Anti-avoidance provisions—is it the end of the road for s 75A?

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Tax analysis: Michael Quinlan of Temple Tax Chambers discusses the significance of the Court of Appeal's ruling in Project Blue Limited v HMRC and whether this marks the end of the road for section 75A of the Finance Act 2003 (FA 2003).

Original news

Project Blue Ltd v Revenue and Customs Commissioners [2016] EWCA Civ 485, [2016] All ER (D) 62 (Jun)

The Court of Appeal, Civil Division, allowed a taxpayer's appeal regarding its liability to stamp duty land tax on the purchase of Chelsea Barracks in London made in accordance with Islamic financing principles. The taxpayer was not a 'vendor' for the purposes of FA 2003, s 71A(2). Accordingly it had had no chargeable interest to have been regarded as having entered into a contract for a land transaction with the bank. It was the bank who was liable for stamp duty land tax under FA 2003, s 45(3) and it was not entitled to claim FA 2003, s 71A relief.

Why is the case important?

Unless HMRC apply successfully for leave to appeal to the Supreme Court, the decision will be the culmination of proceedings involving FA 2003, s 75A, the principal anti-avoidance provision for stamp duty land tax. It is the first case on FA 2003, s 75A to reach the Court of Appeal.

Section 75A was inserted into the stamp duty land tax (SDLT) legislation on 6 December 2006 and was re-enacted as FA 2003, ss 75A–75C in 2007. It is headed 'Anti-avoidance'. It is not targeted at a particular tax relief or treatment, but is of general application. There is no express motive test, as there is for SDLT group relief, or a reasonable choice filter, as there is for the general anti-abuse rule that was introduced in 2013 (the general anti-avoidance rule (GAAR)), which also applies to SDLT. Section 75A has no precedent in UK tax legislation.

The provision applies where:

- one person (V) disposes of a chargeable interest (in land in England, Wales and Northern Ireland) and another person (P) acquires either it or a chargeable interest deriving from it
- a number of transactions are involved in connection with the disposal and acquisition (the scheme transactions), and
- the amount of SDLT payable in respect of the scheme transactions is less than it would be on a notional transaction effecting the acquisition of V's chargeable interest by P on its disposal by V (the tax saving test)

SDLT is calculated on the amount or value of the consideration. Accordingly, the measure for the tax saving test in (c) is the attribution of the largest amount or aggregate amount of consideration given for the scheme transactions or received by or on behalf of V. Superficially, it looks like a statutory embodiment of the kind of judicial approach to linear tax avoidance in the line of cases since *Furniss (Inspector of Taxes) v Dawson* [1984] AC 474, [1984] 1 All ER 530, but with FA 2003, s 75A, it does not matter that any particular step has substance and enduring consequences—it may be disregarded anyway.

Project Blue Ltd v HMRC [2013] UKFTT 378 (TC) was the first substantive case on FA 2003, s 75A. It was followed by an appeal to the Upper Tribunal (UT) (see *Project Blue Ltd v HMRC* [2014] UKUT 564 (TCC), [2015] STC 745. Ironically, HMRC have won every case in which SDLT avoidance has been alleged in respect of transactions prior to its introduction on the basis of a purposive interpretation of the particular provisions in issue. These cases have been heard and determined after December 2006, leaving one to wonder why such a sweeping, potentially destructive provision was necessary in the first place.

Although the decision of the Court of Appeal was expected to provide some authoritative guidance on FA 2003, s 75A, it was principally a decision on the interaction of sub-sale relief under FA 2003, s 45 as it was in January 2008 and the relief

for alternative property finance in FA 2003, s 71A. HMRC can now be expected to pursue sub-sale to Shari'a schemes aggressively subject to meeting applicable time limits.

The law was applied as at the time the transactions completed in January 2008. Much has changed since then, particularly the relief for assignments and sub-sales.

What was this case about?

The case involved the acquisition of Chelsea Barracks as a development site in a manner that sought to couple the relief for sub-sales under FA 2003, s 45 prior to its later amendment with that for alternative property finance in FA 2003, s 71A. The Shari'a law element was, I believe, not contrived and the financial institution, although associated with one of the members of the appellant, was established and genuine.

The main issue before the First-tier Tribunal (FTT) and UT was whether Project Blue Limited (PBL) was liable to pay SDLT under FA 2003, s 75A and, if so, on what amount. PBL had agreed to buy the site for £959m from the Ministry of Defence (the MoD). PBL was controlled by the sovereign wealth fund of the State of Qatar and decided to finance the acquisition and future development of the site in a way that was compliant with Shari'a law. It did so by contracting for a sub-sale of the site to a Qatari Bank (MAR) for the US$ equivalent of £1.25bn and take a 999-year lease back with various options in respect of the freehold. The FTT applied FA 2003, s 75A and decided that PBL was P and SDLT of £50m was payable on the £1.25bn received from MAR. The UT agreed that PBL was P for the purpose of the section but, in a split decision, held that the relevant consideration was £959m and the SDLT was therefore £38.36m. In cross appeals before the Court of Appeal, PBL argued, among other things, that the only person liable to SDLT was MAR and that any assessment of MAR was out of time. HMRC argued that PBL was liable, but on the sum of £1.25bn.

It was common ground that no SDLT arose on the contracts as they were not substantially performed before completion or on the options, as they were granted for no consideration.

What did the Court of Appeal decide?

The leading judgment was that of Patten LJ. His Lordship's starting point was that security interests such as mortgages are not chargeable to SDLT. It is the mortgagor who is chargeable on the acquisition which is subject to the loan. In contrast, the Ijara form of Shari'a financing, as used by PBL, does not involve such an interest but rather an outright purchase by the financial institution followed by a lease to the person seeking the finance with the option to acquire the freehold at a later date. On the application of sub-sale relief in FA 2003, s 45, he referred to *DV3 RS Ltd Partnership v HMRC* [2013] EWCA Civ 907, [2013] STC 2150 and the disregard of any land transaction or acquisition of a chargeable interest by PBL such that the transfer to MAR was the only possible land transaction. Turning to the exemption in FA 2003, s 71A for the Ijara model of Shari'a compliant financing in light of *DV3*, he considered whether the effect of the sub-sale was that the vendor was the MoD rather than PBL (ie, whether the vendor condition in FA 2003, s 71A had been satisfied). He noted that the availability of both sub-sale relief and alternative finance relief had been accepted by both parties in the proceedings before the FTT and the argument that alternative finance relief was not available for MAR had received short shrift by the UT. HMRC had chosen to invoke FA 2003, s 75A and assess a notional transaction between the MoD and PBL. However, if FA 2003, s 71A did not apply, FA 2003, s 75A could not apply either as the tax saving test would not be satisfied: absent FA 2003, s 71A, MAR would in any event be liable to SDLT on £1.25bn (and PBL would be liable to lease duty on its acquisition of the leaseback).

His Lordship concluded that FA 2003, s 71A did not apply as it was not consistent with the policy behind the provision to treat PBL as the vendor. In context, the section was intended to apply in circumstances where either the person seeking the finance or the financial institution had paid SDLT on its purchase. As it was a pure question of law, permission was granted for PBL to rely on its argument that FA 2003, s 71A did not apply and, having concluded that it did not, the point disposed of the appeal in PBL's favour. Absent FA 2003, s 71A, SDLT was payable on MAR's acquisition for £1.25bn.

Accordingly, the comments that follow on the application of FA 2003, s 75A were brief in comparison with the decisions by the FTT and by the UT.

First, His Lordship agreed with the FTT and UT that there is no motive test for FA 2003, s 75A, saying that although it was clear that its provisions were introduced to combat avoidance they operate according to their terms and there is no requirement for any such purpose or objective. Secondly, he discussed the identity of P. In the proceedings below, PBL

had been identified as P because it was the person who had avoided SDLT, or was the real purchaser, or both PBL and MAR could be P. The application of FA 2003, s 75A should be approached without such preconceptions. What has to be identified is the disposal and acquisition of V's chargeable interest or an interest derived from it. Here, by reason of FA 2003, s 45(3), the only candidates were the transfer of the freehold to MAR and the grant of the leaseback to PBL. If the conditions of FA 2003, s 71A had been satisfied, FA 2003, s 75A would have applied to MAR's acquisition and the leaseback would have been disregarded under FA 2003, s 75A(4). This sequential approach reflects the priority imposed by FA 2003, s 75A(1)(a). If V's interest and not a derivation of it is acquired in the chain one need look no further. It is the primary and obvious acquisition of V's chargeable interest. MAR was the real purchaser of the freehold and falls to be taxed as such. Had FA 2003, s 71A applied, FA 2003, s 75A would also have applied to the purchase by MAR.

Lewison LJ agreed adding some reasons of his own about the inapplicability of FA 2003, s 71A, explaining why it was wrong to equate the financial institution in Shari'a compliant transactions with traditional lenders for tax purposes and, more briefly still, on the proper construction of FA 2003, s 75A(1)(c), stating that 'payable' in that paragraph means liable to pay at the effective date of the notional transaction. A subsequent mistake by HMRC in issuing a closure notice to one taxpayer cannot of itself impose liability on a different taxpayer. Underhill LJ agreed with both judgments. HMRC are time-barred from assessing MAR. They had only pursued PBL for the tax.

Where are we now on the application of FA 2003, s 75A?

While the decision stands, the reasons of the FTT and the UT fall away as largely misconceived and we have only dicta on the application of FA 2003, s 75A to the effect that it is quite mechanical and literal in its operation. It is not contextual or to be limited by its purpose in any meaningful sense. There is no requirement for a tax avoidance motive or object and the primary candidate for P is the person who acquires the precise interest that the vendor disposed of rather than the ultimate purchaser in a series of transactions viewed as a composite whole. The priority to be given to an acquisition or acquisitions of V's interest, rather than a derivation of it, reduces the potential for HMRC to identify P solely by reference to the last transaction in the series. Indeed, subject to further appeal, they have lost £50m for doing so.

Where are we now on the application of FA 2003, s 71A?

It is easy to discern the principle that FA 2003, s 71A anticipates a single charge to SDLT, much as a purchaser using mortgage finance would do, but less so to justify comments to the effect that, as alternative property finance needs to be structured differently from a legal point of view, the tax treatment must be expected to be different. Surely the whole point of these exemptions is to align traditional lending with Shari'a compliant finance for SDLT purposes.

Is it the end of the road for FA 2003, s 75A?

Regrettably not. HMRC now have some judicial guidance, albeit a bit muddled, although I expect that they will wonder if their initial instincts to focus on the end purchaser and principal beneficiary of sequential transactions might ultimately find favour in the courts.

What can taxpayers learn from this case?

I am sorry to say it, but taxpayers, or more realistically those of us that advise them in this field, have to apply FA 2003, s 75A somewhat literally to the facts viewed realistically (to twist the phrase about the purposive interpretation of tax statutes repeated by the Supreme Court most recently in *UBS AG v HMRC* [2016] UKSC 13, [2016] STC 934) and, if we conclude as we often do that the section has the potential to apply, seek comfort in, or by extrapolating, HMRC guidance, exercising our judgment about whether they will view it as aggressive or benign. I will come to the GAAR in section 207 of the Finance Act 2013 in a moment, but if the GAAR is likely to be offended, FA 2003, s 75A will bite. The more difficult question is whether FA 2003, s 75A will be invoked if it is not, the answer to which is that it shouldn't be, but that there is certainly a risk that it may and that risk has to be assessed on the facts. It will be interesting to observe the first case where HMRC allege both FA 2003, s 75A and the GAAR in the alternative.

What is your view of the outcome?

Intuitively, I remain unpersuaded by the Project Blue saga to date. I think that FA 2003, s 75A was enacted to counter linear avoidance as an antidote to *McNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL 6, [2001] STC 237 because SDLT, being all to do with legal transactions rather than economic flows, is necessarily legalistic in its application. For my part, I think the anti-avoidance heading has more significance than that currently attributed to it. As the House of Lords said in *R v Montila* [2004] UKHL 50, [2005] 1 All ER 113 headings are there for guidance. In my opinion, FA 2003, s 75A ought only to be applied where the result is contrived and not a reasonable choice by the purchaser in view of the legitimate options that Parliament has provided to taxpayers—the draftsman has not used the word 'scheme' in FA 2003, s 75A for nothing. Sequencing transactions is not, per se, avoidance and example of those that HMRC view as benign can be found in the guidance for FA 2003, s 75A and the GAAR.

Regardless of the position when FA 2003, s 75A was enacted, the question of what Parliament now views as tax avoidance is pretty clear. The last and most considered expression of parliamentary intention in relation to the avoidance of tax was the enactment of the GAAR. Section 207 defines 'tax arrangements' and 'abusive' as those where, 'it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements' and 'they are arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances including—

(a) whether the substantive results of the arrangements are consistent with any principles on which those provisions are based (whether express or implied) and the policy objectives of those provisions,

(b) whether the means of achieving those results involves one or more contrived or abnormal steps, and

(c) whether the arrangements are intended to exploit any shortcomings in those provisions.'

Before this decision, HMRC have tended to apply a reasonable choice filter before they seek to invoke FA 2003, s 75A. My personal view is that this is what Parliament intended and is to their credit.

I am not sure that this would have saved Project Blue if FA 2003, s 71A, and therefore FA 2003, s 75A, had applied as, unless you buy a company or another wrapper that has a legitimate tax advantage embedded in it, or you are a charity or find special favour for SDLT treatment for some other reason, the purchase of real estate without paying any SDLT is prima facie an anomaly and will, generally speaking, be too good to be true.

My own view is that FA 2003, s 75A is either unduly draconian or, read purposively in light of the heading, obsolete because of the GAAR and on either view should be repealed. Although, as I say, HMRC appear, to their credit, to be taking a more moderate view of the provision than the courts, like any other public lawyer I bridle at the notion that legislation should be drawn so widely that collateral damage has to be controlled by administrative discretion. I empathise with Mr Justice Morgan in the UT at para [51], where he says:

> '[I] was far from reassured by reading HMRC's guidance published on 1 March 2011 which contained the statement: "…HMRC will not seek to apply s 75A where it considers transactions have already been taxed appropriately". This suggests that s 75A confers on HMRC a discretionary power to tax a transaction in accordance with ss 75A to 75C. I can see no sign of the section conferring such a power.'

Can we expect HMRC to appeal?

HMRC were refused permission to appeal by the Court of Appeal but, in view of the amount of tax at stake, the ambiguity around who is the vendor under FA 2003, s 45 for the purposes of FA 2003, s 71A and the pressing need for further judicial guidance on the application of FA 2003, s 75A, I would expect them to apply for leave to appeal to the Supreme Court.

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