[2012] UKUT 399 (TCC)

Appeal number FTC/48/2011

SDLT – sub-sale – acquisition by partnership – effect of sections 45 and 44 on paragraph 10 of Schedule 15 FA 2003 – appeal dismissed

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellants**

- and -

DV3 RS LIMITED PARTNERSHIP **Respondent**

TRIBUNAL: MR JUSTICE HENDERSON

Sitting in public at the Rolls Building, London EC4A 1NL on 18 and 19 July 2012

Mr Malcolm Gammie QC, instructed by the General Counsel and Solicitor to HMRC, for the Appellants

Mr Roger Thomas, instructed by Olswang LLP, for the Respondent

DECISION

Introduction

1. In July 2005 a company incorporated in the British Virgin Islands ("BVI") called DV3 Regent Street Limited ("the Company") acquired an occupational leasehold interest in the Dickins and Jones building at 224-244 Regent Street, London, W1 ("the Property"). The lease was due to expire in June 2038. Some 15 months later, on 24 October 2006, the Company entered into a contract with the owner of the head leasehold interest in the Property, Legal and General Assurance Society Limited ("L&G"), to buy that interest from L&G for £65.1 million. Completion was fixed for 4 December 2006. The terms of the contract enabled, but did not oblige, the Company to require L&G to transfer the Property directly to a third party, or to enter into a sub-sale transfer with the Company and one or more third parties.

2. Had that contract been completed either by a transfer of the Property from L&G to the Company, or by a transfer directly from L&G to a third party nominee of, or sub-purchaser from, the Company, it is common ground that stamp duty land tax ("SDLT") would have been payable by the person acquiring the Property at the rate of 4% of the full chargeable consideration of £65.1 million, i.e. £2,604,000.

3. However, that is not what happened. A scheme was instead devised with the object of reducing the SDLT liability to nil. The machinery by which it was hoped to achieve this involved the establishment on 29 November 2006 of a limited partnership under BVI law called the DV3 RS Limited Partnership ("the Partnership"), and a contract of sub-sale entered into on 30 November 2006 between the Company as vendor and the two general partners of the Partnership acting on its behalf as purchaser, whereby the Company agreed to sell on the head leasehold interest in the Property to the Partnership for the same price (£65.1 million), without payment of a deposit, and with completion on the same day (4 December 2006).

4. The Partnership was structured in such a way that:

    a) one of the partners, namely the Company, was entitled to 98% of its income;

    b) the other four partners (the two general partners, another related company, and the trustees of a unit trust) were all connected with the Company for the purposes of the partnership

provisions relating to SDLT contained in schedule 15 to the Finance Act 2003 ("FA 2003"); and

c) thanks to the inclusion of the unit trust, the partners were not all "bodies corporate" within the meaning of paragraph 13 of that schedule.

The final critical element in the plan was that the sub-sale should be completed by a separate transfer from the Company to the Partnership, and not by a transfer made directly to the Partnership by the original vendor under the first contract, L&G.

5. In this way, it was hoped to take advantage of the detailed provisions relating to contracts, conveyances and sub-sales in sections 44 and 45 of FA 2003, and to ensure that the sub-sale by the Company to the Partnership fell within paragraph 10 of schedule 15 which applied "where – (a) a partner transfers a chargeable interest to the partnership". In broad terms, the purpose of paragraph 10, in the form in which it stood at the relevant time, appears to have been to measure the chargeable consideration for such a transfer by reference to the market value of the interest transferred, but to leave out of charge so much of that value as was referable to the beneficial interests in partnership income of the transferor and persons connected with the transferor. There was, however, an exception to this treatment when all the partners were bodies corporate, and certain other conditions were satisfied, in which case there would be no reduction from the market value and SDLT would be chargeable on its full amount.

6. The scene having thus been set, completion of the original sale and of the sub-sale took place at a single meeting on 5 December 2006, one day later than planned. Nothing turns on the short delay, and an appropriate adjustment was made to the consideration payable on completion to reflect it. Two forms of transfer were executed, the first from L&G to the Company, and the second from the Company to the Partnership.

7. It is common ground that, if the sub-sale fell within paragraph 10 as it stood at the relevant date, the arrangements made in the present case had the following results:

a) by application of the formula in paragraph 10(2), which had been substituted by the Finance Act 2006 in relation to transfers with an effective date on or after 19 July 2006 for a different version previously in force, the chargeable consideration for the

transfer by the Company to the Partnership was reduced to nil; and

b) the exception from such treatment in paragraph 13 of schedule 15 could not apply, because one of the partners (the trustees of the unit trust) was not a body corporate.

8. It is also common ground that the operation of the detailed provisions in sections 44 and 45 of FA 2003 had at least the following consequences:

a) no SDLT was chargeable on the making of either of the two contracts for the sale and the sub-sale;

b) no SDLT was chargeable on the completion of the first sale by L&G to the Company; and

c) by virtue of section 45(3), section 44 fell to be applied in relation to the sub-sale as if there were a contract for a land transaction (described in the subsection as a "secondary contract") under which the Partnership was the purchaser and the consideration was £65.1 million.

9. Ignoring for the moment the possible impact of the special partnership provision in schedule 15 paragraph 10, the result of applying section 44 to the notional secondary contract created by section 45(3) would admittedly have been to generate a charge to SDLT of £2,604,000 on the consideration of £65.1 million when the secondary contract was completed. The date of completion of the secondary contract can only have been 5 December 2006, when the subject matter of the secondary contract (the head lease) was transferred to the purchaser (the Partnership). The tax would have been payable by the Partnership as the purchaser, in accordance with the general rule in section 85(1) of FA 2003 that "The purchaser is liable to pay the tax in respect of a chargeable transaction".

10. The issues which divide the parties centre on the interaction between sections 44 and 45 on the one hand, and paragraph 10 of schedule 15 on the other hand. The Partnership's contention, shortly stated, is that the sub-sale falls squarely within the specific terms of paragraph 10, and nothing in the main body of FA 2003 changes that simple analysis. By contrast, HMRC's fundamental contention is that paragraph 10 has to be read and applied in the context of the Act as a whole, and that the effect of sections 44 and 45 is to eliminate the Company as the transferor of a chargeable interest to the Partnership, with the

consequence (so it is argued) that the provisions of schedule 10 are not engaged at all.

11. The matter came before the First-tier Tribunal (Tax Chamber) ("the FTT") on an appeal by the Partnership against a closure notice issued by HMRC on 9 May 2009 under FA 2003 schedule 10 paragraph 23. That notice had amended the Partnership's land transaction return in respect of the acquisition of the head lease by increasing the chargeable consideration for the transaction from nil to £65.1 million. The FTT (Judge Hellier and Mr John Robinson) heard the appeal in London on 16 and 17 November 2010, and released their decision ("the Decision") on 23 February 2011. The representation before the FTT was the same as on the present appeal to the Upper Tribunal, with Mr Roger Thomas appearing for the Partnership and Mr Malcolm Gammie QC appearing for HMRC.

12. The FTT considered the matter with great care, and came to the conclusion that the Partnership's arguments were substantially correct. They therefore allowed the appeal. HMRC now appeal to the Upper Tribunal, with permission granted by the FTT on 2 June 2011. In granting permission, Judge Hellier observed that this was a difficult case. I respectfully agree, and express my gratitude to both counsel for their comprehensive and thoughtful arguments.

Facts

13. The facts were not in dispute, and the parties produced a statement of agreed facts and issues before the FTT. I have already referred to the basic facts on which the resolution of the appeal turns in the introductory section of this decision. A slightly fuller summary may be found in paragraphs 8 to 16 of the Decision, which led the FTT to comment at paragraph 17:

> "Thus as a matter of general law, aside from the effects of FA 2003, there was on 5 December 2006 the transfer of an interest in the Dickins and Jones Lease by [L&G] to [the Company] and then another such transfer from [the Company] to [the Partnership]. Those transfers were made between the respective parties to the First Contract and the Second Contract, were made in conformity with those contracts, and took place at substantially the same time and in connection with each other."

14. I would mention at this point that the FTT used the descriptions "AA", "BB" and "CC" to refer to L&G, the Company and the Partnership respectively,

while using the terms "A", "B" and "C" to refer to persons in corresponding positions when dealing with the legislation in the abstract. Speaking for myself, and without intending any criticism of the FTT, I prefer to use less abstract definitions when referring to the actual parties and the transactions which took place, and I have therefore substituted my definitions in quotations from the Decision.

15. There is one small point on the facts which it is convenient to deal with at this stage. At two places in the Decision (paragraphs 77 and 114) the FTT expressed some doubt whether the sub-sale by the Company to the Partnership was really a sub-sale within the meaning of section 45. Their reasons were that no consideration was given "for" the contract, as opposed to consideration given "under" it, and that completion took place after, rather than at precisely the same time as, that "of a secondary contract under which C was the purchaser" (see paragraph 77). I do not share those doubts. In the absence of any suggestion that the onward sale by the Company to the Partnership was a sham, I am satisfied that both in law and in fact it was a sub-sale within the normal meaning of that term. In particular, I can see no reason why a transaction should be disqualified from being a sub-sale merely because the consideration for it happens to be the same as the consideration for the previous sale, or because completion of the two transactions is not simultaneous. Neither side sought to persuade me that there was any substance in the FTT's doubts on this score, and as the FTT themselves recorded (in paragraph 77) neither party had pursued the question below.

The legislation

16. SDLT was a new tax introduced in 2003 to replace stamp duty on instruments other than those relating to stocks and marketable securities. Despite its name, SDLT is conceptually quite different from stamp duty which was, notoriously, a tax on documents. In the absence of a chargeable document to which a stamp could physically be affixed, no liability to stamp duty could normally arise. By contrast, SDLT is a tax on land transactions. The relevant legislation is contained in Part 4 of FA 2003 and schedules 3 to 19. Unless otherwise stated, all references in this Decision are to the legislation as it stood in October to December 2006.

17. Section 42 introduces the tax:

> "(1) A tax (to be known as "stamp duty land tax") shall be charged in accordance with this Part on land transactions.
>
> (2) The tax is chargeable –

> a) whether or not there is any instrument effecting the transaction,
>
> b) if there is such an instrument, whether or not it is executed in the United Kingdom, and
>
> c) whether or not any party to the transaction is present, or resident, in the United Kingdom."

"Land transaction" is defined in section 43(1) as meaning "any acquisition of a chargeable interest", and "chargeable interest" is defined in section 48(1) in wide terms which include "an estate, interest, right or power in or over land in the United Kingdom", other than an exempt interest. By virtue of section 49(1), a land transaction is a chargeable transaction if it is not a transaction that is exempt from charge. Various exemptions are set out in schedule 3, including transactions for which there is no chargeable consideration.

18. Section 43 contains further definitions and provisions of a general nature relating to land transactions, of which the following may be noted:

> "(2) Except as otherwise provided, this Part applies however the acquisition is effected …
>
> …
>
> (4) References in this Part to the "purchaser" and "vendor", in relation to a land transaction, are to the person acquiring and the person disposing of the subject-matter of the land transaction.
>
> …
>
> (6) References in this Part to the subject-matter of a land transaction are to the chargeable interest acquired (the "main subject-matter") …"

19. Section 55 sets out the amount of tax chargeable, expressing it as a percentage of the chargeable consideration for the transaction. The top rate for non-residential property is 4% where the chargeable consideration exceeds £500,000. By virtue of paragraph 1(1) of schedule 4:

> "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 with him."

20. As the FTT noted in paragraph 25 of the Decision, there are several situations where a different amount is "expressly provided". These include certain cases where the purchaser is connected with the vendor, when market value is substituted (section 53); exchanges of land (dealt with in paragraph 5 of schedule 4); and a number of provisions in schedule 15, including paragraphs 10 and 13 to which I have already referred. The FTT went on to say in paragraph 25:

> "In relation to Schedule 15 it was clear to us that, if Schedule 15 provided for the determination of an amount of chargeable consideration in relation to a land transaction, that was express provision which ousted the general rule in Schedule 4 paragraph 1."

I agree, and Mr Gammie did not seek to argue the contrary.

21. An obvious problem with a transaction-based tax is how to deal with the standard procedure for the sale of land whereby a contract is followed on a later date by a conveyance on completion. In the absence of special provision, both the contract and the conveyance would involve the acquisition of different chargeable interests in land for substantially the same consideration, and tax would prima facie be charged twice on what is commercially a single transaction, assuming that it proceeds to completion. This problem is addressed by section 44, the relevant parts of which provide as follows:

> "(1) This section applies where a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance.
>
> (2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.
>
> (3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction.
>
> In this case the effective date of the transaction is the date of completion.
>
> (4) If the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract.

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

[*Subsections (5) to (7) explain when a contract is "substantially performed"*]

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

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

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

…

(10) In this section –

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

(b) "contract" includes any agreement and "conveyance" includes any instrument."

22. Leaving aside cases where a contract for a land transaction is substantially performed before completion, it can be seen that the general effect of these provisions is twofold. First, the purchaser is not regarded as entering into a land transaction when the contract is made, so no charge to tax can arise at that stage. Secondly, when the transaction is completed, the contract and the transaction effected on completion are rolled together and treated as parts of a single land transaction the effective date of which is the date of completion. Accordingly, a charge to tax is triggered at that stage, and the consideration given by the purchaser at each stage of the composite single transaction is aggregated and brought into account. In other words, there is a single charge to tax on completion of the contract, and the chargeable consideration is the full purchase price, including any amount paid as a deposit on exchange of contracts.

23. The provisions relating to substantial performance were no doubt introduced to counter the prevalent practice under stamp duty of allowing a land transaction to "rest in contract", whereby the parties would agree to the sale of the entire legal and beneficial interests in land, but with the intention that there should be no actual conveyance (and therefore no stampable instrument) unless and until this were called for by one of the parties. The solution which

the legislation adopts is to treat the contract itself as if it were the relevant land transaction, if and when the contract is substantially performed without having been completed. A contract is substantially performed when, broadly speaking, the purchaser takes possession of the property which is the subject-matter of the contract, or when a substantial amount of the consideration is paid or provided. Subsection (8) then deals with the position when such a contract is subsequently completed by a conveyance. In that event, both the contract and the transaction effected on completion are occasions of charge, but in computing the tax chargeable on completion credit is given for the tax chargeable on the contract.

24. The substantial performance provisions are of no direct relevance to the present case, but it is worth observing the technique used by the draftsman both in relation to contracts which are substantially performed and in relation to contracts which are completed. In each case, by what one might call a process of limited deeming, the actual facts are treated as modified to the extent necessary to bring about the desired result. Thus, on completion without prior substantial performance, there is deemed to be a single land transaction as at the date of completion; while in a case of substantial performance before completion, the contract is deemed to be the transaction which would take place on completion, and it is deemed to occur at the date of substantial performance. In the absence of any clear indication to the contrary, it seems to me reasonable to infer that limited deeming provisions of this nature were in general not intended to impact on what happened in the real world to a greater extent than was necessary to fulfil the immediate purpose of the deeming. However, it is also necessary to have regard to the well-known guidance given by Peter Gibson J (as he then was) in the Court of Appeal in Marshall v Kerr [1993] STC 360 at 366, cited with approval by Lord Browne-Wilkinson on the subsequent appeal to the House of Lords at [1995] 1 AC 148, 164E:

> "For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

25. I now move on to section 45, which as the FTT rightly said "is close to the heart of this appeal" (paragraph 34 of the Decision). So far as relevant, the section provides as follows:

> "(1) This section applies where –
>
> (a) a contract for a land transaction ("the original contract") is entered into under which the transaction is to be completed by a conveyance,
>
> (b) there is an assignment, subsale or other transaction (relating to the whole or part of the subject-matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him, and
>
> (c) …
>
> References in the following provisions of this section to a transfer of rights are to any such assignment, subsale or other transaction, and references to the transferor and the transferee shall be read accordingly.
>
> (2) The transferee is not regarded as entering into a land transaction by reason of the transfer of rights, but section 44 (contract and conveyance) has effect in accordance with the following provisions of this section.
>
> (3) That section applies as if there were a contract for a land transaction (a "secondary contract") under which –
>
> (a) the transferee is the purchaser, and
>
> (b) the consideration for the transaction is –
>
> (i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and
>
> (ii) the consideration given for the transfer of rights.
>
> The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded except in a case where the secondary contract gives rise to a transaction that is exempt from charge by virtue of subsection (3) of section 73

(alternative property finance: land sold to financial institution and re-sold to individual).

…

(5A) In relation to a land transaction treated as taking place by virtue of subsection (3) –

(a) references in Schedule 7 (group relief) to the vendor shall be read as references to the vendor under the original contract;

(b) other references in this Part to the vendor shall be read, where the context permits, as referring to either the vendor under the original contract or the transferor."

26. It can at once be seen that section 45 is dealing with a wide variety of different factual situations, the common features of which are that (a) there is an original contract, which is due to be completed by a conveyance, and (b) as a result of a further transaction relating to the whole or part of the subject-matter of the original contract, somebody other than the original purchaser becomes entitled to call for a conveyance. Paradigm examples of such intermediate transactions are an assignment for value of the benefit of the original contract, or a sub-sale to a further purchaser. Any such intermediate transaction is called a "transfer of rights" for the purposes of the section, and the parties to the transaction are called the transferor and the transferee. It is common ground that section 45 applies in the present case, the relevant transfer of rights being the sub-sale by the Company to the Partnership, the transferor under the sub-sale being the Company, and the transferee being the Partnership.

27. It follows, by virtue of subsection (2), that the Partnership was not regarded as entering into a land transaction by reason of the sub-sale agreement. This provision corresponds in its effect to section 44(2) as it applied to the original contract between L&G and the Company. In each case, any charge is postponed until subsequent completion or substantial performance. In the context of section 45, however, section 44 has to be applied *as if* there were a secondary contract with the features specified in subsection 45(3). The secondary contract is another example of the limited deeming technique to which I have drawn attention in relation to section 44. The express purpose of the deeming is to posit the existence of a contract under which the transferee (under the transfer of rights) is the purchaser, and the consideration for the transaction is the aggregate of the two sums mentioned in subsection (3)(b). The limited nature of the deeming is brought out by the fact that it applies only for the purpose of applying section 44 to a transfer of rights identified under section 45(1). The effect of section 44, thus applied and varied, will be to impose a charge to tax when the secondary contract is either completed or

substantially performed. On completion of the secondary contract, the chargeable consideration will normally be the aggregate sum specified in section 45(3)(b), and the tax will be payable by the transferee as the deemed purchaser.

28. Having posited the existence of a partially fictional secondary contract to which section 44 would apply, and which would generate a charge to tax when it was either completed or substantially performed, it was clearly necessary for the draftsman to deal also with the completion or substantial performance of the original contract, because otherwise two concurrent charges to tax might arise. The solution to this problem is to be found in the first limb of the tailpiece to section 45(3), which provides that "[t]he 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". In other words, the charge under the partly fictional secondary contract replaces the charge which would otherwise arise under the actual original contract, but only if both the original and the secondary contracts are completed (or substantially performed) at the same time as, and in connection with, each other.

29. It will be noted that the draftsman expressly envisages the *actual* completion or substantial performance of the secondary contract, notwithstanding its partly fictional status, and a comparison between such completion or substantial performance and what takes place under the original contract. This feature seems to me to reinforce the limited nature of the deeming involved in positing the secondary contract, and to add force to the inference that the draftsman did not wish to interfere with reality more than he had to. In the context of section 45, the obvious purposes of positing a secondary contract, in the widely differing factual circumstances to which the section might apply, were (a) to ensure that there would be a contract to which section 44 could be applied, (b) to identify the purchaser who would be liable to pay the tax following a transfer of rights, (c) to identify the appropriate consideration in such a case, and (d) to regulate the relationship between the charge on completion or substantial performance of the secondary contract and the charge which would otherwise arise on the completion or substantial performance of the original contract. Leaving aside subsection (5A), to which I will return later, I can find no clear indication in section 45 itself that the draftsman needed the deeming for any wider purposes; and the tailpiece to section 45(3) shows at the very least that one still has to have recourse to the actual facts in order to ascertain when the secondary contract is completed or substantially performed.

30. In the present case, as I have already indicated (see paragraph 9 above), there is no difficulty in identifying either the purchaser or the consideration under the secondary contract. The purchaser was the Partnership; and the

consideration was £65.1 million, because the sub-sale was of the whole of the subject-matter of the original contract, the whole of the original purchase price was payable by the Partnership under the sub-sale agreement, and no further consideration was given by the Partnership for the sub-sale. Furthermore, there can be no doubt that the secondary contract was completed at the same time as the original contract and in connection with it. Accordingly, the first limb of the tailpiece to section 45(3) applied. It follows that the completion of the original contract on 5 December 2006 is to be disregarded, but the completion of the secondary contract on the same date gave rise, in the absence of any provision to the contrary, to a charge to tax on the Partnership in the same amount as would have been payable by the Company in the absence of the sub-sale.

The Partnership Provisions

31. As originally enacted, FA 2003 contained only general provisions relating to partnerships and specifically excluded from the scope of SDLT the transfer of an interest in land into a partnership, the acquisition of an interest in a partnership, and the transfer of an interest in land out of a partnership. The general provisions were contained in Part 1 of schedule 15. Paragraph 1 defined a "partnership" as meaning a partnership within the Partnership Act 1890, a limited partnership registered under the Limited Partnerships Act 1907, a limited liability partnership formed under the Limited Liability Partnerships Act 2000, "or a firm or entity of a similar character to any of those mentioned above formed under the law of a country or territory outside the United Kingdom". It is an agreed fact in the present case that the Partnership is of a similar character to a "partnership" of one of the types specified in paragraph 1.

32. Paragraph 2 of schedule 15 is important, because it lays down the basic principle that any separate legal personality of the partnership is to be disregarded:

> "2(1) For the purposes of this Part of this Act –
>
> i) a chargeable interest held by or on behalf of a partnership is treated as held by or on behalf of the partners, and
>
> ii) a land transaction entered into for the purposes of a partnership is treated as entered into by or on behalf of the partners,

and not by or on behalf of the partnership as such.

(2) Sub-paragraph (1) applies notwithstanding that the partnership is regarded as a legal person, or as a body corporate, under the law of the country or territory under which it is formed."

In other words, a partnership is treated as transparent, even if as a matter of general law it has separate legal personality or corporate status. There is no need for such a provision in relation to English partnerships under the 1890 Act, which have no separate legal personality, but the same is not true of (for example) Scottish partnerships or limited liability partnerships.

33. Part 2 of schedule 15 is headed "Ordinary partnership transactions" and is stated to apply to transactions entered into as purchaser by or on behalf of the members of a partnership, other than transactions within Part 3. It deals with their responsibility as partners for matters requiring or authorised to be done under the SDLT legislation by or in relation to the purchaser under a land transaction; with the joint and several liability of the partners for the payment of tax, interest or penalties; and with the appointment of representative partners.

34. The reason for the comprehensive exclusions in Part 3 of schedule 15, as originally enacted, appears to have been that fuller consideration needed to be given to such transactions before they could be brought within the scope of SDLT. Of the three categories of transaction thus excluded, transfers of an interest in land into a partnership were described as follows in paragraph 10:

"(1) This paragraph applies to a transaction by which –

i) a partner transfers an interest in land to a partnership, or

ii) a person transfers an interest in land to a partnership in return for an interest in the partnership,

whether in connection with the formation of the partnership or in a case where the partnership already exists.

(2) There is a transfer of an interest in land to a partnership in any case where an interest in land that was not partnership property becomes partnership property."

35. Proposals to bring the excluded transactions within the scope of SDLT were then announced in the 2004 Budget, following the publication of draft legislation on 20 October 2003 and subsequent consultation. As enacted by the Finance Act 2004, and as subsequently amended by the Finance Act 2006 in relation to transfers with an effective date on or after 19 July 2006, paragraph 10 of schedule 15 provides as follows:

"(1) This paragraph applies where –

a) a partner transfers a chargeable interest to the partnership, or

…

It applies whether the transfer is in connection with the formation of the partnership or is a transfer to an existing partnership.

(2) The chargeable consideration for the transaction shall (subject to paragraph 13) be taken to be equal to –

MV x (100 – SLP)%

where –

MV is the market value of the interest transferred, and

SLP is the sum of the lower proportions.

(5) Paragraph 12 provides for determining the sum of the lower proportions.

…"

36. As I have already explained, it is common ground that the effect of the formula thus substituted by the Finance Act 2006, when applied to the facts of the present case, is that the chargeable consideration for the sub-sale by the Company to the Partnership is nil, on the assumption that the transaction falls within the scope of paragraph 10. I have also explained that the exception in paragraph 13 does not apply, because it is not the case that all the partners in the partnership were bodies corporate. Finally, paragraph 10(1)(a) needs to be read with paragraph 35 of schedule 15, which provides that:

> "For the purposes of this Part of this Schedule, there is a transfer of a chargeable interest to a partnership in any case where a chargeable interest becomes partnership property."

The rival contentions in outline

(1) The Partnership

37. In paragraph 34 of his skeleton argument for this Tribunal, Mr Thomas helpfully provides the following summary of the Partnership's case:

> "(1) Section 45 does not require the transaction by which the Partnership acquired the Property to be disregarded for all SDLT purposes, and especially does not require its disregard for the purposes of Schedule 15 paragraph 10. Rather, the provision simply requires that Section 44 has effect on the basis that the substantial performance or completion of the original contract be disregarded.
>
> (2) If Section 45 does require the deemed secondary contract to be substituted for the land transaction effected between [the Company] and the Partnership, nevertheless, the secondary contract is one under which [the Company] is the vendor and the Partnership the purchaser.
>
> (3) Alternatively, if Section 45 does create a deemed secondary contract to which the original vendor, the intermediate purchaser/vendor and the ultimate purchaser are all parties, there is nothing in the secondary contract which prevents the intermediate purchaser from being the person who transfers the chargeable interest to the final purchaser.
>
> (4) Accordingly, paragraphs 10 and 12 of Schedule 15 do apply to the transfer of the Property from [the Company] to the Partnership, with the result that the SDLT payable on this transaction was nil."

(2) HMRC

38. HMRC's case, as it is now presented by Mr Gammie QC, may I think fairly be summarised as follows:

1) Section 45 must on any view apply to the transactions in the present case, because of the sub-sale to the Partnership. Furthermore, the Partnership has to rely on section 45 (namely the first limb of the tailpiece to subsection 45(3)) in order to eliminate the charge to tax which would otherwise have arisen on completion of the original contract between L&G and the Company by the first transfer executed on 5 December 2006, and to justify the Company's failure to submit any land transaction return in respect of the completion of the original contract.

2) There is no justification for treating the provisions of schedule 15 in general, and paragraph 10 in particular, as insulated from the main body of FA 2003, and the alleged application of paragraph 10 must be considered in the light of sections 44 and 45, including in particular section 45(3).

3) As a result of the combined effect of sections 44 and 45, the Company never acquired any chargeable interest for SDLT purposes. This follows from the disregard of the original contract by virtue of section 44(2), and the disregard of its completion by virtue of section 45(3). Accordingly, the Company cannot be regarded for SDLT purposes as having transferred the head lease to the Partnership, with the result that paragraph 10 of schedule 15 cannot apply.

4) It is no objection to this analysis that, as a matter of conveyancing, the composite transaction was in fact completed by two separate transfers to which the Company was a party, instead of by a single transfer from L&G to the Partnership.

5) As to the deemed secondary contract under section 45(3), the Company again cannot be treated as the vendor, or as the transferor of the head lease to the Partnership thereunder, because the Company must still be treated for SDLT purposes as having acquired no chargeable interest in the head lease, and therefore as having no interest in the head lease to dispose of.

The relationship between schedule 15 and the main body of Part 4 of FA 2003

39. I find it convenient to begin by considering the relationship between the partnership provisions in schedule 15 and the main body of the SDLT legislation contained in Part 4 of FA 2003. This is the foundation for the submission which Mr Thomas logically places first, to the effect that the transfer made by the sub-sale falls squarely within the language of paragraph 10(1)(a), with the consequence that the chargeable consideration for the transaction has to be calculated by reference to the formula in paragraph 10(2).

40. In the Partnership's response to HMRC's notice of appeal, broadly equivalent to a respondent's notice under the CPR, the point is put in this way:

> "7… the effect of Part 3 [*of Schedule 15*] is to create a code which overlays and, to the extent necessary, replaces, the usual rules imposed by sections 42ff. Schedule 15 is not couched in terms of "acquisitions", or "purchasers", or "vendors", or "contracts", or "conveyances", or "completion". Nor is there any question of whether a contract has or has not been "substantially performed" or "completed" – or indeed whether there is a contract at all. Instead, one has to apply a further and wholly different set of rules to transactions which may or may not also be land transactions within the meaning of s.43.
>
> 8. If, on examining the relevant transactions, the special partnership rules are applicable, then the chargeable consideration for that transaction will be determined by these rules, and not by those that would otherwise generally have been applicable."

41. This contention was amplified by Mr Thomas in his written and oral submissions. He submitted that the creation of a self-contained code in Part 3 of schedule 15 was achieved by section 104(1) of FA 2003, which provides that:

> "(1) Schedule 15 has effect with respect to the application of this Part in relation to partnerships.
>
> (2) In that Schedule –
>
> …
>
> Part 3 makes special provision for certain transactions."

He also relied on the general principle of statutory construction that special provisions override general ones, citing Bennion on Statutory Interpretation, 5th edition (2008), p1164:

> "Where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision."

Finally, Mr Thomas relied on the fact that, as I have explained, the specific provisions in Part 3 of schedule 15 designed to bring partnership provisions within the scope of SDLT were introduced by amendment in 2004, and did not form part of the statutory scheme of SDLT as originally enacted in 2003.

42. I am unable to accept these submissions. As a matter of general principle, provisions contained in a schedule to an Act are just as much a part of the overall statutory scheme as provisions contained in the main body of the Act. That principle appears to me to be reinforced in the present case by the wording of section 104(1), which provides that schedule 15 has effect with respect to *the application of this Part*, i.e. Part 4 of FA 2003, in relation to partnerships (my emphasis). Furthermore, Parts 1 and 2 of schedule 15 itself contain general provisions, and provisions relating to ordinary partnership transactions, which formed part of the legislation from the beginning. The reason for the exclusion from the scope of SDLT of the types of transaction originally specified in Part 3 was not that they inherently needed to be dealt with in a separate self-contained code, but rather that (as appears from the 2004 Budget note issued by HMRC) it was considered advisable to publish draft legislation and consult on it before such transactions were brought within the scope of the tax.

43. Mr Gammie QC also made the telling point that paragraph 10 of schedule 15 is not itself a charging provision, although it is stated to apply where a partner transfers a chargeable interest to the partnership, and it stipulates what the chargeable consideration for the transaction is to be. The charge itself has to be found in the main body of the Act. Furthermore, he was also able to show that Mr Thomas's argument that Part 3 of schedule 15 eschews the usual SDLT vocabulary was exaggerated, and certainly does not appear to be the product of a deliberate decision to enact a self-contained code. In my view, the likely explanation for the absence of much of the familiar terminology is that the focus of Part 3 is on transfers of property into or out of a partnership, and transfers of interests in a partnership, whereas the general focus of SDLT is on acquisitions, which are the occasion of charge: see sections 42(1) and 43(1). Mr Thomas in any event had to concede that at least one key concept of SDLT, namely "chargeable interest", occurs throughout Part 3.

44. I am therefore satisfied that schedule 15 should be read, construed and applied in the context of the SDLT legislation as a whole, and should not be treated as if it formed some sort of legislative island all by itself.

45. For the same reasons, I am also satisfied that Mr Thomas's first submission cannot be accepted as it stands. It is true that, if one looks at the sub-sale in isolation, it appears to fall squarely within the wording of paragraph 10(1)(a); but to assert that that is the end of the matter involves pre-judging the issue which needs to be considered, which is whether sections 44 and 45, and in

particular section 45(3), have any (and if so what) impact on that apparently straightforward analysis.

What is the effect of the deemed secondary contract on paragraph 10 of schedule 15?

46. I now turn to the issue which seems to me to lie at the heart of the case, namely the relationship between the secondary contract posited by section 45(3) and paragraph 10 of schedule 15. I preface my discussion of the issue by saying that I agree with Mr Gammie that the Partnership cannot sidestep the question, if only because it has to rely on section 45(3) in order to eliminate the charge to tax on the Company which would otherwise have arisen on completion of the first contract. That consequence can come about only if the completion of the first contract coincided with the completion of the secondary contract; and the secondary contract is itself created by the same subsection which provides for the completion of the first contract to be disregarded. In other words, the disregard upon which the Company has to rely is inextricably bound up with the secondary contract and its completion.

47. My next point is that the secondary contract is expressly brought into existence for the sole purpose of modifying the application of section 44 to the transfer of rights referred to in section 45(1). This follows from section 45(2), which says that section 44 "has effect in accordance with the following provisions of this section", and the opening words of section 45(3) itself, "*That section* applies as if there were a contract for a land transaction …" (my emphasis). There is no indication in the deeming provision itself that the concept of a secondary contract was intended to have any wider application, a point which is perhaps reinforced by its absence from the index of defined expressions to be found in section 122.

48. I have already drawn attention to the technique of limited deeming which the draftsman seems to have employed in sections 44 and 45, and to the fact that the secondary contract was on any view envisaged as retaining at least some features of the relevant transfer of rights (because section 45(3) assumes that one can ascertain, as a matter of fact, when the secondary contract is either completed or substantially performed). Consistently with this approach, the only aspects of the secondary contract which the draftsman considered it necessary to specify were the identity of the purchaser and the amount of the consideration. In addition, given the multiplicity of possible types of transfer of rights, not all of which would necessarily involve the making of a contract, it was necessary to posit the existence of a contract in order to ensure that section 44 was effectively engaged. This is achieved by the opening words of the hypothesis in section 45(3) ("as if there were a contract for a land

transaction"). These features apart, however, the natural inference to my mind is that all other aspects of the secondary contract, including the identity of the vendor, were intended to reflect as closely as possible the actual transfer of rights, and the reason why the draftsman did not spell this out was that the other terms of the secondary contract had no bearing on the limited purpose for which it was brought into existence.

49. There was a good deal of debate before me about the identity of the transferor under the secondary contract, and whether any light was thrown on that question by section 45(5A), but in the context of the present case I feel little doubt that the right answer is that the transferor was the Company alone. The only parties to the sub-sale were the Company and the Partnership, and it follows from the final sentence of section 45(2) that references elsewhere in the section to the transferor and transferee must be read accordingly. The transferee is then expressly deemed by subsection (3)(a) to be the purchaser under the secondary contract, which in the present case can only mean the Partnership. Given the limited purpose for which the secondary contract is posited (the application of section 44 to a modified version of the actual transfer of rights), it seems to me that in the absence of clear provision to the contrary the transferor under the secondary contract must be taken to be the same as the transferor under the transfer of rights, i.e. in the present case the Company alone.

50. This conclusion gains some further support, in my view, from the only subsequent reference to "the transferor" in section 45, in paragraph (b) of subsection (5A). That paragraph says that, save in relation to the group relief provisions in schedule 7, "other references in this Part to the vendor shall be read, where the context permits, as referring to either the vendor under the original contract or the transferor". It seems to me to be implicit in this wording that the transferor is envisaged as somebody other than the vendor under the original contract. Since the only possible candidates for the transferor under the secondary contract would be the vendor under the original contract, the transferor under the transfer of rights, or (if it were right to posit a tripartite secondary contract) the vendors or transferors under both the original contract and the subsequent transfer of rights, and since the language of paragraph (b) is disjunctive, I find here an indication both that the secondary contract is not normally envisaged as being a tripartite construct, and that the transferor will normally be the actual transferor under the transfer of rights and nobody else.

51. Nor is this the only assistance to be gained from subsection (5A). The subsection was introduced by amendment in 2004. According to Mr Thomas, its purpose was to counteract a tax avoidance scheme which involved a sub-sale within a group of companies and sought to take advantage of the exemption conferred by paragraph 1(1) of schedule 7 "if the vendor and

purchaser are companies that at the effective date of the transaction are members of the same group". The scheme involved one group company, A, contracting to buy land from a third party and then selling the land on by way of a transfer of rights to another group company, B. The completion of the first contract of sale would be disregarded by virtue of section 45(3), and group relief would then be claimed for the second transfer within the group. The way Parliament decided to counter the scheme was by providing in paragraph (a) of subsection (5A) that references in schedule 7 to the vendor "shall be read as references to the vendor under the original contract". The implication is that, but for this special provision, the vendor under the transfer of rights would be group company A, and not the vendor under the original contract.

52. Mr Gammie did not dispute that one of the objects of subsection (5A) was to prevent the unintended grant of relief from SDLT in the kind of case instanced by Mr Thomas, but he pointed out that the alleged scheme had never been tested in the courts, and that if HMRC's argument in the present case is correct there was in fact never a loophole of the type described, because company A could never be treated as the vendor under the secondary contract. The fact remains, however, that Parliament clearly felt it advisable to close the loophole, if loophole there were, and that the chosen remedy clearly proceeds on the assumption that there would be circumstances in which the transferor in a transfer of rights between two group companies would be the vendor under a secondary contract. To that extent, I consider that paragraph (a) of subsection (5A) does provide some additional support for the Partnership's case.

53. Mr Thomas also sought to derive support for his argument from the second limb of the tailpiece to section 45(3). The second limb was introduced by amendment in 2005, and operates as an exception to the general rule that the substantial performance or completion of the original contract is to be disregarded if it occurs at the same time as, and in connection with, the substantial performance or completion of the secondary contract. For convenience, I will set out the exception again:

> "… 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)."

54. Section 73 is one of a group of sections dealing with alternative forms of property finance, including, as I understand it, certain Sharia-compliant forms of transaction. So far as material, section 73 provides that:

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

a) the institution –

i) purchases a major interest in land ("the first transaction"), and

ii) sells that interest to the person ("the second transaction"), and

b) the person grants the institution a legal mortgage over that interest.

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

a) the person concerned …

(3) The second transaction is exempt from charge if the financial institution complies with the provisions of this Part relating to the first transaction (including the payment of any tax chargeable on a chargeable consideration that is not less than the market value of the interest …)"

As originally enacted, section 73 referred to an "individual" rather than a "person", but the latter word was substituted throughout the section by the Finance Act 2006.

55. The section accordingly contemplates the making of arrangements between a person (A) and a financial institution (F), whereby F purchases a major interest in land ("the first transaction") and sells it to A ("the second transaction"), who then grants F a legal mortgage over that interest. If A is himself the vendor to F under the first transaction, the first transaction is exempt from charge by virtue of subsection (2). The second transaction is also exempt from charge, by virtue of subsection (3), but only if F, in effect, treats the first transaction as though it were not exempt and pays tax on the full market value of the property conveyed. Thus the composite transaction will give rise to a single charge to SDLT, either on the first transaction, if F chooses to comply with the provisions of subsection (3), or on the second transaction, if F does not comply with those provisions. In the former case, the tax would be payable by F; in the latter case, it would be payable by A. It is the conditional exemption from charge of the second transaction to which the tailpiece of section 45(3) refers.

56. If one assumes that A is the vendor to F (or, in other words, that there is a sale and repurchase by A of the same property), and that the sale and repurchase are to be completed by conveyances, it is clear that the provisions of section 45 would be engaged. The first transaction under section 73 would be the

original contract, and the second transaction would be a transfer of rights, giving rise to a deemed secondary contract.

57. In those circumstances, submits Mr Thomas, the effect of section 45(3) as originally enacted, without the second limb of the tailpiece, would have been to exempt the first transaction if it were completed at the same time as the secondary contract, leaving F free to take advantage of the exemption for the second transaction in section 73(3) without having to pay any tax on the first transaction. The condition of compliance "with the provisions of this Part relating to the first transaction" would be satisfied, but the result would be a further exemption from tax, and not the charge clearly contemplated by section 73(3). It was in order to close this apparent loophole that the second limb of the tailpiece was introduced in 2005. By way of exception to the general rule, the completion of the first transaction (the original contract) would no longer be disregarded, so F would still have to pay tax on its completion as the price of obtaining exemption for the second transaction under section 73(3). But none of this would have been necessary, says Mr Thomas, if HMRC's argument in the present case were correct. The effect of disregarding the first transaction would be that F could not be the vendor under the second transaction, because F would have nothing to sell back to A.

58. In my view this is a telling argument, for at least two reasons. First, it shows that Parliament was concerned about the interaction between section 45 and the special provisions contained in section 73. This reinforces the general point that the legislation has to be read and applied as a whole, even where the subject-matter is highly specialised. Secondly, it strongly suggests to me that Parliament intended the factual premises of section 73, relating to the arrangements and the first and second transactions, to be construed as referring to the actual facts of the case in the real world, unaffected by any deeming or disregard which might arise on completion of either of the transactions. In particular, application of a fiction which would cause F to drop out of the picture on the simultaneous completion of the two transactions, with the result that F could no longer be regarded as the transferor under the second transaction, would in my judgment make a nonsense of the whole section.

59. It may be said that this conclusion is not necessarily incompatible with HMRC's argument in the present case, because of the strength of the particular context and the terms of section 73. That is true, but I nevertheless find here another indication in support of the view that Parliament never intended the disregard of the original contract in section 45(3) to carry across in such a way as to affect or undermine transactions in the real world, unless of course specific provision to that effect is made. Parliament's concern, as evinced by the second limb of the tailpiece to section 45(3), was not that F might magically disappear from the scene, but rather that the specific

disregard of the first transaction under section 45(3) would eliminate the charge to tax contemplated by section 73(3).

60. All the points which I have so far considered seem to me to provide support, to a greater or lesser degree, for the Partnership's argument that the Company is to be regarded as the vendor under the secondary contract. If that is right, the remaining steps in the argument are relatively straightforward. On completion of the secondary contract, there was a transfer of a chargeable interest by the Company to the Partnership, so paragraph 10(1)(a) of schedule 15 applies, albeit by reference to the deemed secondary contract rather than the actual facts of the sub-sale viewed in isolation. Section 45(3) says that the consideration (not, it should be noted, the chargeable consideration) for the transfer is £65.1 million. In order to ascertain the chargeable consideration it is necessary to turn to section 50(1), which states that schedule 4 "makes provision as to the chargeable consideration for a transaction". By virtue of paragraph 1(1) of schedule 4, quoted above, the chargeable consideration is, "except as otherwise expressly provided", the consideration in money or money's worth given for the subject-matter of the transaction by the purchaser or a person connected with him. In the present case, express provision to the contrary is made by paragraph 10(2) of schedule 15, which therefore ousts and takes priority over the consideration for the secondary contract specified in section 45(3).

61. I must now consider HMRC's core argument that the Company cannot be regarded as the vendor or transferor of the head lease to the Partnership, whether under the actual sub-sale or under the deemed secondary contract, because of the disregards in sections 44(2) and 45(3). In essence, the argument is a simple one. Since the original contract between L&G and the Company did not give rise to a chargeable land transaction by virtue of section 44(2), and since the completion of the original contract had to be disregarded by virtue of section 45(3), it must follow that for SDLT purposes the Company never acquired a chargeable interest which it could transfer to the Partnership. Accordingly there was no transfer by the Company to the Partnership within paragraph 10 of schedule 15, and there is nothing to displace the charge to tax on completion of the secondary contract on the full consideration of £65.1 million specified in section 45(3). It also follows that the transferor under the secondary contract must be L&G, the Company having dropped out of the picture, although Mr Gammie submits that the FTT were right to hold that the secondary contract should be taken to be a tripartite one between L&G, the Company and the Partnership.

62. Mr Gammie also relies on the definition of "completion" in section 44(10)(a) as "completion of the land transaction proposed, between the same parties, in substantial conformity with the contract". He submits that the conveyancing formalities adopted by the parties are irrelevant to completion as defined, and

where there is a transfer of rights it should make no difference whether completion is effected by a single conveyance from A to C, or two conveyances via the original purchaser B. He submits that this would be consistent with Parliament's intention to replace stamp duty, for which conveyancing formalities were fundamental, with a transaction-based tax such as SDLT. This change of focus, he says, should inform the proper construction of the relevant statutory provisions.

63. I recognise the logical attraction of Mr Gammie's argument, and it is tempting to accede to it because it would produce a sensible result on the facts of the present case. I am nevertheless unable to accept it. In the light of all the considerations which I have discussed, I am satisfied that the two provisions upon which the argument depends do not have the far-reaching consequences for which he contends.

64. I take first section 44(2). This is not framed as a full-blown deeming provision, but simply says that a person is not regarded as entering into a land transaction "by reason of entering into the contract". All that the subsection negates is the imposition of a charge to tax on the acquisition of a chargeable interest (that being the definition of "land transaction" in section 43(1)) by reason of entering into a contract for a transaction that is to be completed by a conveyance. The evident purpose is to negate the double charge to tax that would otherwise arise on completion, and to introduce the different regime of occasions of charge set out in section 44(3) to (8). The limited nature and purpose of the disregard is to my mind brought out by the focus on the entry into the contract alone, and the express link with the provisions which follow ("but the following provisions have effect"). Further, the disregard does not purport to change anything which has happened in the real world: it merely disapplies the legal consequences that would otherwise follow from entering into the contract, by (in effect) carving out an exception from the definition of land transaction in section 43(1).

65. I now turn to section 45(3) and the deemed secondary contract. The first point I would make is that the disregard upon which HMRC rely comes into play only if and when there is simultaneous completion of the secondary contract and the original contract. This timing point is reinforced by the shape of the subsection itself, where the hypothetical secondary contract is first introduced, and it is only then that the disregard follows. In other words, the disregard presupposes that the secondary contract is already in place and that it has been completed. Yet HMRC want to rely on the disregard to show that, in the SDLT world, the Company could never have had anything to transfer to the Partnership, because it never acquired anything under the original contract. In my view that is to put the cart before the horse. It seems reasonably clear to me that the draftsman begins by referring to a factual state of affairs in the real world, and then constructs a hypothesis which in certain limited respects

modifies that state of affairs. The sub-sale by the Company to the Partnership forms part of the real state of affairs, and I can find nothing in the statutory hypothesis which requires it to be displaced. The purpose of the disregard of the completion of the original contract has nothing to do with the real world state of affairs from which the hypothesis of the secondary contract is constructed, but is rather to ensure that there is only one charge to SDLT if the original contract and the secondary contract are completed at the same time. I am unable to see any grounds for giving it a wider or more general effect, and still less for using it to undermine or modify the factual basis of the secondary contract.

66. If, as I think, the Company is to be regarded as the vendor under the secondary contract, I would then accept the remaining stages in the Partnership's argument as set out in paragraph 57 above. Paragraph 10(1)(a) of schedule 15 applies, and the chargeable consideration for the sub-sale is nil. I would only add that, if the correct view were that the hypothesis of the secondary contract does not carry over into Part 3 of schedule 15, the position would be even simpler. There would then be nothing to prevent the straightforward application of paragraph 10(1)(a) to the actual sub-sale, and the same result would of course follow.

67. This result is no doubt one that Parliament would not consciously have intended had the facts of the present case been drawn to its attention. But, in respectful agreement with the FTT, I consider that this is the result which follows from a proper construction of the relevant statutory provisions and their application to the undisputed facts. It is also worth noting in this connection that the partnership provisions in Part 3 of schedule 15 have undergone considerable evolution since their introduction in 2004. Mr Thomas told me, and Mr Gammie did not disagree, that if the transactions in the present case had taken place four months earlier, the effect of the previous formula for computation of the consideration in paragraph 10(2) would have been to impose a charge to tax on the Partnership based on the full consideration of £65.1 million. Similarly, if the relevant transactions had taken place a few months later, they would probably have been caught by anti-avoidance provisions in sections 75A to 75C of FA 2003 which were enacted in relation to disposals taking place on or after 6 December 2006. Thus the loophole of which the Company and the Partnership have, if I am right, succeeded in taking advantage was open for only a short period, and it appears to reflect a period of considerable legislative uncertainty about how to deal with transfers involving a partnership.

The Decision of the FTT

68. Although I have reached the same conclusion as the FTT, and although I have greatly profited from their careful consideration of the issues, there are some comparatively minor points on which I disagree with them or would express myself rather differently. However, as the issues involved are pure questions of law, in relation to convoluted and difficult legislation, I do not think it would be useful to prolong this decision by analysing or citing at length from the Decision, which is reported at [2011] SFTD 531.

Conclusion

69. For the reasons which I have given, this appeal will be dismissed.

TRIBUNAL JUDGE:

MR JUSTICE HENDERSON

RELEASE DATE: 5 November 2012