

More questions than answers

Patrick Cannon reviews HMRC's refreshed guidance on FA 2003, s 75A.

On 15 January 2020, HMRC updated the pages dealing with FA 2003, s 75A in its *Stamp Duty Land Tax Manual* (tinyurl.com/rhdjyt4). This refresh had been much anticipated coming in the wake of the judgment of the Supreme Court in *Project Blue v CRC* [2018] STC 1355. This addressed an aggressive combining of tax reliefs in an effort to avoid stamp duty land tax and the First-tier Tribunal decision in *Hannover Leasing* (TC7102) in which the tribunal held that s 75A can apply to indirect acquisitions of properties including transactions in units in a fund or shares in a company when there is a commercial purpose and no stamp duty land tax avoidance motive.

HMRC had informed various stakeholders and interest groups towards the end of last year that they would be consulted before the guidance was published. However, I understand this did not occur, and the guidance simply appeared online on 15 January 2020. This echoed the situation with the formal consultation on the draft stamp duty land tax legislation that was abruptly suspended by HMRC in January 2003 and enacted in FA 2003. It was ill-thought through and contained many gaps that had to be filled later on, not least by the enactment of s 75A in 2006-07.

HMRC's approach

Before considering the detail of the refreshed guidance, it is worth mentioning a few points about HMRC's current approach to its published guidance especially in stamp duty land tax.

I was appearing in the First-tier Tribunal in a stamp duty land tax appeal earlier this month for which the *Stamp Duty Land Tax Manual* guidance was relevant and the judge asked

Key points

- HMRC published the revised guidance without consulting interest groups.
- Confusion even within the department about who its manuals are aimed at.
- The guidance seems to undermine HMRC's offer to provide advance clearances.
- The manual states s 75A is to be applied as an anti-tax saving test.
- Protecting clients from an enquiry even when the correct returns have been filed and tax paid.



the HMRC advocate what the purpose of the manual was. The advocate replied that its purpose was to help members of the public to know what HMRC's views were. Strictly speaking this was incorrect because the manuals are internal publications prepared to assist HMRC staff in applying the tax rules – as the following extract from HMRC's manual homepage shows:

'These manuals contain guidance prepared for HMRC staff and are published in accordance with the Freedom of Information Act 2000 and HMRC publication scheme.

'The guidance is not comprehensive and does not provide a definitive answer in every case. It is based on the law as it stood when they were published. HMRC publishes amended or supplementary guidance if there's a change in the law or in the department's interpretation of it.'

However, one can understand the HMRC advocate's confusion because at some points even the manuals' authors become confused and assume that the publications are there to speak to members of the public direct. See the following extract from the start of the *Stamp Duty Land Tax Manual*:

'From 1 April 2018 you'll pay land transaction tax (LTT) on any land transactions in Wales. LTT is operated by the Welsh Revenue Authority. You won't have to pay stamp duty land tax (SDLT) or need to send HM Revenue and Customs (HMRC) a return for these transactions. For more detail about SDLT to LTT, read cross-border and transitional guidance.'

This confusion is compounded by my experience of HMRC advocates in tribunals having no hesitation either in not mentioning published guidance that directly contradicts their statement of case or flatly contradicting it when it suits them

to do so. HMRC has also now begun to amend its published guidance so that it is written with the tax result it has in mind rather than, as in the past, reflecting an objective view of what parliament can be taken to have intended. The recent revisions to the *SDLT Manual* on the meaning of ‘garden and grounds’ and ‘dwellings’ is a case in point.

Overall, the effect of these developments is likely to dilute the respect that tax tribunals and taxpayers’ representatives have for HMRC guidance.

Section 75A

Much has already been written about the effect of the *Project Blue* and *Hannover Leasing* decisions. Suffice to say that although s 75A is headed ‘anti-avoidance’, these cases establish that section is really an ‘anti-tax saving rule’ and can apply regardless of whether there is a tax scheme or a commercial or tax avoidance motive. This creates considerable uncertainty for commercial property transactions, if due to the way in which a transaction is structured, the maximum possible stamp duty land tax appears to have been avoided.

Because s 75A is and was intended to be a statutory formulation of the *Ramsay* principle as applied to a series of linear transactions, but does not contain any exceptions for transactions with a commercial purpose or those without a tax avoidance motive, it has become the antithesis of the traditional case law approach to anti-avoidance provisions exemplified in *CIR v Brebner* 43 TC 705. In that case Lord Upjohn famously said:

‘No commercial man in his senses is going to carry out a commercial transaction except upon the footing of paying the smallest amount of tax he can.’

In other words, the fact that the taxpayer had chosen to carry out a genuine commercial transaction in a way that involved paying a reduced amount of or no tax did not necessarily mean that one of the main objects was the avoidance of tax. What the noble and learned lord would make of s 75A and the two decisions mentioned above can only be guessed at, particularly given that, despite the heading of s 75A, the Supreme Court has ruled that the absence of a tax avoidance motive does not prevent the section applying.

HMRC guidance

A sample of the difficulties that arise from the refreshed guidance follows with the proviso that some of these issues existed already but have been highlighted by the refresh.

Advance clearances

The facility to obtain an advance clearance from HMRC is more important than ever with a statutory provision that imposes an ‘anti-tax saving test’ in the context of multi-step commercial property transactions that are commercially driven and do not have as a main object a tax avoidance motive. HMRC says at SDLTM09080 that advance clearances are available for s 75A but then goes on to dash one’s hopes by stating:

‘In particular we will not provide clearances where, in our view, the transactions are undertaken for the purpose of

avoiding tax or where the clearance application only requests confirmation of whether s 75A applies or not.’

Given that most clearance requests will be made to establish whether HMRC will regard the transaction as a tax avoidance transaction in the sense that the maximum theoretical possible stamp duty land tax may not be paid and/or requesting confirmation whether s 75A applies, read literally the proviso seems significantly to undermine the offer to supply advance clearances.

Intention and purpose

That s 75A is now to be applied as an ‘anti-tax saving test’ instead of only where there is a tax scheme or tax avoidance motive is made clear by SDLTM09090 which states:

‘Section 75A is an objective test which sets out conditions for the legislation to apply. None of these conditions require there to be a tax avoidance motive by or on behalf of any of the persons who are party to the property transaction or arrangements.’

The unanswered question, the answer to which will become clearer with subsequent judicial decisions, is how generous the margins of appreciation will be when comparing the actual transaction with a theoretical transaction that would have triggered a greater amount of stamp duty land tax.

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The ‘anti-tax saving test’ is reinforced at SDLTM09170 which states: ‘There is no tax avoidance motive required for a transaction to meet the definition of a scheme transaction. Similarly, scheme transactions need not be linked together by, or be part of, a larger scheme for s 75A to be applied ie *s 75A can apply where the reduction in stamp duty land tax is an unintended consequence of the transactions*’. [Author’s emphasis.]

Connected companies

Where P is a company connected with V, FA 2003, s 53 is applied by s 75C(6) to ensure that the chargeable consideration for the notional transaction will be not less than market value. Although it seems self-evident that the exceptions to the operation of s 53 contained in s 54 should also apply, s 75A does not expressly provide for s 54 to apply and in one case of which the author is aware HMRC is arguing that s 54 does not apply. The refreshed guidance now, however, states: ‘When considering whether s 53 applies, you should consider the exception cases listed in s 54.’

This is helpful although my recent experience in tax tribunal hearings is that HMRC advocates will sometimes ignore or flatly decline to follow HMRC published guidance leading to questions from the judge about whether the taxpayer is seeking to make out a claim for legitimate expectation with the added complications that this involves.

Procedural question

A practical concern that arises with complex property transactions is how to protect the client from a subsequent revenue determination in the four years after the transaction even when the actual land transactions have been reported on the stamp duty land tax returns, the tax paid and a full disclosure made to HMRC so that a discovery assessment cannot be made after the end of the nine-month enquiry period. HMRC can and often will take the view that, because there has been no return for the notional transaction arising under s 75A, a revenue determination can still be issued up to four years later despite the return and disclosure having been made for the actual transaction.

A possible way of dealing with this dilemma is to also file a return for the notional transaction and make a separate, suitably worded disclosure in respect of the second return. In that way a revenue determination cannot be issued because a land transaction return will have been filed for the notional land transaction.

Conclusion

In *Project Blue* Lord Hodge said: 'In my view both s 75A and s 75B are difficult provisions to apply to particular transactions.'

Planning point

To avoid future enquiries, it may be worth filing a return for the notional transaction arising under FA 2003, s 75A as well for the actual transaction.

That difficulty was emphasised in *Hannover Leasing* when the tax tribunal decided that s 75A applied to transactions when there is a commercial purpose and no stamp duty land tax avoidance motive.

Those who are advising clients on complex commercial property transactions have been presented with an anti-avoidance provision of considerable uncertainty and ambiguity which requires them to make a worst-case assessment of any given scenario by ascertaining the maximum theoretical stamp duty land tax that might be paid. Having done this, a view has to be taken on the justification for filing the stamp duty land tax return that reports a lesser amount of tax based on the actual – as distinct from the notional – land transactions under s 75A. The issue of whether to make a disclosure will also need to be addressed along with whether to file an alternative return and disclosure for the possible notional transaction. ●

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Out & about

Bishop Fleming raises £150,000 for charity in its centenary year

Bishop Fleming has rounded off its centenary year by raising a remarkable £150,000 for charity. The Strictly Come Dancing star, Anton Du Beke, hosted a Great Gatsby-themed centenary event in December to bring the firm's activities to a close.

During 2019, the firm celebrated 100 years in business and placed fundraising at the heart of its centenary campaign. This included a full rebrand and its ambition to be recognised as the most rewarding accountancy firm in the UK for its clients, people and communities. This would all be underpinned by a new set of values to reflect that aim.

The firm hit its £100,000 charity fundraising target halfway through the



year, with more than 115 fundraising activities generating nearly 3,000 donations. The money raised will benefit over 60 different UK charities.

Spearheading the centenary fundraising campaign was Bishop Fleming's title partnership of the 2019

Bath half marathon when more than 120 staff and clients became the largest corporate team entry in the history of the race, raising over £30,000 in the process. So successful was the half marathon event, that the firm will repeat the partnership in 2020.