Neutral Citation: [2024] UKFTT 00807 (TC)

Case Number: TC09281

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2023/16493

PROCEDURE — application to make a late appeal by the Appellant — avoidance scheme arrangement in a property transaction — code 28 relief claimed in SDLT return in relation to sub-sale relief pursuant to section 45 of the Finance Act 2003 – revenue determination issued on 2 October 2015 but vacated following the Supreme Court decision in Project Blue v HMRC - closure notice issued on 3 November 2021 amending the Appellant's SDLT return to charge 5% SDLT on the consideration paid – review conclusion issued on 12 May 2022 – appeal only made to the Tribunal on 17 November 2023 - Martland applied - length of delay 524 days – delay serious and significant – no good reason given for delay – evaluation of all of the circumstances and balance of prejudice to the parties – grounds of appeal weak in light of the Court of Appeal decision in Fanning v R & C Comrs - application REFUSED

Heard on: 20 June 2024
Judgment date: 5 September 2024

Before

JUDGE NATSAI MANYARARA
JANE SHILLAKER

Between

LESLIE GORDON

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Appellant in Person

For the Respondents: Mr Dan Hopkin, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is the Appellant's application for permission to make a late appeal against a closure notice which was issued on 3 November 2021, pursuant to para. 12, Schedule 10 of the Finance Act 2003 ('FA 2003'). The closure notice followed an enquiry into the Appellant's Stamp Duty Land Tax ('SDLT1') return - which was submitted on 30 November 2011 - following the Appellant's purchase of the property situated at Elmers Barn, Stane Street ('the Property').

2. HMRC concluded that the Appellant had incorrectly claimed code 28 relief within the SDLT return, as the consideration paid for the Property was not subject to sub-sale relief pursuant to s 45 FA 2003. Consequently, the closure notice amended the Appellant's SDLT1 return to charge 5% SDLT on the £1,025,000.00 consideration, which produced tax due of £51,250.00. The tax subsequently due was £51,250.

3. HMRC issued their review conclusion letter on 12 May 2022. The Appellant made his appeal to the Tribunal on 17 November 2023. The Appellant's appeal to the Tribunal was made outside of the statutory deadline for appealing. HMRC have refused consent.

4. With the consent of the parties, the form of the hearing was V (video). Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public. The documents to which we were referred to were: (i) the Document Bundle consisting of 532 pages (within which were the Notice of Appeal dated 17 November 2023 and the Notice of Objection dated 29 January 2024); and (ii) Appellant's Supplementary Document Bundle consisting of 89 pages.

BACKGROUND FACTS

5. On 30 November 2011, HMRC received the Appellant's SDLT1 return, reference no. 504298899, following the transfer of the Property to Mr and Mrs Gordon by Mr and Mrs Spittle. The return showed that consideration of £1,025,000 was paid for the Property. The return however declared nil SDLT was due as code 28 relief had been claimed, pursuant to s 45 FA 2003 (sub-sale relief). The transferee was Havelet Properties PCC Limited ('Havelet').

The avoidance scheme

6. Arrangements of the nature of the arrangement that took place in this transaction is that A (i.e., Mr and Mrs Spittle) agrees to sell the property to B (i.e., Mr and Mrs Gordon) and contracts are exchanged ('the original contract'). At the same time as the completion of the A and B contract, B grants C (Havelet) an option of £1 over the property. The terms and conditions of the option are set out in an option agreement between B and C. The option can be exercised by C at any time as set out by the options agreement, unless otherwise agreed between B and C. The option can be assigned by C with consent from B. The option exercise price is £1,025,000 or open market value of the property on the date the option is exercised, whichever is greater. B takes possession of the property, having paid the full price demanded under the original contract. The option period is 30 November 2036 to 29 November 2041. The consideration B pays to A for the property is replaced with the much smaller amount that C pays to B for the option to buy the property at a later date. B occupies the property from day one, having paid no SDLT, and the option will almost certainly never be exercised

7. The scheme seeks to combine the sub-sale rules within s 45 FA 2003, with an option to avoid the SDLT due on the arm's length acquisition of the property by B from the original vendor A. The reality is, however, that B has not sub sold the property or any part of it to C.

The enquiry, revenue determination and closure notice

8. A notice of enquiry into the SDLT1 return was issued to the Appellant on 16 August 2012.

9. On 2 October 2015, a revenue determination was issued on the grounds that s 75A FA 2003 was engaged meaning that, pursuant to s 75A(4), the scheme land transaction was disregarded and a 'notional transaction' pursuant to s75A(4)(b) was imposed, resulting in undeclared liability by the Appellant ('the 2015 determination'). The revenue determination was issued to protect HMRC's position pending the ongoing wider litigation on schemes of the same nature as that which is relevant to the scheme in this appeal, which subsequently resulted in the *Project Blue v HMRC* [2018] UKSC 30 ('*Project Blue*').

10. On 26 October 2015, the Appellant appealed to HMRC against the 2015 determination.

11. On 2 November 2015, the Appellant amended his appeal to request an independent review of the 2015 determination.

12. On 8 February 2016, HMRC acknowledged the Appellant's appeal.

13. On 13 June 2018, the *Project Blue* decision confirmed that a closure notice issued further to an enquiry into the SDLT1 return containing the A to B transaction could encompass any potential s 75A FA 2003 liability determined by way of the 'notional transaction'. The case established the principle that SDLT must be paid by the person who would have paid it if the avoidance scheme had not been used.

14. On 3 November 2021, HMRC confirmed that the 2015 determination had been vacated, and that a closure notice had been issued to subsume the £51,250.00 SDLT liability found to be due as a result of the enquiry.

15. On 15 November 2021, the Appellant appealed to HMRC against the closure notice.

16. On 13 January 2022, HMRC issued their View of the Matter letter to the Appellant and advised the Appellant that he could request an independent review of the decision, or appeal to the Tribunal, within 30 days of 13 January 2022 (i.e., 12 February 2022).

17. On 10 February 2022, the Appellant requested an independent review of the decision.

18. On 16 March 2022, HMRC acknowledged the Appellant's review request and extended the review period to 15 May 2022.

19. On 12 May 2022, HMRC issued the review conclusion letter, upholding the decision. The Appellant was advised that if he disagreed with the review conclusion, he must appeal to the Tribunal within 30 days of 12 May 2022 (i.e., 11 June 2022), or the matter would be deemed to be settled by agreement under para. 37 of Schedule 10 FA 2003.

20. On 30 May 2022, the Appellant emailed HMRC to raise a formal complaint and to ask why an independent review of the 2015 determination was not conducted. The Appellant acknowledged that he had until 15 June 2022 to decide if he wished to appeal to the Tribunal.

21. On 11 June 2022, the statutory 30-day period to appeal to the Tribunal against the closure notice expired.

22. On 23 June 2022, the Respondents issued a Tier 1 complaint response. The Appellant was advised that if he disagreed with the independent review conclusion of 12 May 2022, he must ask the Tribunal to decide the matter.

23. On 28 June 2022, the Appellant raised a Tier 2 complaint.

24. On 17 August 2022, HMRC issued a Tier 2 complaint response. The Appellant was advised that if he disagreed with the independent review conclusion of 12 May 2022, he must ask the Tribunal to decide the matter. The Appellant was also advised about how he could escalate his complaint to the Adjudicator's Office.

25. On 17 November 2023, the Appellant submitted an appeal to the Tribunal.

MARTLAND AND THE THREE-STAGE TEST

26. The principles applicable to determining the issue of delay have been the subject of much adjudication. In *BPP Holdings v R & C Comrs* [2017] SC 55 ('*BPP Holdings*'), a direction had been made by the First-tier Tribunal ('FtT') indicating that HMRC would be barred from participating in proceedings if the direction was not adhered to. This was the relevance of the strict approach in adhering to time-limits. The differences in fact in *BPP Holdings* and the appeal before us do not, however, negate the principle established in relation to the need for statutory time limits to be adhered to. In *BPP Holdings,* the court endorsed the approach described by Morgan J in *Data Select Ltd v R & C Comrs* [2012] STC 2195 ('*Data Select*'). Mr Justice Morgan described the approach in the following way:

> "[34] … Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions.
>
> …
>
> [37] In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to s 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. None the less, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeal against a judicial decision."

27. In the context of an application to make a late appeal, the obligation is simply to take into account of all of the relevant circumstances and to disregard factors that are irrelevant.

28. Helpful guidance can also be derived from the three-stage process set out by the Court of Appeal in *Denton & Ors v T H White Ltd & Ors* [2014] EWCA Civ 906 ('*Denton*') for a clear exposition of how the provisions of rule 3.9(1) should be given effect (in relation to relief from sanctions). Although the third stage of that guidance, as set out by the majority, includes the requirement to give particular weight to the efficient conduct of litigation and the compliance with rules etc., by way of summary, the majority in the Court of Appeal in *Denton* described the three-stage approach in the following terms, at [24] (the references to "factors (a) and (b)" being to the particular factors referred to in CPR r 3.9):

> "We consider that the guidance given at paras 40 and 41 of Mitchell remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the

approach that should be applied in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]". …"

29. Once the factors (a) and (b) are afforded no special weight or significance, that approach is no different in principle to that set out in *Data Select*. The seriousness and significance of the relevant failure has always been one of the factors relevant to the Tribunal's determination. That is encompassed in the reference in *Data Select*, at [34], to the purpose of the time-limit and the length of the delay. The reason for the delay is a common factor in *Denton* and *Data Select*, as is the need to evaluate the circumstances of the case so as to enable the Tribunal to deal with the matter justly.

30. The approach to the consideration of an application to extend time should now follow that set out by the Upper Tribunal ('UT') in *Martland v R & C Comrs* [2018] UKUT 178 (TCC) ('*Martland*'). That case itself concerned a late appeal to the FtT. The approach adopted followed from a consideration of authorities, including *BPP Holdings*. *Martland* held that the principle of fairness and justice is applicable, as a general matter, to any exercise of a judicial discretion. Applying the three-stage approach adopted in *Denton*, the UT in *Martland* set out the following staged approach, at [44]:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances equate to the breach being "neither serious nor significant"), then the tribunal is unlikely to need to spend much time on the second and third stages – though this cannot be taken to mean that applications can be granted for very short delays without moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The tribunal can then move onto its evaluation of all the circumstances of the case. This will involve a balancing exercise which will essentially assess the merits of the reasons given for the delay and the prejudice which would be caused to both parties by granting or refusing the extension of time.

31. This approach was confirmed by the UT in *Websons (8) Limited v HMRC* [2020] UKUT 0154 (TCC).

APPEAL HEARING

32. We derived considerable benefit from hearing the submissions made by the parties.

33. Mr Hopkins' submissions, as set out in the Notice of Objection, can be summarised as follows:

(1) Paragraph 36G of Schedule 10 FA 2003 sets out the time-limit for notifying an appeal to the Tribunal after statutory review has been completed. The review conclusion letter is dated 12 May 2022 and the Appellant only made an appeal on 17 November 2023. The Appellant's appeal was 524 days after the expiration of the time-limit specified at para. 36G(5)(a). The delay is serious and significant.

(2) The Appellant was sent reminders to appeal on 22 June 2022, 17 August 2022, 30 September 2022 and 25 July 2023. The Appellant's own letter of 30 May 2022 showed that he was aware of the need to appeal.

(3) HMRC issued revenue determinations in several cases involving the avoidance schemes under the sub-sale relief provisions, in order to protect their position. The

ability to issue a closure notice in relation to an SDLT return was not established until the *Project Blue* case had been determined by the Supreme Court.

(4) The Appellant contends that he should be granted permission to appeal as a result of special circumstances relating to HMRC's conduct following an appeal against the revenue determination. The revenue determination was revoked in 2021, prior to the issuing of the closure notice. There is no statutory provision which gives the FtT the jurisdiction to consider the revenue determination. Furthermore, there is no public law jurisdiction in relation to the provisions set out at Schedule 10 FA 2003.

(5) The Appellant chose not to pursue the complaint against HMRC up to adjudicator level. The Tier 2 conclusion, dated 17 August 2022, informed the Appellant of the need to submit an appeal and a link to appeal was provided within that letter. Furthermore, the complaint investigation did not prevent the Appellant making an appeal to the FtT, as set out in the review conclusion letter. HMRC did not contribute to the delay in making an appeal.

(6) If the late appeal was to be admitted, HMRC would be prejudiced by having to divert resources to an appeal that HMRC were entitled to consider closed. Allowing the late appeal to proceed is inconsistent with good administration.

(7) The appeal has little to no prospects of success. As established in *Project Blue* and *Fanning v R & C Comrs* [2023] EWCA Civ 263 ('*Fanning*'), the transaction that the Appellant entered into is not disregarded by s 45 FA 2003. The Appellant's case is on all fours with *Fanning*.

(8) Any arguments related to HMRC's conduct, and the fairness of the decision, are properly directed to a judicial review claim. The FtT has no supervisory jurisdiction over HMRC.

34. The Appellant's submissions can be summarised as follows:

(1) The 2015 determination is relevant to the late appeal as it explains the delay in making an appeal.

(2) On 2 October 2015, HMRC made an offer of statutory review in relation to the revenue determination. He accepted the review but no review was carried out. He had no further communication from HMRC for two and a half years and he lost confidence in the process. HMRC vacated the determination six years later, without complying with the necessary legal requirements. HMRC know, and admit, that mistakes were made.

(3) HMRC's Charter and internal manual show that HMRC have a duty to act fairly.

(4) He sought guidance on how to appeal in 2022 and HMRC only responded in 2024. The 2021 COVID-19 notice added a further three months to the delay. He should have been informed that he could appeal via the website. HMRC have caused the delay in making an appeal.

(5) He appealed within 120 days of the Tier 2 complaint being finalised.

35. At the conclusion of the hearing, we reserved our decision, which we now give with reasons.

FINDINGS OF FACT

36. The following facts were admitted, or proved:

(1) In November 2011, the Appellant acquired the Property. On 30 November 2011, he submitted his SDLT return and claimed Code 28 relief.

(2) On 16 August 2012, HMRC issued a notice of enquiry into the SDLT return.

(3) On 2 October 2015, a revenue determination was issued on the grounds that s 75 FA 2003 was not engaged.

(4) On 26 October 2015, the Appellant appealed against the revenue determination.

(5) On 2 November 2015, the Appellant amended his appeal to request a statutory review.

(6) On 8 February 2016, HMRC acknowledged the Appellant's request for a review.

(7) On 3 November 2021, HMRC confirmed that the revenue determination was vacated and a closure notice was issued in respect of the £51,250 SDLT.

(8) On 15 November 2021, the Appellant appealed to HMRC (against the closure notice).

(9) On 13 January 2022, HMRC issued their View of the Matter ('VoM') letter and made an offer of review.

(10) On 10 February 2022, the Appellant requested a review.

(11) On 16 March 2022, the review period was extended to 15 May 2022.

(12) On 12 May 2022, HMRC issued their review conclusion letter, which required the Appellant to appeal to the FtT within 30 days of the date of the letter (i.e., by 11 June 2022).

(13) On 30 May 2022, the Appellant raised a formal complaint with HMRC. The Appellant acknowledged that he had until 15 June 2022 to appeal against the review conclusion letter.

(14) On 23 June 2022, HMRC issued a Tier 1 complaint response.

(15) On 28 June 2022, the Appellant raised a Tier 2 complaint.

(16) On 17 August 2022, HMRC issued a Tier 2 complaint response and the Appellant was advised about how he could raise his complaint to the Adjudicator's office. The Appellant was further advised that if he disagreed with the review conclusion letter of 12 May 2022, he could appeal to the FtT.

(17) On 17 November 2023, the Appellant appealed to the FtT.

37. We, therefore, make these findings of fact.

CONSIDERATION

38. It is well established that the FtT must take all relevant matters into account when exercising its discretion to admit a late appeal: *Data Select*. While this means that the Tribunal might, in appropriate circumstances, grant leave to appeal out of time to a taxpayer without a reasonable excuse, it also means that the FtT will take all matters into account and so a taxpayer with a reasonable excuse will not necessarily be granted permission to appeal out of time. There are no fetters given in the legislation on the exercise of discretion by the FtT.

39. For the following reasons, we have decided not to give permission for the appeal to be notified late:

The length of the delay

40. In respect of the first stage, there can, in our view, be no argument but that the delay in making an application to appeal was serious and significant. In this application, HMRC issued a review conclusion letter in relation to the closure notice on 12 May 2022. The review conclusion letter advised the Appellant that an appeal to the FtT had to be made by 12 June 2022. The Appellant only made his appeal on 17 November 2023. That was 524 days after the statutory time-limit to make an appeal had expired. The length of the delay is to be considered by reference to the time-limit for submitting an appeal. This was confirmed in *Romasave (Property Services) Ltd v Revenue & Customs Comrs* [2015] UKUT 254 (TCC) ('*Romasave*'), at [96]. There, the UT held that:

> "In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

41. In *Secretary of State for the Home Department v SS (Congo) & Ors* [2015] EWCA Civ 387, the Court of Appeal, at [105], has similarly described exceeding a time-limit of 28 days for applying to that court for permission to appeal by 24 days as significant, and a delay of more than three months as serious.

The reasons why the default occurred

42. In relation to the second stage, and the reasons why the default occurred, the Appellant submits that the late appeal should be admitted due to the special circumstances that exist. Those special circumstances relate to the revenue determination that was issued in 2015, before being vacated in 2021 and replaced by a closure notice. We had the benefit of considering the contents of the Notice of Appeal, and the submissions made by the Appellant during the hearing. Having considered all of the evidence, we find that the issue of special circumstances does not arise in this application.

43. We accept that HMRC issued a revenue determination in 2015. This was, however, vacated in 2021 and it was replaced by a closure notice. The closure notice was followed by a statutory review, the conclusion of which was reached on 12 May 2022. The review conclusion letter included the following statement:

> *"**What happens next***
>
> *If you do not agree with my conclusion you can ask an independent tribunal to decide the matter. You must notify your appeal to the Tribunal in writing. The statutory appeal period is 30 days from the date of this letter.*
>
> *If you chose to appeal to HM Courts and Tribunal Service you will need to attach a copy of this letter with your appeal. If you do not then they may reject your appeal. You can find out how to do this on the Tribunals Service website https://www.gov.uk/tax-tribunal/appeal-to-tribunal."*

44. From the above, and contrary to the Appellant's assertions that he was not informed about how to appeal, the review conclusion letter set out, in clear terms, how and when an appeal should be made. The letter further included a hyperlink to assist. Furthermore, by his own email dated 30 May 2022, the Appellant acknowledged that he was aware of the need to make an appeal (in respect of the closure notice), as follows:

> *"Dear Mr Ahmed,*
>
> *...*
>
> *I wish to make a formal complaint for the reasons set out in my letter of 10th February 2022, attached.*
>
> *...*

The second issue in the paragraph above is urgent as I have until 15th June 2022 to decide if I wish to appeal to the tribunal service in respect of the review conclusion of the Closure Notice dated 12th May 2022…"

[Emphasis added]

45. We, therefore, find that the Appellant was aware of the need to make an appeal by the deadline specified. He was aware of this as long ago as May 2022. Whilst the Appellant subsequently commenced complaint proceedings against HMRC, we find that this did not prevent the Appellant from making an appeal to the Tribunal as the two-tier complaints process is completely separate from the Tribunal appeals process. This can be gathered from the contents of the Tier 2 response, dated 17 August 2022, as follows:

*"**My Role***

To clarify from the outset my role as a Complaint Investigator is to consider whether we have followed our guidance and policies correctly. I am unable to intervene in any matters which carry the right of appeal to Tribunal…"

46. We find that this is a clear exposition of the distinct nature of the complaints process. We find that the Appellant was, therefore aware that the closure notice did not form a part of his complaint in respect of the withdrawal of the revenue determination. Moreover, the Appellant was reminded of the need to make an appeal on 25 July 2023, as follows:

"In my letter dated 30 September 2022, I explained that the 2015 determination you wished to be reviewed had since been vacated, and as such it as not possible for any review of it to be carried out. I also set out that a closure notice was issued to you on 03 November 2021, which you had appealed and asked to be reviewed. The review of the decision in the closure notice dated 03 November 2021 was carried out, and you were notified on 12 May 2022 that the conclusion of the review was that the decision was to be upheld, which also explained that if you disagreed, you need to appeal to the tribunal.

…

Following your email of 17 October 2022, the next correspondence showing on your case file is out letter dated 31 March 2023, which explained to you that as we had not had notification of an appeal having been made to the tribunal, that we consider the matter settled and payment due

…

An appeal can now only be made against the closure notice, by way of asking the tribunal to accept your late appeal. Details of how to make such an appeal were included in our review conclusion letter dated 12 May 2022. You can also find more information on how to appeal to the tribunal on the GOV.UK website by searching 'Appeal to the tax tribunal.""

47. We are satisfied that there was nothing preventing the making of an appeal.

48. In *HMRC v Katib* [2019] UKUT 189 (TCC), the UT concluded that the lack of experience of the appellant and the hardship that is likely to be suffered was not sufficient to displace the responsibility on the appellant to adhere to time limits. The duty remains on the Appellant to ensure that his tax obligations are adhered to. In *Subway London Ltd. v HMRC* [2019] UKFTT 579 (TC), Judge Zaman summarised the reasoning of the UT in *Katib* as follows:

"64…

…

(5) the fact that the taxpayer did not have the expertise to deal with the dispute with HMRC himself does not weigh greatly in the balance since most people who instruct a representative to deal with litigation do so because of their own lack of expertise in this arena;

…

(9) ... The core point is that the taxpayer would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that could be propounded by large numbers of taxpayers, and it does not have sufficient weight to overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them."

49. As Moore-Bick LJ stated in *Hysaj, R (in the application of) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 ('*Hysaj*'), at [44], that:

> "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"

50. Whilst we accept that the Appellant is a truthful witness who wanted to resolve the complaint, we find that no good reason has been provided for the delay that has occurred in making an appeal against the closure notice. We are fortified in our view by the correspondence that was exchanged between the parties, which clearly specified the need to make a timely appeal.

Evaluating all of the circumstances

51. We turn to the third stage in the process; that of having regard to all the circumstances and the respective prejudice to the Appellant and to HMRC. The UT in *Martland* held that the balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost. The UT further made clear, as is apparent from the recent authorities, that the balancing exercise at this stage should take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost, and for statutory time limits to be respected.

52. The case of *Global Torch Ltd v Apex Global Management Ltd & Ors (No 2)* [2014] 1 WLR 4495, at [29], referred to the merits of the underlying case generally being irrelevant. As Moore-Bick LJ said in *Hysaj*, at [46], only where the court (or tribunal) can see without much investigation that the grounds of appeal are either very strong or very weak that the merits will have any significant part to play when it comes to balancing the various factors at stage-three of the process. That should not involve any detailed analysis of the underlying merits.

53. Similarly, in *Martland*, at [45] to [46], the UT highlighted the need for statutory time-limits to be respected. In so doing, the UT must have regard to any obvious strengths or weaknesses in the applicant's case.

54. In summary, the closure notice issued in the underlying appeal amended the Appellant's SDLT return as a result of the scheme land transaction being disregarded, and a 'notional transaction' pursuant to s 75A(b) FA 2003 being imposed. This resulted in undeclared tax liability.

55. In *Project Blue*, the Supreme Court was considering the provisions of sub-sale relief, pursuant to s 45 FA 2003, and the application of the anti-avoidance provisions in ss 75A to 75C. The scheme involved the Sharia-compliant financing known as "*Ijara*". The combined effect of sub-sale in the circumstances of that appeal was to exclude any SDLT charge.

56. The facts of the case were that Project Blue ('PBL') entered into a contract with the Ministry of Defence ('the MoD') to purchase Chelsea Barracks for £959,000,000. PBL later contracted to sub-sell the freehold to Bank Masraf al Rayan ('MAR') for consideration of £1.25 billion, payable in instalments. On the same date, MAR agreed to lease the barracks back to PBL. Two days later, on completion, MAR and PBL put options entitling, or requiring, PBL to repurchase the freehold in the barracks. On the same date, the MoD

conveyed the freehold to PBL and PBL conveyed the freehold to MAR. Immediately thereafter, MAR leased the barracks to PBL. PBL subsequently filed an SDLT return in respect of the contract between it and the MoD, claiming no liability to SDLT due to relief under s 45(3). MAR filed a return in respect of the sale agreement between it and PBL, stating the consideration to be £1.25 billion, and claiming exemption under s 71A(2) for this as the 'first transaction' under that sub-section.

57. The overall result was that PBL claimed no SDLT was payable under any of these transactions. It was common ground that the conveyance of the freehold to PBL and PBL's conveyance of it to MAR brought into play the sub-sale relief then available under s 45(3).

58. The Supreme Court held, reversing the decision of the Court of Appeal (Lord Briggs dissenting) that the vendor under s 71A(2) was PBL not MAR, hence MAR's purchase of the barracks from PBL was exempt from tax. Since the combined effect of sub-sale relief under former s 45(3), and exemption under s 71A(2), was to exclude any SDLT charge on both the sale from the MoD to PBL and the sale from PBL to MAR, the correct interpretation and application of s 75A had to be considered.

59. As the FtT, the UT and the Court of Appeal had earlier found, the existence of a tax-avoidance motive was not a requirement for the application of s 75A. Applying a purposive approach to the transactions in the "real-world", the purchaser in s 75A was PBL and not MAR, and the chargeable interest PBL acquired under s 75A(1) was the lease. The chargeable consideration for the notional transaction posited by s 75A was £1.25 billion, giving rise to tax due of £50,000,000. PBL had the right, under s 80, to claim repayment of so much of the tax as was due on the difference between the actual consideration paid by MAR and £1.25 billion, or £959,000,000. The Supreme Court, similarly, considered the correct interpretation of s 75A and came to the same conclusions.

60. The Appellant's appeal concerns the granting of a future option which is deemed (per *Fanning*) to neither be an 'other transaction' for the purposes of s 45, or to provide the Appellant with a right to call for conveyance unless the option was performed or completed at the same time as the original transaction between A and B. Therefore, the Appellant cannot benefit from relief pursuant to s 45 FA 2003. This position negates the need for further or alternative arguments (including s 75A) as the scheme transactions fall at the first hurdle when attempting to utilise the disregard provided within s 45.

61. The case of *Fanning* concerned the SDLT avoidance scheme (i.e., the sub-sale relief and option provisions in ss 45 and 46 FA 2003), which attempts to provide relief from SDLT under s 45 FA 2003 for the transaction undertaken between A and B by creating an option transaction between B and C.

62. In *Fanning*, the FtT had held that the grant of an option was an 'other transaction', for the purposes of s 45(1)(b) FA 2003, even though the option could not be exercised for five years, was not registered and could only be assigned with permission from the grantor. The FtT considered that it was sufficient for the grantee to rely on contractual rights should the grantor sell the property before the end of the option period. It was not, however, accepted that payment of the option grant price completed, or substantially performed, the secondary contract. Taking a purposive construction, the notional contract refers to the transfer of the property itself and payment of the full price, which can only be triggered after the exercise of the option. Therefore, sub-sale relief failed to apply. In a potential analysis of the effect of s 75A FA 2003, it was considered that only the grant of the option could be considered to be involved in connection with the earlier transactions, so, a charge under s 75A could not be regarded as deferred until the exercise of the option.

63. On appeal to the UT, the UT in *Fanning* found that the grant of the option was not an 'other transaction' for the purposes of s 45(1)(b). Therefore, there was no relief (as claimed). The condition in s 45(1)(b) had to be tested on the date on which the property was transferred to the taxpayer since its satisfaction, or otherwise, had a bearing on whether SDLT was chargeable on those transfers. At that time San Leon (Mr Fanning's company) had not exercised the option. Furthermore, the company was not entitled to exercise the option since the exercise period did not start until five years later. The option conferred no 'entitlement' on San Leon to obtain a conveyance of the property. In addition, the relevant statutory scheme showed that the kind of contingent future entitlement to a conveyance of the property that San Leon obtained under the option was not sufficient to engage s 45(1)(b).

64. The Court of Appeal agreed with the UT and held that the grant of the option was not an 'other transaction' for the purposes of s 45(1)(b) of the FA 2003, so that sub-sale relief was not available and, in view of that conclusion, the court did not need to consider whether s 75A applied to the transaction.

65. The Court of Appeal, ultimately, decided that in order for there to be relief, s 45(1)(b) FA 2003 required there to be an assignment, sub-sale or other transaction under which a taxpayer would become entitled to call for a conveyance of the property no later than the completion of the same sale to the taxpayer. The grantee of an option, however, had no such entitlement unless, and until, the option is exercised. The grant of an option did not meet the requirements of s 45(1)(b) FA 2003 if it was exercised before completion and is not an 'other transaction'. This is the statutory scheme pursuant to s 45. The court was satisfied that this conclusion was consistent with the policy objectives, and that Parliament could not readily be taken to have intended s 45 to be a means of avoiding SDLT by the grant of an option when the original buyer ended up with enjoyment of the property, rather than the purchaser, under the sub-sale.

66. We are satisfied that the Appellant's case is on all-fours with the appeal in *Fanning* and we find that there is considerable force in HMRC's submission that the Appellant's case is weak.

67. It is important that time-limits are observed, and so leave to appeal out of time should therefore only be exceptionally granted. HMRC, and therefore the public in general, have the right to finality in tax affairs. Where a taxpayer does not observe the time limits, that should ordinarily be the end of any dispute over liability.

68. As the UT in *Romasave*, held, at [96]:

> "permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely."

69. This was also so in *Martland*, at [34]:

> "… the purpose of the time limit is to bring finality, and that is a matter of public interest, both from the point of view of the taxpayer in question and that of the wider body of taxpayers."

70. We accept that if the Appellant is unable to pursue his appeal, he will not have an opportunity to challenge the decision. The courts and tribunals have consistently emphasised the public interest in the finality of litigation, and the purpose of a time limit being to bring finality: see, for example, *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 and *Data Select*.

71. Having considered all of the evidence, we satisfied that the balance between the prejudice to the Appellant, the prejudice to HMRC and the administration of justice through

the finality of litigation falls firmly on the side of an extension of time being refused. We have balanced the competing interests and the arguments presented by the parties.

Ancillary matter: The complaint

72. The Appellant submits that HMRC have acted otherwise than in accordance with their Charter. We accept that HMRC acknowledged mistakes that were made following the revenue determination. However, the FtT does not have any supervisory jurisdiction over HMRC. We have considered the case of *R & C Comrs v Hok Ltd* [2012] UKUT 363 (TCC); [2013] STC 255. We have also considered the case of *Rotberg v R & C Comrs* [2014] UKFTT 657 (TC), where it was accepted that the FtT's jurisdiction went only to determining how much tax was lawfully due and not the question of whether HMRC should, by reason of some act or omission on their part, be prevented from collecting tax otherwise lawfully due. The UT held, at [109], that the FtT has no general supervisory jurisdiction. Applying *Aspin v Estill* [1987] STC 723, the UT found, at [116], that the jurisdiction of the FtT in cases of that nature was limited to considering the application of the tax provisions themselves.

73. In *Marks & Spencer plc v C & E Comrs* [1999] STC 205, at 247, Moses J said this:

> "…in so far as the complaint is not focused upon the consequences of the statute but rather upon the conduct of the Commissioners then it is clear the Tribunal had no jurisdiction. It jurisdiction is limited to decisions of the Commissioners and it has no jurisdiction in relation to supervision of their conduct."

74. This principle was applied by Warren J in *HMRC v Abdul Noor* [2013] UKUT 071, at [28].

RIGHT TO APPLY FOR PERMISSION TO APPEAL

75. 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.

NATSAI MANYARARA
TRIBUNAL JUDGE

Release date: 05th SEPTEMBER 2024