Neutral Citation: **[2023] UKUT 00068 (TCC)**

Case Number: UT/2022-000020

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing Venue: **The Rolls Building,**
Fetter Lane, London EC4A 1NL

STAMP DUTY LAND TAX – land transaction return – validity of a document purporting to be a land transaction return – validity of enquiry opened by HMRC and closure notice issued by HMRC – whether HMRC are subject to any time limit in issuing a closure notice.

Heard on: 05 December 2022
Judgment date: 16 March 2023

Before

Judge Phyllis Ramshaw
Judge Jonathan Cannan

Between

REDMOUNT TRUST COMPANY LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Rory Mullan KC and Ross Birkbeck, Counsel, instructed by Blackfriars Tax Solutions LLP

For the Respondents: Elizabeth Wilson KC, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The appellant appeals against a decision of the First Tier Tribunal (Tax Chamber) ('the FTT') released on 24 November 2021 with neutral citation [2021] UKFTT 0443 (TC) ('the Decision').

2. The FTT was concerned with two appeals against decisions of HMRC. Firstly, an appeal against a closure notice issued on 7 September 2016 which concluded that £294,000 of stamp duty land tax ('SDLT') was due from the appellant. Secondly, an appeal against a discovery assessment issued in the alternative on 25 September 2018 in the same amount. In the Decision, the FTT upheld HMRC's closure notice. In the alternative, it held that the discovery assessment would also have been valid.

3. The appellant says that the FTT was wrong in law in reaching those conclusions.

BACKGROUND

4. The factual background is not in dispute. The appellant entered into certain arrangements whereby it intended to avoid SDLT on the purchase of a property in south west London. The appellant asserted that as a result of the arrangements SDLT was not due on the purchase of the property because sub-sale relief under section 45(3) Finance Act 2003 ('FA 2003') applied to the arrangements. The details of the arrangements entered into are set out in the Decision at paragraph 23:

> (1) On 1 May 2012, the appellant as trustee of the Nanu Trust ('Redmount-Nanu') entered into a contract ('the Original Contract') for the purchase of the Property from the vendors (Mr and Mrs Vahan Eminian) for £4.2m with a completion date of 14 June 2012.
>
> (2) On 13 June 2012, the appellant entered into a contract ('the Option Agreement') with Redmount acting as trustee of the Mariant Trust ('Redmount-Mariant'). Under the terms of the Option Agreement, the appellant agreed to grant a call option ('the Option') to Redmount-Mariant to purchase the Property upon payment by Redmount-Mariant of the 'Grant Price', being either £127,000 or (if the Grant Price was paid within 2 months of completion of the Original Contract) £1,000.
>
> (3) On 14 June 2012, the Original Contract was completed, and the Property was transferred to the appellant. The transfer was registered with the Land Registry on Form TR1. The appellant was a cash buyer.
>
> (4) On 14 June 2012, the appellant granted the Option. Under its terms, the Option can be exercised by the grantee (Redmount-Mariant) at any time during the 'Option Period', being the period between 30 and 35 years after the date of the Option Deed, (or earlier by mutual agreement) for a price equal to the market value of the Property at that time less a discount.
>
> (5) The Option has not been exercised by Redmount-Mariant.

5. These arrangements were an iteration of an avoidance scheme which has previously been implemented by other purchasers of property. The previous arrangements involved the grant of an option rather than an agreement to grant an option. They were held to be ineffective by

the Upper Tribunal in *Fanning v HM Revenue & Customs* [2022] UKUT 21 (TCC), which is on appeal to the Court of Appeal. It is accepted that *Fanning* would not necessarily be determinative as to the effectiveness of the present arrangements.

6. The FTT set out the detail of the SDLT documents that were filed in connection with the arrangements at paragraph 30 of the Decision:

> '(1) On 25 June 2012, the appellant filed a Land Transaction Return in respect of its acquisition of the Property; no SDLT was assessed by that Return.
>
> (2) On 5 July 2012, the appellant (as trustee of the Mariant Trust) filed a Land Transaction Return in respect of its acquisition of the Option. The chargeable consideration for this Land Transaction Return was treated as the maximum possible Grant Price at that time (£127,000) in accordance with s 51(1) FA 2003, and so £1,270 of SDLT was paid (at the 1% rate applicable at the time).'

7. The return, at (1) above, submitted by the appellant was on the basis that sub-sale relief was available pursuant to section 45(3) and therefore no SDLT was due. We shall refer to the appellant's land transaction return as "the Return", without intending to pre-empt any of the issues which arise in connection with that document. It is convenient at this stage to set out some of the provisions of section 45 which applied at the time the appellant submitted the Return:

> 45(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, …
>
> (1A) The reference in subsection (1)(*b*) to an assignment, subsale or other transaction does not include the grant or assignment of an option.

8. In broad terms, the appellant's case as to the effectiveness of the scheme is that the agreement to grant an option fell within section 45(1)(b) with a person other than the appellant becoming entitled to call for a grant of the option, which is a conveyance. It was not excluded by section 45(1A). Section 45(1A) had been introduced by Finance Act 2012 to counteract the avoidance scheme used in *Fanning*, which involved the grant of an option rather than an agreement to grant an option. If section 45 applied, the acquisition by the appellant would be disregarded for SDLT purposes, and instead the Redmount-Mariant trust would be treated as acquiring an interest.

9. On 13 September 2012 HMRC wrote to the appellant stating that it was opening an enquiry into the Return under paragraph 12 Schedule 10 FA 2003.

10. Finance Act 2013 ('FA 2013') was subsequently enacted and received Royal Assent on 17 July 2013. It was intended to remove the version of the avoidance scheme entered into by the appellant using an agreement for the grant of an option, and to do so with retrospective effect. Section 194(1) and (2) provided as follows:

> 194(1) Section 45 of FA 2003 (contract and conveyance: effect of transfer of rights) -

(*a*) has effect subject to the amendment in subsection (2) below in relation to agreements for the grant or assignment of an option that are entered into during the period beginning with 21 March 2012 and ending immediately before the day on which this Act is passed, and

(*b*) …

(2) At the end of subsection (1A) insert 'or an agreement for the future grant or assignment of an option'.

11. The appellant challenged the legality of this retrospective amendment in judicial review proceedings. The challenge was ultimately unsuccessful following a decision of the Court of Appeal in *R (otao St Matthews (West) and others) v HM Treasury* [2015] EWCA Civ 648. The claimants were refused permission to appeal by the Supreme Court and on 15 September 2016 the European Court of Human Rights declined to accept an appeal.

12. It is now accepted by the appellant that the effect of the amendment is that sub-sale relief was not available on the appellant's purchase of the property.

13. We note at this stage that section 194(12) FA 2013 made provision for the position where persons had already made a land transaction return in relation to a transaction affected by the amendment. Such persons were required to give a notice to HMRC amending that return no later than 30 September 2013.

14. The appellant wrote to HMRC on 27 September 2013 asserting that in light of the judicial review proceedings an amendment of the Return would be premature. The appellant maintained its position that no SDLT was due and referenced its rights under the Human Rights Act 1998 and European Union law.

15. The enquiry was left in abeyance pending determination of the appellant's claim for judicial review. On 7 September 2016, HMRC issued a closure notice in respect of its enquiry into the Return. The closure notice indicated that HMRC was amending the Return to show SDLT due of £294,000.

16. The appellant appealed this amendment to the closure notice. The amendment was upheld on review and on 29 March 2017 the appellant notified its appeal to the FTT.

17. The appeal was listed to be heard by the FTT on 9 February 2018. On 1 February 2018 the appellant sought to introduce new grounds of appeal arguing that the Return was 'voluntary' and 'unsolicited', and HMRC had no power to open an enquiry into such a return. In the circumstances, the appellant contended that the enquiry and the closure notice were invalid.

18. The FTT vacated the hearing following an application from HMRC. It subsequently granted permission for the appellant to raise the new ground of appeal. On 25 September 2018, HMRC issued a discovery assessment as an alternative to the closure notice in the event that the closure notice was found to be invalid.

19. The appellant appealed the discovery assessment on 12 October 2018 but it was upheld on review. On 1 March 2019, the appellant notified its appeal against the discovery assessment to the FTT.

20. The two appeals were joined and heard together by the FTT. The FTT dismissed both appeals. It granted the appellant permission to appeal to the Upper Tribunal on 17 February 2022.

THE ISSUES

21. The FTT identified at paragraphs 8 and 9 of the Decision the issues for determination. The same issues arise on this appeal and they may be summarised as follows :

(1) Was the Return a "voluntary" return in that at the time it was delivered the scheme was effective, there was no notifiable transaction and therefore no obligation on the appellant to deliver a return?

(2) If so, was HMRC entitled to open an enquiry into the Return and was the closure notice issued by HMRC valid?

(3) If the closure notice was valid, was it out of time in any event?

(4) Was the discovery assessment invalid because there was no operative discovery of an insufficiency of tax?

(5) Was the discovery assessment invalid because it was out of time?

22. There was also a separate issue before the FTT as to whether any discovery was stale such that it could not be relied on to support the discovery assessment. It was subsequently held by the Supreme Court in *HM Revenue & Customs v Tooth* [2021] UKSC 17 that there is no concept of staleness in the context of discovery assessments. The parties accept that this decision applies to the SDLT regime.

23. In order to determine the validity of the closure notice the FTT considered that the efficacy of the scheme fell to be determined as a preliminary issue. The FTT found that the scheme was ineffective even before the FA 2013 amendment and that sub-sale relief was not available. It set out its reasons at paragraphs 66 to 112 of the Decision. The FTT held that the appellant was therefore under an obligation to deliver the Return and the enquiry into the Return had been validly opened. The FTT went on to find that even if that was not right and the Return had been a voluntary return, HMRC would have been entitled to open an enquiry into the Return. It stated at paragraphs 116 and 117:

> 116. In any event, I agree with HMRC's submission that the duty to make a land transaction return arises with immediate effect regardless of the true tax consequences of the underlying transaction. In the present case, the return submitted in June 2012 contained information about the purchase of the Property by the appellant. *Project Blue* confirms that there is no limit on HMRC's power to enquire into any return once a purchaser has taken the step to file one. That power follows from para 13 of Sch 10…
>
> 117… even if one is to suppose that s 45(3) applies, and the only issue is s 194, then adopting the reasoning in *Project Blue* at [83], HMRC have the powers to enquire into that return by virtue of the provisions under para 13 Sch 10 …

24. The FTT went on to find at paragraphs 135 to 145 that the closure notice was not subject to any time limit and was therefore valid. It was not necessary for the FTT to deal with the appeal against the discovery assessment but it went on to briefly consider that appeal. It held, at paragraphs 151 to 154, that there was an operative discovery and the discovery assessment was therefore valid.

25. The appellant appeals against the FTT's decision on all issues apart from the issue of staleness in relation to the discovery assessment.

26. For the reasons which follow, we are satisfied that the FTT was right to hold that even if the scheme had been effective, HMRC were entitled to enquire into the Return despite it being what the appellant calls a voluntary return. It is therefore not necessary for us to consider whether the scheme was effective prior to the retrospective amendment in FA 2013. In those circumstances we prefer not to address that issue. We are conscious that the appeal in *Fanning* against a previous iteration of the scheme is currently before the Court of Appeal. Whilst the scheme in this case is different to the scheme in *Fanning*, there may well be some overlap of the issues. In fact, judgment was handed down on 13 March 2023 after the draft of this decision had been circulated to the parties. The taxpayer's appeal was dismissed.

27. For the reasons which follow, we are also satisfied that the FTT was right to hold that the closure notice was not out of time. Therefore, it is not necessary for us to consider the discovery assessment appeal. Where the FTT only gave brief reasons for its decision on the discovery assessment appeal, again we prefer not to address that appeal.

28. In the circumstances we address the following issues in this decision:

(1) If there was no obligation on the appellant to make the Return, was HMRC entitled to open an enquiry into the Return and was the closure notice issued by HMRC valid?

(2) If the closure notice was valid, was it out of time in any event?

ISSUE (1) - VALIDITY OF THE ENQUIRY AND CLOSURE NOTICE

29. The FTT's conclusion in relation to the validity of the enquiry and the closure notice is stated at paragraphs 116 and 117, quoted above. The appellant's case is that where a return is made in circumstances where there was no obligation to make a return, then that return has no effect for SDLT purposes. In particular, there is no return into which HMRC can open an enquiry and no return to amend by way of closure notice.

30. The following legislative provisions are relevant to the parties' submissions on this issue. Save where otherwise indicated, all references are to FA 2003 and to the provisions as they stood at the relevant time.

31. Section 76 provides for an obligation on purchasers of certain interests in land to deliver a land transaction return. Returns are required in relation to notifiable transactions which are separately defined:

> 76(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, …

32. Section 78 introduces Schedule 10 as follows:

> 78(1) Schedule 10 has effect with respect to land transaction returns, assessments and related matters.
>
> (2) In that Schedule -
>
> Part 1 contains general provisions about returns;
>
> Part 2 imposes a duty to keep and preserve records;

Part 3 makes provision for enquiries into returns;

Part 4 provides for a Revenue determination if no return is delivered;

Part 5 provides for Revenue assessments;

Part 6 provides for relief in case of excessive assessment; and

Part 7 provides for appeals against Revenue decisions on tax.

33. The relevant paragraphs of Part 1 of Schedule 10 concerning general provisions about returns are as follows:

1(1) A land transaction return must-

(a) be in the prescribed form,

(b) contain the prescribed information, and

(c) include a declaration by the purchaser (or each of them) that the return is to the best of his knowledge correct and complete.

2(1) References in this Part of this Act to the filing date, in relation to a land transaction return, are to the last day of the period within which the return must be delivered.

(2) References in this Part of this Act to the delivery of a land transaction return are to the delivery of a return that-

(a) complies with the requirement of paragraph (1) (contents of return), …

5(1) If it appears to the Inland Revenue –

(*a*) that a purchaser required to deliver a land transaction return in respect of a chargeable transaction has failed to do so, and
(*b*) that the filing date has now passed,

they may issue a notice requiring him to deliver a land transaction return in respect of the transaction.

34. The effect of section 76(1) and paragraph 2(1) are that the filing date was at the material time 30 days after the effective date of the land transaction. There are flat-rate penalties and tax related penalties for late filing of a return.

35. The relevant provisions of Part 3 of Schedule 10 concerning enquiries are as follows:

12(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).

13(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…

19(1) At any time when an enquiry is in progress into a land transaction return any question arising in connection with the subject-matter of the enquiry may be referred to the tribunal for determination.

(2) Notice of referral must be given -

(a) jointly by the purchaser and the Inland Revenue,
(b) …
(c) to the tribunal.
…

(5) For the purposes of this paragraph the period during which an enquiry is in progress is the whole of the period –

(a) beginning with the day on which the notice of enquiry was given, and
(b) ending with the day on which the enquiry is completed.

36. The relevant provisions of Part 4 which deal with revenue determinations are as follows:

25(1) If in the case of a chargeable transaction no land transaction return is delivered by the filing date, the Inland Revenue may make a determination (a "Revenue determination") to the best of their information and belief of the amount of tax chargeable in respect of the transaction.

(2) Notice of the determination must be served on the purchaser, stating the date on which it is issued.

(3) No Revenue determination may be made more than 4 years after the effective date of the transaction.

37. The relevant provisions of Part 5 which deal with HMRC assessments are as follows:

28(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.

…

30(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-paragraph (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)…

38. The scheme for self-assessment of SDLT pursuant to these provisions was summarised by the Court of Appeal in *HM Revenue & Customs v Candy* [2022] EWCA Civ 1447 at paragraph 47:

47. Taxpayers are required to complete a return and include a self-assessment to tax in the return. There are strict time limits for delivering returns: at the material time returns had to be submitted 30 days after the effective date of the transaction (that period is now 14 days). Returns must comply with the requirements of Sch 10 FA 2003, including the time limits imposed for amending returns in para 6(3), and those imposed on HMRC for opening an enquiry in para 12. As Mr Afzal emphasised, the self-assessment system imposes hard-edged deadlines, both on taxpayers and HMRC, for the sound administration of the tax system and to achieve certainty and finality. If HMRC make no enquiry and a taxpayer has not amended his or her return once the time limits have expired, the self-assessment return becomes final. So, if HMRC fail to open an enquiry in time, the correct amount of tax will not be recoverable by HMRC in respect of an insufficient self-assessment (unless the case falls within the exceptions in Pt 5 Sch 10 FA 2003, which has its own time limits)…

39. We should also note various procedural aspects of section 194 FA 2013 which amended the sub-sale relief provisions. They were necessary because section 194 had retrospective effect:

194(10) Section 76 of FA 2003 (duty to deliver land transaction return) is to be regarded as requiring the purchaser under the original contract to deliver a land transaction return relating to the land transaction not later than 30 September 2013.

(11) Accordingly, 30 September 2013 is for the purposes of Part 4 of FA 2003 the filing date for the land transaction return relating to the transaction.

(12) If the purchaser under the original contract ('P') has delivered a land transaction return relating to the land transaction before the day on which this Act is passed, P must not later than 30 September 2013 give notice under paragraph 6 of Schedule 10 to FA 2003 amending the

> return, but this does not prevent P from making subsequent amendments within the time allowed by sub-paragraph (3) of that paragraph.

40. Paragraphs 12 and 13 of Schedule 10 provide for enquiries into a return to have a wide scope. Paragraph 13(1) refers to the enquiry extending to '*anything that is contained in the return, or required to be contained in the return*'. This indicates that once a purchaser has delivered a return, HMRC can enquire into anything in the return that relates to whether tax is chargeable in respect of the transaction and the amount of tax chargeable. The power of enquiry also extends to matters not contained in the return but which were required to be contained in the return. We note that the prescribed form of land transaction return requires a description of the transaction and the effective date of the transaction amongst other details.

41. The appellant as a matter of fact filed a document in the prescribed form which was, or purported to be, a return. It complied with the contents requirements. It has not been suggested that at the time of filing the Return the appellant believed that it was not required or that it understood that no legal consequences would follow from filing the Return. However, the appellant's understanding as to the validity of the Return at the time of filing is not relevant. It has never been suggested in this case that the appellant is estopped from denying the validity of the Return (Cp *Tinkler v HM Revenue & Customs* [2021] UKSC 39).

42. We have difficulty with the appellant's argument that the Return could not be the subject of a valid enquiry if there was no obligation on the appellant to deliver a return. If the argument is right, at the time it was delivered HMRC would not know whether they could open a valid enquiry into a document which on its face was a return in the correct form. The status of the document could only be determined after enquiries had been opened. It might be expected that legislation which provides powers exercisable by HMRC to open an enquiry would not depend for their validity on a factual situation which could not be known by HMRC at the time the power was exercised.

43. We also have difficulty with the appellant's description of a return which it turns out was not delivered pursuant to an obligation as a 'voluntary' return. HMRC described such a return as an 'anticipatory' return, in the sense of anticipating that the transaction described in the return may be a notifiable transaction. It seems to us that in the ordinary course a purchaser would deliver a return to HMRC in two situations. Firstly, where it is known that there is an obligation to deliver a return. Secondly, where it is uncertain whether there is an obligation to deliver a return, for example where the transaction may not be a notifiable transaction. Given the existence of penalties for failure to deliver a return, in the latter case the return might be better described as a 'protective' return.

44. Before considering the parties submissions in detail, we should refer to the appellant's criticism of paragraph 116 of the Decision. In that paragraph, quoted above, the FTT appears to be saying that even if the scheme was ineffective, there was still a duty on the appellant to deliver a return. If that is what the FTT intended to say, then we agree with the appellant that it cannot be right. However, the FTT stated at paragraph 116 that it was accepting HMRC's submission to that effect. It had previously recorded HMRC's submission at paragraph 60(5) of the Decision in different terms as follows:

> 60(5) …the duty to make a land transaction return arises with immediate effect notwithstanding that the true tax consequences of the underlying sale might only be ascertained following an enquiry and an appeal.

45. That is a different submission to the one recorded at paragraph 116. It is not controversial that if there is doubt over whether a return is required, if it turns out that there was a notifiable transaction then there was an obligation to deliver a return. If it turns out that there was no notifiable transaction then there was no obligation to deliver a return. We do not know whether the FTT misinterpreted HMRC's submission or simply incorrectly transposed the submission at paragraph 116. In any event, for the reasons which follow the FTT was right to find that HMRC was entitled to open an enquiry into the Return which the appellant delivered.

46. The FTT relied on *Project Blue Ltd v HM Revenue & Customs* [2018] UKSC 30 and Paragraph 13(1) Schedule 10 for the proposition that '*there is no limit on HMRC's power to enquire into any return once a purchaser has taken the step to file one'*. The appellant argues that the FTT was wrong to conclude that a provision on the scope of an enquiry was relevant to the question of whether there was a valid enquiry in the first place. The issue in *Project Blue*, it argues, was concerned with the scope of the enquiry rather than whether there was a valid enquiry.

47. *Project Blue* concerned sub-sale relief in section 45 in the context of Shari'a compliant financing of a purchase of land. The appellant in that case ("PBL") argued that the return which it had made was not strictly necessary and had been submitted in order to complete the land registration. At paragraph 82, Lord Hodge records the argument and that PBL accepted that HMRC was entitled to enquire into that return. PBL's case was that HMRC had no power to amend the return to impose a liability by reference to the notional transaction treated as taking place by virtue of the anti-avoidance provision in section 75A FA 2003. It ought to have made a determination under paragraph 25 Schedule 10 or a discovery assessment. The Supreme Court rejected that argument, Lord Hodge stating at paragraph 83:

> 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…
>
> 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…
>
> 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.

48. The appellant's argument in the present case is that the appellant had no obligation to file a return and the Return which was filed had no legal consequences for SDLT purposes. That argument does not appear to have been put to the Supreme Court. The appellant argues that *Project Blue* was concerned only with the scope of a valid enquiry, and not whether there was a valid enquiry. However, the Supreme Court's reasoning was applied to a factual situation in which the return delivered by PBL was not required. It was not dealing with a hypothetical scenario. We agree with HMRC that it is implicit in the reasoning of the Supreme Court that where a return has been made that was not strictly necessary, that return can be the subject of an enquiry.

49. The appellant relies on what was said by the Upper Tribunal in *Hannah v HM Revenue & Customs* [2021] UKUT 22 (TCC) at paragraph 141. In that case, the Upper Tribunal was

concerned with various issues as to the validity of a discovery assessment to SDLT and associated penalties. As noted above, paragraph 30 Schedule 10 sets out various conditions for a discovery assessment where a return has been delivered. HMRC sought to establish that those conditions were satisfied. The Upper Tribunal held that the FTT had been entitled to find that the conditions were satisfied. However, by way of an aside, the Upper Tribunal noted at paragraph 141:

> 141 … we wish to make two preliminary observations. The first is that HMRC only need to bring the case within para 30(3) if the appellants had delivered a land transaction return "in respect of the transaction in question": see sched 10 para 30(1). In this case, the appellants delivered a return in respect of an alleged transaction on 5 October 2011. However, as we have held, there was no relevant transaction for SDLT purposes on 5 October 2011. The transaction which did occur for SDLT purposes and which is "the transaction in question" for the purposes of sched 10 para 30(2) was the transaction which occurred on completion on 12 October 2011. The appellants did not deliver a return in relation to that transaction. Therefore, it would seem to follow that the case is not within sched 4 para 30(1) and HMRC did not have to establish that para 30(3) applied. However, this point was not argued by HMRC.

50. The appellant says that HMRC's case on this issue is inconsistent with what the Upper Tribunal said in *Hannah*. We do not agree with the appellant's characterisation of the observation of the Upper Tribunal. It did not say that a return filed in respect of a transaction which was not a notifiable transaction was not a return at all. The Upper Tribunal was considering whether there was a return made 'in respect of the transaction in question'. It considered that the appellant had delivered a return in respect of a different transaction which is why paragraph 30(1) did not appear to be engaged. The Upper Tribunal was not concerned with whether a return in respect of the different transaction could support a valid enquiry.

51. The appellant also relies on two FTT decisions in the context of direct tax returns pursuant to the *Taxes Management Act 1970* ("TMA 1970"). In *Bloomsbury Verlag GmbH v Revenue and Customs Commissioners* [2015] UKFTT 660 (TC), HMRC had not issued a notice to file a company return which was a pre-requisite to an obligation on the taxpayer to do so. A document purporting to be a return for a particular accounting period was filed by the taxpayer which was seeking to establish a right to loss relief for losses claimed in the return. The FTT held that a return filed where there was no obligation to do so was not a return for the purposes of TMA 1970. It is this decision which appears to have coined the description a "voluntary" return. The same decision was reached by the FTT in *Patel v Revenue and Customs Commissioners* [2018] UKFTT 185 (TC) in the context of personal tax returns. The taxpayer successfully argued that an enquiry and subsequent closure notice were invalid because there had been no notice to file a return. The latter decision prompted an amendment to TMA 1970 which effectively provided that enquiries into voluntary returns would be valid (see *Allam v HM Revenue and Customs* [2021] UKUT 291 (TCC)). The appellant says that the same principles apply to SDLT, and in the absence of any equivalent amending legislation there can be no valid enquiry into a voluntary return.

52. The FTT in this appeal distinguished *Bloomsbury* and *Patel* on the basis that the SDLT regime has no requirement for HMRC to give any notice to a purchaser in order to trigger the obligation to deliver a return. The appellant says that it is irrelevant why the obligation to make a return has not arisen. What is important is that in this case, as in *Bloomsbury* and *Patel*, there was no obligation to make a return.

53. In our view the FTT was right to distinguish the position in relation to direct tax cases from the position in relation to SDLT in the way it did. Unlike direct taxes, SDLT is a transactional tax where there are penalties for failing to put in a return. Although the parties did not put it in these terms, the question of construction in this case is whether the reference to a land transaction return in paragraph 12(1) and elsewhere in FA 2003 means only a return that is delivered pursuant to the obligation arising under section 76. Alternatively, whether it extends to a return submitted as a protective return. There are practical reasons, which we have noted above, why the enquiry provisions should be considered to apply to protective returns. Otherwise, the statutory regime would be unworkable. There would be no statutory procedure for a purchaser such as the appellant to protect its position in cases of uncertainty.

54. HMRC also rely on the fact that the appellant had every reason to file the Return in order to register its title at the Land Registry. We note that section 79 provides that many land transactions cannot be registered without a certificate of compliance with the requirements under FA 2003 from HMRC. The FTT noted this at paragraph 129 of the Decision and the same point was made by PBL in *Project Blue*. This is a further practical reason which supports HMRC's case.

55. The appellant suggested that a purchaser could inform HMRC of the transaction without making a return, so that HMRC could require a return under paragraph 5 or make a revenue determination under paragraph 25. However, this would not protect the purchaser from penalties if it turned out that there was a notifiable transaction, and it would not enable the land to be registered at HM Land Registry.

56. The appellant argued that there are procedural difficulties with HMRC's construction. In particular, the time limits for payment of tax in section 86(1) and for HMRC to open an enquiry are defined by reference to the filing date. The filing date in relation to a land transaction is itself defined by paragraph 2(1) by reference to the last day on which the return "must be delivered". If there is no notifiable transaction, then there is no filing date and no date by reference to which an enquiry can be opened or the tax paid. The appellant submitted that the provisions were not set up to deal with enquiries into protective returns.

57. We do not accept that these are real difficulties. The last day on which the return must be delivered can easily be construed on the basis that the land transaction in question is a notifiable transaction for the purposes of section 76 where the purchaser considers it may be a notifiable transaction. The return would include a description of the transaction in question and its effective date. Time starts to run for opening an enquiry pursuant to paragraph 12(2) as soon as a return is delivered.

58. It is notable also that section 194(12) FA 2013 recognises that at the time of a transaction such as the appellant's transaction, a purchaser may have submitted a return that was not required under section 76. Purchasers were provided with an opportunity to amend the return that had been submitted. We do not accept Mr Mullan's suggestion that this provision may have been directed at a situation where there were arrangements involving an agreement for an option to purchase only part of the land transferred so that there was an obligation to deliver a return.

59. The parties agreed that section 194 was in the nature of a deeming provision. Section 45 was deemed to apply retrospectively to the appellant's arrangements. The effect of a deeming provision was authoritatively stated by Peter Gibson J as he then was in *Marshall* (*Inspector of*

Taxes) *v Kerr* [1993] STC 360 at 366, (1993) 67 TC 56 at 79 and endorsed by the House of Lords in that case as follows:

> For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.

60. If necessary, we would also have found that the effect of section 194(12) was to deem the appellant's Return to have been a valid return. We do not consider that restrictions on the application of retrospective legislation described in *Lauri v Renad* [1892] 3 Ch 402 at 420 and 421 and *Yew Bon Tew v Kenderaan Bas Mara* [1983] AC 553 at 558F and 563B affect that conclusion. However, for the reasons given above, the Return was valid as a protective return in any event.

61. For the above reasons we conclude that there was no error in the FTT's decision. The enquiry was validly opened. Subject to the time limit issue, the closure notice was also valid. It is not material whether the Return was strictly necessary.

ISSUE (2) – CLOSURE NOTICE TIME LIMIT

62. The FTT found that once an enquiry into a return has been opened, there is no time limit within which HMRC must issue a closure notice. It summarised its conclusions as follows:

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

63. The following provisions of Schedule 10 FA 2003 are relevant to this issue, in addition to provisions previously referred to on Issue (1).

64. Part 3 Schedule 10 deals with enquiries into returns and provides as follows in relation to the completion of an enquiry:

> 23(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.

24(1) The purchaser may apply to the tribunal for a direction that the Inland Revenue give a closure notice within a specified period.

(2) Any such application is to be subject to the relevant provisions of Part 5 of the Taxes Management Act 1970 (see, in particular, section 48(2)(*b*) of that Act).

(3) The tribunal hearing the application shall give a direction unless satisfied that the Inland Revenue have reasonable grounds for not giving a closure notice within a specified period.

65. Part 4 deals with revenue determinations. We have already referred to paragraph 25 above. Paragraph 26 provides that a determination has effect as if it were a self-assessment:

26(1) A Revenue determination has effect for enforcement purposes as if were a self-assessment by the purchaser.

(2) In sub-paragraph (1) "for enforcement purposes" means for the purposes of the following provisions of this Part of this Act –

(a) the provisions of this Schedule providing for tax-related penalties;
(b) section 87 (interest on unpaid tax);
(c) section 91 and Schedule 12 (collection and recovery of unpaid tax etc).

(3) Nothing in this paragraph affects any liability of the purchaser to a penalty for failure to deliver a return.

66. Part 5 deals with revenue assessments and time limits:

31(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,

(*c*) attributable to arrangements in respect of which the person has failed to comply with an obligation under section 309, 310 or 313 of the Finance Act 2004 (obligation of parties to tax avoidance schemes to provide information to Her Majesty's Revenue and Customs),

may be made at any time not more than 20 years after the effective date of the transaction to which it relates…

(3) An assessment under paragraph 29 (assessment to recover excessive repayment of tax) is not out of time –

(*a*) in a case where notice of enquiry is given into the land transaction return delivered by the person concerned, if it is made before the enquiry is completed…

67. Part 7 deals with reviews and appeals and paragraph 42 sets out the jurisdiction of the tribunal, including:

42(3) If, on appeal it appears to the tribunal -

(a) that the appellant is undercharged to stamp duty land tax by a self-assessment; or

(b) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment shall be increased accordingly.

68. The appellant's principal submission is that a closure notice takes effect by making amendments to a land transaction return, including the self-assessment contained in the return. As such, it is an assessment by HMRC and subject to the general time limit in paragraph 31 Schedule 10. It is said that such a construction is consistent with Parliament's intent that even a taxpayer who is chargeable to SDLT should not be liable unless HMRC assess within 4 years, save in cases of carelessness or deliberate default. Such a construction gives certainty to taxpayers in the management of their affairs and is consistent with the policy described by the Court of Appeal in *Candy*.

69. FA 2003 makes provision for different types of assessments, in particular self-assessments (in section 76), revenue assessments (in Part 5 Schedule 10) and discovery assessments (paragraph 28). The appellant says that where the legislation applies to a particular type of assessment it expressly says as much. The appellant relies in particular on the following references in FA 2003:

(1) Section 76(3) requires a land transaction return to include "an assessment" which is also described as a "self-assessment".

(2) Paragraph 30 refers specifically to restrictions on "an assessment under paragraph 28 or 29". If the term "assessment" in paragraph 31(1) meant an assessment only under paragraph 28 or 29 then it would have said so.

(3) Paragraph 42(2) refers to the jurisdiction of the tribunal where an appellant is overcharged "by an assessment other than a self-assessment".

70. We do not accept the appellant's submission that "assessment" in paragraph 31(1) includes a self-assessment included in a return.

71. The self-assessment required to be included in a return is clearly an assessment to tax which is calculated in the first instance by the taxpayer. It is notable that if HMRC enquire into a return and wish to increase the amount of tax which is due they do not issue an assessment. They amend the taxpayer's self-assessment. It continues to be a self-assessment, albeit one that has been amended by HMRC.

72. As previously noted, Schedule 10 is divided into 7 parts. Each part contains provisions on specific requirements, duties, rights, and powers of purchasers and HMRC. Part 3 sets out matters relating to enquiries, Part 4 sets out matters concerning revenue determinations where a return is not delivered and Part 5 sets out matters in relation to revenue assessments. Each part sets out matters that apply in particular circumstances. In our view, the structure of Schedule 10 indicates that the parts are intended to be self-contained. For example, in Part 4 paragraph 25(3) provides a 4-year time limit in relation to revenue determinations where no return is delivered.

73. Paragraphs 19-22 of Schedule 10 provide a procedure for any question arising in connection with the subject matter of an enquiry to be referred to the tribunal for determination. Paragraph 21 provides that whilst proceedings are in progress, HMRC cannot give a closure

notice in relation to the enquiry. A question referred under this procedure could clearly take a considerable time to be resolved by the tribunal and, if necessary, in subsequent appeals. Appeals can take several years to go through the tribunals and the courts. However, there is no procedure whereby HMRC can apply to extend the time limit if paragraph 31(1) applies to the issue of a closure notice.

74. Paragraph 23 dealing with the completion of an enquiry makes no reference to time limits. It does however state at paragraph 23(3) that a closure notice takes effect when it is issued. If there was a time limit for the issue of a closure notice one would expect to see it in paragraph 23.

75. Paragraph 24 makes provision for a taxpayer to apply to the tribunal for a direction requiring HMRC to issue a closure notice within a specified period. Such a direction involves a temporal restriction on a closure notice. It is the only temporal restriction on closure notices referred to in Schedule 10. If there was a backstop of 4 years from the effective date of the transaction, there is no indication how this provision would interact with that backstop.

76. In our view, paragraph 31(1) in Part 5 sets out the general rule that no revenue assessment pursuant to paragraph 28 or 29 is to be made more than 4 years after the effective date of the transaction. It then goes on in sub-paragraphs (2) and (2A) to set out exceptions to that general rule, including cases where such an assessment was brought about carelessly or deliberately or where no return has been submitted. We should note that the appellant says that paragraph 31(2A)(b) is not engaged because it asserts that the letter dated 27 September 2013 did amount to a land transaction return, even though it was not in the prescribed form.

77. Paragraph 31(3) was not drawn to our attention, but we note that it refers to assessments under paragraph 29. Paragraph 29 concerns assessments to recover tax which has wrongly been repaid by HMRC. The general four-year time limit would apply to such assessments, but paragraph 31(3) provides that that time limit does not apply where an enquiry has been opened and has not been completed at the time of the assessment. If the four-year time limit applied to a closure notice, then this provision would be ineffective.

78. Paragraph 32 in Part 5 sets out a specific procedure for assessments requiring notice of an assessment to be served on the purchaser. The notice must state the tax due, the date the notice is served and the time limit for any appeal. On the appellant's argument, this would also apply to a closure notice. In our view this is a separate procedure for assessments in Part 5. It does not apply to a closure notice issued under paragraph 23. The formal requirements for a closure notice are set out in paragraph 23, although we accept that as a matter of law the amendments required by a closure notice to give effect to HMRC's conclusions must include a statement of the amended amount of tax due (see by analogy, *R (Archer) v HMRC* [2017] EWCA (Civ) 1962).

79. We were also referred to a decision of Patten J as he then was in *Morris v HM Revenue & Customs* [2007] EWHC 1181 (Ch). Patten J held that in the context of TMA 1970, there are no time limits within which HMRC must issue a closure notice once they have commenced an enquiry into a taxpayer's return. HMRC did not rely on *Morris* to any great extent in their oral submissions and accepted that it was dealing with the separate regime under TMA 1970. We have not taken it into account in our reasoning, although our conclusion in the context of SDLT is consistent with the conclusion in *Morris*.

80. For the above reasons we agree with the FTT that the time limit under paragraph 31(1) is specific to Part 5. It does not apply to closure notices. A purchaser is afforded protection from an unnecessarily prolonged enquiry by paragraph 24.

DISPOSITION

81. Our decision on the above two issues is sufficient to dispose of the appeal. For the reasons given above we do not propose to determine whether the arrangements entered into by the appellant were effective to avoid SDLT, or whether the discovery assessment issued in the alternative was valid and in time.

82. There was no material error in the Decision of the FTT in relation to the closure notice. The appeal is therefore dismissed.

JUDGE PHYLLIS RAMSHAW
JUDGE JONATHAN CANNAN

Release date: 21 March 2023