



*STAMP DUTY LAND TAX – land transaction – effect of transfer of rights by grant of option  
– Finance Act 2003, sections 44-46 and 75A*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2018/03634**

**BETWEEN**

**OISIN FANNING**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE VICTORIA NICHOLL**

**Sitting in public at Taylor House, London on 9-10 March 2020**

**Patrick Cannon, Counsel, instructed by Levy & Levy, for the Appellant**

**Elizabeth Wilson, Counsel, instructed by the General Counsel and Solicitor to HM  
Revenue and Customs, for the Respondents**

## DECISION

### INTRODUCTION

1. This case concerns a stamp duty land tax (“SDLT”) avoidance scheme that involves the ‘sub-sale relief’ and option provisions in sections 45 and 46 Finance Act 2003 (“FA 2003”) (“the Scheme”). The appeal is against a discovery assessment issued by the Respondents (“HMRC”) to Oisín Fanning (“Mr Fanning”) under paragraph 28 Schedule 10 Finance Act 2003 on 28 March 2014. The assessment is for £250,000, representing a 5% SDLT charge on the purchase price of £5,000,000 paid by Mr Fanning.

### The Scheme

2. The parties agree (save as noted in the footnote) that the Scheme comprises the following steps:

(1) The Vendor (“V”) and a third-party purchaser (“P”) enter into a contract for the sale of a chargeable interest in land to be completed by a conveyance.

(2) At the same time as the completion of the V-P contract of sale, P grants another person (“O”) a call option over the chargeable interest for nominal consideration. The option exercise price is not less than the market value of the chargeable interest at the date of the exercise.

(3) P occupies the property having paid the full purchase price demanded under the V-P contract of sale.

(4) The option is not exercised by O (save as part of any onward sale to some other person).<sup>1</sup>

(5) O co-operates in the Scheme.

3. The Scheme was intended to work as follows:

(1) The V-P contract of sale is a “contract for a land transaction (“the original contract”) under which the transaction is to be completed by a conveyance” (within section 45(1)(a) FA 2003).

(2) The grant of the option is “an assignment subsale or other transaction (relating to the whole or part of the subject matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him” (within section 45(1)(b) FA 2003).

(3) Section 44 FA 2003 applies as if there was a “contract for a land transaction (a “secondary contract”)” under which O is the deemed purchaser and the consideration payable for the option agreement is the deemed consideration (section 45(3)).

(i) The original contract is completed simultaneously with the completion of the secondary contract (i.e., the option grant).

(ii) Alternatively, the original contract is completed simultaneously with the substantial performance of the secondary contract (by virtue of paying the £100 consideration due under the option grant).

(iii) As such, the original contract is disregarded for SDLT purposes.

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<sup>1</sup> Mr Fanning claims that the option may be exercised.

(4) Thus, unless and until the option is exercised, SDLT is chargeable on the (deemed) consideration for the secondary contract, which here is £100. The result is a nil SDLT charge on (here) a £5,000,000 residential property purchase.

4. The Scheme was blocked by an amendment made by sections 194(1) and 194(2) Finance Act 2013 with effect from 21 March 2012. HMRC state that the amendment was to “put beyond doubt” that the Scheme did not work.

#### **FINDINGS OF FACT**

5. I have made the following findings of fact from the evidence in the Tribunal’s bundles, the witness statement of Mrs J Mooney, HMRC officer, and the oral evidence of Mr Fanning:

##### ***The background***

(1) Mr Fanning is the CEO of San Leon Energy plc (“San Leon”). He was the Executive Chairman between 2008 and 2016 when the transactions the subject of this decision were carried out. Mr Fanning’s home address is in County Kildare, Ireland.

(2) San Leon is an oil and gas exploration and production company. San Leon is an Irish company that was admitted to the Alternative Investment Market (“AIM”) in 2008. San Leon is subject to Irish company law and regulation, as well as the rules, standards and regulations applicable to AIM companies. Mr Fanning’s shareholding was below 2% at the time of the transactions the subject of this appeal. He was precluded from voting on matters that directly or indirectly concerned him. He did not hold the greater part of the voting power in San Leon or rights that would entitle him to receive the greater part of income or assets distributed for the purposes of section 450 Corporation Tax Act 2010.

(3) Mr Fanning spends about one week a month working in London, and splits the rest of his working time between Nigeria and Dubai. San Leon rents serviced accommodation in for use by its staff when they are working in London. Similar arrangements are in place in Nigeria. San Leon rented a flat in Carlos Place, Mayfair, until 2011 when it was decided that it would be helpful to rent a larger flat. San Leon was therefore happy to assist Mr Fanning with the purchase a large flat in Mayfair on the basis that it would be available for rent by San Leon for use by its staff when in London. The purchase of the Property by Mr Fanning and its rental to San Leon was a mutually beneficial arrangement.

(4) In or before July 2011 Mr Fanning instructed solicitors, Streathers Solicitors LLP (“Streathers”), in relation to the purchase of the Garden Flat & Storage Room, 48 Grosvenor Square, London W1K 2HT (“the Property”) for £5,200,000 (including £200,000 for chattels). The memorandum of sale records that the purchaser was to be “SPV – name TBC”. Streathers introduced Mr Fanning to Stratega Limited to advise him on ways to mitigate the SDLT charge that would otherwise have been payable on the transaction. Stratega Limited advised Mr Fanning about the Scheme, confirming that they had an appropriate written opinion on the SDLT analysis from Patrick Cannon of Tax Chambers. Mr Fanning’s understanding of the Scheme was that on completion of the transaction he would grant an option to purchase his new Property to an unconnected third party for a small sum of money (£100), and that this would enable him to “claim an exemption to SDLT”.

(5) Stratega Limited advised Mr Fanning that a special purpose vehicle should be set up to be the grantee of the option. I accept Mr Fanning’s evidence that he told Stratega Limited that San Leon could be the grantee of the option as it was assisting him with the purchase by lending him £300,000, and that it would rent the flat from him at a market rate. Mr Fanning confirmed that he has received a market rental for the Property from

San Leon since his purchase, and that other members of San Leon's staff also stay at the Property when working in London.

### ***The Purchase of the Property***

(6) On 16 September 2011 the purchase of the Property by Mr Fanning from Glendale Enterprises Four Limited for £5,000,000 was completed. A form TR1 was filed at the Land Registry recording Mr Fanning as the transferee for entry in the register.

(7) The purchase of the Property for a consideration of £5,000,000 was funded with the assistance of a mortgage loan of £4,900,000 from Barclays Wealth and a loan of £300,000 from San Leon. The Barclays mortgage was in two parts, the first an interest only loan of £3,900,000 for a five-year term and the second an interest only and repayment loan of £1,000,000 for a one-year term. The Barclays legal charge deed dated 16 September 2011 records that in consideration of the bank giving Mr Fanning credit, he entered into the charge by way of legal mortgage over the Property;

“No disposition of the registered estate by the proprietor of the registered estate is to be registered without a written consent signed by the proprietor for the time being of the charge date 16/09/2011 in favour of Barclays Private Clients International Limited (Company Number 5619) of PO Box 9, Barclays House, Victoria Street, Douglas, IM99 1AJ, Isle of Man referred to in the charges register.”

(8) Mr Fanning did not seek or obtain Barclays' consent to register the grant of the option.

### ***The Option***

(9) On 16 September 2011, the board of San Leon (excluding Mr Fanning from the meeting), held a board meeting in Dublin to resolve to purchase a call option to buy the Property “from the current owner, Oisin Fanning, c/o Streathers Solicitors, Wigmore Street St, London for a consideration of £100. The option will be exercisable between the dates of 5 years and 15 years from the date of the grant of the option and on the terms therein contained.” The board also appointed Stratega Law Limited as its legal representative in the matter.

(10) The option was granted by Mr Fanning to San Leon on 16 September 2011. The option provides that the grantee may purchase the Property at any time in the period between 16 September 2016 and 15 September 2031 (“the option period”) at open market value. The option was not registered at the Land Registry. The option is in San Leon's annual accounts, but this does not protect San Leon's rights in respect of the option or prevent Mr Fanning selling the Property to a third party before the option is exercised. **Mr Fanning was not able to provide a reasonable explanation of why a public company, advised by English legal advisers, failed to register the option.** He suggested that this was because registration is not required under Irish law, but it was noted that this is property in England subject to English law. **Mr Fanning was also unable to provide a reasonable explanation of why the option period begins five years after the grant of the option.** It is noted that the larger Barclays mortgage is for a five-year term and that San Leon's rights stand behind those of Barclays.

(11) The option agreement includes provisions that allow Mr Fanning to determine the option on payment of £1 to San Leon if it applies for consent to assign the option. The option may also be terminated by Mr Fanning if San Leon has a receiver or an administrative receiver appointed in respect of all or any part of its assets.

### ***Reporting, enquiry and discovery assessment***

(12) On 19 September 2011 Streathers filed an SDLT 1 return under Ref: UTRN 504091310ML in respect of the transfer of the Property to Mr Fanning by Glendale Enterprises Four Ltd on 16 September 2011. Consideration of £5,000,000.00 was shown as paid for the property. The SDLT1 showed “nil” tax due and claimed “code 28” relief. Code 28 covers “other relief”. No further details or disclosures were provided with the SDLT1 return.

(13) No enquiry was opened into the return under Part 3 Schedule 10 FA 2003. The SDLT1 return was identified for checking as part of an exercise by Specialist Investigations into returns making “code 28” relief claims. On 13 February 2014, the case was referred to Mrs Mooney, as the nominated officer in HMRC Counter Avoidance, to carry out checks. Mrs Mooney checked the Land Registry and established that Mr Fanning had paid £5m for the Property on 16 September 2011 and that he was registered as the proprietor. The SDLT 1 return was checked to confirm that no SDLT was paid, that the transaction was not linked to another transaction and that it was not between connected parties. Mrs Mooney also checked that that no disclosure or other return of an SDLT liability had been paid or filed in respect of the same Property on the same date.

(14) These checks led Mrs Mooney to conclude that Mr Fanning had implemented an avoidance scheme and that either an amount of tax that ought to have been assessed had not been assessed or that the relief that had been given had become excessive.

(15) A discovery assessment was issued under paragraph 28 Schedule 10 FA 2003 on 28 March 2014 in the sum of £250,000. This sum represents consideration of £5,000,000 chargeable at 5%. The discovery was made after the last date for opening an enquiry into the SDLT return.

(16) Mr Fanning appealed to HMRC against the discovery assessment. This was followed by a number of procedural applications and steps that do not affect the outcome of this appeal, following which HMTC offered an independent review. The statutory review was concluded on 20 April 2018 upholding HMRC’s decision.

(17) On 16 May 2018 Mr Fanning signed a notice of appeal to the Tribunal and the notice was filed on 18 May 2018.

(18) On 20 December 2018 Tribunal Judge Poole decided that this appeal and the appeal in another case, which HMRC had accepted raises “almost identical” issues, should be combined and progress towards a joint hearing to provide material assistance in the determination of the potentially large number of other cases. The other case has since been settled and the outcome of this appeal will now provide the “lead decision”.

### **SUBMISSIONS**

6. Mr Fanning claims that the sub-sale should be respected on the authority of the Supreme Court in *Project Blue*. Further, while section 75A applied in *Project Blue*, the section is not yet applicable on the facts of this case and may never be because the conditions for its operation have not yet been met.

7. Mr Cannon’s detailed submissions, including those in response to Ms Wilson’s submissions, are set out in context in the discussion below.

8. HMRC’s case is that the implementation of the Scheme is fundamentally flawed because:

(1) section 45 is not engaged,

- (2) the secondary contract is not substantially performed or completed at the same time as the original contract,
- (3) *Ramsay* applies, and
- (4) the option is a personal right insufficient for section 45.

9. Alternatively, HMRC's case is that the Scheme is counteracted by section 75A which applies to charge the amount assessed.

10. Finally, HMRC's case is that the discovery assessment is valid. It was confirmed at the hearing that Mr Fanning does not challenge the validity of the assessment.

#### **RELEVANT LAW**

11. The statutory provisions referred to or relied upon in this decision are set out in the Schedule to this decision. The following cases were cited by the parties in their submissions and are discussed in context below:

- (1) *London and South Western Railway Co v Gomm* (1882) 20 Ch D 562 ("*Gomm*")
- (2) *Spiro v Glencrown Properties Limited* [1991] Ch 537 ("*Spiro*")
- (3) *Vardy Properties and another v HMRC* [2012] SFTD 1398 ("*Vardy*")
- (4) *HMRC v DV3 RS Limited Partnership* [2013] EWCA Civ 907, [2013] STC 2150 ("*DV3*")
- (5) *R (St Matthews (West)) v HM Treasury Admin Court* [2014] STC and the decision of the Court of Appeal on appeal [2015] EWCA Civ 648 ("*St Matthews*")
- (6) *Lehman Brothers Holdings Inc v The Joint Administrators of Lehman Brothers International (Europe) and others* [2017] UKSC 38 ("*Lehman Brothers*")
- (7) *Project Blue Ltd v HMRC* [2018] UKSC 30 ("*Project Blue*")
- (8) *Hannover Leasing Wachstumswerte Europa Beteiligungsgesellschaft MBH, Hannover Leasing Wachstumswerte Europa VI GMBH & Co. KG v HMRC* [2019] UKFTT 262 (TC) ("*Hannover*").

12. The burden of proof in this appeal is for Mr Fanning to establish that SDLT is not due on his purchase of the Property. It is for HMRC to establish the validity of the discovery assessment.

#### **DISCUSSION**

13. The parties agree that the steps involved in the implementation of the Scheme structure by Mr Fanning are simple, as set out in paragraph 2 above. The Scheme relies on the application of section 45(3) to disregard the purchase of the Property by Mr Fanning for SDLT purposes. The parties have made submissions on the provisions in the Stamp Act 1891 on sub-sales, the provisions of sections 44-46 and the application of section 75A. Each of these points is considered below, followed by my conclusions on the validity of the assessment.

#### ***Legislative background***

14. Both parties referred me to the legislative background of section 45. Mr Cannon explained that section 45 was included in the Finance Act 2003 following representations from the property industry that sub-sale relief, as provided in section 58 Stamp Act 1891, was commercially required for SDLT. The stamp duty relief had been amended by the Finance Act 1984 to exclude relief where the chargeable consideration was less than the value of the property, but an equivalent provision was not included in the SDLT sub-sale relief. Instead, section 45 was drafted to include the provisions in section 45(3)(b)(i) that bring in consideration given by connected persons. Mr Cannon submits that if the absence of protection to deal with situations in which the parties are not connected was a temporary lacuna (pending the amendments made by Finance Act 2013), the Supreme Court has made clear in *Lehman*

*Brothers* [at 120] that this is a matter for Parliament to address rather than the judiciary, and in *Project Blue* [at 34] that a purposive interpretation may not always remove it.

15. Ms Wilson submits that nothing can be taken from the absence of an equivalent provision to section 58(4) Stamp Act 1891 in relation to SDLT because it is a tax on land transactions as opposed to a tax on documents. Ms Wilson described the design of the SDLT legislation as a charge on the person who enjoys the rights and use of the property, and the provisions in section 43 and 44, and sub-sale relief in section 45 must be read in this context.

16. Section 43 sets out a number of definitions for the purposes of the charge to SDLT on land transactions, and the following are relevant to the analysis of this Scheme. Section 43(1) defines a “land transaction” as any acquisition of a chargeable interest (section 48 defines a “chargeable interest” as an estate, interest, right or power in or over land in the United Kingdom). Section 43(4) explains that references to the “purchaser” and “vendor” in relation to a land transaction, are to the person acquiring and the person disposing of the subject-matter of the transaction. Section 43(5) then clarifies that references to the subject-matter of a land transaction are to the chargeable interest acquired (the “main subject-matter”), together with any interest or right appurtenant or pertaining to it that is acquired with it.

17. Section 44 applies where a contract for a land transaction is to be completed by a conveyance. The provisions that are relevant to the analysis of this Scheme are those set out in section 44(3), (4) and (5) that determine the effective date of substantial performance or completion of a land transaction. Section 44(5) provides that a contract is substantially performed when the purchaser takes possession of the subject matter of the contract or a substantial amount of the consideration is paid.

## **Section 45**

### ***Section 45(1)***

18. Section 45(1) applies where a contract for a land transaction (“the original contract”) is entered into under which the transaction is to be completed by a conveyance, and there is an assignment, subsale or other transaction (relating to the whole or part of the subject-matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him.

19. The purchase of the Property by Mr Fanning is a contract for a land transaction to be completed by a conveyance. It is the original contract for the purposes of section 45(1)(a). This is not in dispute. HMRC’s submission is that the grant of option does not constitute an “other transaction (relating to the whole or part of the subject-matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance” within section 45(1)(b) in order to engage section 45.

20. Ms Wilson submits that the grant of the option is not within section 45(1)(b) because it does not make San Leon entitled to call for a conveyance. This entitlement only arises following the exercise of the option because section 45 must be construed to go with the grain of section 44. This means that a relevant entitlement to call is one that completes the transaction mentioned in section 45(1). Ms Wilson also submits that the option is an unregistered personal right held by San Leon, and as such it is not in the nature of a land transaction as a result of which the purchaser becomes entitled to call for a conveyance.

21. Mr Cannon submits that the grant of the option is an “other transaction” within the meaning of section 45(1)(b) as the legislation does not require the right to call for a conveyance to be unconditional or immediate. HMRC argued this point in *Vardy*, suggesting that as a result of the way in which the dividend operated as a matter of law, no entitlement to call for a conveyance arose until after the original contract had been completed. While the decision was

against the taxpayer on other grounds, Judge Poole’s rejection of this argument provides persuasive authority that the right to call for a conveyance is not required to be unconditional or immediate. Judge Poole commented as follows [at 51]:

“The question to be asked therefore is whether [sub-purchaser] became entitled to call for a conveyance of the property as a result of the declaration of the Dividend. We do not consider that a close analysis of the nature of any such entitlement as it existed immediately before the completion of [original purchaser’s] purchase from the Vendor is relevant or will assist us in answering this question. The fact of the matter is that, as both parties appear to agree, once [original purchaser] completed the purchase of the Property from the Vendor, [sub-purchaser] was entitled to call for a conveyance to it of the Property. We consider that entitlement arose as a result of the earlier declaration of the Dividend, and the fact that it was less than an unconditional and/or immediate entitlement immediately before [original purchaser] completed its purchase from the Vendor is, in our view, irrelevant.”

22. Mr Cannon submits that an option to buy land is equivalent to a contract to buy land and that it is more than a personal contract that does not create an equitable interest in the land. He referred me to passages from Barnsley’s Land Options that reflect the decisions in *Gomm* and *Spiro*. The points relied upon by Mr Cannon are perhaps most clearly summarised in the following quotation from *Spiro*, that cites [at 605] a passage in *Gomm* on the nature of an option as compared to an irrevocable offer:

“Thus in the famous passage in *London and South Western Rly Co v Gomm* (1882) 20 Ch D 562 at 581, [1881–5] All ER Rep 1190 at 1193 Jessel MR had no use for [the analogy of an irrevocable offer] in explaining why the grant of an option to buy land confers an interest in the land upon the grantee:

‘The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land.’

23. I have concluded that the grant of the option to San Leon is, on the facts of this case, an “other transaction” for the purposes of section 45(1)(b). The option is a valid agreement that gives San Leon an entitlement to call for a conveyance of the Property. Section 45 does not exclude options that are within section 46. There is no qualification to section 45(1)(b) that requires the right to call to be immediate or unconditional. As Judge Poole concluded in *Vardy*, it is not relevant that the right to call for a conveyance is not immediately exercisable. The option period begins five years after grant, but Mr Fanning does not have the right to terminate the option in this period. His rights to terminate the option are limited to circumstances in which a receiver is appointed, or San Leon seeks to assign the option.

24. The option is assignable with Mr Fanning’s consent and, as described in *Spiro* [at 606], its effect is to bind him to sell the Property to San Leon if it is exercised. Even if Mr Fanning were to refuse consent for San Leon to assign the option, there is nothing in section 45 that suggests that the transaction cannot be a personal right to call for a conveyance. It is reported in San Leon’s accounts as it is a transaction with a director, but it is not required to register the option so that it binds the land as well as the parties in order to meet the terms of section 45(1)(b). San Leon is free to choose to rely on contractual rights against Mr Fanning if he sells the Property to a third party before the end of the option period in 2031.



**Section 45(2)**

25. The parties agree that Mr Fanning's purchase of the Property is within section 44, and that section 45(2) provides that section 44 is to have effect in accordance with the provisions set out in section 45.

**Section 45(3)**

26. Section 45(3) is set out in two parts, the first creating a [deemed] secondary contract and the second (the "tailpiece") providing the relief as follows:

"(3) That section applies as if there were a contract for a land transaction (a "secondary contract") under which—

- (a) the transferee is the purchaser, and
- (b) the consideration for the transaction is—
  - (i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and
  - (ii) the consideration given for the transfer of rights.

The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded except in a case where the secondary contract gives rise to a transaction that is exempt from charge by virtue of any of sections 71A to 73 (which relate to alternative property finance)."

27. Having decided that the option is an "other transaction" within section 45(1)(b), the opening words of section 45(3) mean that section 44 applies to the purchase of the Property by Mr Fanning as if the grant of the option was the "secondary contract" under which San Leon is the purchaser.

28. The provisions in section 45(3)(b) determine the chargeable consideration under the secondary contract, together with section 45(6) which defines who is connected with San Leon for the purposes of section 45(3)(b)(i). Mr Fanning is connected with San Leon for the purposes of section 45 if he has control of it (section 1122 Corporation Tax Act 2010). As noted in paragraph 5(2) above, Mr Fanning's shareholding was below 2% at the relevant time, and he did not have the voting power or rights that would give him control of San Leon for the purposes of section 450 Corporation Tax Act 2010 at the date of the transactions.

29. The tailpiece of section 45(3) provides relief by disregarding the original contract for SDLT purposes if the substantial performance or completion of the original contract is at the same time as, and in connection with, the substantial performance or completion of the secondary contract. There is no dispute that the original contract, the sale to Mr Fanning, completed on 16 September 2011.

30. The question of the effective date of completion of the secondary contract is key to the availability of the relief.

31. Ms Wilson asked me to view the facts realistically in considering the question of whether the secondary contract has been substantially performed. HMRC have not argued that the option is a sham, but that an option does not satisfy the requirements of section 45(1)(b). If it is found that the option does satisfy section 45(1)(b), Ms Wilson submits that I must construe the "consideration" in section 45(3)(b) as all of the consideration required for the conveyance under the secondary contract referred to in section 45(1)(b) to be made, as any other

interpretation leads to an absurdity that section 45 applies forever, and it fails to further the purpose of the SDLT code. In this sense Ms Wilson submits that the *Ramsay* approach applies. Ms Wilson referred me to the decision of Lewison LJ in *DV3* that makes clear that while “section 44 and 45 are what are sometimes called ‘deeming provisions’” [para 13], the deeming provision in section 45 has a limited purpose “to modify the operation of section 44” [para 20]. The consideration remains the amount that is required to be paid for completion to be in conformity with the contract as required by section 44(10).

32. Ms Wilson submits that, applying a purposive construction to a realistic view of the facts, substantial performance is when a substantial amount of the consideration is paid on exercise of the option. Section 45(3) picks up all of the consideration by reference to how section 44 operates, and this must include the consideration payable on exercise of the option to secure the conveyance referred to in section 45(1)(b).

33. Ms Wilson also referred me to the decision of Vos LJ in *St Matthews* who explains [at para 7]:

“The Finance Act 2003 aimed to place the burden of SDLT on the person who was to acquire the use and enjoyment of the property in question, and so to reduce that burden on those with only a transient interest in the property”.

34. I note for completeness that the decisions in *St Matthews* relate to what Mr Cannon referred to as “a rival Scheme” and that they were decided on the “common ground” between the parties that the type of SDLT scheme used in Mr Fanning’s case, which combine the grant of call options with sub-sales, “did not work” [para 20 High Court] or were “unsuccessful” [para 10 Court of Appeal]; Andrews J declined to decide the underlying tax issue, noting [at para 54] that “such disputes are best left to the specialist tribunal to determine.”

35. Mr Cannon submits that the question of the effective date of completion of the secondary contract is answered by section 46. Section 46(1) provides that the acquisition of an option “binding the grantor to enter into a land transaction” is a land transaction “distinct from any land transaction resulting from the exercise of the option”. Section 46(3) provides that the effective date of the transaction is “when the option or right is acquired (as opposed to when it becomes exercisable)”. Mr Cannon notes that, as compared to section 58 Stamp Act 1891, there is no requirement for the sub-sale to be completed by a conveyance to benefit from relief under section 45. It is enough that the option grant contract is completed. Even if it is necessary to determine the effective date by reference to section 44, subsection (5)(b) provides that a contract was substantially performed when a substantial amount of the consideration was paid under section 45(3)(ii).

36. Mr Cannon submits that section 45(3)(b)(i) is not in point as San Leon does not give any “consideration under the original contract” that is referable to the subject-matter of the transfer of rights as it does not give any consideration under that contract. Further, as Mr Fanning is not connected with San Leon, the consideration that he gives to the vendor is irrelevant. Mr Cannon concludes that the only relevant consideration is the consideration under section 45(3)(b)(ii) for the transfer of rights, and that this is the option grant payment of £100 that was paid on 16 September 2011. This payment substantially performed the secondary contract.

37. I do not accept Mr Cannon’s argument that the secondary contract was substantially completed by the payment of option grant price for the following reasons.

38. First, the secondary contract under consideration for the application of the relief under the tailpiece of section 45(3) is not the grant of the option, but a deemed land transaction. Section 45(3)(a) provides that the secondary contract is one under which “the transferee is the purchaser”. San Leon is the “transferee” because section 45(1) provides that references to the

“other transaction (relating to the whole or part of the subject-matter of the original contract)” in the following provisions of section 45 are to it being a “transfer of rights”. San Leon is therefore deemed to be “purchaser” under the deemed secondary contract. The subject-matter of the deemed secondary contract is the subject-matter of the “transfer of rights” and, as set out in section 45(1)(b), this relates to “the whole or part of the subject-matter of the original contract”, the Property.

39. The next step is to determine when this secondary contract is substantially performed or completed for the purposes of section 45(3). The opening words of section 45(3) and the use of the term “substantial performance or completion” make clear that the effective date is to be determined by reference to section 44. Section 45 adjusts section 44 to focus on the secondary contract, but it otherwise applies as intended. Applying section 44, it is clear that the secondary contract has not been completed by a conveyance within section 44(3) and that San Leon has not substantially performed the contract by taking possession within section 44(5)(a). **Mr Fanning has taken possession of the Property and enjoys the use, rentals and growth in value of the Property.** This leaves Mr Cannon’s submission that the contract is substantially performed in accordance with section 44(5)(b) by the payment of the option grant price as it is a “substantial amount of the consideration” referred to in section 45(3)(b)(ii).

40. I do not accept this submission because section 45(3)(b) aggregates two elements of consideration. Section 45(3)(b)(i) refers to the consideration “referable to the subject-matter of the transfer of rights” in section 45(1)(b) that “is to be given (directly or indirectly) by the transferee”. This is not the option grant price referred to in section 45(3)(b)(ii) that is given for the entitlement, but a future payment that is “referable to” the Property. This is the payment that “is to be given” when the option is exercised. Therefore while a small part of the consideration under section 45(3)(b)(ii) has been paid, “a substantial amount” of the aggregate consideration under section 45(3)(b)(i) and (ii) has not been paid.

41. Secondly, or alternatively, while relief under section 45(3) does not require the secondary contract to be completed by an actual conveyance because section 44 provides the alternative of substantial performance, the relief is dependent on the original contract being substantially performed or completed at the same time “and in connection with” the substantial performance or completion of the secondary contract. Therefore, if section 45(3)(b)(i) can be read to refer to the consideration given by San Leon on completion of the original contract (nil) as Mr Cannon suggests, section 45(3)(b)(ii) should then be read as referring to the consideration payable on substantial performance of the “other transaction” in section 45(1)(b) in conformity with its terms, as a result of which San Leon is in a position to call for a conveyance of the Property following exercise of the option and payment of the exercise price. Until the exercise price is paid, “a substantial amount” of the aggregate consideration has not been paid and the secondary contract has not been substantially performed.

42. As Ms Wilson submits, this conclusion on the consideration is supported by a purposive reading of sections 44 and 45. The secondary contract will only be completed if the option is exercised. In the meantime, to use Mr Cannon’s terminology (in his argument that section 75A cannot apply as the transaction has not completed (para 46 below), completion of the secondary contract “hovers like a cloud”.

### **Section 75A**

43. Section 75A(1) provides that section 75A applies if one person (the vendor) disposes of a chargeable interest and another person (Mr Fanning) acquires it in circumstances in which 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 the amount that would be payable on a straightforward transaction (a “notional land transaction”) to effect Mr Fanning’s acquisition.

44. Sections 75A(4)-(6) provide that if section 75A applies, the original land transaction is disregarded, and instead a notional land transaction is chargeable on the effective date of the notional land transaction.

45. HMRC argue that if (which they refute) section 45(3) applies to disregard the sale to Mr Fanning because of the option grant to San Leon, the effective date of the notional transaction was completion on 16 September 2011, and that the chargeable consideration is the aggregate of the £5m paid to the vendor.

46. Mr Cannon submits that no notional transaction has materialised yet and that it may never do so. He argues that this is because the scheme transactions include the option, and that it doesn’t make sense to split the grant and exercise of the option in accordance with section 46 when considering the application of section 75A because, as Mr Fanning explained, the option may yet be exercised. Mr Cannon’s argument continues that this means that section 75A(6) requires us to wait and see if or when the option is exercised, triggering the effective date of the notional transaction. Further, as the chargeable consideration under the option exercise will be the open market value of the Property payable on exercise of the option (now in excess of £5m), the deferred SDLT charge will be higher than the SDLT “saved” on the original sale to Mr Fanning. Mr Cannon concludes that the tax saving test in section 75A(1)(c) will not be satisfied. In the meantime, the potential section 75A charge simply “hovers like a cloud” over the transactions.

47. Mr Cannon submits that the application of section 75A in *Project Blue* and the conclusion of the Court of Appeal *DV3* can be distinguished as the facts of those cases are not on all four with Mr Fanning’s appeal because those cases involved the aggressive combination of statutory reliefs with sub-sale relief; alternative finance relief in *Project Blue* and the partnership provisions in Schedule 15 in *DV3*.

48. Addressing this last submission first, it is clear that this case cannot be distinguished on those grounds. The Scheme in this case seek to combine the provisions of section 46 with the application of sub-sale relief in section 45 in order to prevent an SDLT arising. If, contrary to my conclusions above, the planning succeeds under those sections, the application of section 75A is on the basis that section 45(3) operates to disregard the conveyance to Mr Fanning and to charge the option grant on the basis that it was substantially performed or completed. This leads to the application of section 75A as follows.

49. The first step in the application of section 75A is to identify the “notional transaction”. As Lord Hodge explained [at para 44] in *Project Blue*:

“The words of section 75A by themselves do not disclose who is V and who is P in a particular case. But the mischief which the provision addresses and the context of the provision within Part 4 of the FA 2003 provide the answer. The court adopts the purposive approach which the House of Lords sanctioned in *Barclays Mercantile Business Finance Ltd*, to which I have referred in para 34 above. ...

The task is to identify where the tax loss has occurred as a result of the adoption of the scheme transactions in relation to the disposal and acquisition of the relevant interest or interests in land. This in turn involves identifying the person on whom the tax charge would have fallen if there had not been the scheme transactions to which subsection (1)(b) refers and which exploited a loophole in the statutory provisions.”

50. Adopting this approach, the notional transaction is between the vendor and Mr Fanning who acquires the chargeable interest.

51. The chargeable consideration is the largest amount (or aggregate amount) given by or on behalf of any one person by way of consideration for the scheme transactions, or received by or on behalf of the vendor (or a person connected with the vendor) by way of consideration for the scheme transactions. Mr Fanning is not connected to the vendor for the purpose of determining the chargeable consideration. The chargeable consideration is the £5m received by the vendor from Mr Fanning.

52. The effective date of the notional transaction is the last date of the scheme transactions or, if earlier, the last date on which a contract in respect of the scheme transactions is substantially performed. As noted above, Mr Cannon submits that the last date is when the option is exercised. It is at this point that it is important to highlight that section 75A is only in point if completion of the actual conveyance to Mr Fanning has been disregarded for SDLT purposes because of the combination of the provisions in section 45 with those in section 46. That same application of section 46 in considering section 75A in accordance with *Project Blue* provides that the option exercise is a distinct transaction, and it should be disregarded as a scheme transaction for the purposes of section 75A. Mr Cannon cannot point to the transaction that will occur on exercise of the option as a distinct land transaction pursuant to section 46 when seeking to apply section 45(3) on the effective date of grant of the option, and then choose to ignore this distinction when seeking to defer the application of section 75A until the exercise of the option. The last date on which a contract in respect of the scheme transactions is completed or substantially performed is 16 September 2011.

53. As an alternative analysis I have considered whether the exercise of the option can be treated as one of the transactions “involved in connection with the disposal and acquisition”, such that it is one of the “scheme transactions” for the purposes of applying section 75A. I have concluded that the exercise of the option cannot be a scheme transaction for the following reasons.

54. As noted in paragraphs 5(3) and (5), I accept that the purchase of the Property by Mr Fanning and its rental to San Leon is a mutually beneficial arrangement, and that Mr Fanning suggested that San Leon could be the grantee of the option, but existence of a possible commercial motive for granting the option to San Leon rather than a special purpose vehicle does not affect the application of section 75A any more than using such a vehicle triggers a charge. In *Hannover* Judge Aleksander considered whether he was required to identify a “tax avoidance scheme” in order to apply section 75A. He concluded [at para 188] that although the provision is intended to act as an anti-avoidance provision, it “self-defines the kind of tax avoidance that is within its scope”, citing the following passage from Lord Hodge’s decision in *Project Blue*:

"It is sufficient for the operation of the section that tax avoidance, in the sense of a reduced liability or no liability to SDLT, resulted from the series of transactions which the parties put in place, whatever their motive for transacting in that manner".

55. I have therefore considered the transactions in this case based on my findings of facts to determine if the option exercise is a scheme transaction. It is not possible to rule out the possibility that the option may be exercised by San Leon. However, the circumstances in which this may take place would be as a result of an independent decision of a listed company in the light of future events and commercial circumstances, including the possible additional tax charges that the purchase of the Property by an offshore company would entail. The possibility of a third party making such a decision in the future cannot be treated as a transaction “involved

in connection with the disposal and acquisition” in order to be part of the “scheme transactions” for the purposes of section 75 A (1)(b). Accordingly, while the original contract, transfer and grant of the option are scheme transactions, the exercise of the option is not “involved”, and it cannot be a “scheme transaction” for the purpose of determining the effective date of the notional contract under section 75A(6).

56. Section 75A(6) applies on the basis that the effective date of the notional transaction is the date of completion of the scheme transactions on 16 September 2011 and the chargeable consideration is the £5m that Mr Fanning paid to the vendor.

### **Validity of the assessment**

57. I have considered the circumstances of the issue of the discovery assessment to determine whether HMRC have established that the conditions for its issue have been satisfied. Mr Fanning does not challenge the validity of the discovery assessment.

58. Birmingham Stamp Office and the Counter Avoidance Stamp Duty Land Tax Team became aware that code 28 relief was being used by promoters of certain SDLT planning schemes. A project was set up to identify returns that claimed ‘other relief’ under code 28. As code 28 may be claimed in a number of circumstances in which a relief is applicable that does not have a unique code, the project search criteria identified the cases in which the basis of the claim under ‘other relief’ had not been explained in a disclosure. The project search criteria also identified cases that involved certain ‘indicative agents’ that HMRC considered to be involved in providing SDLT mitigation during the course of the conveyancing process.

59. The project identified that the SDLT 1 return filed in respect of the purchase the Property by Mr Fanning claimed relief under code 28 and that the agents, Streathers, were indicative agents. As noted in paragraph 5(13) above, on 13 February 2014, the case was referred to Mrs Mooney as the nominated officer in Counter Avoidance to carry out checks. On completion of these checks Mrs Mooney concluded that either an amount of tax that ought to have been assessed has not been assessed, or that relief has been given that is or has become excessive. Mrs Mooney issued a discovery assessment under paragraph 28(1) Schedule 10 FA 2003 to Mr Fanning under cover of a letter dated 28 March 2014.

60. I am satisfied that Mrs Mooney made a valid discovery within paragraph 28(1) Schedule 10 FA 2003 when she completed her checks after the last date for opening an enquiry (nine months after the filing date). The SDLT return was identified for checking as a result of the project described above, and it was Mrs Mooney’s checks that led to her discovery. HMRC have discharged the burden of showing that the discovery meets the criteria set out in paragraph 30(3) Schedule 10 FA 2003 as the use of code 28 was not sufficient to alert HMRC to the insufficiency of tax. HMRC could not have been reasonably expected, on the basis of the information made available to them before the enquiry window closed, to be aware of the situation. The discovery assessment was made within the time limit in paragraph 31 Schedule 10.

### **DECISION**

61. The appeal is dismissed. The assessment charging SDLT of £250,000 is confirmed.

### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

62. 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.

**VICTORIA NICHOLL**

**TRIBUNAL JUDGE**

**RELEASE DATE: 9 JULY 2020**

## APPENDIX

### RELEVANT PROVISIONS IN THE FINANCE ACT 2003 AND CORPORATION TAX ACT 2010 AS AT THE RELEVANT DATES

#### FINANCE ACT 2003

##### Section 42 The tax

- (1) A tax (to be known as “stamp duty land tax”) shall be charged in accordance with this Part on land transactions.
- (2) The tax is chargeable—
  - (a) whether or not there is any instrument effecting the transaction,
  - (b) if there is such an instrument, whether or not it is executed in the United Kingdom, and
  - (c) whether or not any party to the transaction is present, or resident, in the United Kingdom.
- (3) The tax is under the care and management of the Commissioners of Inland Revenue (referred to in this Part as “the Board”).

##### Section 43 Land transactions

- (1) In this Part a “land transaction” means any acquisition of a chargeable interest. As to the meaning of “chargeable interest” see section 48.
- (2) Except as otherwise provided, this Part applies however the acquisition is effected, whether by act of the parties, by order of a court or other authority, by or under any statutory provision or by operation of law.
- (3) For the purposes of this Part—
  - (a) the creation of a chargeable interest is—
    - (i) an acquisition by the person becoming entitled to the interest created, and
    - (ii) a disposal by the person whose interest or right is subject to the interest created;
  - (b) the surrender or release of a chargeable interest is—
    - (i) an acquisition of that interest by any person whose interest or right is benefitted or enlarged by the transaction, and
    - (ii) a disposal by the person ceasing to be entitled to that interest; . . .
  - (c) the variation of a chargeable interest [(other than a lease)] is—
    - (i) an acquisition of a chargeable interest by the person benefitting from the variation, and
    - (ii) a disposal of a chargeable interest by the person whose interest is subject to or limited by the variation;
- ...
- (4) References in this Part to the “purchaser” and “vendor”, in relation to a land transaction, are to the person acquiring and the person disposing of the subject-matter of the transaction. These expressions apply even if there is no consideration given for the transaction.
- (5) A person is not treated as a purchaser unless he has given consideration for, or is a party to, the transaction.
- (6) References in this Part to the subject-matter of a land transaction are to the chargeable interest acquired (the “main subject-matter”), together with any interest or right appurtenant or pertaining to it that is acquired with it.

##### Section 44 Contract and conveyance

- (1) This section applies where a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance.
- (2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.



(3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction.

In this case the effective date of the transaction is the date of completion.

(4) If the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract.

In this case the effective date of the transaction is when the contract is substantially performed.

(5) A contract is “substantially performed” when—

(a) the purchaser[, or a person connected with the purchaser,] takes possession of the whole, or substantially the whole, of the subject-matter of the contract, or

(b) a substantial amount of the consideration is paid or provided.

(6) For the purposes of subsection (5)(a)—

[(a) possession includes receipt of rents and profits or the right to receive them, and]

(b) it is immaterial whether [possession is taken] under the contract or under a licence or lease of a temporary character.

(7) For the purposes of subsection (5)(b) a substantial amount of the consideration is paid or provided—

(a) if none of the consideration is rent, where the whole or substantially the whole of the consideration is paid or provided;

(b) if the only consideration is rent, when the first payment of rent is made;

(c) if the consideration includes both rent and other consideration, when—

(i) the whole or substantially the whole of the consideration other than rent is paid or provided, or

(ii) the first payment of rent is made.

(8) Where subsection (4) applies and the contract is subsequently completed by a conveyance—

(a) both the contract and the transaction effected on completion are notifiable transactions, and

(b) tax is chargeable on the latter transaction to the extent (if any) that the amount of tax chargeable on it is greater than the amount of tax chargeable on the contract.

...

(10) In this section—

(a) references to completion are to completion of the land transaction proposed, between the same parties, in substantial conformity with the contract; and

(b) “contract” includes any agreement and “conveyance” includes any instrument.

(11) Section 1122 of the Corporation Tax Act 2010] (connected persons) has effect for the purposes of this section.

### **Section 45 Contract and conveyance: effect of transfer of rights**

(1) This section applies where—

(a) a contract for a land transaction (“the original contract”) is entered into under which the transaction is to be completed by a conveyance,

(b) there is an assignment, subsale or other transaction (relating to the whole or part of the subject-matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him, and

(c) ...

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

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

(3) That section applies as if there were a contract for a land transaction (a “secondary contract”) under which—

(a) the transferee is the purchaser, and

(b) the consideration for the transaction is—

(i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and

(ii) the consideration given for the transfer of rights.

The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded except in a case where the secondary contract gives rise to a transaction that is exempt from charge by virtue of any of sections 71A to 73 (which relate to alternative property finance).

(4) ...

The substantial performance or completion of the secondary contract arising from an earlier transfer of rights at the same time as, and in connection with, the substantial performance or completion of the secondary contract arising from a subsequent transfer of rights shall be disregarded.

...

(6) Section 1122 of the Corporation Tax Act 2010 (connected persons) applies for the purposes of subsection (3)(b)(i).

(7) In this section “contract” includes any agreement and “conveyance” includes any instrument.

### **Section 46 Options and rights of pre-emption**

(1) The acquisition of—

(a) an option binding the grantor to enter into a land transaction, or

(b) a right of pre-emption preventing the grantor from entering into, or restricting the right of the grantor to enter into, a land transaction,

is a land transaction distinct from any land transaction resulting from the exercise of the option or right.

They may be “linked transactions” (see section 108).

(2) The reference in subsection (1)(a) to an option binding the grantor to enter into a land transaction includes an option requiring the grantor either to enter into a land transaction or to discharge his obligations under the option in some other way.

(3) The effective date of the transaction in the case of the acquisition of an option or right such as is mentioned in subsection (1) is when the option or right is acquired (as opposed to when it becomes exercisable).

(4) Nothing in this section applies to so much of an option or right of pre-emption as constitutes or forms part of a land transaction apart from this section.

### **Section 48 Chargeable interests**

(1) In this Part “chargeable interest” means—

(a) an estate, interest, right or power in or over land in the United Kingdom, or

(b) the benefit of an obligation, restriction or condition affecting the value of any such estate, interest, right or power,

other than an exempt interest.

(2) The following are exempt interests—

- (a) any security interest;
- (b) a licence to use or occupy land;
- (c) in England and Wales or Northern Ireland—
  - (i) a tenancy at will;
  - (ii) an advowson, franchise or manor.

(3) In subsection (2)—

- (a) “security interest” means an interest or right (other than a rentcharge) held for the purpose of securing the payment of money or the performance of any other obligation; and
- (b) “franchise” means a grant from the Crown such as the right to hold a market or fair, or the right to take tolls.

(3A) Section 73B makes additional provision about exempt interests in relation to alternative finance arrangements.

(4) In the application of this Part in Scotland the reference in subsection (3)(a) to a rentcharge shall be read as a reference to a feu duty or a payment mentioned in section 56(1) of the Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5).

(5) The Treasury may by regulations provide that any other description of interest or right in relation to land in the United Kingdom is an exempt interest.

(6) The regulations may contain such supplementary, incidental and transitional provision as appears to the Treasury to be appropriate.

(7) This section has effect subject to subsection (3) of section 44A (contract and conveyance to third party) and to paragraph 15A of Schedule 17A (reduction of rent or term of lease).

### **Section 75A Anti-avoidance**

(1) This section applies where—

- (a) one person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it,
- (b) a number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition (“the scheme transactions”), and
- (c) the sum of the amounts of stamp duty land tax payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V.

(2) In subsection (1) “transaction” includes, in particular—

- (a) a non-land transaction,
- (b) an agreement, offer or undertaking not to take specified action,
- (c) any kind of arrangement whether or not it could otherwise be described as a transaction, and
- (d) a transaction which takes place after the acquisition by P of the chargeable interest.

(3) The scheme transactions may include, for example—

- (a) the acquisition by P of a lease deriving from a freehold owned or formerly owned by V;
- (b) a sub-sale to a third person;
- (c) the grant of a lease to a third person subject to a right to terminate;
- (d) the exercise of a right to terminate a lease or to take some other action;
- (e) an agreement not to exercise a right to terminate a lease or to take some other action;
- (f) the variation of a right to terminate a lease or to take some other action.

(4) Where this section applies—

- (a) any of the scheme transactions which is a land transaction shall be disregarded for the purposes of this Part, but

(b) there shall be a notional land transaction for the purposes of this Part effecting the acquisition of V's chargeable interest by P on its disposal by V.

(5) The chargeable consideration on the notional transaction mentioned in subsections (1)(c) and (4)(b) is the largest amount (or aggregate amount)—

(a) given by or on behalf of any one person by way of consideration for the scheme transactions, or

(b) received by or on behalf of V (or a person connected with V within the meaning of [section 1122 of the Corporation Tax Act 2010]) by way of consideration for the scheme transactions.

(6) The effective date of the notional transaction is—

(a) the last date of completion for the scheme transactions, or

(b) if earlier, the last date on which a contract in respect of the scheme transactions is substantially performed.

(7) This section does not apply where subsection (1)(c) is satisfied only by reason of—

(a) sections 71A to 73, or

(b) a provision of Schedule 9.

### **Schedule 10 FA 2003**

#### ***Paragraph 23 Completion of enquiry***

(1) An enquiry under paragraph 12 is completed when the Inland Revenue by notice (a “closure notice”) inform the purchaser that they have completed their enquiries and state their conclusions.

(2) A closure notice must either—

(a) state that in the opinion of the Inland Revenue no amendment of the return is required, or

(b) make the amendments of the return required to give effect to their conclusions.

(3) A closure notice takes effect when it is issued.

#### ***Paragraph 28 Assessment where loss of tax discovered***

(1) If the Inland Revenue discover as regards a chargeable transaction that—

(a) an amount of tax that ought to have been assessed has not been assessed, or

(b) an assessment to tax is or has become insufficient, or

(c) relief has been given that is or has become excessive,

they may make an assessment (a “discovery assessment”) in the amount or further amount that ought in their opinion to be charged in order to make good to the Crown the loss of tax.

(2) The power to make a discovery assessment in respect of a transaction for which the purchaser has delivered a return is subject to the restrictions specified in paragraph 30.

#### ***Paragraph 29 Assessment to recover excessive repayment of tax***

(1) If an amount of tax has been repaid to any person that ought not to have been repaid to him, that amount may be assessed and recovered as if it were unpaid tax.

(2) Where the repayment was made with interest, the amount assessed and recovered may include the amount of interest that ought not to have been paid.

(3) The power to make an assessment under this paragraph in respect of a transaction for which the purchaser has delivered a land transaction return is subject to the restrictions specified in paragraph 30.

***Paragraph 30 Restrictions on assessment where return delivered***

- (1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28 or 29 in respect of the transaction—
  - (a) may only be made in the two cases specified in sub-paragraphs (2) and (3) below, and
  - (b) may not be made in the circumstances specified in sub-paragraph (5) below.
- (2) The first case is where the situation mentioned in paragraph 28(1) or 29(1) is attributable to fraudulent or negligent conduct on the part of—
  - (a) the purchaser,
  - (b) a person acting on behalf of the purchaser, or
  - (c) a person who was a partner of the purchaser at the relevant time.
- (3) The second case is where the Inland Revenue, at the time they—
  - (a) ceased to be entitled to give a notice of enquiry into the return, or
  - (b) completed their enquiries into the return,could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 28(1) or 29(1).
- (4) For this purpose information is regarded as made available to the Inland Revenue if—
  - (a) it is contained in a land transaction return made by the purchaser,
  - (b) it is contained in any documents produced or information provided to the Inland Revenue for the purposes of an enquiry into any such return, or
  - (c) it is information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 28(1) or 29(1)—
    - (i) could reasonably be expected to be inferred by the Inland Revenue from information falling within paragraphs (a) or (b) above, or
    - (ii) are notified in writing to the Inland Revenue by the purchaser or a person acting on his behalf.
- (5) No assessment may be made if—
  - (a) the situation mentioned in paragraph 28(1) or 29(1) is attributable to a mistake in the return as to the basis on which the tax liability ought to have been computed, and
  - (b) the return was in fact made on the basis or in accordance with the practice generally prevailing at the time it was made.

***Paragraph 31 Time limit for assessment***

- (1) The general rule is that no assessment may be made more than [4 years] after the effective date of the transaction to which it relates.
- (2) An assessment of a person to tax in a case involving a loss of tax brought about carelessly by the purchaser or a related person may be made at any time not more than 6 years after the effective date of the transaction to which it relates (subject to sub-paragraph (2A)).
- (2A) An assessment of a person to tax in a case involving a loss of tax—
  - (a) brought about deliberately by the purchaser or a related person,
  - (b) attributable to a failure by the person to comply with an obligation under section 76(1) or paragraph 3(3)(a), 4(3)(a) or 8(3)(a) of Schedule 17A, . . .
  - (c) attributable to arrangements in respect of which the person has failed to comply with an obligation under section 309, 310 or 313 of the Finance Act 2004 (obligation of parties to tax avoidance schemes to provide information to Her Majesty's Revenue and Customs), [or
  - (d) attributable to arrangements which were expected to give rise to a tax advantage in respect of which the person was under an obligation to notify the Commissioners for Her Majesty's Revenue and Customs under section 253 of the Finance Act 2014 (duty to notify Commissioners of promoter reference number) but failed to do so,]may be made at any time not more than 20 years after the effective date of the transaction to which it relates. . . .

**Paragraph 35 – Right of appeal**

- (1) An appeal may be brought against—
  - (a) an amendment of a self-assessment under paragraph 17 (amendment by Revenue during enquiry to prevent loss of tax),
  - (b) a conclusion stated or amendment made by a closure notice,
  - (c) a discovery assessment, . . .
  - (d) an assessment under paragraph 29 (assessment to recover excessive repayment)[, or
  - (e) a Revenue determination under paragraph 25 (determination of tax chargeable if no return delivered). . .

**CORPORATION TAX ACT 2010**

**Section 450 - “Control”**

- (1) This section applies for the purpose of this Part.
- (2) A person (“P”) is treated as having control of a company (“C”) if P—
  - (a) exercises,
  - (b) is able to exercise, or
  - (c) is entitled to acquire,direct or indirect control over C's affairs.
- (3) In particular, P is treated as having control of C if P possesses or is entitled to acquire—
  - (a) the greater part of the share capital or issued share capital of C,
  - (b) the greater part of the voting power in C,
  - (c) so much of the issued share capital of C as would, on the assumption that the whole of the income of C were distributed among the participants, entitle P to receive the greater part of the amount so distributed, or
  - (d) such rights as would entitle P, in the event of the winding up of C or in any other circumstances, to receive the greater part of the assets of C which would then be available for distribution among the participants.
- (4) Any rights that P or any other person has as a loan creditor are to be disregarded for the purposes of the assumption in subsection (3)(c).
- (5) If two or more persons together satisfy any of the conditions in subsections (2) and (3), they are treated as having control of C.
- (6) See also section 451 (section 450: rights to be attributed etc).

**Section 1122 -“Connected” persons**

- (1) This section has effect for the purposes of the provisions of the Corporation Tax Acts which apply this section (or to which this section is applied).
- ...
- (3) A company is connected with another person (“A”) if—
  - (a) A has control of the company, or
  - (b) A together with persons connected with A have control of the company.
- (4) In relation to a company, any two or more persons acting together to secure or exercise control of the company are connected with—
  - (a) one another, and
  - (b) any person acting on the directions of any of them to secure or exercise control of the company.
- ...