[2017] UKUT 0225 (TCC)
Appeal number: UT/2016/0045

STAMP DUTY RESERVE TAX– surrender of units in unit trust scheme - redemption in specie-relief where unit holder receives a proportionate share of all the trust assets-whether relief applies if and only if the unit holder receives a proportionate share of all the trust assets (as nearly as practicable) or to the extent that the unit holder receives such a share-paragraphs 2 and 7 Schedule 19 Finance Act 1999

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

HENDERSON INVESTMENT FUNDS LIMITED **Appellant**

- and -

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

TRIBUNAL: Mr Justice Norris
Judge Timothy Herrington

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 6 March 2017

Michael Quinlan, Counsel, instructed by Forbes Hall LLP, Solicitors, for the Appellant

Richard Vallat, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Henderson Investment Funds Limited ("Henderson") appeals against a decision by the First-tier Tribunal ("FTT") (Judge Morgan and Mr Charles Baker) released on 16 October 2015 ("the Decision"). The FTT dismissed an appeal from a determination by the Respondents ("HMRC") of the amount of Stamp Duty Reserve Tax ("SDRT") payable in respect of a redemption in specie by a unit holder in a unit trust scheme managed by Henderson.

2. A redemption in specie occurs in a unit trust scheme when a unit holder surrenders his units in the scheme to the manager of the scheme and instead of receiving consideration in the form of a cash payment equivalent to the value of his units he receives a distribution of securities and cash from the scheme of equivalent value.

3. As we describe in more detail later, at the time the transaction which is the subject of this appeal occurred, Paragraph 2 of Schedule 19 of the Finance Act 1999 ("Schedule 19") imposed a charge to stamp duty reserve tax inter-alia, where a unit holder disposes of all or part of his interest in a unit trust scheme by authorising or requiring the trustees or managers of the scheme to treat him is no longer interested in one or more of the units which represent his interest in the scheme. Paragraph 3 of Schedule 19 charged SDRT in that situation at the rate of 0.5% of the market value of the unit concerned.

4. Paragraph 7 of Schedule 19 sets out an exclusion from this charge in the case of a redemption in specie where the unit holder "received only such part of each description of asset in the trust property as is proportionate to, or as nearly as practicable proportionate to, the unit holder's share."

5. In this case, which concerned a redemption in specie of all the units held in the Henderson UK Enhanced Equity Trust (the "Scheme") by a pension fund trustee (the "Unit Holder"), the Unit Holder's interest in the Scheme represented by value 27.41% of the Scheme's property but the securities received in most cases by the Unit Holder on the redemption represented an interest of 28.68% of the Scheme's property. The Unit Holder therefore received an over allocation of securities in the Scheme on the redemption of some 1.27% and a corresponding under allocation of cash.

6. The question before the FTT was whether paragraph 7 of Schedule 19 should be construed to allow relief on the redemption in specie of units in a unit trust scheme if and only if the unit holder receives a proportionate share of all the trust assets (as nearly practicable) or whether relief is available to the extent that the unit holder receives such a share. Henderson's position was that paragraph 7 of Schedule 19 operated to provide an exclusion from charge to SDRT on a redemption in specie to the extent that there was no change in the beneficial ownership of the securities received by the Unit Holder with the result that in this case SDRT was due under

Schedule 19 only by reference to the proportion of the market value of the unit surrendered which were attributable to the over allocation of securities of 1.27%. HMRC's position was that paragraph 7 of Schedule 19 provided an "all or nothing" or "hard edged" exclusion. Consequently, in its view, as the transfer of the relevant securities on the redemption was not proportionate to, or as nearly as practicable proportionate to, the Unit Holder's share in the Scheme, an SDRT charge was due by reference to the market value of all of the units surrendered, subject to any other applicable reduction in charge.

7. Henderson, as the person accountable for the SDRT due on the redemption, had initially paid SDRT on the full market value of all the units surrendered of £1,775,714.68. It later sought repayment from HMRC of £1,657,825.93 (plus interest) having recalculated the SDRT charge as £117,888.75.

8. The FTT agreed with HMRC's interpretation of paragraph 7 of Schedule 19 and dismissed the appeal. Permission to appeal against this finding was given by Judge Morgan on 23 March 2016.

The Facts

9. The facts were not in dispute. The FTT set out the relevant facts clearly at [7] to [19] of the Decision. For the purposes of this decision, we can summarise these findings as follows:

(1) The Scheme is a unit trust scheme established in the UK and authorised under the Financial Services and Markets Act 2000;

(2) As required by the rules made by the then regulator, the Financial Services Authority, the Trust Deed constituting the Scheme contained a declaration of trust to the effect that the property of the Scheme was held by the Trustee on trust for the unit holders pari passu according to the number of units held by each unit holder;

(3) The Trust Deed contained a specific power for a unit holder to make a request to the Trustee of the Scheme for a redemption of units in specie which the Trustee could accept provided it had taken reasonable care to ensure that the redemption would not be likely to result in any material prejudice to the interest of unit holders;

(4) The power to redeem in specie was supplemented by provisions in the Scheme's prospectus permitting Henderson to select the property to be transferred on a redemption in specie subject to the Trustee having taken reasonable care to ensure that the transfer is not likely to result in any material prejudice to the interests of unit holders;

(5) Most of the assets made up the property of the Scheme were transferable securities which were subject to SDRT if transferred for value. Some of the property consisted of derivative contracts that could not be transferred and the Scheme also held cash;

(6) On 3 May 2011, the Unit Holder, who at that point held 27.41% of the units in issue in the Scheme and which therefore represented a beneficial interest in 27.41% of the property of the Scheme, requested that its units be redeemed in specie;

(7) The units were redeemed on 10 May 2011 and the Unit Holder received securities as a distribution, together with some cash; and

(8) A number of the lines of securities distributed exceeded the Unit Holder' s proportionate share in the Scheme, some variances being tiny and some substantial; to the extent that more than 27.41% of any line of securities was allocated to the Unit Holder, beneficial ownership of those securities was transferred to the pension fund from the other unit holders, the other securities distributed representing assets already owned beneficially by the pension fund for whom the Unit Holder acted as trustee.

10. Although not referred to in the Decision, we were taken to correspondence between HMRC and Henderson which took place in June 2014. In response to a request from HMRC that Henderson explain the basis of the fund manager's original decision on "how to distribute the assets", in an email dated 25 June 2014 Henderson explained that the individual in the fund management team who carried out the calculation was no longer with them and it was therefore unable to say precisely why the distribution was as much as 1.27% overweight. Henderson did say, however that "the individual concerned was aware of the need to distribute as nearly as practicable pro rata in specie for the purposes of Schedule 19." It went on to say that the allocation exercise was very complicated and quite uncommon due to the relatively high percentage of non-transferable positions and it is thought that the fund manager, having fixed upon a basket that he was confident would satisfy regulatory constraints and those overseeing his actions, did not want to adjust it further.

11. Henderson conceded that the manager might have been able to allocate more cash to come closer to the 27.41% perfect pro rata slice of chargeable securities and there was some speculation as to whether the reason for large discrepancy was a wish on the part of the fund manager to rebalance the amount of cash in the interest of the remaining investors. There was a suggestion at the end of the email that "as nearly as practicable" may "take into account the regulatory, investor and trading concerns and constraints that a fund manager may face on a distribution of this novelty, complexity and size" and whether this could be taken, implicitly, as the reasons for the over allocation of securities.

12. We were told that in addition to accepting that the "as nearly as practicable" test would be met where a pro rata allocation of each line of security was not possible because of restrictions on transfer (such as may apply in the case of over-the-counter derivatives instruments or non-transferable unquoted securities) HMRC accepted a tolerance of 0.02% from an exact pro rata allocation.

13. In this case the pension fund, which was the beneficial owner of the units surrendered on redemption, was the beneficial owner of approximately 96% of the

transferable securities that those units represented both before and after the distribution in specie.

The Law

14. At [20] to [24] of the Decision the FTT set out a helpful description of the nature of a unit holder's interest in a unit trust scheme. This description was common ground and we are content to adopt it.

15. The FTT applied Park J's description of the rights of a unit holder in *M & G Securities Ltd v IRC* [1999] STC 315 *("M & G")* where he said at 322:

> "in law and in equity a unit Holder is the owner of an undivided share in the investments and cash which from time to time comprise the fund of the unit trust."

16. This formulation is consistent with the declaration of trust in the Trust Deed constituting the Scheme in this case summarised at [9] (2) above. Consequently, as the FTT said at [23] and [24] of the Decision, in this case the Unit Holder was a trustee of a pension fund and, therefore, the beneficial interest in the property of the Scheme was held by the pension fund beneficiaries. It followed that, to the extent that a distribution of assets made to a unit holder in a unit trust scheme on a redemption of units exactly matches that unit holder's share in the property of the scheme, there is no change in the beneficial ownership of the assets received.

17. Mr Quinlan referred us to the historic provisions regarding the imposition of stamp duty on transactions relating to units in unit trust schemes and it is helpful to refer to some of these provisions in summary by way of background before considering the provisions of Schedule 19 in context.

18. Transfers of units in unit trust schemes were first brought within the scope of stamp duty by provisions in the Finance Act 1946 ("FA 1946"). Those provisions deemed references in the enactments relating to stamp duty to stock to include a reference to a unit under a unit trust scheme. The effect of that would be to render a conveyance or transfer on sale of such a unit liable to a charge to stamp duty in the same way as a conveyance or transfer on sale of other securities.

19. Section 57 (3) FA 1946 provided that where a unit holder authorised or required the trustees or managers of a unit trust scheme to treat him as no longer interested in a unit under that scheme and did not authorise or require them to treat another person is entitled to the unit, he was to be deemed to transfer that unit to the managers, and any instrument whereby he gave the authority or made the requirement was deemed for stamp duty purposes to be a conveyance or transfer of the unit on sale. That provision recognised the open-ended nature of unit trust schemes; a unit holder wishing to dispose of his units usually did so by asking the managers to redeem his units in return for payment in cash equal to the value of the units or a transfer of a proportionate part of the underlying property of the scheme equivalent to the value of the units redeemed.

20. In recognition of the fact that that the managers of a unit trust scheme would often retain redeemed units as a principal for on sale to other persons wishing to subscribe for units in the scheme in what was known as the “managers’ box”, s 57 (4) FA 1946 deemed a subsequent transfer by the managers to the new unit holder likewise as a conveyance or transfer on sale. However, in order to avoid a double charge to stamp duty, s 54 (3) limited to 50p the stamp duty payable in respect of a transfer by the managers of a unit acquired by them upon a redemption effected within the previous two months.

21. Furthermore, s 54 (4) FA 1946 contained the following relieving provision:

> “Where a unit under a unit trust scheme is transferred to the managers by an instrument of transfer duly stamped and, before the expiration of two months from the date of the transfer, the managers and trustees jointly certify –
>
> > (a) that the certificate, if any, in respect of the unit has been cancelled; and
> >
> > (b) that, as a consequence of the transfer, a proportionate part of the trust property has been realised and the trust property diminished accordingly; and
> >
> > (c) that the unit is extinguished and that the managers have no power to transfer any other unit in lieu thereof,
>
> the Commissioners shall, on the application of the person by or on behalf of whom the duty was paid and on production to them of the instrument of transfer and of the joint certificate of the managers and trustees, refund the duty.”

22. Therefore, this provision gave relief from stamp duty in circumstances where the unit holder received on redemption a transfer of a proportionate part of the property of the scheme, there being no change of beneficial ownership in the underlying property of the scheme in those circumstances. It was recognised by the High Court (Park J) in *M & G* that the provision had that effect.

23. The Finance Act 1986 (“FA 1986”) introduced a new transfer tax, SDRT, in relation to “chargeable securities” to operate alongside the previous enactments relating to stamp duty on shares and marketable securities. This new tax was introduced in recognition of the fact that with the dematerialisation of securities held in clearing systems interests in securities were no longer regularly transferred by a written instrument of transfer.

24. The principal charge to SDRT (the “Principal Charge”) was set out in s 87 FA 1986. It provided for a charge to SDRT:

> “where a person (A) agrees with another person (B) to transfer chargeable securities (whether or not to B) for consideration in money or money’s worth.”

It can therefore be seen that the focus of this tax was on whether there was an agreement to transfer chargeable securities, whether that agreement was in writing, or concluded orally or electronically, rather than on an instrument of transfer and the charge only applied insofar as consideration was provided pursuant to the agreement to transfer. Broadly speaking, "chargeable securities" are shares and other securities issued or registered in the UK (including interests in such securities) and the definition includes units in a UK unit trust scheme: see s 99 FA 1986. The definition does not, however, include securities the transfer of which is exempt from all stamp duties. Units in a UK unit trust scheme are not chargeable securities if under the terms of the scheme the trust property can only be invested in "exempt investments"; an investment is an exempt investment, relevantly, "if and only if" it is not an investment on the transfer of which ad valorem stamp duty would be chargeable: see s 99 (5A) and (5B) FA 1986.

25. It follows from the terms of the Principal Charge that SDRT is not chargeable if there is no change of beneficial ownership of the chargeable security concerned; that follows from the fact that there would be no agreement to transfer a chargeable security for consideration in those circumstances. As an exception to this principle, pursuant to s 90 (3) FA 1986 there is a separate charge of 1.5% on a transfer of securities into an overseas clearing system against which depositary receipts are issued, this charge being a "season ticket" charge to take account of the fact there will be no scope to recover the principal 0.5% charge on subsequent transfers of depositary receipts within the clearance system.

26. The impact of the Principal Charge in FA 1986 on transactions in units in unit trust schemes was not significant, such transactions not usually being effected in dematerialised form or otherwise than through the managers, and therefore the stamp duty provisions in FA 1946, as summarised above, would continue to apply in most situations. In addition, s 90 (1) provided that the Principal Charge did not apply as regards an agreement to transfer a unit under a unit trust scheme to or from the managers under the scheme. Section 90 (1A) FA 1986 excluded agreements to transfer a unit under a unit trust scheme if a transfer giving effect to the agreement would itself be exempt from stamp duty and s 90 (1) (B) excluded agreements to transfer trust property to the unit holder on the surrender to the managers of a unit under a unit trust scheme with the effect that the only charge in that situation would be a charge to stamp duty under s 54 FA 1946, subject to the ability to reclaim the duty paid pursuant to the relief in s 54 (4).

27. However, pursuant to the Finance Act 1999 on 6 February 2000 the relevant provisions in FA 1946 imposing stamp duty on transactions in unit trust units were repealed and Schedule 19 came into force.

28. Paragraph 1 (1) of Schedule 19 provided that no stamp duty was chargeable on a transfer or other instrument relating to a unit under a unit trust scheme. Certain transfers of units in unit trust schemes (broadly those otherwise than to the managers of the scheme) would remain subject to SDRT because of the provisions of s 99 FA 1986 which treat certain units as "chargeable securities" for SDRT purposes.

29. Part II of Schedule 19 set out a new charge to SDRT relating to redemptions of units in a unit trust scheme.

30. The main charging provision was in paragraph 2(1) as follows:

> "There is a charge to stamp duty reserve tax where -
>
> (a) a person authorises or requires the trustees or members under a unit trust scheme to treat him as no longer interested in a unit under the scheme, or
>
> (b) a unit under a unit trust scheme is transferred to the managers of the scheme,
>
> and the unit is a chargeable security.
>
> Those events are referred to in this Part of this Schedule as a "surrender" of the unit to the managers."

31. Paragraph 2(2) provided that the persons liable for the tax were the trustees of the unit trust.

32. Paragraph 2(4) provided that the charge was "subject to the exclusions provided for in paragraph 6, 6A and 7."

33. Whether a unit was a "chargeable security", so as to fall within the scope of the charge, was determined by reference to the definition in FA 1986 referred to at [24] above.

34. Under Paragraph 3 the charge under schedule 19 was due at the rate of 0.5 % of the market value of the unit subject to any proportionate reduction under Paragraphs 4 and 5. There is no need to refer to those provisions in detail; broadly speaking the effect of Paragraph 4 was that the amount of tax was proportionally reduced if the number of units of the same class as those surrendered in a two week period exceeded the number of units of the same class issued in that period, the expression "issue" by virtue of Paragraph 8 (1) including the transfer of an existing unit out of the managers' box as well as an issue of new units by the trustee of the scheme. As Mr Quinlan submitted, the apparent intention for this reduction was to exclude the charge where a fund is contracting, it not being appropriate to charge all the units surrendered as though they were being transferred to another unit holder. The effect of Paragraph 5 was to reduce the tax proportionally where the trust property was invested in both exempt and non-exempt investments as defined in s 99 (5A) and (5B) FA 1986: see [24] above. This has the effect of excluding assets for the purpose of the calculation of the charge that would not otherwise be caught by SDRT or stamp duty.

35. Paragraph 6 contains a number of exclusions applying in certain circumstances where a unit surrendered and the person surrendering the unit authorises or requires the managers or trustees to treat a new owner as entitled to it. The circumstances in which the exclusions apply are those where a transfer otherwise than through the managers would not be chargeable to stamp duty or SDRT; for example, Paragraph 6 (2) provides that there is no charge to tax if no consideration in money or money's worth is given in connection with the surrender of the unit or the new owner becoming entitled to it.

36. Paragraph 7 is the exclusion under consideration in this case. It was headed "Exclusion of charge in case of in specie redemption" and provided as follows:

> "There is no charge to tax under this Part of this Schedule if on the surrender of the unit the unit holder receives only such part of each description of asset in the trust property as is proportionate to, or as nearly as practicable proportionate to, the unit holder's share."

37. The regime in Schedule 19 was recognised by the Government as being complex and burdensome and as having a major deterrent to domiciling investment funds in the UK with a particularly damaging effect on the ability of UK funds to attract non-UK investors. Accordingly, Schedule 19 was repealed by s 114 (1) Finance Act 2014 in respect of surrenders of units made on or after 30 March 2014. From that time, transactions in units of unit trust schemes are subject only to the Principal Charge which, as will be apparent from the description of the legislation and its impact on unit trust schemes set out above, will apply in only very limited circumstances.

38. It was common ground that Schedule 19 should be interpreted and applied in accordance with the purposive approach set out by the House of Lords in *Barclays Mercantile Business Finance Limited v Mawson* [2005] 1 AC 684. As explained in that case by Lord Nicholls at [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 and this approach applies as much to a taxing statute as any other. Lord Nicholls went on to say at [29] that in seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole. At [32] he summarised the essence of the new approach as giving the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the transaction in question answers to the statutory description.

39. We were referred to two further authorities which Mr Quinlan relied on to support his interpretation of Paragraph 7 of Schedule 19, namely *M & G* and *Pollen Estate Trustee Co Limited v HMRC* [2013] 1 WLR 3785 ("*Pollen Estate*"). We will turn to those authorities when dealing with Mr Quinlan's submissions.

The Decision

40. Having set out in some detail the parties' submissions, the FTT summarised the competing positions of the parties at [73] and [74] as follows:

> "73. In summary, the appellant's stance was that para 7 applied in effect to the extent that the receipt of the relevant assets was proportionate to or, as nearly as practicable proportionate to, the relevant share. (We note that we have used the term "to the extent that". The appellant argued that this interpretation did not require the reading in of the words "to the extent that" but was a justifiable interpretation of the actual words used on a contextual analysis as discussed below.)

74. For the reasons set out in full in their submissions, HMRC argued that para 7 was an "all or nothing" or "hard edged" provision. On that basis, if the receipt of relevant assets was not proportionate or as nearly as practicable proportionate in the required way, the exemption did not apply. The units surrendered were potentially subject to the SDRT charge on their full value (including the value of the "excess assets")."

41. The FTT then summarised its reasoning for accepting HMRC's position at [75] to [78] as follows:

"75. We consider that the natural construction of para 7 is that the exclusion contained an absolute condition which had to be satisfied for it to apply. The use of the word "*if*", on its plain meaning, creates a hypothesis as to what was required for the surrender to be excluded from the charge. The requirement was that, on the surrender, the unit holder receives "*only*" such part of each description of asset of the trust as is proportionate to, or as nearly as practicable proportionate to, the unit holder's share. The use of the word "only" stresses that, for the condition created by the use of the word "if" to be satisfied, the unit holder must receive, as regards each description of asset in the trust, that part of such asset as is proportionate to, or as nearly as practicable proportionate to, the unit holder's share and no more.

76. We note that the proportionate (or as nearly as practicable proportionate) test has to be applied by reference to each description of asset. In our view this means that, where different descriptions of asset are transferred, the exemption in para 7 will not apply if any one of the different descriptions of asset transferred is not proportionate to or, as nearly as practicable proportionate to, the unit holder's share. In other words, the test has to be met in relation to each and every description of asset. We have not considered in full what "each description of asset" means as this was not an issue here (as it was agreed that this test was not met).

77. That this is the correct interpretation is reinforced by the inclusion of the "or as nearly as practicable proportionate" wording. From the term itself, it seems this was included in acknowledgement that there may be practical difficulties in a unit holder receiving assets on an exactly proportionate basis and that it would be unfair not to allow the exclusion to apply where an exactly proportionate basis was not achieved for that reason. Therefore, a margin was allowed for cases where the distribution of assets was "as nearly as practicable" proportionate. We interpret this as giving a relatively flexible approach. The term "practicable" suggests that what must be assessed is how close a match with the unit holder's share can feasibly or viably be achieved in practice in the particular circumstances of the case. It would be reasonable to expect that this allows sufficient leeway for managers and trustees of unit trusts usually to ensure that the exclusion applied to a redemption.

78. In conclusion, our view is that the interpretation set out above is the plain meaning of para 7 and that there is no ambiguity or uncertainty. We cannot see any reason for deviating from this natural meaning of the exclusion, whether in the context of the overall scheme of the stamp taxes legislation, or the particular interaction of schedule 19 with the principal charge."

42. The FTT correctly recognised at [79] that in forming its view as to the correct interpretation of the provision in question it should apply a purposive approach to construction. Looking at the overall scheme of the relevant SDRT provisions whilst Schedule 19 was in force, it concluded at [81] that within that overall framework, the mechanism for imposing and calculating the Principal Charge and the Schedule 19 charge were distinct and different. Whilst recognising at [82] that there was a degree of intended alignment between Schedule 19 and the Principal Charge and that Schedule 19 was aimed at capturing changes of beneficial ownership of the relevant units in line with the principles underpinning the Principal Charge (and stamp duty), it said at [83]:

> "However, we do not consider that this very broad alignment is sufficient to indicate that the legislature intended the exclusion in para 7 to operate *to the extent that* a distribution of assets is proportionate (or as nearly as practicable proportionate) to the unit holder's share, as is the effect of the appellant's argument. Within this overall framework, the provisions of schedule 19 were a detailed and prescriptive set of rules imposed under a very different mechanism from that used for the principal charge (or for stamp duty). It appears to us that a deliberate distinction was drawn in schedule 19 between cases where there was a proportionate reduction in the charge and those where a particular exemption or exclusion applied in full or not (according to whether the specified condition was satisfied). There were two provisions described as proportionate reductions in the charge to reflect the constantly changing composition of a fund (para 4) and the nature of the investments it held (paragraph 5). There were then the provisions described as exclusions in paras 6, 6A and 7 each of which applied "if" a particular set of circumstances applied. If the intention was for these exclusions also to apply on a proportionate basis, the legislature could have described them as proportionate reductions and used wording other than "if" and, in the case of para 7, other than "only"."

43. In support of its approach the FTT also relied on other "hard edged" exemptions in the stamp duty regime, for example pursuant to s 75 1986 which provided an exemption where a company acquires the undertaking of another company in pursuance of a scheme for the reconstruction of the company where certain conditions are satisfied. The FTT correctly observed at [85] that this exemption was aimed at providing relief where following the reconstruction there was no real change in economic ownership but that if the requirement for proportionate shareholdings to be held is not met, no relief is available at all.

44. The FTT also considered *M & G* and *Pollen Estate* [2013] in detail but found that they did not support the adoption of the construction of Paragraph 7 of Schedule 19 sought by Henderson.

45. Finally, the FTT considered whether it was justified to have recourse to Hansard under the rule in *Pepper v Hart* [1993] AC 593 at 634 but held at [111] that they did not regard this as an ambiguous case where the interpretation adopted gives absurd results such that recourse is permitted. In any event, having considered statements from the relevant Minister, the FTT considered there was no sufficiently clear statement to indicate that Parliament's intention was as Henderson submitted.

Grounds of appeal and issues to be determined

46. Henderson advanced ten grounds of appeal. In essence, those grounds amount to a series of arguments challenging the reasoning of the FTT by which it came to the conclusion that it preferred HMRC's position on the interpretation of Paragraph 7 of Schedule 19.

47. The only issue before the FTT was whether, as HMRC contended, Paragraph 7 of Schedule 19 provided an "all or nothing" or "hard edged" exclusion providing relief if and only if the Unit Holder receives a proportionate share of all the trust assets (as nearly as practicable) or whether, as Henderson contended, the provision provided an exclusion from charge to SDRT on a redemption in specie to the extent that there was no change in the beneficial ownership of securities received by the Unit Holder. That is also the only issue that we need to determine on this appeal.

Discussion

48. The basis for the interpretation of Paragraph 7 of Schedule 19 contended for by Henderson was that a charge to SDRT on 100% of the value of the units redeemed when the same beneficial owner, before and after the redemption, held approximately 96% of the securities distributed to it, is so out of line with the scheme of the legislation, illogical and unjust, that it cannot have been intended by Parliament.

49. Henderson contend that, properly construed, Paragraph 7 should be applied to exclude the charge arising under Paragraph 2 of Schedule 19 in respect of the 96% of the securities distributed to which the beneficial owner of the units was already entitled and, if necessary, as though "if "in Paragraph 7 means "to the extent that", to achieve a result that is consistent with the apparent intention of Parliament. In short, Henderson contend that the FTT accorded insufficient weight to the scheme of the legislation and misconstrued Parliament's intent.

50. Mr Quinlan submits that in interpreting the provisions, it should be recognised, with one exception on clear policy grounds relating to the transfers of securities into an overseas clearing system, that stamp taxes relate to the alienation of property, imposing a charge on the purchaser when securities are sold, that is on a change of beneficial ownership for valuable consideration, tax arising in the case of stamp duty on a transfer of the security concerned and on an agreement to transfer in the case of SDRT. He submits that a charge to tax without an actual or anticipated change of beneficial ownership is very rare and always has a clear policy rationale.

51. Mr Quinlan's analysis of the scheme of Schedule 19 is that the provisions are a proxy for a transfer of units for consideration, with "market value" (as provided for in Paragraph 3) being a proxy for consideration and "surrender", the basis of the charge in Paragraph 2, and "issue", as defined in Paragraph 8 being a proxy for transfer. He therefore submits that the intention behind the legislation was that Schedule 19 should be consistent with the rest of the enactments relating to stamp duty and SDRT and that there should not be a greater charge to stamp taxes under these provisions. He therefore rejects the FTT's analysis at [81] and [83] of the Decision that the

provisions of Schedule 19 were intended to be "distinct and different" and "detailed and prescriptive".

52. Mr Quinlan submits that the strict reading of Paragraph 7 adopted by the FTT is absurd, in the sense of anomalous or illogical, by not excluding a charge to the extent there is no change in beneficial ownership and thus disregarding the apparent intention to align Schedule 19 with the general scheme of stamp taxes on securities. He referred us to the meaning of "absurdity" in the context of statutory interpretation, as explained in Section 312 of *Bennion on Statutory Interpretation* which provides as follows:

> "(1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of "absurdity" using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial or productive of a disproportionate counter-mischief
>
> (2) In rare cases there are overriding reasons for applying a construction that produces an absurd result, for example where it appears that Parliament really intended it or the literal meaning is too strong."

53. Mr Quinlan submits that the absurdity identified above justifies recourse to Parliamentary Debates under the rule in *Pepper v Hart.*

54. Mr Quinlan distinguishes the "exclusion" from charge in Paragraph 7 of Schedule 19 from exemptions elsewhere which provide relief for that which would ordinarily be chargeable. For example, the "hard edged" exemption in s 75 FA 1986 was a targeted anti-avoidance provision to protect the tax base from abuse and should, rightly, be interpreted with a view to the mischief at which it was aimed. Paragraph 7, like Paragraph 6 (2) of Schedule 19, was intended to take out of charge that which would otherwise not be chargeable at all.

55. As mentioned above, Mr Quinlan relies on *M & G* and *Pollen Estate* in support of his submissions.

56. In *M & G* Park J considered the provisions of s 54 (4) FA 1946 set out at [21] above. The managers of a unit trust scheme sought a refund of stamp duty paid in respect of a redemption of units made by the unit holder return for distribution in specie. HMRC argued that the conditions for repayment set out in s 54 (4) were not satisfied on the basis that there was no realisation of the trust property by the trustees. In their view, this would require that the trustees realise the relevant proportion of the trust property for cash and that the cash was then used to make the redemption of units. Park J rejected this and held that the redemption of the units was the realisation of the proportionate part of the trust property whereby the trust property was diminished by the transfer in specie. He followed the approach of interpreting the provision in question in the context of the scheme of the legislation as a whole. He considered that his interpretation accorded with the use of the word "realised" being "an entirely apt word to describe what happens when a unit holder exchanges his units for a specie distribution": see page 325 c of the judgment.

57. Park J considered that HMRC's interpretation would produce an unreasonable result. He said at 325 f and g:

> "The Revenue's interpretation is quite remarkably severe in its impact upon unit trust managers, as these cases demonstrate. When the unit-holders wrote exercising their rights to require redemptions in specie the managers had to pay ad valorem duty. On the Revenue's argument there is no possibility of their obtaining any form of statutory relief from the charge, and under all customary forms of unit trust deeds they have no right to recover their outlays of stamp duty either from the trustees or from the former unit-holders or from anyone else.....It is in my view most unlikely that Parliament intended to create such an unreasonable result."

58. He referred to the practical difficulties which in his view HMRC's interpretation would cause at 326 d to g and 327 a and b as follows:

> "The particular situation where the Revenue argument runs into overwhelming difficulties is where, at the time of a surrender of units, the trustees already hold part of the fund in cash - which would in practice be so in virtually every case. If when a unit holder (who might be the manager and often would be) requests redemption of his units the trustee holds uninvested cash sufficient to fund the whole or part of the redemption it appears to me that, on the Revenue's interpretation, it is impossible to comply with the statutory conditions. The Revenue's argument is that, if say 10 per cent of the units are to be redeemed, the trustee has to "realise" (which they say means sell) 10 per cent of the trust fund. But it is impossible to sell that part of it which is cash already."

> "Generally the Revenue's interpretation would put the trustee into a straitjacket if the manager is to meet the conditions for a refund of duty which it has been required to pay by s 57(3). If it has sufficient cash already to meet the redemption request it cannot use it but must sell a precise proportion of the investments and use that cash to pay the redemption proceeds. Further it would have to do that even if on conventional investment criteria the sales are badly timed and undesirable. In a case such as the present ones where the unit-holder has required an in specie redemption, the manager, if the Revenue are right, has a powerful fiscal incentive to persuade the unit-holder to agree that the trustee, instead of transferring investments in specie, can sell the investments and transfer the cash instead. I cannot believe that Parliament intended to bring about those kinds of results."

59. He also observed that on HMRC's interpretation, Parliament had "imposed a stamp duty cost where the only relieving provisions can hardly ever be complied with": see 325 j.

60. Mr Quinlan submits that the unreasonable result that would have followed from HMRC's interpretation in *M & G* prompted Park J to move away from a literal interpretation of the provision on the basis that Parliament could not have intended

that result. Mr Quinlan submits likewise in this case HMRC's construction of paragraph 7 of Schedule 19 also produces "quite remarkably severe" consequences and an "unreasonable result" which could not have been intended.

61. In *Pollen Estate,* the issue before the Court of Appeal was whether an exemption from stamp duty land tax applied where two charities, beneficiaries under a bare trust, acquired an undivided share in a property jointly with the other beneficiaries under the trust which were not charities as tenants in common. Under the relevant statutory provision relief applied "where the purchaser is a charity" and certain other conditions were satisfied. The Court of Appeal rejected HMRC's argument that the exemption did not apply because the purchaser was not solely a charity or charities. Lewison LJ held that the wording of the exemption could be interpreted as meaning that a land transaction is exempt from stamp duty land tax "to the extent that the purchaser is a charity (and the other relevant conditions were met). He found at [22] of the judgment that no policy justification had been advanced for the anomalous position in which the charities found themselves which would have led Parliament deliberately to exclude the charities from the exemption and therefore he found at [23] of the judgment that if it did so it did so by mistake.

62. Lewison LJ referred at [24] of the judgment to the modern approach to statutory construction set out in *Barclays Mercantile Business Finance Ltd v Mawson* [2005], as described at [38] above. He then referred at [25] to *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at 592 where Lord Nicholls of Birkenhead spoke of the ability of the courts to correct drafting errors in the following terms:

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit particular words...... This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation."

63. Lewison LJ then noted at [26] that this approach applies to taxing statutes on the authority of *Luke v Inland Revenue Commissioners* [1963] AC 557. He concluded at [49]:

> "...it seems to me there is sufficient 'policy imperative' to justify the reading I favour. I believe that it is also consonant with the approach of Lord Nicholls in

Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586. We are not parliamentary draftsmen; and it is sufficient that we can be confident of the gist or substance of the alteration, rather than its precise language. In substance what this means is that the exemption would apply as regards that proportion of the beneficial interest that is attributable to the undivided shares held by the charity for qualifying charitable purposes. I do not see that this gives rise to any conceptual uncertainty or to any insuperable practical administrative problem. In my judgement this reading is necessary in order to give effect to what must have been Parliament's intention as regards the taxation of charities...Not to afford a charity relief in such circumstances would, in my judgement, be capricious."

64. Mr Quinlan submits that, likewise in this case, a strict reading of Paragraph 7 of Schedule 19 which results in a person being subject to SDRT for taking possession of his own property is equally capricious and demonstrates that Parliament made a mistake if it did so. He submits that there was no policy reason for it to take that approach.

65. We accept that if the effect of Paragraph 7 to Schedule 19 is that there is no charge at all to SDRT in circumstances where 100% (or 99.98 per cent if HMRC's permitted tolerance was applied) of the assets distributed to a unit holder on an in specie redemption were immediately before the transfer beneficially owned by the unit holder but there is a charge to SDRT of 0.5 of the market value of the whole of the assets transferred in circumstances where, as in this case, 96% of those assets were immediately before the transfer beneficially owned by the unit holder then the result is harsh. So much is accepted by HMRC and was accepted by the FTT.

66. However, for the reasons set out below we have to conclude that the clear effect of the charging provision set out at Paragraph 2 of Schedule 19 is that a transfer in specie on redemption of units by a unit holder in circumstances where the conditions for the exclusion set out at Paragraph 7 of Schedule 19 are not met is that SDRT is payable in respect of the market value of all of the assets transferred.

67. We do not accept that such an interpretation is out of line with the scheme of the legislation for surrenders and issues of units set out at Schedule 19. In our view, it is plain that Parliament intended Schedule 19 should set out a self-contained and exhaustive regime for the charging of SDRT in relation to transactions in units of unit trust schemes effected between existing and new unit holders and the managers which is quite distinct from the previous charge to stamp duty and the Principal Charge. We have explained at [26] above that the impact of the Principal Charge was not significant in relation to transactions in units in unit trust schemes and Paragraph 1 (1) of Schedule 19 took units in unit trust schemes entirely out of the scope of stamp duty.

68. The previous stamp duty regime, in common with the new regime in Schedule 19, could deny relief from stamp taxes in circumstances where there was no change in beneficial ownership. The provisions of FA 1946, which established for the first time a framework for the charging of stamp duty in respect of the surrender of units in unit trust scheme to the managers did so by deeming any such transfer to be a conveyance or transfer on sale. Therefore, without a specific relief, a surrender of units to the

managers in return for a transfer in specie was subject to a charge to stamp duty. The way the relief operated was that there had to be a certificate from the managers and the trustee supporting a claim for repayment of stamp duty concerned where "as a consequence of the transfer, a proportionate part of the trust property has been realised". It was a condition of obtaining this repayment that the certificate was given within two months of the transfer so that a failure to comply with this condition would mean that there would be a stamp duty charge in respect of a transfer of property where no change in beneficial ownership had occurred. To that extent, the previous relief was "hard edged" so it was not the case there was no precedent for a "hard edged" relief in respect of transfers not involving a change in beneficial ownership.

69. As we have previously indicated, both the previous stamp duty regime and the SDRT regime in Schedule 19 recognise the particular way in which transactions in units in unit trust schemes operate, in the context of a unit trust scheme being open-ended and with the trust property constantly expanding and contracting according to the demand for units.

70. Paragraph 2 of Schedule 19 imposes a charge to SDRT which is not dependent upon whether there is transfer on sale or whether there is an agreement to transfer an interest in securities. It is absolutely clear in its terms that, in common with the previous stamp duty regime in s 54 FA 1946, a charge is imposed in all circumstances where there is a surrender of units in unit trust scheme to the managers. We therefore do not accept that "surrender" should be considered a proxy for consideration and "issue" a proxy for transfer. There is a deliberate use of stand-alone terms which are apt in the context of how a unit trust operates.

71. The provisions in Paragraphs 4 and 5 of Schedule 19 described at [34] above recognise the open-ended nature of a unit trust and give a degree of relief from the charge in circumstances where the fund is contracting so that in effect SDRT is not charged in respect of all the units which in a specified period are not acquired by incoming unit holders. Otherwise, unit trusts as an investment vehicle would be put at a disadvantage compared to closed ended corporate investment vehicles. That was a more sophisticated process than the previous relief from stamp duty contained in s 54 (3) FA 1946 described at [20] above but the fact that the relief operates by reducing the stamp duty otherwise payable on a proportionate basis does not in our view indicate that the exclusion in Paragraph 7 should likewise operate to provide relief in respect of that proportion of the assets transferred on a redemption in specie which are beneficially owned by the transferee.

72. Looking therefore at the structure of Schedule 19 as a whole, it is clear that what are described under the heading of "exclusion of charge" in both Paragraphs 6 and 7 of the Schedule must be interpreted against a position where the starting position is that there is a clear charging provision in respect of all surrenders of units. Therefore, where Paragraph 7 says that "there is no charge to tax" where the terms of the exclusion are met it necessarily follows that the charge does apply if those conditions are not met.

73. In that context, in our view the combination of the use of the word "if" in line one of the provision and "only" in line two demonstrates that the exclusion can only apply in circumstances where each description of asset in the trust property which the transferee receives in respect of an in specie redemption is as proportionate to, or as nearly as practicable to, his beneficial interest in the description of asset concerned.

74. We distinguish that situation from the circumstances in *M & G.* In that case, the phrase "a proportionate part of the trust property has been realised" could be said to be ambiguous; HMRC contended that for the relief to apply the trust property concerned had to have been sold and it could not apply where the trust property concerned was transferred directly to the redeeming unit holder whereas M & G contended that the phrase referring to the realisation takes place as a result of the unit holder's request for redemption by the transfer to him of a proportionate share of the trust property. Park J accepted M & G's interpretation because to adopt HMRC's interpretation would mean the result was unworkable and the exemption would not in practice be likely to be available. Understandably, he held that it was most unlikely that Parliament intended to create such an unreasonable result.

75. We reject Mr Quinlan's submission that HMRC's construction in this case produces a similar result. It has not been suggested that in practice the relief in Paragraph 7 is unworkable. The evidence which we have referred to at [10] and [11] above suggests that Henderson was aware of the requirements. Although it was not clear why the fund manager did not ensure that the requirements were met in the way that he made the allocation, the FTT made no findings that strict compliance with requirements was unworkable nor that those requirements were incapable of being complied with by a careful fund manager, although from what we were told, they may have been onerous and gave rise to a degree of complexity in a large transaction of the nature with which this appeal is concerned. Nor did the FTT find that a strictly proportionate allocation could not be made because of the need to comply with the regulatory obligation to ensure that the redemption would not be likely to result in any material prejudice to the interest of unit holders. In the absence of any findings to the contrary, we should assume that a diligent fund manager would adopt a cautious approach and could take all steps necessary to ensure that the allocation was made on a strictly proportionate basis, except insofar as it was impracticable to do so, for example in circumstances where some of the assets held in the scheme were non-transferable.

76. It follows from the foregoing analysis of the scheme of the legislation that we reject Mr Quinlan's submission that interpretation adopted by the FTT is absurd in the sense of being anomalous or illogical. The worst criticism that can be levelled of the provision is that it operates harshly in circumstances where, as in this case, a redemption in specie is made in the manner which is not exactly proportionate in the way that it distributes each line of securities, but that of course, is not a reason for adopting a more flexible approach. As has often been said, equitable principles do not apply when construing tax statutes.

77. Accordingly, in our view there is no basis on which recourse to Hansard is justified under the rule in *Pepper v Hart.* It also follows that we reject Mr Quinlan's

submission that the position is similar to that with which the Court of Appeal was faced with in *Pollen Estate* which Lewison LJ characterised as an obvious drafting error with the result that the provision in question there did not have the effect that Parliament intended. Our analysis of Schedule 19 demonstrates that it was Parliament's intention to create, as the FTT found, a distinct and different regime for the charging of SDRT on the surrender of units in unit trust schemes from that which applied in respect of the Principal Charge and from that which had previously operated in respect of stamp duty under FA 1946.

78. As Mr Vallat submitted, it is plain that the structure of Schedule 19 was to impose a market value based charge to SDRT on all surrenders of units through Paragraph 2 of Schedule 19 (rather than one depending on the value received or the changing economic interest of the unit holders concerned) subject to the proportionate reductions in Paragraphs 4 and 5 and finally the specific exclusions set out later in the Schedule under the heading "exclusion of charge."

79. Therefore, in our view there can be no basis for reading in to the exclusion in Paragraph 7 the words "to the extent that" instead of "if" on the basis that the draftsman made a mistake in omitting them. Harsh though it may be, our view is that Parliament plainly intended the exclusion to be "hard edged." It can be seen that in policy terms Parliament had a choice between an all or nothing exclusion with a degree of tolerance, which had the merit of simplicity, or a more complicated exclusion where it would be necessary to identify in respect of each line of stock distributed where there had been a change in beneficial ownership. It cannot therefore be said to have been anomalous or illogical to have opted for the first of those choices.

Conclusion

80. We therefore conclude, in agreement with the FTT, having had regard to the context and scheme of the relevant provisions as a whole, that the exclusion in Paragraph 7 of Schedule 19 was not intended to apply to a distribution in specie unless the unit holder received only such part of each description of asset in the trust property as was proportionate to, or as nearly as practicable proportionate to, the unit holder's share.

Disposition

81. The appeal is dismissed.

MR JUSTICE NORRIS **JUDGE TIMOTHY HERRINGTON**

UPPER TRIBUNAL JUDGES
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