Neutral Citation: [2024] UKFTT 00808 (TC)

Case Number: TC09282

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video/telephone hearing

Appeal reference: TC/2022/13631

SDLT. Whether the transaction involved a "Type A" transaction within the meaning of paragraph 14(3A) Schedule 15 to the FA 2003. Whether paragraph 2(4A) of Schedule 7 to the FA 2003 operated to deny group relief to the Appellant. Whether section 75A of the Finance Act 2003 applied. Big Bad Wolff Ltd v HMRC [2019] UKUT 12, Blackrock HoldCo 5, LLC v Revenue and Customs Comrs [2024] STC 740, Kwik-Fit Group Ltd v Revenue and Customs Comrs [2024] STC 897, JTI Acquisition Company (2011) Ltd v Revenue and Customs Comrs [2024] EWCA Civ 652, Inland Revenue Commissioners v Willoughby [1997] 1 WLR 1071) considered applied.

Heard on: 17-19 July 2024
Judgment date: 6 September 2024

Before

HIS HONOUR JUDGE MALEK

Between

BRINDLEYPLACE HOLDINGS S.À R.L

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr. Jonathan Peacock KC of counsel and Ms. Sarah Black of counsel, instructed by Bryan Cave Leighton Paisner.

For the Respondents: Ms. Rebecca Murray of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs.

DECISION

INTRODUCTION

1. This hearing was conducted remotely by 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.

2. This is an appeal by Brindleyplace Holding S.à r.l ("**BP Holding**") against an assessment to Stamp Duty Land Tax ("**SDLT**") following its acquisition in March 2015 of the partnership interest in Tritax Brindleyplace (7, 8 & 10) Limited Partnership (the "**BP ELP**") (the "**Acquisition**"), and the subsequent transfer to it, in May 2015, of the land and buildings known as 7, 8 and 10 Brindleyplace, Birmingham B1 2JA (the "**Properties**").

3. The Respondents issued two closure notices to BP Holding in respect of these transactions, both dated 9 September 2022:

(1) Closure Notice 1 – amends the SDLT return 508702222MB to increase the SDLT liability from nil to £2,842,065.

(2) Closure Notice 2 – amends the SDLT returns 508709522MC, 508709509MK, 508709518ML, and 508702205MB to increase the SDLT liability from nil to £5,229,200 from those returns.

Collectively (the "**Closure Notices**").

4. The total SDLT liability arising from the Closure Notices is therefore £8,071,265 (plus interest).

EVIDENCE AND FINDINGS OF FACT

5. In this case the pertinent facts are mainly to be discerned from contemporaneous documents and are, in most parts, uncontroversial. In addition to the documents, I heard oral testimony on behalf of BP Holding from (a) Mr. Chris Gilchrist-Fisher who is a Senior Director of CBRE Investment Management (formerly known as CBRE Global Investors) ("**CBRE**"), and (b) Mr. Harald Floeer who is a Managing Director in the Portfolio Management department of CBRE. They were both cross-examined on behalf of the Respondents and I had, in the usual way, an opportunity to ask questions of them.

6. In an attempt to ensure that this decision is no longer than absolutely necessary I have sought to restrict myself to making findings of fact which are pertinent to the issues argued before me, which issues in turn are (thanks to the efforts made by the parties) relatively discrete.

The Appellant and associated entities

7. BP Holding, the Appellant, is a company, which was incorporated in Luxembourg on 10 February 2015. At the time of the Acquisition, the Appellant was wholly owned by BAEK SICAV-FIS, a Luxembourg entity, which was, in turn, owned by several German Pension Schemes ("**Versorgungswerke**").

8. Brindleyplace Partner S.á r.l ("**BPPS**") was incorporated in Luxembourg on the same day and was also wholly owned by BAEK SICAV-FIS.

9. Verwaltungsgesellschaft fur Versorgungswerke mbH ("**VGV**") is a subsidiary of, and advisor to Versorgungswerke.

10. CBRE, a global real estate asset investment management firm, acts for VGV as one of its portfolio managers.

Background to the acquisition

11. Prior to the Acquisition, the Properties were held by BP ELP, which was a property investment partnership within the meaning of paragraph 14(8) of Schedule 15 to the Finance Act 2003 ("FA 2003").

12. Prior to 24 March 2015, the partners in BP ELP were:

(1) Tritax Brindleyplace (7, 8 & 10) Trustee Limited (the "**Trustee**"), as trustee of Tritax Brindleyplace (7, 8 & 10) Unit Trust (the "**JPUT**"),

(2) Tritax Brindleyplace (7, 8 & 10) GP Limited (the "**GP**") as the general partner for BP ELP; and

(3) Tritax BBP 7, 8 & 10 (Carry) LP (the "**Carry LP**"), a Scottish Limited Partnership.

13. Pursuant to a sale and purchase agreement (the "**SPA**") entered into on 18 February 2015, which completed on 24 March 2015:

(1) the Appellant purchased:

(a) 99.8% of the units in the JPUT;

(b) the entire issued share capital of the GP; and

(c) the partnership interest held by the Carry LP in BP ELP

for consideration of £59,611,019; and

(2) BPPS acquired the remaining 0.2% of the units in the JPUT for consideration of £100,000.

14. In accordance with clause 6.2(d)(ii) of the SPA, also on 24 March 2015, the Appellant paid, for and on behalf of BP ELP, the amount of £71,051,644 to Barclays Bank PLC (the "**Debt**") to discharge BP ELP's existing debt that it owed to Barclays Bank PLC.

15. On 8 May 2015, the Appellant subscribed £71,051,644 for the issue of additional units in the JPUT. The Appellant issued a promissory note to the JPUT in satisfaction of the consideration for the issue of the additional units (the "**Promissory Note**").

16. On the same day:

(1) The JPUT contributed the Promissory Note to BP ELP by way of capital;

(2) BP ELP assigned the Promissory Note to the Appellant in discharge of the Debt; and

(3) BPPS redeemed its units in the JPUT for £100,000.

17. On 8 May 2015, in accordance with the terms of the trust instrument establishing JPUT, the Trustee distributed its interest in BP ELP in specie to the Appellant upon the termination and winding up of the JPUT. At this point the partners in BP ELP were the Appellant and the GP.

18. Also on 8 May 2015, the GP and Tritax Brindleyplace (7, 8 & 10) Nominee Limited ("**BP Nominee**"), acting as the bare trustees for BP ELP, distributed the Properties to the Appellant (the sole limited partner in BP ELP) upon the termination and winding up of BP ELP. BP Nominee was a wholly owned subsidiary of the GP.

19. Following the above transactions (the "**Transactions**"), the Appellant was the sole legal and beneficial owner of the Properties.

20. At all material times, the Properties had a market value of £130,730,000.

The enquiry and appeal

21. On 5 June 2015, KPMG (on behalf of the Appellant) submitted seven SDLT returns with the following UTRNs: 508702222MB, 508709522MC, 508709509MK, 508702212MV, 508709518ML, 508702205MB and 508709539MT (the "**SDLT Returns**") to the Respondents:

(1) one in respect of the transfer of the interest in BP ELP to the Appellant by the Trustee (see 17); and

(2) six in respect of the transfer of the interests comprising the Properties from BP ELP to the Appellant (see 18 above).

22. The figures used in the SDLT Returns were based on the valuation that Savills plc prepared for the lender. The total consideration of the linked transactions was £130,730,000.

23. On 23 December 2015, the Respondents opened an enquiry into the SDLT Returns.

24. There followed correspondence between the Respondents and the Appellant's representatives in which the latter provided information and documentation to the Respondents and the parties set out their respective analyses of the tax treatment.

25. The Appellant's representatives applied on 10 May 2022 to the Tribunal for a closure notice to be issued. The Respondents agreed to issue closure notices.

26. On 9 September 2022, the Respondents issued two closure notices, closing its enquiry into the SDLT Returns.

27. Closure Notice 1 relates to the acquisition of the partnership interest in BP ELP by the Appellant on 8 May 2015 (see 17 above). By Closure Notice 1, the Respondents amended return 508702222MB to increase the SDLT liability to £2,842,065.

28. Closure Notice 2 relates to the distribution of the Properties to the Appellant BP ELP on 8 May 2015 (see 18 above). By Closure Notice 2, the Respondents amended the returns with UTRNS 508709522MC, 508709509MK, 508709518ML and 508702205MB so as to increase the SDLT liability arising from these returns to £5,229,200.

29. The total SDLT liability arising as a result of the amendments made by Closure Notice 1 and Closure Notice 2 is £8,071,265 (plus interest).

30. The Appellant served its notices of appeal against the Closure Notices on the Respondents on 3 October 2022 and transmitted its notices of appeal to the Tribunal on 6 October 2022.

THE LEGAL FRAMEWORK

31. The relevant statutory framework is not contentious. Section 43 Finance Act 2003 gives the meaning of a "land transaction" as –

> "(1) In this Part a "land transaction" means any acquisition of a chargeable interest.
>
> As to the meaning of "chargeable interest" see section 48.
>
> …
>
> (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."

32. Section 48 provided:

> "(1) In this Part "chargeable interest" means –
>
> (a) an estate, interest, right or power in or over land in England and Wales or Northern Ireland11, 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."

33. Section 49 provides:

> "(1) A land transaction is a chargeable transaction if it is not a transaction that is exempt from charge.
>
> (2) Schedule 3 provides for certain transactions to be exempt from charge.
>
> Other transactions are exempt from charge under other provisions of this Part."

34. Section 50 provides:

> "(1) Schedule 4 makes provision as to the chargeable consideration for a transaction."

35. Section 62 provides:

> "(1) Schedule 7 provides for relief from stamp duty land tax.
>
> (2) In that Schedule –
>
> Part 1 makes provision for group relief,
>
> …
>
> (3) Any relief under that Schedule must be claimed in a land transaction return or an amendment of such a return."

36. Section 75A provides:

> "(1) This section applies where-
>
> (a) one person (V) disposes of a chargeable interest and another person (P) acquires with it or a chargeable interest deriving from it,
>
> (b) a number of transaction (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 transaction 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) …
>
> (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) …"

37. Section 75C provides:

> "(1) A transfer of shares or securities shall be ignored for the purposes of section 75A if but for this subsection it would be the first of a series of scheme transactions.

(2) The notional transaction under section 75A attracts any relief under this Part which it would attract if it were an actual transaction (subject to the terms and restrictions of the relief).

…"

38. Schedule 7 to FA 2003 provides:

"**Group Relief**

1

(1) A transaction is exempt from charge if the vendor and purchaser are companies that at the effective date of the transaction are members of the same group.

(2) For the purposes of group relief –

(a) "company" means a body corporate, and

(b) companies are members of the same group if one is the 75% subsidiary of the other or both are 75% subsidiaries of a third company.

(3) For the purposes of group relief a company ("company A") is the 75% subsidiary of another company ("Company B") if company B –

(a) is beneficial owner of not less than 75% of the ordinary share capital of company A,

(b) is beneficially entitled to not less than 75% of any profits available for distribution to equity holders of company A, and

(c) would be beneficially entitled to not less than 75% of nay assets of company A available for distribution to its equity holders on a winding-up.

(4) The ownership referred to in sub-paragraph (3)(a) is ownership either directly or through another company or companies.

…

(7) This paragraph is subject to paragraph 2 (restrictions on availability of group relief) and paragraphs 3 and 4A (withdrawal of group relief).

Restrictions on availability of group relief

2

(4A) Group relief is not available if the transaction –

(a) is not effected for bona fide commercial reasons, or

(b) forms part of arrangements of which the main purpose, or one of the main purposes, is the avoidance of liability to tax.

"Tax" here means stamp duty, income tax, corporation tax, capital gains tax, or tax under this Part.

(5) In this paragraph –

"arrangements" includes any scheme, agreement or understanding, whether or not legally enforceable; and

"control" has the meaning given by section 1124 of the Corporation Tax Act 2010."

39. Schedule 15 to FA 2003 relevantly provides:

> "**Transfer of a chargeable interest to a partnership: general**
>
> **1**
>
> This paragraph applies where –
>
> (a) A partner transfers a chargeable interest to the partnership, or
>
> (b) A person transfers a chargeable interest to a partnership in return for an interest in the partnership, or
>
> (c) A person connected with –
>
> (i) A partner, or
>
> (ii) A person who becomes a partner as a result of or in connection with the transfer,
>
> Transfers a chargeable interest to the partnership.
>
> It applies whether the transfer is in connection with the formation of the partnership or is a transfer to an existing partnership.
>
> ….
>
> **Transfer of interest in property-investment partnership**
>
> **14**
>
> (1) This paragraph applies where-
>
> (a) there is a transfer of an interest in a property-investment partnership.
> (b) …and
>
> (c) the relevant partnership property includes a chargeable interest.
>
> (2) The transfer –
>
> (a) shall be taken for the purposes of this Part to be a land transaction;
>
> (b) is a chargeable transaction.
>
> (3) The purchaser under the transaction is the person who acquires an increased partnership share or, as the case may be, becomes a partner in consequence of the transfer.
>
> (3A) A transfer to which this paragraph applies is a Type A transfer if it takes the form of arrangements entered into under which –
>
> (a) the whole or part of a partner's interest as partner is acquired by another person (who may be an existing partner), and
>
> (b) consideration in money or money's worth is given by or on behalf of the person acquiring the interest.
>
> (3B)…
>
> (3C) Any other transfer to which this paragraph applies is a Type B transfer.
>
> (4) …
>
> (5) the "relevant partnership property" in relation to a Type A transfer of an interest in a partnership, is every chargeable interest held as partnership property immediately after the transfer, other than –

(a) any chargeable interest that was transferred to the partnership in connection with the transfer;

…

(6) The chargeable consideration for the transaction shall be taken to be equal to a proportion of the market value of the relevant partnership property.

(7) That proportion is-

(a) If the person acquiring the interest in the partnership was not a partner before the transfer, his partnership share immediately after the transfer;

(b) If he was a partner before the transfer the difference between his partnership share before and after the transfer.

(8) In this paragraph –

"property-investment partnership" means a partnership whose sole or main activity is investing or dealing in chargeable interests (whether or not that activity involves the carrying out of construction operations on the land in question);

…

Interpretation: transfer of interest in a partnership

36

For the purposes of this Part of this Schedule, where a person acquires or increases a partnership share there is a transfer of an interest in the partnership (to that partner and from the other partners).

ISSUES IN THE CASE

40. The parties are agreed that the issues that are required to be determined by me in this appeal are as follows:

(1) In respect of Closure Notice 1:

(a) Whether as the Respondents contend, the transfer mentioned at paragraph 17 above is a Type A transfer within paragraph 14(3A) of Schedule 15 to FA 2003, so that SDLT is payable in respect of chargeable consideration equal to the market value of the Properties (i.e., £130,730,000).

(2) In respect of Closure Notice 2:

(a) Whether, as the Respondents contend, group relief is not available in respect of the transfer mentioned at paragraph 18 because paragraph 2(4A) of Schedule 7 to FA 2003, applies, and accordingly SDLT is payable in respect of chargeable consideration equal to the market value of the Properties (i.e. £130,730,000); alternatively

(b) Whether section 75A applies to the transactions which are the subject of Closure Notice 2 and, if so, the amount of the chargeable consideration in respect of which SDLT is payable.

DISCUSSION

41. As I have set out elsewhere in this judgment the issues are relatively discrete. Although nothing much turns on the point, I have, as might be expected, in mind the relevant burden and standard of proof. It is, of course, for the Appellant to prove its case on the balance of probabilities.

Closure Notice 1 and "Type A" transaction

42. The Respondents have issued Closure Notice 1 on the basis that there is a "Type A" transaction within the meaning of paragraph 14(3A) Schedule 15 to the FA 2003.

43. As can readily be seen from paragraph 14(3A) a "Type A" transfer must, firstly, take the form of arrangements under which the whole or part of a person's interest as a partner is acquired by another person. There is no dispute between the parties that this occurred here.

44. The second limb of the test under paragraph 14(3A) requires there to have been consideration in money or money's worth given by or on behalf of the person acquiring the interest. The Appellant argues that no such consideration was given by or on behalf of BP Holding for the acquisition of the interest in BP ELP and, therefore, this was not a "Type A" transaction. In order for there to be a "Type A" transaction, it is argued by the Appellant, there needs to be a transfer of a partnership interest, with consideration being paid for the acquisition of that partnership interest. In short, the consideration must be given for the acquisition of the partnership interest, and not for something else. The only consideration given by BP Holding here was not for the acquisition of a partnership interest, but the sum paid to the JPUT (the £71,071,644) which was given in consideration for the issue of additional units in the JPUT.

45. The Respondents' response to this is to point to the statutory wording, arguing that paragraph 14(3A) does not state that consideration must be given for the transfer. Instead, it states that consideration must be given (i) by or on behalf of the person acquiring the partnership interest, and (ii) under the same arrangements under which the partnership interest is acquired.

46. There is no argument that in determining the application here of the relevant statutory provisions it is necessary to consider and apply the relevant principles of statutory construction, namely to interpret the provisions as a whole, in their proper context, and with a view to discerning the intention of Parliament (see *R (Project for the Registration of Children As British Citizens), R (O) v Secretary of State for the Home Department [2022] UKSC 3, [2023] AC 255 at [29] to [31],* and *Rossendale BC v Hurstwood Properties (A) Ltd, Wigan Council v Property Alliance Group Ltd [2021] UKSC 16, [2022] AC 690)*. In the same way there can be no argument that Explanatory Notes to Finance Bills can be relied upon as aids to construction as they "...cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed…". However,

> "24....the relevance of Explanatory Notes should not be overstated. It is important to bear in mind that Explanatory Notes might simply reflect the views of the Government (as distinct from Parliament) and, moreover, that Explanatory Notes will often include summaries of statutory provisions prepared by people who are unskilled in statute law.
>
> 25. Thus, in R (Westminster City Council) v National Asylum Support Service Lord Steyn said at [6] of his speech:

> 'What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted.'" *Big Bad Wolff Ltd v HMRC [2019] UKUT 121* at [23] to [26].

47. The relevant parts of the Explanatory Notes to clause 94 of and schedule 31 to the Finance Bill 2008 (which enacted paragraph 14(3A)) (the "**Explanatory Notes**") provide as follows:

> "1. Clause 94 and Schedule 31 contain amendments to paragraph 14 of Schedule 15 to the Finance Act (FA) 2003 to ensure that, where there is a transfer of an interest in a property within an investment partnership, there will be no charge to stamp duty land tax (SDLT).
>
> ...4. Paragraph 1 of the Schedule amends paragraph14 of Schedule 15 to FA 2003 relating to SDLT chargeable on transfers of interests in property-investment partnerships. This paragraph has placed a charge for SDLT on the transfer of an interest in a property within an investment partnership.
>
> ...7. New sub-paragraph (3A) provides that a transfer to which this paragraph applies is a Type A transfer if:
>
> - It takes the form of arrangements entered into under which:
> - A partner transfers the whole or part of his interest as partner to another person (who may be an existing partner); or
> - A person becomes a partner and an existing partner reduces his interest in the partnership or ceases to be a partner, and
> - Consideration is given for the transfer.
>
> This sub-paragraph sets to the types of transactions to which the relief from SDLT given by this clause will apply." [Emphasis added].

48. The starting point is, of course, to look at paragraph 14(3A)(b). Read literally, I agree with HMRC, that a Type A transfer requires only that the transfer forms part of arrangements under which a partner's interest is acquired by another and consideration is given by or on behalf of the person acquiring the interest. On the face of it, there is no additional requirement for the consideration to be given to or for the benefit of a particular person (such as the vendor) and neither is there any requirement for the consideration to be given for the transfer in question. However, the Rubicon with regards to the purposive as opposed to literal interpretation of taxing statutes was crossed long ago.

49. When one considers the Explanatory Notes it is clear that Parliament intended that it be a requirement for a Type A transfer that consideration is given for the transfer because the Explanatory Note expressly says so. This makes eminent sense in light of the background note set out in the Explanatory Notes. In summary, these notes show that the FA 2007 had introduced changes that tackled schemes which allowed payment of SDLT to be avoided; but after the FA 2007 had received Royal Assent some property investment partnerships raised concerns that the legislation meant that each time there was a change in the size of share held within the property-investment partnership there is a charge for SDLT regardless of whether there was any consideration paid for the change and regardless of whether the parties involved in the transaction were connected with each other in any way. In response the Finance Bill 2008 proposed amendments to the FA 2003 inserted by FA 2007 (which bill was

ultimately enacted) to "ensure that where there is a transfer of an interest in a property within an investment partnership, there will be no charge to SDLT".

50. Whilst I accept that there is a risk that, as a general rule, Explanatory Notes may be wrong or misleading I do not think that this is the case here. Firstly, the Explanatory Notes appear to be clear and, as I have set out above, internally consistent. Secondly, although it was submitted on behalf of the Respondents that it would be "wrong to read anything in from the Explanatory Notes" and that "paragraph 7 of the Explanatory Notes gives an inaccurate description of paragraph 14(3A)" it was not all clear to me as to why it would be wrong for me to read anything from the Explanatory Notes or why the Explanatory Notes gave an inaccurate description of paragraph 14(3A).

51. Naturally, there could be situations where the explanatory notes urge a result which is illogical or absurd. Given that Explanatory Notes are not themselves statute (often including only summaries of the statutory provisions) and may not be prepared by people who are skilled in statutory interpretation I readily accept that where this is the case (i.e. where the explanatory notes urge an illogical or absurd interpretation) a court should have no difficulty in rejecting these type of explanatory notes as worthless. I detect such an argument in HMRC's submissions that paragraph 14(3A) cannot be read as impliedly providing that consideration must be given for the acquisition of the partnership interest because:

> (1) then the express requirement that the consideration must be given under arrangements under which the partnership interest is acquired would be a waste of ink; and
>
> (2) then the express requirement that the consideration must be given by or on behalf of the person acquiring the interest (rather than by any other person) would not make any sense.

52. I disagree. There is nothing otiose in requiring that the partnership interest must be transferred under an arrangement and, in addition, consideration be paid by or on behalf of the acquirer <u>for the transfer</u>. The first limb fixes the transfer of the partnership interest to an arrangement. The second limb fixes the transfer of the partnership interest to consideration. You could have a transfer of a partnership interest under an arrangement, but no consideration in relation to the transfer of the partnership interest.

53. Further the requirement that the consideration must be given by or on behalf of the person acquiring the interest does make sense. The point is that not only must the transfer be under an arrangement and consideration must be given by or on behalf of the acquirer, but the consideration must also be given for the transfer. Otherwise, as Mr. Peacock rightly points out, an innocent payment of legal fees, for example, by a party to the transaction to his solicitors in relation to the transfer could be caught. This is because the fees would be paid as part of an arrangement and by the person acquiring the partnership interest and that is all, according to the Respondents, that is required.

54. In summary, it is now not only permissible or desirable for a judge to interpret taxing statutes purposively, but s/he is probably under a positive duty to do so. I say "probably" only because it was not a point on which anything in this case turned and I did not hear argument on it. Explanatory notes (together with Hansard) provide a valuable window into the mind of Parliament and used judiciously offer a valuable aid to interpretation. That these materials should not supplant the statute itself goes, in my view, without saying. With that caveat (namely that they are an aid to interpretation and not statute) explanatory notes are often, as in the present case, of enormous help. In the present case not only did the Explanatory Notes

clarify that Parliament intended that the consideration must have been paid on or behalf of the acquirer for the transfer, but there was nothing to suggest that the Explanatory Notes were wrong or misleading. Nor could it be said, in the present case, that the Explanatory Notes urged an interpretation of the statute that was illogical or absurd.

55. For the reasons given, the Appellant's appeal in respect of Closure Notice 1 must succeed.

Closure Notice 2

56. Closure Notice 2 was issued by the Respondents on the basis that (1) Group Relief was not available in respect of the Transactions and specifically that paragraph 2(4A) of Schedule 7 to FA 2003 is engaged; or, alternatively, (2) that the conditions of s.75A FA 2003 are met.

Group relief

57. As set out earlier in this judgment paragraph 2(4A) of Schedule 7 to the FA 2003 operates to deny group relief in respect of a transaction where that transaction (a) is not effected for bona fide commercial reasons, or (b) forms part of arrangements (defined as including any scheme, agreement or understanding, whether or not legally enforceable) of which the main purpose, or one of the main purposes, is the avoidance of liability to tax (defined as including SDLT).

Bona fide commercial reasons

58. In so far as section 2(4a)(a) is concerned there is no dispute between the parties as to the meaning of the sub-section. The parties simply join issue as to whether or not the Transaction was effected for bona fide commercial reasons. The Respondents contend that the transfer of the Properties to the Appellant was not effected for bona fide commercial reasons. This is because, it is submitted, it was not a transaction with a third party, but instead was a purely internal transaction, and there was no business reason for it, the only reason being to avoid an income tax "leakage" of the JPUT being a non-UK resident landlord holding the Properties and receiving rental income on which basic rate tax would be deducted at source.

59. This submission was expanded upon in the Respondents' note on the evidence wherein it was said that there is no commercial reason supported by documentary or witness evidence for the acquisition by the Appellant of the Properties once the JPUT had been acquired, the reasons evidenced are all tax reasons.

60. Further, it was submitted by the Respondents, that no evidence had been adduced of a regulatory reason as to why the Properties could not continue to be held by the JPUT.

61. Dealing with the latter point first; clearly, if there was a regulatory prohibition on the JPUT continuing to hold the Properties then that would be, in my view, clear commercial justification for the JPUT not continuing to hold the Properties. However, it does not follow that absent regulatory prohibition no commercial reason can exist or was demonstrated by the Appellant for the transfer of the Properties from BPUT.

62. A fair assessment of the documentary evidence and that given by Messrs. Floeer and Gilchrist-Fisher suggests, importantly, that:

(1) It was open for the Appellant to have purchased the properties directly (an asset sale) or indirectly by purchasing units in JPUT (a share sale). One of the reasons why the Appellant chose to purchase the properties through a share sale is because this led to a lower tax burden and the Appellant was able, as a result, to offer a higher price for the properties.

(2) The structure acquired was complex and it was unusual for a German occupational pension fund to hold an asset through this type of structure.

(3) Collapsing the structure would make it leaner and thereby reduce the administration costs.

63. The desire to reduce complexity in the holding structure and reduce administration costs in the manner described and evidenced is, in my view, a sufficiently commercial reason such that it cannot be said that there was no commercial reason for the transfer of the Properties from the JPUT to the Appellant.

64. It follows then that this part of the transaction was, in my view, carried out for bona fide commercial reasons.

Tax avoidance as the main or one of the main purposes

65. The parties agree that, in relation to paragraph 2(4A)(b) the test here is very similar to that in the second limb of section 137(1) of the Taxation of Chargeable Gains Act 1992 which was recently considered by the Court of Appeal in *Delinian v HMRC [2023] EWCA 1281* at [27], approving the interpretation which had been adopted by the Chancellor in *Snell v HMRC[2007] STC 1279,* to the effect that the second limb involves two factual issues. In the present context, those issues are: (1) was the transfer of the Properties part of arrangements as defined, and if so, what were they? (2) did the purpose of such arrangements include the avoidance of SDLT, and was that a main purpose?

66. The Court of Appeal has, further, considered what amounts to an "unallowable" main tax purpose in this context in *Blackrock HoldCo 5, LLC v Revenue and Customs Comrs [2024] STC 740* ("**Blackrock**"), *Kwik-Fit Group Ltd v Revenue and Customs Comrs [2024] STC 897* ("**Kwik-Fit**"), and *JTI Acquisition Company (2011) Ltd v Revenue and Customs Comrs [2024] EWCA Civ 652* ("**JTI**"). In particular the following principles apply (see Blackrock [124], cited in Kwik-Fit at [54] and JTI at [27]):

> (a) "Save in 'obvious' cases, ascertaining the object or purpose of something involves an inquiry into the subjective intentions of the relevant actor.
>
> (b) Object or purpose must be distinguished from effect. Effects or consequences, even if inevitable, are not necessarily the same as objects or purposes.
>
> (c) Subjective intentions are not limited to conscious motives.
>
> (d) Further, motives are not necessarily the same as objects or purposes.
>
> (e) 'Some' results or consequences are 'so inevitably and inextricably involved' in an activity that, unless they are merely incidental they must be a purpose for it.
>
> (f) It is for the fact finding tribunal to determine the object or purpose sought to be achieved, and that question is not answered simply by asking the decision maker."

67. As for the meaning of "main" in reference to "main purpose" the parties are agreed that the best guidance that can be provided is to be found at [48] *Travel Document Service v HMRC [2018] EWCA Civ 549* ("**Travel Document Service**") where it was held that "main" in this context has a "connotation of importance". If one was looking simply at a "main" purpose (singular) then I should venture "primary" purpose as very good proxy or working definition. The difficulty, however, is that here we are also looking at "one of the main purposes" (plural). Given the obvious difficulties in having more than one "primary" purpose; it is, therefore, not surprising that in *Travel Document Service* the Court of Appeal was forced to conclude that, in this context, "main purpose(s)" denotes a "connotation of importance".

68. In my judgment, after applying the above-mentioned guidance, when looking for the main purpose or one of the main purposes, another way of asking the same question is to ask whether tax avoidance was either (1) the most important or one of the most important purposes, or (2) an important or one of the important purposes. I appreciate that there is a difference between the two formulations that I have set out, but because I did not hear full arguments on the point and because my decision does not turn on the issue I leave further finessing to another case.

69. There is no dispute between the parties that the transfer of the Properties formed an arrangement or part of arrangements represented by the Transactions. However, Mr. Peacock argued, in short, that before one even starts to delve into the subjective intentions (or conscious motives) of the Appellant (or other actors) consideration must be given to what is meant by "avoidance".

70. The issue was tackled some 27 years ago in *Inland Revenue Commissioners v Willoughby [1997] 1 WLR 1071 ("***Willoughby***"),* a decision of the House of Lords, where Lord Nolan said at [1079]:

> "In order to understand the line thus drawn, submitted Mr. Henderson, it was essential to understand what is meant by tax avoidance for the purposes of Section 741. Tax avoidance was to be distinguished from tax mitigation. The hallmark of tax avoidance is at the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option. Where the taxpayers chosen course is seen upon examination to involve tax avoidance (as opposed to tax mitigation), it follows that tax avoidance must be at least one of the taxpayer's purposes in adopting that course, whether or not the taxpayer has formed the subjective motive of avoiding tax.
>
> My Lords, I am content for my part to adopt these propositions as a generally helpful approach to the elusive concept of tax avoidance, the more so since they owe much to the speech of Lord Templeman and Lord Goff of Chiveley in *Ensign Tankers (Leasing) Limited v Stokes [1992] A.C. 675c – 676f, 681b-e*. One of the traditional functions of the tax system is to promote socially desirable objectives by providing a favourable tax regime for those who pursue them. Individuals who make provision for their retirement or for greater financial security are a familiar example of those who received such fiscal encouragement in various forms of the years. This, no doubt, is why

> the holders of qualifying policies, even those issued by non-resident companies, were granted exemptions from tax on the benefits received. In a broad colloquial sense tax avoidance might be said to have been one of the main purposes of those who took out such policies, because plainly freedom from tax was one of the main attractions. But it would be absurd in the context of section 741 to describe as tax avoidance the acceptance of an offer of freedom from tax which Parliament has deliberately made. Tax avoidance within the meaning of section 741 is a course of action designed to conflict with or defeat the evident intention of Parliament. In saying this, I'm attempting to summarise, I hope accurately, the essence of Mr Henderson' submissions, which I accept."

71. Whilst Lord Nolan's speech relates to section 741 of the Income and Corporation taxes Act 1988 it is, I think, common ground between the parties that the statutory language is so similar so as to make any distinction (for present purposes) meaningless. If I am mistaken and this was not common ground between the parties then I should equally be content to hold that, for my part, I can (again for present purposes) decipher no point of difference in the statutory language.

72. Mr. Peacock submitted that SDLT applies to the transfer of a chargeable interest in land. SDLT does not apply to the transfer of shares or securities. Parliament had thus made a choice: to charge SDLT on the transfer of a chargeable interest in land, but not on the transfer of shares or securities (on which other taxes such as Stamp Duty or Stamp Duty Reserve Tax may apply). Where a company holds property (a chargeable interest in land), the vendor, therefore, has the option to sell (and the buyer has the option to buy) either the property itself or shares in the company holding the property. The parties have the freedom to choose and choosing the option which, obviously, results in a smaller tax burden (whilst accepting the economic consequences of that choice) cannot, in any meaningful way at least, be described as tax avoidance. The parties decided to proceed by way of share (or unit) sale and there is no suggestion that the economic consequences of doing so have been avoided. I agree and doubt very much whether, if that was all that was involved in the Transactions, this matter would have ended up being heard on appeal.

73. In much the same way, by enacting Part 1 of Schedule 7 to the FA 2003, Parliament has decided to relieve from SDLT the transfer of a chargeable interest in land where the transfer is between companies forming part of the same group. By choosing to take advantage of a relief expressly provided for by Parliament, Mr. Peacock submits, you cannot, again, be said to be avoiding tax. Again, I agree. Again, I doubt there would be much controversy if this was all that the Transactions involved.

74. However, what if there is a decision to purchase shares (or units) and then subsequently take advantage of the group relieving provisions relating to the SDLT? What if the two steps (as happened in this case) take place relatively soon after one another? And, what if, as in the present case, forethought was applied and a plan set in place at the outset detailing the steps, the order and the timeframe in relation to each step and then executed in line with the plan? To my mind this makes no difference and does not take what would otherwise not be 'tax avoidance' into the realms of that which is. Putting the two steps (purchasing the shares and then using group relief to move the property inter-group) together (in time and in planning) does not, to my mind, mean that the parties are not facing the economic consequences of their decision or using a tax relief for a purpose or way not intended by Parliament. The parties are not, in the sense required at least, thereby engaged in 'tax avoidance'.

75. Given my findings on whether or not there was any 'tax avoidance' in the present case it is unnecessary for me to go onto consider the Respondents' submissions on 'purpose' or 'main purpose'.

Other arguments to do with group relief

76. By their skeleton argument the Respondents raised an argument that the JPUT was not a "company" for SDLT purposes. However, that argument, rightly in my view, was abandoned at the hearing such that I need say no more about it.

Section 75A

77. It was common ground before me that there are three conditions that must be met for s.75A to apply:

> (1) One person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it ("**Condition 1a**");
>
> (2) a number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition (the "**Scheme Transactions**") ("**Condition 1b**"); and
>
> (3) the sum of the amounts of SDLT 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 ("**Condition 1c**").

78. I agree with Mr. Peacock that V must be identified with reference to the disposal of the chargeable interest. V is the person who disposes of the chargeable interest in question. It cannot be controversial that (a) the chargeable interest here can only mean the Properties, and (b) the Properties were, prior to the Transactions, owned by the partners in BP ELP. Accordingly, the disposal of the Properties (or the relevant chargeable interest) could only be affected by the partners in BP ELP and, therefore, they must be V.

79. The issue that divides the parties is the identity of the partners in BP ELP because this, as can be seen from the agreed statement of facts referred to earlier in this decision, changed over time. That in turn depends on the date of the notional transaction for the purposes of section 75A.

80. The Appellant's argument is a straightforward one. The Appellant says that the relevant date to look at is the date the chargeable interest was transferred. This, the Appellant argues, was on 8 May 2015 when BP Nominee (acting as bare trustee for BP ELP) distributed the properties to the Appellant (who was at the time the sole limited partner in BP ELP).

81. The Respondents say that the "notional land transaction which is postulated by section 75(A)(4)(b) is in essence a deemed transfer of the property from the persons who own the property at the start of the chain of scheme transactions, to the persons who owned the property at the end of that chain". V, therefore, is the person who owned the Properties before any of the steps in the Transaction.

82. Whilst some general support, rooted in the fact that we are dealing here with an anti-avoidance provision, may be found in interpreting section 75A in the way urged by the Respondents I can find no such support in this chamber's decision in *Hannover Leasing Wachstumswerte Europa Beteiligungsgesellschaft MBH v HMRC [2019] UKFTT 262*

("**Hannover Leasing**"). Not only is the decision in *Hannover Leasing* a first instance decision, but it also turns on its own facts.

83. I prefer the Appellant's interpretation. Firstly, this interpretation, to me at least, fits with the natural meaning of the words used and flows logically. The identity of V is inextricably linked to the transfer of the chargeable interest in question and the identity of P. So much so that it is impossible to identify V without identifying the chargeable interest or P at the same time. It seems to me that V will only become V on the day (or moment) that there is a transfer of a chargeable interest to P. Put like that, I think it makes logical sense that the relevant date should be the date that the transfer of the chargeable interest is made. This is to be contrasted with the Respondents' interpretation which casts too wide a net, is altogether more "woolly" and is not founded in the language used in section 75A.

84. Secondly, the Respondents' interpretation ignores section 75(A)(6) which provides that the effective date of the notional transaction is either (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. In this case the Respondents accept that the scheme transactions were completed on 8 May 2015, but argue that section 75(A)(6) is to be used for administrative purposes only, namely, to set a date further to which returns must be submitted and any penalties, etc can be calculated. I can find nothing in the statutory language which would suggest that section 75(A)(6) is to be used for administrative purposes only. It seems to me that sub-section (6) sets out the effective date of the notional transaction for all purposes relevant to section 75(A).

85. Accepting, as I do, that the relevant date for present purposes is 8 May 2015, the notional transfer under section 75(A) is the same as the actual transfer and, therefore, it cannot be said that the SDLT payable is less under the actual transfer.

86. It follows, therefore, that the Appellant's appeal against Closure Notice 2 also succeeds.

CONCLUSION

87. For the reasons given above I allow the Appellant's appeal.

88. In the usual way, I would like to express my gratitude to counsel for their very able assistance and in particular for the production of an agreed statement of facts, notes on the evidence and focussed skeleton arguments- all of which I have significantly drawn upon in the production of this judgment.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

89. 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.

HHJ ASIF MALEK
TRIBUNAL JUDGE

Release date: 06th SEPTEMBER 2024