Neutral Citation: [2024] UKFTT 00947 (TC)

Case Number: TC09328

FIRST-TIER TRIBUNAL
TAX CHAMBER

Sitting in public in Taylor House
London

Appeal reference: TC/2016/07224

STAMP DUTY LAND TAX – Subsale arrangements - husband and wife scheme – discovery assessment – was a discovery made when officer follows a process set by others? - yes – did s 45 Finance Act 2003 operate to reduce the chargeable consideration? - no – Section 75A Finance Act 2003 considered in the alternative with the same result – appeal dismissed

Heard on: 15-16 May 2024
Judgment date: 17 October 2024

Before

TRIBUNAL JUDGE MALCOLM FROST
DR CAROLINE SMALL

Between

MICHAEL MURPHY
JULIE MURPHY

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Murphy appeared in person

For the Respondents: David Street litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal against an assessment made by HMRC on 8 April 2014 charging additional Stamp Duty Land Tax ("SDLT") of £8,310 on the acquisition of a property in Hillingdon, London ("the Property").

2. The arrangements under appeal were sometimes referred to as a "husband and wife" SDLT savings scheme.

3. For the reasons set out below, we dismiss the appeal.

FINDINGS OF FACT

4. The documentary evidence before the Tribunal consisted of a document bundle of 311 pages and a supplementary bundle of 54 pages. Mr Murphy gave oral evidence and was cross examined.

5. HMRC suggested that the fact that the copies of transactional documents provided by Mr Murphy were unsigned indicated that the relevant documents were not executed.

6. We were happy to accept Mr Murphy's evidence that he and Mrs Murphy had been provided with the unsigned documents, had signed them and then sent them to their solicitors. As such, our findings below are on the basis that the relevant documents were all executed as intended. The legal effect of the documents is a point we shall return to later in this decision.

7. The effective date of the transaction was 29 April 2010.

8. Pursuant to a sale agreement (the "Original Sale Contract"), Mr and Mrs Murphy purchased the Property for £277,000 from third party sellers (the "Original Sellers"). At the time of the sale, Mr and Mrs Murphy were not married and Mrs Murphy was known by her maiden name of Dennis. However, for convenience we have referred to her as Mrs Murphy throughout.

9. On the same date as the Original Sale Contract Mr and Mrs Murphy executed the "Supplemental Deed", which relevantly provided as follows.

(1) The recitals provided that:

> "(A) By a sale and purchase agreement ('the Contract' bearing the same date as this Supplemental Deed the Seller has agreed to sell the Property to the Buyer at the Initial Price
>
> (B) The transfer to the Buyer ('the Transfer') is to be in the form referred to in the Contract
>
> (C) Michael [Mr Murphy] has paid a deposit of 10% of the purchase price and intends to pay a further amounts of 47% of the purchase price pursuant to the Contract.
>
> (D) Michael has agreed to transfer all his interest in the original agreement and the Property into the joint ownership of himself and Julie [Mrs Murphy] on the following terms:"

(2) The operative clauses of the deed were clauses 2.1 and 2.2 which provided:

> "2.1 In consideration of Julie agreeing to pay the balance of the consideration under the Contract being the sum of £119,110 and on consideration of the natural love and affection of Michael for Julie, Michael transfers and Julie accept by way of sub-sale Michael's interest in the Property pursuant to the Contract.

> 2.2 On completion of the purchase of the Property pursuant to the Contract and this Agreement, the Property shall be held by Michael and Julie upon trust as to 1% of the beneficial interest in the Property for Michael absolutely and as to the remaining 99% upon trust for Julie absolutely."

10. The purchase of the Property from the Original Sellers was funded by a mortgage advance of £221,570 made jointly to Mr and Mrs Murphy. We consider further below how the joint nature of the mortgage affected the SDLT treatment of the transaction.

11. On 29 April 2010, Mr and Mrs Murphy notified the transaction to HMRC via as SDLT1 return. The return contained the following details:

(1) Box 4 – the effective date of transaction was 29 April 2010.

(2) Box 10 – the total consideration reported in the return was £119,110.

(3) Box 14 – the total amount of tax due was £nil.

(4) Boxes 36-7 and 45-7 – the vendors were the Original Sellers

(5) Box 52-53 – the first purchaser was Mr Murphy.

(6) Box 66-67 – the second purchaser was Mrs Murphy (under her maiden name)

(7) Box 60 – the Agent's name was Arc Property Solicitors

12. The Land Registry Title, dated 21 May 2010, contains the following details

(1) The proprietors were Mr Murphy and Mrs Murphy (under her maiden name).

(2) The price stated to have been paid on 29 April 2010 was £277,000

13. As noted above, the agents stated on the SDLT1 were Arc Property Solicitors ("Arc"). Arc was a trading name of Adobe Solicitors Ltd ("Adobe").

14. As a consequence of HMRC's investigative work, HMRC considered that Adobe/Arc were a company which had been promoting SDLT avoidance schemes.

15. On 4 October 2013, the Solicitors Regulation Authority ("SRA") intervened in Adobe. As per the SRA website "In an intervention, the Solicitors Regulation Authority (SRA) closes down a solicitor's practice at once – to protect clients' interests. After a firm has been closed down, it can no longer act for its clients."

16. In late-2013 HMRC wrote to taxpayers who it had identified as using Arc for their property purchase. The letter notified the recipient of the SRA intervention. The letter also informed the recipient that HMRC would be carrying out a review of all the SDLT returns submitted by Arc. HMRC sent such a letter to Mr and Mrs Murphy on 12 December 2013.

17. HMRC then undertook a review of the returns which had been submitted by Arc, including the return for Mr and Mrs Murphy. HMRC officer Mr Ian Lewis reviewed the Appellants' return.

18. Officer Lewis stated in his witness statement that he could not recall the specific assessment, but would have compared the £119,000 consideration shown on the SDLT1 with the £277,000 figure on details held by the land registry. We find that this is what occurred.

19. On 8 April 2014, Officer Lewis made an assessment under paragraph 28 Schedule 10 FA 2003, to assess additional SDLT of £8,310. The assessment was made on the basis that the Appellants were liable to SDLT in respect of consideration of £277,000.

20. In the assessment letter, Officer Lewis stated:

> "As part of our review we compared the figures on your return to the information that was sent to Land Registry for title registration purposes.
>
> Your SDLT return shows the amount paid for the property as £119,110. Land Registry information shows the amount paid for the property as £277,000.
>
> We believe that the Land Registry information is correct, and that your SDLT return is wrong.
>
> Your SDLT return shows the tax due as £nil. Based on the Land Registry information, we believe that the tax due is £8,310.00."

21. On the balance of probabilities, we are satisfied that Officer Lewis concluded that there had been a loss of tax and raised an assessment in line with that conclusion.

22. On 1 May 2014 Mr Murphy wrote to HMRC on behalf of himself and Mrs Murphy appealing against the assessment.

23. The appeal was notified to the Tribunal, was subject to a number of stays, and a number of grounds of appeal were struck out following a hearing on 23 August 2023.

24. The substantive appeal, on the remaining grounds, is now before this Tribunal.

KEY LEGISLATION

25. The arrangements put in place by Mr and Mrs Murphy were intended to engage the subsale provisions set out in section 45 Finance Act 2003 ("FA 2003" - all statutory references are to FA 2003 unless stated otherwise).

26. A subsale generally refers to a transaction whereby an initial sale has been agreed for a property to pass from A to B but, before the sale is completed, B agrees to sell the property to C. If no relief were available, there may be SDLT due on both the A to B sale as well as the B to C sale – despite B never having possession of the property for any substantive period. Subsale relief seeks to relieve the effective double taxation that might arise.

27. Section 45 (as in force at the material time) provides (so far as is 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) paragraph 12B of Schedule 17A (assignment of agreement for lease) does not apply.
>
> 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 except in a case where the secondary contract gives rise to a transaction that is exempt from charge by virtue of subsection (3) of section 73 (alternative property finance: land sold to financial institution and re-sold to individual).

...

(5) Where a transfer of rights relates to part only of the subject-matter of the original contract ("the relevant part")–

(a) subsection (8)(b) of section 44 (restriction of charge to tax on subsequent conveyance) has effect as if the reference to the amount of tax chargeable on that contract were a reference to an appropriate proportion of that amount, and

(b) a reference in the second sentence of subsection (3) above to the original contract, or a reference in subsection (4) above to the secondary contract arising from an earlier transfer of rights, is to that contract so far as relating to the relevant part (and that contract so far as not relating to the relevant part shall be treated as a separate contract)"

28. The arrangements also potentially engage s 75A FA 2003, which we set out below.

29. The first subsection of s 75A sets out the basic test for the section to apply. There must be a disposal and acquisition of a chargeable interest, a number of scheme transactions and an SDLT saving as a result:

"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. "

30. The second and third subsection set out the broad range of matters that may fall within the scope of the section. We note that the list expressly includes a subsale.

"(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."

31. Subsections 4 to 6 then set out the consequences of s 75A applying to a particular situation – the scheme transactions are substituted for a notional direct transaction with deemed consideration:

"(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."

32. Subsection 7 is not relevant to the present case.

33. The provisions for making an assessment are set out in Sch 10 FA 2003, para 28 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."

34. Mr Murphy had originally suggested that some of the restrictions in paragraph 30 applied, but these arguments were struck out by the Tribunal prior to the case coming before us.

THE ISSUES

35. There are two overall issues to be determined by the Tribunal:

(1) Whether or not the discovery assessment was valid

(2) What is the correct amount of SDLT due.

36. The burden of establishing the first issue falls to HMRC. In relation to the second issue, it is for Mr and Mrs Murphy to demonstrate that they were overcharged by HMRC's assessment.

Validity of the discovery assessment

37. Mr Murphy (on behalf of both himself and Mrs Murphy) argued that the assessment was not valid as the assessing officer had not made a 'discovery' within the meaning of Sch 10 paragraph 28.

The test

38. HMRC submitted, and we accept, that the leading case on the meaning of discovery is *Anderson v HMRC* [2018] UKUT 159 (TCC). In that case, the Upper Tribunal reviewed the authorities on the meaning of s 29(1) TMA and concluded that the test of whether or not there had been a discovery had both a subjective and an objective element.

Subjective test

39. In relation to the subjective element of the test, HMRC emphasised the formulation set out in paragraph [28] of *Anderson*:

> "Having reviewed the authorities, we consider that it is helpful to elaborate the test as to the required subjective element for a discovery assessment as follows:
>
> > 'The officer must believe that the information available to him points in the direction of there being an insufficiency of tax.'
>
> That formulation, in our judgment, acknowledges both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not."

40. HMRC placed a good deal of emphasis on the "points in the direction of there being an insufficiency of tax" part of the formulation without noting the paragraph below that emphasises that there must be something more than a suspicion.

41. In the present case, where the primary evidence is of a mismatch between Land Registry figures and an SDLT1 return, we must be careful to distinguish between the discovery of information that may point towards an insufficiency (but may equally point elsewhere) and an officer forming a subjective view based on that evidence that there was such an insufficiency.

42. The Tribunal must therefore be able to make a finding that the officer had formed the necessary conclusion. In the absence of agreement between the parties, the Tribunal must weigh the available evidence.

Objective test

43. The objective element is concisely summarised in *Anderson* as follows (at [30]):

> "The officer's decision to make a discovery assessment is an administrative decision. We consider that the objective controls on the decision making of the officer should be expressed by reference to public law concepts. Accordingly, as regards the requirement for the action to be 'reasonable', this should be expressed as a requirement that the officer's belief is one which a reasonable officer could form. It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer's belief was not reasonable."

44. We take this to mean that the officer's subjective decision must conform to ordinary public law principles. Most commonly, this will mean that the officer's decision can only be impugned as being made on the basis of insufficient evidence if it is a view no reasonable officer could come to on the basis of that evidence. This provides the officer with a wide margin of appreciation to consider the information available and come to a view.

Mr Murphy's submissions

45. In essence, Mr Murphy suggests that at the relevant time Officer Lewis could not have objectively reasonably formed a view that there had been a loss of tax. The available evidence was primarily that there was a disparity between the consideration figure reported on the SDLT1 and the figure recorded at the Land Registry. Mr Murphy submits that there are any number of reasons why there may be such a disparity, and as a result the evidence cannot justify anything more than a suspicion that there has been a loss of tax.

46. Mr Murphy pointed to the fact that HMRC's assessment covering letter also included a number of requests for further information. This, he says, supports the argument that the enquiry was at too early a stage to allow a discovery.

47. Mr Murphy also submitted that the following of a process set by other officers takes an element of decision making out of the hands of the officers actually performing the task. He suggested that Officer Lewis could not be said to have reached his own objectively reasonable conclusion that there was an under assessment of tax.

48. Mr Murphy also suggested that HMRC's failure to produce a copy of the process map followed by Officer Lewis indicated a failure to discharge the burden of proof.

Discussion

49. The discovery is said to have been made by Officer Lewis. The key evidence available to the Tribunal was:

(1) Officer Lewis' witness evidence that he could not recall the specific assessment, but would have compared the £119,000 consideration shown on the SDLT1 with the £277,000 figure on details held by the land registry.

(2) The letter written by Officer Lewis at the time of the assessment in which he stated:

> "We believe that the Land Registry information is correct, and that your SDLT return is wrong.

> Your SDLT return shows the tax due as £nil. Based on the Land Registry information, we believe that the tax due is £8,310.00."

50. The latter evidence is contemporaneous to the making of the assessment and shows a clear conclusion that there had been a loss of tax. Therefore, on the balance of probabilities, we are satisfied that Officer Lewis concluded that there had been a loss of tax and raised an assessment in line with that conclusion. Therefore the subjective element of the test is met.

51. As to the objective element of the test, we consider that this is also met. We consider that the mismatch between the Land Registry and SDLT1 figures, coupled with Officer Lewis being made aware of the potential implications of the involvement of Arc is sufficient basis for Officer Lewis' conclusion to be within the wide margin of appreciation available to him.

52. Furthermore, we are unable to accept Mr Murphy's submission that the existence of a process set by other officers necessarily means that an officer has not formed a view.

53. An HMRC officer must be able to take advice and guidance from colleagues. If an officer is told by colleagues that a mismatch between the SDLT filing and the land registry, in the context of the involvement of particular advisers, is likely to indicate an underpayment of tax, an officer is entitled to accept that position and direct themselves accordingly.

54. We do not consider that following a process set out by other officers implies that Officer Lewis fettered his discretion to the point where he could not be said to have arrived at his own conclusion. Officer Lewis was, entirely reasonably, making use of the process set down to identify potential underassessments and making decisions based upon that guidance. To suggest that such a process cannot be followed implies that Officers cannot rely upon each others' knowledge and experience, and the general institutional knowledge of HMRC, and must instead consider each point from first principles. This cannot be what Parliament intended in enacting the discovery provisions.

55. It also follows from the above that we do not accept Mr Murphy's submission that HMRC's failure to produce a copy of the process map followed by Officer Lewis indicated a failure to discharge the burden of proof.

56. We also do not accept t the suggestion that HMRC's request for further information and documents necessarily undermines the existence of a discovery. It is well established that an Officer can make a discovery notwithstanding that they are not in a position to conclusively prove their view, and that the Officer may be aware that his discovery may ultimately turn out to be incorrect once the full facts are known.

57. Overall, we conclude that a discovery was made and that the resulting assessment was valid.

The correct amount of SDLT due

58. There were two overall points to be decided in connection with the amount of SDLT that fell to be paid:

59. (1) Does section 45 FA 2003 apply, and with what impact?

60. (2) Does section 75A FA 2003 apply, and with what impact?

61. We consider each point in turn.

Section 45 FA 2003

62. Mr Murphy's core argument was that section 45 FA 2003 operates so as to reduce the chargeable consideration.

63. He argues that section 45 is engaged because:

(1) There is an original contract (the subject of which is the Property) under which the transaction is to be completed by a conveyance. Condition 45(1)(a) is therefore met.

(2) There is a subsale, the result of which Mrs Murphy became entitled to call for a conveyance of part of the Property to her. Condition 45(1)(b) is therefore met.

(3) The interests in the property do not meet the definition of a lease at Schedule 17. Paragraph 12B of Schedule 17A (assignment of agreement for lease) therefore does not apply. As such, Condition 45(1)(c) is met.

64. HMRC say that this analysis cannot be correct as the original and final purchasers are the same – Mr and Mrs Murphy are purporting to purchase the Property jointly and then sell part of it to Mrs Murphy alone. Section 45(1)(b) requires there to be an "assignment, subsale, or other transaction… as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him".

65. We can see some force in HMRC's argument. However, we need not express a firm view on the point as the application of s 45 simply does not result in the outcome Mr Murphy seeks.

The impact of section 45

66. Mr Murphy argues that the impact of s 45 is that:

(1) Under s45(3) FA 2003, 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". Therefore, the amount he regards as paid by him (disregarding the joint nature of the mortgage), being £157,890 is not to be brought into account in the SDLT return.

(2) Instead, Mr Murphy argues, under s45(3)(a), Mrs Murphy ("the transferee") is deemed to be the purchaser of a 99% interest in the property. Under this notional secondary contract, the deemed consideration calculated in accordance with s45(3)(b) is the aggregate of:

(a) the amount (£119,110) she gave in exchange for her 43% interest under the Original contract and

(b) the amount (£nil) she gave for the subsale

67. We do not accept that is the correct result. The primary reason for this is that the Supplemental Deed is expressed to be a subsale of "Michael's interest in the Property" - a subsale of part of the Property. It cannot therefore follow that the subsale provisions deem the consideration for the entire Property to fall outside the charge to SDLT - the subsale provisions only affect the part of the Property that has been sub-sold. We also disagree with Mr Murphy's suggestion of the impact of s 45(3)(b).

Discussion

68. Our analysis of the impact of s 45 (noting that we have not expressed a view on whether the section does in fact apply) is as follows.

69. Firstly, we approach the question as if there are two parts to the Property: a 57% interest worth £157,890 and a 43% interest worth £119,110.

70. Mr Murphy argues that under the original sale contract, the 57% interest was his and the 43% interest was Mrs Murphy's. This is because he had funded the 10% deposit and intended to pay a further 47% of the purchase price. The basis for the figures, and the legal impact of such intention is questionable, but as we explain below, it makes no difference to

the final result so we proceed on the basis of a 57%/43% ownership split between Mr and Mrs Murphy.

71. The Supplemental Deed is intended to sub-sell all but 1% of Mr Murphy's 57% interest to Mr Murphy. Again, it is not necessary for us to express a view on whether the Supplemental Deed actually has this effect.

72. We must therefore consider a transaction where:

(1) Under the Original Sale Contract, Mr and Mrs Murphy were to acquire the property as tenants in common, with Mr Murphy entitled to a 57% share and Mrs Murphy entitled to a 43% share.

(2) Mr Murphy then sub-sells his 57% share (save for 1%) to Mrs Murphy.

73. The starting point for analysing a subsale of part of a property, is s 45(5), which provides:

> "(5) Where a transfer of rights relates to part only of the subject-matter of the original contract ("the relevant part")–
>
> (a) subsection (8)(b) of section 44 (restriction of charge to tax on subsequent conveyance) has effect as if the reference to the amount of tax chargeable on that contract were a reference to an appropriate proportion of that amount, and
>
> (b) a reference in the second sentence of subsection (3) above to the original contract, or a reference in subsection (4) above to the secondary contract arising from an earlier transfer of rights, is to that contract so far as relating to the relevant part (and that contract so far as not relating to the relevant part shall be treated as a separate contract)"

74. The effect of 45(5) is to split the original contract into two parts. The part not being subsold is subject to SDLT in its own right, whereas the part being subsold is subject to the subsale provisions.

75. In this case, the 56% being subsold is subject to the subsale provisions. The remaining 44% is subject to SDLT in the usual way. The chargeable consideration for the 44% not being subsold is 44% of the total consideration given for the original sale.

76. The impact of the subsale provisions on the 56% is provided for by s 45(3):

> (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 except in a case where the secondary contract gives rise to a transaction that is exempt from charge by virtue of subsection (3) of section 73 (alternative property finance: land sold to financial institution and re-sold to individual)."

77. This provision gives rise to a notional secondary contract under which Mrs Murphy is the purchaser (of the 56%, rather than of 99% as suggested by Mr Murphy).

78. The consideration under that notional secondary contract is made up of two parts. The first part is (pursuant to 45(3)(b)(i)) to be read as:

> "so much of the consideration under the contract between Mr and Mrs Murphy and the Original Sellers as is:
>
> (1) Referrable to the 56% and
>
> (2) To be given directly or indirectly by Mrs Murphy or a person connected with her."

79. The amount of the consideration under the Original Sale Contract that is referrable to the 56% share in question must be 56% of the purchase price to be paid to the Original Sellers. In order to be consideration under the notional secondary contract it must also be consideration to be given by Mrs Murphy.

80. The question therefore becomes "how much of the consideration under the Original Sale Contract is to be given by Mrs Murphy?". This is a simple question with a simple answer: "all of it".

81. Mrs Murphy, alongside Mr Murphy, is one of the two joint purchasers under the Original Sale Contract. Under that contract Mr and Mrs Murphy are to pay the entire purchase price. If the price were not paid, the Original Sellers could bring proceedings against Mr and Mrs Murphy for the entire amount. Therefore, within the meaning of s 45(3)(b)(i), all of the consideration is "to be given" by Mrs Murphy.

82. We do not consider that position is altered by Mr Murphy's suggestion as to the proportions that Mr and Mrs Murphy may have intended to hold the Property. That is a matter between Mr and Mrs Murphy and does not impact the consideration to be given to the Original Sellers. Mrs Murphy contracted to give the entire consideration, it does not matter that this obligation was entered into jointly with Mr Murphy.

83. Furthermore, as a matter of practicality, the consideration was to be funded by way of joint mortgage. The sum was to be paid jointly and Mrs Murphy was, in the eyes of the bank, equally liable to make repayments under the mortgage. It would not matter that Mr and Mrs Murphy saw the debt as being split between them.

84. As a result, the first element of the consideration under the notional secondary contract is 56% of the purchase price under the Original Sale Contract (56% of £277,000 being £155,120). This is the same as the consideration that would have been provided for 56% of the property without the subsale arrangement. As a result, the planning cannot produce any tax saving.

85. We would also note that s 45(3)(b)(ii) provides for a second limb for the consideration under the notional secondary contract, which is to be added to the first limb to provide the overall consideration figure for the subsale.

86. It follows from our conclusion on the first limb that, if the consideration under the second limb is more than zero, then the subsale arrangement would actually result in increased chargeable consideration.

87. The consideration under the second limb is (pursuant to s 45(3)(b)(ii)) "the consideration given for the transfer of rights".

88. The Supplemental Deed provides that the consideration given for the transfer of rights consists of two parts:

(1) "Julie agreeing to pay the balance of the consideration under the Contract being the sum of £119,110" and

(2) "the natural love and affection of Michael for Julie"

89. This Tribunal does not intend to put a value on the love and affection between two people, but the first part above appears to be of more than nominal value.

90. Under the first part, Mrs Murphy agrees to solely (as opposed to jointly) pay the sum of £119,110. What is the value of this agreement?

91. In our view, a reasonable starting point for the value of an agreement to solely bear the cost of what was previously a joint responsibility (assuming that the parties were previously intending to split the costs equally) is half of that joint cost. In other words, Mrs Murphy is agreeing to pay Mr Murphy's half of the £119,110. We therefore value that agreement at £59,555.

92. Combining this with the consideration we have found to be due under 45(3)(b)(i), provides a total consideration for the subsale of £214,675.

93. Adding this to the consideration for the 44% share of the Property not being subsold (treated as a separate contract under s 45(5)) gives a total chargeable consideration of £336,555.

94. This figure is higher than the chargeable consideration if there was no subsale. However, that is simply the result of applying the statutory provisions to the facts.

95. We leave it to the parties to determine how the chargeable consideration is to reflected in the amended SDLT assessments. The parties may apply to the Tribunal should it not be possible to agree the final figures.

Section 75A FA 2003

96. In case we are wrong in our view as to the application of s 45, we now go on to consider the application of s 75A. For the purposes of this section, we will assume that the transaction steps resulted in the zero figure for SDLT contended for by Mr and Mrs Murphy.

97. Section 75A operates by first requiring the consideration of three 'gateway' provisions, if those gateway provisions are met, then SDLT is calculated on the basis of a notional alternative transaction.

98. We consider the gateway provisions first. They are set out in s 75A(1), which provides:

> "(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."

99. It is therefore necessary to first identify V and P, before considering the remainder of the tests.

Identifying V and P

100. It is common ground between the parties that the Original Sellers are V.

101. In relation to P, HMRC contend this is Mr and Mrs Murphy collectively whereas Mr Murphy contends that it is just Mrs Murphy.

102. Mr Street, for HMRC drew our attention to relevant discussion in *Project Blue v HMRC* [2018] UKSC 30, from para [43] onwards. In particular, at [44], Lord Hodge observed:

> "The task is to identify where the tax loss has occurred as a result of the adoption of the scheme transactions in relation to the disposal and acquisition of the relevant interest or interests in land. This in turn involves identifying the person on whom the tax charge would have fallen if there had not been the scheme transactions to which subsection (1)(b) refers and which exploited a loophole in the statutory provisions"

103. We also note that 75A(1)(a) refers to the acquisition of 'a chargeable interest or a chargeable interest deriving from it'. In this case Mr and Mrs Murphy acquired the freehold of the Property as tenant as in common (Mrs Murphy 99% and Mr Murphy 1%).

104. In *The Pollen Estate Trustee Company Limited v HMRC* [2013] EWCA Civ 753 the Court of Appeal (at [32]onwards) indicated that, where a property is acquired as tenants in common, the correct chargeable interest for the purposes of determining the amount of SDLT due is the entire interest rather than the undivided shares intended to be held by each purchaser.

105. As a result therefore, we consider that P must be Mr and Mrs Murphy collectively. The persons on whom the tax charge would have fallen were it not for the subsale were both Mr and Mrs Murphy. The reduction in SDLT is on the overall acquisition of the Property, rather than the subsale specifically. It would therefore be inappropriate (and contrary to the views expressed in Pollen Estate) for the portion said to have been subsold to be considered in isolation.

Application of the gateway conditions

106. We now turn to the gateway conditions in 75A(1)(a)-(c).

107. The Original Sellers (V) disposed of the Property and Mr and Mrs Murphy (P) acquired it, therefore the condition in s 75A(1)(a) is met.

108. Section 75A(1)(b) requres that there are a number of scheme transactions involved with the acquisition and disposal.

109. Mr Murphy argues that s 75A(1)(b) is not met on two bases:

(1) Firstly, he argues that the operation of section 45 is to disregard the Original Sale Contract and the subsale and to substitute them with a single secondary contract. As such there is only a single transaction.

(2) Secondly, Mr Murphy argues that a narrow approach shoud be taken to the identification of scheme transactions. He argues that transactions that occur at the same time but are not connected with acquisition and disposal are not scheme transactions. To illustrate his point, he says that the payment of legal fees and SDLT itself should not be considered a scheme transaction.

110. We do not accept Mr Murphy's first argument. The test in s 75A(1)(b) looks at whether a number of transactional steps actually took place, before the operation of any reliefs or the effects of any planning steps. To look at the results of planning steps as a part of the 75A(1)(b) test would go against the anti-avoidance purpose of the section.

111. In any event, the disregard in s 45 does not seem to us to have the effect argued for by Mr Murphy. The section does not deem the transactions not to have taken place, it simply disregards the substantial performance or completion of the relevant contracts for the purposes of computing the SDLT due.

112. Mr Street drew our attention to *Brown & Anor* [2021] UKFTT 208 (TC) in which the FTT (Charles Hellier) also reached the view (at [91]) that 45(3) does not disregard contracts such as the Original Sale Contract and Supplemental Deed as transactions for the purposes of section 75A. We agree with that view.

113. As to Mr Murphy's second argument (that a narrow approach should be taken to the identification of scheme transactions), we do not think it results in an absence of scheme transactions. The subsale pursuant to the Supplemental Deed was plainly involved in connection with the disposal and acquisition of the Property.

114. Mr Street drew our attention to comments made by the Upper Tribunal in *Project Blue Ltd v HMRC* [2013] UKFTT 378 (TC) at [250]-[253] that transactions that were always intended to operate together would be seen as scheme transactions. The subsale in the present case was dependent on the Original Sale Contract, and intended to reduce the overall SDLT that arose.

115. Furthermore, we note that s 75A(3) expressly lists a subsale (albeit to a third person) as an example of a scheme transaction. If a subsale to a third person can be a scheme transaction, then a subsale to one of the original purchasers must necessarily also be a scheme transaction.

116. We therefore find that the condition in s 75A(1)(b) is met.

117. For present purposes we assume that our findings in relation to s 45 above are incorrect and that the planning was in fact (apart from the operation of s. 75A) effective to reduce the total SDLT payable. As a result, the condition in s 75A(1)(c) must be met.

Impact of 75A

118. The effect of the s 75A(1) gateway conditions being met is to substitute a notional land transaction effecting a direct sale from V (The Original Sellers) to P (Mr and Mrs Murphy).

119. The chargeable consideration on that notional transaction is stated in s 75A(5) to be the largest amount (or aggregate amount)–

> (1) given by or on behalf of any one person by way of consideration for the scheme transactions, or;
>
> (2) received by or on behalf of V (or a person connected with V) by way of consideration for the scheme transactions.

120. The second limb above is straightforward. The Original Sellers received the £277,000 contracted for under the Original Sale Contract. This would have the effect of making the chargeable consideration for the notional transaction £277,000 - negating any reduction in chargeable consideration said to have arisen from the planning.

121. The first limb is perhaps more complicated, and results in the same increased consideration figure as arises under the s 45 analysis above.

122. We must determine that largest amount (or aggregate amount) given by any one person for the scheme transactions.

123. Mrs Murphy gave the following consideration for the scheme transactions:

> (1) Under the Original Sale Contract, she (jointly) agreed to pay £277,000

(2) Under the Supplemental Deed, she agreed to be solely responsible for funding £119,000 of the consideration that would have otherwise been jointly payable. We value this agreement on the same basis as in our discussion in relation to s 45 above, at £59,555.

124. Therefore, the total consideration provided by Mrs Murphy is the same as under the s 45 analysis: £336,555.

125. As a result, if we are wrong as to the impact of s 75A, the operation of s 75A results in chargeable consideration of £336,555.

CONCLUSION

126. For the reasons set out above we:

(1) Dismiss the appeal

(2) Find that the total chargeable consideration for the acquisition of the Property was £336,555.

127. We leave it to the parties to agree how the above is to be reflected in the amended assessments. We give leave to apply to the Tribunal if the parties are unable to agree.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

128. 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.

MALCOLM FROST
TRIBUNAL JUDGE

Release date: 17th OCTOBER 2024