Neutral Citation: [2023] UKFTT 01044 (TC)

Case Number: TC09015

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Taylor House, Rosebery Avenue, London

Appeal references: TC/2017/08537; TC/2017/08545; TC/2017/08617; TC/2017/08623; TC/2017/08627; TC/2017/08629 TC/2017/01195

Keywords: Stamp Duty Land Tax – whether valid enquiry opened – yes – whether taxpayer estopped from arguing that no valid enquiry was opened – no – discovery assessment – whether evidence of discovery – yes – whether appellants failed to file tax returns so that 20-year time limit in paragraph 31(2A) Schedule 10 Finance Act 2003 applies – yes – appeals dismissed

Heard on: 20 and 21 June 2023
Judgment date: 15 December 2023

Before

JUDGE ASHLEY GREENBANK

Between

(1) Pulak Rakshit and Sharmilla Rakshit
(2) Daniel Kent and Stephanie Kent
(3) Giovanni Scatola and Amy Scatola
(4) Georgina Juma
(5) Paul Bermer and Helen Katherine Stoddart
(6) Adrian Birch and Jayne Birch
(7) Alistair Brown and Sarah Brown

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants:	Thomas Chacko, counsel, instructed by Spector Constant & Williams
For the Respondents:	Ben Elliott, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. These are appeals against closure notices issued by the Commissioners for His Majesty's Revenue and Customs ("HMRC") under paragraph 23 of Schedule 10 to the Finance Act 2003 ("FA 2003") and assessments issued by HMRC under and paragraph 28 Schedule 10 FA 2003 ("discovery assessments"). The closure notices and discovery assessments concern liabilities to stamp duty land tax ("SDLT") arising from transactions in residential property.

2. The appellants in each of the appeals entered into a series of transactions as part of a marketed scheme which was designed to eliminate their potential liabilities to SDLT on the acquisition of a residential property. The steps in the scheme replicated the transactions underlying the decision of the Supreme Court in *Project Blue Limited v HMRC* [2018] UKSC 30[1] ("*Project Blue*").

3. The appellants now accept that the transactions were not effective to achieve the intended tax savings. However, the appellants appeal against the closure notices issued by HMRC on various grounds including:

   (1) that HMRC did not open valid enquiries into their land transaction returns and so the closure notices are equally invalid; and

   (2) that the discovery assessments issued by HMRC under paragraph 28 Schedule 10 FA 2003 were ineffective.

THE HEARING AND EVIDENCE

4. For the hearing, I was provided with an electronic bundle of documents.

5. The hearing bundle included two witness statements of Mr David Wright, an officer of HMRC. Mr Wright gave evidence and was cross-examined on his statements.

6. Mr Wright gave evidence concerning HMRC's enquiries into the appeals. He was not, however, the officer with primary responsibility for the enquiries. The officer who was primarily responsible had retired and did not give evidence. Mr Wright's knowledge was therefore limited to his review of the documents and the information that he had obtained from discussions with colleagues. In cross-examination, Mr Wright had to accept that some of the broader statements in in witness statement - for example, a statement that the appellants had not, at any stage, challenged the validity of the enquiries – were simply wrong. Mr Wright's second witness statement was primarily designed to introduce additional documentation that had been omitted because it had been kept on a generic file. As a consequence, Mr Wright's evidence did not add much to the documentary evidence and I have relied primarily on the documentary evidence for the purpose of this decision notice.

7. At the hearing, I was also provided with a witness statement of Mr Shaun Hemmings, also an officer of HMRC. This witness statement related to the question as to whether or not a discovery was made by an officer of HMRC. HMRC applied to admit that statement in evidence. I have dealt with that application later in this decision notice when I deal with the discovery assessments.

[1] The decisions of the courts and tribunals at the earlier stages of the *Project Blue* case have the following neutral citation references: Court of Appeal [2016] EWCA Civ 485; Upper Tribunal [2014] UKUT 564 (TCC); First-tier Tribunal [2013] UKFTT 378 (TC).

THE SCHEME

The steps in the scheme

8. I will begin by describing the steps undertaken by the appellants as part of the scheme. There is no material dispute between the parties as to these facts. Each of the appellants undertook these transactions in substantially the same way. All transactions took place in 2010 or 2011.

9. The steps in the scheme were as follows.

(1) Each of the appellants entered into a contract to purchase the freehold of a property from a third party vendor with the purchase price to be paid on completion.

(2) The appellant(s) agreed to sell the freehold of the property to a Guernsey protected cell company, Vale Property Finance PCC Limited ("Vale"), which was stated to be a finance institution, for the same purchase price. Vale was a special purpose vehicle established for the purposes of the scheme.

(3) Vale agreed to grant a 999-year lease of the property back to the appellant(s) for a premium equal to the purchase price.

(4) On completion of the purchase of the of the property from the vendor, the appellant(s) sold the freehold of the property to Vale and Vale immediately granted the 999-year lease to the appellant(s) with an option to purchase the freehold reversion for £1.

(5) The appellant(s) occupied the property from the date of completion of the contract with the vendor.

The intended tax analysis

10. SDLT is usually payable on the "chargeable consideration" for a "land transaction" involving a transfer of a "chargeable interest" in land. A freehold or leasehold is a "chargeable interest" and so, if they had not taken the steps involved in the scheme, the appellants would, in the normal course, have expected to pay SDLT on their purchases of the properties.

11. The intended effect of the steps in the scheme was that no SDLT would be payable on those purchases. This was on the basis that:

(1) The acquisition of the property from the vendor by the appellant(s) would attract relief from SDLT under section 45(3) FA 2003.

At the time, section 45(3) dealt with "sub-sales". In broad terms, where the section applied, the sale of a property by a vendor to a purchaser (the original purchaser) was ignored in circumstances where the original purchaser had transferred the rights under the original contract to another person (the second purchaser). Instead SDLT would be charged on a deemed transaction between the vendor and the second purchaser.

At the time, section 45 FA 2003 was in the following form (so far as relevant):

> **45 Contract and conveyance: effect of transfer of rights**
>
> (1) This section applies where—
>
> (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, and

(c)…

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.

(2) The transferee is not regarded as entering into a land transaction by reason of the transfer of rights, but section 44 (contract and conveyance) has effect in accordance with the following provisions of this section.

(3) That section applies as if there were a contract for a land transaction (a "secondary contract") under which—

(a) the transferee is the purchaser, and

(b) the consideration for the transaction is—

(i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and

(ii) the consideration given for the transfer of rights.

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…

(2) No SDLT would be chargeable on the sale and leaseback arrangements by virtue of section 71A FA 2003.

Section 71A applies to certain alternative finance arrangements. The intention was that Vale would be treated as a "financial institution" as defined by section 71A, such that, although the sales of the properties by the appellants to Vale would normally be brought into charge by section 45, the sales would be exempt from SDLT under section 71A. The leases granted by Vale to the appellants would also be exempt from SDLT under section 71A.

At the time, section 71A was in the following form (so far as relevant):

71A Alternative property finance: land sold to financial institution and leased to person

(1) This section applies where arrangements are entered into between a person and a financial institution under which—

(a) the institution purchases a major interest in land or an undivided share of a major interest in land ("the first transaction"),

(b) where the interest purchased is an undivided share, the major interest is held on trust for the institution and the person as beneficial tenants in common,

(c) the institution (or the person holding the land on trust as mentioned in paragraph (b)) grants to the person out of the major interest a lease (if the major interest is freehold) or a sub-lease (if the major interest is leasehold) ("the second transaction"), and

(d) the institution and the person enter into an agreement under which the person has a right to require the institution or its successor in title to transfer to the person (in one transaction or a series of transactions) the whole interest purchased by the institution under the first transaction.

(2) The first transaction is exempt from charge if the vendor is—

(a) the person, or

(b) another financial institution by whom the interest was acquired under arrangements of the kind mentioned in subsection (1) entered into between it and the person .

(3) The second transaction is exempt from charge if the provisions of this Part relating to the first transaction are complied with (including the payment of any tax chargeable).

(4) Any transfer to the person that results from the exercise of the right mentioned in subsection (1)(d) ("a further transaction") is exempt from charge if—

(a) the provisions of this Part relating to the first and second transactions are complied with, and

(b) at all times between the second transaction and the further transaction—

(i) the interest purchased under the first transaction is held by a financial institution so far as not transferred by a previous further transaction, and

(ii) the lease or sub-lease granted under the second transaction is held by the person.

…

(8) In this section "financial institution" has the meaning given by section 564B of the Income Tax Act 2007 (alternative finance arrangements).

…

(3) The intended tax treatment also assumed that the anti-avoidance rules in section 75A FA 2003 did not apply.

At the time, section 75A was in the following form:

75A Anti-avoidance

(1) This section applies where–

(a) one person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it,

(b) a number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition ("the scheme transactions"), and

(c) the sum of the amounts of stamp duty land tax payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V.

(2) In subsection (1) "transaction" includes, in particular–

(a) a non-land transaction,

(b) an agreement, offer or undertaking not to take specified action,

(c) any kind of arrangement whether or not it could otherwise be described as a transaction, and

(d) a transaction which takes place after the acquisition by P of the chargeable interest.

(3) The scheme transactions may include, for example–

(a) the acquisition by P of a lease deriving from a freehold owned or formerly owned by V;

(b) a sub-sale to a third person;

(c) the grant of a lease to a third person subject to a right to terminate;

(d) the exercise of a right to terminate a lease or to take some other action;

(e) an agreement not to exercise a right to terminate a lease or to take some other action;

(f) the variation of a right to terminate a lease or to take some other action.

(4) Where this section applies–

(a) any of the scheme transactions which is a land transaction shall be disregarded for the purposes of this Part, but

(b) there shall be a notional land transaction for the purposes of this Part effecting the acquisition of V's chargeable interest by P on its disposal by V.

(5) The chargeable consideration on the notional transaction mentioned in subsections (1)(c) and (4)(b) is the largest amount (or aggregate amount)–

(a) given by or on behalf of any one person by way of consideration for the scheme transactions, or

(b) received by or on behalf of V (or a person connected with V within the meaning of section 1122 of the Corporation Tax Act 2010) by way of consideration for the scheme transactions.

(6) The effective date of the notional transaction is–

(a) the last date of completion for the scheme transactions, or

(b) if earlier, the last date on which a contract in respect of the scheme transactions is substantially performed.

(7) This section does not apply where subsection (1)(c) is satisfied only by reason of–

(a) sections 71A to 73, or

(b) a provision of Schedule 9.

The *Project Blue* case

12. As I have described, the transactions in the scheme were based on the transactions involved in the *Project Blue* case. The appellant(s) withdrew their arguments that there was no liability to SDLT on their transactions following the decision of the Supreme Court in the *Project Blue* case that section 75A applied to impose SDLT on the acquisition of the property in that case.

13. I will refer to the decision of the Supreme Court in the *Project Blue* case in more detail later in this decision notice, but, before I turn to the facts surrounding HMRC's enquiry into the implementation of the scheme by each of the appellants, I will first summarize the facts of and decisions of the courts and tribunals in the *Project Blue* case as it provides some useful background to the progress of those enquiries.

14. The *Project Blue* case involved the purchase by a company, Project Blue Limited ("PBL"), of the site of the Chelsea Army Barracks from the Ministry of Defence for £959 million. PBL financed the acquisition of the site through an Islamic financing arrangement with a Qatari bank. Under that arrangement, PBL agreed to sub-sell the freehold of the site to the bank and the bank agreed to lease the site back to the company. The company and the bank also entered into various options which entitled PBL in due course to re-acquire the freehold from the bank.

15. PBL filed a land transaction return, claiming that no liability to SDLT arose on its purchase of the barracks from the Ministry of Defence because sub-sale relief under section 45(3) FA 2003 applied. The bank filed a return in relation to the sale of the freehold to it by PBL, claiming relief under section 71A FA 2003 ("alternative property finance"). PBL also filed a return in relation to the grant of the lease by the bank to the company. The company claimed relief under section 71A FA 2003 in relation to the grant of the lease.

16. In a decision issued on 18 December 2014, the Upper Tribunal found that the transactions did not attract SDLT but for the application of the anti-avoidance rule in section 75A FA 2003. However, SDLT was payable by PBL under section 75A FA 2003 on the purchase price of £959 million.

17. The Court of Appeal overturned that decision in a judgment issued on 26 May 2016. The Court of Appeal found that section 45(3) applied to exclude the transfer of the barracks to PBL from SDLT, but that section 71A(2) did not exempt the bank from liability on the transfer of the barracks to it under the financing arrangements. This was on the basis that PBL could not be the "vendor" for the purpose of section 71A(2) as the contract between the Ministry of Defence MoD and PBL for the purchase of the barracks was disregarded under section 45(3) FA 2003.

18. The Supreme Court released its decision on 30 June 2018. The majority found that section 45(3) and section 71A applied to exempt the relevant transactions from SDLT. However, PBL was liable to SDLT under section 75A FA 2003 on a notional transaction between the Ministry of Defence and PBL.

THE BACKGROUND FACTS

19. My findings of fact are set out in this section.

20. The parties conducted their arguments by reference to the transactions undertaken by the first appellants, Mr Pulak Rakshit and Mrs Sharmilla Rakshit. I will also describe the steps in the scheme by reference to the transactions undertaken by them. Unless otherwise stated, these findings apply to all of the appellants.

The transactions

21. The first appellants appointed ELS International Lawyers LLP ("ELS") as their agent. (Each of the other appellants also appointed ELS.)

22. The first appellants agreed to purchase a property at 14a Tangier Road, Guildford from Ms Gillian Botwright (the "original vendor") for £656,000 under a contract dated 20 August 2010 (the "original contract").

23. After the exchange of contracts but before completion, the first appellants entered into an agreement with Vale to transfer the property to Vale at the same time as the completion of the original contract for £656,000 under an alternative finance arrangement, under which Vale also agreed to grant a 999-year lease of the property back to the first appellant for a premium equal to the purchase price.

24. The contracts were completed on 2 September 2010. On that date, the first appellants transferred the freehold in the property to Vale and Vale granted a 999-year lease of the property back to the first appellants.

The returns

25. On 7 September 2010, ELS sent a letter to HMRC headed "Acquisition of Land at 14a Tangier Road, Guildford, Surrey, GU1 2DE" summarizing their analysis as to why no SDLT liability arose to the taxpayer on the transactions, in particular, due to the application of section 45(3) and section 71A FA 2003 (and the fact that section 75A did not apply).

26. On 7 September 2010, ELS also filed three land transaction returns:

(1) a land transaction return filed on behalf of the first appellants in respect of their acquisition of the property from the original vendor on 2 September 2010, claiming relief under section 45(3) FA 2003 by entering code 28 "other relief" in box 9 of the return ("Return A");

(2) a land transaction return filed on behalf of Vale in respect of its acquisition of the property from the first appellants on 2 September 2010, claiming relief under section 71A FA 2003 by entering code 24 ("alternative property finance") in box 9 of the return ("Return B");

(3) a further land transaction return filed on behalf of the first appellants in respect of their acquisition of an interest under the terms of the 999-year lease on 2 September 2010, claiming relief under section 71A FA 2003 by entering code 24 ("alternative property finance") in box 9 of the return ("Return C")

No SDLT was self-assessed as being due as a result of the transactions.

The disputed enquiry notices

27. On 8 June 2011, and so within the time limit for opening an enquiry, HMRC wrote to the first appellants in the following terms:

> Dear Mr and Ms Rakshit
>
> **Property: 14A Tangier Road Guildford Surrey GU1 2DE**
>
> Thank you for your Land Transaction Return in relation to the above. I am writing to tell you that I intend to make some enquiries under Paragraph 12 Schedule 10 Finance Act 2003 ("FA 2003") into this return. I have written to your agent ELS International Lawyers LLP and enclose a copy for your attention.
>
> I enclose a copy of our Code of Practice COP 8. It explains how we make enquiries and how we keep our promise of fair treatment under the Revenue's Service Commitment to you. The Code also explains how you may ask for an enquiry to be concluded.
>
> When you have read this leaflet, please contact me if you require further information.
>
> …

28. Also on 8 June 2011, HMRC wrote to ELS, as the first appellants' agent, in the following terms:

> Dear Sirs,
>
> **Customer Name: Mr Pulak Rakshit & Ms Sharmilla Rakshit**
> **Property: 14A Tangier Road Guildford Surrey GU1 2DE**
>
> I have today issued to your above named clients notices under Paragraph 12 Schedule 10 Finance Act 2003 ("FA 2003") of my intention to enquire into their land transaction returns. Copies of the notices are attached.
>
> At this time I am not requesting any further documentation or information in connection with the land transaction, however this may be asked for at a later date.
>
> …

29. The letter from HMRC to the first appellants enclosed a copy of the letter to ELS. The letter from HMRC to ELS enclosed a copy of the letter to the first appellants

30. Also on 8 June 2011, HMRC sent a letter to Vale notifying Vale of their intention to open enquiries into Return B.

Further correspondence

31. There was no further correspondence until 23 October 2013. On that date, following the decision of the First-tier Tribunal in *Project Blue*, HMRC sent a letter to the first appellants inviting the first appellants to withdraw from the scheme, or, in the alternative, requesting that the first appellants provide information listed in a schedule to the letter.

32. The letter was in the following terms:

> Dear Sir or Madam
>
> **Stamp Duty Land Tax (SDLT) Avoidance Scheme – Settlement Invitation**
>
> Your purchase of property at 14A Tangier Road, Guildford, Surrey, GU1 2DE on 9/2/2010 is presently under enquiry by HM Revenue & Customs ("HMRC").
>
> A recent Tax Tribunal judgment has supported HMRC's interpretation of Stamp Duty Land Tax (SDLT) law and decided that the scheme used in the case of *Project Blue Limited v Commissioners of HMRC* does not work.
>
> Cornerstone Tax Advisors has informed us that you have used the same scheme as Project Blue Limited to reduce SDL T on your property purchase. HMRC's view is that the scheme that you have used does not work and that tax and interest is due on this transaction.
>
> What you need to do now
>
> I invite you to withdraw from the scheme and make payment of £28661.98 now.
>
> …
>
> What will happen if I do not withdraw from the scheme?
>
> …
>
> If you do not withdraw from the scheme, in preparation for a Tribunal hearing, I need you to supply all the documentation detailed on the attached schedule by 29 November 2013.
>
> …
>
> I am required to make you aware that you would be committing a criminal offence to conceal, destroy or otherwise dispose of any document I have asked for or which is later required by the independent Tribunal, or arrange for it to be concealed, destroyed, or disposed of.
>
> …

33. The admissibility of this letter in evidence is disputed by the appellants. They say that the letter is subject to without prejudice privilege. I address this issue later in this decision notice.

34. On 12 December 2013, ELS wrote to HMRC on behalf of a number of clients, including the first appellants. The schedule to that letter included a list of land transaction returns including Return A. In that letter, ELS argued that the enquiry notices were invalid because no questions were asked and no requests for information were made in those notices. The letter included the following passage:

> You have requested that our clients provide you with a substantial amount of information should they decide not to settle. We have taken advice and our

> view is that the letters sent to our clients purporting to open an enquiry into their Land Transaction Returns were not sufficient and no enquiry was opened. The "enquiry" letters specifically stated that no further questions were being asked which is very different to enquiry letters received on other schemes where the notice of intention to enquire is accompanied by a list of enquiries. As our clients do not believe that an enquiry was opened within the required time frame they do not intend to provide you with the information requested. Should you issue an Information Notice it is likely that we will be instructed to challenge any such notice.

35. ELS responded to HMRC's letter of 23 October 2013 on 9 January 2014 in a letter marked "without the prejudice save as to costs"[2]. The letter was in the following terms:

> **Without prejudice save as to costs**
>
> Dear Sirs
>
> **Customer Name: Rakshit**
> **Property Name: 14A Tangier Road Guildford Surrey GUl 2DE**
>
> We write further to your letter dated 23 October 2013.
>
> Our clients are taking legal advice on the contents of your letter. However, in order to limit the interest accruing whilst the enquiry continues our client would like to place an amount of stamp duty that you believe is due on account with HMRC.
>
> Please can you kindly confirm the amount including interest that should be placed on account. Our client will place this money on account whilst the enquiry continues. If it is resolved in their favour then the full amount should be returned.
>
> Please confirm your agreement.
>
> …

36. The admissibility of this letter in evidence is also disputed by the appellants. They say that this letter is subject to without prejudice privilege. Once again, I will address this issue later in this decision notice.

37. HMRC wrote to ELS on 13 January 2014 noting that the first appellants wished to make a payment on account on a without prejudice basis. In that letter, HMRC stated:

> You indicated that your above-named clients wish to make a payment on account on a without prejudice basis. As you will be aware, a payment on account made voluntarily and without legal obligation is repayable at the taxpayer's request.

38. On 10 December 2015, ELS wrote to HMRC once again arguing that no valid enquiries had been made by HMRC within the enquiry period. The letter stated:

> In respect of our clients who received COP 8 Enquiries, there are a number of things wrong with such enquiries. The letters were posed as an intention to make an enquiry, but they did not make any such enquiries and it appears that HMRC's enquiry period is now finished. It is unreasonable that HMRC are continuing to pursue clients who used such schemes, when HMRC are fully aware that they may well be out of time to pursue the tax.

39. On 21 April 2016, HMRC responded to ELS's letter expressing the view that "the enquiry period into those enquiries where closure notices have not been issued remains open".

[2] A letter in this form was not sent in relation to all of the appellants.

40. On 29 June 2016, following the decision of the Court of Appeal in *Project Blue*, ELS wrote to HMRC inviting HMRC to close any enquiry. ELS stated:

> Notwithstanding our position that you are, in any event, out of time to make an assessment that our client should pay stamp duty, you should immediately close your enquiry in the light of the clear decision of the Court of Appeal.
>
> This enquiry has now been ongoing for far too long and we invite you to respond confirming closure of your enquiry within 14 days of the date of this letter. If we do not hear from you, we will issue a closure notice and seek costs of doing so from HMRC.

(I have treated the reference in this letter to the "issue of a closure notice" as being a reference to the making of an application to the tribunal for a direction that HMRC issue a closure notice.)

41. On 2 August 2016, HMRC responded to ELS noting that HMRC did not object to issuing a closure notice where all enquiries had been completed but that no documents had so far been provided in relation to the enquiries and requesting documents and information.

42. In response to that letter, ELS wrote to HMRC, on 25 November 2016. In that letter ELS reiterated its position that, following the decision of the Court of Appeal in *Project Blue*, the first appellants were not liable to pay SDLT. Notwithstanding that assertion, ELS provided various documents whilst stating that they did not consider that HMRC were entitled to the documents as they were "outside of [the] prescribed time period for issuing an assessment".

43. On 30 November 2016, HMRC wrote to ELS noting that not all the documentation and information that had been requested had been provided and stating that HMRC could not consider whether to issue a closure notice until that information and documentation had been provided.

44. On 22 March 2017, ELS responded to the outstanding requests for information. The letter once again raised the argument that, in order for a valid enquiry to be commenced, HMRC were required to make actual requests for documentation and information within the relevant time limit (rather than merely sending a notice of their intention to commence an enquiry). The letter also requested that HMRC issue a closure notice:

> "We note that you should have raised any requests for documents and information within 9 months of completion of the acquisition in accordance with legislation and your own guidance. This information is given on a without prejudice basis to our client's contention that you are out of time to raise enquiries.
>
> As this has now been ongoing for a number of years and the Court of Appeal has determined that our client is not the taxpayer for the purposes of this transaction we kindly ask you to issue a closure notice.

45. On 21 April 2017, HMRC issued two closure notices to the first appellants:

(1) a closure notice in relation to the enquiry into Return A concluding that the acquisition from the original vendor by the first appellants did not fall to be disregarded under section 45 or, in the alternative, section 75A applied;

(2) a closure notice in relation to the enquiry into Return C concluding that no relief was due under section 71A and, in the alternative, section 75A applied.

In each case, the notice concluded that SDLT of £26,240 was payable (before any late payment interest).

46. Also on 21 April 2017, HMRC also issued to the first appellants an assessment under paragraph 28 of Schedule 10 in respect of the first appellants' notional acquisition of the

property under section 75A. The assessment confirmed that the notional land transaction was a notifiable transaction for which HMRC had not received an SDLT return and therefore the assessment was subject to the extended time limit under paragraph 31(2A)(b) Schedule 10 FA 2003. The assessment was for SDLT in the amount of £26,240 (before any late payment interest).

47. HMRC also issued a closure notice to Vale claiming SDLT of £26,240 (before any late payment interest).

The progress of the appeal

48. On 3 May 2017, ELS wrote to HMRC to appeal against the decisions in the closure notices and the assessment on the grounds that:

(1) relief was available under section 71A;

(2) if section 75A applied, then the party liable to pay SDLT was Vale and not the first appellants;

(3) if HMRC's analysis in relation to section 71A was correct, HMRC were out of time to raise the assessment;

(4) whilst HMRC had raised an intention to raise enquiries, no enquiries were in fact raised within a reasonable time frame:

> We consider your initial enquiries were also defective in that they raised an intention to raise enquiries but no enquiries were raised. Our client had a legitimate expectation that enquiries would be raised within a reasonable time frame.

49. On 29 June 2017. HMRC wrote to the first appellants stating their view of the matter and offering a statutory review. This offer was accepted by ELS on 27 July 2017. In a letter dated 8 September 2017, ELS provided further representations.

50. On 1 November 2017, HMRC issued their review conclusion upholding the assessment and closure notices.

51. On 30 November 2017, the first appellants notified their appeal to the tribunal. The grounds of appeal were, in summary:

(1) that the discovery assessment was issued out of time as it was issued outside the six-year time limit and the 20-year time limit in paragraph 31(2A) Schedule 10 FA 2003 did not apply;

(2) that section 45(3) FA 2003 applied to disregard the original contract;

(3) that if section 75A FA 2003 applied, the relevant taxpayer was Vale and not the first respondents;

(4) that relief was available under section 71A FA 2003 in relation to the transactions with Vale (and, in particular, that Vale was a "financial institution" for the purposes of that section).

52. Vale withdrew its appeals against the closure notices issued to it in relation to its participation of the scheme in connection with the acquisitions by the first appellants under the scheme on 25 January 2018.

53. On 7 March 2018, the tribunal directed that the appeals be case managed and heard together. The appeals were stayed pending the outcome of *Project Blue* in the Supreme Court. The Supreme Court released its decision on 30 June 2018.

54. On 24 August 2018, HMRC issued their Statement of Case. In their Statement of Case, HMRC pleaded, inter alia, that:

(1) sub-sale relief under section 45(3) FA 2003 was not available on the purchases of the properties by the appellants from the third party vendors either:

(a) on the grounds that, applying the principles set out by the House of Lords in *Barclays Mercantile Business Finance Limited v Mawson* [2005] 1 AC 684 ("*BMBF*"), on the facts viewed realistically, the appellants did not enter into sub-sale transactions with Vale; or

(b) on the grounds that the completion of the sales of the properties to Vale did not take place "in connection with" the contracts with the third party vendors for the purposes of section 45(3).

(2) relief under section 71A FA 2003 was not available on the grant of the leases by Vale to the appellants; and

(3) section 75A FA 2003 applied to the transactions.

55. On 3 March 2020, HMRC applied for the present appeals to be lead cases. On 13 April 2022, the tribunal directed that the appellants should either amend their grounds of appeal or notify their withdrawal of their appeals.

56. On 24 May 2022, the appellants filed Amended Grounds of Appeal replacing their previous grounds with two grounds of appeal being, in summary:

(1) that HMRC failed to give notice of an intention to open an enquiry under paragraph 12 Schedule 10 FA 2003 within the time period prescribed in the legislation (Ground 1);

(2) that:

(a) Vale had withdrawn its appeal against the closure notice; and

(b) that withdrawal had been accepted by HMRC

and so Vale was the purchaser for the purposes of section 75A FA 2003 and HMRC could not also impose a liability under section 75A on the appellants (Ground 2).

57. On 4 July 2022, HMRC amended their Statement of Case to address the new grounds of appeal. The Amended Statement of Case noted (at paragraph 37) that the appellants had not challenged the discovery assessments.

58. On 31 August 2022, HMRC made a request for further and better particulars in relation to Ground 1 (that HMRC had failed to give notice within paragraph 12 Schedule 10 FA 2003 within the time limit). In that letter, HMRC requested further particulars of the challenges that were made to the validity of the notices to enquire into the returns. HMRC also asked whether the appellants contended that the discovery assessments were procedurally invalid for any reason.

59. On 16 September 2022, the appellants' solicitors responded confirming that the appellants were still advancing Ground 1. In relation to that ground, the appellants' solicitors provided further details as follows:

> The requirements for a notice of enquiry are that (a) it must identify the relevant return in clear terms and (b) it must state that HMRC intend to enquire into that return. The first requirement was not met because the purported notice of enquiries did not clearly state which transaction they were enquiring in to. There is no reference in the notice of enquiries to a land transaction return. In these transactions there were three land transaction returns and the

> purported notice of enquiry is not clear at all as to which return it is relating to. The purported notice of enquiry, when construed objectively from the perspective of a reasonable taxpayer, does not state an intention to enquire into a particular land transaction return.

In relation to the discovery assessments, the appellants' solicitors challenged the basis of the discovery assessments on the grounds that the appellants had provided sufficient information to HMRC to enable a hypothetical officer to identify an insufficiency in the amount of tax, and so the condition in paragraph 30 Schedule 10 FA 2003 was not fulfilled.

60. The appellants' solicitors wrote to HMRC further on 13 November 2022. In that letter the appellants' solicitors:

> (1) confirmed that the appellants "no longer challenged the substantive SDLT treatment" following the decisions of the Supreme Court in *Project Blue*;
>
> (2) in relation to the discovery assessments:
>
> > (a) noted that the burden was on HMRC to show that a discovery assessment was properly made, citing the Upper Tribunal decision in *Burgess and Brimheath Developments Limited v HMRC* [2015] UKUT 578 ("*Burgess*");
> >
> > (b) challenged HMRC's assertion, in their amended Statement of Case, that the discovery assessments could be made in this case within 20 years of the effective date of the transaction, relying on paragraph 31A(2) Schedule 10 FA 2003.

61. Following their receipt of that letter, HMRC applied on 23 December 2022 to amend their Statement of Case to include an argument that the appellants were estopped from arguing that there were no valid enquiries into the appellants' returns.

62. HMRC confirmed, by email dated 1 February 2023, that they were taking the position that paragraph 31A(2) Schedule 10 FA 2003 could apply to permit a 20-year time limit for the issue of the discovery assessments on the grounds that the appellants had failed to file an SDLT return in relation to the notional transaction for the purposes of section 75A FA 2003.

THE ISSUES BEFORE THE TRIBUNAL

63. At the hearing, the appellants have not advanced Ground 2 in its Amended Grounds of Appeal – that HMRC could not assess the appellants under section 75A FA 2003 because Vale had withdrawn its appeal and so accepted liability. I have treated this ground as withdrawn.

64. The appellants advanced Ground 1 of their grounds of appeal – that no valid notice of enquiry had been given to the appellants. HMRC took issue with this ground on the facts. HMRC also raised the alternative argument that the appellants were, in any event, estopped from arguing that no valid enquiry had been opened given the course of conduct and correspondence over several years. In that context, there was an issue between the parties as to whether some of the correspondence between them, on which HMRC relied, was inadmissible as it was subject to without prejudice privilege.

65. The appellants also sought to challenge the discovery assessments under paragraph 28 Schedule 10 FA 2003 on the grounds that no discovery had been pleaded by HMRC and that any assessment under paragraph 28 was out of time. Once again, HMRC took issue with these arguments, but also argued that the appellants should not be permitted to challenge the discovery assessments as the issue had not been raised until the exchange of skeleton arguments.

THE VALIDITY OF THE ENQUIRY NOTICES

66. The first issue between the parties relates to the validity of any notice of enquiry. In summary, the question is whether the correspondence between the parties was sufficient to

constitute notice of an intention to enquire into the both returns (Return A and Return C) within paragraph 12 Schedule 10 FA 2003. If not, then, subject to the issues surrounding whether or not the circumstances give rise to an estoppel to which I will return later in the decision notice, the closure notices issued by HMRC are invalid (*Raftopolou v HMRC* [2018] EWCA Civ 818 at [51]).

The relevant legislation

67. I will begin by setting out the relevant legislation.

68. Section 76(1) FA 2003 provides for the delivery of SDLT returns in relation to notifiable transactions. So far as relevant, section 76 is in the following form:

> **76 Duty to deliver land transaction return**
>
> (1) In the case of every notifiable transaction the purchaser must deliver a return (a "land transaction return") to the Inland Revenue before the end of the period of 30 days after the effective date of the transaction.
>
> …
>
> (3) A land transaction return in respect of a chargeable transaction must—
>
> (a) include an assessment (a "self-assessment") of the tax that, on the basis of the information contained in the return, is chargeable in respect of the transaction;
>
> …

69. The reference to the "purchaser" in section 76 is to a person acquiring a chargeable interest (section 43(4) FA 2003).

70. The meaning of "notifiable transaction" for the purposes of section 76 FA 2003 is given by section 77 FA 2003. At the relevant time, it provided:

> **77 Notifiable transactions**
>
> 77 Notifiable transactions
>
> (1) A land transaction is notifiable if it is–
>
> (a) an acquisition of a major interest in land that does not fall within one or more of the exceptions in section 77A,
>
> (b) an acquisition of a chargeable interest other than a major interest in land where there is chargeable consideration in respect of which tax is chargeable at a rate of 1% or higher or would be so chargeable but for a relief,
>
> (c) a land transaction that a person is treated as entering into by virtue of section 44A(3), or
>
> (d) a notional land transaction under section 75A.
>
> …

71. Pursuant to paragraph 12 Schedule 10 FA 2003, HMRC may enquire into an SDLT return by giving notice of their intention to do so to the purchaser within nine months of the filing date (in cases where the return was delivered on or before that date).

72. At the relevant time, paragraph 12 provided as follows (so far as relevant):

> **12 Notice of enquiry**
>
> (1) The Inland Revenue may enquire into a land transaction return if they give notice of their intention to do so ("notice of enquiry")—
>
> (a) to the purchaser,

(b) before the end of the enquiry period.

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

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

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

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

…

73. In the case of the transactions in all of these appeals, the filing date was the last day for the filing of a return under section 76(1) FA 2003 i.e. the date 30 days after the effective date of the transaction: paragraph 2 Schedule 10 FA 2003.

74. Paragraph 13 of Schedule 10 sets out the scope of any enquiry initiated under paragraph 12. It provides:

13 Scope of enquiry

(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.

This is subject to the following exception.

(2) If the notice of enquiry is given as a result of an amendment of the return under paragraph 6 (amendment by purchaser)—

(a) at a time when it is no longer possible to give notice of enquiry under paragraph 12, or

(b) after an enquiry into the return has been completed,

the enquiry into the return is limited to matters to which the amendment relates or that are affected by the amendment.

75. An enquiry is completed by the issue of a closure notice under paragraph 23 Schedule 10 FA 2003. It provides:

23 Completion of enquiry

(1) An enquiry under paragraph 12 is completed when the Inland Revenue 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 the Inland Revenue 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.

The parties' submissions

76. Mr Elliott makes the following submissions on behalf of HMRC.

(1) There is no prescribed format that must be used by HMRC to give notice of intention to enquire into a return. However, the purported notice must be sufficient

that, in the context in which the notice was received, a reasonable taxpayer in the taxpayer's position would have understood that HMRC was intending to enquire into the relevant return. The test is objective (*HMRC v Mabbutt* [2017] UKUT 289 (TCC) ("*Mabbutt*") [45]).

(2) The relevant context in this case is that of a taxpayer who had entered into an SDLT saving scheme, had made two SDLT returns, and had access not only to the letter sent to the first appellants on 8 June 2011 but also the letter of the same date that was sent to the agent. In that context, a reasonable taxpayer receiving the letter from HMRC would understand that HMRC intended to enquire into both returns.

(3) It was not appropriate to import concepts derived from cases concerning the receipt of a notice in other contexts (for example, *Mannai Investment Co. Limited v Eagle Star Life Assurance Co. Limited* [1997] AC 749 ("*Mannai*"), *Barclays Bank Plc v Bee* [2002] 1 WLR 332 ("*Barclays*"), *Bristol & West Plc v HMRC* [2016] EWCA Civ 397 ("*Bristol & West*")) into the test that applies for the receipt of notice of intention to enquire into a tax return in paragraph 12 Schedule 10 FA 2003.

(4) It could be seen from the later conduct and correspondence of the parties, that the first appellants and their agents knew that HMRC intended to enquire into both returns. The first appellants' conduct and that of their agents was good evidence that a reasonable taxpayer in receipt of the letter from HMRC in the relevant context would have assumed that it was HMRC's intention to do so.

77. In summary, Mr Chacko, for the appellants, makes the following submissions.

(1) Mr Chacko agreed with Mr Elliott that there was no particular form prescribed for a notice under paragraph 12 Schedule 10 FA 2003, that the relevant test is that set out by the Upper Tribunal in *Mabbutt*, and that test is an objective one.

(2) For the purpose of that test, the communication with the client that constitutes the notice must be clear and unambiguous as to the return into which HMRC intend to enquire. For these purposes, there must be "no arguable ambiguity" (see *GDF Suez Teesside Limited v HMRC* [2017] UKUT 68 (TCC) ("*GDF Suez*") at [117]).

(3) HMRC's letter of 8 June 2011 was ambiguous. It referred only to a "return" in the singular. The first appellants had made two returns. The letter did not identify the particular return into which HMRC intended to enquire.

(4) The purported notice should be read in context. In appropriate circumstances, that context may resolve the ambiguity (see *Mannai*). But the only context in this case was the letter that was sent to the agent. That letter did not resolve the ambiguity; it added to it. Where there was an ambiguity which could not be resolved, the only conclusion open to the Tribunal was that the notice was invalid. It was not open to the Tribunal to determine the case by reference to the most likely reading of the purported notice (*Mannai*).

Discussion

78. There was no material dispute between the parties as to the basic principles that should be applied in addressing this question. Both agreed that there is no particular form of notice prescribed by the legislation; all that was required by paragraph 12 Schedule 10 FA 2003 was that the communication was sufficient to inform the first appellants of HMRC's intention to enquire into the relevant returns (*R (Sword Services Ltd) v HMRC* [2016] EWHC 1473 per Cranston J at [71])).

79. The parties also agree that the relevant test is an objective one, namely whether a reasonable taxpayer, in the circumstances of the taxpayer in question, would have understood that HMRC intended to open an enquiry into the particular return. As the Upper Tribunal in *Mabbutt* describes (*Mabbutt* [45]):

> The question whether the disputed notice sufficiently makes a taxpayer aware of HMRC's intention to open an enquiry into a particular tax return is an objective one. The test is whether a reasonable taxpayer, in the circumstances of the taxpayer in question, would have understood that HMRC intended to open an enquiry into a particular tax return. It is not a matter of the parties' intentions or actual knowledge. We consider that this objective test applies as much to the question whether certain documents could be said to form part of the notice as it does to the question whether the notice itself sufficiently informed the taxpayer of the intended enquiry to be a valid section 9A TMA notice.

80. As can be seen from that extract, *Mabbutt* concerned a disputed notice to enquire into a return for income tax and capital gains tax under section 8 of the Taxes Management Act 1970 ("TMA"). However, there is no material difference between the provisions of section 9A TMA, which provides for HMRC to give notice of their intention to enquire into such a return, and the provisions of paragraph 12 Schedule 10 FA 2003 which apply for the purposes of SDLT.

81. That objective test must be applied by reference to the context in which the taxpayer received the disputed notice.

82. For example, in *Mannai*, the House Lords found that an error in a notice to exercise a break clause under a lease, which referred to 12 January when the applicable break day was 13 January, did not invalidate the notice. Lord Steyn said this (at *Mannai*, p772H):

> The question is not whether 12 January can mean 13 January: it self-evidently cannot. The real question is a different one: does the notice construed against its contextual setting unambiguously inform a reasonable recipient how and when the notice is to operate under the right reserved?

A reasonable recipient of the notice would have known that the terms of the lease prescribed the break day as 13 January, and would have appreciated that the tenant wished to terminate the lease on that day, but had wrongly referred to 12 January instead of 13 January (*Mannai*, p768H-p769A).

83. The context may also cause an otherwise valid notice to be treated as invalid. In *Barclays*, a case concerning notices under the Landlord and Tenant Act 1954, a tenant received an otherwise valid notice agreeing to a new tenancy at the same time as an invalid notice opposing the grant of a new tenancy. The Court of Appeal found that the otherwise valid notice was invalid. This was because the invalid notice opposing the new tenancy was part of the relevant factual context. A reasonable recipient in receipt of the two notices would have been left in reasonable doubt as to whether or not the landlord intended to oppose the new tenancy (*Barclays* [28]-[34]).

84. Also – and in a tax context – in *Bristol & West*, HMRC was not bound by a closure notice which was issued in error where HMRC, having realized its mistake, had informed the taxpayer in advance that it would receive a notice which had been issued in error. The earlier email was part of the relevant factual context in which the disputed closure notice was received (*Bristol & West* [30]).

85. Before I turn to the application of these principles to the facts of the present case, I should deal with an issue raised by Mr Elliott in argument. Mr Elliott suggested that I should exercise

some caution in applying some of the principles in the cases to which I have referred, in particular, those cases which concern notices given in contexts other than the issue of a notice under paragraph 12 Schedule 10 FA 2003. I do not accept that submission. It seems to me that the principles derived from those cases are of equal relevance in the present context. All the cases concern whether a notice should be regarded as ineffective where the reasonable recipient of the relevant communication would have some doubt about its effect. In any event, the non-tax cases (principally *Mannai* and *Barclays*) are regarded as good authority by the Upper Tribunal in *GDF Suez* and *Mabbutt* and by the Court of Appeal in *Bristol & West*. I can see no good reason to diverge from that approach.

86. That having been said, in my view, the letter of 8 June 2011 sent by HMRC to the first appellants gave sufficient notice of HMRC's intention to enquire into both returns i.e. Return A and Return C. My reasons are set out in the following paragraphs.

87. As a starting point, the first appellants received the letter of 8 June 2011 in which HMRC expressed their intention to enquire into a "return" in the singular. That letter referred to and enclosed a copy of the letter to their agents, which referred to an intention to enquire into the "returns" in the plural.

88. There is a question as to whether the enclosed letter to the agents forms part of the notice to the first appellants. I note that in *Mabbutt*, the Upper Tribunal took the view that, in very similar circumstances, a letter to the taxpayer's agent which was enclosed with the letter to the taxpayer, formed part of the same notice. This was on the grounds that any reasonable recipient of the letter to the taxpayer would have understood that the two letters had to be read together (*Mabbutt* [47]). I take this same approach in this case.

89. In any event, even if it did not form part of the notice to the first appellants, the letter to the agent in this case must form part of the relevant factual context for the purposes of determining whether or not a reasonable recipient of the disputed notice would have understood that HMRC intended to open an enquiry into both returns.

90. In argument, Mr Chacko made much of the inconsistencies between the two letters. He submitted, in reliance on cases such as *Barclays*, that the inconsistences between them could not be resolved. In his submission, the effect of the Upper Tribunal's decision in *GDF Suez* was that there must be "no arguable ambiguity" (*GDF Suez* [117]) and so, if the inconsistencies could not be resolved, the Tribunal must treat the notice to the first appellants as invalid.

91. In my view, that approach is too narrow. The case law is clear that the relevant test is whether a reasonable recipient, in the circumstances of the taxpayer in question, would have understood that HMRC intended to open an enquiry into a particular tax return (*Mabbutt* [45]).

92. Although the communication with the first appellants, which included the copy of HMRC's letter to the agents, was on its face inconsistent (in referring in the letter to the first appellants to "this return" and in the letter to the agents to "their… returns"), that communication must, as the cases demonstrate, be read in its context. To my mind, that context must include the following facts of which the reasonable recipient must be taken to have been aware:

> (1) the recipient had purchased a particular property which was clearly identified in the letters from HMRC;
>
> (2) in relation to the purchase of that property, the recipient had entered into a scheme involving the same pre-planned steps undertaken by the first appellants that are designed to secure a particular tax advantage;

(3) that scheme involved more than one land transaction and required the submission of two SDLT returns by the taxpayer (Return A and Return C).

93. Against that background, a reasonable taxpayer in receipt of the communication from HMRC would, it seems to me, assume that HMRC intended to enquire into arrangements for the acquisition of the property as a whole and its SDLT treatment. The acquisition of the property was made under a scheme involving pre-planned steps, of which the reasonable recipient would have been aware, and involving the submission of two returns. This is not a case like *Barclays* where the tenant received two separate communications that were entirely inconsistent. On receipt of the two notices, the reasonable recipient would assume that the letter to the agent was correct in referring to "returns" in the plural and that any error was in the letter to the taxpayer in referring to a return in the singular. For those reasons, a reasonable taxpayer would have been informed of the intention of HMRC to enquire into both returns.

94. As I have mentioned above, the test is an objective one. The first appellants' and their agent's understanding of the letters from HMRC is not strictly relevant. However, I am fortified in my conclusion by the fact that the first appellants and their agents clearly understood the letters in the same way. Although they disputed whether or not the letters constituted a valid notice for other reasons, which have not been pursued, the first appellants and their agents clearly treated the letters as a notice of an intention to enquire into both Return A and Return C for many years. It was only when prompted to amend their grounds of appeal following the decision of the Supreme Court in *Project Blue*, that the first appellants indicated that they intended to challenge the validity of the disputed notice on this ground (in their Amended Grounds of Appeal filed on 24 May 2022).

Section 83(2) FA 2003

95. The parties argued their cases on the validity of the enquiry notices primarily by reference to the case law authorities. However, I was also referred by the parties to the potential application of section 83(2) FA 2003.

96. Section 83(2) FA 2003 is part of section 83 which deals with formal requirements of documents relevant to the assessment and collection of SDLT. It provides for certain circumstances in which mistakes and errors in a notice will not be regarded as rendering a notice ineffective. Section 83 is in the following form.

> **83 Formal requirements as to assessments, penalty determinations etc**
>
> (1) An assessment, determination, notice or other document required to be used in assessing, charging, collecting and levying tax or determining a penalty under this Part must be in accordance with the forms prescribed from time to time by the Board and a document in the form so prescribed and supplied or approved by the Board is valid and effective.
>
> (2) Any such assessment, determination, notice or other document purporting to be made under this Part is not ineffective—
>
> (a) for want of form, or
>
> (b) by reason of any mistake, defect or omission in it,
>
> if it is substantially in conformity with this Part and its intended effect is reasonably ascertainable by the person to whom it is directed.
>
> (3) The validity of an assessment or determination is not affected—
>
> (a) by any mistake in it as to—
>
> (i) the name of a person liable, or
>
> (ii) the amount of the tax charged, or

(b) by reason of any variance between the notice of assessment or determination and the assessment or determination itself.

97. Mr Elliott submits that, even if the notice given to the first appellants was not sufficient to inform the first appellants of HMRC's intention to enquire into both returns, the reference to a "return" in the singular in the letter to the first appellants was clearly a mistake. However, the letter was substantially in conformity with the requirements of FA 2003 and the intended effect of the letter was reasonably ascertainable by the first appellants. Section 83(2) FA 2003 could therefore apply to correct any error in the notice.

98. Mr Chacko submitted that HMRC's argument that section 83(2) FA 2003 might apply to rectify any error in the purported notice was misplaced. In his view, section 83(2) added nothing on the facts of this case. The hypothetical reasonable recipient postulated by section 83(2) would be in no different a position to the reasonable recipient under the case law test as set out in *Mabbutt*.

99. Mr Chacko also referred to two decisions of the First-tier Tribunal on the application of section 83(2). They were *Coolatinney Developments Limited v HMRC* [2011] UKFTT 252 (TC) ("*Coolatinney*") and *Smith Homes 9 Limited v HMRC* [2022] UKFTT 000005 (TC) as illustrations of the relationship between section 83(2) and the principles derived from cases such as *Mabbutt*. Those decisions are not binding upon me. I have decided this issue by reference to the case law test. Given the parties' positions – HMRC's case, that section 83(2) is potentially a broader test than that in *Mabbutt*, and, on the appellants' case, that there is no practical difference between them on these facts – I do not need to determine whether there is, in fact, any material difference in the application of the two tests. I do not do so.

100. I should, however, note in passing one point. This is that the FTT, in its decision in *Coolatinney*, expressed the view that where the statute itself (through section 83(2)) provided a mechanism for determining whether a notice was ineffective by reason of a mistake in it, recourse could only be had to that statutory provision to resolve the issue (*Coolatinney* [21]). Neither Mr Elliott for HMRC, nor Mr Chacko for the first appellants, advanced their case on the basis that section 83(2) provided an exclusive mechanism for rectifying errors in a notice under paragraph 12 Schedule 10 FA 2003. I have adopted their approach.

Conclusion

101. For the reasons that I have given, the letter of 8 June 2011 to the first appellants together with the enclosed copy of the letter to the agents provided sufficient notice to the first appellants of HMRC's intention to enquire into both Return A and Return C for the purposes of paragraph 12 Schedule 10 FA 2003.

102. That conclusion decides these appeals in favour of HMRC. However, I have heard full argument on the remaining issues and, in case these appeals progress further, I will express my views on them.

ESTOPPEL

103. If I had concluded that the notice given to the appellants was not sufficient to inform the first appellants of HMRC's intention to enquire into both returns, HMRC's case is that the first appellants are estopped by convention from arguing that the notice failed to identify the returns into which HMRC intended to enquire.

Privilege

104. There is, however, a point that I need to address before I turn to the question of estoppel. As I have indicated, the appellants assert that HMRC is not entitled to rely on some of the correspondence in support of this argument because it is subject to without prejudice privilege. The relevant pieces of correspondence are:

(1) HMRC's letter to the first appellants dated 23 October 2013, which was not marked "without prejudice", in which HMRC invited the first appellants to withdraw from the scheme; and

(2) ELS's response dated 9 January 2014, which was marked "without prejudice subject to costs", in which ELS indicated that the first appellants wished to make a payment on account.

105. Mr Chacko, for the appellants, says that this exchange is subject to without prejudice privilege. Without prejudice privilege is broad. It applies to exclude from evidence all negotiations, whether oral or in writing, genuinely aimed at settlement. In this case, ELS's letter of 9 January 2014 was in response to the letter from HMRC of 23 October 2013, which was headed "Invitation to Settlement". Any response to such an invitation must be privileged (*R(oao Wildbur) v Ministry of Defence* [2016] EWHC 821 Admin per Cranston J [14]-[15], *Cutts v Head* [1984] Ch 290 per Oliver LJ at page 296). It is not open to HMRC to rely upon non-privileged information (in particular, any reference in the ELS letter to an enquiry being in progress) contained in correspondence to which privilege otherwise applies (*Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2010] UKSC 44 per Lord Clarke [25]-[27]).

106. Mr Elliott, for HMRC, says that none of this correspondence is privileged. A document is only privileged if it is genuinely part of negotiations towards a settlement. It does not apply to a communication which is simply an assertion of one party's case or a criticism of the other party's case (*Galliford Try Construction Limited v Mott Macdonald Ltd* [2008] EWHC 603 TCC ("*Galliford Try*") [5.2(c)]). In this case, neither letter was attempting to negotiate the dispute between the parties. The fact that the ELS letter was headed "without prejudice" makes no difference; it was not part of communications aimed at settling the dispute (*Galliford Try* [5.3(a)]).

107. Notwithstanding the breadth of the principle, on this issue, I agree with Mr Elliott.

108. The cases to which I have been referred indicate that the without prejudice rule is based, at least in part, on public policy arguments in favour of promoting settlement and compromise and so should apply to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. That policy would not extend to these communications. They were not made with any intention of opening or furthering negotiations or seeking any form of compromise of the dispute. HMRC's letter is simply a statement of its own position, inviting the appellants to capitulate (*Galliford Try* [5.2(c)], referring to *Buckinghamshire County Council v Moran* [1990] Ch 623). ELS's letter of 9 January 2014 contains no indication of any intention to negotiate or compromise at all.

The relevant case law principles on estoppel by convention

109. I now turn to the question of estoppel by convention.

110. The parties made their submissions on this issue by reference to the decision of the Supreme Court in *Tinkler v HMRC* [2021] UKSC 39 ("*Tinkler*"). I will begin by summarizing the facts of, and the principles that I draw, from that case.

Tinkler v HMRC

111. *Tinkler* concerned a notice of intention to enquire into a return for the purposes of income tax and capital gains tax under section 9A TMA. A notice to of intention to enquire into such a return may be served by delivery to the taxpayer at the taxpayer's "last known place of residence or his place of business or employment" (section 115 TMA).

112. In *Tinkler*, the relevant notice was sent to Mr Tinkler's previous address even though HMRC were aware of the new address. A copy of the notice was also sent to Mr Tinkler's

accountants. The accountants' response included a statement "as the return is now the subject of a section 9A TMA enquiry". The enquiry continued on the basis that it had been validly opened. At the conclusion of the enquiry, HMRC issued a closure notice in which they denied Mr Tinkler the use of a loss that he had claimed, and sought to impose additional tax on Mr Tinkler of approximately £700,000.

113. Mr Tinkler appealed. In addition to his arguments on the substantive issues, Mr Tinkler amended his notice of appeal to the FTT to include an argument that the notice under section 9A was invalid (and so the closure notice was invalid) because it had not been properly served on him.

114. The only issue before the Supreme Court in *Tinkler* was whether Mr Tinkler was estopped by convention from denying that HMRC had validly opened an enquiry. The Supreme Court decided that he was. In his judgment, with which all the members of the Supreme Court agreed, Lord Burrows approved the principles which govern the application of estoppel by convention as set out by Briggs J in *HMRC v Benchdollar Ltd* [2019] EWHC 1310 (Ch) subject to a refinement derived from the decision of the Court of Appeal in *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023 (*Tinkler* [42]-[50]).

115. Those principles are conveniently set out in the decision of Master Clark in *Brierley* v *Otuo* [2022] EWHC 1530 (Ch) at [38]:

> 38. These principles, as amended are,
>
> (1) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be shared between them. This may be inferred from words, or conduct, or even silence, but there must be a "crossing of the line", sufficient to show an assent to the assumption.
>
> (2) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.
>
> (3) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.
>
> (4) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
>
> (5) Some detriment must thereby have been suffered by the person alleging the estoppel or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

116. Applying these principles to the facts in *Tinkler*, Lord Burrows found:

(1) there was a common mistaken assumption between the parties that HMRC had validly opened an enquiry and the conduct of Mr Tinkler's agent, BDO, in its correspondence, "crossed the line" by making it clear to HMRC that it shared the common assumption and acting upon it (*Tinkler* [57], [61]);

(2) BDO "assumed some element of responsibility" for the common assumption because, as it expected, its affirmation of the common assumption influenced HMRC in continuing to rely on the common assumption (*Tinkler* [61]);

(3) HMRC relied upon the common assumption (*Tinkler* [61]);

(4) that reliance was reflected in future dealings between HMRC and Mr Tinkler – in that case, questions as part of the enquiry relating to certain Ukrainian properties (*Tinkler* [62]);

(5) HMRC suffered some detriment because it did not issue another notice within the 12-month time period – as it could have done so on the facts in *Tinkler* (*Tinkler* [63]).

Discussion

HMRC's case

117. Mr Elliott, for HMRC, says that the present case is on all fours with *Tinkler*:

(1) HMRC and the first appellants (acting through their agents, ELS) shared a common assumption that notice of an intention to enquire into both returns had been given and the conduct of ELS, in its correspondence, "crossed the line" by making it clear to HMRC that it shared the common assumption and acting upon it;

(2) ELS "assumed some element of responsibility" for the common assumption because its affirmation of the common assumption – in particular in its letters of 12 December 2013, 9 January 2014, 29 June 2016 – influenced HMRC in continuing to rely upon it;

(3) HMRC relied upon the common assumption;

(4) that reliance was reflected in future dealings between HMRC and ELS – in this case, in the course of the enquiry both parties proceeded on the assumption that notice of an intention to enquire into both returns had been given;

(5) HMRC suffered detriment because it did not issue another enquiry notice or a discovery assessment, which it would have done if the first appellants had raised any reasonable argument that the notices were invalid.

118. Mr Chacko raises various challenges to that analysis. I will deal with them in turn.

The common assumption must be specific

119. Mr Chacko submits that there was no common assumption that could found an estoppel in this case. As a starting point, the assumption on which HMRC rely – that a valid enquiry had been opened – is too vague. He relies on the decisions in *Republic of India v Indian Steamship Limited* [1997] UKHL 40 (*"The Indian Endurance"*) and *HIH Casualty & General Insurance Limited v Axa Corporate Solutions* [2002] EWCA Civ 1253 in support of a submission that, in order to found an estoppel, that a common assumption must be specific to the issue at hand. So, for example, in *The Indian Endurance*, a shared common assumption that a smaller claim was preceding outside the UK (at Cochin) and that the larger claim would be brought elsewhere was not sufficient to bar a claim before the UK courts. The defendant would have had to made clear that "in future proceedings no plea or defence on the basis of a judgment in Cochin would be raised whatever the outcome of the proceedings in Cochin".

120. Mr Elliott points out that, at various points in his judgment in *Tinkler*, Lord Burrows refers to the relevant assumption as being that "a valid enquiry had been opened". This is the same common assumption for which HMRC argue in this case. In response, Mr Chacko says that the common assumption in *Tinkler* was, in effect that notice had been received by Mr Tinkler at the correct address. I do not accept that submission. Lord Burrows refers to the common assumption on several occasions in his judgment in exactly the same terms. See, for example, at [63] and perhaps most importantly in his conclusion at [84]. Furthermore, Lord Briggs in his short concurring judgment uses exactly the same phrase to describe the common assumption (*Tinkler* [91]). For these reasons, I conclude that, at least in principle, an assumption that a valid enquiry had been opened is sufficiently specific to found an estoppel.

The appellants did not assume responsibility for the common assumption

121. Mr Chacko also says that it cannot be said on the facts of this case that the first and second requirements for an estoppel by convention as set out by Lord Burrows in *Tinkler* are not met. At no point did the first appellants "cross the line" by making it clear to HMRC that they assented to a common assumption that a valid enquiry had been opened. Nor could it be said that the first appellants assumed any responsibility for the common assumption.

122. On this issue, I agree with Mr Chacko.

123. As I have described, it is clear from the decision of Lord Burrows in *Tinkler* that, in order to found an estoppel by convention, it is not enough that the common assumption is identified by both parties. There must be a "crossing of the line" sufficient to show that the person against whom the estoppel is raised assented to the common assumption. Also, the person against whom an estoppel is raised must have assumed some element of responsibility for the common assumption, in the sense of conveying to the other party an understanding that the person against whom an estoppel is raised expected the other party to rely upon it.

124. Lord Burrows says this (at *Tinkler* [52]):

> 52. It will be apparent from that explanation of the ideas underpinning the first three *Benchdollar* principles that C must rely to some extent on D's affirmation of the common assumption and D must (objectively) intend or expect that reliance. This is in line with the paragraph from *Spencer Bower, The Law Relating to Estoppel by Representation*, 4th ed (2004) p 189, which was cited by Briggs J just before his statement of principles:
>
> "In the context of estoppel by convention, the question here is whether the party estopped actually (or as reasonably understood by the estoppel raiser) intended the estoppel raiser to rely on the subscription of the party estopped to their common view (as opposed to each, keeping his own counsel, being responsible for his own view)."

125. The point is reiterated by Lord Briggs in his short judgment (*Tinkler* [88]-[89]).

126. Whilst it is true that the first appellants or their agents refer to "enquiries" in their letters of 12 December 2013, 9 January 2014, 10 December 2015, 29 June 2016 and 22 March 2017, I cannot read any of this correspondence as implying an acceptance, on the part of the first appellants, that HMRC had opened a valid enquiry.

> (1) The references in the letters of 12 December 2013, 10 December 2015 and 22 March 2017 are in the context of an argument that the enquiry notices were not valid, albeit for reasons which are no longer being pursued.
>
> (2) As I have mentioned above, the appellants have objected to the admissibility of the correspondence including the letter of 9 January 2014. In my view, it is admissible. However, that makes little difference to the substantive issue. The reference in the letter of 9 January 2014 to the enquiry is a passing reference in a letter relating to voluntary payments made on a without prejudice basis.
>
> (3) The letter of 29 January 2016 has to be seen in the light of the Court of Appeal's decision in Project Blue. It is simply presenting an argument that there is no SDLT liability at all. ELS is not making a representation that the first appellants accept that a valid enquiry has been opened.

127. There is no unqualified statement in this case by the first appellants or their advisers, such as that in *Tinkler*, where the taxpayer's agent stated in correspondence with HMRC its assumption that a valid enquiry had in fact been opened. Indeed, throughout this period, the first appellants continued to assert that no valid enquiry had been opened. This was on the

grounds that were articulated in the letter from ELS dated 12 December 2013. This argument was still being made in the letter of 22 March 2017, only shortly before the issue of the closure notices in April 2017. The first appellants no longer rely on those grounds. However, against that background, the reference to the continuing enquiries in this correspondence can only be read as referring to enquiries which HMRC regarded as validly opened and on-going. I cannot read into them an acceptance on the part of the appellants that the enquiries had otherwise been validly opened.

128. Furthermore, there is no point in the correspondence or the conduct of the enquiry that the appellants could be said to have "assumed responsibility" for the assumption in terms of conveying to HMRC that the appellants intended and expected HMRC to rely upon it. Nor did the appellants or their agents – as the taxpayer's agents did in *Tinkler* – proceed to rely upon that assumption in future dealings with HMRC. Whilst the appellants provided some documentation to HMRC, this was on the basis as expressed in the letter from ELS of 25 November 2016 that there was no liability and that HMRC was out of time to issue an assessment (because no valid enquiry had been made).

129. Mr Elliott submits that notwithstanding these objections to the validity of any enquiry, there remained a common assumption, on which HMRC relied, that a notice of intention to enquire had been given in relation to both returns and that the parties proceeded on that basis. I assume by this argument he means that the common assumption was not that a valid enquiry had been opened but rather that some form of notice – whether or not it constituted a valid enquiry notice – had been received by the appellants in relation to both returns. As will be apparent from my comments in relation to the question of whether a valid notice was in fact received, I agree that was the case. But if this is the assumption to which Mr Elliott refers, there is no statement on the part of the appellants or their representatives by which they "crossed the line" and indicated to HMRC that they assented to that more specific assumption. Even if some of their actions in pursuance of the enquiry could be regarded as "crossing the line"– which I do not agree - the appellants did not assume responsibility for the common assumption. I do not accept, in a case such as this, where the appellants are actively disputing the validity of an enquiry – albeit on a basis that is subsequently withdrawn – that by continuing to take action in pursuance of the enquiry to protect their positions, they should be regarded as representing to HMRC in a manner sufficient to ground an estoppel, which can be relied upon by HMRC, that there is no other basis on which the appellants might challenge the validity of the notice.

130. For these reasons, I agree with Mr Chacko that the requirements for an estoppel by convention adopted by the Supreme Court in *Tinkler* are not met in this case. The first appellants did not "cross the line" in relation to a common assumption or assume responsibility for a common assumption by affirming the assumption to HMRC in a manner that they intended and expected HMRC to rely upon it. Accordingly, if I had found that HMRC had not validly issued a notice to enquire into both returns, I would have concluded that the correspondence and conduct of the appellants was not sufficient to support a claim of estoppel by convention by HMRC.

Estoppel cannot be used to extend the jurisdiction of the tribunal

131. Mr Chacko also raised a technical challenge to the application of an estoppel in this case.

132. Mr Chacko says that an estoppel by convention cannot apply in these circumstances. The point at issue in this case is whether a valid notice to enquire into a return has been issued. The question goes to the jurisdiction of the tribunal. If there is no valid notice, the closure notice is not valid and the tribunal does not have jurisdiction to hear the appeal (*Raftopoulou* [51]). Just as it is not possible for the parties to agree that a statutory tribunal has jurisdiction when it

does not, it is not possible for estoppel to be used to expand the jurisdiction of a statutory tribunal when it would not otherwise have such jurisdiction. Mr Chacko relies on the decisions of the House of Lords in *Essex County Council v Essex Incorporated Congregational Church Union* [1963] AC 808 per Lord Reid at pages 820-821 and *J&F Stone Lighting and Radio v Levitt* [1947] AC 209 at page 216 in support of this submission.

133. The point is similar to the principle that estoppel cannot be used to undermine a statutory protection. This is the principle underlying the decision of the Court of Appeal in *Keen v Holland* [1984] 1 WLR 251. That case concerned the operation of the Agricultural Holdings Act 1948. In response to an argument that it was possible for the statutory protections afforded by the Act to be ousted by the operation of estoppel, Oliver LJ says this at page 261C:

> Attractively as this argument was put, it is not, in our judgment, sound. Once there is in fact an actual tenancy to which the Act applies, the protection of the Act follows and we do not see how, consistently with *Johnson v. Moreton* [1980] A.C. 37, the parties can effectively oust the protective provisions of the Act by agreeing that they shall be treated as inapplicable. If an express agreement to this effect would be avoided, as it plainly would, then it seems to us to follow that the statutory inability to contract out cannot be avoided by appealing to an estoppel…

134. There are similar statements that the principle in the judgments of the Court of Appeal in *Daejan Properties Ltd v Mahoney* [1995] 28 HLR 498 (per Bingham LJ at page 505 and Hoffman LJ at page 511).

135. In response to this point, Mr Elliott relies on the decision of the Supreme Court in *Tinkler*. He points out that, in that case, the failure of HMRC to issue a valid notice did not prevent the Supreme Court from concluding that the taxpayer was estopped from denying that a valid enquiry had been opened. Furthermore, a conclusion that the appellants are estopped from denying that valid enquiries were opened does not impermissibly outflank a statutory protection – in particular, as in both *Tinkler* and this case, where the taxpayer knew of HMRC's intention to enquire (*Tinkler* [65]).

136. This point is directly addressed by Lord Burrows in *Tinkler*. In *Tinkler*, Lord Burrows distinguishes *Keen v Holland* on the grounds that section 115 TMA is permissive. It simply provides a method by which a notice can be given. HMRC and Mr Tinkler could have agreed that notice could be given in another way. It followed that estoppel by convention could apply. Lord Burrows says this at [81]-[82]:

> 81. The situation with which we are concerned is distinguishable. Section 9A TMA requires that a notice of enquiry is given to the taxpayer; and section 115(2) provides one method by which that notice may be given. But it would have been open to the parties (ie HMRC and Mr Tinkler) to agree expressly the method by which the notice of enquiry was to be given (including, it would seem, that a notice of enquiry given to Mr Tinkler's tax advisers would have counted). It follows from the TMA being permissive as to the method of giving notice that an estoppel by convention, by which HMRC and Mr Tinkler/BDO operated on the basis that a valid enquiry had been opened (ie that a particular method had been used), does not undermine the purpose of the Act . As, applying the principles of estoppel by convention, Mr Tinkler is otherwise estopped from denying that HMRC opened a valid enquiry, there is nothing in the statutory provisions, purposively interpreted, that requires the court to reject that estoppel.
>
> 82. There is an additional reason, on the facts, supporting that conclusion. We have seen, at para 15 above, that the FTT found that Mr Tinkler and/or his PA knew of HMRC's enquiry in November 2005. Even if, contrary to the view

> taken in the last paragraph, the purpose of section 9A would otherwise be undermined by the operation of the estoppel by convention, there cannot be any conceivable undermining of the statutory purpose once the taxpayer actually knows of the enquiry. After November 2005, therefore, there has been no conceivable statutory reason why the taxpayer should be protected by rejecting the operation of estoppel by convention.

137. An estoppel could therefore apply in a case, like *Tinkler*, where it was otherwise open to the parties to agree a means of service of the notice. However, that leaves open the question in a case such as this as to whether estoppel can apply in a case where the taxpayer's argument is that no notice has been given at all. In such a case, I can see some force in Mr Chacko's argument that the question becomes simply whether or not a valid notice has been given and there is no room for the operation of estoppel. However, I have decided that no estoppel arose on the facts of this case. I do not need to decide this point and I do not do so.

Conclusion

138. For the reasons that I have given above, in my view, the requirements for an estoppel by convention are not met in this case.

VALIDITY OF THE DISCOVERY ASSESSMENTS

139. As I have mentioned above, HMRC issued discovery assessments in relation to each charge to tax under s75A FA 2003 to protect their position if the notices to enquire into the returns should for any reason be invalid.

The issues in outline

140. The appellants seek to challenge the discovery assessments on three grounds.

(1) The first is that HMRC have not pleaded a positive case on discovery and so, the discovery assessments must be invalid applying the principles in *Burgess* (the "discovery issue").

(2) The second is that the assessments are out of time – in particular, it is not open to HMRC to rely upon the 20-year time limit in paragraph 31(2A) Schedule 10 FA 2003 (the "time limit issue").

(3) The third is that section 75A FA 2003 can only apply if section 45(3) and section 71A FA 2003 apply. HMRC has continued to plead that section 45(3) FA 2003 could not apply on the sale of the property by the third party vendor to the appellants (the "pleading issue").

Relevant legislation

141. Before I address these issues, I will first set out the relevant legislation.

142. In certain circumstances, HMRC has power to make a discovery assessment outside the normal enquiry process. The relevant provision is in paragraph 28 Schedule 10 FA 2003. It provides:

> **28 Assessment where loss of tax discovered**
>
> (1) If the Inland Revenue discover as regards a chargeable transaction that—
>
> (a) an amount of tax that ought to have been assessed has not been assessed, or
>
> (b) an assessment to tax is or has become insufficient, or
>
> (c) relief has been given that is or has become excessive,

they may make an assessment (a "discovery assessment") in the amount or further amount that ought in their opinion to be charged in order to make good to the Crown the loss of tax.

(2) The power to make a discovery assessment in respect of a transaction for which the purchaser has delivered a return is subject to the restrictions specified in paragraph 30.

143. There are restrictions on HMRC's power to make a discovery assessment in cases where the purchaser has made a return. These restrictions are contained in paragraph 30 Schedule 10 FA 2003. Paragraph 30 provides:

30 Restrictions on assessment where return delivered

(1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28 or 29 in respect of the transaction—

(a) may only be made in the two cases specified in sub-paragraphs (2) and (3) below, and

(b) may not be made in the circumstances specified in sub-paragraph (5) below.

(2) The first case is where the situation mentioned in paragraph 28(1) or 29(1) is attributable to fraudulent or negligent conduct on the part of—

(a) the purchaser,

(b) a person acting on behalf of the purchaser, or

(c) a person who was a partner of the purchaser at the relevant time.

(3) The second case is where the Inland Revenue, at the time they—

(a) ceased to be entitled to give a notice of enquiry into the return, or

(b) completed their enquiries into the return,

could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 28(1) or 29(1).

(4) For this purpose information is regarded as made available to the Inland Revenue if—

(a) it is contained in a land transaction return made by the purchaser,

(b) it is contained in any documents produced or information provided to the Inland Revenue for the purposes of an enquiry into any such return, or

(c) it is information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 28(1) or 29(1)—

(i) could reasonably be expected to be inferred by the Inland Revenue from information falling within paragraphs (a) or (b) above, or

(ii) are notified in writing to the Inland Revenue by the purchaser or a person acting on his behalf.

(5) No assessment may be made if—

(a) the situation mentioned in paragraph 28(1) or 29(1) is attributable to a mistake in the return as to the basis on which the tax liability ought to have been computed, and

(b) the return was in fact made on the basis or in accordance with the practice generally prevailing at the time it was made.

144. These provisions relating to SDLT are similar - but not identical - to provisions which allow HMRC to make discovery assessments for income tax and capital gains tax, which are contained in section 29 TMA, and corporation tax, which are found in paragraphs 41 to 45 of Schedule 18 to the Finance Act 1998 ("FA 1998"). Some of the authorities to which I was referred by the parties concern the application of these other provisions. Although the wording of section 29 TMA and paragraphs 28 and 30 Schedule 10 FA 2003 differ in some respects, the parties regarded the principles which are outlined in those cases as applicable equally to both sets of provisions. I have adopted the same approach.

145. The time limit for the making of an assessment is set out in paragraph 31 Schedule 10 FA 2003 and is usually four years from the effective date of the transaction: paragraph 31(1). There are, however, various exceptions to that general rule. Where the loss of tax is attributable to carelessness on the part of the taxpayer, the time limit is extended to six years from the effective date of the transaction: paragraph 31(2). The time limit is further extended to 20 years from the effective date of the transaction in various circumstances set out in paragraph 31(2A). Those circumstances include: where the loss of tax is brought about deliberately by the taxpayer; and where the loss of tax is attributable to the failure of the taxpayer to comply with its obligations under various provisions including section 76(1) FA 2003 (the obligation to file a land transaction return).

146. Paragraph 31 is, so far as relevant, in the following form.

> **31 Time limit for assessment**
>
> (1) The general rule is that no assessment may be made more than 4 years after the effective date of the transaction to which it relates.
>
> (2) An assessment of a person to tax in a case involving a loss of tax brought about carelessly by the purchaser or a related person may be made at any time not more than 6 years after the effective date of the transaction to which it relates (subject to sub-paragraph (2A)).
>
> (2A) An assessment of a person to tax in a case involving a loss of tax—
>
> (a) brought about deliberately by the purchaser or a related person,
>
> (b) attributable to a failure by the person to comply with an obligation under section 76(1) or paragraph 3(3)(a), 4(3)(a) or 8(3)(a) of Schedule 17A,
>
> …
>
> (5) Any objection to the making of an assessment on the ground that the time limit for making it has expired can only be made on an appeal against the assessment.
>
> (6) In this paragraph "related person", in relation to a purchaser, means—
>
> (a) a person acting on behalf of the purchaser, or
>
> (b) a person who was a partner of the purchaser at the relevant time.

Some preliminary points

147. As a preliminary point, HMRC challenge the appellants' right to contest the discovery assessments. I heard argument on this point at the beginning of the hearing, but decided that I would reach a conclusion on the point as part of this decision, and having heard the arguments on the three issues to which I have referred above.

148. In short, Mr Elliott, for HMRC, says that, although the appellants' original grounds of appeal dated 30 November 2017 asserted that the discovery assessments were out of time, the amended grounds of appeal dated 24 May 2022 did not contain any challenge to the discovery assessments. HMRC expressly noted in their Amended Statement of Case of 4 July 2022 that no challenge was made to the discovery assessments. When the issue was raised with the appellants, the only issue raised in the appellants' solicitors' response related to the conditions in paragraph 30 Schedule 10 FA 2003. This point was not taken further. HMRC considered that the matter had been withdrawn. The first time that HMRC were aware that the appellants had resurrected their challenge to the discovery assessments was at the time of the exchange of skeleton arguments. HMRC say that, given how late this issue has been raised, the appellant should not be entitled to run these arguments before the tribunal.

149. I do not accept Mr Elliott's arguments on these issue. As Mr Chacko pointed out, the validity of a discovery assessment is an issue which it is incumbent on HMRC to make a positive case. The burden is clearly on HMRC (*Burgess* [38]). The appellants are not required to plead a positive case. HMRC is not entitled to assume the absence of any reference to this issue in the grounds of appeal is some form of concession or waiver of the point (*Burgess* [49]). In any event, HMRC were clearly on notice that they might be put to proof on various issues relating to the discovery assessments at the very latest following their receipt of the appellants' solicitors' letter of 13 November 2022. That letter included a reference to both the discovery issue and the time limit issue. Mr Elliott invited me to conclude that the appellants had withdrawn or conceded the point. However, any withdrawal or concession would have to be clear and unambiguous (*Burgess* [44]), and I cannot infer from the relevant correspondence any form of waiver or concession on the part of the appellants.

150. I have therefore concluded that the appellants should be permitted to raise these issues before the tribunal.

The discovery issue

151. As regards the question of discovery, Mr Elliott applied to admit the evidence of Mr Hemmings on this issue. He says that HMRC should be entitled to submit the additional evidence given the manner in which this point has arisen, which he described as a "planned ambush" by the appellants.

152. I do not accept Mr Elliott's description. However, I have decided to admit Mr Hemmings's evidence. It has become clear that there has been some confusion over the issues which are to be argued before the Tribunal in this case. It would be fair and just for me to hear all of the arguments and all of the evidence at this time. The evidence is unchallenged.

153. All that is required for HMRC to prove a "discovery" is for HMRC to show that an officer of the board came to a conclusion that there is a possible insufficiency. This is a subjective test (*HMRC v Tooth* [2021] UKSC 17, [72] and [78] – [80]). It is Mr Hemmings's unchallenged evidence that, having been instructed to issue closure notices for the enquiries that are relevant to these appeals, he came to the view that the appellants had failed to submit returns under section 76(1) FA 2003 in respect of the notional transactions under section 75A FA 2003 and that there was a risk of "significant losses" of SDLT as a result. He then arranged for the discovery assessments to be issued.

154. There is, of course, an issue as to whether Mr Hemmings's analysis is correct – this is the time limit issue. However, discovery in this case is proved by the evidence of Mr Hemmings.

The time limit issue

155. The time limit issue arises from the fact that the discovery assessment in this case was issued on 21 April 2017. The assessment was made outside the usual four-year time limit for the making of a discovery assessment (paragraph 31(1) Schedule 10) and outside the six-year time limit that applies where the loss of tax is attributable to carelessness on the part of the taxpayer or a related person (paragraph 31(2) Schedule 10). Instead, HMRC says that the discovery assessments are made in time because the 20-year time limit in paragraph 31(2A) Schedule 10 applies.

The parties' submissions

156. In summary, Mr Elliott, for HMRC, submits:

(1) section 75A applies to the transactions to treat them as giving rise to a notional land transaction giving effect to the acquisition of the third party vendor's interest by the first appellant (section 75A(4));

(2) section 76(1) requires the appellants to file an SDLT return in respect of a notifiable transaction;

(3) under section 77(1)(d) the notional land transaction created by section 75A FA 2003 is a notifiable transaction;

(4) the first appellants did not file a SDLT return in respect of the notional land transaction and so the 20-year time limit in paragraph 31(2A)(b) applies;

(5) the obligation to file an SDLT return in respect of the notional land transaction is a separate and unqualified obligation. It is not met by filing an SDLT return in relation to one of the transactions that forms part of the steps in the scheme.

157. Mr Chacko disagrees. He says that it is possible to treat the SDLT return submitted by the first appellants in respect of their purchase of the property from the third party vendor (Return A) as the relevant return in respect of the notional land transaction (so that paragraph 31(2A)(b) does not apply). He asserts that this conclusion follows from the judgment of Lord Hodge in *Project Blue*.

158. The relevant passage from the judgment of Lord Hodge in *Project Blue* is found at [81] to [84] and is as follows:

> 81. PBL submits that HMRC are in any event not entitled to pursue their claim for the SDLT because they had no power to amend the SDLT return, lodged on its behalf, relating to the completion of the contract of 5 April 2007 between the MoD and PBL (para 7 above), because it was not a return relating to the notional transaction under section 75A.
>
> 82. PBL argues that the return, which referred to the section 45(3) disregard, was not strictly necessary but was submitted on its behalf in order to have the purchase of the barracks entered onto the Land Register. It submits that HMRC, while entitled to inquire into that return under section 76 of and paragraph 12 of Schedule 10 to the FA 2003 in relation to the sale by the MoD to PBL, had no power to amend the return in order to impose a liability to SDLT on the separate, notional transaction. The only avenues which had been open to HMRC to impose a liability to SDLT on the notional transaction, it submits, were to make a determination under paragraph 25 of Schedule 10 , because no return had been lodged in respect of the notional transaction, or to make a discovery assessment under paragraph 28 of that Schedule. As the six-year time limit for either the determination or the assessment had now expired,

HMRC could no longer seek payment of any SDLT due on a notional transaction.

83. I do not accept that submission. The answer lies in the terms of paragraph 13 of Schedule 10 , which sets out the scope of the inquiry which HMRC can make under paragraph 12 of that Schedule, and HMRC's powers on completion of the inquiry under paragraph 23. Paragraph 13 provides so far as relevant:

"(1) An inquiry 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. …"

The relevant information contained in the return included information about the sale of the barracks by the MoD to PBL. To my mind, the fact that the information in the return was provided to HMRC in relation to a transaction (the MoD-PBL sale), which was to be disregarded under both section 45(3) and section 75A(4), does not limit the scope of the inquiry. HMRC were entitled to inquire into the tax consequences of that sale. The powers of HMRC on completion of the inquiry are set out in paragraph 23 of Schedule 10 which provides:

"(1) An inquiry under paragraph 12 is completed when [HMRC] by notice ('a closure notice') inform the purchaser that they have completed their inquiries 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. …"

HMRC were entitled to inquire 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 PBL to submit a return in relation to the notional transaction does not limit the scope of HMRC's power to inquire into the MoD-PBL sale or their power to amend the return under paragraph 23.

84. I therefore reject this procedural challenge.

159. Mr Chacko also refers to a decision of the Upper Tribunal in *Brown v HMRC* [2022] UKUT 298 ("*Brown*"). *Brown* was a case involving a different scheme to avoid SDLT on the purchase of residential property, which was also based on sub-sale relief under section 45(3). Under that scheme, the purchasers of a property funded an unlimited company by subscribing shares. The company then purchased the property and transferred the property to the purchasers by distribution in specie. The Upper Tribunal decided the case by reference to a point on the construction of section 45(3) FA 2003. However, one issue that was before the Upper Tribunal concerned the scope of the determination made by HMRC under paragraph 25 Schedule 10 FA 2003. On that issue, the Upper Tribunal expressed the view that a determination made in respect of the acquisition of the chargeable interest by the purchaser was capable of meeting the requirements of paragraph 25 whether the charge to tax was under section 45(3) FA 2003 or under section 75A FA 2003.

160. Mr Chacko refers in particular to a passage at the end of the decision of the Upper Tribunal (at [88] to [89]) in which the Upper Tribunal considers whether its conclusion on this latter point is consistent with the decision in *Project Blue*. The Upper Tribunal says this:

> 88. This conclusion is consistent with the Supreme Court judgment in *Project Blue* where PBL filed a land transaction return in relation to its actual acquisition of the property and claimed relief under s 45(3). HMRC opened an enquiry into the return and amended the return to impose SDLT on a notional transaction under s 75A . The Court rejected an argument that HMRC could not amend the return to impose liability in respect of the notional transaction arising under s 75A when the return had been submitted in relation to the actual transaction. The Court held at [83] that the return was provided to HMRC in relation to a transaction, namely the sale from the MoD to PBL and HMRC were entitled enquire into the tax consequences of that sale and, following the completion of their enquiries, to issue a closure notice making the amendments to the return which were required to give effect to their conclusions.
>
> 89. It is therefore clear, as Mr Elliott submitted, that the Supreme Court did not follow the narrow approach taken by the FTT in this case which would be to say that the only chargeable transaction in respect of which the return had been filed was the actual transaction and not the s75A notional transaction. Instead, it held that the closure notice could impose liability in respect of the notional transaction (as well as the actual transaction) because the subject of the return was the sale (i.e., acquisition) of the property by PBL. As Mr Elliott submitted, this approach is consistent with identifying the land transaction which is the subject of the relevant return, assessment, or determination by reference to the broad definition in s 43(1), being the acquisition of the chargeable interest (regardless of whether that acquisition is treated as being pursuant to an actual transaction or a notional transaction).

161. As I have mentioned above, the Upper Tribunal decided the case by reference to the construction of section 45(3) FA 2003. So these statements are strictly obiter. However, Mr Chacko says that the effect of the decision of the Supreme Court in *Project Blue*, as interpreted by the Upper Tribunal in *Brown*, is that a return is made in relation to the relevant land transaction, which is the acquisition of a chargeable interest by the first appellants from the third party vendor. It does not matter whether that acquisition takes place pursuant to an actual transaction for SDLT purposes or pursuant to a notional transaction under section 75A. It follows, in this case, that the return made in respect of the sale from the third party vendor to the first appellants (i.e. Return A) should properly be regarded as a return in relation to the underlying land transaction, whether that is an actual transaction or a notional land transaction under section 75A FA 2003. As a result, the obligation in section 76(1) has been fulfilled and paragraph 31(2A)(b) does not apply and the discovery assessments are out of time.

Discussion

162. It is not clear to me that Lord Hodge's words in *Project Blue* extend as far as Mr Chacko suggests. In the passage from his judgment (at *Project Blue* [81]-[84]), Lord Hodge rejects an argument that HMRC was not entitled to amend the return – equivalent to Return A in this case – relating to the purchase of property from the third party vendor in order to impose a liability to SDLT on a notional land transaction under section 75A (because the return related to a separate transaction which had been disregarded under section 45(3) FA 2003). Instead, Lord Hodge takes the view that it was open to HMRC as part of the enquiry into that return to impose a liability on a notional transaction under section 75A. He reaches that view by reference to the scope of the enquiry into that return, which by virtue of paragraph 13 Schedule 10 extends to anything included in the return. The return contained information regarding the underlying

transaction (i.e. the sale from the third party vendor to the purchaser). HMRC were entitled to enquire into the consequences of that transaction, which as it was part of a wider scheme, included the possibility of a charge under section 75A.

163. The passage therefore refers to the scope of HMRC's enquiry into a return. As Lord Hodge states, at the end of paragraph [83] of his judgment, the scope of HMRC's powers to enquire into the return relating to the actual transaction is not limited by any obligation on the purchaser to submit a return in relation to the notional land transaction.

164. This observation does not, however, exclude Mr Chacko's point. As I understand it, his analysis – consistent with the Upper Tribunal's comments in *Brown* (*Brown* [88]-[89]) – is as follows.

> (1) Under section 76(1), a return is filed by the "purchaser" in respect of a "notifiable transaction" as defined in section 77(1) FA 2003.
>
> (2) As the opening words of that section make clear, each notifiable transaction is a "land transaction". A "land transaction" is "any acquisition of a chargeable interest" (section 43 FA 2003). The reference to the "purchaser" in section 76 is to the person acquiring the chargeable interest (section 43(4) FA 2003).
>
> (3) As the Upper Tribunal identified in *Brown*, the matters that are covered by the return are defined by reference to the land transaction i.e. the particular acquisition of a chargeable interest by the particular purchaser. It does not matter whether the acquisition for SDLT purposes takes place pursuant an actual transaction or to a notional transaction under section 75A.
>
> (4) On that analysis, in a case, such as this, where the acquisition of the relevant chargeable interest by the purchaser is the subject of a return made by the same purchaser, that return (i.e. Return A) will meet the requirement to submit a return in respect of the notional transaction for the purposes of section 76 and section 77 FA 2003.
>
> (5) If so, in this case, paragraph 31(2A)(b) Schedule 10 FA 2003 does not apply; the discovery assessments were made outside the time limits in paragraph 31 FA 2003 and are out of time.

165. I should note, however, that the transactions in *Project Blue* (and in *Brown*) took place under a slightly different regime for the notification of land transactions in SDLT returns. In particular, they took place before the introduction in Finance Act 2008 of a new section 77 FA 2003, which included the specific reference to "a notional land transaction under section 75A" (in paragraph (d) of subsection (1)) in the list of notifiable transactions. The effect of that change, in combination with the obligations to file returns in section 76 FA 2003, was to introduce a specific obligation to file an SDLT return in respect of a notional land transaction created by section 75A FA 2003. There was no such specific reference in the prior legislation.

166. The key question is whether the changes made by the Finance Act 2008 affect the analysis. I have decided these appeals by reference to the validity of the notices to enquire into the returns. However, if I am wrong on that issue, I would agree with Mr Chacko that the Finance Act 2008 changes do not affect the analysis. Return A was a return in respect of the notional transaction under section 75A. Paragraph 31(2A)(b) Schedule 10 FA 2003 does not apply. The discovery assessments are therefore out of time.

The pleading issue

167. The final point that I need to address is the pleading issue.

168. In short, the appellants argue that section 75A can only apply where both section 45(3) FA 2003 and section 71A FA 2003 apply to the transactions in the scheme. HMRC has continued to plead that section 45(3) applies. Mr Chacko refers to the Upper Tribunal's decision in *Brown* (*Brown* [53]) as authority for the proposition that section 45(3) does not apply on the basis that the transactions are self-cancelling (applying *BMBF*)

169. On this point, I agree with Mr Elliott. HMRC's case before the tribunal has been that section 75A FA 2003 applies to the transactions. HMRC has not sought to argue that the financing transactions are self-cancelling applying *BMBF* and so section 45(3) cannot apply. HMRC's case rests on the similarity of the transactions in this case with those in *Project Blue*. The analysis follows that of the Supreme Court in *Project Blue*.

DISPOSITION

170. For the reasons that I have given, HMRC gave notice of intention to enquire into both returns (Return A and Return C) under paragraph 12 Schedule 10 Finance Act 2003. The closure notices are therefore valid.

171. I dismiss these appeals.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

172. 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.

ASHLEY GREENBANK
TRIBUNAL JUDGE

Release date: 15th DECEMBER 2023