[2011] UKFTT 138 (TC)

# TC01012

**Appeal number: TC2009/10261**

***SDLT – subsale – acquisition by partnership – effect of section 45 and 44 on para 10 Sch 15 FA 2003***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**DV3 RS LIMITED PARTNERSHIP** **Appellant**

**- and -**

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

**TRIBUNAL: CHARLES HELLIER (Judge)**
**JOHN ROBINSON**

**Sitting in public in London on 16 and 17 November 2010**

**Roger Thomas instructed by Olswang LLP for the Appellant**

**Malcolm Gammie QC instructed by the General Counsel and Solicitor to HMRC for the Respondents**

DECISION

## I. Introduction

1. The SDLT provisions in FA 2003 created a new tax. It is charged on 'land transactions'. A land transaction is the acquisition of an interest in land. It is charged at a percentage of the consideration for the transaction. The acquirer is liable for the tax.

2. If A transfers land to B, and B then transfers it to C, there will be two acquisitions of an interest in land: the first by B and the second by C. In normal circumstances this will give rise to two charges to SDLT – one on B's, and one on C's acquisition. But in some circumstances sections 44 and 45 ensure that only C's acquisition is taxed.

3. When land is transferred to a partnership by a partner, that partner may retain, in his capacity as a partner, some sort of an interest in the land. In Schedule 15 of the Act there is recognition of this retention, and paragraph 10 of Schedule 15 provides that the consideration by reference to which the partnership is to be charged SDLT is only a percentage of the market value of the land: that percentage being generally the share of the land the partner has lost. Thus if he has a 40% interest in the partnership, the partnership will pay SDLT by reference to 60% of the market value of the land.

4. This case concerns the interaction of these partnership rules and those deriving from sections 44 and 45. A transferred land to B who was a partner in a partnership, C. B transferred it to the partnership. The effect of the detailed rules in Schedule 15 was that B was treated as having a 100% interest in the partnership (because its interest in the partnership was aggregated with that of partners with whom it was connected). That meant that those rules specified that the consideration for a transfer by him to the partnership was (100%-100%) x the market value, i.e. nil.

5. The Appellant says that the effect of the rules in section 45 is that the transfer from A to B is ignored and that SDLT is payable only on C's acquisition. The consideration for that acquisition, it says, is treated as nil. As a result the combined transaction by which the property was transferred by A to C through B gives rise to no SDLT liability.

6. The Respondents say this is not the case. They accept that section 45 applies to require the acquisition by B to be ignored and that, as a result, B is not liable to SDLT on its acquisition, but they say that the way section 45 works is that it requires C's acquisition to be treated as not being a transfer from B with the result that Schedule 15 does not apply. As a result they say C is liable to tax on a substantial consideration.

7. Thus the issue in this appeal was how section 45 affected the operation of Schedule15.

## II **The Facts**

8. There was no dispute about the facts. There was an agreed statement of facts. The material facts were the following.

9. When dealing with the legislation in the abstract we refer to A, B and C as we have above. When dealing with the transactions relevant to this appeal we refer to AA, BB and CC.

10. On 24 October 2006 DV3 Regent Street Ltd (whom we call BB) entered into a contract to acquire from Legal and General Assurance Society Ltd (whom we call AA) a leasehold interest in 224-244 (even numbers) Regent Street London (the "Dickins and Jones Lease"). The purchase price was £65,100,000. Completion was to take place on 4 December 2006 by the completion of a transfer (a form TR1) from AA to BB. We call this the First, or the original, Contract.

11. On 29 November 2006 a partnership, the DV3 RS Limited Partnership (which we call CC) was formed under the laws of the British Virgin Islands. The character of the partnership was such that it constituted a partnership for the purposes of Schedule 15.

12. The partners in the partnership were BB (which had a 98% interest in its income), DVS Regent Street No.2 Co Ltd, DV3 Regent Street (General Partner) No.1 Co Ltd, DV3 Regent Street (General Partner) No 2 Co Ltd, and the trustees of the Equity Reversions Unit Trust No.1 (the Unit Trust). The interest of each of the partners other than BB was ½%.

13. 100% of the issued share capital of BB and each of the other DV3 companies was owned by DV3 Limited. DV3 Limited owned 99% of the units in the Unit Trust.

14. The trustee of the Unit Trust was Royal Bank of Canada Trustees Ltd.

15. On 30 November 2006 CC entered into a contract to acquire the Dickins and Jones Lease from BB. The purchase price was £65,100.00. Completion was to take place on 4 December 2006 (the same date as that for the First Contract) by the completion of a transfer (a form TR1) from BB to CC. We call this the Second Contract.

16. The First and the Second Contracts were completed on 5 December 2006, a day late. At a single completion meeting forms of transfer were executed first from AA to BB and then from BB to CC and the consideration due under each

of the contracts (after adjustment for the deposit paid by BB and for late completion) was paid by BB to AA, and by CC to BB.

*Comment*

17. Thus as a matter of general law, aside from the effects of FA 2003, there was on 5 December 2006 the transfer of an interest in the Dickins and Jones Lease by AA to BB and then another such transfer from BB to CC. Those transfers were made between the respective parties to the First Contract and the Second Contract, were made in conformity with those contracts, and took place at substantially the same time and in connection with each other.

## III The Legislation

18. Section 42 of the Act introduces the tax:

> (1) A tax (to be known as "stamp duty land tax") shall be charged … on land transactions.
> (2) The tax is chargeable –
>
> (a) whether or not there is any instrument affecting the transaction,
> (b) if there is such an instrument, whether or not it is executed in the United Kingdom, and
> (c) whether or not any party to the transaction is present, or resident, in the United Kingdom …

19. There is no doubt that the introduction of this tax was in at least partial replacement of stamp duty on conveyances. That is clear from the title of the tax, and the abolition in section 125 of the Act of stamp duty on instruments other than those relating to stocks and marketable securities (although for a time some transactions relating to partnerships remained outside SDLT and within the scope of stamp duty).

20. But the words of section 42 made clear that, unlike stamp duty, SDLT was not a tax on documents, but a tax on land transactions, and section 85(1) provided that the tax was a direct liability of the purchaser under such a transaction.

21. Section 43 defines "land transaction" and some associate phrases:-

> (1) In this Part a "land transaction" means any acquisition of a chargeable interest … see section 48.
>
> (2) …

(3) References in this Part to the "purchaser" or "vendor" in relation to a land transaction are to the person acquiring and the person disposing of the subject matter of the transaction.

(4) These expressions apply even if there is no consideration given for the transaction.

(5) …

(6) References in this part to the subject-matter of a land transaction are to the chargeable interest acquired (the "main subject-matter") …

22. Section 48 defines "chargeable interest":

(1) In this Part "chargeable interest" means

(a) an estate, interest, right or power in or over land in the United Kingdom, or
(b) the benefit of an obligation, restriction, or condition affecting the value of any such estate, interest, right or power,

other than an exempt interest.

[(2). (3). (4), (5) and (6) deal with exempt interests and are not relevant to the appeal].

23. Thus far it may therefore be seen that a person who acquires any interest in land thereby enters into a land transaction in relation to which he is termed the purchaser, and, as a result of which, he will become liable to pay SDLT under the Act.

24. Section 55 provides for the amount of tax chargeable, setting it at a percentage of the "chargeable consideration" varying with the amount of that consideration.Schedule 4 defines the chargeable consideration:

"1(1) The chargeable consideration for a transaction is, except as otherwise expressly provided, any consideration in money or money's worth given for the subject-matter of the transaction, directly or indirectly, by the purchaser or a person connected with him."

25. As Mr Thomas noted there are a number of situations where a different amount is "expressly provided". These include section 53 which may substitute market value where the purchaser is connected with the vendor; a similar substitution where the acquisition is in exchange for other land in paragraph 5 of Schedule 4; and some of the provisions of Schedule 15. In

relation to Schedule 15 it was clear to us that, if Schedule 15 provided for the determination of an amount of chargeable consideration in relation to a land transaction, that was express provision which ousted the general rule in Schedule 4 paragraph 1.

26. The date on which the tax is payable is determined by reference to the effective date of the transaction : section 76 requires a land transaction return to be delivered within 30 days of the effective date, and section 86 requires the tax to be paid on delivery of that return. Section 119 provides that the effective date is the date of completion unless otherwise expressly provided.

27. On the basis of the legislation set out so far, if A contracted with B to transfer land with the contract to be completed by a conveyance of the land there would be two land transactions – two acquisitions of a land interest by B each for a separate consideration: the first being the acquisition of the interest in, or benefit of the restriction over the land, effected by the contract alone, and the second the acquisition of the full interest in the land effected by the conveyance: the effective date of the first being the date of the contract, and that of the second being the date of the conveyance. Section 44, however, changes this. In such a situation it postpones the land transaction and the effective date to the date of completion. But where there is "substantial performance" prior to completion it also provides for the acceleration of the acquisition and of the effective date. The relevant parts of section 44 read:-

> (1) This section applies when a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance.
>
> (2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.
>
> (3) If the contract is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction.
>
> In this case the effective date of the transaction is the date of completion."

28. Pausing there we note that, absent substantial performance, these subsections also have the effect of rolling together the contract and completion. Thus, in particular, all the consideration under that contract becomes the consideration for the acquisition effected on its completion for the purposes of the Act.

29. The section continues in subsection (4) to provide that if the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract. In this case the effective date is when the contract is substantially completed.

30. Subsections (5) to (7) define substantial performance, and include in the meaning of that phrase the payment of a substantial part of the consideration.

31. This appeal did not involve substantial performance, nor did it figure significantly in the arguments before us. In the rest of this decision we refer only to completion, bearing in mind that in other contexts substantial performance may be relevant.

32. Subsection (10) provides:-

> "(10) In this section –
>
> (a) references to completion are to the completion of the land transaction proposed, between the same parties, in substantial conformity with the contract …"

33. Thus, (1) in order to know whether this section applies you need to be able to describe the activity between the parties to the contract which, in accordance with that contract, completes it; and (2) an activity between other persons or between another person and a party cannot be 'completion' within section 44. The provisions in subsection 44A(7) which treat an A to C conveyance in the context of s 44A as completion of a B to C contract show the importance of the definition in s 44(10) in considering the operation of s 44.

34. Section 45 is close to the heart of this appeal:

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

35. Thus these provisions apply where there is an A to B contract and a "transfer of rights" as a result of which C becomes entitled to a conveyance. The transfer of rights cannot be the conveyance itself since it must be as a result of it that the conveyance can be called for.

36. On the facts of the current appeal section 45 must apply: the contract between AA and BB satisfies (1)(a), and the contract between BB and CC is accepted by the parties to be a sub-sale by virtue of which CC became entitled to a conveyance, and thus satisfies (1)(b). Thus, in the following provisions, BB and CC must be the transferor and the transferee.

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

37. The words of the first half of this subsection precisely match those of section 44(2). It seems to us that they should then be construed in exactly the same way – namely that the B-C transfer of rights ( which is the sub-sale contract in the case of BB and CC) is not a chargeable event (although, whereas section 44(2) applies only to contracts, section 45(2) applies to transactions other than contracts).

38. The second half of the sentence makes clear that the following provisions only have effect on the operation of the Act to the extent that they can do so by affecting the way in which section 44 operates within the Act.

39. Next comes subsection (3), and a central question in this appeal is how this section affects the operation of the Act through section 44:

> "(3) That section [section 44] applies as if there were a contract for a land transaction (a "secondary contract") under which –
>
> (a) the transferee [C] 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 (2) of section 73 …"

40. We note at this stage that there are two parts to this subsection. The first introduces the secondary contract. That part appears independent of the conditions for the operation of the second part, the tailpiece. The tailpiece applies only where there is what we will call contemporaneous completion; the first part appears to apply in any case where the conditions in ss.(1) are satisfied.

41. Subsection (4) deals with successive transfers of rights, and subsection (5) with transfers relating to only part of the subject matter of the original contract.

42. Subsection (5A) was inserted in 2004:

"(5A) In relation to a land transaction treated as taking place by virtue of subsection (3) –

(a) references in Schedule 7 (group relief) to the vendor shall be read as references to the vendor under the original contract;
(b) other references in this Part to the vendor shall be read, where the context permits, as referring to either the vendor under the original contract or the transferor.

43. We deal with the parties' submissions in relation to this point below, but at this stage we note the opening words 'a land transaction treated as taking place by virtue of subsection (3)'. There is in these words an assumption that a transaction takes place by virtue of 45(3) which would not otherwise take place or which is different from that which would otherwise take place. That transaction must be the combination (by virtue of s 44(3)) of the secondary contract and its completion.

44. Part 3 of Schedule 15 is headed "Transactions to Which Special Provisions Apply". Paragraph 9(1) provides that:

"(1) This Part of this Schedule applies to certain transactions *involving*-
(a)the transfer of a chargeable interest to a partnership (paragraph 10)…" [Our italics].

45. Paragraph 10 provides:

"(1) This paragraph applies where-

(a) a partner transfers a chargeable interest to a partnership, or...

(2)The chargeable consideration for the transaction shall (subject to paragraph 13) be taken to be equal to-
MV x (100-SLP)%
Where-

MV is the market value of the interest transferred, and
SLP is the sum of the lower proportions…"

46. We discuss the interpretation of para 10(1) in section V below.

47. Paragraph 12 applies to determine the "sum of the lower proportions". Its effect in this case is that SLP is the aggregate of the partnership interests of the transferring partner and all those partners connected with it. It requires the proportion of the chargeable interest attributable to the transferring partner to be determined. It can therefore apply only if the transferring partner has an interest in the land being transferred.

48. We note that the drafting of para 12 is defective because the sum it determines is the addition of the proportionate interests in the partnership, which will always be no more than 1, and thus (100 – SLP)% will always be 99% or more. It is clear that it was intended that the SLP was intended to be the number which was the numerator of the fraction whose denominator was 100 and which equalled the sum of those proportions. Mr Gammie did not seek to argue that the paragraph should be construed literally.

49. Paragraph 13 provides that the chargeable consideration is 100% of the market value of the land where all the partners are "bodies corporate". Mr Thomas contended that this paragraph did not apply, since, although s 101 of the Act provides that a unit trust scheme shall be treated as if the trustees were a company, that was not enough to make the Unit Trust in this appeal a body corporate. That was because s 100 defined "company" to mean "any body corporate or unincorporated association", and thus the fact that the trustee of the Unit Trust was deemed to be a company did not make it a body corporate for the purposes of paragraph 13. Mr Gammie did not dissent from this proposition.

50. Since BB was connected with all the other members of the CC partnership, the aggregate of the proportions of those partners interests in the partnership was 100%. Thus (100- SLP) was nil, and where paragraph 13 did not apply, the chargeable consideration was therefore 0% of the market value of the land, or nil.

## IV The Parties' arguments

(a) The Respondents' Case

51. Mr Gammie says that the "transaction" in the context of para 10(1) is the land transaction under which a partner transfers the chargeable interest to the partnership. The BB-CC contract is not the contract by reference to which the land transaction arises.

52. He says that section 44 on its own does not deal adequately with multiple contracts: where A contracts with B, and B contracts with C, the completion of the two contracts could be a conveyance from A to C. That conveyance would not, in relation to either contract fulfil the definition of conveyance in 44(10) because it would not be between the parties to the contract. The provisions of s 44 would not apply. Thus the consideration for C's acquisition would not be determined by looking at the aggregate of the contract and its completion, and, if A actually transferred to B, and B actually transferred to C, then two lots of tax would be exigible with no relief. Sections 44A and 45 remedy these defects.

53. Section 44A deals with the case where the A-B contract permits the conveyance at B's direction to another, C. Section 44A(7) says that completion for section 44 purposes includes the conveyance by A to C. Thus C's acquisition may be taxed at the times determined by section 44.

54. Section 45 he says provides a framework for dealing with other multiple transactions. It provides relief in the case of a sub-sale by restricting the charge to that on C's acquisition, but it only does so where the transaction are completed contemporaneously. It does not deal only with sub-sales but with arrangements and other transfers. It applies to a variety of situations and thus has to make a general framework provision. In some cases the transfer of rights will not be a contract, in others it may be: section 45(3) is intended to cope with all those situations.

55. He says that the secondary contract created by section 45(3) must be a tripartite contract intended to be completed at one time. He says the contract is not the B-C contract (or transfer of rights) but something different. The B-C contract he says is either modified – turned by section 45(3) into a different contract, or a new free standing contract. The terms of that contract are to be inferred from the circumstances of the case : the original contract and the transfer of rights.

56. If it is a modified contract it can only be completed by contemporaneous completion. Such completion is not the transfer from B to C, but the whole of the contemporaneous process by which C's acquisition was completed. It cannot be simply the acquisition from B because, by the tailpiece of section 45(3), the completion of the A-B contract is disregarded so B cannot have the interest in the land to transfer to C. C gets the land on completion, but not by transfer from B.

57. If it is a new free standing contract that contract is likewise not completed by a transfer from B for the same reason. He says the B-C contract is never completed so there is never a completion under that contract under which C acquires by transfer from B. That is because the disregard of the completion of the A-B contract deprives B of the ability to make a transfer (or possibly because the transfer to C is not in completion of the B-C contract because it is in completion of the new free standing contract).

58. Mr Gammie says that, because s 45 applies, "B did not enter into a land transaction on contracting with A (ie did not acquire any chargeable interest)"; at the heart of this is the proposition that B cannot transfer to C, or be treated as transferring to C, because of the disregard of the A-B transfer in the tailpiece. As a result, for the purposes of section 44, B cannot transfer, and thus there is no land transaction created by section 44(3) which encompasses that transfer. By contrast the acquisition by C on completion of the notional contract is, together with that notional contract, rolled into one land transaction by section 44(3) and taxable as such.

59. Mr Gammie admits that the language of section 45(3) is not as clear as that in section 45A(3) which deals with the combination of a section 44A direction to transfer to a third party (C) and a transfer of rights to D. In that section 45A(3) provides expressly that the deemed secondary contract is to be the original contract between A and B with B replaced by D and different consideration.

60. Because there was no transfer by B to C under which C acquired the land para 10 Schedule 15 cannot apply. Because the completion of the secondary contract involved an acquisition by C without a transfer by B the land transaction created by that contract and its completion did not fall within paragraph 10 Schedule 15. Para 12 (and therefore para 10) of Schedule 15 can apply only where B is entitled to an interest in the land before the transfer. In this case BB never acquired an interest because of the operation of section 45. Alternatively para 10 is not concerned with the tripartite acquisition by C.

61. He says that the Respondents' interpretation is consistent with the policy evident from FA 2003 of moving from a concentration in documents to a focus on the acquisition of an interest. If the combination of the A-B and B-C contract could be completed either by an A-C conveyance or by contemporaneous step conveyances, A to B and B to C, that should not affect the tax due on C's acquisition.

(b) The Appellant's case

62. Mr Thomas says that paragraph 10 Schedule 15 means that the chargeable consideration on CC's acquisition was nil. He says that paragraph 10 applies because CC acquired the interest in the land in circumstances in which paragraph 10 applied:-

"(1) This paragraph applies where –

(a) a partner transfers a chargeable interest to a partnership …"

63. Where the paragraph applied subparagraph (2) prescribed the chargeable consideration "for the transaction". Thus whenever the transaction was the transfer by a partner to a partnership the terms of (2) determined the consideration as an exception from the general rule in Schedule 4.

64. He says that paragraph 35, which says:

> "For the purposes of the Part of this Schedule, there is a transfer of a chargeable interest to a partnership in any case where a chargeable interest becomes partnership property."

makes clear that there was a transfer of the lease to the partnership for the purposes of para 10.

65. In this case the transaction was the transfer by BB to CC: by a partner to the partnership.

66. He says that section 45 properly construed does not change this result:

(1) the first part of 45(3) creates a contract when the transfer of rights may not have been a contract. Seen in that light its operation was limited.

(2) Although it created a contract in some cases, in other cases, where there was already a contract, it should be taken merely as wrapping round that contract rather than a substitution for that contract. The object is to increase the consideration for the land transaction by including the amounts in paragraph (b). Then, because of the final words of section 44(3), that total consideration is treated as the consideration for C's acquisition (in this case the transfer by BB to CC), not simply that actually paid for the transfer;

(3) the tailpiece applies when there is contemporaneous completion of the original contract and the secondary contract. Yet there is no express definition of how that secondary contract is completed. What else can actually occur at that time? The only answer is the completion of the B-C contract (or the relevant transfer of rights). That must be the occasion of the completion of the secondary contract;

(4) section 44 operates only when a contract is to be completed by a conveyance (44(11)). That means a completion "between the same parties" as the contract. What are parties to the secondary contract? Unless you identify them you cannot otherwise apply section 44 – and since the secondary contract is created for the

purposes of section 44, it must be possible to identify them. You know the transferee (C), the other must be B;

(5) the tailpiece requires the disregard of the completion of the A-B contract; it says nothing about disregarding the completion of B-C;

(6) there is nothing in the section that requires the completion of the secondary contract to be treated as a transfer from A-C when it is not;

(7) any construction of the secondary contract as not being completed by a transfer from B to C gives rise to difficulties if the contracts are not contemporaneously completed. We discuss this later; and

(8) the provisions of (5A) indicate that the natural interpretation of 45(3) is that the secondary contract is completed by a transfer from B to C. We return to the details of that later.

67. He says that the object of the words in the tailpiece, which disregard the completion of the A-B contract, is to ensure that there is no charge on its completion. That is all. That completion is disregarded for section 44 purposes. Thus the first contract gives rise to no land transaction whether on entering into it, on its actual completion, or on its substantial performance: section 44 cannot bring it into charge. But that is quite different from disregarding it for <u>all</u> purposes: it is not required to be disregarded for the purpose of Schedule 15.

68. Therefore:

(1) the secondary contract, whether a separate free standing contract or a wrap around the B-C contract, is completed by a conveyance from B to C.

(2) B's acquisition and ownership of the land is not to be disregarded for all purposes. B does transfer to C for the purpose of Schedule 15.

(3) the land transaction arising from the secondary contract or the B-C contract is completed by a transfer from B to C.

(4) the transaction which section 44 then brings into change on completion is a transaction to which paragraph 10 Schedule 15 can apply.

69. And, even if the secondary contract is a separate contract between A, B, and C it is completed by the transfer from B to C and is thus within para 10 Schedule 15.

**V Discussion**

*Schedule 15*

70. Para 9 applies Part 3 to transactions (acquisitions) "involving" the acquisition by a partnership. It is clear that CC acquired a chargeable interest. Thus CC's acquisition may be affected by the later provisions of Part 3.

71. Para 10(1) indicates when the provisions of para 10 apply. Where para 10 applies, para 10(2) specifies the consideration "for the transaction". In our view that transaction must be the land transaction to be charged. Para 10(1) does not expressly say that para 10 applies when *the land transaction* to be taxed falls within (a) to (c), merely saying that it applies when there are such events as are listed. In other words in this appeal para 10(2) applies only if the acquisition by CC (which is the land transaction) was "where" there is a transfer by BB to CC.

72. In the following paragraphs we therefore consider the nature of the land transaction by which C acquires as a result of the effect of section 44 in accordance with section 45. That we do starting by considering generally the transactions to which section 45 applies, then considering whether: the B-C contract is displaced, what the terms of the secondary contract are (and consequently what is the single land transaction which is created by section 44), and what is the effect of the disregard of the B-C contract in the tailpiece of section 45(3). We return to consider the operation of Sch 15 in the light of our conclusions on these issues.

*Section 45*

(a) Assignment

73. The words of section 45(1)(b), "assignment, subsale or other transaction…", the use of "transfer of rights" to describe such an "assignment…", and the structure of section 45(3)(b)(ii) which considers the consideration *for* the transfer of rights rather than that to be given *under* the transfer, all strongly suggest that the paradigm the draftsman had in mind in this provision was the situation in which A contracted with B, B assigned the benefit of that contract to C, C paid B £x for the assignment, and on completion C might pay to £y to A being some or all of the consideration payable by B under the A- B contract.

74. What seems clear is that in that situation tax is intended to be charged only on C's acquisition and by reference to the total consideration of £ x+y expended by him. Why does the draftsman have to change the way the Act, and in particular, section 44 operates to achieve this result? The answer is that:

(1) the assignment does not fall within section 44 since it is a not a contract which is to be completed by a conveyance between the parties to the contract (section 44(1) and (10)). There may be nothing further to be done to complete it. But the assignment itself might, like a contract of sale (were such contract not protected by section 44(2)) be a land transaction. It thus needs to be excepted: hence the first part of section 45(2), which *unlike the second part* does not appear to apply only for the purposes of modifying the operation of section 44.; and

(2) now all that there is left for the charge to bite on is the acquisition by C under the conveyance to C, which is a land transaction but not one to which s

44 can apply (because it will not complete between the parties to the A-B contract (s44(10)) or by the B to C assignment), and in any event is for a consideration of £y only. The draftsman remedies this by creating the secondary contract with consideration £ x+y to which section 44 can apply which completes by the actual conveyance from A to C. And when it does complete section 44(3) creates a land transaction with this consideration: because, by s 44(3), the A to C conveyance is treated as a single land transaction with the secondary contract.

75. The disregard of any completion of the A-B contract by the A-C conveyance then ensures (if necessary) that there is no competing A-B land transaction.

76. In this case the secondary contract must be a contract between A, B and C under which A is to convey to C, C is to pay £x to B, and C is to pay £y to A. Any amount which B actually pays A is not treated as part of the consideration for the land transaction (s44(3)(b)). Completion of that contract takes place when A conveys to C and any unmade payments are made. The land transaction occurring by virtue of that contract entails that transfer and those payments.

(b) subsale

77. We did wonder whether the transaction under appeal was truly a subsale as contemplated by section 45. That was because: no consideration was given "for" the contract, as opposed to consideration given under it; and its completion took place after (albeit immediately after) rather than at precisely the same time as that of a secondary contract under which C was the purchaser. However neither party pursued this question.

78. A subsale we take as an agreement between B and C to sell land which B has contracted to purchase from A, which is made before the A-B contract completes. One form of such a subsale (and *not* the one at issue in this appeal), is where it is later agreed that on the contemporaneous completion of the two contracts C will pay £y directly to A and £x to B, and A will convey directly to C. (The later agreement for direct transfer takes this case out of s 44A.) In this case only a little difficulty arises in applying section 44 and 45: as in the case of an assignment, the A-B contract and its completion are disregarded (s44(2) and 45(3) tailpiece), and the secondary contract's completion must encompass the A-C conveyance. The consideration for the land transaction which comprises the secondary contract and its completion is £y (s45(3)(b)(i)) plus whatever C gives for the subsale (the transfer of rights). In this circumstance it is fairly easy to regard the payment *under* the subsale of £x to B as being the payment *for* the subsale (s45(3)(b)(ii)) so that the total consideration for the land transaction is £x+y. The subsale contract between B and C is ignored by s 45(2), but its completion involves the conveyance from A to C. Are there therefore two contracts which for the purposes of s44 are completed by the A-C transfer? The answer is no, because the A-C completion is not completion of the A-B contract for the purposes of section 44(10) since it is not between the parties to that contract: as a result section 44 (3) does not

aggregate the A-B contract and the A-C conveyance. That conveyance is C's acquisition for the purposes of (and is aggregated with) the secondary contract only.

79. In this case the secondary contract must be a contract between A, B and C under which C is to pay B £x, C is to pay £y to A, and A is to transfer to C. It is completed by the transfer from A to C and the making of the outstanding payments (although any payment by B to C is not regarded as part of the consideration). The land transaction occurring by virtue of that contract is the acquisition by C.

80. Thus the provisions of these sections work tolerably clearly to give the expected result in the case of such a subsale too. The difficulty arises when the subsale has the form it has in the present case. We explore the effects of sections 44 and 45 in that case below.

*Where there is a B-C contract, is it displaced by the secondary contract?*

81. Is the effect of section 44 applied in accordance with section 45 to leave the B-C contract and its completion as a land transaction in addition to the land transaction which arises by virtue of the secondary contract and its completion?

82. It seems to us that this cannot be the effect of section 44 so applied. If it were then there would be two land transactions created by section 44(3): the first the B-C contract and its completion, and the second, the secondary contract and its completion. In the present appeal this would not result in absurd taxation, but in the ordinary case, where no exemption or special rule applies to the subsale, there would either be two occasions of charge or one acquisition with competing considerations (that under the B-C contract, and that under the secondary contract as determined by s 45(3)). The first result, double taxation, cannot have been intended, and the second involves ignoring one of the two contracts (considerations) – in other words making the very choice between them asked in the question.

83. We conclude that the effect of section 44 so applied is treat only a single land transaction as arising on the completion of the secondary contract and thus to treat the B-C contract (if there is one) as displaced by, or transformed into, the secondary contract, and as not giving rise to a separate land transaction. (We note however that if Mr Gammie is right and the effect of ignoring the A to B transfer is to treat B as never having acquired an interest to transfer to C that the same result applies, but that his assertion neither compels nor is compelled by this result.)

84. How does this work if there is no completion of the secondary contract?

85. The first part of section 45(3) appears to apply whether or not there is a completion of the secondary contract: the existence of that contract is not expressly made contingent on the contemporaneous completion referred to in

the tailpiece. On the other hand the overall impression created by the subsection is that it is only where there is contemporaneous completion that the section should affect the operation of section 44, and through it the charge(s) to tax. It seems to us that what is meant is either:

(1) that the first part of section 45(3) , the creation of the secondary contract, should be read as having effect only if there is contemporaneous completion; or

(2) that the secondary contract should be treated as if by its terms it reverted to the B-C contract or transfer of rights if there was no contemporaneous completion.

But that it is not relevant to this appeal to decide which.

*What is completion of the secondary contract?*

86. The tailpiece to section 45(3) envisages that the secondary contract can be completed. It must therefore be assumed in applying section 44 that there are events which constitute its completion within the meaning of section 44(10). (Were there not then section 44 would have no effect in relation to the secondary contract other than to treat the entering into it as not being a land transaction.)

87. Neither section 44 nor 45 deems there to have been actions on the completion of any contract which did not actually take place. All that is required is the assumption that there was a secondary contract. It is not a necessary consequence of that assumption that something is deemed to have taken place in the completion of that contract which did not in fact take place, and neither Mr Thomas nor Mr Gammie suggested otherwise.

88. In order for section 44 to apply the completion must be between the same parties, in substantial conformity with that contract (s44(10)) . Who are the parties to that contract?

89. Mr Gammie says that the details of the secondary contract, other than those made express in section 45(3), can be easily inferred from the combination of the original contract and the transfer of rights, although he says that the particular forms of the original contract and transfer of rights should not dictate the outcome. He says that the secondary contract is therefore a tripartite contract to be completed by a combination of the A-B and B-C transfers.

90. Mr Thomas says that the language of the tailpiece makes it eminently clear that the completion of the secondary contract takes place by real and not deemed transactions which take place at the same time. What other completion occurs at the same time as that of the original contract? There is only one answer: the completion of the B-C contract. That completion is the lynchpin. In other words the secondary contract is that which completes by a transfer

from B to C. The parties to the land transaction effected by the secondary contract are B and C.

91. Mr Thomas took us to subsection (5A). We did not find this of any help. Whilst it makes clear that in the context of Sch 7 the vendor is to be taken as A, it expressly leaves that question at large in relation to other provisions. In other words the vendor (being by section 43(4) the person disposing under the transaction) was to be determined by the context. That is the very determination we are attempting in relation to section 45 and 44.

92. Mr Thomas also relied on the effect of the Alternative Finance exception in the tailpiece. We find this difficult. It is discussed below.

93. Leaving aside the effect of this exception, we concluded that the parties to the secondary contract are A, B and C, and accordingly that the completion of that contract must be between those parties and is the contemporaneous execution of those actions which remain to be done between those parties. That was for the following reasons.

    (1) the concept of the completion of a contract is not limited to the transfer of the land. It also includes the payment of any unpaid consideration. S 45(3)(b) envisages that C makes payment to A as well as to B. That suggests that A, B and C are parties to the contract. Otherwise the completion would not fall within s 44(10);

    (2) section (5A) indicates that A might be the vendor under the contract as well as that it might not be;

    (3) in the cases where the transfer of rights is an assignment or the kind of subsale described at [77] above, A was clearly intended to be a party to the secondary contract. That suggests that the same is the case in relation to a subsale of the type in this appeal.

94. We now turn to the exception relating to Alternative Finance in the tailpiece of s 45 (3).

95. The final words of the tailpiece resurrect the completion of the A-B contract "where the secondary contract gives rise to a transaction that is exempt from charge by virtue of" section 73(3). These words were a later addition to the subsection, but having been added, the subsection falls to be construed with them as a whole.

96. Section 73 "applies where arrangements are entered into between a person ("P") and a financial institution [we shall call it Bank], under which-

    (a)[Bank]

        (i) purchases a[n]… interest in land ("the first transaction"), and

        (ii) sells that interest to [P] ("the second transaction"),"

and P grants Bank a mortgage over the land. Where the section applies, subsection (2) exempts the first transaction from tax if the Bank purchases the land from P, and subsection (3) exempts the second transaction from tax.

97. Consider therefore an example of an arrangement under which A sells to Bank, and Bank "sells to" P. Section 73(3) will exempt the transaction of sale to P. SDLT is payable only by Bank on the acquisition from A, and on the original acquisition price.

98. The provisions of section 73 are clearly intended to ensure that the same amount of tax is paid on a transaction by which a person finances an acquisition of a property in a manner which does not involve the payment of interest as is paid on a transaction in which the acquisition is financed by a loan. One would expect that in such a transaction the consideration to be paid by P on the acquisition from Bank would be paid in instalments and that the total amount so paid would be equivalent to the capital (the original acquisition price) plus the interest which would have been paid paid under a borrowing. Without the section 73 exemption, and ignoring for the moment section 45, tax would be payable both by Bank on its acquisition and by P on the finance cost enhanced price payable to Bank. The exemption ensures a level playing field with more usual forms of property finance.

99. But, assuming that these transactions complete contemporaneously, section 44 will apply in accordance with section 45 because the sale by Bank to P is a subsale, or transfer of rights. The result would, absent the exception, be the following.

100. The Bank to P contract is not a land transaction (s44(2) or 45(2)) and on our interpretation of those sections that contract is subsumed into the secondary contract. The A to Bank contract is not a land transaction (s 44(2)), and, if the disregard in the tailpiece applies, the A to Bank completion is disregarded. Thus the only land transaction which would remain is the secondary contract and its completion. The only charge would be on the acquisition by P by reference to the consideration given by P. That consideration could in circumstances where its payment is in instalments or is otherwise delayed exceed the consideration paid by Bank (and if P's acquisition were capable of being termed a sale by Bank to P within s 73(1)(a), it will be exempt under s 73, and so no tax at all would be collected). It appears that the excepting words are intended to avoid that result and reinstate what would otherwise be the s 73 treatment.

101. But those words achieve that purpose only if (i) the secondary contract "gives rise to a transaction" within section 73(3), ie gives rise to a sale by Bank to P, and (ii) the secondary contract and its completion can be termed a sale by Bank to P. Where both these conditions are satisfied: (a) the completion of the A to Bank contract is resurrected and by virtue of section 44(3) gives rise, in combination with its contract, to a land transaction taxable on the original acquisition price, and (b) the land transaction comprising the secondary contract and its completion is exempt by section 73(3). (If the Bank

to P contract remained unmodified by section 45's affect on section 44, its completion too would be exempt under section 73(3).)

102. Thus, if the secondary contract were taken simply as a sale by A to P, it would not be a sale by the Bank to P and so would not give rise to a transaction falling within section 73(3). The resurrection would fail and tax (if any) would be payable by P rather than by Bank, and the consideration would include any financing cost added to the price by Bank.

103. The first condition, that the secondary contract "gives rise" to a sale from B to C does not however require that such a sale is the only result of that contract. These words leave open the possibility that completion of that contract is seen by section 45 as not just a transfer from B to C.

104. The second condition, however, indicates that section 45 intends the single transaction comprising the secondary contract and its completion to be capable of being described as B "selling" to C within section 73(3)(a)(ii).

105. We conclude that the exception words do not indicate that the completion of the secondary contract is not a tripartite combination of A-B and B-C, but that the acquisition by C under that contract and its completion is intended by section 45 to be capable of being described as being on a sale by B to C. Such a sale would naturally be regarded as completing by a transfer from B to C, or at least as involving such a transfer.

106. Mr Gammie says that the secondary contract is a tripartite contract which, with its completion, may properly be regarded as a sale from B to C within section 73, even though the resultant land transaction is not a transfer from B to C for the purposes of Sch 15.

107. We cannot see how, in ordinary English usage, a transaction can be a sale from B to C without being a transfer from B to C. The question is whether there is anything in para 9 and 10 of Sch 15 which suggests some special meaning for "transfer" from B to C which is not encompassed on a "sale" from B to C. We address that below.

108. (Before we leave the Alternative Finance exception, we note that those words, together with para (5A), dispel another possibility. It might be thought that the draftsman, in creating the land transaction to which the secondary contract gives rise was not interested in specifying a vendor or a transferor: since the tax was to be charged on acquisitions by reference to consideration, all that was needed was to ensure that C was the acquirer and the consideration was £x+y. In that exercise he had no interest in who sold or transferred to C. But the exception words and those of (5A) make clear that there is intended to be an identifiable vendor under the secondary contract: it becomes legitimate to seek to determine who it is where it is relevant to the way in which section 44 affects other parts of the Act.)

*The disregard of the performance of the A-B contract.*

109. It seems to us that the tailpiece does not require the disregard of the *actions* of completion for all purposes: what is to be disregarded is that there would be completion *for the purposes of section 44* of the contract. This has the result that section 44(3) has effect so that the A-B contact and the actions which would constitute its completion do not give rise to a land transaction. We so conclude for the following reasons.

110. First, the section 45(3) disregard is for the purposes of section 44. It is only through the effect of section 44 on Sch 15 that the disregard can affect Sch 15. But the only effect of section 44 is in subsection (3): to treat the taxable transaction as a combination of contract and completion. The effect of the tailpiece on the operation of section 44 is that the A to B contract and its completion are not regarded as a single land transaction and the secondary contract and its completion are. The question is how that affects Sch 15. The answer is, not that B is to be regarded as never having had the land, but that in determining to what transaction para10 is to apply one is required to consider the composite transaction rather than the combination of the A-B contract and its completion.

111. Second, in the context of a transfer of rights which is an assignment of the type described at [73] above, the only completion of the secondary contact is the action of transfer of the land from A to C. To disregard that transfer would be to leave no land transaction to be taxed. Disregarding only the "completion" of the A-B contract ensures that there is no question of a further land transaction arising by virtue of that contract on its own.

112. Third, disregarding that transfer entirely would mean that C never got the land, because B never had it to transfer to him. There would be no acquisition to be taxed. That goes too far: it cannot be the intention.

113. Fourth, some action must be contemplated as the completion of the secondary contract, and in the case of a subsale if that was both the A to B and B to C transfers and related payments, disregarding the first action means that the secondary contract could never complete.

114. (It seemed to us that if the AA to BB conveyance had been at precisely the same time as the BB to CC transfer, then Mr Gammie might have succeeded on this point on general principles. That made us wonder again whether the transaction under appeal really was a subsale within section 45.)

**Conclusions**

115. The tax is on land transactions. That means on acquisitions. In this appeal it was the acquisition by CC. Can that acquisition be regarded as a transfer from BB within para 10 Sch 15?

116. In an A to B only case, section 44, by rolling together contract and completion determines the consideration for the acquisition (the transaction). Section 45 imposes a different contract. The effect of section 44 when applied in accordance with section 45 where there is contemporaneous completion must be to displace the land transaction which would otherwise arise from the section 44(2) combination of the B-C contract and its completion and replace it with the secondary contract and its completion. We concluded at [93] that completion of the secondary contract must be the composite contemporaneous activity of AA transferring to BB and BB paying AA, and BB transferring to CC and CC paying BB. (Although the consideration for SDLT purposes of CC's acquisition under this different contract is set by s 45(3)(b)). The acquisition to be taxed is that effected under that contract in those circumstances. It is the acquisition by CC.

117. Para 10(1) sets out "where" para 10(2) applies. One of those circumstances is "where … a partner transfers a chargeable interest to a partnership". Is the land transaction formed by the composite of the secondary contract and its completion a transaction "where" there is such a transfer?

118. We have rejected the argument that the tailpiece of section 45(3) requires BB to be treated as not having acquired an interest and therefore as not being able to transfer it (see [110]). There is nothing in the composite which involves BB never having had the land, on the contrary BB's transfer is part of the completion of the secondary contract.

119. If the effect of ss44 and 45 had been to create a new deemed completion of the arrangements between A, B and C under which there was a deemed transfer by A to C, then para 10 would not apply. But sections 44 and 45 do no such thing: they require neither expressly nor by necessary implication that there is such a deemed transfer, nor is such a transfer a consequence which inevitably flows from the deemed state of affairs.

120. Mr Gammie says that Parliament must have intended no different result in the case of a subsale completed by a direct transfer from A to C from the case of a subsale completed in stages A to B, and B to C. The problem is that that may well be the case in relation to the operation of s44 and 45: where there is an A-B contract and a B-C contract which are completed contemporaneously, the consideration given by those sections for the only chargeable land transaction can confidently be expected to have been intended to be £x+y; but that says nothing about the intention of Parliament in relation to the operation of Schedule 15 in relation to the secondary transaction which those sections create. Even if Parliament had intended the same tax treatment for both transactions it is not wholly clear why that does not require the direct transaction to share the treatment of the indirect one rather than vice versa.

121. Mr Gammie appeals to the change of focus in the move from stamp duty to SDLT – from documents to transactions. But that does not help: here

there are several actions or transactions, the question is how those actions (rather than documents) should be classified for the purposes of Sch15.

122. The fact that an acquisition by CC in these circumstances must be capable of being regarded for the purposes of section 73 as a sale by BB to CC, indicates that CC's acquisition would normally be regarded as on a transfer from BB to CC. (See [107])

123. Is there anything in para 10 which indicates that it should not apply in circumstances where there is a transfer of the type described in para 10(1) but there are also other actions which form part of the acquisition transaction?

124. On an initial reading para 10 does not appear tightly drawn: it does not specify the transactions to which it applies in detail, merely providing that para 10(2) applies "where" there is a transfer of the sort described (rather than which *is* a transaction of that sort). That word suggests that such a transfer may be a part of the transaction rather than the whole of it.

125. However, although "where" appears at first sight to permit a wide range of transactions, that cannot be the intention of the paragraph. Thus if, in section 45 circumstances, A was a partner in B, and B transferred to a third party, C, the fact that C's acquisition "involved" the acquisition by a partnership from a partner does not make C's acquisition one "where a partner transfers…to a partnership": that is because it is clear from the computational provisions in para12 that para10 is directed to the acquisition by a partnership. "Where" must be construed in context as meaning where there is an acquisition by the transferee as described in the following subparagraphs.

126. But we cannot see in Part 3 of Sch 15 any purpose for which a land transaction which comprises two transfers together, and which results in a partnership acquiring from a partner, should not be described as an acquisition where there was a transfer from a partner to a partnership within para10(1). (Thus if under an arrangement which fell outside s 45 because there was no first contract, B inherited land from A and contributed it to his partnership with contemporaneous completion, para 10 should apply.) In particular we could not see why, because another provision effectively removed the tax on one of the acquisitions in the composite, that should on a purposive view of the statute affect the construction of para 10.

127. The language of para 10 indicates that the composite transaction falls within it. A purposive approach to that language does not compel a contrary view.

128. Therefore para 10 Sch 15 does apply to the acquisition by CC.

129. We therefore allow the appeal.

Hansard: *Pepper v Hart* [1993] AC 593

130. The parties addressed written submissions to us on the question of whether parliamentary material might be relevant to the proper construction of section 45. We were grateful for their submissions. In the end we concluded that section 45 was not ambiguous in the sense that in the context of the issues on the appeal there was more than one meaning fairly emanating from its words where the choice between those meanings affected the outcome of the appeal. We therefore concluded that we were not entitled to take into account the Hansard material relating to section 45.

**Rights of Appeal**

131. 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.

**CHARLES HELLIER**
**TRIBUNAL JUDGE**

**RELEASE DATE: 23 February 2011**