[2015] UKFTT 0505 (TC)

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TC04663

Appeal number: TC/2014/04990

STAMP DUTY RESERVE TAX – interpretation of para 7 of Part II of Schedule 19 of the Finance Act 1999 - that there is no charge on the surrender of a unit if the unit holder receives only such part of each description of asset in the trust as is proportionate to, or as nearly as practicable proportionate to, the unit holder's share - whether this applied to the extent that the surrender was proportionate – whether recourse to Hansard permitted as an aid to interpretation. Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

HENDERSON INVESTMENT FUNDS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER CHARLES BAKER

Sitting in public at The Royal Courts of Justice, London on 10 June 2015

Mr Michael Quinlan, Counsel, instructed by Deloitte LLP, for the Appellant

Mr Richard Vallatt, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents ("HMRC")

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DECISION

1. The issue was the correct amount of stamp duty reserve tax ("**SDRT**") due in respect of the redemption of units held in the Henderson UK Enhanced Equity Trust (the "**Fund**") by a pension fund trustee (the "**Unit Holder**") in respect of which the Unit Holder received a distribution of securities and cash from the Fund (the "**redemption**").

2. It was agreed that the redemption was potentially within the scope of the SDRT charge imposed on a surrender of a unit in a unit trust scheme under schedule 19 of the Finance Act 1999 ("**schedule 19**"). The dispute was solely as to the scope of the exclusion from the charge provided for under para 7 of schedule 19 which applied:

> "if on the surrender of the unit the unit holder receives only such part of each description of asset in the trust property as is proportionate to, or as nearly as practicable proportionate to, the unit holder's share".

3. It was agreed that the distribution of securities to the Unit Holder on the redemption was not proportionate to, or as nearly as practicable proportionate to, the Unit Holder's share in the Fund. At the time of the redemption, the Unit Holder held an interest of 27.41% in the Fund but the securities received largely represented an interest of 28.68% in the Fund. The Unit Holder therefore received in most cases an over allocation of securities in the Fund of 1.27%.

4. The appellant's position was that para 7 operated to provide an exclusion from the schedule 19 charge in effect to the extent that there was no change in the beneficial ownership of the securities received by the Unit Holder. On that basis, in their view, SDRT was due under schedule 19 only by reference to the proportion of the market value of the units surrendered attributable to the over allocation of securities of 1.27%. HMRC's view was that para 7 provided an "all or nothing" exclusion. As the transfer of the relevant securities on the redemption was not proportionate to, or as nearly as practicable proportionate to, the Unit Holder's share in the Fund, an SDRT charge was due by reference to the market value of all of the units surrendered (subject to any other applicable reduction in charge).

5. The appellant, as manager of the Fund and the person accountable for the SDRT due on the redemption, had initially paid SDRT on the full market value of all of the units surrendered of £1,775,714.68. The appellant later sought repayment from HMRC of £1,657,825,93 (plus interest) having recalculated the SDRT charge as £117,888.75.

Facts

6. The facts as set out in 7 to 19 were not in dispute. It was noted that there was a disagreement as to the calculation of the amount of the potential SDRT charge but the tribunal was not asked to consider this.

7. The Fund was and is a unit trust scheme established in the UK and authorised under the Finance Services and Markets Act 2000 ("**FSMA**").

8. The Fund was formed on the 27 August 2003 initially under the name Henderson (NPI) Enhanced Equity Fund under the terms of a Trust Deed of that date. The name of the Fund changed to Henderson UK Enhanced Equity Trust under a Supplemental Trust Deed of 20 October 2004.

9. Clause 4.1 of the Trust Deed dated 27 August 2003 governed how the property of the Fund was held for unit holders including accumulation unit holders, which were the only units in issue when the redemption took place:

> "4.1 It is hereby declared that subject to the provisions of this Deed and all rules made under section 247 of the Act [FSMA]:
>
> 4.1.1 the property of the Scheme (other than sums standing to the credit of the distribution account) is held by the Trustee on trust for the unitholders pari passu according to the number of units held by each unitholder or if both income units and accumulation units are in issue, according to the number of undivided shares in the property of the Scheme represented by the units held by each unitholder;"

10. The power to redeem units on making a distribution of assets was provided for in clause 11.5 of the Supplemental Trust Deed of 20 October 2004:

> "11.5 The Trustee may take into or pay out of scheme property assets other than cash as payment for the issue of cancellation of units but only if it has taken reasonable care to ensure that the property concerned would not be likely to result in any material prejudice to the interest of unit holders".

11. The trustee changed form J.P. Morgan Trustee and Depositary Company Limited to The Royal Bank of Scotland plc under a Supplemental Trust Deed of 12 February 2005. National Westminster Bank plc subsequently became the trustee, but this was on 1 October 2011 after the date of the redemption. The manager of the Fund was the appellant, but its investment management powers and discretion were delegated to Henderson Global Investors Limited.

12. The constitution and objects of the Fund were described in the prospectus stated to be valid as of 17 March 2011. The prospectus contained the following statement as regards the manager:

> "Henderson Investment Funds Limited (the "Manager") takes reasonable steps to ensure that each investment transaction carried out within each of the Schemes is suitable for the Scheme concerned having regard to the investment objective and policy of the Scheme."

13. The prospectus set out in paragraph 13 when the manager can redeem units for assets as follows:

> "If a unitholder requests the redemption of units the Manager may, where it considers the deal to be substantial in relation to the total size of a Scheme concerned or in some way advantageous or detrimental to a Scheme, arrange, having given prior notice in writing to the unitholder, that in place of payment for the units in cash, a Scheme transfers property or, if required by the unithholder the net proceeds of sale of the relevant property, to the unitholder. Before the redemption proceeds of the units become payable, the Manager must given written notice to the unitholder that the relevant property or the proceeds of sale of the relevant property will be transferred to that unitholder so that the unitholder can acquire the net proceeds of redemption rather than the relevant property if he so desires.
>
> The Manager will select the property to be transferred in consultation with the Trustee but will only do so where the Trustee has taken reasonable care to ensure the property concerned is not likely to result in any material prejudice to the interests of unitholders."

14. Most of the assets that made up the trust property of the Fund were transferrable securities, such as shares issued in the UK, which were subject to SDRT if transferred for value. Some assets were derivative positions, such as contracts for difference and credit default swaps that could not be transferred. The Fund also held cash.

15. The transferrable securities were uncertificated and dematerialised in the CREST settlement system operated by Euroclear UK and Ireland Limited under the Uncertificated Securities Regulations 2001 SI 2001/3755 (as amended). Each line of these securities was fully fungible which is taken to mean that there was no difference economically or in equity between, for example, holding a beneficial interest in 10 shares in a company in a segregated fund and holding an undivided share of 10 per cent in a pooled fund with 100 shares in the same company.

16. On Tuesday 3 May 2011, the Unit Holder held 27.41% of the units in the Fund being 301,718,501.25 accumulation units with a value reflecting net assets of £412,685,738.52. There were no income units in issue. Each unit had a value of 136.7784 pence. Those units represented 27.41% of the beneficial ownership of the trust property. The Unit Holder asked for its units to be redeemed in specie as part of a transition management transaction initiated on 13 April 2011 and the assets to be transferred were effectively frozen on 3 May 2011.

17. On the following Tuesday, 10 May 2011, the units were redeemed and the Unit Holder received securities as a distribution, together with some cash. 401 lines of transferrable securities were distributed. 396 lines were chargeable securities. 371 lines were transferred where the percentage of the distribution, at 28.68%, exceeded the Unit Holder's proportionate share in the fund of 27.41%, representing an over allocation of 1.27%. Some variances were tiny and some were substantial. The

percentage allocation of 11 positions varied from 9.98% to 28.34%. 8 lines were distributed at less than 27.41%. The percentage allocation of 19 positions varied from 28.69% to 100%.

18. Legal title to the securities was transferred to the bank of New York Mellon NA in its capacity as custodian for the pension fund through CREST. To the extent that more than 27.41% of any line of securities was allocated to the pension fund for which the Unit Holder was trustee, beneficial ownership was transferred to the pension fund from the other unit holders. That was all that the pension fund for which the Unit Holder was trustee acquired that it did not already own.

19. The trustees were liable for the tax under sub-para 2(3) of Schedule 19. However, as there was a manager (the appellant), it was accountable for the tax under "accountable person" (f), in regulation 2 of the SDRT Regulations 1986 SI 1986/1711. The obligations to file returns in relation to transactions in units in a unit trust scheme was to be found in regulation 4B of the SDRT Regulations. Two returns were filed by the appellant. The first return was filed on 14 June 2011. SDRT was paid in relation to each unit trust scheme of which the appellant was manager for the relevant period and this included the SDRT in dispute, The second amended return was attached to a letter from the appellant to HMRC of 30 June 2011 requesting repayment of the majority of the SDRT previously paid.

Nature of a unit holder's interest in a unit trust scheme

20. The description of the nature of a unit holder's interest in a unit trust scheme set out in 21 to 24 was not disputed.

21. There is a good description of a unit trust and the rights of participants in Hudson, Equities and Trusts (eighth edition, 2015) Routledge, from pages 190-192, where the author refers to section 237 FSMA and concludes that the participants, the unit holders, have proprietary rights against the trust property. Hudson cites *M&G Securities Ltd v IRC* [1999] STC 315 which related to the stamp duty position on an in specie redemption of units (this case is further referred to in the submissions and the discussion). At 322 of that case, Park J described the rights of a unit holder as follows:

> "in law and in equity a unit holder is the owner of an undivided share in the investments and cash which from time to time comprise the fund of the unit trust".

22. This passage was cited and applied in *Save & Prosper Securities* [2000] STC (SCD) 408 at pages 416 to 417, which concerned SDRT on the amalgamation of one unit trust into another. Dr Brice found for the appellant on the basis that the merger was by operation of law and involved the creation of new trusts, rather than an agreement to transfer securities for consideration.

23. In this case the Unit Holder was a trustee of a pension fund and, therefore, the beneficial interest in the property of the Fund was held by the pension fund beneficiary. The law that governed the Fund included section 237 FSMA and its

constitution conformed to that provision. How the property of the Fund was held is set out in 9.

24. It was agreed that it followed from this legal position that, to the extent that a distribution of assets made to a unit holder on a redemption of units exactly matches the unit holder's share in the Fund, there is no change in the beneficial ownership of the assets received.

Legislation

25. The provisions of schedule 19 were introduced with effect from 6 February 2000. Prior to that time stamp taxes on transactions in unit trusts were primarily imposed under the stamp duty legislation. Schedule 19 abolished the stamp duty charge and introduced a new form of SDRT charge. Certain transaction in unit trusts remained within the scope of the principal SDRT charge provided for in the Finance Act 1986 ("**FA 1986**") (the "**principal charge**"). The scope of and interaction between the two sets of charges as they applied at the time of the redemption is set out below.

Schedule 19 provisions as in force at the time of the redemption

26. The charge to stamp duty on instruments of transfer of unit trusts was abolished under para 1 of Part 1 of schedule 19. Part II of schedule 19 contained the operative provisions of the charge and all references in 27 to 35 to paragraphs are to paragraphs of that part (except where otherwise expressly stated).

27. The main charging provision was in para 2 as follows:

> "2(1) There is a charge to stamp duty reserve tax where -
>
> (a) a person authorises or requires the trustees or members under a unit trust scheme to treat him as no longer interested in a unit under the scheme, or
>
> (b) a unit under a unit trust scheme is transferred to the managers of the scheme,
>
> and the unit is a chargeable security.
>
> Those events are referred to in this Part of this Schedule as a "surrender" of the unit to the managers….
>
> This paragraph is subject to the exclusions provided for in paragraphs 6, 6A and 7."

28. Whether a unit was a "chargeable security", so as to fall within para 2, was determined according to the definition in the principal SDRT provisions in FA 1986 (see 38).

29. Under para 3 the charge under schedule 19 was due at the rate of 0.5 % of the market value of the unit subject to any proportionate reduction under paras 4 and 5.

30. In outline, the "proportionate reductions" operated as follows:

(1) Under para 4 the amount of tax was to be proportionately reduced if, in a relevant two week period, the number of units of the same class as the unit in question that were surrendered to the managers exceeded the number of units of that class issued by the managers. The proportionate reduction was made by applying the fraction produced by the formula I/S to the amount otherwise chargeable to SDRT (where I was the number of units of the class issued in the two week period and S was the number of units of the class surrendered in that period.) The proportionate reduction did not apply if, on the surrender, the unit holder received anything other than money and no account was taken in the formula of any such surrender.

(2) Under para 5 the amount of tax was to be further reduced if, in the relevant two week period, the trust property was invested in exempt and non exempt investments. Again there was a formula for working out the reduction. Exempt investments had the same meaning as for the purposes of the principal charge (in sub-s 99(5A)(b) FA 1986) being, broadly, those which would not themselves attract stamp duty or SDRT charges.

31. Paragraph 6 contained certain "exclusions" from the charge "in certain cases of change of ownership". Under sub-para 6(1) the exclusions applied where "in pursuance of arrangements between the person entitled to a unit and another person (the "new owner") (a) the unit is surrendered to the managers, and (b) the person surrendering the unit authorises or requires the managers or trustees to treat the new owner as entitled to it":

(1) "if no consideration in money or money's worth is given in connection with the surrender of the unit or the new owner's becoming entitled to it" (sub-para 6(2)); or

(2) "if the new owner is -

(a) a charitable company, or

(b) the trustees of a charitable trust"

or certain other entities (sub-para 6(3)); or

(3) "if an instrument executed at the time of the surrender –

(a) in pursuance of arrangements between the persons entitled to the unit and the new owner, and

(b) transferring the unit from one to the other,

would be exempt from stamp duty (if stamp duty were otherwise chargeable) by virtue of" certain specified provisions (sub-para 6(4)).

32. The exclusions provided for in para 6 to some extent corresponded to equivalent exemptions from the principal charge (see 40 to 42).

33. There was also an exclusion in para 6A which applied "if" immediately before the surrender, the unit was held within an individual pension account, not all of the units were so held at that time and certain certification requirements were complied with.

5 34. Paragraph 7 contained the exclusion for "in specie redemptions" in consideration here:

> "There is no charge to tax under this Part of this Schedule if on the surrender of the unit the unit holder receives only such part of each description of asset in the trust property as is proportionate to, or as nearly
> 10 as practicable proportionate to, the unit holder's share."

35. Sub-paragraph 8(1) provided that the term "issue" in the context of the issue of a unit by the managers under a unit trust scheme includes their transferring an existing unit or authorising or requiring the trustees to treat a person as entitled to a unit under the scheme.

15 36. Under sub-para 14(2) of Part IV "unit trust scheme" had the meaning given by s 237(1) FSMA subject to certain exclusions which are not in point here. Under s 237(1) FSMA "unit trust scheme" meant a collective investment scheme under which the property is held on trust for the participants. The definition of collective investment scheme was set out in s 235 FSMA.

20 *Principal SDRT charging provisions in FA 1986 as in force at the time of the redemption*

37. The principal charge applied where a person (a) agrees with another person (B) to transfer chargeable securities (whether or not to B) for consideration in money or money's worth under s 87 FA 1986. SDRT was due at the rate of 0.5% of the amount
25 or value of the consideration in money or money's worth under sub-s 87(6).

38. The term "chargeable securities" was defined to include units under a unit trust scheme (under sub-s 99(3) FA 1986) but subject to certain exceptions. Under the exceptions, chargeable securities did not include units under a unit trust scheme where (a) all the trustees under the scheme were resident outside the UK and the unit was not
30 registered in a register kept in the UK or (b) under the terms of the scheme the trust property could only be invested in exempt investments (sub-s 99(5A) FA 1986). As noted, the schedule 19 charge also only applied where the unit in question was a chargeable security within this definition.

39. Unit trust scheme and related expressions were stated to have the meaning given
35 in schedule 19 (under sub-s 99(9) FA 1986) (see 36).

40. There were specific exemptions from the charge under s 87 for transactions involving unit trusts in the following provisions of FA 1986:

> "90(1) Section 87 shall not apply as regards an agreement to transfer a unit under a unit trust scheme to or from the managers under the scheme.

> 90(1A) Section 87 above shall not apply as regards an agreement to transfer a unit under a unit trust scheme if an instrument executed at the same time as the agreement and giving effect to the agreement would be exempt from stamp duty (if stamp duty were otherwise chargeable) by virtue of…[certain specified provisions corresponding to those in sub-para 6(4) of schedule 19.]
>
> 90(1B) Section 87 shall not apply as regards an agreement to transfer trust property to the unit holder on the surrender to the managers of a unit under a unit trust scheme".

41. There was an exemption from the principal charge under sub-s 90(7) FA 1986 for an agreement to transfer securities to a charitable company, the trustees of a charitable trust or certain other bodies.

42. As noted above, the exemptions in sub-s 90(1A) and sub-s 90(7) are to some extent mirrored in corresponding exclusions from the schedule 19 charge in sub-paras 6(4) and 6(3) respectively.

Abolition of schedule 19

43. The provisions of schedule 19 were abolished with effect for surrenders of units made on or after 30 March 2014. From that time transactions in unit trusts are subject only to SDRT charges, where applicable, under the principal charge.

44. The principal charging provisions remained as set out above except that sub-s 90(1B) FA 1986 was amended to mirror the wording of the former para 7 as follows:

> "90(1B) Section 87 above shall not apply as regards an agreement to transfer trust property to the unit holder on the surrender to the managers of a unit under a unit trust scheme if the unit holder is to receive only such part of each description of asset in the trust property as is proportionate to, or as nearly as practicable proportionate to, the unit holder's share.
>
> For these purposes, there is a surrender of a unit where –
>
> (a) a person ("P") authorises or requires the trustees or managers of a unit trust scheme to treat P as no longer interested in a unit under the scheme, or
>
> (b) a unit under the unit trust scheme is transferred to the managers of the scheme,
>
> and the unit is a chargeable security".

Submissions for the appellant.

45. Mr Quinlan submitted that schedule 19 was intended to compliment, mesh with and operate coherently with the stamp tax provisions imposing stamp taxes on

dealings in securities generally. Looking at the overall scheme of the SDRT rules applicable to unit trusts, schedule 19 was intended to operate as a subset of and to mimic and protect the principal SDRT charging provisions.

46. Both stamp duty and the principal SDRT charge operate by reference to the value given for a change in beneficial ownership of the relevant asset. Under s 87 FA 1986 SDRT could arise on a distribution from a unit trust scheme if, or to the extent that, there was a change in beneficial ownership. Prior to the repeal of schedule 19, sub-s 90(1B) FA 1986 exempted an in specie distribution from the s 87 charge to prevent double taxation. HMRC accept that a distribution of chargeable securities made on redemption of units on an exactly proportionate basis was not (and is not) within the scope of the principal charge (see 51).

47. It would be out of kilter with this general principle underpinning the stamp duty and principal SDRT rules and with the intention for the alignment of the schedule 19 charge with the principal charge to interpret schedule 19 as imposing a charge to the extent that there was no change in beneficial ownership of the underlying assets of the Fund. Paragraph 7 was intended to prevent from being charged by a special provision that which would otherwise not be charged at all.

48. Applying a purposive construction to para 7, looking at the context of the provisions and the very harsh manifestly unfair result which would result from the alternative interpretation, para 7 could be construed to give this result. Schedule 19 was not intended to impose a large multiple of tax ordinarily payable in an arbitrary and counter intuitive way and HMRC's narrow interpretation of para 7 was contrary to the scheme of the legislation and the intention of Parliament. It is inconceivable Parliament intended the provision (or would have intended, had it turned its mind to it) to operate in a way which, in order to come within it, may require the trustees of a unit trust to act contrary to their obligations as a matter of regulatory law (for the distribution of assets to satisfy the requirement to be proportionate or as nearly as practicable proportionate to the unit holder's share).

49. Mr Quinlan made a number of detailed points in support of his submission as regards the intended alignment of schedule 19 with the principal charge:

(1) Schedule 19 was introduced to align the way in which dealings in unit trusts were dealt with for stamp taxes purposes with dealings in other securities traded through CREST. The aim was to mimic the principal charge as the old stamp duty and SDRT regime was not working well for units trust and it was thought that the *M&G* case had created a loophole as regards the cancellation of units.

(2) Both sets of provisions operated by reference to the same definitions of unit trust and unit trust scheme and related expressions.

(3) The cases intended to be caught by the schedule 19 charge were specifically carved out of the principal charge to avoid double charges (see sub-ss 90(1), 90(1A) and 90(1B)).

(4) The rate of SDRT charge was the same albeit that the schedule 19 charge operated by reference to market value of the units whereas the principal charge operated by reference to consideration in money or money's worth.

(5) The proportionate reduction in the schedule 19 charge provided for in para 4 in effect confined the scope of schedule 19, as regards transactions in units involving the manager, to operating on the same basis as the principal charge, as regards transactions in units without manager involvement. For example, the effect of para 4 was that, if in the relevant two week period 100 units are surrendered and only 50 are issued, SDRT was due on the value of 50 units only. In effect there was a deemed transfer of 50 units reflecting the position had there been a direct transfer of units between unit holders without manager involvement.

(6) Unit trusts which invest only in exempt investments were excluded from both sets of charges. Schedule 19 also contained the proportionate reduction in para 5 where trust property included both exempt and non exempt investments.

(7) Both sets of provisions contained exclusions or exemptions for cases where the new owner/transferee was a charity or certain other specified bodies (except that an additional body was specified for the principal charge exemption) (sub-para 6(3) of schedule 19 and sub-s 90(7) FA 1896).

(8) Both sets of provisions contained an exclusion or exemption for cases where an instrument executed at the time would have been exempt from stamp duty in certain circumstances (sub-para 6(4) of schedule 19 and sub-s 90(1A) FA 1986).

50. Mr Quinlan noted the following as regards the exclusions provided for in para 6 of schedule 19:

(1) Sub-paragraph 6(2), which provided there was no schedule 19 charge where there is no consideration in money or money's worth, in effect provided an exemption where there was no change in the underlying beneficial ownership of units. For example, this would apply to exclude from the charge a transfer of units between two custodians for the same beneficial owner or from a custodian to the beneficial owner.

(2) The exclusions provided for in para 6 were not "hard edged" exclusions as contended by HMRC. They could operate on a partial basis. Mr Quinlan gave examples of how he thought these provisions operated one of which is set out below in the discussion.

(3) In view of the way the exclusions of para 6 operated, it would be irrational and inconsistent with the approach in para 6 to apply the provisions of the immediately following para 7 in a "hard edged" way.

51. As mentioned above, HMRC accept that a distribution of chargeable securities made on a redemption of units on an exactly proportionate basis was not (and is not) within the scope of the principal charge. Reference was made to HMRC's Stamp Taxes Manual (at STSM 107030) which states, as regards the corresponding situation

of a proportionate in specie contribution of assets to a unit trust in return for an issue of units, that:

> "the investor is not relinquishing ownership of his property in return for a different proportionate interest in each of the existing underlying investments (which includes his own contributing property) contained in the trust fund. There is therefore no transfer on sale, or an agreement to transfer, as the transaction represents, in effect, no change of beneficial ownership."

52. Mr Quinlan noted that, although the above statement was published after the date of the redemption, he believed it reflected HMRC's view at the time. As a contribution of this kind is the flip side of a surrender, the same reasoning applied. He added that he understood that HMRC also accepted that this remained the case following the abolition of schedule 19. The exemption from the principal charge then inserted (reflecting the wording of the former para 7) for proportionate or as nearly as practicable proportionate transfers of assets on a surrender of units, was not necessary as regards exactly proportionate transactions. As previously, the principal charge did not in any event apply to such surrenders as there was no change in beneficial ownership of the relevant assets. Mr Vallat confirmed that HMRC did agree that this was the case.

53. Mr Quinlan said that no support for HMRC's position could be derived from the fact that there are a number of examples of "hard edged" provisions in the stamp taxes legislation such as in ss 75, 76 and 77 FA 1986 and elsewhere. Those provisions (and others in the stamp taxes legislation) are concerned, for policy reasons, to relieve stamp duty and SDRT for transactions which involve a change in beneficial ownership. This case is different in that there was simply no change in beneficial ownership as regard the majority of the assets transferred to the Unit Holder.

54. The contextual interpretation of para 7 which the appellant sought to apply was in line with the approach taken in the cases of *M&G* (at pages 319 a, 322 b to c, 323 f to j, 324 f to 325 b and 325 f to 326 a) and *Pollen Estate Trustee Co Ltd v Revenue and Customs Commissioners* [2013] 1 WLR 3785 (at [46] to [49]). In both of those cases, the approach was to interpret the relevant provisions in a contextual way, taking into account manifest unfairness and unworkability of alternative constructions to that adopted by the court. These cases and the submissions made in relation to them are further set out in the discussion below.

55. Mr Quinlan made the following points on the wording of para 7:

(1) "If" merely created a condition or supposition. "If" the condition was not satisfied, it did not mean that the exclusion did not apply in its entirety. The argument that it was perfectly easy for the draftsman to include the words "to the extent that" was rejected in the *Pollen* case

(2) The provision stated "receives only such part" it did not state "only receives such part". These words can be taken to read as focusing on the nature of what was received rather then describing the entirety of what was received.

(3) "Only" is emphatic. It stresses that the exclusion extends to the extent that what is received satisfies the description that follows.

(4) "The unit" was referred to in the singular in para 7 as it was throughout Part II of schedule 19.

5 56. Following the contextual approach taken in the cases set out above, there were two possible interpretations of para 7, both of which allow for the result sought by the appellant:

(1) The better interpretation was that para 7 should be applied on a unit by unit basis. On that approach it applied to exclude only those units that represent
10 the unit holder's existing share of the trust property. Each unit redeemed that represents the acquisition of securities in excess of a unit holder's share fell within the charge under para 2 of schedule 19. This was the only interpretation which gave a sensible and consistent result where a distribution is uniformly underweight such as where a person receives 90% of its share in the form of
15 assets of the unit trust and 10% in cash.

(2) If instead para 7 was taken to refer to the surrender of the units on mass, first, one identifies the unit holder's share in the trust property as a percentage. Then one identifies the percentage of each asset where the unit holder received only such part as represented its existing share in the trust property. That
20 percentage of units is excluded from the charge. The balance of units would be within the other charging provisions of schedule 19. Such an interpretation does not require the words "or to the extent that" to be read into para 7. However, if that is incorrect, the reading in of such words would be justified in order to prevent the distortion that cannot have been intended on the authority of the
25 *Pollen* case.

57. Mr Quinlan continued that, should the above arguments not succeed, the matter could be concluded in the appellant's favour by recourse to the Parliamentary debates on schedule 19 of 15 June 1999 as recorded in Hansard. This was a situation where recourse could be had to such debates on the authority of the case of *Pepper*
30 *(Inspector of Taxes) v Hart* [1993] AC 593. Reference was made to pages 634 (D to H) and 635 (A) of that case and the following summary in the text book Bennion on Statutory Interpretation (sixth edition, 2013) Lexis Nexis at page 566:

> "(2) This section applies to an enactment contained in an Act where, in the opinion of the court, construing the enactment, it is ambiguous or obscure
> 35 or its literal meaning leads to an absurdity.
>
> (3) The statement must be made by on behalf of the Minister or other person who is the promoter of the Bill.
>
> (4) The statement must disclose the mischief aimed at by the enactment, or the legislative intention underlying its words.
>
> 40 (5) The statement must be clear."

58. Mr Quinlan also referred to page 671 of Bennion where it is noted that the concept of absurdity is to be give a wide meaning. He concluded that in this case the requirements set out in Bennion were satisfied. Paragraph 7 was ambiguous as regards the phrase "each description of asset" and the literal interpretation would lead to absurdity. The passages of the debate on which HMRC intended to rely were made by the Minister who was the promoter of the Bill (the Economic Secretary of State at the time, Ms Patricia Hewitt) and contained clear statements of the intent underlying the words. From the relevant passages it was clear that there was not intended to be a charge to SDRT under schedule 19 in the circumstances where there was no change in beneficial ownership of the assets distributed on the redemption. Parliament intended schedule 19 to be read in line with the principal charging provisions and para 7 does not have to be read as "hard edged". (Extracts from the relevant passages are set out in the discussion below.)

Submissions for HMRC

59. Mr Vallatt submitted that paragraph 7 is to be construed as applying only where the unit holder receives assets in proportion to (or as nearly as practicable in proportion to) the unit holder's share. Where that condition is not met, the full value of the units is within the charge to SDRT under schedule 19 (subject to the application of any other exemption or the proportionate reduction where both exempt and non exempt assets are held).

60. This natural meaning of the provision does not ignore a purposive interpretation. This construction is supported by reading the whole of para 7 and doing so in the context of schedule 19 and stamp taxes generally. The structure of schedule 19 was to impose a market value charge on the surrender of securities, provide certain proportionate reductions and finally certain "hard edged" exclusions of which para 7 was one.

61. On the natural meaning of the words in para 7 read in their context:

(1) The use of the words "if" and the reference to "only" such part as is proportionate clearly indicates that the provision was not intended to apply "to the extent that".

(2) The exclusion for cases where the in specie redemption was "as nearly as practicable" proportionate clearly indicates the degree of intended exclusion to avoid unnecessarily harsh results. The tolerance margin was not a fixed amount but rather to be determined in each case according to what was practicable. If any other margin had been intended the legislation could have specifically said "to the extent that". Given the use of the "as nearly as practicable" mechanism it would seem most unlikely that reading in the words "to the extent that" was intended. To ask whether the distribution is as nearly as practicable proportionate makes more sense than asking to what extent the distribution is as nearly as practicable proportionate.

(3) As noted, schedule 19 drew a distinction between the proportionate reductions in the charge provided for in paras 4 and 5 and the exclusions

provided for in paras 6, 6A and 7. It is clear that all of these exclusions were intended to be "hard edged".

(4) The same type of wording was used in other contexts such as in the financial services regulations and in sub-s 90(1B) FA 1986 where reading in "to the extent that" would not be appropriate.

62. Mr Vallat made further reference to the intended operation of the "hard edged" provisions of para 6. Sub-paragraph 6(2) simply did not apply if there is any consideration at all for the transfer of units. Similarly sub-para 6(3) only provided an exclusion where the relevant new owner or owners are a specified body. The *Pollen* case does not support an alternative approach to the construction of that provision. In *Pollen* the property in question was land which was jointly owned by a charity and non-charities as an indivisible asset. Whilst it may have been justifiable to read in words to the SDLT charitable exemption in that context the same would not apply where the relevant assets are fungible assets such as units in a unit trust.

63. "Hard edged", "all or nothing" exclusions of the kind provided for in para 7 (and paras 6 and 6A) are common in stamp tax legislation. An example of this is in s 75 FA 1986 which, for the relevant relief to apply, requires a precise mirroring of economic interests before and after the transaction or for them to be "as nearly as may be". If the shareholdings do not satisfy that requirement, the relief does not apply and there is no proportionate reduction in duty payable. Section 77 FA 1986 provides a similar example. Mr Quinlan's assertion that the para 7 situation is somehow different from these cases is not correct. Each of these cases involves a situation where there is a change in economic ownership.

64. Whilst the provisions of schedule 19 did to some extent complement the principal SDRT charging provisions in FA 1986, they were not wholly aligned as submitted by the appellant. In particular, there was a distinct difference in that the schedule 19 charge was by reference to market value of the units and not consideration in money or money's worth as for the principal charge.

65. Whilst it is correct that the SDRT charge which applied under schedule 19 was greater than that which applied before schedule 19 was introduced or after it was repealed, that in itself is no reason to construe schedule 19 as imposing a smaller charge. The relevant explanatory notes published when the schedule 19 charge was abolished in 2014 makes it clear that the abolition of the special charge and reintroduction of the new general charge was intended as a tax cut not merely a replacement of one charge with another:

"**BACKGROUND NOTE**

7. There is a special SDRT charge (known as the "Schedule 19" charge) on UK unit trusts and open-ended investment companies. This is a 0.5 per cent charge on the value of surrenders by investors, of units or shares in a fund to the fund manager, although this charge may be reduced in to different ways when the amount of tax is calculated.

> The tax is generally accounted for by the fund manager but ultimately borne by the investors.
>
> 8. The Government announced at Budget 2013 that the Schedule 19 charge would be abolished in Finance Bill 2014 as part of a package of measures to make the UK more attractive as a domicile for investment funds."

66. Mr Vallatt noted that the appellant submitted that the introduction of schedule 19 was a reaction to the decision in the *M&G* case, seemingly as a further basis for the argument that there should only be a charge on an in specie redemption of units to the extent that there is a change in beneficial ownership. HMRC's position in the *M&G* case was that there should be a stamp duty charge on the full amount in question where the relevant conditions for relief in consideration in that case were not satisfied. In HMRC's view the introduction of schedule 19 was preserving such a full charge as HMRC had thought the position to be all along.

67. The decisions in the *M&G* and *Pollen* cases do not support the appellant's submissions:

(1) In *M&G*, Park J essentially regarded the provision in question as wholly unworkable. The provisions of para 7 of schedule 19 were not wholly unworkable. In requiring that the distribution is proportionate or "as nearly as practicable proportionate" there was an allowable margin which taxpayers should be able to come within.

(2) In *Pollen*, there was a wholly different approach of being able to rectify an intended obvious mistake. This was not a matter of applying a purposive approach to statutory construction but was a case of correcting errors. In this case there is no policy imperative to justify reading in words. The fact that the unit holder is a pension fund is not sufficient to justify the approach the appellant seeks and this is a very different situation from that involving a charity in *Pollen*.

68. On whether it is permitted to have recourse to Parliamentary debate as an aid to construction of the provisions, Mr Vallatt noted that Bennion is only a text book in which some of the comments are the opinion of the author. In any event, it is clear from the case of *Pepper v Hart* that recourse is to be had to such debate only where the relevant provisions are ambiguous or obscure or the literal meaning would lead to an absurdity (as per Lord Browne Wilkinson at page 634 of that case). The fact that para 7 was a "hard edged" provision does not of itself create absurdity. If recourse is permitted to Hansard, the passages from the parliamentary debate relied on by the appellant do not support the appellant's position.

Discussion

69. When the redemption took place, dealings in units in unit trust schemes were subject to stamp taxes primarily through the operation of schedule 19. It is accepted by the appellant that the redemption of units in the Fund and related distribution of

chargeable securities fell within the scope of the charging provisions of para 2 of schedule 19 and that the principal charge in FA 1986 was not in point.

70. The dispute between the parties as regards the application of the SDRT charge under schedule 19 is whether and the extent to which para 7 of schedule 19 exempted the redemption from the charge. To recap, this provided that there is no SDRT charge under schedule 19:

> "if on the surrender of the unit the unit holder receives only such part of each description of asset in the trust property as is proportionate to, or as nearly as practicable proportionate to, the unit holder's share."

71. It was accepted by the appellant that on the redemption the Unit Holder did not receive only such part of each description of asset in the trust property of the Fund as was proportionate to, or as nearly as practicable proportionate to, the Unit Holder's share. The Unit Holder held a total of 27.41 % of the units in the Fund at the relevant time. On the redemption it received in most cases an interest in 28.68 % of the relevant assets of the Fund representing an over allocation of assets of the Fund of 1.27%.

72. On the redemption the Unit Holder received what were described as lines of securities. Looking at each line of securities separately, as set out in 17, some of them represented an interest of more or less than 28.68% with the variances described as ranging from tiny to substantial. Paragraph 7 required the proportionate requirement to be considered as regards each description of asset in the trust property. If each line of securities is viewed as a different description of asset, the Unit Holder received an over allocation in respect of particular descriptions of asset of substantially more than 1.27% (and in some cases received less).

73. In summary, the appellant's stance was that para 7 applied in effect to the extent that the receipt of the relevant assets was proportionate to or, as nearly as practicable proportionate to, the relevant share. (We note that we have used the term "to the extent that". The appellant argued that this interpretation did not require the reading in of the words "to the extent that" but was a justifiable interpretation of the actual words used on a contextual analysis as discussed below.)

74. For the reasons set out in full in their submissions, HMRC argued that para 7 was an "all or nothing" or "hard edged" provision. On that basis, if the receipt of relevant assets was not proportionate or as nearly as practicable proportionate in the required way, the exemption did not apply. The units surrendered were potentially subject to the SDRT charge on their full value (including the value of the "excess assets").

Analysis of the wording of para 7

75. We consider that the natural construction of para 7 is that the exclusion contained an absolute condition which had to be satisfied for it to apply. The use of the word "*if*", on its plain meaning, creates a hypothesis as to what was required for the surrender to be excluded from the charge. The requirement was that, on the

surrender, the unit holder receives "*only"* such part of each description of asset of the trust as is proportionate to, or as nearly as practicable proportionate to, the unit holder's share. The use of the word "only" stresses that, for the condition created by the use of the word "if" to be satisfied, the unit holder must receive, as regards each description of asset in the trust, that part of such asset as is proportionate to, or as nearly as practicable proportionate to, the unit holder's share and no more.

76. We note that the proportionate (or as nearly as practicable proportionate) test has to be applied by reference to each description of asset. In our view this means that, where different descriptions of asset are transferred, the exemption in para 7 will not apply if any one of the different descriptions of asset transferred is not proportionate to or, as nearly as practicable proportionate to, the unit holder's share. In other words, the test has to be met in relation to each and every description of asset. We have not considered in full what "each description of asset" means as this was not an issue here (as it was agreed that this test was not met).

77. That this is the correct interpretation is reinforced by the inclusion of the "or as nearly as practicable proportionate" wording. From the term itself, it seems this was included in acknowledgement that there may be practical difficulties in a unit holder receiving assets on an exactly proportionate basis and that it would be unfair not to allow the exclusion to apply where an exactly proportionate basis was not achieved for that reason. Therefore, a margin was allowed for cases where the distribution of assets was "as nearly as practicable" proportionate. We interpret this as giving a relatively flexible approach. The term "practicable" suggests that what must be assessed is how close a match with the unit holder's share can feasibly or viably be achieved in practice in the particular circumstances of the case. It would be reasonable to expect that this allows sufficient leeway for managers and trustees of unit trusts usually to ensure that the exclusion applied to a redemption.

78. In conclusion, our view is that the interpretation set out above is the plain meaning of para 7 and that there is no ambiguity or uncertainty. We cannot see any reason for deviating from this natural meaning of the exclusion, whether in the context of the overall scheme of the stamp taxes legislation, or the particular interaction of schedule 19 with the principal charge.

Context of the provisions and interaction with the principal charge

79. The task of the tribunal is to form a view of the correct interpretation of the particular provision in question applying a purposive approach to construction. As set out in the *Pollen* case we were referred to (at [24]):

> "The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose …. In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole… The essence of the approach is to give the statutory provision a purposive construction in order to determine

the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements designed to operate together) answered the statutory description."

5 80. Looking at the overall scheme of the relevant SDRT provisions, whilst schedule 19 was in place, it provided the primary mechanism for the charging of stamp tax on transactions in unit trusts. It is clear it was intended to operate within the same overall parameters as the principal charge. In particular, both sets of provisions operated by reference to the same definitions, both were confined in scope, broadly, to 10 UK based unit trusts, both did not apply to unit trusts which invest only in exempt investments and they otherwise contained some similar exemptions. As there was potentially a degree of overlap between the two sets of rules, provisions were included to prevent double charges essentially by carving out from the principal charge cases intended to fall within the schedule 19 charge (such as under sub-ss 90(1) and 90(1B) 15 FA 1986).

81. Within that overall framework, the mechanism for imposing and calculating the charges were distinct and different.

(1) The principal charge operated, as for other chargeable securities, by reference to an agreement to transfer units made in return for consideration in 20 money or money's worth and was charged by reference to that consideration.

(2) The schedule 19 charge was imposed where a person authorises or requires the trustees or members under a unit trust to treat him as no longer interested in a unit or transfers a unit to the manager of the trust. In contrast to the principal charge, this charge was imposed on the value of the units 25 irrespective of the consideration. The charge could be proportionately reduced by looking over a two week period (a) at the number of units of the same class in issue and surrendered and (b) the extent to which the unit trust had exempt and non exempt investments.

(3) The schedule 19 charge contained certain exclusions in addition to that in 30 para 7, some of which corresponded to exemptions from the principal charge. As regard the exclusions in para 6, Mr Quinlan put forward that these were not "hard edged" but could operate on a partial basis. One example he gave was that if units were transferred (in a way caught by schedule 19) to a fund owned as to 50 per cent by a charity and 50 per cent by other entities, sub-para 6(3) 35 would apply to exclude 50 per cent of the units from the schedule 19 charge. However, sub-para (3) (and the other provisions of para 6 and para 6A) applied, like para 7, "if" certain specified circumstances existed or occurred. Without commenting definitively on the application of these provisions in all circumstances, for the same reasons as set out above in relation to para 7, we 40 interpret these provisions, on their natural meaning, as also generally intended to apply only where the condition specified was satisfied.

82. It can clearly be seen that there was a degree of intended alignment between schedule 19 and the principal charge. The two sets of provisions were intended to work in tandem and on a complimentary and non overlapping basis as set out above.

It can also be concluded from how the provisions of schedule 19 collectively operated that, in broad terms, schedule 19 was aimed at capturing changes of beneficial ownership of the relevant units in line with the principles underpinning the principal charge (and stamp duty) albeit that the mechanics of charge were very different.

83. However, we do not consider that this very broad alignment is sufficient to indicate that the legislature intended the exclusion in para 7 to operate *to the extent that* a distribution of assets is proportionate (or as nearly as practicable proportionate) to the unit holder's share, as is the effect of the appellant's argument. Within this overall framework, the provisions of schedule 19 were a detailed and prescriptive set of rules imposed under a very different mechanism from that used for the principal charge (or for stamp duty). It appears to us that a deliberate distinction was drawn in schedule 19 between cases where there was a proportionate reduction in the charge and those where a particular exemption or exclusion applied in full or not (according to whether the specified condition was satisfied). There were two provisions described as proportionate reductions in the charge to reflect the constantly changing composition of a fund (para 4) and the nature of the investments it held (paragraph 5). There were then the provisions described as exclusions in paras 6, 6A and 7 each of which applied "if" a particular set of circumstances applied. If the intention was for these exclusions also to apply on a proportionate basis, the legislature could have described them as proportionate reductions and used wording other than "if" and, in the case of para 7, other than "only".

84. We note that as a general matter both the principal SDRT charge and stamp duty charges apply only where there is a change in beneficial ownership of relevant assets. We also note that transactions in unit trusts (taking place without manager involvement) were (as now) within the scope of the principal charge, under general principles, only if there was a change in beneficial ownership of the units. Similarly, a distribution of assets made on an exactly proportionate basis on a redemption of units did not and does not fall within the principal charge. However, again we are unable to see that this general position provides evidence of an intent that para 7, an exclusion from an SDRT charge imposed under a prescriptive set of rules in a very different way to the principal charge, should be interpreted wholly out of kilter with its plain meaning in the context used.

Other "hard edged" provisions

85. Looking at the wider scheme of the stamp taxes legislation, it is not unusual for charges to be imposed by reference to full value where an exemption has been provided but a relevant condition for the exemption to apply is not satisfied. There are a number of such exemptions which operate in what might be described as a "hard edged" or "all or nothing" manner. For example, s 75 FA 1986 provides an exemption from stamp taxes where a company acquires the undertaking of another company in pursuance of a scheme for the reconstruction of that company where certain conditions are satisfied. The conditions include that, after the acquisition each shareholder of each of the companies is a shareholder of the other and, the proportion of shares of one of the companies held by any shareholder is the same as the proportion of shares of the other company held by that shareholder or "as near as may

be". Clearly this is aimed at providing relief where there is no real change in economic ownership. However, if the requirement for proportionate shareholdings to be held is not met, no relief is available at all. The charge to tax applies in full and there is no proportionate reduction. A similar position applies under s 77 FA 1986.

5 86. Mr Quinlan submitted that the current case is different to the "hard edged" provisions of s 75 and s 77. Here we are looking at a situation where there has been no change in beneficial ownership whereas the scenarios to which s 75 and s 77 potentially apply are those where there has been a change in beneficial ownership but no change in economic ownership. However, to view these situations differently is 10 artificial. Although, as a matter of the precise mechanics of the transactions to which s 75 and s 77 potentially apply there may have been an actual movement of ownership at some level, the reliefs are aimed at cases where economic ownership remains the same as the ultimate beneficial ownership remains the same. So the effect, where the relief does not apply, is that there is a charge notwithstanding that there is no 15 substantial change in the ultimate beneficial ownership.

Mr Quinlan's two approaches

87. Mr Quinlan put forward two interpretations of para 7 based on whether the provision is taken to require an assessment of the position as regards each unit surrendered individually, on a unit by unit basis, or as regards all of the units 20 surrendered taken collectively. We cannot see a basis for the result sought by the appellant whichever of these approaches is taken.

88. First, Mr Quinlan argued that, taking para 7 to require the surrender of each unit to be looked at individually, it would apply to exclude only those units that represent the unit holder's existing share of the trust property. Each unit redeemed 25 that represents the acquisition of securities in excess of a unit holder's share would fall within the charge under para 2. We cannot see how this result follows from approaching the interpretation on a unit by unit basis.

89. On a unit by unit basis, the question is whether, on the surrender of each unit, the unit holder receives only such part of each description of asset in the trust property 30 as is proportionate to, or as nearly as practicable proportionate to, the unit holder's share in the trust represented by that unit. In our view this requires an assessment, as regards each unit, of what share the unit holder has in the trust and what rights that unit carries to the assets of the trust according to the actual rights attributable the units.

35 90. In this case, the property of the Fund (other than sums standing to the credit of the distribution account) was stated to be held by the Trustee on trust for the accumulation unit holders pari passu according to the number of units held by each unit holder. On that basis each unit would carry a proportionate entitlement to the Unit Holder's overall share in the trust and to the underlying assets. On a simplified 40 example, if a unit holder has 10 units representing in total a 10% interest, each unit would be regarded as representing an interest of 1%. If the unit holder received a single description of assets representing an interest of 11% in the trust, the unit holder

would be regarded as receiving a 1.1% share in the assets as regards each unit. Accordingly, the exclusion in para 7 would not apply unless it could be held that the excess of 0.1% of assets received in respect of each unit is as nearly proportionate as practicable to the 1% share represented by the unit.

5 91. Our view is that the better interpretation is that para 7 is to be interpreted looking at the units surrendered collectively and not on an individual basis. This follows from applying the normal statutory rule of interpretation that, unless the context otherwise requires, the singular is to be taken to include the plural. We do not see there is any reason from the context to apply the test in the singular only (although 10 as we have said, if it was, that approach in any event would not support the appellant's contentions). This is a more practical approach than applying the test on a unit by unit basis with the potential difficulties caused by apportioning the assets of the fund to each unit. It also accords with the more natural interpretation of "the unit holder's share" as being his collective interest in the fund represented by all of the 15 units surrendered.

92. As regards viewing the units surrendered collectively, the appellant submitted that the result it seeks can be obtained by simply asking first "what was the unit holder's share in the trust property as a percentage", then "identifying the percentage of each asset where the unit holder received only such part as represented such share" 20 and "excluding that percentage of the units from charge". This seems to follow from the appellant's submission that "if" does not raise an absolute condition, but merely a form of supposition which applies to the extent it is satisfied and that "only" appearing as it does after the word "receives" (rather than before) focuses on the nature of what is received rather then describing the entirety of what is received. The 25 appellant submitted that this construction did not require the words "to the extent that" to be read into para 7.

93. We are unable to see that the construction sought by the appellant could succeed unless in effect the word "if" in para 7 is replaced by the phrase "to the extent that". We cannot see any viable interpretation of the words used which would achieve the 30 result the appellant seeks without the need to read such words in. As set out, our view is that on its normal meaning in the context used "if" creates a condition which must be satisfied for the exclusion to apply. It seems to us that the appellant's argument is essentially that the word "if" is to be interpreted as meaning "where". However, we cannot see that interpreting "if" in that way of itself creates the interpretation the 35 appellant argues for. This still creates conditionality in that the normal meaning would be that "where" the subsequent requirement is met, the exclusion applies, but "where" it is not, the exclusion does not apply. We also cannot see that the use of the word "only" after the word "receives" (rather than before) somehow limits the exclusion to applying to the extent that the following requirement as to the 40 proportionate (or as nearly as practicable proportionate) receipt of assets is satisfied. The word "only" means just that – that nothing other than what is then specified must be received.

94. For all the reasons set out above, we cannot see any justification for reading the provision in the way the appellant argues for, either from the wording of para 7 or the

context of the provisions. The appellant further submitted that its interpretation was justified, even if (as is our view) it is necessary to read the words “to the extent that” into the provision, on the basis of the decisions in the cases of *M&G* and *Pollen*. We have concluded that these decisions do not assist the appellant’s argument as set out in 95 to 110.

Case law - M&G

95. In the *M&G* case the question was whether, under the stamp duty regime as it applied at the time, the managers of a unit trust were entitled to a refund of stamp duty paid in respect of a document relating to a redemption of units made by the unit holder in return for the transfer of cash and investments from the trust. At the relevant time, the written request from the unit holders to the managers for the redemption was treated as a deemed transfer on sale of the units which had to be duly stamped with ad valorem duty. However, the managers of the unit trust could claim repayment of the duty where certain conditions were satisfied. The relevant condition under consideration was that in sub-s 54(4) (b) of the Finance Act 1946:

> “where a unit under a unit trust scheme is transferred to the managers by an instrument of transfer duly stamped … that, as a consequence of the transfer a proportionate part of the trust property has been realised and the trust property diminished accordingly”.

96. HMRC argued that this condition was not satisfied on the basis that there was no realisation of the trust property by the trustees. In their view, this would require that the trustees had realised the relevant proportion of the trust property for cash (or the equivalent of cash), which would usually take place by way of sale on the open market, and that the cash was then used to make the redemption of units. Park J rejected this and held that the better interpretation was that the redemption of the units was itself the realisation of the trust property whereby the trust property was diminished accordingly.

97. In reaching this view Park J took the approach of interpreting the provision in question in the context of the scheme of the legislation as a whole and taking into account the “unreasonable result” which would follow from HMRC’s alternative interpretation. He noted (at page 324 g to j) that he had thought HMRC’s view initially looked correct “on a stand alone basis, divorced from the context and the results of the rival interpretations” but that had been his view:

> “before I had assimilated the scheme of the legislation as a whole, before I properly appreciated the role which the subsection performed, before I had begun to reflect on the consequences of the rival interpretation. I believe that when the critical words are evaluated more deeply – not just linguistically but also in terms of how they fit with the rest of sub-s (4) and in terms of the effects they produce – the balance of argument shifts decisively.”

98. In setting out his conclusions on this contextual approach, Park J noted a number of points justifying his view on the basis of the language used in the provision:

(1) In comparing the two approaches to the meaning of "a proportionate part of the trust property" he noted (at page 324 j to page 325 c) that whilst this was obviously capable of referring to underlying investments of the trust fund (as HMRC argued) it was also in his view:

> "an accurate and satisfactory description of a unit. If a person holds 10% of the units in issue, he owns a 10% part of the trust property. I do of course agree that, if a trust owns shareholdings of equal value in ten companies, company A to J, all the shares in company A are a part of the trust property. But I assert that a 10% interest in the entire fund is perfectly capable of being described as a part of the trust property.… I acknowledge that if the draftsman intended the expression a proportionate part of the trust property to refer to units, he could have said "the units" ….. it is not enough to cause me to change my conclusion. In any case, a similar inconclusive argument could be put against the Revenue's argument; if the draftsman intended "realised" to mean "sold" or "sold or redeemed", he could have said so."

(2) He considered his interpretation (at page 325 c) to accord with the use of the word "realised" being "an entirely apt word to describe what happens when a unit holder exchanges his units for a specie distribution."

(3) He continued (at page 325 e) that if, as he thought, the reference to a proportionate part of the trust property being realised is a reference to the surrender of units in exchange for assets distributed out of the trust fund:

> "the rest of para (b) fits like a glove. The surrender is a direct consequence of the deemed transfer (the unit-holder's requirement of a redemption) and the trust property is diminished accordingly. As I say below, the rest of para (b) does not fit at all well with the Revenue's interpretation."

(4) As regards the rest of the provision not fitting with HMRC's interpretation, he explained this as follows (at page 326 a to c):

> "The statute refers to two things "being a consequence of the transfer" (i) a proportionate part of the trust property is realised, (ii) the trust property is diminished accordingly. The Revenue say that there are two different consequences: first the trustee sells part of the trust funds; second and separately, when the cash is used to redeem the shares, the trust property is diminished. But Mr McCall and Mr Prosser say, and I agree, that the paragraph powerfully indicates that those two consequences are the same thing viewed from different perspectives. As Mr McCall says, they are the two sides of the same coin. That is to say the realisation of a proportionate part of the trust property *is* the diminution of the trust

> property. I think that is right for three reasons: (a) the omission by the draftsman of "is" in the phrase "the trust property diminished"; (b) the presence of the word "accordingly", which to me signifies that the draftsman had in mind a case where the trust property was diminished in accordance with the realisation of the proportionate part of it; (c) the way the paragraph referred to the two matters as a consequence (singular) of the transfer, not as consequences (plural) of the transfer."

(5) He found further support for this view (at 326 (c))

> "that the sale by the trustee of trust investments for cash (which is what the Revenue say is being referred to) does not reduce the trust property. It merely changes the composition of it."

99. As regards the "unreasonable result" which would follow from HMRC's interpretation, Park J noted the financial impact upon the managers as follows (at page 325 f and g):

> "The Revenue's interpretation is quite remarkably severe in its impact upon unit trust managers, as these cases demonstrate. When the unit holder wrote exercising their rights to require redemptions in specie the managers had to pay ad valorem duty. On the Revenue's argument there is no possibility of their obtaining any form of statutory relief from the charge, and under all customary forms of unit trust deeds they have no right to recover their outlays of stamp duty either from the trustees or from the former unit-holders or from anyone else…..It is in my view most unlikely that Parliament intended to create such an unreasonable result."

100. As regards the practical difficulties he thought HMRC's interpretation would cause, he noted (at 326 d to g and 327 a and b) the following:

> "The particular situation where the Revenue argument runs into overwhelming difficulties is where, at the time of a surrender of units, the trustees already hold part of the fund in cash – which would in practice be so in virtually every case. If when a unit holder (who might be the manager and often would be) requests redemption of his units the trustee holds uninvested cash sufficient to fund the whole or part of the redemption it appears to me that, on the Revenue's interpretation, it is impossible to comply with the statutory conditions. The Revenue's argument is that, if say 10 per cent of the units are to be redeemed, the trustee has to "realise" (which they say means sell) 10 per cent of the trust fund. But it is impossible to sell that part of it which is cash already."

> "Generally the Revenue's interpretation would put the trustee into a straitjacket if the manager is to meet the conditions for a refund of duty which it has been required to pay by s 57(3). If it has sufficient cash already to meet the redemption request it cannot use it but must sell a precise proportion of the investments and use that cash to pay the redemption proceeds. Further it would have to do that even if on

conventional investment criteria the sales are badly timed and undesirable. In a case such as the present ones where the unit-holder has required an in specie redemption, the manager, if the Revenue are right, has a powerful fiscal incentive to persuade the unit-holder to agree that the trustee, instead of transferring investments in specie, can sell the investments and transfer the cash instead. I cannot believe that Parliament intended to bring about those kinds of results."

101. He also noted (at page 325 h and j) that he thought that in enacting the relevant provisions Parliament had intended to equate the stamp duty treatment of units with that of shares but that if HMRC were correct "Parliament has imposed a stamp duty cost in respect of units where there was none for the equivalent transaction in shares." On a redemption of shares there was no stamp duty "yet on a redemption of units Parliament, according to the Revenue, has imposed a stamp duty cost where the only relieving provisions can hardly ever be complied with".

102. Mr Quinlan saw this case as support for the appellant's construction of para 7 particularly citing that Park J had taken a contextual approach, had taken account of the "quite remarkably severe" consequences and "unreasonable result" which would follow from HMRC's approach and had taken into account the intended alignment of the stamp duty position for unit trusts with that of shares. Mr Vallatt submitted unlike in the present case, the alternative approach in *M&G* would have rendered the provisions wholly unworkable with potentially very adverse extreme results. As regards para 7 this was not the case as it is allowed for a margin which most taxpayers should be able to comply with.

Conclusion on M&G

103. In *M&G*, in adopting the approach of interpreting the particular provision in the context of the scheme of the legislation as a whole, Park J took into account the "unreasonable result" or "quite remarkably severe" consequences which would follow from HMRC's alternative interpretation. In reaching his decision, however, Park J paid close attention to the language of the provision in question. Park J in effect acknowledged that there was more than one viable interpretation of the relevant provision and a number of difficulties of interpretation. But it is clear that he considered his interpretation was fully justified by the language used (see 98) albeit that, had he not had regard to the consequences of the alternative construction and the context, he may have initially thought the alternative construction was to be preferred (see 97). Park J was not seeking to read words into the relevant provision as would be necessary for the appellant's interpretation to prevail here.

104. Unlike here, M*&G* was not a case where there was a very plain natural meaning of the provision in question. Moreover, the natural interpretation of para 7, which in our view applies here, does not lead to the extreme results of concern to Park J such as to justify an interpretation wholly out of kilter with that natural meaning as would be required for the appellant's argument to succeed. We regard this as the case whether or not we are correct that the appellant's interpretation requires the reading into para 7 of the words "to the extent that". Our interpretation does not render para 7 as "hardly

ever" applicable with "remarkably severe" consequences or render the manager subject to a "straitjacket" if the conditions for the exclusion to apply are to be met.

105. The end result of the exclusion not applying in this case is that the appellant is charged to SDRT on the receipt of securities where there was no change of beneficial ownership. In this particular case this is, unfortunately, a very harsh result as, on the agreed facts, there was no change in beneficial ownership as regards around 96 per cent of the securities received by the Unit Holder. However, para 7 allowed for a distribution which was "as nearly as practicable proportionate" to qualify for the exclusion. As noted, our view is that this provided a relatively flexible approach to allow for a margin, according to how close a match it was possible to achieve of the relevant assets distributed with the unit holder's share in the trust, in practice as a practical matter in all the circumstances of the case. Given the allowance of a margin and the flexibility in that margin, it cannot be said that, on our interpretation, the relieving provision would hardly ever be applicable or that it is impossible in many cases to comply with the condition thereby giving rise to "quite remarkably severe" results. As this point was not in issue here we were not required to consider why it had not been possible for the redemption to come within this margin.

106. We do not see the fact that Park J mentions the intended alignment of stamp duty on units with that on shares as a consideration in his decision as sufficient of itself for us to conclude that para 7 should be interpreted as applying to the extent there is no change in beneficial ownership of the relevant assets in alignment with the principles underpinning the principle charge and the stamp duty regime. For all the reasons set out above, this is not a satisfactory justification given the very plain natural meaning of the words used.

Case law - Pollen

107. In the *Pollen* case the issue before the Court of Appeal was whether an exemption from stamp duty land tax applied where a charity acquired an undivided share in a property with non-charities. Under the relevant provision relief applies "where the purchaser is a charity" and certain conditions are satisfied. Lewison LJ held that this could be interpreted as meaning that a land transaction is exempt from SDLT *to the extent that* the purchaser is a charity (and the other relevant conditions were met).

108. Lewison LJ referred to the case of *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 where Lord Nicholls of Birkenhead spoke of the ability of the courts to correct drafting errors (at page 592):

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit particular words…… This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course

> which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation.

109. Lewison LJ then noted that this approach applies to taxing statutes by quoting from the case of *Luke v Inland Revenue Commissioners* [1963] AC 557. He concluded that:

> "…it seems to me there is sufficient 'policy imperative' to justify the reading I favour. I believe that it is also consonant with the approach of Lord Nicholls in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586. We are not parliamentary draftsmen; and it is sufficient that we can be confident of the gist or substance of the alteration, rather than its precise language. In substance what this means is that the exemption would apply as regards that proportion of the beneficial interest that is attributable to the undivided shares held by the charity for qualifying charitable purposes. I do not see that this gives rise to any conceptual uncertainty or to any insuperable practical administrative problem. In my judgement this reading is necessary in order to give effect to what must have been Parliament's intention as regards the taxation of charities…Not to afford a charity relief in such circumstances would, in my judgement, be capricious."

Conclusion on Pollen

110. In this case, we cannot see that there is sufficient "policy imperative" to read words in to para 7 to apply the construction sought by the appellant. The approach in the *Inco* case referred to by Lewison LJ noted that there is a difference between a court correcting drafting errors and in effect judicial legislation. Therefore, the approach was justifiable only where the court was "abundantly sure" what the intended purpose of the provision was, that by inadvertence the legislature failed to give effect to that purpose and the substance of the provision which Parliament would have made. For all of the reasons set out above, it is not clear that the legislature intended the exclusion in para 7 to apply if the distribution of assets on a surrender of units was not proportionate to, or as nearly as practicable proportionate to, the unit holder's share. Moreover, as noted above, whilst in this case unfortunately the result is harsh, the provision allows a flexible parameter for cases where in practice it is not possible for the distribution to be made on an exactly proportionate basis. The

provision is workable as it reads on its natural construction. If we were to adopt the interpretation sought by the appellant, we would, in our view, be straying into judicial legislation.

Hansard

111. Finally, we have considered whether, in interpreting para 7, we can consider the Parliamentary debate on 15 June 1999 as regards the proposed introduction of schedule 19, as reported in Hansard, to which Mr Quinlan referred us. As is evident from our conclusions above, we do not regard this as an ambiguous case where the interpretation adopted gives absurd results such that recourse is permitted. We note Mr Quinlan's comment that the term "each description of asset" in para 7 is ambiguous. However, the meaning of that term is not part of our decision in this case. If we are wrong on that, our view is that, from the passages of debate cited, there is no sufficiently clear statement from the relevant Minister, Ms Patricia Hewitt, to indicate that Parliament's intention was as the appellant submits. The main passages from the debate are set out below.

112. In the debate Ms Hewitt noted that doubt had been cast on the operation of stamp duty as regards unit trusts by the *M&G* case:

> "which suggested that all that is needed for a refund of stamp duty is for a unit to be cancelled on surrender. That decision would have the perverse effect that unit trusts could avoid any stamp duty by simply cancelling all units surrendered and creating new ones for all new investors rather than reselling units."

113. Ms Hewitt summarised the operation of the new regime as follows:

> "The purpose of the provision is to allow the units that are surrendered to be matched by a sale to a new investor within a short period. Once the surrender takes place and is followed in a short period by a new sale, it should be subject to a [*] per cent charge in exactly the same way as the transfer of an ordinary share between two investors. On the other hand, where there are more surrenders than sales to new investors, - again within the two week period the per cent charge is reduced by the extent to which surrenders are greater than the sales to new investors. That is achieved by multiplying the SDRT charge by the number of sales to new investors…. All other things being equal the trust will have to sell some of its underlying assets as a result of the drop in the number of units in issue. The total size of the fund will shrink. The sale of those underlying assets will normally attract a stamp duty or SDRT charge in their own right. Therefore the provision prevents a double charge arising.

114. Ms Hewitt also stated the following as regards the intention behind the new regime:

> "The new regime may seem complex to members of the Committee – I certainly needed a wet towel as I struggled to get to grips with the

> technicalities. However, the regime arises from out desire to create fairness between dealings in unit trusts, which are open ended bodies, and in shares in ordinary trading companies which are closed bodies…… The new regime ….. will maintain a broadly consistent approach between dealings in units and dealings in shares. It will also be more straightforward to administer and will pave the way for the electronic trading of units."

115. We note that the above statements of Ms Hewitt lend support to Mr Quinlan's submissions as to why schedule 19 was introduced and in general terms the intended degree of alignment of schedule 19 with the principal charge. However, for the reasons set out above, we do not regard an intent for the charges to be aligned in broad terms to be sufficient of itself to evidence that para 7 was to apply to the extent that there is no change in beneficial ownership of the relevant assets.

116. There followed some exchanges on the proposed para 7. In the passages of the debate which discuss para 7, a question is raised by a Member of Parliament as follows:

> "The next concern of industry relates to paragraph 7 of the new schedule. Originally, the Bill contained the absurd position that funds that invested entirely in exempt funds would be exempt from stamp duty reserve tax, but that there was to be no pro rate relief for funds investing in a mixture of exempt and non-exempt funds. That position is put right by the amendments, but there is still a problem where the funds carries out an in specie redemption, which is what happens when a fund sells an investment and instead of distributing cash, redeemed to the unit holder the actual shares held in the fund. If the fund carries out an in specie redemption that is not precisely pro rate with the investment assets held by the fund, the whole redemption is stamped at [*] per cent. Without any other possibility. Will the Economic Secretary explain why that is the case, and respond to the industry's concerns?

117. Later on in the debate, Ms Hewitt makes two comments on in specie redemptions. The first is as follows:

> "As for in specie redemptions, when an investor exchanges units in a unit trust for a basket of shares that are proportionate to the trust's investment, there is no fundamental change in the nature of the investments that are held. However, when an investor receives other shares in, for example, just one company when the unit trust invests in a range of companies, there is a change in the underlying nature of the investment and there should be an SDRT charge, just as there would be with any other change of investment."

118. In this comment Mrs Hewitt was confirming that it was correct that there should be an SDRT charge where an investor did not receive a proportionate share of each kind of investment held by the unit trust as there was a change in the underlying

nature of the investments held. She did not otherwise comment on the mechanics or the precise extent of the charge. This does not provide a clear statement which supports the appellant's view. If anything her comments could be held to support the opposite view in that it could be implied that Ms Hewitt was accepting the MP's initial premise that there would be a full SDRT charge on an in specie redemption that was not made on a proportionate basis.

119. In her second comment Ms Hewitt interpreted the MP's question as a concern that double tax charges could arise as follows:

> "The hon. Member for Guildford feared that there would be a double charge for some in specie redemptions. Again where underlying assets are transferred to the unit holder in proportion with the underlying assets of the fund in exchange for his units, there is no need for the trust to sell underlying assets as a consequence of the surrender. Therefore, there is no possibility of a double charge arising. A single [*] per cent SDRT charge will arise and that is only right."

120. It is not entirely clear as to what single SDRT charge reference is made in the above passage. In the circumstances Ms Hewitt describes, where there is a proportionate distribution and no sale of the underlying assets of the fund, there would not be any SDRT charge. She may perhaps be confirming that if there is a distribution which is not made on a proportionate basis (referring back to her comment in set out in 117) there would only be a single charge. Again this is not a clear statement supporting the appellant's contentions as to the intention of Parliament as regards the scope of para 7.

121. In conclusion, the statements made by Ms Hewitt both as regards the general operation of schedule 19 and para 7 do not in our view provide a clear statement as to the intended scope of para 7. If anything we would see Ms Hewitt's comments as counter to the appellant's interpretation.

Conclusion

122. For all the reasons set out above, we have concluded that para 7 of schedule 19 did not apply to exempt to any extent the redemption from the SDRT charge otherwise applicable under schedule 19. The appeal is dismissed.

123. 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.

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HARRIET MORGAN

TRIBUNAL JUDGE
RELEASE DATE: 16 OCTOBER 2015

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