TC02777

Appeal number: TC/2011/08390

STAMP DUTY LAND TAX – sale of property with subsequent Shari'a-compliant sub-sale and lease-back – no SDLT paid pursuant to sections 45(3) and 71A Finance Act 2003- application of section 75A Finance Act 2003- anti-avoidance provision - approach to interpretation of section 75A – identification of "V" and "P" within section 75A(1) Finance Act 2003- "scheme transactions"- meaning of "involved in connection with"- calculation of SDLT under section 75A(5)- whether indirect discrimination contrary to Article 14 of the European Convention on Human Rights – HMRC arguing that tax undercharged in amendment by closure notice to SDLT return: onus of proof – paragraph 42 Schedule 10 Finance Act 2003 - whether correct return amended- appeal dismissed- SDLT undercharged in amendment to return.

FIRST-TIER TRIBUNAL
TAX CHAMBER

PROJECT BLUE LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE GUY BRANNAN
RUTH WATTS DAVIES, MHCIMA FCIPD

Sitting in public at Bloomsbury Place, London WC1 on 20 and 21 March 2013 and written submissions May 2013

Roger Thomas, Counsel, instructed by Clifford Chance LLP for the Appellant

Malcolm Gammie CBE QC and Hui Ling McCarthy, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This case concerns the application of stamp duty land tax ("SDLT") to the sale of Chelsea Barracks in London in 2007/2008 and its subsequent Shari'a-compliant financing by way of a sale and lease-back. It raises important and difficult questions concerning the application of the anti-avoidance provisions in sections 75A –C Finance Act 2003 ("FA 2003").

Background

2. The Chelsea Barracks ("the Property") have been a British Army barracks since the 1860s. They occupied a large site in Pimlico, London, off the Chelsea Bridge Road.

3. The Property was owned by the Ministry of Defence ("MoD"). The MoD decided to sell the Property for development.

4. The Appellant (Project Blue Limited, occasionally referred to hereafter as PBL) agreed to buy the freehold of the Property from the MoD in April 2007.

5. The current appeal arises from the completion of sale of the Property and its financing by way of a sale and lease-back in January 2008.

The parties

6. We find the following facts in relation to the parties involved in the transactions to which this appeal relates.

7. The three principal parties to the transactions were as follows:

(a) MoD – the vendor.

(b) The Appellant – the purchaser, a company incorporated in Guernsey and which is now resident in Jersey. It is a special purpose acquisition subsidiary brought into existence for the purpose of acquiring the Property.

(c) Qatari Bank Masraf al Rayan ("MAR") – a Qatari financial institution, specialising in Islamic finance, which provided and syndicated the finance for the purchase of the Property.

8. The eventual tenant and developer of the Property was Project Blue Developments Ltd ("PBDL"), a Guernsey company connected to the Appellant. The Appellant and PBDL were members of a group of companies referred to as the "Project Blue group". There were four other members of the Project Blue group

relevant to this appeal but which were not directly involved in the transactions. These companies were as follows:

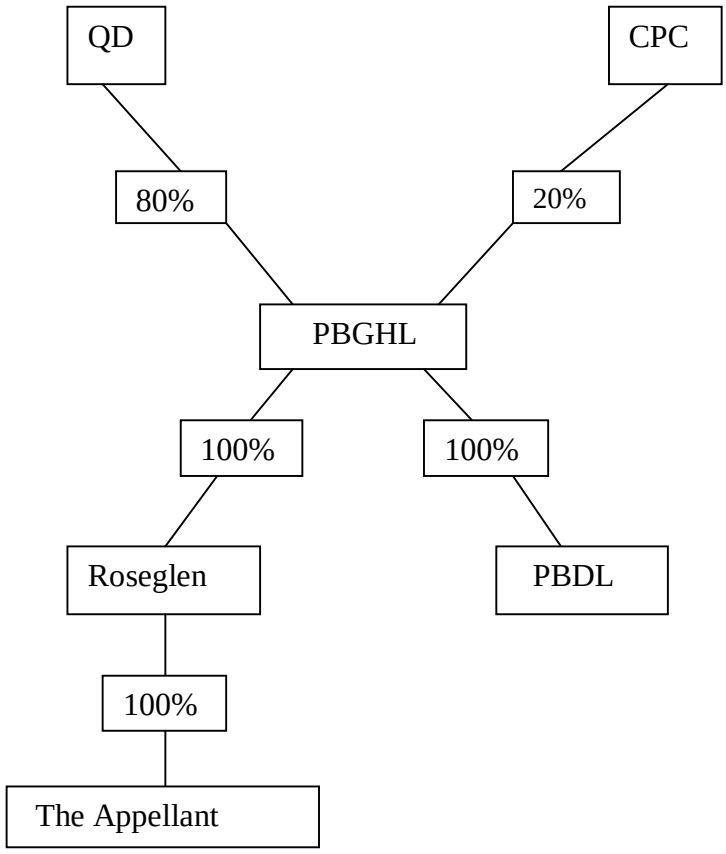
(a) Qatari Diar Real Estate Investment Company ("QD") – a Qatari incorporated and resident company owned by Qatari Investment Authority, a sovereign wealth fund owned by the Qatari government (and ultimately, therefore, by the Qatari ruling family). As we shall see, QD was a founding minority shareholder in MAR.

(b) CPC Group Limited ("CPC") – a partner in the joint-venture with QD, but otherwise unrelated to it.

(c) Roseglen Limited ("Roseglen") – a Guernsey Inc and resident company: a member of the Project Blue group.

(d) Project Blue Guernsey Holdings Limited ("PBGHL") – a Guernsey Inc and resident joint-venture company within the Project Blue group.

9. At the time of the purchase of the Property the Project Blue group was structured as follows (in a diagram to which both parties agreed):



10. In broad terms, the role of the Appellant was to acquire the Property and to secure planning permission to allow it to be developed into residential flats. PBDL was responsible for the development of the property.

11. The Appellant at all times material to this appeal in 2007 – 2008 was a Guernsey company called Project Blue (Guernsey) Limited. On 31 December 2010, for reasons wholly unconnected with the facts of this case, the Appellant migrated to Jersey, in accordance with section 98 of the Companies (Guernsey) Law 2008, and thereafter continued as a limited company under the name Project Blue Limited in accordance with the Companies (Jersey) Act 1991.

Transaction steps in outline

12. On 5 April 2007, the Appellant contracted to purchase the freehold of the Property from The MoD (**"Step 1").**

13. On 29 January 2008:

(1) the Appellant sub-sold the freehold of the Property to MAR (**"Step 2")**

(2) MAR agreed to lease the Property back to the Appellant for the finance period (**"Step 3"**).

14. On 31 January 2008 the following steps took place:

(1) MAR and the Appellant entered into put and call options respectively requiring or entitling the Appellant to repurchase the freehold of the Property at the end of the finance period (**"Step 4"**).

(2) The MOD conveyed the freehold of the Property to the Appellant ("**Step 5"**).

(3) At the same time as, and in connection with Step 5, the Appellant conveyed the freehold in the Property to MAR **("Step 6"**).

(4) Immediately after Step 6, MAR leased the Property back to the Appellant for the required finance period (**"Step 7"**).

15. On 1 February 2008, the Appellant granted a 999 year lease to PBDL, together with put and call options respectively requiring or entitling PBDL to purchase the freehold of the Property. It was common ground between the parties that this transaction was not directly relevant to the SDLT treatment of the transactions described above.

Outline of the dispute

16. In short, the Appellant contends that no charge to SDLT arose to it in respect of the above transactions because:

(1) sub-sale relief under section 45(3) FA 2003 applied to Steps 1, 2, 5 and 6 above;

(2) alternative finance relief under section 71A FA 2003 applied to the transactions at Steps 2, 3, 6 and 7 above.

(3) Section 75A FA 2003 applied to none of the above Steps.

17. The Respondents ("HMRC", which expression refers to its predecessor organisation the Inland Revenue) contend that section 75A FA 2003 applied to the above transactions. HMRC argues, for the purposes of section 75A, that the MoD is "V" and the Appellant is "P" with the result that there is a notional land transaction for the purposes of Part 4 of FA 2003 effecting the acquisition of the MoD's chargeable interest by the Appellant on its disposal by the MoD.

18. HMRC further argue that the chargeable consideration for this notional transaction is deemed by section 75A(5) to be the largest amount given by any one person by way of consideration for the "scheme transactions" (under section 75A (5) (a)) or received by the vendor (under section 75A(5) (b)). The MoD received £959 million but, HMRC argue that (in a recent amendment to their Statement of Case – see below), because MAR gave £1.25 billion to the Appellant as consideration for the sub-sale of the freehold, the chargeable consideration for the notional transaction in accordance with section 75A (5) (a) is £1.25 billion rather than £959 million.

19. SDLT is, if chargeable, payable at the rate of 4% of the chargeable consideration. Thus, if the chargeable consideration is £959 million the SDLT payable at 4% is £38.36 million and if it is £1.25 billion it is £50 million.

20. HMRC opened an enquiry into the SDLT returns submitted in respect of the above transactions. In the case of the Appellant, the enquiry was concluded by a closure notice contained in a letter dated 13 July 2011 which amended the Appellant's transaction return 307388936MC. By that amendment, HMRC adjusted the amount of SDLT due from the Appellant from £0 to £38.36 million. As noted above HMRC now considers that the Appellant was under-charged by this amendment and that the correct amount due is £50 million rather than £38.36million.

21. The Appellant, also in a recent amendment to its Grounds of Appeal, argues that HMRC has amended the wrong return. The return referred to in paragraph 20 above was the return which related to the completion of the contract between the MoD and the Appellant dated 5 April 2007. The Appellant argues that HMRC were in error when they amended this return because it was not a return relating to the alleged notional land transaction.

The Appeal

22. On 8 August 2011, the Appellant appealed against the amendment to its land transaction return (Form SDLT 1, Ref: 307388936MC), which, as explained above, had been made by HMRC on 13 July 2011. HMRC had opened its enquiry into this return on 14 November 2008. In his letter of 13 July 2011, the relevant HMRC officer (Mr Buttery) said:

> "I have amended your SDLT return to reflect my conclusion.
>
> - It previously showed that you were due to pay £0 tax.
> - It now shows that you are due to pay £38,360,000.
> - The difference is £38,360,000."

23. As regards land transaction return is 308727497ME, 308876820MQ, 309375484MH and 308727494MV HMRC concluded that no amendment to the return was required as a result of the enquiry.

24. On 28 February 2012 HMRC filed its Statement of Case.

The evidence

25. The evidence in this appeal was contained in two folders of documents which comprised witness statements, correspondence and the relevant transaction documents.

26. The witness statements were given by Mr Timothy Sherwood-King, a senior property lawyer with Clifford Chance LLP ("Clifford Chance") and by Mr Qudeer Latif, a partner based in Clifford Chance's Dubai office and the statements were admitted as evidence. Mr Sherwood-King was responsible for the conveyancing aspects of the purchase of the Property and its financing under the sale and lease-back. Mr Latif is the head of Clifford Chance's Islamic finance practice and specialises in Islamic financing. He gave advice internally to colleagues in relation to the 2007 and 2008 transactions. He was consulted on Islamic finance principles and their application to the transactions, although the documents were governed by English law and were drafted by his colleagues in London with his assistance. His evidence chiefly concerned the characteristics of Shari'a-compliant financing.

27. Mr Gammie QC, appearing with Ms McCarthy, for HMRC did not cross-examine Mr Sherwood-King or Mr Latif on their witness statements. Accordingly, the evidence of these two witnesses was unchallenged.

The relevant statutory provisions

28. Although sections 45 and 71A FA 2003 were relevant to the transactions which form the subject matter of this appeal, their effect was not in dispute. Instead, it was the application of sections 75A to C FA 2003 and related provisions to these transactions which was the main issue in contention between the parties.

29. HMRC accepted that if section 75A FA 2003 did not apply to the transactions the SDLT analysis, based on sections 45 and 71A FA 2003, was that described by the Appellant in its skeleton argument.

30. For convenience, we set out sections 45, 71A, 75A-C FA 2003 and the other relevant provisions of FA 2003 in an appendix to this decision.

31. Section 75A refers to a notional transaction between "V" and "P". In this decision we shall refer to V and P in accordance with the meaning of those expressions in section 75A.

The transactions in detail

32. The main facts in this appeal were not in dispute, although oddly there was no agreed statement of facts. As we shall see, there was a dispute between the parties whether the transactions (particularly, the Shari'a-compliant financing) were motivated, at least in part, by tax (SDLT) considerations and, indeed, by religious considerations.

33. We find the following facts.

34. First, we take judicial notice of the fact that Qatar is an independent sovereign country located on the Arabian Peninsula. It is ruled as an hereditary emirate and its population is predominantly Muslim.

35. On 5 April 2007 the Appellant exchanged contracts with the Secretary of State for Defence (for convenience referred to as the "MoD") for the purchase of the Property. This transaction was not subject to SDLT as it was not substantially performed (section 44 (2) FA 2003).

36. The contract was a result of a sealed bid deadline tender process. In other words, interested parties were invited to submit competing bids on the basis of the vendor-drafted outline contract. The contract was, therefore, in standard form as part of the tender process, which was designed to discourage deviation from the standard seller documentation. Accordingly, a Memorandum was attached to the contract specifying the parties and the purchase price.

37. Mr Sherwood-King's evidence was that in a tender process, such as that described, he would not expect to see any accommodation for bidders' specific funding needs because these were, broadly, their own affair.

38. QD was a party to this contract as guarantor of the Appellant's obligations.

39. The Memorandum specified that the Appellant would be the buyer of the Property at the price of £959 million (inclusive of VAT, if any).

40. A 20% deposit (£191.8 million) was to be paid on exchange and that completion would take place on 31 January 2008 (clause 4). The delayed completion was specified in order to allow the MoD to re-quarter troops from the Property.

41. It was agreed to complete the agreement by means of a TR1 in the form annexed to the contract, under which the MoD would be the transferor and the Appellant would be the transferee (clause 8).

42. The balance of the consideration was to be paid in four equal instalments of £191.8 million each on 31 January 2008, 2 February 2009, 1 February 2010 and 31 January 2011 (clause 25).

43. Within 28 days of 5 April 2007, the Appellant was to procure a guarantee from a UK clearing bank to guarantee payment of the four instalments (clause 26). The guarantee was provided by HSBC Bank on 3 May 2007.

44. The MOD reserved overage rights (i.e. rights to participate in future dispositions of the property by the Appellant at a higher price) (clause 8 and the Schedule to the Transfer next to the contract). As we shall see, this caused some difficulty when the financing with MAR was being negotiated.

45. In order to pay the £191.8 million deposit, the Appellant borrowed from QD; the deposit was duly paid on the day of exchange of contracts. However, the Appellant had not yet arranged financing for the balance of the purchase price. The intention was that the Appellant would secure financing between 5 April 2007 and completion on 31 January 2008.

46. Mr Sherwood-King said that, after the guarantee from HSBC had been sorted out (paragraph 40 above), he prepared a bible of transaction documents and, thereafter, the transaction became substantially dormant as far as he was concerned.

47. On 11 June 2007 Mr Sherwood-King said that Clifford Chance were contacted by HSBC Bank Middle East Limited, of Doha, to say that HSBC and MAR had together been instructed by QD to put together a financing package for the Appellant's acquisition of the Property, for which purpose they were visiting London the next day and wished to have a meeting. Mr Sherwood-King records the meeting as having taken place at Clifford Chance's offices on 13 July 2007 (although it is possible that this is a typographical error for 13 June 2007). Mr Sherwood-King and a colleague met two representatives from HSBC Middle East, a director of HSBC Amanah's asset finance advisory group and also the General Manager for Product Development of MAR. Mr Sherwood-King said that it was immediately clear that the proposed financing would be Islamic in nature, since this was the only type of financing which MAR could engage.

48. As explained above, MAR is a Qatari incorporated financial institution specialising in Islamic finance. Mr Latif's evidence was that MAR was formed on 4 January 2006 under Qatari law as a commercial and investment bank with an entirely Shari'a-compliant portfolio of products. Mr Latif referred to MAR's Annual Report for 2007 which stated that its operations commenced in October 2006. He said that MAR's founding members were numerous (128 persons in all) but QD was the largest amongst them (at approximately 4%). Of the next six (by size) five were Qatari state-owned institutions or funds of one sort or another. 30 members of the Qatari ruling family were also founding shareholders, as also were members of the ruling families of Saudi Arabia and Bahrain. MAR has had, from the outset, a strong "establishment" status in Qatar. It was Mr Latif's understanding that from the beginning QD (the 80% indirect shareholder of the Appellant) and MAR had enjoyed a close relationship, reflecting QD's status as "main founder" or promoter, its direct shareholding, its representation on MAR's board of directors and also the two companies' overlapping ownership (QD being ultimately owned by the Qatari ruling family).

49. Those initial holdings were diluted by a public offering of MAR's shares in late January 2006. Those new shares constituted 55% of the enlarged company and were admitted to listing on the Doha stock exchange in June 2006. It was Mr Latif's

understanding, based on information supplied by HSBC Amanah in the course of the transaction, that no shareholder of MAR then held more than 5%. Mr Latif also noted from a MAR publication on corporate governance of 2011 that QD had a right to appoint a representative director to the MAR board.

50. Mr Latif also noted that MAR had announced on 5 March 2007 that it was funding a US $2.25 billion real estate project with QD at Lusail in Qatar, describing QD as its "strategic partner". Mr Latif considered that that description was a reasonable one and since both institutions enjoyed a considerable degree of official sponsorship and support from the Qatari state he expected them to cooperate closely with one another and to support one another's efforts. Mr Latif considered that MAR would be a natural first choice for banking services in relation to a Shari'a transaction

51. Mr Sherwood-King considered that it would not have been practical for QD or the Appellant to have procured MAR to bid for the Property in their place, in order that MAR could have taken a direct transfer from MOD. Although not a finance lawyer nor privy to the financial affairs of QD and MAR, Mr Sherwood-King considered that to procure a funding party to stand in as a bidder in a commercial transaction would be most unusual. He did not find it easy to envisage a financial institution well adapted to take the necessary decisions required by a bid process, especially a comparatively small and newly-formed institution lacking Western experience.

52. According to Mr Sherwood-King, the proposal for Shari'a-compliant financing was likely to have been in contemplation for some time before MAR and HSBC were instructed as bankers.

53. At some time after the meeting referred to in paragraph 44 above, Norton Rose, the law firm, were appointed to act jointly for HSBC and MAR on the Shari'a financing.

54. The Board of Directors of QD ("QD Board") met on 27 January 2008 to consider and approve the proposed financing of the Appellant's acquisition of the Property. In addition to the transaction and financing documents requiring approval, the QD Board was provided with a "tax structure paper" and a "Steps Paper" prepared by QD's legal advisers, Clifford Chance.

55. A further meeting of the QD Board was held on 28 January 2008 at which the execution of the remaining transaction documents was approved.

56. It appears that the same "tax structure paper" and "Steps Paper" had been considered by the Board of Directors of the Appellant (the "Appellant Board") at a meeting on 23 January 2008. Minutes of a subsequent meeting of the Appellant Board refer to the transaction having been discussed at length at the meeting on 23 January and to both papers having been considered. The Appellant has not disclosed minutes of that Board meeting, nor disclosed the tax structure paper nor disclosed the Steps Paper.

57. On 29 January 2008 the following steps took place:

(1) the Appellant entered into a contract with MAR (the "Sale Agreement") for the sale of the Property for a price of US $2,467,875,000 to be paid as set out in clause 4 of the contract, part being payable to the MoD at the request and direction of the Appellant and the remainder to the Appellant itself. The First Tranche of US dollars 757,341,480 was payable on completion date, the Second Tranche of US $378,670,740 was payable on 2 February 2009, the Third Tranche of US $378,670,740 was payable on 1 February 2010 and the Fourth Tranche of US $378,670,740 was payable on 31 January 2011. In addition, there was an SDLT Tranche of US $75,813,120 to be paid at the Appellant's request to discharge any SDLT liability of the Appellant and an Additional Payment Tranche of US $498,708,180 payable at the request of the Appellant in respect of the rent due under the leaseback, fees, transaction costs and professional costs. Clause 7.3.3 provided that MAR was only liable to make future payments if, when such payments fell due, “neither a valid Sale Undertaking Notice nor a valid Purchase Undertaking Notice” had been served. Although the price was expressed in US Dollars, the SDLT1 submitted in respect of the transaction records the consideration payable as being £1.25 billion. The Appellant was not required to transfer the Property otherwise than to MAR and MAR agreed not to sub-sell the Property prior to completion. This transaction was not subject to SDLT as it was not substantially performed (section 44 (2) FA 2003).

(2) The Appellant entered into an agreement for lease (the "agreement for lease") under which MAR would immediately grant a lease back to the Appellant. The form of the lease was set out in a schedule to the agreement. The term of the lease was 999 years and two days ("the financing period") and was to commence on the date of the transfer of the Property by the Appellant to MAR (clause 7). This transaction was not subject to SDLT as it was not substantially performed (section 44(2) FA 2003).

(3) MAR, the Appellant, QD, PBGHL, Roseglen, four arranging banks (BNP Paribas, Calyon Credit Agricole CIB, HSBC Bank Middle East Limited, MAR and Qatar National Bank), HSBC Bank PLC entered into a Common Terms Agreement. Under that agreement the Appellant indemnified, inter-alia, MAR against any SDLT in respect of any Transaction Document (which included the sale and leaseback arrangements i.e. the Shari’a-compliant financing). The Common Terms Agreement contained an acknowledgment by the parties that the Transaction Documents were consistent with Shari’a principles.

58. On 31 January 2008:

(1) the Appellant entered into to purchase undertakings entitling MAR to sell the Property back to the Appellant at the end of the financing period (the "Put Option") or on the occurrence of certain events (equivalent to a loan default); and

(2) MAR entered into a sale undertaking, entitling the Appellant to buy back the Property at the end of the financing period or at any time if the notice was given, provided that notice had not already been given by MAR under one of the purchase undertakings (the "Call Option"). The effect of the Call Option was

that, in order for the Appellant to acquire the freehold reversion from MAR, it would have to pay a sum equal to the price paid to date by MAR.

59. On 31 January 2008 the MoD transferred the Property to the Appellant by a Form TR1. The consideration was expressed as consisting of £383,600,000, which was acknowledged to have already been paid, together with a further £575 million which was to be paid in accordance with the contract of sale of 5 April 2007, as explained above. This transaction was not subject to SDLT because, although it completed the contract between the parties, it was completed at the same time as, and in connection with, the completion of the contract between the Appellant and MAR (section 45 (3) FA 2003). At the same time, the Appellant executed a charge over the Property by way of legal mortgage for the purchase monies remaining unpaid.

60. In addition, on 31 January 2008, the MoD, the Appellant and QD entered into a Deed of Clarification. Once the Shari'a-compliant financing proposals had been mentioned to Mr Sherwood-King it was clear to him that an Ijara structure did not sit well with the existing contract because the MoD had reserved "overage" rights, that is, rights to participate in any sub-sale or on-sale of the Property at a higher price. Since the contract made no allowance for non-conventional financing, there was some ambiguity as to whether the Ijara financing was to be regarded simply as a type of mortgage (which the contract did permit) or whether it would trigger a right to additional payment, as being (literally) a subsequent sale at a higher price. The MoD accepted that the Ijara financing was in the nature of the mortgage and this was reflected in the Deed of Clarification.

61. On 31 January 2008, the Appellant transferred the Property to MAR by a Form TR 1. The consideration was expressed as consisting of US $757,341,480, which was acknowledged to have already been paid, together with a further US $1,710,533,520 which was to be paid in tranches in accordance with Sale Agreement. This transaction was exempt from the charge to SDLT under section 71A(2) FA 2003 (alternative finance).

62. On 31 January 2008 MAR granted a lease to the Appellant in accordance with the terms of the agreement for lease. As already explained, the term of the lease was for 999 years +2 days commencing on the date of the lease. The rent was calculated to give MAR an appropriate return on its ownership of the Property. This transaction was exempt from the charge to SDLT under section 71A(3) FA 2003 (alternative finance).

63. It was common ground that the sale and leaseback arrangements adopted in this case were a Shari'a-compliant Ijara-style financing. A Fatwa of Sheikh Nizam Yaquby of the HSBC Amanah Shari'a Committee was obtained at the time in order to certify compliance with Islamic requirements.

64. Mr Latif also confirmed that he was not aware of any deviation "from standard" motivated by the tax laws of any jurisdiction. He further confirmed that structuring the financing as a forward sale agreement would not be accepted by most Islamic finance experts as being in compliance with Islamic finance principles. Moreover, structuring the transaction as a Murabaha transaction (another type of Islamic

financing) would be disapproved of by many Shari'a experts and would have created an immediate adverse liquidity (within the pool of Shari'a financiers) and would consequently have had an adverse pricing effect. In his view, an overwhelming proportion of Islamic financing of real estate in the UK and elsewhere is undertaken on the Ijara model as in this transaction.

65. HMRC, in their Statement of Case, suggested that a forward sale agreement might have been an alternative method of structuring or financing the transaction. Mr Latif's evidence was that most Islamic finance experts would not accept a forward sale agreement as being in compliance with Islamic finance principles.

66. It was clear from the documentation that the sale and lease-back between the Appellant and MAR contemplated and was predicated upon the prior sale of the Property by the MoD to the Appellant.

67. Although MAR was the sole finance counterparty for the transaction with the Appellant, MAR subsequently syndicated the funding. In addition, it was provided that the funding parties should hold their interest in the Property through a trustee, in order to avoid the danger that the Appellant's interests might be encroached upon by equities created by MAR when syndicating its finance participation. For convenience, in this decision references of a transfer of the Property to MAR include a transfer to the trustee.

68. On the same day (i.e. 31 January 2008) the following payments were made:

(1) MAR transferred US $789,735,642.50 to the Appellant's Guernsey bank account. Of this amount, US $757,341,480 included the sum that was used by the Appellant to make the first instalment due from the Appellant to the MoD on 31 January 2008. US $27.2 million represented certain fees and other professional expenses; and

(2) the Appellant paid £191.8 million to the MoD.

69. 1 February 2008, the Appellant granted a 999 years intragroup lease (the "under lease") for no premium and a peppercorn rent to PBDL. PBDL was a 75% subsidiary of the Appellant within paragraph 1 of Schedule 7 FA 2003. The reason for the under lease was that the onward sale of the residential units, once constructed, could be carried out without having to disclose the entire Islamic funding structure. The transaction was exempt from charge to SDLT under paragraph 1 (1) Schedule 7 FA 2003 because the Appellant and PBDL were members of the same group.

70. On 1 February 2008 the Appellant granted PBDL, in consideration for a premium of £1 plus a deferred premium equal to any increase in the market value of the Property above the Base Price, the right to buy the Property (defined as the freehold and the leasehold in respect of the Property) from the Appellant for the Base Price of £1,270,000,000. The option was exercisable only after the Appellant had acquired the freehold from MAR under the Call Option.

71. On 1 February 2008 PBDL granted the Appellant the option of requiring PBDL to buy the Property from the Appellant for the price of £1,270,050,000. The option

was exercisable only after the Appellant had acquired the freehold from MAR under the Call Option.

72. On 1 February 2008, Clifford Chance submitted a notification "Disclosure of Avoidance Scheme" in accordance with SDLT Tax Avoidance (Prescribed Description of Arrangements) Regulations (SI 2005/1868). The notification stated:

> "No SDLT is payable by B [the Appellant] on the sale from S [the MoD] by virtue of sub-sale relief under section 45 (3) Finance Act 2003. No SDLT is payable by FI [MAR] on the sale of the Property from B [the Appellant] to FI [MAR] by virtue of alternative property finance relief under section 71A (2) Finance Act 2003."

73. Under section 306(1) Finance Act 2004 arrangements are notifiable in the following circumstances:

> "In this Part "notifiable arrangements" means any arrangements which—
>
> (a) fall within any description prescribed by the Treasury by regulations,
>
> (b) enable, or might be expected to enable, any person to obtain an advantage in relation to any tax that is so prescribed in relation to arrangements of that description, and
>
> (c) are such that the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of that advantage."

74. The SDLT Avoidance Schemes (Prescribed Descriptions of Arrangements) regulations 2005 (SI 2005/1868) prescribed arrangements relating SDLT in respect of non-residential property for the purposes of section 306 (1) (a) above.

75. The Ijara financing to which the Appellant and MAR were parties was terminated on 1 March 2010. The Fourth Tranche of consideration (US $378,670,740, payable on 31 January 2011) was, therefore, never paid.

Land transaction returns

76. The following land transaction returns were filed in relation to the above transactions on 22 February 2008:

(1) **307388936MC** – this return, filed on behalf of the Appellant, related to the completion on 31 January 2008 of the contract between the MoD and the Appellant dated 5 April 2007. The return related to a transaction which was completed at the same time as and in connection with the completion of the contract between the Appellant and MAR and the Appellant considered that no liability to SDLT arose by virtue of section 45(3) FA 2003.

Since HMRC had not prescribed a form of return which catered for the intermediate transaction in a sub-sale, the Appellant filed the SDLT 307388936MC and claimed "other relief" in Box 9.

This was the return that was amended by HMRC's letter of 13 July 2011.

(2) **308727994ME** – this return, filed on behalf of MAR, related to the completion on 31 January 2008 of the sale agreement between the Appellant and MAR dated 29 January 2008. Box 10 set out the total consideration for the transaction as £1,250,000,000, which we assume is the sterling equivalent of US $2,467,875,000 as specified in the Sale Agreement.

In Box 9 MAR claimed "Alternative Property Finance Relief" under section 71A FA 2003.

(3) **308876820MQ** – this return related to the grant of the lease by MAR to PBDL on 31 January 2008. Box 24 set out the net present value of the rent reserved by the lease, being £1,640,799,863.

In Box 9 the Appellant claimed "Alternative Property Finance Relief" under section 71 A (3) FA 2003.

(4) **308727494 MV and 308727495MA** – the lease put and call options from the Appellant to PBDL.

77. On 1 March 2010 a land transaction return **309375484MH** was filed in relation to the transfer of the freehold from MAR to the Appellant recording consideration payable of £1.25 billion.

Preliminary issues

HMRC's application to amend Statement of Case

78. On 5 March 2013, with the hearing of this appeal scheduled for 20 and 21 March 2013, HMRC applied to amend their Statement of Case.

79. As we explained, HMRC's original amendment to the Appellant's land transaction return 307388936MC increased the amount of SDLT due from £38.3 6 million on the basis that section 75A FA 2003 applied to the transactions in dispute with the result that consideration of £959 million was charge to SDLT at the rate of 4% by virtue of section 75A (5) (b) FA 2003.

80. On further review, which we were informed occurred when Counsel commenced the preparation of the skeleton argument, HMRC considered that the amendment (and consequently HMRC's original Statement of Case) understated the correct amount of SDLT due in relation to the transactions.

81. HMRC requested that the Statement of Case should be amended to show the SDLT due as being £50 million i.e. £1,250,000,000 x 4%.

82. Mr Gammie explained that, as we shall see in detail later, HMRC's analysis was that under section 75A the MoD was cast in the role of "V" and the Appellant was cast as "P", with the result that there was a notional land transaction for the purposes of Part 4 FA 2003 effecting the acquisition of the MoD's chargeable interest by the

Appellant on its disposal by the MoD. The chargeable consideration for this notional transaction was deemed by section 75A(5) to be the largest amount either given by any one person by way of consideration for the scheme transactions (section 75A(5)(a)) or received by the vendors (under section 75A(5)(b)). The MoD received £959 million. But since MAR gave £1.25 billion to the Appellant for the sub-sale of the freehold, the chargeable consideration for the notional transaction had to be determined under section 75A(5)(a) i.e. £1.25 billion.

83. HMRC argued in the alternative that, if for any reason we disagreed with this analysis, SDLT was in any event due (under section 75A (5) (b)) on the consideration of £959 million received by the MoD, as per HMRC's original Statement of Case.

84. Accordingly, in seeking to increase the amount of SDLT payable, HMRC requested that the Tribunal should increase the self-assessment (as amended), pursuant to paragraph 42 (3) Schedule 10 FA 2003.

85. In support of the application, whilst recognising that the point was being taken for the first time, Mr Gammie argued that the point was a pure point of law and required no additional evidence or witnesses. In any event, the appeal inevitably required the Tribunal to consider the correct amount of consideration chargeable under section 75A. Therefore, Mr Gammie submitted that there was no procedural prejudice to the Appellant in granting his application.

86. Mr Thomas, appearing for the Appellant, drew attention to the overriding objective in the Tribunal's Rules i.e. the need to deal with matters fairly and justly. Mr Thomas noted that the Tribunal had wide case management powers under Rule 5.

87. Mr Thomas argued that HMRC had before them all the facts and evidence from the very start. Those advising the Appellant had thought HMRC were being reasonable in originally limiting their amendment to £38.36 million and assumed this was an exercise of HMRC's discretion.

88. Mr Thomas referred to the decision of the Supreme Court in *Tower MCashback* [2011] 3 All ER 171 and, in particular, the judgment of Lord Walker at paragraphs 15 – 17. The decision of the Supreme Court was that a closure notice did not have to give reasons for the conclusion reached. Recognising that this might be seen as "putting temptation in HMRC's way" the Supreme Court emphasised that HMRC's officers should not be tempted to draft every closure notice in wide and uninformative terms.

89. The closure notice and the present appeal was issued just two months after this warning by the Supreme Court. Mr Thomas said the closure notice was, however, uninformative: it simply increased the SDLT from £nil to £38,360,000. It followed that the "subject matter" of the appeal had to be defined by that sum.

90. Mr Thomas argued that the proposed amendment to the Statement of Case was made too late and was unfair to the Appellant.

91. In reply, Mr Gammie noted that Mr Thomas had admitted that the Appellant's advisers had already been aware of the issue which he was seeking to raise. There was, therefore, no prejudice.

Our decision on HMRC's application

92. We decided to allow HMRC's application, bearing in mind the overriding principle to deal with matters fairly and justly. We considered that there was little or no prejudice to the Appellant in relation to the lateness of the application. The correct amount of chargeable consideration for the purposes of section 75A was a matter that was already before the Tribunal. It was important that the Tribunal correctly applied the law in relation to the determination of the chargeable consideration. No new evidence or witnesses were required because the point was simply a question of law.

93. For these reasons, we allowed HMRC's application.

The Appellant's application to amend its Notice of Appeal

94. Mr Thomas applied to amend the Appellant's Notice of Appeal dated 14 October 2011 in order to advance the argument that HMRC had amended the wrong land transaction return. HMRC had amended the return referenced 307388936MC, which was the return in respect of the land transaction effected by the TR1 which completed the Appellant's contract with The MoD. The effect of section 45 (3) was that the transaction was not a land transaction and had to be disregarded for SDLT purposes. The return was correct and ought not to have been the subject of amendment.

95. HMRC were contending that the Appellant was subject to SDLT in respect of a notional transaction under section 75A. It was not open to HMRC to amend a return in respect of another (actual) transaction. A land transaction return was delivered in respect of the land transaction to which it referred and not to some other notional land transaction to which it does not refer. HMRC should have (but did not) made a determination of the amount of SDLT due from the Appellant under paragraph 25 Schedule 10 FA 2003. It was now too late (after the expiry of four years from the effective date of the notional land transaction) to make such a determination.

96. Mr Thomas argued that the Notice of Appeal dated 14 October 2011 was potentially wide enough to cover the new ground of appeal put forward. In the second and fourth subparagraphs it was noted that there was no transaction in relation to which the Appellant was chargeable (in which case any amendments to the Appellant's return must necessarily have been mis-targeted). The Appellant had not deliberately withheld this point waiting for a time limit to expire. In any event, when those grounds of appeal were lodged, the Appellant was "partially blindfold" in the absence of any statement of conclusions or grounds for conclusions in the closure notice.

97. Mr Gammie noted that the point which the Appellant now sought to raise had first been put forward in Mr Thomas's skeleton argument filed on 6 March 2013. It

was purely a procedural point and sought to prevent HMRC collecting tax which would otherwise be due.

98. Mr Gammie disputed the assertion that the Appellant was "partially blindfold" when filing its Notice of Appeal. Mr Gammie referred to correspondence between the Appellant and HMRC prior to the issue of the closure notice which explained HMRC's position. They had also been subsequent correspondence in the course of 2011 in which HMRC set out the reasons for the closure notice.

99. In addition, Mr Gammie submitted that if the Appellant had fully set out its grounds for appeal in its Notice of Appeal in October 2011, HMRC would have issued a protective determination under paragraph 25 Schedule 10 FA 2003 prior to the expiry of the four-year deadline at the end of January 2012.

Our decision on the Appellant's application

100. We decided to allow the Appellant's application, bearing in mind the overriding principle to deal with matters fairly and justly.

101. In the same way that HMRC's application had been made late, the application made by the Appellant was also made at a very late stage.

102. Subject to one point which we deal with below, our reasons for allowing the Appellant's application were similar to those for which we allowed HMRC's application. The Appellant's application raised a point of law which required no additional evidence or witnesses. The Tribunal in considering whether to uphold the amendment to the self-assessment land transaction return was bound to consider, as a matter of law, whether the correct return had been amended. Again, it was important that the Tribunal reached its decision on the correct legal basis.

103. The one issue that caused us some initial concern was the Mr Gammie's written submission that if the Appellant had raised this point in its Notice of Appeal dated 14 October 2011, or indeed at any time before the end of January 2012, HMRC could have made a determination in respect of the notional land transaction under paragraph 25 Schedule 10 FA 2003. The four year time limit for such a determination expired at the end of January 2012 and that it was now too late for a determination to be raised.

104. In our experience an Appellant's Notice of Appeal usually states the grounds for the appeal in relatively general terms, usually reflecting matters debated in correspondence. It is only when HMRC's Statement of Case is served on the Appellant that the detailed case of HMRC is set out. At that stage it would be appropriate for the Appellant to revise or file more detailed grounds of appeal in response to HMRC's Statement of Case.

105. In this case HMRC filed its original Statement of Case on 28 February 2012 i.e. after the four-year time limit for making a determination had already expired. In our view, therefore, it was reasonable for the Appellant only finally to formulate its case after the Statement of Case had been served.

106. Therefore, bearing in mind the overriding principle of dealing with matters fairly and justly, we considered that the Appellant's application should be allowed.

Arguments for the Appellant

HMRC amended the wrong return

107. Mr Thomas submitted that HMRC had amended the wrong land transaction return. Section 76 FA 2003 imposed a duty on the purchaser to deliver a land transaction return to HMRC in respect of every notifiable transaction. The return had to include a self-assessment of the tax that, on the basis of the information contained in the return, was chargeable in respect of the transaction (section 76 (3)). Section 77 FA 2003 specified which land transactions were notifiable. Mr Thomas argued that there was no obligation to return a notional land transaction within the meaning of section 75A.

108. In fact, as Mr Thomas noted, section 94 FA 2008 substituted a new section 77 FA 2003 and in the new section 77 there was a provision (section 77(1) (d)) which identified a notional land transaction under section 75A as a notifiable land transaction. However, this new provision only had effect in relation to transactions with an effective date on or after 12 March 2008 i.e. it did not apply to the transactions involved in this appeal.

109. Moreover, there was no land transaction between the MoD and the Appellant because this transaction fell to be disregarded under the tail piece of section 45 (3). It was clear from the details contained in the SDLT return 307388936MC that the return related to this disregarded transaction. It did not relate to the notional transaction for which HMRC argued under section 75A. HMRC could not, in Mr Thomas's submission, take one land transaction return and amend it to apply to a completely different (ie notional) transaction.

110. Accordingly, HMRC could not have come to the conclusion the return 307388936MC should be amended. Instead, Mr Thomas submitted that HMRC should have exercised its powers under paragraph 25 Schedule 10 FA 2003 and made a determination. Paragraph 25 applied in the case of a chargeable transaction where no land transaction return has been delivered. The determination must be made no more than four years after the effective date of the transaction in question. Since no determination had been made it was now too late to make one.

Section 75A only applies to avoidance transactions

111. In any event, Mr Thomas submitted that section 75A should not apply to the transactions involved in this appeal. Section 75A was an anti-avoidance provision but the transactions in this appeal were wholly commercial.

112. The structure of the funding involving MAR was entirely driven by the client (the Appellant) and not by the bankers. This was not what would be expected if the funding had been structured to avoid SDLT. The transactions and documents had not

been structured or amended to achieve a favourable SDLT result. Mr Thomas submitted that the facts indicated that the financing was not a short-term funding to avoid SDLT which was then abandoned.

113. Instead, the facts demonstrated the importance of Shari'a-compliant financing to the parties. Mr Thomas noted that Shari'a financing gave the totality of ownership to the funding bank, unlike a conventional Western-style funding where the bank would simply take a security interest.

114. Mr Thomas argued that section 75A should be construed purposively (*Barclays Mercantile Business Finance Limited v Mawson (HMIT)* [2002] EWCA Civ 1853) and that purposive construction over-rode a "black letter" approach to statutory interpretation (*Attorney-General's reference (Number 5 of 2002)* [2004] UKHL 40 per Lord Steyn at paragraph [31]). Mr Thomas referred to the summary of the case law concerning the interpretation of tax statutes in an anti-avoidance context contained in the judgment of Arden LJ in *Astall v HMRC* [2010] STC 137 paragraphs 20 – 36 and, particularly, to the judgment of the Appellate Committee in *Mawson* at paragraph 36.

115. In deciding what transactions answered the statutory description contained in section 75A it was necessary to have regard to the short title of the provisions contained in the legislation i.e. "Anti-avoidance". It was legitimate to refer to the short title or marginal note in determining the statutory context. Mr Thomas referred to the judgment of Sir Nicholas Browne-Wilkinson V-C in *Tudor Grange Holdings Limited v Citibank NA* [1991] 4 All ER 1 at 13d as follows:

> "Although the marginal note to a section cannot control the language used in the section, it is permissible to have regard to it in considering what is the general purpose of the section and the mischief at which it is aimed."

116. In determining the statutory context and the purpose of section 75A it was also legitimate to have regard to the Explanatory Notes which accompanied the Finance Bill 2007. These Explanatory Notes indicated that, what was, Clause 70 Finance Bill 2007 was intended "to counter schemes which attempt to avoid stamp duty land tax (SDLT)." Mr Thomas drew attention to the well-known passage in the judgment of Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] 4 All ER 654 at 657 [5]:

> "The question is whether in aid of the interpretation of a statute the court may take into account the explanatory notes and, if so, to what extent. The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen… Again, there is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates. Applied to the subject under consideration the result is as follows. In so far as the explanatory notes cast light on the objective setting or contextual scene of the statute, and the mischief

> at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose explanatory notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, government Green or White Papers, and the like. After all, the connection of explanatory notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: see Cross *Statutory Interpretation* (3rd edn, 1995) pp 160–161."

117. Mr Thomas, therefore, submitted that the context showed section 75A was not designed to catch every transaction where SDLT was less than it might have been but, instead, was only intended to apply where transactions had been structured to avoid tax.

118. Mr Thomas also referred to HMRC's technical guidance in respect of section 75A contained in "Technical News" August 2007 which stated that section 75A was "intended to counter certain schemes which have the effect of reducing Stamp duty land tax." The guidance gave examples of transactions to which the provision might apply. In particular, the guidance indicated that section 75A was intended to apply to artificial schemes, for example, where the terms of the lease were modified in return for a payment in cases where a freehold had previously been devalued. These examples made it clear that section 75A intended apply to "scheme transactions" which modified disposals between V and P.

119. In *Pollen Estate Trustee Company Limited v HM Revenue and Customs Commissioners* [2012] STC 2443 the Upper Tribunal (Warren J and Judge Herrington) also referred (at [64]) to the fact that section 75A was an anti-avoidance provision.

120. Therefore, Mr Thomas argued that it was plain from the statutory background and context that section 75A was intended to catch avoidance and was not intended to apply to innocent transactions. Avoidance involved taking deliberate steps to bring about or prevent a particular tax result. But where a taxpayer engaged in steps which were commercial, as in this case, which happened to lead to a particular tax result which was favourable, Mr Thomas submitted that this was not avoidance. The transactions in this appeal, according to Mr Thomas, were not within the statutory intention when the statute was construed purposively.

121. Mr Thomas argued that the approach adopted by HMRC would give rise to the application of section 75A in many inappropriate circumstances. For example, if at the height of the property market P contracted to sell land to B for £2 million, with completion delayed for a year, but the market value of the land fell to £1.5 million by the completion date, with the result that B could no longer afford finance the purchase but had to sub-sell at market value to a newly-found purchaser, C, Mr Thomas argued that HMRC's approach would result in C paying SDLT on £2 million, despite the wholly commercial nature of his purchase (and despite the fact that C may be wholly unaware of the terms of A's contract).

122. Mr Thomas addressed criticism from HMRC that the Appellant had not called its directors to give evidence as to what was intended. Mr Thomas submitted that what was intended by the Appellant could be discerned from what was actually done. The evidence of directors was not always the best guide to a company's intentions. In any event, Mr Thomas informed us that none of the directors of the Appellant who were directors at the time of the transactions in question were still with the Appellant.

123. In this case, Mr Thomas argued that the Islamic funding proposal did not come from UK professional advisers and that the evidence of Mr Sherwood-King made this clear. The contract for the acquisition of the Property in 2007 occurred before the financing of the transaction had been decided upon. Mr Sherwood-King's evidence was that MAR could not been brought into the bidding process at the time of the acquisition. Mr Latif's evidence was that Ijara-type funding was likely to be the only suitable form of Islamic financing arrangement in this context. Therefore, the manner in which the transactions took place represented the only realistic way which the transactions could have occurred. All the steps were commercial and no steps were taken to avoid tax.

124. The result, if HMRC's arguments were accepted, would be that the Appellant had to pay more tax because it used an Islamic financing arrangement then it would have done if it had used a Western-style loan financing. Indeed, Mr Thomas submitted that, if section 75A was construed to apply to a normal Islamic financing, this was a strong indication that HMRC's construction was flawed.

If section 75A applies, is the Appellant the right target?

125. Mr Thomas argued in the alternative, that if section 75A did apply to these transactions it had to be capable of being applied in a way that taxpayers knew how it applied and could, consequently, comply with the requirements of the legislation e.g. as to the filing of land transaction returns.

126. It was, therefore, necessary to establish the identity of P for the purposes of section 75A. This was not easy where there were multiple parties, particularly where there was no tax avoidance. Nonetheless, Mr Thomas submitted, it was necessary in order to give effect to the principle of legal certainty that a single P should be identifiable: all other land transactions identified as "scheme transactions" were disregarded by section 75A (4)(a).

127. Mr Thomas cited the Court of Appeal decision in *Attorney-General v Wilts United Dairies Limited* Times Law Reports 22 July 1921 as authority for the proposition that Parliament would usually be presumed not to have delegated to a Minister of the Crown undefined and unlimited powers of imposing taxation.

128. Mr Thomas submitted that a more logical candidate than the Appellant for the role of P was MAR. In applying the section, Mr Thomas argued that it was appropriate to apply it to the earliest land transaction first, then to the next land transaction and then to the final land transaction. On that basis it was the acquisition of the freehold interest in the Property by MAR which should first be subjected to A.

Having done this, any attempt to apply section 75A to any subsequent acquisition of the chargeable interest must take account of the tax which had been charged under section 75A by reference to the prior acquisition.

129. The transactions involved in connection with the acquisition of the freehold in the Property must, Mr Thomas argued, include the contract between the MoD and the Appellant, the transfer of that freehold by the MoD to the Appellant, the sale agreement between the Appellant and MAR and the transfer of the freehold by the Appellant to the MAR. Mr Thomas submitted that no SDLT was payable on those transactions for the reasons given earlier that in this decision. If, however, the MoD had disposed of the freehold and MAR had acquired it for the consideration received by the MoD, the SDLT payable would have been £38,360,000 (section 75A (5)).

130. As regards the acquisition by the Appellant of the lease granted by MAR (the parties agreed that the acquisition of the freehold by the Appellant was to be disregarded by virtue of section 45 (3)), Mr Thomas submitted that, applying the same reasoning, section 75A (1)(c) was not satisfied: in respect of this transaction the amounts of SDLT payable in respect of the scheme transactions had to include the amount of £38,360,000 which was due by virtue of MAR's acquisition of the freehold in the Property. Therefore, section 75A was inapplicable to any later transaction i.e. later than MAR's acquisition of the freehold.

131. Moreover, Mr Thomas drew attention to the words "transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition" in the definition of "scheme transactions" in section 75A(1)(b). In his submission the words "involved… in connection with" meant that the relevant transaction must modify or affect what was acquired by P. This was in line with the purpose of the legislation i.e. it was aimed at transactions which depreciated what was passed to P followed by transactions which restored the value. To be "involved… in connection with" the disposal and the acquisition the transaction had to affect the transaction between V and P. In this case, the agreement and the transfer between the MoD and the Appellant were not affected by later transactions. By contrast, the acquisition of the leasehold by the Appellant from MAR was involved in connection with the disposal by the MoD of the freehold and MAR's acquisition – the lease to the Appellant by MAR could not have happened without the transfer from the MoD to MAR. Therefore, the first transaction that could have engaged section 75A was not the acquisition by the Appellant of the freehold but rather the acquisition of that interest by MAR.

132. Alternatively, it was possible to construe section 75A as imposing a charge to SDLT on the purchaser who, at the completion of the scheme transactions, was left with the valuable chargeable interest. This was supported by the apportionment provisions of section 75C(5). Section 75C(5) was not dealing with the notional transaction envisaged by Section 75A but rather with the eventual purchaser. Furthermore, the freehold retained all the value: the lease to the Appellant was nothing more than the means by which the equivalent of interest on a loan by MAR to the Appellant was to be paid. Until the Appellant acquired the freehold by exercise of the call option, and paid the full price of US $2,467,875,000 to MAR, it did not own a

chargeable interest which fairly reflected the consideration paid to MoD. It was MAR which ended up with the most valuable chargeable interest.

"By reason only of section 71A"

133. If, contrary to his earlier submissions, section 75A was engaged and the Appellant was the correct target then Mr Thomas submitted that section 75A (7) applied. This provision stated:

> "This section [section 75A] does not apply where subsection (1) (c) is satisfied only by reason of –
>
> (a) section 71A to 73…
>
> (b)…."

134. Had it not been for section 71A, the amount of tax payable on the relevant land transactions would have been in excess of £38,360,000. The amount chargeable on the purchase of the freehold by MAR would have been £50 million. In addition, the Appellant would have paid SDLT at 1% on the net present value of the rents reserved by the lease granted by MAR of £1,640,799,863 – a further £1,640,800. It was therefore only by reason of the application of section 71A to both these transactions that the condition in section 75A(1) (c) was satisfied.

Arguments for HMRC

How did section 75A apply in this case?

135. Mr Gammie submitted that in this case, "one person" (the MoD, i.e. V) disposed of the freehold in the Property and "another person" (the Appellant, i.e. P) acquired "a chargeable interest deriving from it" i.e. the leasehold. Section 75A(1)(a) explicitly contemplated the acquisition by P of an interest derived from the freehold. Accordingly, section 75A(1)(a) was satisfied.

136. The Appellant's contract to acquire the Property from the MoD, the financing of that acquisition by way of a sub-sale of the Property to MAR, including the transfer to the Appellant and associated transfer to MAR and the lease-back of the property by MAR to the Appellant were transactions "involved in connection with" the disposal by the MoD and the leasehold acquisition by the Appellant. Accordingly, section 75A(1)(b) was satisfied. These transactions together comprised the "scheme transactions" as defined.

137. The sum of the SDLT payable in respect of the transactions described in the preceding paragraph (£nil) was less than the amount that would be payable on a notional land transaction effecting the acquisition of the freehold in the Property by the Appellant on its disposal by the MoD. Notwithstanding that the Appellant actually acquired a leasehold interest in the property initially, the notional transaction postulated by section 75A(1)(c) focused on the chargeable interest disposed of by V (i.e. the MoD), namely the freehold. Thus, Mr Gammie submitted, section 75A(1) (c) was also satisfied.

138. Pursuant to section 75(4)(a) any of the scheme transactions which was a land transaction had to be disregarded for SDLT purposes. Instead, under section 75A(4)(b), there was postulated a notional land transaction effecting the acquisition of the freehold in the Property (i.e. the MoD's chargeable interest) by the Appellant on its disposal by the MoD.

139. Pursuant to section 75A(5), the chargeable consideration for the notional land transaction was the largest amount either given by any one person by way of consideration for the scheme transactions (under section 75A(5) (a)) or received by the vendors (under section 75A(5)(b)). The MoD, as vendors, received £959 million. But since MAR agreed to pay £1.25 billion to the Appellant for the sub-sale of the freehold, the chargeable consideration for the notional transaction was determined by section 75A(5)(a). SDLT was therefore due at the rate of 4% of £1.25 billion, namely £50 million.

140. Mr Gammie accepted that the results of his submissions was that the SDLT due as a result of the arrangements was greater than that due on a straightforward purchase of the property by the Appellant from The MoD. This arose, not because HMRC's interpretation was wrong, but was a natural result of the transactions entered into by the Appellant and MAR.

141. Pursuant to section 75A(6), the effective date of the notional transaction was 31 January 2008, the date of the lease from MAR to the Appellant.

Is section 75A engaged?

142. Mr Gammie argued that the Appellant had not produced evidence in relation to their motives for the transactions concerned in this appeal. He noted that Mr Thomas had relied squarely on the commerciality of transactions but seemed to accept that they fell within the literal wording of section 75A.

143. As regards Mr Thomas's argument that section 75A did not apply to commercial transactions but only to those transactions concerned with tax avoidance, the only support for that argument was in the heading or side-note of section 75A. Otherwise, the provision made no reference to the exclusion of commercial transactions.

144. Section 75A(7) excluded commercial transactions that would otherwise be caught. For example, section 75A(7)(b) referred to transactions falling within Schedule 9 (which dealt with the right to buy public housing and shared ownership leases). The fact that Parliament needed to exclude these transactions was indicative of the broad scope of the provisions.

145. Section 75C(11) and (12) provide that the Treasury may by order provide for section 75A not to apply in specified circumstances and that such provision may be made retrospective. Again, this indicated that Parliament intended section 75A to have a very broad potential scope. Mr Gammie noted that the Treasury had not excluded the Appellant's transactions.

146. Mr Gammie referred to the decision of the Court of Appeal in *Page (HMIT) v Lowther* [1983] STC 799. In this case, the trustees of an estate decided to develop for residential purposes some land included in the estate. Rather than develop the land themselves, the trustees granted a lease to a development company in return for a rent and a premium on terms which they were advised will produce the best possible price. The premium was a predetermined proportion of the price obtained by the development company for under leases of the houses and flats erected on the land. The trustees were assessed under provisions introduced in 1969 to end transactions which converted development profits from land into capital gains. The side-note of the relevant provision, section 488 Income and Corporation Taxes Act 1970, contained a side note reading: "Artificial transactions in land." Subsection (1) expressly stated the purpose of the section is being the prevention of the avoidance of tax by persons concerned with land or the development of land. In Mr Gammie's submission all the arguments raised by Mr Thomas in relation to section 75A applying only to tax avoidance transactions, were dealt with by the Court of Appeal in *Lowther*.

147. In *Lowther* Slade LJ said at 807d:

> "I must accept that on my construction of the section, the side note reading "Artificial transactions in land" may, in some cases, be somewhat misleading. I would accept that the transactions involved in the present case cannot on the evidence fairly be described as artificial. Nevertheless, as Lord Upjohn pointed out in *R v Schildkamp* [1971] AC 1 at 28, "a side-note is a very brief précis of the section and therefore forms a most unsure guide to the construction of the enacting section…"

148. Robert Goff LJ said at 807j:

> "It is plain from the authorities... That, although it may be legitimate to look at the side note, nevertheless a side note is a very poor guide and will very rarely throw light on the intention of Parliament. The argument of counsel for the trustees really goes so far as to pray in aid a side note to limit, even qualify, the natural meaning of the words of the subsection. This is seeking, in my judgment, to derive from the side note more than can legitimately be derived from it as a matter of construction."

149. Mr Gammie also referred to the decision of the House of Lords in *R v Montila* [2005] 1 All ER 113 where the Appellate Committee [at 124] accepted that heading and Explanatory Notes were permissible aids in determining the statutory context of legislation.

150. Mr Gammie summarised the authorities on headings and side-notes as leading to the conclusion that headings and side-notes were something which a court or Tribunal could refer to but they could not alter the plain language of the statutory provision. In his submission, the interpretation of section 75A for which HMRC contended gave effect to the purpose of the heading attached to that provision.

151. Section 75A (1)(a), according to Mr Gammie, "controlled" subsections (1)(b) and (c). The reference in (1) (b) to a "number of transactions" referred to transactions which were connected with the disposal by V and the acquisition by P referred to in (1) (a). The reference to "scheme transactions" was not sinister: it merely referred to those transactions that were "involved in connection with" the disposal and acquisition referred to in (1) (a). The avoidance and which section 75A was aimed was identified by subsection (1) (c).

152. Almost from the introduction of SDLT in 2003 avoidance had, according to Mr Gammie, involved the manipulation of several reliefs (e.g. the unit trust exemption in section 64 A FA 2003). The avoidance at which section 75A was aimed was clear and, in Mr Gammie's submission, the heading and the Explanatory Notes provided no assistance to the interpretation of the provision.

153. Mr Gammie addressed the example raised by Mr Thomas in paragraph 121 above about the sub-sale at a lower price caused by a drop in the market value between contract and completion. The question in Mr Thomas's example was, Mr Gammie submitted, whether the sub-sale transaction was in connection with the disposal or acquisition. It would have to be determined whether C was involved only by reason of the fall in the market. The facts of the present appeal were entirely different. In this case the financing transaction entered into between the Appellant and MAR was plainly involved connected with the notional transaction.

154. Mr Gammie considered the authorities on the phrase "in connection with" and, in particular, *HMRC v Barclays Bank plc and another* [2008] STC 476. Referring to the judgment of Arden LJ at paragraph 30, Mr Gammie noted that the proper meaning of the words "in connection with" could be used to describe a range of links. The proper meaning would depend on the surrounding words and the overall purpose of the legislation. In the *Barclays* case Arden LJ rejected counsel for the taxpayer's attempt to restrict the width of the words "in connection with", stating [30]:

> "Parliament has used a broad expression, namely the expression "in connection with". Having cast the net widely, Parliament has drawn it in particularly by imposing limits that there should be a connection with the service. The limitations prescribed by Parliament of the limitations that the court should apply."

155. In the context of section 75A, Mr Gammie submitted that it was clear that the requirement for the intermediate transaction to be involved in connection with the disposal and acquisition was broad. Section 75A(1)(b) was plainly satisfied in the present case, where a series of transactions had been entered into to facilitate the vendor's disposal of the property and the purchaser's acquisition of it. There was no express or implied condition that some or all the parties involved must have engaged in a tax avoidance scheme as a precondition to the application of the section.

156. In any event, HMRC's Statement of Case gave the Appellant notice that HMRC required it to prove the absence of a tax avoidance motive, should the Appellant have wished to rely on such a submission. However, the Appellant had failed to call any director as a witness. HMRC also pointed to the fact that a "tax structure paper" had

been considered at meetings of the QD and the Appellant's Board in order to decide whether to enter into the transactions. This structure paper had not been disclosed in the current appeal on the basis of legal professional advice privilege.

157. Moreover, Clifford Chance had made a disclosure of the arrangements used in relation to SDLT to HMRC on 1 February 2008, pursuant to Part 7 of FA 2004 and the SDLT Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2005 (SI 2005/1868). Mr Gammie noted that section 306(1) (b)-(c) FA 2004 only required notification if it was expected that the arrangements was such that "the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of an advantage in relation to any tax."

158. Mr Gammie argued that Mr Sherwood-King's evidence simply demonstrated that he was not a party to discussions concerning the form of the transactions.

159. In addition, in relation to Mr Thomas's submission that the Islamic financing was designed to put in place long-term finance, Mr Gammie noted that the financing with MAR had been repaid in March 2010. In other words, the financing lasted for just over two years.

160. Mr Gammie submitted that the Appellant had led no evidence that it had no tax avoidance motives when structuring the transactions concerned in this appeal. If the Appellant's case was that section 75A only applied to transactions involving tax avoidance, the burden of proof lay with the Appellant to show that it had not engaged in such transactions. The Appellant, Mr Gammie submitted, had failed to discharge this burden of proof. Nonetheless, Mr Gammie's primary submission in this respect was that the motivation of the Appellant was irrelevant.

Identifying P and V

161. Mr Gammie submitted that in applying section 75A the first step was to identify V and P. Subsections (1)(b) and (c) depended on who was defined as V and P in subsection (1)(a).

162. In his submission the identification of P as the Appellant was obvious. The Appellant was buying the Property and financing it. If it had re-mortgaged its acquisition in a conventional Western-style financing then it would have paid SDLT and section 75A would not have applied.

163. In a more complex arrangement it was necessary to look at all the transactions and all the reliefs claimed in order to identify the tax advantage gained. Section 75A was targeted at using SDLT reliefs in combination in order to reduce SDLT paid on the more direct transaction envisaged by subsection (1)(c). Mr Gammie criticised the approach suggested by Mr Thomas (which identified P as MAR) as stopping at an intermediate point rather than looking at the whole of the transactions. This was not, he argued, an obvious way of reading the provision.

164. The notional transaction was specifically contemplated by subsection (3)(a) which provided that a scheme transaction may include:

> "the acquisition by P of a lease deriving from a freehold owned or formerly owned by V…."

165. The natural reading of subsection (3)(a) was that, in identifying P, it was not appropriate to stop at the person who had acquired the freehold. In Mr Gammie's submission not only was this a logical way of approaching the interpretation of section 75A but the provision envisaged it would be applied in such a manner.

166. In relation to the *Wilts Dairies* case referred to by Mr Thomas, Mr Gammie considered that a better authority was *Vestey v IRC* [1980] AC 1148 in which HMRC argued that they could choose which beneficiaries under a discretionary trust should be taxed. The House of Lords rejected this approach and construed the provision in question in a way which prevented HMRC having a discretion. In this case, Mr Gammie argued that HMRC did not need to choose between different parties for the role of P: there was only one P in this case i.e. the Appellant.

167. Mr Gammie argued that MAR could not be identified as P. It was the wrong person. MAR was a funding bank and under the Common Terms Agreement the Appellant indemnified it in respect of SDLT. MAR was not really the purchaser of the Property.

168. If the MoD was V and MAR was P, as Mr Thomas submitted, Mr Gammie argued that section 75A did not operate. The scheme transactions involved in connection with the disposal from the MoD to MAR were the sale by MoD to the Appellant and the sub-sale by the Appellant to MAR. The leaseback from MAR to the Appellant was not involved in connection with the notional transaction between the MoD and MAR. Thus, the sum of the amounts of SDLT payable in respect of the scheme transactions for the purposes of subsection (1) (c) would be the same as the amount chargeable under section 75A. This, in Mr Gammie's submission, showed the illogicality of Mr Thomas's approach which he described as "stopping halfway through."

169. As regards Mr Thomas's secondary submission that P was a person who ended up with the most valuable interest, Mr Gammie noted that the Appellant had submitted no valuation evidence. Even if the Appellant's interest was not valuable this was because the Appellant had sub-leased the Property to PBDL at a peppercorn rent. In addition, it was clear that PBDL was not a candidate for the role of P, because the sub-lease was not a transaction involved in connection with the original acquisition from the MoD.

170. In relation to section 75C(5) (which allowed a "just and reasonable apportionment" where, in the application of section 75 A (5), an amount was given or received partly in respect of the chargeable interest acquired by P and partly in respect of another chargeable interest), Mr Gammie submitted that this dealt with the situation where two Ps were involved. Thus, for example, where the chain of transactions started with V and was followed by a series of transactions between A, B

and C and (eventually) P, if section 75A applied to all the transactions there would be multiple double charges to SDLT. Section 75C(5) prevented this result by allowing apportionment. But the provision did not apply in this case. In the present appeal there was only one P.

"By reason only of section 71 A"

171. In this case the SDLT payable in respect of the scheme transactions was £nil because of a combination of section 45 (3) and section 71 A FA 2003.

172. Mr Gammie criticised Mr Thomas's approach in relation to section 75 A (7) ie taking each transaction separately and asking what SDLT was paid and then calculating if the total was less than the notional transaction between V and P. The meaning of section 75A(7) was plain enough. It was obvious why the total of SDLT payable on the scheme transactions was nil. It was because of the combination of two separate reliefs: section 45 (3) and section 71A FA 2003.

Was the right return amended?

173. Mr Gammie explained that the provisions contained in section 75A were originally introduced by a statutory instrument (Stamp Duty Land Tax (Variation of the Finance Act 2003) Regulations SI 2006/3237) and were replaced by sections 75A – C (enacted by the Finance Act 2007) applying to transactions on or after 6 December 2006.

174. Section 76 FA 2003 required a purchaser to deliver a land transaction return to HMRC in respect of every notifiable transaction before the end of the period of 30 days after the effective date of the transaction. The land transaction return (subsection (3) had to include a self-assessment.

175. Section 77(1)(d) FA 2003 (substituted by FA 2008) defined a notional transaction under section 75A with an effective date on or after 12 March 2008 as a notifiable land transaction.

176. Mr Gammie accepted that prior to 12 March 2008, a date which came after the transactions involved in this appeal, there was no specific provision requiring a return of a section 75A notional land transaction. However, he submitted that this made no difference because there was always an obligation to notify a land transaction under section 77 (3) ("… any other acquisition of a major interest in land is notifiable…"). He argued that Mr Thomas's approach amounted to an argument that section 75A was ineffective because it was a self-assessed tax and if no return was made there could be no self-assessment. In other words, Mr Thomas was arguing that Parliament had misfired. It had imposed a charge to tax but had not provided a mechanism for the tax to be calculated and collected. This was unlikely and any court or Tribunal should avoid any construction which led to that result. However, Mr Thomas's submission was wrong because the notional transaction in this case (a notional disposal of The MoD's freehold to the Appellant) was a land transaction (and therefore notifiable)

because it involved a major interest in land (i.e. the freehold: see section 117(2) FA 2003).

177. No form had been prescribed for a return under section 75A. The effect of section 45 (3) meant that there was no land transaction in relation to the Appellant's acquisition of the freehold and, therefore, no obligation to submit a land transaction return. Instead, the Appellant had submitted a return in relation to the transaction between the MoD and the Appellant and that this return was the only one relevant to the notional transaction which postulated the transfer of the MoD's freehold to the Appellant. The return was amended by a closure notice and the amendments which the closure notice made were to a notional transaction. The SDLT 1 identified the Property, the freehold being transferred, the effective date of the transaction, the correct purchaser (the Appellant). The closure notice only amended the tax due and the consideration.

178. Therefore, in Mr Gammie's submission, HMRC had amended the correct return.

Appellant's Reply

179. Mr Thomas noted that HMRC were arguing that the correct charge to SDLT under section 75A was £50 million rather than £38 million. As regards any increase in the amount of SDLT from that which HMRC sought to charge in the amendment to the Appellant's self-assessment return, the onus of proof was on HMRC.

180. However, under the Sale Agreement dated 29 January 2008 between the Appellant and MAR, clause 7.3 provided that payments of the various tranches of the purchase price were only due if a valid Sale Undertaking Notice had not been served. However, a Sale Undertaking was served before the last tranche (US $378,670,740) was due.

181. Section 75A(5) referred to the chargeable consideration on the notional transaction is being the "largest amount (or aggregate amount)… *given* by… any one person by way of consideration for the scheme transactions or… received by V… by way of consideration for the scheme transactions." (Emphasis added)

182. Mr Thomas informed us by reference to the exhibits that the final tranche of approximately £378 million had not been paid. The total consideration paid by MAR to the Appellant was £970,302,212. SDLT at 4% on this amount would total approximately £38.8 million. HMRC accepted that £970,302,212 was the total amount that the Appellant drew down under the Ijara facility (ie the amounts paid by MAR to the Appellant).

183. Section 51 FA 2003 contained the SDLT version of the old stamp duty "contingency principle." Section 51(1) provided that where the chargeable consideration for a transaction was contingent the amount of the consideration should be calculated on the assumption that the outcome of the contingency would be such that the consideration was payable. However, section 80(4) FA 2003 provided that

where section 51 applied but the contingency occurred and less SDLT was payable than had already been paid, the purchaser could claim a repayment.

184. In the circumstances, Mr Thomas submitted that in amending a land transaction return under section 75A, HMRC had to take account of the fact that the consideration paid by the Appellant was approximately £970.3 million rather than £1.25 billion.

185. In relation to the question whether the Appellant had demonstrated that there was no tax avoidance motive, Mr Thomas submitted that the witness statements of these two witnesses was sufficient to discharge the burden of proof. The Appellant was, as Mr Thomas put it, an emanation of an Islamic state, MAR was a company in which the parent of the Appellant was a founding member. The transactions in question were ordinary transactions structured as a Shari'a-compliant financing. Mr Thomas submitted that he had, therefore, discharged the burden of proof that lay upon him.

186. Mr Thomas observed that we did not know what the tax structure paper prepared by Clifford Chance contained but he suggested that it may have addressed the withholding tax issues which were the concern of a letter submitted by Clifford Chance under Code of Practice 10.

187. As regards the DOTAS notification, the practice of Clifford Chance and other major law firms was to make a return if there was the remotest possibility of being required to do so. Indeed, Mr Thomas submitted HMRC had invited law firms to do this and had assured those firms that the filing of a return would not be taken as an admission that the transactions disclosed constituted tax avoidance.

188. In relation to the Court of Appeal decision in *Page v Lowther*, Mr Thomas submitted that the law has moved on. The decision came before the decision of the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] 1 All ER 97and before the decision in *National Asylum Support Service*. The approach adopted by the Court of Appeal was different from that which would have been adopted today, taking account of contextual documents and background. In *Page v Lowther* the court was unwilling to resort to context in the absence of ambiguity, but more recent authority indicated that a more flexible approach, which delved more deeply into the words that had been used, was more appropriate.

Written Submissions

189. In the course of argument both counsel compared the position in relation to the Shari'a-compliant financing involved in this appeal with the position that would have obtained had PBL and MAR engaged in a conventional loan financing secured by a mortgage.

190. We raised the issue whether Article 14 of the European Convention on Human Rights ("the Convention") was relevant to this appeal. In particular, it appeared to us

that Article 14 might have some relevance in relation to HMRC's argument that the SDLT chargeable was £50 million rather than £38.36 million.

191. It was agreed that the parties would make further written submissions on this point if, after the hearing, the Tribunal considered that it would be of assistance. We subsequently directed the parties to make written submissions on this point.

192. We also requested written submissions on whether section 83 FA 2003 was relevant to the issues raised by this appeal.

193. In the event, we received written submissions from the parties which in total exceeded 70 pages. So far as relevant, we deal with these written submissions in the relevant sections of this decision as set out below.

194. In his reply to HMRC's written submissions, Mr Thomas pointed out, correctly in our view, that HMRC's written submissions went beyond those matters on which the Tribunal had requested submissions. In fact, these additional submissions of HMRC related to matters that had been touched or considered on at the hearing. In the event, we were satisfied that no injustice arose because Mr Thomas helpfully and fully dealt with HMRC's submissions in appendices to his reply.

Discussion

Burden of proof

195. At the hearing and in his written submissions in reply, Mr Thomas submitted that in relation to HMRC's argument that the correct amount of SDLT chargeable was £50 million rather than £38.36 million, the burden of proof was on HMRC. This was because HMRC were asking the Tribunal to increase the amount charged by the amended self-assessment return pursuant to paragraph 42 (3) Schedule 10 FA 2003. Mr Thomas accepted that in so far as the Appellant argued that the amount charged by the amended self-assessment return (£38.36 million) was excessive, the burden of proof lay upon the Appellant.

196. HMRC did not expressly address this issue of the burden of proof (in relation to their argument that the amendment to the land transaction return had undercharged the Appellant) either at the hearing or in their written submissions, although in their written submissions they appeared to assume that in relation to Article 14 of the Convention the onus lay upon the Appellant.

197. Paragraph 42 provides as follows:

> (1) In this paragraph any reference to an appeal means an appeal under paragraphs 33(4) or 35(1).
>
> (2) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that the appellant is overcharged by a self-assessment; or
>
> (b) that the appellant is overcharged by an assessment other than a self-assessment,

> the assessment shall be reduced accordingly, but otherwise the assessment shall stand good.
>
> (3) If, on appeal it appears to the tribunal—
>
> (a) that the appellant is undercharged to stamp duty land tax by a self-assessment; or
>
> (b) that the appellant is undercharged by an assessment other than a self-assessment,
>
> the assessment shall be increased accordingly.

198. It will be seen that paragraph 42 broadly follows the format of section 50(6) to (7) TMA 1970. It is well-established that section 50(6) (the equivalent of paragraph 42 (2)) places the burden of proof on an appellant to show that the appellant has been overcharged. Section 50(7) (the equivalent of paragraph 42 (3)) is silent as to the burden of proof. Generally, however, "the burden of proof lies upon the party who asserts the affirmative of the issue" (see Phipson: *On Evidence,* 17th edition paragraph 6 – 06). Thus, it is for HMRC to demonstrate that the Appellant has been undercharged by the amended self-assessment return.

199. There is, as far as we are aware, no direct authority on this point but we note that in *Glaxo Group Limited v IRC* [1996] STC 191 the Court of Appeal appeared to assume, in relation to section 50 (7) TMA 1970, that it would be HMRC which would need to provide evidence to substantiate the assertion that an assessment undercharged the taxpayer.

200. In HMRC's Appeals Handbook (which was in force before 1 April 2009) HMRC summarise the position in relation to section 50 (7) TMA 1970 as follows:

> "*AH2135 - ITSA Appeals: Assessments, Amendments and Enquiries: Onus of proof: self-assessment, assessment or partnership statement inadequate*
>
> Under TMA70/S50(7) the Commissioners have both the power and the duty to increase a self- assessment or HMRC assessment on appeal where it appears to them that it is inadequate (see *Cain v Schofield* 34TC364). Similarly, they may increase the amounts contained in a partnership statement if they consider them insufficient.
>
> The statute does not specify who has to show that the assessment etc is inadequate. It follows that the onus of proving that the assessment etc is inadequate must lie on the party who asserts that inadequacy. Usually it will be HMRC who assert that an assessment etc is inadequate. It will therefore be for you to show that the assessment etc should be increased. You will also have to produce evidence as to the amount by which the assessment etc needs to be increased."

201. The replacement HMRC guidance which took effect from 1 April 2009 does not address this issue.

202. In our view, the guidance contained in the Appeals Handbook referred to above reflects the correct legal position in relation to section 50 (7) TMA 1970. We see no

reason why the position should be different in relation to paragraph 42 (3) Schedule 10 FA 2003. Accordingly, the burden of proof in relation to HMRC's argument that the Appellant was undercharged by the amendment to the Appellant's SDLT return lies upon HMRC and not upon the Appellant.

203. We shall return to this issue when we consider the application of Article 14 of the Convention later in this decision.

Some general principles of construction relevant to section 75A

204. Section 75A FA 2003 is a provision which has attracted a great deal of controversy. There is no doubt that it is difficult provision to interpret. Before examining the statutory wording in detail and then applying it to the facts of this case, let us examine a few general principles of construction which should guide our path.

1) Purposive or literal construction?

205. At various points in the argument before us, counsel referred to purposive interpretation and, on the other hand, mechanical or literal interpretation.

206. It is now clear beyond doubt that tax statutes, like any other statutes, must be construed purposively. In other words, in interpreting the words used by Parliament the purpose of Parliament should be borne in mind. The Appellate Committee of the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2005] 1 All ER 97 said:

> "[28]… The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose.

207. The question, in our view, is not whether to choose between literal or purposive construction. It is clear from the authorities that we should construe any statutory provision in a purposive manner. Instead, the question is how should the purpose of the legislation be ascertained and what consequences flow from purposively construing section 75A.

2) Statutory context

208. Just as seeking to determine the purpose of a statute is well-established as the correct method of construction, so too is the manner in which that purpose is to be ascertained.

209. There was much debate before us about the headings of Sections 75A – C, which were, respectively, "Anti-avoidance", "Anti-avoidance: incidental transactions" and "Anti-avoidance: supplemental".

210. In *R v Montila* [2004] UKHL 50, the Appellate Committee of the House of Lords made it clear that in construing a statutory provision a court could take account of statutory headings and Explanatory Notes. The committee said [34 – 36] :

> The question then is whether headings and side notes, although unamendable, can be considered in construing a provision in an Act of Parliament. Account must, of course, be taken of the fact that these components were included in the Bill not for debate but for ease of reference. This indicates that less weight can be attached to them than to the parts of the Act that are open for consideration and debate in Parliament. But it is another matter to be required by a rule of law to disregard them altogether. One cannot ignore the fact that the headings and side notes are included on the face of the Bill throughout its passage through the Legislature. They are there for guidance. They provide the context for an examination of those parts of the Bill that are open for debate. Subject, of course, to the fact that they are unamendable, they ought to be open to consideration as part of the enactment when it reaches the statute book.
>
> There is a further point that can be made. In *Pickstone v Freemans Plc* [1989] AC 66, 127 Lord Oliver of Aylmerton said that the explanatory note attached to a statutory instrument, although it was not of course part of the instrument, could be used to identify the mischief which it was attempting to remedy: see also *Westminster City Council v Haywood (No 2)* [2000] 2 All ER 634, 645, para 19 per Lightman J. In Coventry and Solihull Waste Disposal Co Ltd v Russell [1999] 1 WLR 2093, 2103, it was said that an explanatory note may be referred to as an aid to construction where the statutory instrument to which it is attached is ambiguous. In *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956, 2959B-C, Lord Steyn said that, in so far as the Explanatory Notes that since 1999 have accompanied a Bill on its introduction and are updated during the Parliamentary process cast light on the objective setting or contextual scene of the statute and the mischief at which it is aimed, such materials are always admissible aids to construction. It has become common practice for their Lordships to ask to be shown the Explanatory Notes when issues are raised about the meaning of words used in an enactment.
>
> The headings and side notes are as much part of the contextual scene as these materials, and there is no logical reason why they should be treated differently. That the law has moved in this direction should occasion no surprise. As Lord Steyn said in that case, at p 2958, the starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used."

211. The Explanatory Notes on Clauses of the Finance Bill 2007 said in relation to Clause 70 (which inserted new sections 75 A-C into FA 2003:

> "This clause amends Finance Act… 2003 so as to counter schemes which attempt to avoid stamp duty land tax (SDLT)."

212. Later, in paragraph 29 of the Explanatory Notes under the heading "Background Note", it stated:

> "This clause has been introduced to counter avoidance schemes which have been developed to avoid payment of SDLT."

213. Paragraph 30 of the Explanatory Notes stated:

> "The clause inserts three new sections after section 75 of FA 2003. The first new section, section 75 A, describes how the anti-avoidance measure works and what sort of transaction it applies to, in particular what sort of scheme transactions it seeks to prevent."

214. Paragraph 31 also referred to the new provisions as an "anti-avoidance measure."

215. The heading to section 75A and the Explanatory Notes make it clear that purpose of the provision is to combat the avoidance of SDLT. This is consistent with the assurances given by the Chief Secretary to the Treasury in Parliament and is also consistent with HMRC's SDLT Technical News (Issued 5 – 15 August 2007) which stated that section 75A "is intended to counter certain schemes which have the effect of reducing stamp duty land tax… liability." There can be little doubt, therefore, that section 75A was designed to be an anti-avoidance provision.

216. Moreover, anyone with the slightest familiarity with tax legislation will recognise section 75A, with its sweeping and general language, as being what is known as a targeted (in the sense that it deals with a specific tax) anti-avoidance provision.

3) Does HMRC have a discretion to levy tax?

217. Another issue in this appeal is whether HMRC has a discretion in relation to charging tax under section 75A. The point arises not so much from the submissions of HMRC in this case but rather, as we shall see, from the implications of those submissions. There are, in fact, two separate issues. The first is whether HMRC has a discretion to apply section 75A and, secondly, whether it has a discretion to decide which party in a series of transactions should be taxed under the provision. We shall deal with this point more fully later in this decision. For the present, however, we shall set out what we understand to be the relevant principles.

218. HMRC state in their Guidance Note dated 1 March 2011:

> "Section 75 A is an anti-avoidance provision. [HMRC] therefore takes the view that it applies only where there is avoidance of tax. On that basis, HMRC will not seek to apply section 75A where it considers transactions have already been taxed appropriately."

219. It is not clear to us how this statement can be reconciled with the more general proposition that HMRC are under an obligation to collect a tax imposed by Parliament, subject to concessions arising from the need to collect tax pragmatically, dealing with minor or transitory anomalies and cases of hardship or cases at the

margin or cases in which a statutory rule was difficult to formulate or its enactment would take up a disproportionate amount of Parliamentary time (see: *R (on the application of Wilkinson) v IRC* [2005] UKHL 30 at [21]). Section 75A does not contain a requirement, as a precondition to its application, that HMRC should deliver a notice to the taxpayer applying the provision (compare, for example, the provisions of Part 13 Chapter 1 (Transactions in Securities) Income Tax Act 2007). The provision applies automatically and is part of the self-assessment regime, so that a taxpayer must consider whether the provision applies in its terms when making the necessary returns.

220. In *Vestey v IRC* [1980] STC 10, HMRC sought to tax beneficiaries under a discretionary trust under section 412 Income Tax Act 1952 (transfer of assets abroad). This provision stated that its purpose was the prevention "of the avoiding …liability to income tax by means of transfers of assets." The statute laid down no guidance as to how income arising to the foreign trustees might be apportioned for tax purposes amongst the potential discretionary beneficiaries. HMRC argued that the provisions gave them a discretion which enabled them to assess one or more or all of the individuals in such sums as they thought fit; the only limitation being that the total income of the foreign trustees could not be assessed more than once. As Lord Wilberforce noted, HMRC claimed the right to select one or more of the beneficiaries to tax and to pass over the others. Secondly, HMRC claimed the right to apportion the tax between several beneficiaries according to any method they thought fit, without any possibility of appeal. Finally, the liability of an individual beneficiary might depend on when HMRC chose to make its assessment.

221. Lord Wilberforce, in a well-known passage, said (at pages 18 – 19):

> "Taxes are imposed on subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer, and the amount of his liability is clearly defined.
>
> A proposition that whether a subject is to be taxed or not, or that, if he is, the amount of his liability is to be decided (even though within a limit) by an administrative body, represents a radical departure from constitutional principle. It may be that the Revenue could persuade Parliament to enact such a proposition in such terms that the courts would have to give effect to it; but unless it has done so, the courts, acting on constitutional principles, not only should not, but cannot validate it.
>
> … When Parliament imposes a tax, it is the duty of the commissioners to assess and levy it on and from those who are liable by law. Of course they may, indeed should, act with administrative common sense. To expend a large amount of tax payers' money in collecting, or attempting to collect, small sums would be an exercise in futility; and no one is going to complain if they bring humanity to bear in hard cases. I accept also that they cannot, in the absence of clear power, tax any given income more than once. But all of this falls far short of saying that so long as they do not exceed a maximum they can decide that beneficiary A is to bear so much tax and no more, or that beneficiary B is to bear no tax.

> This would be taxation by self-asserted administrative discretion and not by law. As the judge [Walton J] well said, 'One should be taxed by law, and not be untaxed by concession.' "

222. Lord Wilberforce and the other members of the House, refused to countenance such a range of discretions. Instead, the House of Lords, overruling one of its previous decisions, construed the relevant words of the statute ("such an individual") in a manner way which prevented HMRC having the discretion which Lord Wilberforce considered so offensive to constitutional principle.

223. We derive from *Vestey* the proposition that, unless it clearly provides otherwise, section 75A should be construed as not giving HMRC a discretion whether to apply the statute nor as conferring on HMRC a discretion either whom to tax or as to the amount of tax to be levied. This is, of course subject to section 75C (11) and (12), to which we now turn.

4) Section 75C (11) and (12) Finance Act 2003

224. Section 75C (11) and (12) constitute two of the more unusual statutory provisions in the UK tax code. In short, subsection (11) allows the Treasury to make an order providing that section 75A should not apply in certain specified circumstances. Subsection (12) provides that an order under subsection (11) may include incidental, consequential or transitional provision and may make provision with retrospective effect.

225. The main purpose of these provisions was that, if section 75A was construed so broadly that it applied to transactions which were not within the intention of Parliament, the Treasury could dis-apply section 75A, with retrospective effect where necessary. This is, indirectly, an indication of the width that Parliament intended section 75A to have i.e. that Parliament provided for the eventuality that the legislation might "overshoot." As far as we are aware, the Treasury have not made an order dis-applying section 75A.

226. In a sense, this “dis-application” provision is hardly surprising. Various SDLT avoidance schemes were "doing the rounds" prior to the introduction of sections 75A – C in the Finance Act 2007. Indeed, section 75A (3) gives non-exhaustive examples of the type schemes that were in use. Section 75A was intended as a broad-spectrum anti-avoidance provision (albeit targeted on SDLT avoidance) to counteract a range of schemes. Parliament decided that “enough was enough” and opted for an anti-avoidance provision which was general in nature and not specific – a blunderbuss rather than a sniper's rifle. Plainly, therefore, in construing section 75A we should give effect to Parliament's evident intention and not be astute artificially to limit the scope of the provision.

Construction of Section 75A: specific issues

(a) Relevance of motive

227. Whilst it is clear that the purpose of section 75A is to counteract the avoidance of SDLT, the provision contains no requirement that the taxpayer should have a tax avoidance motive or purpose as a precondition or defence to the application of the provision. There is no "motive defence", often found in other forms of anti-avoidance legislation, by means of which a taxpayer can escape the charge to tax if it can, for example, prove that the relevant tax advantage was not one of the main benefits of the transaction and the transaction was carried out to commercial purposes. The omission of a motive defence was hardly accidental. Parliament obviously intended that the provision should apply regardless of motive. Accordingly, we reject Mr Thomas's primary submission that section 75A is not engaged where transactions have commercial motives and are not part of a tax avoidance scheme.

228. It follows, therefore, that (subject to the observations made below in relation to the application of Article 14 of the Convention) evidence of the Appellant's motives is not strictly relevant. Nonetheless, for what it is worth, we do not consider that the Appellant has discharged the burden of proof in demonstrating that its transactions were not, at least in part, motivated by tax avoidance considerations. We accept Mr Thomas's submission that the acquisition of the Property by the Appellant and the subsequent sale and leaseback involving MAR were carried out for a commercial reason i.e. the acquisition of the Property for development and the financing of that acquisition. We also accept, on the evidence, that the Appellant and MAR desired the sale and leaseback of the Property to qualify as a Shari'a-compliant Ijara financing (indeed the evidence was that MAR could only provide finance in a Shari'a-compliant manner). As we shall see in relation to the discussion later in this decision in relation to Article 14 of the Convention it is not clear why the Appellant required that the financing should be structured in a Shari'a-compliant manner.

229. However, the fact that a transaction may be carried out for commercial reasons does not mean that it does not also have a tax avoidance motive. In our experience, there can often be many different ways of structuring the same overall commercial transaction, some of which have more beneficial tax consequences than others.

230. We do not accept that the Appellant has shown that, although its transactions had a commercial purpose, they did not also have an intention to avoid SDLT. Mr Sherwood-King's evidence indicated that the decision to use Shari'a-compliant financing had been taken prior to the meeting in June or July 2007, but Mr Sherwood-King was evidently not party to the thinking behind that decision.

231. We know that the Board of the Appellant considered a tax structure paper prepared by Clifford Chance but we do not know what that paper contained because the Appellant has asserted its right to legal professional advice privilege. We draw no adverse inference from the Appellant's claim to legal professional advice privilege – it is entitled not to disclose its legal advice.

232. We do, however, attach significance to the fact that Clifford Chance submitted a notification on 1 February 2008 (i.e. immediately after the transactions involved in this appeal were undertaken) under SDLT Tax Avoidance (Prescribed Description of Arrangements) Regulations (SI 2005/1868). Clifford Chance clearly considered that the arrangements could fall within the Regulations. As noted above, section 306 (1) and the above-mentioned Regulations require transactions to be disclosed if the main benefit, or one of the main benefits, that might be expected to arise from the arrangements was obtaining an SDLT advantage.

233. Whilst we recognise that legal advisers may well err on the side of caution, it is clear from this notification that the Appellant's advisers were well aware, and we infer that the Appellant was as well, that the manner in which the acquisition from the MoD and the Shari'a-compliant financing with MAR were being structured involved an SDLT advantage and which was one of the main benefits of the transaction structure.

234. There was no evidence from present or former directors of the Appellant (or from its shareholders such as QD, bearing in mind that the Appellant was effectively a special purpose vehicle) and we do not accept Mr Thomas's assertion that evidence of intention can be more reliably inferred from the Appellant's actions than from direct evidence of its directors. The board of directors will usually be the guiding mind of a limited company and the board's intentions and purposes will usually be attributed to a company. It seems to us that the Appellant has refrained from putting forward evidence of all the factors that may have been taken into account in the decision how best to finance and how to structure the financing of the acquisition of the Property. Whatever the reason for this may be, the result is that the Appellant has not established to our satisfaction that tax avoidance, and particularly the avoidance of SDLT, was not a factor in its decision how best to structure these transactions. In short, the precise motives of the Appellant for structuring the financing of the acquisition of the Property in the way that it did have not been established by the evidence, although the notification under the SDLT Tax Avoidance (Prescribed Description of Arrangements) Regulations (SI 2005/1868) strongly suggests that the avoidance of SDLT may have been a factor.

(b) Identifying V and P

235. Essentially, therefore, we have accepted Mr Gammie's submission that motive and intention are not preconditions to the application of section 75A. That does not, however, require us to ignore the anti-avoidance purpose of the provision. As we shall see, that purpose must guide the manner in which we construe the language of section 75A.

236. Apart from the general purpose of section 75A to counteract tax (i.e. SDLT) avoidance, as we have noted, subsection (3) contains clues as to the type of transactions at which it was aimed. Section 75A was intended, *inter alia*, to counteract the use of various reliefs (including sub-sale relief) so that title to property passed with no SDLT being payable and to circumstances where a property was devalued, transferred and the value was later restored by a transaction which did not attract SDLT. This can be divined from the wording of section 75A itself, although we

recognise that these are only examples and are not comprehensive statements of the application of the provision.

237. Section 75A states the circumstances in which it applies as follows:

> "**75A Anti-avoidance**
>
> (1) This section applies where–
>
> (a) one person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it,
>
> (b) a number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition ("the scheme transactions"), and
>
> (c) the sum of the amounts of stamp duty land tax payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V´s chargeable interest by P on its disposal by V."

238. Two initial points arise from subsection (1). First, how do we identify V and P? Secondly, what is meant by the expression "involved in connection with the disposal and acquisition." In approaching these questions we believe that each of subparagraphs (a) – (c) of subsection (1) should be construed in the context of the other subparagraphs, rather than as self-standing tests.

239. On the first issue, HMRC's argument was simple. HMRC's case was that one person (the MoD) had disposed of the freehold in the Property and another person (the Appellant) had acquired a chargeable interest deriving from it, i.e. the leasehold. Therefore, the MoD was V and the Appellant was P.

240. We agree with this analysis, subject to one important limitation. Construing section 75A (1) (a) purposively, we consider that P must be a person who has avoided SDLT which would otherwise have been payable. It is not, in our view, open to HMRC to pick parties at random from the chain of transactions, apply a mechanical test of whether that party has disposed of or acquired property, and thereby deem subsection (1)(a) to be satisfied. The purpose of section 75A, counteracting the avoidance of SDLT, requires a construction which prevents HMRC having a discretion as to which taxpayer the provision should apply, thereby avoiding the constitutional impropriety of which Lord Wilberforce spoke so forcefully in *Vestey*.

241. In fairness, in reply to Mr Thomas's submissions, Mr Gammie sought to justify the identification of the Appellant as P on these grounds. The Appellant was buying the Property and financing it. If the Appellant had mortgaged the Property it would have paid SDLT.

242. In our view, this approach was more consistent with the correct purposive interpretation of section 75A. The Appellant was acquiring the Property with the benefit of finance provided by MAR. By combining the reliefs contained in section 45(3) and section 71A, no SDLT was paid by the Appellant. It was not, perhaps, surprising that MAR paid no SDLT because its role, in reality, was that of a financier.

Therefore, the real avoidance of tax was by the Appellant as a result of the application of the tail piece to section 45(3). Thus, identifying the Appellant as P would be consistent with the purpose of the legislation. It follows that, construing section 75A purposively, we do not agree with Mr Thomas's submission that MAR was the most likely candidate for the role of P.

243. Similarly, we see no justification for construing section 75A so that P is the person left with the most valuable interest (Mr Thomas's secondary submission). There is no indication in the wording or the purpose of the provision that it should be construed in this manner. Section 75A's purpose is concerned with counter-acting avoidance not with valuation. In any event, no valuation evidence was presented to us. In argument, although not abandoning it, Mr Thomas did not dwell on this submission and we consider he was correct not to do so.

244. Moreover, we do not consider that P's acquisition must be directly from V. Section 75A(1)(a) imposes no such requirement (although the two transactions must be linked as “scheme transactions” as contemplated by section 75A(1)(b)). It simply requires that V disposes of a chargeable interest and another person acquires that chargeable interest or one deriving from it. It is notable that the provision does not require P to acquire the chargeable interest directly from V. We think that the use of the word "derived" indicates a more indirect chain of transactions and contemplates the creation of a leasehold interest. If the drafter had envisaged that P must acquire or derive its interest directly from V is more likely that the provision would have spoken of an acquisition "from" V to P and a "grant" of a lease or subordinate interest by V to P.

245. This interpretation, we think, is supported by section 75A(3)(a) which refers to "the acquisition by P of a lease deriving from a freehold owned or formerly owned by V." The use of the word "formerly" also indicates, in our view, that the acquisition or derivation need not be direct.

246. Accordingly, we consider that the disposal of the Property by the MoD and the grant of the lease by MAR to the Appellant constitute the disposal and acquisition envisaged by section 75A(1)(a).

(c) Transactions “involved in connection with” the disposal and acquisition

247. As regards the second issue, the acquisition by P referred to in subsection (1)(a) must be construed in the context of subsection (1)(b). The "number of transactions" referred to in the latter subsection include the disposal and the acquisition. However, those transactions must be "involved in connection with" the disposal and the acquisition by V and P. Subsection (1) (b) is important because it not only constitutes one of the three conditions which determines whether section 75A applies, but also because in defining "the scheme transactions" it controls:

(1) the comparison transactions taking into account in subsection (1) (c) in determining whether less SDLT has been paid on the notional transaction between V and P;

(2) the "disregard" of scheme transactions under section 75A(4); and

(3) the transactions taken into account under section 75A(5) to determine the chargeable consideration on the notional transaction.

248. The expression "involved in connection with" is an unusual one. We are not aware of this exact expression being used elsewhere in the tax or wider legislative code. The words "in connection with" are familiar enough. We were referred to a number of cases on the meaning of those words. Usually, courts have tended to construe the phrase "in connection with" widely, but noting that the meaning of this expression will depend upon the context in which the expression is used. Thus, in *Coventry and Solihull Waste Disposal Co Ltd v Russell (Valuation Officer)* [2000] 1 All ER 97, Lord Hope said at 107:

> "The majority in the Court of Appeal held that it was a sufficient answer to the appellant's argument to construe the words 'in connection with' as meaning 'having to do with'. This explanation of the meaning of the phrase was given by Macfarlane J in *Re Nanaimo Community Hotel Ltd* [1944] 4 DLR 638. It was adopted by Somervell LJ in *Johnson v Johnson* [1952] 1 All ER 250 at 251–252, [1952] P 47 at 50–51. It may be that in some contexts the substitution of the words 'having to do with' will solve the entire problem which is created by the use of the words 'in connection with'. But I am not, with respect, satisfied that it does so in this case, and Mr Holgate QC did not rely on this solution to the difficulty. As he said, the phrase is a protean one which tends to draw its meaning from the words which surround it. In this case it is the surrounding words, when taken together with the words used in the 1991 amending order and its wider context, which provide the best guide to a sensible solution of the problem which has been created by the ambiguity."

249. In addition, Arden LJ in *HM Revenue and Customs Commissioners v Barclays Bank plc and another* [2008] STC 476, citing [18] those words of Lord Hope, said that "the expression 'in connection with' could describe a range of links." The expression in question ("in connection with past service" for the purpose of the definition of "retirement benefits") drew its meaning from its statutory context. The other parts of the definition of 'relevant benefits' and the surrounding provisions of the legislative scheme would inform the court as to the extent of the link required by any particular provision. Thus, the court had to examine the function or purpose of the definition of 'relevant benefits'. In that case, the purpose of the definition was to identify the chargeable payments under a retirement benefits scheme. Parliament was unlikely to have intended to limit connections to direct connections.

250. As we have seen, in section 75A the phrase "in connection with" is deliberately used in conjunction with the word "involved." In our view, the word "involved" must be intended to qualify the phrase "in connection with." The word "involved" denotes some form of participation (i.e. involvement). Thus, a transaction which is part of a

series of transactions will not be "involved" with other transactions simply because it is part of a series or sequence of successive conveyancing transactions. The linkage must be more than merely being a party in a chain of transactions and the test must be more than a "but for" test (or, as the classicists would put, it a *sine qua non* test) otherwise the word "involved" would be deprived of significant meaning.

251. Mr Gammie argued that the Appellant had acquired a chargeable interest derived from the chargeable interest disposed of by the MoD. Thus, the lease-back to the Appellant was the acquisition of a leasehold interest which was derived from the freehold disposed of by the MoD. The sale of the freehold by the MoD to the Appellant, the sub-sale of that freehold by the Appellant to MAR and the lease-back from MAR to the Appellant were all transactions "involved in connection with" that sale and that acquisition.

252. Certainly, we consider that the sub-sale of the freehold by the Appellant to MAR and the lease-back from MAR to the Appellant were transactions "involved in connection with" the acquisition of the leasehold interest (by the Appellant). These were the two "legs" of the Ijara financing and were always intended to operate together.

253. The more difficult question, in our view, is whether those two transactions were "involved in connection with" the disposal by the MoD. Plainly, the sub-sale and, therefore, the lease-back could not have occurred without the disposal by the MoD. As we have discussed, however, we take the view that the words "involved in connection with" require more than a sequential or "but for" connection. In this case, the sub-sale and the lease-back were intended to finance the completion of the acquisition of the Property by the Appellant. Moreover, we consider that the documentation effecting the sub-sale to MAR and the lease-back to the Appellant (including the Board Minutes of the relevant companies) and the ancillary documentation (e.g. the Deed of Confirmation) clearly contemplate those transactions being completed after and being dependent on the transfer of the freehold by the MoD to the Appellant. For these reasons, we consider that the sub-sale and the lease-back were involved in connection with the disposal by MAR of the freehold to the Appellant.

(d) Is the SDLT on the scheme transactions less than that payable on the notional transaction by reason only of section 71A?

254. Section 75A(7) provides that section 75A:

> "…does not apply where subsection (1) (c) is satisfied only by reason of
>
> (a) sections 71A to 73…."

255. Mr Thomas argued that the SDLT that would have been payable on the purchase of the freehold by MAR from the Appellant would have been £50 million. In addition, the Appellant would have paid SDLT on the present value of the rents reserved by the lease granted by MAR of £1,640,799. Thus, it was only by reason of

the application of section 71A to both of those transactions that the condition in section 75A (1) (c) was satisfied.

256. We do not accept this submission. In our view, the sum of the amounts of SDLT payable in relation to "the scheme transactions" was £nil. This was because of the combined effect of *both* section 45 (3) and section 71A. Section 75 (1) (c) requires us to look at the sum of the SDLT payable in respect of "the scheme transactions" and ask whether this sum is less than that on the notional transaction only by reason of section 71A. The relevant sum is £nil and this sum is reached by the application of both section 45 (3) and section 71A.

The notional land transaction

257. Having agreed with HMRC's submission that the MoD is V and the Appellant is (by virtue of its lease from MAR) P, section 75A(4)(a) provides that "the scheme transactions" (i.e. the disposal of the freehold by the MoD, the sub-sale by the Appellant and the lease-back by MAR to the Appellant) must be disregarded. Instead, subsection (4) (b) provides that there shall be a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V.

258. In other words, subsection (4)(b) deems there to be a notional acquisition by the Appellant of the MoD's freehold interest.

Chargeable consideration on the notional land transaction

259. Section 75A(5) then prescribes the chargeable consideration for the notional transaction. The chargeable consideration 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… by way of consideration for the scheme transactions."

260. In this case, subject to the issue relating to Article 14 of the Convention considered below, the transfer of the freehold from the Appellant to MAR (the first leg of the Ijara financing) was for a consideration of £1.25 billion, this was the highest consideration given under the scheme transactions. Thus, Mr Gammie argued that SDLT was chargeable at 4% of that figure resulting in a liability of £50m. £1.25 billion was the consideration "given" for the purposes of section 75A(5).

261. The fact that the Fourth Tranche (US$378,670,740) of consideration under the Sale Agreement was never paid because the Ijara financing was terminated on 1 March 2010 does not in our view assist the Appellant.

262. Paragraph 1 (1) of Schedule 4 FA 2003 defines "chargeable consideration" as follows:

> "The chargeable consideration for a transaction is, except as otherwise expressly provided, any consideration in money or money's worth given for the subject-matter of the transaction, directly or indirectly by the purchaser or a person connected to him."

263. Section 51 FA 2003 charges the whole amount of any contingent consideration.

264. SDLT will usually be payable within 30 days of the effective date of the relevant land transaction (see sections 76 (1) and 86 (1) FA 2003). Thus, the framework of the legislation envisages that SDLT will usually be payable on the full amount of the consideration which the parties agree to pay, regardless of whether a payment has occurred or whether all part of the consideration is contingent.

265. Thus, in our view, the consideration "given" by the MAR to the Appellant was, subject to the Article 14 issued discussed below, £1.25 billion rather than the lower amount actually paid of £970 million.

266. In our view, section 80 FA 2003 does not operate to vary the consideration given *ab initio*. Once the period for amending and SDLT return has closed, the effect of section 80 FA 2003 is simply to create a right to a repayment of tax on the making of a claim. We understand that no claim has been made by the Appellant.

Article 14 of the Convention on Human Rights

267. We have discussed above the burden of proof in relation to HMRC's submission that the amendment to the Appellant's SDLT return undercharged the Appellant with the result that the Appellant should be liable, in HMRC's view, to SDLT of £50 million rather than £38.36 million.

268. We have concluded that the burden of proof rests upon HMRC to show that the Appellant has been undercharged for the purposes of paragraph 42 (3) Schedule 10 FA 2003.

269. In the course of the hearing, as we have explained, we noted that there may be a potential issue in relation to the application of Article 14 of the Convention in this context. Accordingly, after the hearing, we directed that both parties make further written submissions on this issue.

270. The question arises whether the onus of proof in respect of Article 14 of the Convention falls upon HMRC or on the Appellant.

271. Although the application of Article 14 relates to the issue whether the Appellant should be charged SDLT in an amount of £50 million rather than £38.36 million, we consider that the burden of proof in respect of the Article 14 issue falls upon the Appellant. HMRC have, in our view, established for the purposes of paragraph 42 (3) a *prima facie* case that the chargeable consideration specified by section 75A (5) is £1.25 billion rather than £959 million or £970 million. The argument in relation to Article 14 is, effectively, a defence to HMRC's case that the Appellant has been undercharged. It is an argument that Article 14 applies to the facts in this appeal in

such a way that, in accordance with section 3 of the Human Rights Act 1998, the provisions of section 75A should, as far as possible, be construed in a manner which gives effect to Convention rights. In view of the nature of a defence based on religious discrimination under Article 14 the evidential issues concerned (e.g. the nature of the Appellant's religious beliefs and its religious motivation) will tend to be within the knowledge of the Appellant rather than HMRC. In those circumstances, therefore, it seems to us that the evidential burden of proving discrimination in relation to Article 14 lies upon the Appellant rather than HMRC (although the burden of showing justification and proportionality is on HMRC).

272. This is the approach that has been adopted by the European Court of Human Rights ("the Court"). The Court has held that the evidential burden is usually on the claimant to show that it has been treated differently by reason of a prohibited ground – in this case religion. Once that has been established, the burden shifts to HMRC to show that the different treatment is objectively justified and proportionate (see: *DH v Czech Republic* (2008) 47 EHRR 3, ECtHR, at para 177).

273. The Court has also held that, because claimants may have difficulty in proving discriminatory treatment, in order to guarantee the effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect discrimination (see: *DH v Czech Republic* (2008) 47 EHRR 3, ECtHR, at para 186).

274. A difference in treatment can be established from the coexistence of sufficiently strong, clear and concordant inferences or of similar un-rebutted presumptions of fact. The level of persuasion necessary for reaching a particular conclusion and the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake (see: *DH v Czech Republic* (2008) 47 EHRR 3, ECtHR, at para 178).

275. Article 14 prohibits discrimination, but only in relation to the exercise of other Convention rights. It is not necessary that the other Convention right should be infringed, but Article 14 prohibits discrimination where another Convention right is engaged. In this case the other relevant Convention right would be the right to peaceful enjoyment of possessions pursuant to the First Protocol, Article 1.

276. Article 14 does not prevent all differential treatment. Instead, as already indicated, it prohibits differential treatment which is not objectively and reasonably justified, which requires that there be a legitimate aim for the discrimination and the treatment to be proportionate to that legitimate aim (see eg *Belgian Linguistics* (1979 – 80) 1 EHRR 241 and 252).

277. Essentially, the issue in this appeal is whether the Appellant was subjected to religious discrimination on the basis that it chose to finance its acquisition of the Property in a manner which was Shari'a-compliant and suffered more SDLT then it would have done had it financed its acquisition by conventional (ie non-Sharia'a-compliant) loan finance. In other words, HMRC contends that the effect of section 75A (5) is that the Appellant is liable to £50 million of SDLT because of the transactions it undertook, whereas if the Appellant had funded its acquisition by

conventional mortgage finance the SDLT payable would have been £38.36million (ie £959million x 4%, representing the price paid to the MoD) on the original purchase from the MoD. This amount of SDLT would have been the same even if it had borrowed £1.25million to finance other development costs in addition to the cost of acquiring the Property).

278. HMRC argued that their analysis did not result in more SDLT only because the transactions were structured in a Shari'a-compliant way. Instead, the "additional SDLT" arose because, as well as using Shari'a-compliant finance, the financing exceeded the purchase price and because the Appellant had used a sub-sale. On this latter point, HMRC argued (having, as we have seen, previously suggested that it could have been structured as a forward sale) that it would have been possible to have structured MAR's acquisition as a direct acquisition from the MoD by means of a novation of the purchase contract between the MoD and the Appellant.

279. We see no merit in the point relating to the fact that the Appellant obtained financing from MAR in excess of the purchase price of the property from the MoD. It is hardly unusual for the principal amount of the finance for the acquisition of a development site to aggregate the acquisition cost of the land with all or some future development costs and possibly an amount representing deferred interest. The comparison transaction by which discrimination should be judged is that of a conventional borrowing of the same amount of finance as the Appellant obtained from MAR.

280. In our view, HMRC's argument in relation to the possibility of a novation is also misconceived. Whether the Appellant could have structured MAR's acquisition by way of a novation of the original purchase contract is a matter of mere speculation. There is no evidence to suggest that it could or could not. A novation usually involves the substitution of a new party to the original contract and a release of the "old" party. Whether this would have been acceptable to the MoD and whether it was practical in the context of a competitive sealed bid process is a matter on which there is simply no evidence.

281. In any event, we do not think it is necessary for the Appellant in claiming the protection of Article 14 to show that the actual way in which it carried out the transaction was the only way in which the transaction could have been effected. It is not required to prove a negative, ie that it could not have novated the Acquisition Agreement to MAR. The Appellant chose to structure the transaction by way of a sub-sale and a Shari'a-compliant financing. It is entitled not to be the subject of discrimination if it chooses to carry out the transaction in that way. It cannot be right for HMRC to say: "we can discriminate against you because you carried out the transaction in manner A rather than carrying it out in manner B".

282. Secondly, HMRC argued that there is no evidence to the effect that the Appellant was under any religious obligation to use Shari'a-compliant financing. Instead, HMRC say that Mr Latif's evidence was simply that there would have been commercial advantages to MAR arising from its involvement in the transaction.

283. On this second argument Mr Thomas countered that Mr Latif's evidence was that MAR could only lend in a Shari'a-compliant way. If funding were to be provided by MAR to the Appellant it had to be provided in a way which would inevitably involve a greater amount of SDLT payable than if they had used conventional mortgage finance.

284. Mr Latif's evidence was that QD could reasonably be described as MAR's "strategic partner", given their links with and sponsorship by the Qatari state. We also note the shareholding of QD in MAR, QD's representation on MAR's board and, as MR Latif pointed out, their overlapping ownership (QD being ultimately owned by the Qatari ruling family).

285. We also note that the parties including the Appellant went to some pains to ensure that the transactions were Shari'a-compliant eg obtaining a Fatwa and having a contractual acknowledgment in the Common Terms Agreement that the transaction documents were consistent with Shari'a principles.

286. In addition, Mr Latif's evidence was that the use of an Ijara form of Shari'a finance, as was used in this case, was preferable to the use of the use of another form of Islamic financing, namely Murahaba, which would not have been approved of by a number of Shari'a experts for real estate transactions. This would have caused liquidity issues amongst Shari'a financiers and would adversely have affected pricing.

287. On this point, the evidence of Mr Latif, which was not challenged, was that QD was likely to want to involve MAR as a financier. This was, however, as HMRC pointed out, a matter of commercial advantage. There is no indication in the evidence before us that the Appellant itself (or its shareholders) required that the financing should be Shari'a-compliant as a matter of religious obligation or observance. Whilst it is clear that the Appellant intended that the financing should be Shari'a-compliant there is no evidence as to why it wished that to be so. As we have already noted, the motives of the Appellant in structuring the transaction in the way it did are unclear. No directors of the Appellant or QD were called to give evidence. The two witnesses who gave evidence for the Appellant gave no evidence as to why the Appellant structured the transaction in the way it did beyond the obvious need of the Appellant to finance the acquisition of the Property and the desire to ensure that it was Shari'a compliant.

288. We note that in paragraph 58 of HMRC's Statement of Case HMRC required the Appellant to show that: "The use of Islamic finance was necessary (because of the parties involved or otherwise)". The Appellant has produced no evidence on this question and made no application to produce such evidence.

289. Accordingly, we have concluded that the Appellant has not established that it entered into the Shari'a compliant financing for religious reasons and that, therefore, it has not shown that it suffered discrimination on the basis of religion contrary to Article 14 of the Convention.

290. In the light of this conclusion it is unnecessary for us to decide whether, pursuant to section 3 of the Human Rights Act 1998, it is possible to construe section 75A (5) FA 2003 in a manner which is compatible with Convention Rights.

Have HMRC amended the wrong land transaction return?

291. The land transaction return amended by HMRC (by their letter of 13 July 2011) was 307388936 MC i.e. the return in respect of the transfer of the freehold in the Property from the MoD to the Appellant, the effective date of which was 31 January 2008.

292. In fact, because of the combined effect of section 45(3) and section 71A FA 2003, the Appellant was not obliged to deliver a land transaction return (SDLT1), although (as Mr Thomas noted) it was common practice amongst taxpayers to do so. There was a disagreement between the parties whether this practice was one sanctioned by HMRC. Mr Thomas asserted that it was and Mr Gammie contended that it was not or, at least, that the Appellant had not proved that it was. In any event, the effect of section 45 (3) was that there was no land transaction in relation to the Appellant's acquisition of the freehold in the Property from the MoD.

293. At the time of the transactions in question, section 77 FA 2003 did not explicitly provide that a notional land transaction under section 75A was a notifiable transaction. The specific notification requirement in respect of notional land transactions was introduced by section 94 FA 2008 (which amended section 77 FA 2003) with effect in relation to transactions with an effective date on or after 12 March 2008, which was several weeks after the last of the transactions involved in this appeal. There was no prescribed form for a notional land transaction return.

294. Mr Gammie contended, however, that the notional land transaction was nevertheless notifiable under section 77(3) FA 2003. This was because if section 75A applied there would have been a notional land transaction for the purposes of Part 4 FA 2003 effecting the acquisition of the MoD's freehold interest by the Appellant on its disposal by the MoD (section 75A (4) (b)). Mr Gammie argued that the effective date of the notional transaction was the last date of completion for the scheme transactions (i.e. 31 January 2008). Therefore, it was argued that the Appellant had been required to make a return under section 77 (3) in respect of its notional acquisition of the freehold under section 75A by 2 March 2008.

295. HMRC sought to support their view by reference to section 86 (1) FA 2003 which provided:

> "Tax in respect of a land transaction must be paid not later than the filing date for the land transaction return relating to the transaction."

296. HMRC argued that if the Appellant's analysis was correct (i.e. that there was no requirement to make a return in respect of the notional section 75A transaction) this would lead to an absurd result i.e. that there would be no requirement to pay tax in respect of a section 75A notional transaction.

297. HMRC accepted that, whilst there was a requirement to make a return in respect of a notional transaction, there was no separate process. In other words, there was no way to distinguish a return for a notional land transaction from a return for an actual land transaction.

298. We agree with HMRC's analysis – the Appellant was under an obligation to return a notional land transaction which was deemed to have taken effect pursuant to section 75A.

299. We should add that a closure notice completes an enquiry under Part 3 Schedule 10 FA 2003. Paragraph 23 of Schedule 10 requires a closure notice to inform the purchaser that HMRC have completed their enquiries and to state their conclusions. Paragraph 23 (2) (b) requires HMRC to make amendments of the return required to give effect to their conclusions.

300. Paragraph 13 of Schedule 10 defines the scope of an enquiry under Part 3. So far as material, paragraph 13 (1) provides as follows:

> "An enquiry extends to anything contained in the return, or required to be contained in the return, that relates –
>
> (a) to the question whether tax is chargeable in respect of the transaction, or to the amount of tax so chargeable…."

301. In our view, the fact that HMRC amended the return in respect of the actual transfer of the freehold by the MoD to the Appellant rather than a return in respect of a notional transfer of the same freehold between the same parties, does not invalidate the closure notice or the amendment.

302. There is nothing in paragraph 23 of Schedule 10 that precludes an amendment to a return in respect of the actual transfer in accordance with the provisions of section 75A which applies to a notional transfer. The conclusion of HMRC was that the tax due was £38.36 million (and by the amendment to HMRC's Statement of Case the Tribunal is asked to increase the amendment to the self-assessment under paragraph 42 (3) Schedule 10 FA 2003 to show tax due of £50m).

303. We do not consider that the terms of paragraph 13 of Schedule 10 contradict this conclusion. The enquiry can extend to anything contained in the return. The return related to a "scheme transaction" for the purposes of section 75A. We do not read the reference in paragraph 13 (1) (a) to "the transaction" as precluding an enquiry into whether the actual transfer of the freehold from the MoD to the Appellant (which by virtue of section 45 (3) was not, in fact, a land transaction) can be re-characterised as a notional transaction under section 75A.

304. In this case, the return amended by the closure notice was a return in respect of the same parties to the notional land transaction (i.e. the MoD and the Appellant) and related to the same interest in the Property. The closure notice of 13 July 2011 made the amendments necessary to give effect to HMRC's conclusions in respect of their enquiry. The only amendment made was to adjust the tax payable by the Appellant.

305. There was no suggestion that the amendment made by the closure notice to the return 307388936MC in any way confused or misled the Appellant.

306. It is true that it would have been open to HMRC to have made a determination under paragraph 25 Schedule 10 FA 2003, which applies in the case of a chargeable transaction where no land transaction return is delivered. That option is now no longer open to HMRC because of the four-year time limit specified in paragraph 25 (3). Nonetheless, we do not consider that the fact that HMRC had, for four years, an alternative mechanism for collecting SDLT precludes them from using the route provided for by paragraph 23 Schedule 10 i.e. an amendment to a closure notice. Parliament often gives HMRC overlapping powers to collect tax.

307. For these reasons we consider that HMRC was entitled to amend the Appellant's return 307388936 MC by means of the closure notice dated 13 July 2011.

Section 83 Finance Act 2003 – mistakes, defects and omissions

308. In their written submissions the parties agreed that section 83 FA 2003 – which allows certain defects in relation to form of documents issued by HMRC and mistakes, defects or omissions to be ignored – was not relevant in the circumstances of this appeal by virtue of the decision of the Court of Appeal in *Baylis v Gregory* [1987] STC 297 (in relation to broadly similar provisions contained in section 114 TMA 1970). We agree.

Summary of conclusions

309. For the reasons set out above, we have concluded that:

(1) the Appellant was chargeable to SDLT under section 75A FA 2003 in respect of a notional land transaction;

(2) the chargeable consideration in respect of the notional land transaction was £1.25 billion;

(3) the Appellant has not established that its treatment is contrary to Article 14 of the Convention; and

(4) HMRC did not err in amending the Appellant's land transaction return to reflect the notional land transaction.

Decision

310. The Appellant's appeal is dismissed and pursuant to paragraph 42 (3) Schedule 10 FA 2003 we increase the amended self-assessment to £50 million.

Costs

311. This appeal was designated as a complex appeal. There was no opt out in respect of costs and both parties asked for their costs in the event of success.

Accordingly, we direct that HMRC should be entitled to their reasonable costs, to be determined, in default of agreement, by a costs judge.

312. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE 5 July 2013

APPENDIX

RELEVANT STATUTORY PROVISIONS

Section 45 Finance Act 2003

Contract and conveyance: effect of transfer of rights

(1) This section applies where—

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

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

(c) paragraph 12B of Schedule 17A (assignment of agreement for lease) does not apply.

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

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

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

(a) the transferee is the purchaser, and

(b) the consideration for the transaction is—

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

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

The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded except in a case where the secondary contract gives rise to a transaction that is exempt from charge by virtue of subsection 3 of section 73 (alternative property finance: land sold to financial institution and re-sold to individual).

Section 51 Finance Act 2003

Contingent, uncertain or unascertained consideration

(1) Where the whole or part of the chargeable consideration for a transaction is contingent, the amount or value of the consideration shall be determined for the purposes of this Part on the assumption that the outcome of the contingency will be such that the consideration is payable or, as the case may be, does not cease to be payable.

(2) Where the whole or part of the chargeable consideration for a transaction is uncertain or unascertained, its amount or value shall be determined for the purposes of this Part on the basis of a reasonable estimate.

(3) In this Part—

"contingent", in relation to consideration, means—

(a) that it is to be paid or provided only if some uncertain future event occurs, or

(b) that it is to cease to be paid or provided if some uncertain future event occurs; and

"uncertain", in relation to consideration, means that its amount or value depends on uncertain future events.

(4) This section has effect subject to—

section 80 (adjustment where contingency ceases or consideration is ascertained), and

section 90 (application to defer payment in case of contingent or uncertain consideration).

(5) This section applies in relation to chargeable consideration consisting of rent only to the extent that it is applied by paragraph 7 of Schedule 17A.

Section 71 A Finance Act 2003

Alternative property finance: land sold to financial institution and leased to person

(1) This section applies where arrangements are entered into between a person and a financial institution under which—

(a) the institution purchases a major interest in land or an undivided share of a major interest in land ("the first transaction"),

(b) …,

(c) the institution… grants to the person out of the major interest a lease (if the major interest is freehold) …("the second transaction"), and

(d) the institution and the person enter into an agreement under which the person has a right to require the institution or its successor in title to transfer to the person (in one transaction or a series of transactions) the whole interest purchased by the institution under the first transaction.

(2) The first transaction is exempt from charge if the vendor is—

(a) the person, or

(b) another financial institution by whom the interest was acquired under arrangements of the kind mentioned in subsection (1) entered into between it and the person.

(3) The second transaction is exempt from charge if the provisions of this Part relating to the first transaction are complied with (including the payment of any tax chargeable).

(4) Any transfer to the person that results from the exercise of the right mentioned in subsection (1)(d) ("a further transaction") is exempt from charge if—

(a) the provisions of this Part relating to the first and second transactions are complied with, and

(b) at all times between the second transaction and the further transaction—

(i) the interest purchased under the first transaction is held by a financial institution so far as not transferred by a previous further transaction, and

(ii) the lease or sub-lease granted under the second transaction is held by the person.

(5) The agreement mentioned in subsection (1)(d) is not to be treated—

(a) as substantially performed unless and until the whole interest purchased by the institution under the first transaction has been transferred (and accordingly section 44(5) does not apply), or

(b) as a distinct land transaction by virtue of section 46 (options and rights of pre-emption).

(6) . . .

(7) A further transaction that is exempt from charge by virtue of subsection (4) is not a notifiable transaction unless the transaction involves the transfer to the [person] of the whole interest purchased by the institution under the first transaction, so far as not transferred by a previous further transaction.

(8) In this section "financial institution" has the meaning given by section 46 of the Finance Act 2005 (alternative finance arrangements).

(9) ...,

(10) ….

Section 75A – C Finance Act 2003

75A Anti-avoidance

(1) This section applies where–

(a) one person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it,

(b) a number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition ("the scheme transactions"), and

(c) the sum of the amounts of stamp duty land tax payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V´s chargeable interest by P on its disposal by V.

(2) In subsection (1) "transaction" includes, in particular–

(a) a non-land transaction,

(b) an agreement, offer or undertaking not to take specified action,

(c) any kind of arrangement whether or not it could otherwise be described as a transaction, and

(d) a transaction which takes place after the acquisition by P of the chargeable interest.

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

(a) the acquisition by P of a lease deriving from a freehold owned or formerly owned by V;

(b) a sub-sale to a third person;

(c) the grant of a lease to a third person subject to a right to terminate;

(d) the exercise of a right to terminate a lease or to take some other action;

(e) an agreement not to exercise a right to terminate a lease or to take some other action;

(f) the variation of a right to terminate a lease or to take some other action.

(4) Where this section applies–

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

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

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

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

(b) received by or on behalf of V (or a person connected with V within the meaning of section 839 of the Taxes Act 1988) by way of consideration for the scheme transactions.

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

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

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

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

(a) sections 71A to 73, or

(b) a provision of Schedule 9.

75B Anti-avoidance: incidental transactions

(1) In calculating the chargeable consideration on the notional transaction for the purposes of section 75A(5), consideration for a transaction shall be ignored if or in so far as the transaction is merely incidental to the transfer of the chargeable interest from V to P.

(2) A transaction is not incidental to the transfer of the chargeable interest from V to P–

(a) if or in so far as it forms part of a process, or series of transactions, by which the transfer is effected,

(b) if the transfer of the chargeable interest is conditional on the completion of the transaction, or

(c) if it is of a kind specified in section 75A(3).

(3) A transaction may, in particular, be incidental if or in so far as it is undertaken only for a purpose relating to–

(a) the construction of a building on property to which the chargeable interest relates,

(b) the sale or supply of anything other than land, or

(c) a loan to P secured by a mortgage, or any other provision of finance to enable P, or another person, to pay for part of a process, or series of transactions, by which the chargeable interest transfers from V to P.

(4) In subsection (3)–

(a) paragraph (a) is subject to subsection (2)(a) to (c),

(b) paragraph (b) is subject to subsection (2)(a) and (c), and

(c) paragraph (c) is subject to subsection (2)(a) to (c).

(5) The exclusion required by subsection (1) shall be effected by way of just and reasonable apportionment if necessary.

(6) In this section a reference to the transfer of a chargeable interest from V to P includes a reference to a disposal by V of an interest acquired by P.

75C Anti-avoidance: supplemental

(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).

(3) The notional transaction under section 75A is a land transaction entered into for the purposes of or in connection with the transfer of an undertaking or part for the purposes of paragraphs 7 and 8 of Schedule 7, if any of the scheme transactions is entered into for the purposes of or in connection with the transfer of the undertaking or part.

(4) In the application of section 75A(5) no account shall be taken of any amount paid by way of consideration in respect of a transaction to which any of sections 60, 61, 63, 64, 65, 66, 67, 69, 71, 74 and 75, or a provision of Schedule 6A or 8, applies.

(5) In the application of section 75A(5) an amount given or received partly in respect of the chargeable interest acquired by P and partly in respect of another chargeable interest shall be subjected to just and reasonable apportionment.

(6) Section 53 applies to the notional transaction under section 75A.

(7) Paragraph 5 of Schedule 4 applies to the notional transaction under section 75A.

(8) For the purposes of section 75A–

(a) an interest in a property-investment partnership (within the meaning of paragraph 14 of Schedule 15) is a chargeable interest in so far as it concerns land owned by the partnership, and

(b) where V or P is a partnership, Part 3 of Schedule 15 applies to the notional transaction as to the transfer of a chargeable interest from or to a partnership.

(9) For the purposes of section 75A a reference to an amount of consideration includes a reference to the value of consideration given as money´s worth.

(10) Stamp duty land tax paid in respect of a land transaction which is to be disregarded by virtue of section 75A(4)(a) is taken to have been paid in respect of the notional transaction by virtue of section 75A(4)(b).

(11) The Treasury may by order provide for section 75A not to apply in specified circumstances.

(12) An order under subsection (11) may include incidental, consequential or transitional provision and may make provision with retrospective effect."

(2) The amendment made by subsection (1) has effect in respect of disposals and acquisitions if the disposal mentioned in new section 75A(1)(a) (inserted by that subsection) takes place on or after 6th December 2006.

(3) But–

(a) the transitional provisions of sub-paragraphs (2) to (5) of paragraph 1 of the Schedule to the Stamp Duty Land Tax (Variation of the Finance Act 2003) Regulations 2006 (S.I. 2006/3237) continue to have effect in relation to this section as in relation to that paragraph, and

(b) a provision of new section 75C (inserted by subsection (1) above) shall not have effect where the disposal mentioned in new section 75A(1)(a) took place before the day on which this Act is passed, if or in so far as the provision would make a person liable for a higher amount of tax than would have been charged in accordance with those regulations.

Section 76 Finance Act 2003

Duty to deliver land transaction return

(1) In the case of every notifiable transaction the purchaser must deliver a return (a "land transaction return") to the Inland Revenue before the end of the period of 30 days after the effective date of the transaction.

(2) The Inland Revenue may by regulations amend subsection (1) so as to require a land transaction return to be delivered before the end of such shorter period after the effective date of the transaction as may be prescribed or, if the regulations so provide, on that date.

(3) A land transaction return in respect of a chargeable transaction must—

(a) include an assessment (a "self-assessment") of the tax that, on the basis of the information contained in the return, is chargeable in respect of the transaction, . . .

(b) . . ..

Section 77 Finance Act 2003 (substituted by section 94 (1) Finance Act 2008 with effect in relation to transactions with an effective date on or after 12 March 2008)

Notifiable transactions

(1) A land transaction is notifiable if it is—

(a) an acquisition of a major interest in land that does not fall within one or more of the exceptions in section 77A,

(b) an acquisition of a chargeable interest other than a major interest in land where there is chargeable consideration in respect of which tax is chargeable at a rate of 1% or higher or would be so chargeable but for a relief,

(c) a land transaction that a person is treated as entering into by virtue of section 44A(3), or

(d) a notional land transaction under section 75A.

(2) This section has effect subject to—

(a) sections 71A(7) . . ., and

(b) paragraph 30 of Schedule 15.

(3) In this section "relief" does not include an exemption from charge under Schedule 3.

Section 78 Finance Act 2003

Returns, enquiries, assessments and related matters

(1) Schedule 10 has effect with respect to land transaction returns, assessments and related matters.

(2) In that Schedule—

Part 1 contains general provisions about returns;

Part 2 imposes a duty to keep and preserve records;

Part 3 makes provision for enquiries into returns;

Part 4 provides for a Revenue determination if no return is delivered;

Part 5 provides for Revenue assessments;

Part 6 provides for relief in case of excessive assessment; and

Part 7 provides for appeals against Revenue decisions on tax.

(3) The Treasury may by regulations make such amendments of that Schedule, and such consequential amendments of any other provisions of this Part, as appear to them to be necessary or expedient from time to time.

Section 80 Finance Act 2003

Adjustment where contingency ceases or consideration is ascertained

(1) Where section 51 (contingent, uncertain or unascertained consideration) applies in relation to a transaction and—

(a) in the case of contingent consideration, the contingency occurs or it becomes clear that it will not occur, or

(b) in the case of uncertain or unascertained consideration, an amount relevant to the calculation of the consideration, or any instalment of consideration, becomes ascertained,

the following provisions have effect to require or permit reconsideration of how this Part applies to the transaction (and to any transaction in relation to which it is a linked transaction).

(2) If the effect of the new information is that a transaction becomes notifiable . . ., or that additional tax is payable in respect of a transaction or that tax is payable where none was payable before—

(a) the purchaser must make a return to the Inland Revenue within 30 days,

(b) the return must contain a self-assessment of the tax chargeable in respect of the transaction on the basis of the information contained in the return,

(c) the tax so chargeable is to be calculated by reference to the rates in force at the effective date of the transaction, and

[(d) the tax or additional tax payable must be paid not later than the filing date for the return].

(3) The provisions of Schedule 10 (returns, enquiries, assessments and other matters) apply to a return under this section as they apply to a [return under section 76 (general requirement to make land transaction return), subject to the adaptation that references to the effective date of the transaction shall be read as references to the date of the event as a result of which the return is required].

(4) If the effect of the new information is that less tax is payable in respect of a transaction than has already been paid—

(a) the purchaser may, within the period allowed for amendment of the land transaction return, amend the return accordingly;

(b) after the end of that period he may (if the land transaction return is not so amended) make a claim to the Inland Revenue for repayment of the amount overpaid.

(4A) Where the transaction ("the relevant transaction") is the grant or assignment of a lease, no claim may be made under subsection (4)—

(a) in respect of the repayment (in whole or part) of any loan or deposit that is treated by paragraph 18A of Schedule 17A as being consideration given for the relevant transaction, or

(b) in respect of the refund of any of the consideration given for the relevant transaction, in a case where the refund—

(i) is made under arrangements that were made in connection with the relevant transaction, and

(ii) is contingent on the determination or assignment of the lease or on the grant of a chargeable interest out of the lease.

(5) This section does not apply so far as the consideration consists of rent (see paragraph 8 of Schedule 17A).

Section 83 Finance Act 2003

Formal requirements as to assessments, penalty determinations etc

(1) An assessment, determination, notice or other document required to be used in assessing, charging, collecting and levying tax or determining a penalty under this Part must be in accordance with the

forms prescribed from time to time by the Board and a document in the form so prescribed and supplied or approved by the Board is valid and effective.

(2) Any such assessment, determination, notice or other document purporting to be made under this Part is not ineffective—

(a) for want of form, or

(b) by reason of any mistake, defect or omission in it,

if it is substantially in conformity with this Part and its intended effect is reasonably ascertainable by the person to whom it is directed.

(3) The validity of an assessment or determination is not affected—

(a) by any mistake in it as to—

(i) the name of a person liable, or

(ii) the amount of the tax charged, or

(b) by reason of any variance between the notice of assessment or determination and the assessment or determination itself.

Schedule 10 Finance Act 2003

Stamp Duty Land Tax: Returns, Enquiries, Assessments and Appeals

Section 78

Part 1 Land Transaction Returns

Contents of return

1

(1) A land transaction return must—

(a) be in the prescribed form,

(b) contain the prescribed information, and

(c) include a declaration by the purchaser (or each of them) that the return is to the best of his knowledge correct and complete.

(1A) Sub-paragraph (1)(c) is subject to paragraphs 1A and 1B.

(2) In sub-paragraph (1) "prescribed" means prescribed by regulations made by the Inland Revenue.

(3) The regulations may make different provision for different kinds of return.

(4) Regulations under sub-paragraph (1)(b) may require the provision of information corresponding to any of the particulars formerly required under—

(a) Schedule 2 to the Finance Act 1931 (c 28) (requirement to deliver particulars of land transactions in Great Britain), or

(b) section 244 of the Finance Act 1994 (c 9) (corresponding provision for Northern Ireland).

(5) The return is treated as containing any information provided by the purchaser for the purpose of completing the return.

Declaration by agent

1A

(1) Where—

(a) the purchaser (or each of them) authorises an agent to complete a land transaction return,

(b) the purchaser (or each of them) makes a declaration that, with the exception of the effective date, the information provided in the return is to the best of his knowledge correct and complete, and

(c) the land transaction return includes a declaration by the agent that the effective date provided in the return is to the best of his knowledge correct,

the requirement in paragraph 1(1)(c) shall be deemed to be met.

(2) Sub-paragraph (1) applies only where the return is in a form specified by the Inland Revenue for the purposes of that sub-paragraph.

(3) Nothing in this paragraph affects the liability of the purchaser (or each of them) under this Part of this Act.

Declaration by the relevant Official Solicitor

1B…

Meaning of filing date and delivery of return

2

(1) References in this Part of this Act to the filing date, in relation to a land transaction return, are to the last day of the period within which the return must be delivered.

(2) References in this Part of this Act to the delivery of a land transaction return are to the delivery of a return that—

(a) complies with the requirements of paragraph 1(1) (contents of return), . . .

(b) . . ..

Failure to deliver return: flat-rate penalty

3…

Failure to deliver return: tax-related penalty

4…

Formal notice to deliver return: daily penalty

5

(1) If it appears to the Inland Revenue—

(a) that a purchaser required to deliver a land transaction return in respect of a chargeable transaction has failed to do so, and

(b) that the filing date has now passed,

they may issue a notice requiring him to deliver a land transaction return in respect of the transaction.

(2) The notice must specify—

(a) the transaction to which it relates, and

(b) the period for complying with the notice (which must not be less than 30 days from the date of issue of the notice).

(3) If the purchaser does not comply with the notice within the specified period, the Inland Revenue may apply to the [Tribunal] for an order imposing a daily penalty.

(4) On such an application the [Tribunal] may direct that the purchaser shall be liable to a penalty or penalties not exceeding £60 for each day on which the failure continues after the day on which he is notified of the direction.

(5) This paragraph does not affect, and is not affected by, any penalty under paragraph 3 or 4 (flat-rate or tax-related penalty for failure to deliver return).

Amendment of return by purchaser

6

(1) The purchaser may amend a land transaction return given by him by notice to the Inland Revenue.

(2) The notice must be in such form, and contain such information, as the Inland Revenue may require.

(2A) If the effect of the amendment would be to entitle the purchaser to a repayment of tax, the notice must be accompanied by—

(a) the contract for the land transaction; and

(b) the instrument (if any) by which that transaction was effected.

(3) Except as otherwise provided, an amendment may not be made more than twelve months after the filing date.

Correction of return by Revenue

7

(1) The Inland Revenue may amend a land transaction return so as to correct obvious errors or omissions in the return (whether errors of principle, arithmetical mistakes or otherwise).

(1A) The power under sub-paragraph (1) may, in such circumstances as the Commissioners for Her Majesty's Revenue and Customs may specify in regulations, be exercised—

(a) in relation to England and Wales, by the Chief Land Registrar;

(b) . . .

(c) in relation to Northern Ireland, by the Registrar of Titles or the registrar of deeds;

(d) in any case, by such other persons with functions relating to the registration of land as the regulations may specify.

(2) A correction under this paragraph is made by notice to the purchaser.

(3) No such correction may be made more than nine months after—

(a) the day on which the return was delivered, or

(b) if the correction is required in consequence of an amendment under paragraph 6, the day on which that amendment was made.

(4) A correction under this paragraph is of no effect if the purchaser—

(a) amends the return so as to reject the correction, or

(b) after the end of the period within which he may amend the return, but within three months from the date of issue of the notice of correction, gives notice rejecting the correction.

(5) Notice under sub-paragraph (4)(b) must be given to the officer of the Board by whom notice of the correction was given.

. . .

8…

Part 3 Enquiry Into Return

Notice of enquiry

12

(1) The Inland Revenue may enquire into a land transaction return if they give notice of their intention to do so ("notice of enquiry")—

(a) to the purchaser,

(b) before the end of the enquiry period.

(2) The enquiry period is the period of nine months—

(a) after the filing date, if the return was delivered on or before that date;

(b) after the date on which the return was delivered, if the return was delivered after the filing date;

(c) after the date on which the amendment was made, if the return is amended under paragraph 6 (amendment by purchaser).

This is subject to the following qualification.

(2A) If—

(a) the Inland Revenue give notice, within the period specified in sub-paragraph (2), of their intention to enquire into a land transaction return delivered under section 80 (adjustment where contingency ceases or consideration is ascertained), 81 (further return where relief withdrawn) [, 81A (return or further return in consequence of later linked transaction) or paragraph 6 of Schedule 6B (adjustment for change of circumstances)], and

(b) it appears to the Inland Revenue to be necessary to give a notice under this paragraph in respect of an earlier land transaction return in respect of the same land transaction,

a notice may be given notwithstanding that the period referred to in sub-paragraph (2) has elapsed in relation to that earlier land transaction.

(3) A return that has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under paragraph 6.

Scope of enquiry

13

(1) An enquiry extends to anything contained in the return, or required to be contained in the return, that relates—

(a) to the question whether tax is chargeable in respect of the transaction, or

(b) to the amount of tax so chargeable.

This is subject to the following exception.

(2) If the notice of enquiry is given as a result of an amendment of the return under paragraph 6 (amendment by purchaser)—

(a) at a time when it is no longer possible to give notice of enquiry under paragraph 12, or

(b) after an enquiry into the return has been completed,

the enquiry into the return is limited to matters to which the amendment relates or that are affected by the amendment.

. . .

14

. . .

15

. . .

16

. . .

Amendment of self-assessment during enquiry to prevent loss of tax

17

(1) If at a time when an enquiry is in progress into a land transaction return the Inland Revenue form the opinion—

(a) that the amount stated in the self-assessment contained in the return as the amount of tax payable is insufficient, and

(b) that unless the assessment is immediately amended there is likely to be a loss of tax to the Crown,

they may by notice in writing to the purchaser amend the assessment to make good the deficiency.

(2) In the case of an enquiry that under paragraph 13(2) is limited to matters arising from an amendment of the return, sub-paragraph (1) above applies only so far as the deficiency is attributable to the amendment.

(3) For the purposes of this paragraph the period during which an enquiry is in progress is the whole of the period—

(a) beginning with the day on which notice of enquiry is given, and

(b) ending with the day on which the enquiry is completed.

Amendment of return by taxpayer during enquiry

18

(1) This paragraph applies if a return is amended under paragraph 6 (amendment by purchaser) at a time when an enquiry is in progress into the return.

(2) The amendment does not restrict the scope of the enquiry but may be taken into account (together with any matters arising) in the enquiry.

(3) So far as the amendment affects the amount stated in the self-assessment included in the return as the amount of tax payable, it does not take effect while the enquiry is in progress and—

(a) if the Inland Revenue state in the closure notice that they have taken the amendments into account and that—

(i) the amendment has been taken into account in formulating the amendments contained in the notice, or

(ii) their conclusion is that the amendment is incorrect,

the amendment shall not take effect;

(b) otherwise, the amendment takes effect when the closure notice is issued.

(4) For the purposes of this paragraph the period during which an enquiry is in progress is the whole of the period—

(a) beginning with the day on which notice of enquiry is given, and

(b) ending with the day on which the enquiry is completed.

Referral of questions to [the Tribunal] during enquiry

19…

Withdrawal of notice of referral

20…

Effect of referral on enquiry

21…

Effect of determination

22…

Completion of enquiry

23

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

(2) A closure notice must either—

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

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

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

Direction to complete enquiry

24…

Part 4 Revenue Determination if No Return Delivered

Determination of tax chargeable if no return delivered

25

(1) If in the case of a chargeable transaction no land transaction return is delivered by the filing date, the Inland Revenue may make a determination (a "Revenue determination") to the best of their information and belief of the amount of tax chargeable in respect of the transaction.

(2) Notice of the determination must be served on the purchaser, stating the date on which it is issued.

(3) No Revenue determination may be made more than [4 years] after the effective date of the transaction.

Determination to have effect as a self-assessment

26

(1) A Revenue determination has effect for enforcement purposes as if were a self-assessment by the purchaser.

(2) In sub-paragraph (1) "for enforcement purposes" means for the purposes of the following provisions of this Part of this Act—

(a) the provisions of this Schedule providing for tax-related penalties;

(b) section 87 (interest on unpaid tax);

(c) section 91 and Schedule 12 (collection and recovery of unpaid tax etc).

(3) Nothing in this paragraph affects any liability of the purchaser to a penalty for failure to deliver a return.

Determination superseded by actual self-assessment

27…

Part 5 Revenue Assessments

Assessment where loss of tax discovered

28

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

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

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

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

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

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

Assessment to recover excessive repayment of tax

29…

Restrictions on assessment where return delivered

30

(1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28 or 29 in respect of the transaction—

(a) may only be made in the two cases specified in sub-paragraphs (2) and (3) below, and

(b) may not be made in the circumstances specified in sub-paragraph (5) below.

(2) The first case is where the situation mentioned in paragraph 28(1) or 29(1) is attributable to fraudulent or negligent conduct on the part of—

(a) the purchaser,

(b) a person acting on behalf of the purchaser, or

(c) a person who was a partner of the purchaser at the relevant time.

(3) The second case is where the Inland Revenue, at the time they—

(a) ceased to be entitled to give a notice of enquiry into the return, or

(b) completed their enquiries into the return,

could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 28(1) or 29(1).

(4) For this purpose information is regarded as made available to the Inland Revenue if—

(a) it is contained in a land transaction return made by the purchaser,

(b) it is contained in any documents produced or information provided to the Inland Revenue for the purposes of an enquiry into any such return, or

(c) it is information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 28(1) or 29(1)—

(i) could reasonably be expected to be inferred by the Inland Revenue from information falling within paragraphs (a) or (b) above, or

(ii) are notified in writing to the Inland Revenue by the purchaser or a person acting on his behalf.

(5) No assessment may be made if—

(a) the situation mentioned in paragraph 28(1) or 29(1) is attributable to a mistake in the return as to the basis on which the tax liability ought to have been computed, and

(b) the return was in fact made on the basis or in accordance with the practice generally prevailing at the time it was made.

Time limit for assessment

31…

Assessments and self assessments

42—

(1) In this paragraph any reference to an appeal means an appeal under paragraphs 33(4) or 35(1).

(2) If, on an appeal notified to the tribunal, the tribunal decides—

(a) that the appellant is overcharged by a self-assessment; or

(b) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment shall be reduced accordingly, but otherwise the assessment shall stand good.

(3) If, on appeal it appears to the tribunal—

(a) that the appellant is undercharged to stamp duty land tax by a self-assessment; or

(b) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment shall be increased accordingly.

(4) Where, on an appeal against an assessment other than a self-assessment which—

(a) assesses an amount which is chargeable to stamp duty land tax, and

(b) charges stamp duty land tax on the amount assessed,

it appears to the tribunal as mentioned in sub-paragraphs (2) or (3), it may, unless the circumstances of the case otherwise require, reduce or increase only the amount assessed; and where an appeal is so determined the stamp duty land tax charged by that assessment shall be taken to have been reduced or increased accordingly.