there was 'completion' of the secondary contract with the Option Deed at the same time as the Original Contract for s 45(3) to be engaged. In the *Fanning* scheme, the absence of the step to make the option deed means that completion of the secondary contract can only come from the *exercise* of the option.

103. The effectiveness of the Scheme, as analysed above, falls to be determined with reference to 'real world' transactions. In *Project Blue* the Supreme Court held at [37] that 'the context of the use of the word "vendor" was in relation to "real world" transactions' in relation to s 45(5A)(b), which states:

> '(5A)(b) other references in this Part to the vendor shall be read, where the context permits, as referring to either the vendor under the original contract or the *transferor*.' (italics added)

104. In a similar vein, the use of the word 'transferor' in s 45(5A)(b) (with reference to the 'secondary contract') is in relation to 'real world' transactions as much as the use of the word 'vendor' (with reference to the original contract).

105. Section 45(1)(b) therefore requires me to ask the 'real world' question: 'is there an assignment, subsale or other transaction as a result of which a person other than the appellant becomes entitled to call for a conveyance to him?' The question has been answered in the negative as a matter of legal analysis set out above. As a matter of fact, and to go with the grain

of Mr Mullan's submissions, the question can be re-cast by focusing on the Option Agreement, by asking: 'Has the Transferee ('T') acquired the right to call for a conveyance of the Property at Fernshaw Road upon entering into the Option Agreement (with its operative clause 2.1)?'

106. The appellant is the purchaser 'P' in the V-P contract, and is also the transferee 'T' in the supposed P-T contract (albeit as trustee of an apparently different trust). The fact that P and T are identical in the supposed P-T contract has beclouded issues in the present case. However, even if the Option Agreement were to be taken as a genuine commercial contract, there still was no transfer of rights to call for a conveyance, notwithstanding clause 2.1 in the Agreement. At its most fundamental level, the call option over the Property is not a transaction that 'completes' a land transaction within the definition of s 44(10), nor would it be 'substantially performed' until the Option is exercised. In order for the s 45(3) subsale relief to apply, the two transactions (the V-P original contract, and the P-T secondary contract) must simultaneously complete, or be substantially performed.

107. The focus on the provision of an Option Deed in the Agreement in this part of Mr Mullan's submissions would seem to suggest that there was simultaneous completion of the P-T contract as when V-P contract was completed for s 45(3) to be engaged. As a matter of legal analysis, such submission would be to ignore s 46(1), and the corollary that the Option cannot 'complete' a land transaction for s 44(1) purposes. As a matter of fact, and taking the Option Agreement on its own terms, there is the Option Period of 30 years before it can be exercised, and there are the restrictions under clause 16 to its exercise, which mean that no simultaneous completion, or substantial performance of the P-T contract could have taken place on 14 June 2012 to transfer the rights to T to call for a conveyance of the Property.

108. There was no transfer of rights to the appellant (as trustee of the Mariant Trust) on 14 June 2012 to call for a conveyance of the Property. The pre-conditions for the exercise of the Option were absent on 14 June 2012, let alone any payment of the full consideration for such rights to be transferred as required by the Agreement: the market value of the Property on the date of the exercise of the Option. Mr Mullan's nuanced submissions cannot change the fundamentals of the analysis that the Grantee of the Option was not entitled to call for a conveyance of the subject matter of the Original Contract for there to be a secondary contract. Nor is the fundamental flaw in the Scheme being cured simply by inserting an extra step of executing an Option Deed the day after the Option Agreement. The material fact is that there was no substantial performance or completion of the secondary contract by way of exercise of the Option simultaneous with the completion of the Original Contract in the Redmount Scheme, and it fails in like manner as the one in *Fanning* (noting that it is being appealed to the Upper Tribunal).

109. If I stand back and look at the transactions in the real world, the inescapable conclusion I draw is that Mr Mullan's submission in this respect has the consequence of rendering SDLT a tax on documents, which 'runs against the grain of the legislation'. I find Mr Mullan's submissions to possess an internal logic peculiar unto itself, but cannot be mapped onto the 'real world' transactions to which the s 45(3) subsale relief is to apply. Quite apart from the express provisions under s 46(1) governing the grant of an option, if the secondary contract were to be deemed to be completed as Mr Mullan submits, then the SDLT liability by that analysis is detached from the operation of s 44. The mere 'transfer of rights' is not sufficient for the purposes of s 44, which is concerned with the *conveyance* of a chargeable interest, and not the contract governing the transfer of rights per se. (The tax is chargeable '*whether or not there is any instrument effecting the transaction*': s 42(2).) The nexus for SDLT liability is anchored with the conveyance of a chargeable interest. The 'transfer of rights' by the Option Deed has not dislodged the SDLT nexus, which continued to reside with the appellant as the purchaser who was entitled to call for a conveyance of the Property.

Section 75A (anti-avoidance) applies

110. Even if I were wrong with the above analysis, the Scheme falls within the anti-avoidance provisions of s 75A. As HMRC submit, in the alternative, the appellant is liable to charge under s 75A in respect of the chargeable consideration placed on the notional land transaction. It is HMRC's case that the Option had no commercial purpose other than to save SDLT. HMRC rely on all the facts, including:

(1) the limited and delayed option period;

(2) the contingent higher Grant Price of £127,000, which can only be explained as a means to ensure the Grantee might make its own SLDT return; noting however, that it was the appellant who paid the SDLT of £1,270 due from the Grantee (and it did so on the basis that the Option Agreement provided for a contingent consideration, so that s 51 required the higher amount of £127,000 to be returned);

(3) the restrictions on assignment set out in clause 16 of the Option;

(4) the fact that the appellant acted as trustee for both Grantor and Grantee;

(5) more generally the fact that the appellant has chosen not to evidence or defend the legitimacy of the Scheme and has provided no evidence whatsoever of any non-tax commercial purpose for granting the option.

111. As provided by s 75A, the appellant (P) entered into a set of transactions under which it directly or indirectly acquired a chargeable interest from V (the freehold which he exploited for occupation or for letting). Through a set of transactions, which includes the option grant to itself in its capacity as trustee of the Mariant Trust, (not exercisable for 30 years), less SDLT has been paid than would have occurred in a straightforward acquisition of the property by the appellant. To that end, HMRC submit that the conditions set out at s 75A(1)(a)-(c) are met and s 75A FA 2003 is engaged.

112. In *Project Blue*, the Supreme Court by a majority held that 'section 75A has been drafted in broad terms to catch a range of tax avoidance schemes and prevent unintended tax losses by the use within a series of transactions of a combination of reliefs and exemptions': at [69]. I have no difficulty in finding that there have been unintended tax losses by the use of the Scheme. Section 75A is engaged, with the result that the Scheme transactions are to be disregarded by virtue of s 75A(4), and a chargeable consideration of £4,200,00 is placed on the notional land transaction, resulting in SDLT of £294,000.

Conclusions on the 'Voluntary Return' argument

The Land Transaction Return is a return pursuant to s 76 FA 2003

113. Having considered the relevant statutory provisions and applying them to the factual matrix in the present case, the conclusion I reach is that the Scheme was ineffective as it stood at the effective date of transaction (14 June 2012) for the Original Contract to procure the subsale relief under s 45(3) FA 2003; and this is so, even before the retrospective amendment to s 45(3). The acquisition by the appellant of the Property was therefore a notifiable transaction of a chargeable interest, and the statutory requirement to file a land transaction return to notify the transaction followed, as the night the day.

114. On that basis, I make the finding of fact that the Land Transaction Return filed by the appellant on 25 June 2012 was a return filed under s 76 FA 2003, and all legal consequences follow therefrom as provided within the legislative framework for the SDLT code.

115. It is argued for the appellant that the Scheme was effective so that the Original Contract was disregarded under the terms of s 45(3) FA 2003 as was *then* in force at the effective date of the transactions on 14 June 2012 before its retrospective amendment by FA 2013. On my

finding of fact as regards the efficacy of the Scheme at the effective date, the whole edifice upon which the 'voluntary return' argument is constructed falls apart; the argument falls away.

The enquiry powers under para 13 Sch 10

116. In any event, I agree with HMRC's submission that the duty to make a land transaction return arises with immediate effect regardless of the true tax consequences of the underlying transaction. In the present case, the return submitted in June 2012 contained information about the purchase of the Property by the appellant. *Project Blue* confirms that there is no limit on HMRC's power to enquire into any return once a purchaser has taken the step to file one. That power follows from para 13 of Sch 10, which provides that:

> '(1) An enquiry extends to anything contained in the return or required to be contained in the return that relates –
>
> (a) to the question whether tax is chargeable in respect of the transaction, or
> (b) to the amount of tax so chargeable.'

117. As Ms Wilson submits, even if one is to suppose that s 45(3) applies, and the only issue is s 194, then adopting the reasoning in *Project Blue* at [83], HMRC have the powers to enquire into that return by virtue of the powers provided under para 13 Sch 10:

> '… the fact that the information in the return was provided to HMRC in relation to a transaction [i.e. the appellant's purchase of the Property], which was to be disregarded under … section 45(3) … does not limit the scope of the enquiry. HMRC were entitled to enquire into the tax consequences of that sale. The powers of HMRC on completion of the enquiry are set out in paragraph 23 of Schedule 10 …

A notional transaction under s 75A

118. The 'voluntary return' argument in the present case is a variant of the argument advanced by the taxpayer in *Project Blue*, which was summarised at [82] in Lord Hodge's judgment. Project Blue argued that its SDLT return was 'not strictly necessary' due to s 45(3) disregard; that HMRC had no power to amend the return in order to impose a liability to SDLT on the separate, notional transaction. The Court rejected this procedural challenge and held that:

> 'HMRC were entitled to enquire into that sale and, on ascertaining that it was a part of a series of transactions which gave rise to a section 75A charge, to amend the return to reflect the tax due on the notional freehold acquisition under section 75A(5). Any obligation on [Project Blue] to submit a return in relation to the notional transaction does not limit the scope of HMRC's power to enquire into the [V-P] sale or their power to amend the return under paragraph 23.'

119. Even if I were wrong in reaching the conclusion as regards the efficacy of the Scheme before the amendment of s 45(3), I find the Scheme to be caught by s 75A anti-avoidance provisions. *Project Blue* is then the express authority that the enquiry opened into the appellant's submitted return was valid, and can found the closure notice amendment to the return to reflect the tax liability under s 75A(5), irrespective of any obligation on the taxpayer to submit a return in relation to the notional transaction under s 75A.

SDLT code critically different to nullify the procedural challenge

120. The procedural challenge in the instant case in reliance on *Bloomsbury* and *Patel* is misconceived. The enquiry-closure notice procedure under the SDLT code is critically different in a most significant respect from the statutory code that governs the enquiry-closure notice procedure under TMA 1970.

121. The appellant's procedural challenge has relied on *Patel* and *Bloomsbury*. In *Patel*, the taxpayers filed tax returns which were 'voluntary' or 'unsolicited' in the sense that HMRC had not served a notice to file a return under s 8(1) TMA. An analogous situation arose in *Bloomsbury* as regards the operation of Schedule 18 to the Finance Act 1988, wherein the taxpayer company filed a 'voluntary' corporation tax return for the relevant year, in the sense that HMRC had not served a notice on the taxpayer company under para 3 Sch 18 to require a return to be filed. HMRC in *Bloomsbury* argued that the loss relief in the 'voluntary' return had no effect. The FTT determined the point in favour of HMRC, concluding that a 'voluntary' return was not a return with any statutory consequences (although the appeal was ultimately determined in favour of the company on other grounds).

122. By virtue of s 12D TMA 1970, the position on voluntary returns for direct tax purposes has been retrospectively amended, which renders *Patel* and *Bloomsbury* of little or no relevance. However, the appellant has relied on the position prior to this retrospective amendment by s 12D TMA to mount the procedural challenge. The reliance is to say the SDLT code is analogous to the TMA framework before the amendment, wherein a taxpayer could have made a voluntary return upon which no legal consequences could have been founded.

123. The concept of a 'voluntary return' in the TMA framework (before s 12D) was derived from the critical provision that a s 8(1) notice must be served by HMRC on a taxpayer in the first place. Without the s 8(1) notice to require the taxpayer to deliver a return, any return lodged by a taxpayer would then be 'voluntary'.

124. The enquiry-closure notice procedure within the TMA code (before s 12D) was that a valid notice of enquiry into a return under s 9A was one not only made within the statutory time limit reckoned from the filing due date of a return, but that it must also be an enquiry into a return delivered under s 8(1). A valid s 9A enquiry could therefore only be founded on the effective service of a s 8(1) notice on the taxpayer to require a return to be delivered in the first place. A closure notice under s 28A was in turn only founded on a valid s 9A enquiry having been opened. The rigid statutory code under TMA required HMRC to serve a notice at each step. Without a requisite s 8(1) notice, there would be no corresponding statutory effect in terms of s 9A and s 28A.

125. Mr Mullan has submitted that there is 'no equivalent amendment' as s 12D TMA being enacted for the SDLT code. He has drawn on the absence of an equivalent s 12D TMA in the SDLT code to support the procedural challenge based on the voluntary return argument.

126. However, it seems obvious to me why the SDLT code has no amendment provision equivalent to s 12D TMA, which is headed '*Returns made otherwise than pursuant to a notice*'. The truth is that there has never been an equivalent s 8 TMA provision within the SDLT code to necessitate any s 12D TMA equivalent amendment. The simple fact why there has never been any SDLT provision equivalent to s 8 TMA is that no other person knows better than the purchaser when there is a notifiable land transaction. It will defeat the efficacy and administration of the SDLT regime if the burden were to be on HMRC to serve a notice to file a land transaction return on a purchaser before any SDLT liability can be assessed.

127. The SDLT code places the onus squarely on the purchaser to file a land transaction return on a *notifiable* transaction. As a matter of law that there is no equivalent provision to s 8 TMA within the SDLT code to support the procedural challenge based on the voluntary return argument. In a 'real world' transaction, the purchaser is the person who has the knowledge to *notify* HMRC of the transaction, and the legislation correctly places the initiative on the purchaser to self-assess the relevant SDLT liability, as the appellant did with filing the Land Transaction Return on 25 June 2012 to *notify* the relevant land transaction and to claim subsale relief. The appellant's procedural challenge therefore has no statutory basis.

128. I therefore reject the procedural challenge mounted on the 'voluntary return' argument. Not only does the efficacy aspect of the Scheme dismantle the 'voluntary return' argument, but that the concept of 'voluntary return' is simply not arguable within the SDLT code in the absence of any mandatory pre-condition to be met by HMRC before a statutory obligation arises for a purchaser to deliver a land transaction return.

Other practical reasons to file a valid SDLT return

129. As HMRC submit, there are other practical reasons why the appellant had filed a return for s 76 FA 2003 purposes on 25 June 2012. The appellant had every interest to obtain a registration of title of the Property with the Land Register, and that registration is administratively dependent on the SDLT5 certificate being issued. The SDLT5 certificate is issued by HMRC upon the filing of a *valid* SDLT return in the form of SDLT1. The appellant did file a valid return in the form of SDLT1, and presumably received the SDLT5 which would have been pivotal for its title registration.

130. Furthermore, the filing of the return within the statutory time limit of the effective date of the Original Contract also protects the appellant against certain penalties, such as the tax-geared penalty (if the Scheme is to fail) under para 3 Sch 10 FA 2003 in relation to failure to file a return under s 76 FA 2003.

The return filing requirements following retrospective amendment

131. On the face of the evidence, I infer that the appellant had all along considered the Land Transaction Return it filed on 25 June 2012 was a return for s 76 FA 2003 purposes. This inference is strongly supported by the action taken by the appellant following the retrospective amendment to s 45(1A), with its corresponding requirements on scheme users to either (i) file an SDLT return (if one had not been filed) or (ii) to amend the return by writing to HMRC with amendment details in the prescribed format as published in the Guidance.

132. In *DV3* the Court of Appeal held that subsale relief was not available and the return was therefore 'required'. The appellant did not differ from that position either by its very action to file the Land Transaction Return on 25 June 2012 (in the eventuality that the Scheme fails), and I find as a fact that the appellant's letter of 27 September 2013 was an intimation to amend the SDLT return which it considered it had filed on 25 June 2012.

133. The relevant part of the letter started by referring to s 194(8) and (12) of FA 2013, and the appellant expressly used the heading of 'Amendment of return'. HMRC were asked to 'take this letter as an amendment to the limited extent of asserting the Purchaser's rights' under HRA. On no view, based on the obtainable documentary evidence, did the appellant try to submit a fresh return as if the Land Transaction Return of 25 June 2012 was a nullity. On the contrary, the appellant sought to meet its filing obligation in relation to the filing requirements following the enacted amendment to s 45(1A), and it did so by way of a letter to *amend* a valid land transaction return which the appellant considered it had filed on 25 June 2012.

134. The 'voluntary return' argument which seeks to re-characterise the Land Transaction Return of 25 June 2012 as a nullity is without factual basis. For all the reasons stated, I reject the 'voluntary return' argument in its entirety, both as a matter of law and as a matter of fact.

The closure notice 'time limit' argument

135. Given that I have found the closure notice to be valid, I now turn to address the time limit argument. Mr Mullan's submission in this respect relies on the time limit provisions under para 31(1). As a matter of statutory construction, the time limit provision under para 31 is specific to the discovery assessment regime, which deals exclusively with discovery assessments. It does not apply to the closure notice procedure, nor does it apply to a determination by HMRC as provided under Part 4, which has its own time limits under para 25(3) and para 27(2).

136. Looking at para 23 (for the closure notice procedure) on its own, it does not incorporate any provisions under paras 31, 31A or 32 of Sch 10 to FA 2003. It is not permissible therefore to import the time limit provisions under para 31 and so on to interpret para 23.

137. In terms of statutory provisions as concerns time limits, para 23 does not stipulate any time limit on the issue of a closure notice. Insofar as the statute does refer to a time frame, I have regard to sub-para 23(3), which states: '*A closure notice takes effect when it is issued*'.

138. Not only is there no express time limit provision for the issue of a closure notice, sub-para 23(3) implies that no such time limit is intended to apply to a closure notice. The statute intends one operative time limit in relation to the enquiry-closure notice procedure, and that is referable to the time limit in opening an enquiry. A valid enquiry is founded on meeting the statutory time limits provided under para 12 Sch 10, and a closure notice is, in turn, founded on a valid enquiry having been opened; but a closure notice is without bounds of a time limit.

139. As Ms Wilson rightly submits, the taxpayer is afforded protection from an unnecessarily prolong enquiry by the fact that the enquiry itself and the subsequent closure notice must relate to the matters prescribed (para 13 Sch 10), and the taxpayer has the right under para 24 Sch 10 to apply to the Tribunal for a direction that HMRC issue a closure notice.

140. The stage at which an enquiry into the appellant's valid SLDT return is completed is identified by a closure notice being given under para 23 Sch 10, which is described as a notice which informs the purchaser that HMRC 'have completed their enquiries and state their conclusions'. The purpose and legal importance of a closure notice are being addressed in some length by the Supreme Court in *Tower MCashback*.

141. The closure notice was issued on 7 September 2016 while the enquiry was opened on 13 September 2012. To the extent that there had been a delay in issuing the closure notice following the retrospective amendment to s 45(1A), that delay was largely occasioned by the Judicial Review proceedings against the retrospective effect of the enacted amendment.

142. I have special regard to the fact that the appellant wrote on 27 September 2013 to 'amend' its return pursuant to s 194(8) and (12) of FA 2013. In that letter, the appellant made specific reference to the judicial review proceedings and stated that 'an amendment of the land transaction return to show SDLT as being due would be premature at this time' in view of the 'outstanding [judicial review] proceedings'.

143. The judicial review proceedings were only fully concluded on 23 December 2015 when the Supreme Court refused permission for the taxpayers to appeal the order made by the Court of Appeal refusing the judicial review challenge. However, the taxpayers sought to appeal to the European Court of Human Rights, and that appeal was declined by the ECHR by letter dated 15 September 2016, (per Statement of Agreed Facts annexed).

144. For the appellant, it is argued that there had been an (inordinate) delay in issuing the closure notice. In my judgment, if there had been a delay, that delay would appear to have been occasioned by the appellant's express wish that there should be no amendment to the Land Transaction Return filed on 25 June 2012 pending the outcome of the judicial review proceedings. Given that those proceedings only came to an end in September 2016, the closure notice which was issued on 7 September 2016 could not have been said to be delayed without good reason, that reason being at the appellant's behest.

145. The 'time limit' argument in relation to the Closure Notice appeal is therefore without statutory basis, and any alleged delay as to be unreasonable is unsupported by the obtainable facts. I therefore dismiss this ground of appeal.

THE DISCOVERY ASSESSMENT APPEAL

146. It is accepted that HMRC bear the burden of proof in relation to the validity and time limit issues as set out by the Upper Tribunal in *Burgess and Brimheath*. The parties proceeded with their submissions in the order of Mr Mullan for the appellant first, followed by Ms Wilson in reply for the respondents. I have set out their respective submissions in that order.

APPELLANT'S CASE

147. Mr Mullan emphasises the right of the taxpayers to finality; that the relevant facts to the Discovery Assessment appeal are separate from those relevant to the Closure Notice appeal; that there is 'the danger and an element of amalgamation of the two'; and it is critical to look at what the legislation says in relation to a valid discovery assessment. Mr Mullan submits:

(1) HMRC must have newly discovered the insufficiency within the meaning of para 28 Sch 10 FA 2003: that 'an amount of tax that ought to have assessed has not been assessed'. The appellant does not accept that this burden has been met.

(2) On the facts, there had never been an enquiry whether there had been a return or no return. The case at all relevant times identified by HMRC at the enquiry process was that there was a relevant return, and the mechanism relied on was the closure notice, which was 'arguably defective'; that HMRC 'made a mistake here', and the present case is 'very close to what is going on in *Tooth*'.

(3) *Atherton* was decided before *Tooth*, and the Tribunal needs to be cautious about its application given aspects of which are 'not entirely consistent with what the Court of Appeal says in *Tooth*'.

(4) A conclusion as to the mechanism under which an assessment is to be issued is not a discovery for these purposes. As such, in this case the appellant's argument that there was no statutory enquiry could not lead to a new discovery any more than the realisation in *Tooth* that there was no statutory enquiry could. At all relevant times, HMRC were aware of the insufficiency of the assessment in place.

(5) The 'Second Assessment' was issued some two years after the 'First Assessment' and potentially considerably longer from the time HMRC had determined that tax was due. It follows that the 'Second Assessment' issued in September 2018 did not have the 'requisite element of "newness" to amount to a discovery assessment'.

148. As respects the time limit issue, Mr Mullan submits:

(1) The Second Assessment was issued on the basis that there had been no land transaction return required by section 194(10) FA 2013. As such, it is asserted that the 20-year time limit under para 31(2A) Sch 10 FA 2003 applied. It follows, however, that if a land transaction return had been filed, the extended time limit does not apply, and the Second Assessment was issued out of time.

(2) HMRC's position on this point is based on the assumption that the letter of 27 September 2013 from the appellant was not a land transaction return. It is submitted that was incorrect.

(3) It is argued for the appellant that the letter of 27 September 2017 incorporated all of the information necessary to meet the obligation of a return, including a self-assessment and made express reference to the Nanu SDLT1. This is not surprising as it was based on a template provided by HMRC for the purpose.

(4) The letter amended the Nanu SDLT1 to the limited extent of asserting rights under Human Rights Act 1998 (which would not form part of the return in any event per

Cotter). The letter and the Nanu SDLT 1 (incorporated by reference) was a land transaction return in the prescribed form. The appellant was adopting the previous voluntary document to meet its obligations.

(5) Furthermore, it was accepted by HMRC as meeting that obligation and was based on a template provided by HMRC. As such it was in a form which had been approved by HMRC for the purposes of reg 9 SDLT (Administration) Regulations 2003/2937 and is a land transaction return in the prescribed form.

HMRC'S CASE

149. In relation to the validity issue of the discovery assessment, Ms Wilson submits that:

(1) If the appellant were to be correct to characterise its original 'nil' return as something in which no valid enquiry could be made, it must follow that it should have made a fresh return under the FA 2013 legislation.

(2) The retrospective changes in 2013 required purchasers to submit a return by 30 September 2013 where one had not already been submitted. This was a fresh obligation.

(3) In these circumstances, the deadline for HMRC to issue an assessment is 20 years, as stipulated in para 31(2) Sch 10 FA 2013.

(4) In other words, HMRC are in time and entitled to raise a discovery assessment under para 31(2A) of Sch 10 to FA 2003.

(5) Further, HMRC noted that the appellant sought to amend the 'voluntary return' on 27 September 2013, which is evidence that the return is a return within s 76 FA 2003 and is sufficient to found an enquiry and valid closure notice. HMRC say that *if* this is not the case, and the return is a nothing, then the appellant's amendment to that 'return' on 27 September 2013 is also a nothing.

150. In relation to the time limit issue, Ms Wilson makes the following submissions:

(1) HMRC rely on the oral and written evidence of Officer Barlow. In that regard, the discovery is not that the self-assessment return is insufficient (HMRC always took that view and still do on the primary case). The discovery is that should the appellant's new argument regarding the legal effect of the return prevail, then –

(a) A return will not have been submitted and consequently an amount of tax that ought to have been assessed will not have been assessed, and

(b) HMRC's current view of the law will then be incorrect, (specifically s 76 and s 77 FA 2003 and s 194 FA 2013).

(2) It follows that the facts of this case are distinguishable from those considered in *Tooth*. The discovery is different, and fact-specific, and the period between discovery and raising the assessment is short (8 months).

(3) *Atherton* further supports HMRC's case. In particular, the Upper Tribunal's observation at [30] to [34] about HMRC's understanding of the law and about the three categories of discovery, which are common to both the TMA 1970 and FA 2003.

(4) HMRC do not accept that the concept of staleness in discovery assessments can limit the period permitted by para 31(2A) of Sch 10 FA 2003 for issuing an assessment.

(5) In any event, the relevant 'discovery' was not that tax had been (under) assessed but rather it had not been assessed at all, because what was thought to have been an SDLT return, was a 'nothing'. HMRC were proceeding on the basis that there was a valid return and a valid enquiry from 13 September 2012. The discovery that that might not be case

was only made or following receipt of the appellant's revised skeleton of 1 February 2018. It is on that basis that HMRC discovered that an amount which ought to have been assessed had not been assessed (at all). The assessment then issued on 25 September 2018 was on any view a reasonable period of time.

DISCUSSION

151. Given my foregoing conclusions as concerns the Closure Notice appeal, *Cotter* is irrelevant. HMRC win on the Closure Notice Appeal, and I need only be brief as regards the Discovery Assessment appeal. The relevant finding of fact to determine this appeal is the nature of discovery. The Upper Tribunal's conclusions in in *Atherton* are instructive in this respect:

> '[32] While we do not consider that the same HMRC officer could make the same discovery more than once, we see nothing to prevent an officer … making successive different discoveries in relation to Mr Atherton's 2007/08 tax liability. Section 29 refers in the alternative to a discovery of any of three situations. The discovery in 2014 falls squarely within sub-s(1)9b0 of s 29 as being a discovery "that an *assessment to tax* is or *has become insufficient*' (emphasis added). The self-assessment had become insufficient because, following *Cotter*, the entry made by F&L in Box 20 took effect to reduce the "assessment to tax" to nil.
>
> [33] The effect of Lord Hodge's judgement in *Cotter* was that HMRC had been wrong to open the 2009 enquiry on the basis that the loss claim was a standalone claim. However, the consequence of that was not … confined to a realisation by HMRC that they has used the wrong procedure in 2009. While HMRC was both cognisant of the relevant facts and of the ineffectiveness of Romangate well before 2014, it was *Cotter* which demonstrated that their understanding of the law had been wrong. The FTT expressed the position accurately at para [230] of the Decision:
>
> > " […] Mr Clarke [HMRC officer] discovered … that his view of the law was wrong and that the self-assessment *in law* was for nil and was therefore insufficient.""

152. I find therefore that Officer Barlow did make a discovery on 1 February 2018 in that the view held by HMRC until then that a valid enquiry had been opened to found the closure notice could be wrong *in law* (in the event that the 'voluntary return' agreement were to succeed). In the context of the ongoing litigation, and the subsequent steps taken by HMRC to ascertain if the appellant would be permitted to raise the new ground of appeal, the issue of the discovery assessment some 8 months later in September 2018 was within a reasonable time scale.

153. Moses LJ in giving the judgment of *Tower MCashback* at the Court of Appeal said:

> 'As I have already observed, apart from a closure notice, and the power to correct obvious errors or omissions, the only other method by which the Revenue can impose additional tax liabilities or recover excessive reliefs is under the new s 29. That confers a far more restricted power than that contained in the previous s 29. … There are statutory limitations as to the time at which the sufficiency or otherwise of the information must be judged. These provisions underline the finality of the self-assessment, a finality which is underlined by strict statutory control of the circumstances in which the Revenue may impose additional tax liabilities by way of amendment to the taxpayer's return and assessment.'

154. In view of the procedural history, the decision taken by HMRC to issue the Discovery Assessment was the only alternative if the 'voluntary return' argument were to prevail. There has been no prejudice to the appellant's right to finality, since the retrospective amendment to

s 45(1) made the tax position amply clear as to the efficacy of the Scheme in avoiding the SDLT liability on the Original Contract. In any event, the SDLT liability as assessed by the discovery assessment crystallised upon the retrospective amendment of s 45(1A), and if the Land Transaction return filed on 25 June 2012 was a nullity as the appellant asserted, then the discovery assessment was valid in assessing what the appellant had failed to self-assess.

DISPOSITION

155. For the reasons stated, the appeal against the Closure Notice to amend the land transaction return filed on 25 June 2012 is dismissed.

156. In the alternative, the appeal against the Discovery Assessment is also dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

157. 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.

DR HEIDI POON
TRIBUNAL JUDGE

Release date: 24 NOVEMEBR 2021

ANNEX 1: STATEMENT OF AGREED FACTS

Relating to the acquisition of 9 Fernshaw Road, London SW10 0TB ("the Property") by Redmount Trust Company Limited ("Redmount") on 14 June 2012. NB: All statutory references are to the Finance Act 2003 "FA 2003" or Finance Act 2013 "FA 2013" (the latter concerning retrospective changes to the former).

Summary

1. On 1 May 2012 Redmount, acting as trustee of the Nanu Trust "Redmount/Nanu", entered into a contract ("the Original Contract") for the purchase of the Property from the vendors for £4.2m with a completion date of 14 June 2012.

2. On 13 June 2012 Redmount/Nanu exchanged a contract ("the Agreement") with Redmount acting as trustee of the Mariant Trust "Redmount/Mariant". Under the terms of the Agreement, Redmount/Nanu was required to grant a call option ("the Option") to Redmount/Mariant to purchase the Property upon payment by Redmount/Mariant of the "Grant Price", being either £127,000 or (if the Grant Price was paid within 2 months of completion of the Original Contract) £1,000.

3. On 14 June 2012 the Original Contract was completed and a (TR1) transfer of the Property by the vendors to Redmount/Nanu was executed. At the same time, Redmount/Nanu and Redmount/Mariant completed the Agreement by granting the Option as an executed deed pursuant to the Agreement. Under its terms, the Option can be exercised by the grantee (Redmount/Mariant) at any time during the "Option Period", being the period between 30 and 35 years after the date of the Option deed (or earlier by mutual agreement) for a price equal to the market value of the Property.

4. Redmount/Nanu filed a Land Transaction Return in respect of its acquisition of the Property claiming subsale relief under Section 45 FA 2003 by entering code 28 "other relief" in box 9 of the Return, so that no SDLT was assessed by that Return.

5. Redmount/Mariant filed a Land Transaction Return in respect of its acquisition of the Option. The chargeable consideration for this land Transaction Return was treated as the maximum possible Grant Price at that time (£127,000) in accordance with Section 51(1) FA 2003 and so £1,270 of SDLT was paid (at the 1% "slab" rate applying at that time).

6. HMRC enquired into Redmount/Nanu's Land Transaction Return for the Property by letter dated 13 September 2012, within the normal 9 month and 30 day post completion enquiry period under Paragraph 12 Schedule 10 FA 2003.

7. Under the terms of Section 45 FA 2003 in force at the time (and before the retrospective amendment to Section 45(1A) FA 2003):

(1) Redmount/Nanu entered into the Original Contract which was to be completed by a conveyance (Section 45(1)(a));

(2) The Agreement was an assignment, subsale or other transaction (relating to the whole or part of the subjectmatter of the Original Contract) as a result of which a person other than the original purchaser (here, the option grantee) became entitled to call for a conveyance (here, the Option) (Section 45(1)(b)). Note, in particular, that Section 45(7) provided:

> "In this section "contract" includes any agreement and "conveyance" includes any instrument."
>
> Therefore, for these purposes the Agreement was a "contract" and the grant of the Option was a "conveyance".

(3) Under Section 45(3), the completion of the Original Contract at the same time as, and in connection with, the completion of the Agreement (by the grant of the Option) is disregarded, so that Redmount/Nanu assessed that no SDLT was payable by them as purchaser of the Property, a matter not admitted by the Respondent (who asserts that payment for the grant of the option is a different legal interest and therefore Section 45(3) is not in point).

(4) If Section 75A FA 2003 applies to the arrangements, then the Option is a scheme transaction and so the effective date of the notional transaction will not arise until the Option is exercised (Section 75A(6) FA 2003). The potential application of section 75A FA 2003 also has the consequence that Redmount/Nanu's acquisition of the Property is disregarded (Section 75A(4) FA 2003).

8. Sections 194(1)(a) and 194(2) FA 2013 amend Section 45(1A) FA2003 so that, with retrospective effect to 21 March 2012, the provisions in Section 45 FA 2003 no longer apply to "an agreement for the future grant or assignment of an option".

9. Section 194(8) and (12) FA 2013 requires that where Section 45 FA 2013 no longer applies to a taxpayer; the effective date of the transaction was before the passing of FA 2013; and the taxpayer has already submitted a land transaction return, then the taxpayer is required to give notice under Paragraph 6, Schedule 10 FA 2003 amending a return which has to be filed by 30 September 2013.

10. Judicial review proceedings challenging the above retrospective legislation were commenced on 3 September 2013.

11. Redmount/Nanu filed a conditional amended Land Transaction Return dated 27 September 2013.[1]

12. As regards the judicial review challenge to the retrospective amendment to Section 45 (1A) in *R (on the application of APVCO 19 Ltd and others) v HM Treasury and HMRC* [2015] EWCA Civ 648, on 23 December 2015 the Supreme Court refused permission for the taxpayers to appeal the order made by the Court of Appeal refusing the judicial review challenge. The taxpayers lodged an appeal at the European Court of Human Rights (within the 6 month appeal deadline), and that appeal was declined by the ECHR by letter dated 15 September 2016 and received later that month. It was initially considered appropriate to write to the ECHR seeking clarification as to why the appeal was declined (since no specific explanation or reason was given other than a generic decision to declare the application inadmissible), but in the interest of costs it was subsequently decided at the earliest in October 2016 not to pursue the matter with the ECHR.

13. Due to the unsuccessful judicial review proceedings, the effect of the retrospective amendment is to deny Redmount/Nanu SDLT subsale relief under Section 45 FA 2003, but that was not known for certain until late September 2016 as above at the earliest.

14. HMRC issued a closure notice to Redmount/Nanu dated 7 September 2016 for £294,000 SDLT plus £10,102.40 interest on late paid SDLT. This was therefore more than 4 years after the completion date of 14 June 2012 and, as the Appellant contends, on all fours with the facts in the case of (1) *Milltown Limited* (2) *Albert House Property Finance PCC Limited* (in *Members Voluntary Liquidation) v HMRC* [2016] UKFTT 0640 (TC) and accordingly Redmount/Nanu appealed to HMRC by letter date 4 October 2016 to postpone (stay) its case pending the outcome of the *Milltown Limited* case.

15. Redmount/Nanu wrote to HMRC on 12 December 2016 requesting a review of HMRC's decision of 15 November 2016 declining Redmount/Nanu's appeal and that review rejected Redmount/Nanu's appeal by letter dated 27 February 2017 and Redmount/Nanu therefore appealed to the First Tier Tax Tribunal on 29 March 2017.

[1] Ms Wilson qualified paragraph [11], stating that HMRC are not running an 'estoppel' case based on the Statement of Agreed Facts being made before the 'voluntary return' argument was introduced, and that the paragraph does not bind HMRC in their legal argument either.

ANNEX 2 – Authorities

(1) *London and Southern Western Railway Co v Gomm* (1882) 20 Ch D 562, HC ('***SW Railway***')

(2) *Lauri v Renad* [1892] 3 CH 402 ('***Lauri v Renad***')*

(3) *Quadrangle Development and Construction Co. Ltd v Jenner* [1974] 1 WLR 68, CA ('***Quadrangle Development***')

(4) *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553, PC ('***Yew Bon Tew***')*

(5) *Armstrong & Holmes Ltd v Holmes and Anr* [1994] 1 All ER 826, HC ('***Armstrong & Holmes***)

(6) *Peter Bone Ltd v IRC* [1995] STC 921, HC ('***Peter Bone v IRC***')

(7) *Kleinwort Benson Ltd v Lincoln C.C. and Others,* HL, [1999] 2 AC 349 ('***Kleinwort Besnon***')*

(8) *IRC v Scottish Provident Institution* [2004] UKHL 52, [2004] 1 WLR 3172 ('***Scottish Provident***')

(9) *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51, [2005] 1 AC 684 ('***BMBF***')

(10) *Sainsbury's Supermarkets Ltd v Olympia Homes Ltd and others* [2005] EWHC 1235 (Ch), [2005] All ER (D) 184 ('***Sainsbury's v Olympia***')

(11) *Morris and another v HMRC* [2007] EWHC 1181; (2007) 79 TC 184 ('***Morris***')

(12) *Astall and another v HMRC* [2009] EWCA Civ 1010. [2010] STC 137 ('***Astall***')

(13) *Tower MCashback LLP1 v HMRC* [2011] UKSC 19, [2010] EWCACiv32 ('***Tower MCashback***')

(14) *Charlton and others v HMRC* [2012] UKUT 770 (TCC), [2013] STC 866 ('***Charlton***')

(15) *HMRC v Cotter* [2013] UKSC 69, [2013] 1 WLR 3514 ('***Cotter***')

(16) *HMRC v DV3 RS Limited Partnership* [2013] EWCA Civ 907, [2013] STC 2150, ('***DV3***')

(17) *R (on the application of St Matthews (West) Ltd and others v HM Treasury and another* [2014] EWHC 1848 (Admin), [2014] STC 2350, and the Court of Appeal *sub nom R (on the application of APVCO 19 Ltd and others) v HM Treasury and another* [2015] EWCA Civ 648 ('***R (St Matthews)***')

(18) *Pattullo v HMRC* [2016] UKUT 270 (TCC), [2016] STC 2043 ('***Pattullo***')

(19) *Bloomsbury Verlag GmbH v HMRC* [2015] UKFTT 660 (TC) ('***Bloomsbury***')

(20) *Revell v HMRC* [2016] UKFTT 97 (TC), [2016] SFTD 205 ('***Revell***')

(21) *Burgess and Brimheath Developments Ltd v HMRC* [2015] UKUT 578 (TCC) ('***Burgess and Brimheath***')

(22) *Project Blue Ltd v HMRC* [2018] UKSC 30, [2018] 3 All ER 943 ('***Project Blue***')

(23) *Patel and another v HMRC* [2018] UKFTT 185 (TC), [2018] SFTD 1000 ('***Patel***')

(24) *R (on the application of Archer) v Revenue and Customs Commissioners* [2017] EWCA Civ 1962, [2018] STC 38 ('***R (oao Archer)***')

(25) *Rebecca Louise Vowles v HMRC* [2017] UKFTT 704 (TC) ('***Vowles***')*

(26) *Tinkler v HMRC* [2019] EWCA Civ 1392, [2019] STC 1685 ('***Tinkler***')*

(27) *Atherton v HMRC* [2019] UKUT 41 (TCC), [2019] STC 575 ('***Atherton***')

(28) *Tooth v HMRC* [2019] EWCA Civ 826, [2019] STC 1316 ('***Tooth***')

(29) *David Newton Young and another v HMRC* [2019] UKFTT 688 (TC) ('***Newton Young***')

(30) *Oisin Fanning v HMRC* [2020] UKFTT 292 (TC) ('***Fanning***')

(31) *Armstrong & Haire Limited v HMRC* [2020] UKFTT 296 (TC) ('***Armstrong & Haire***')*

(32) *David Hannah & Carla Hodgson v HMRC* [2021] UKUT 22 (TC) ('***Hannah & Hodgson***')*