[2020] UKUT 0373 (TCC)

Appeal numbers:
UT/2020/0031& 32
UT/2020/0077 & 78

STAMP DUTY LAND TAX – withdrawal of appeals – HMRC informing Tribunal of objection – no direct notification of taxpayer – whether valid notice given by para 37 Sch 10 FA 2003– whether FTT erred in application of para 42 Sch 10 FA 2003 and in failing to exercise discretion under Rule 5 to bring proceedings to an end – appeals dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

(1) ALBERT HOUSE PROPERTY FINANCE PCC LIMITED (IN LIQUIDATION)
(2) VALE PROPERTY FINANCE PCC (IN LIQUIDATION) **Appellants**

-and-

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

TRIBUNAL: **MR JUSTICE TROWER**
JUDGE GUY BRANNAN

Sitting in public by way of remote video hearing treated as taking place in London on 18 November 2020

Julian Hickey, counsel, instructed by Cornerstone Tax Limited for the Appellant

Ben Elliott, counsel, instructed by the General Counsel and Solicitor for Her Majesty's Revenue & Customs, for the Respondents

DECISION

Introduction

1. The question in these appeals is whether the Appellants can withdraw their appeals. Somewhat paradoxically, the Appellants wish to withdraw their appeals but the Respondents ("HMRC") wish to prevent them from doing so.

2. The Appellants are two Guernsey companies, which are both in members' voluntary liquidation, and each appeals against two separate but related decisions of the First-tier Tribunal ("FTT") (Judge Redston). The two decisions in question were released on 3 December 2019 ([2019] UKFTT 0732 (TC)) and on 26 June 2020 ([2020] UKFTT 274 (TC)). We shall refer to those two decisions, respectively, as the First Decision and the Second Decision. We shall refer to the first Appellant as "Albert House" and to the second Appellant as "Vale Property" and collectively as "the Appellants".

3. The First Decision concerned paragraph 37(4) of Schedule 10 to the Finance Act 2003 ("FA 2003"), which permits an appellant to withdraw a Stamp Duty Land Tax ("SDLT") appeal unless HMRC object within 30 days by giving the appellant notice in writing. In short, HMRC gave notice of their objection to the FTT, which forwarded the notice to the Appellants within the 30 day time limit. The FTT held that, even though the notice had not been given directly to the Appellants, there was a valid notice of objection and that, consequently, the Appellants had not withdrawn their SDLT appeals.

4. The Second Decision concerned the Appellants' applications to the FTT:

> (1) to strike out the appeals under Rule 8(3)(c) of the First-tier Tribunal (Tax Chamber) Rules ("the Rules") on the grounds that the appeals had no reasonable prospect of success;
>
> (2) to strike out the appeals on the basis that it would be an abuse of process if the appeals continued; and
>
> (3) to exercise its discretion under Rule 5 of the Rules to bring proceedings (i.e. the appeals) to an end.

5. The FTT, in the Second Decision, refused the Appellants' three applications.

6. The Appellants now appeal to this Tribunal against the First and Second Decisions, with the permission of the FTT.

7. We dismiss the appeals for the reasons given later in this decision.

The factual background

8. The facts found by the FTT (see [19]-[49] of the First Decision) were not in dispute and we summarise the factual background below.

9. The Appellants participated in two SDLT avoidance schemes which were each substantially similar to the scheme considered at a later date by the Supreme Court in *Project Blue Ltd v HMRC* [2018] UKSC 30 ("*Project Blue*"). The scheme sought to benefit from reliefs from SDLT relating to both sub-sales and alternative finance (sections 45 and 71A FA 2003).

10. In short, as regards each Appellant, the following transactions took place:

> (1) a purchaser ("P") contracted to purchase a property ("the Property") from an unrelated third-party vendor ("V"). The purchase price was payable on completion;
>
> (2) before or concurrently with the completion of the contract with V, P agreed to sell the Property to one of the Appellants, which claimed to be finance companies;
>
> (3) the respective Appellant agreed to lease the property back to P under an alternative finance arrangement;
>
> (4) the Appellant gave P an option to acquire, at a later date, the freehold interest in the Property; and
>
> (5) P took possession of the Property from the date of the completion of its contract with V.

11. In the present appeals, in relation to Albert House, P was a company called Milltown Ltd ("Milltown") and, as regards Vale Property, P was a Ms Fitzgerald.

12. The *intended* effect of these transactions was that no SDLT liability arose on the transactions for the following reasons:

> (1) P's purchase of the property from V qualified for relief from SDLT under section 45(3) FA 2003 with the result that no SDLT was payable by P;
>
> (2) the exemption from SDLT contained in section 71A FA 2003 applied to the sale and leaseback by the relevant Appellant to P on the basis that each Appellant was a "financial institution" within the meaning of Section 71A; and
>
> (3) the SDLT anti-avoidance provision in section 75A FA 2003 did not apply to the above transactions.

13. In *Project Blue*, however, the Supreme Court held that, subject to the application of the anti-avoidance provision in section 75A FA 2003 and on the facts of that case, the combined operation of sub-sale relief in section 45(3) and alternative finance relief in section 71A FA 2003 relieved from SDLT the sale from V to P and similarly exempted the sale from P to the relevant Appellant. The Supreme Court then held that section 75A FA 2003 did apply to these transactions and that P was chargeable to SDLT. The financial institution (playing the role occupied by the Appellants in the present case) was not chargeable to SDLT because it was a "financial institution" for the purposes of section 71A. Thus, in *Project Blue* the only party chargeable to SDLT was P (which, in the present case, would be Milltown and Ms Fitzgerald).

14. Both Appellants entered into voluntary liquidation in Guernsey in November 2013. In a number of documents they are described as being in members' voluntary liquidation. We understood from an exchange with counsel at the hearing that, unlike a company in members' voluntary liquidation in England and Wales, the description of a company being in members' voluntary liquidation in Guernsey did not mean that a declaration of solvency had been made. There was no other evidence as to the Appellants' solvency.

15. HMRC enquired into the SDLT returns of each of the Appellants and issued a closure notice and (in the alternative) a discovery assessment imposing SDLT upon them. We were informed that the enquiry notice in respect of Albert House was issued out of time and that, therefore, HMRC relied upon the discovery assessment in respect of Albert House.

16. In addition, HMRC opened an enquiry into the SDLT returns of Milltown and Ms Fitzgerald (i.e. P in the above transactions). HMRC issued closure notices and, alternatively, assessments imposing SDLT.

17. The Appellants, as well as Milltown and Ms Fitzgerald, appealed against the closure notices and assessments issued to them and notified their appeals to the FTT.

18. In February 2015 Albert House and Vale Property each wrote by email to HMRC and the FTT notifying them of the Appellants' intention to withdraw their respective appeals.

19. HMRC subsequently sent emails to the FTT in respect of each Appellant stating their objection to the withdrawal of the appeals. The FTT forwarded the relevant email to each Appellant. All this happened within 30 days of the notification by the Appellants of their intention to withdraw their appeals. HMRC did not send their email of objection directly to the Appellants.

The statutory provisions

20. We set out below the statutory provisions relevant to these appeals. All statutory references are, unless otherwise stated, to FA 2003 and references to a Rule are to the Rules.

21. The main provision with which the First Decision was concerned was paragraph 37 of Schedule 10. It is headed "Settling appeals by agreement" and provides:

> "(1) If, before an appeal under paragraph 35 is determined, the appellant and the Inland Revenue agree that the decision appealed against
>
> (a) should be upheld without variation,
>
> (b) should be varied in a particular manner, or
>
> (c) should be discharged or cancelled,

> the same consequences shall follow, for all purposes, as would have followed if, at the time the agreement was come to, the tribunal had determined the appeal and had upheld the decision without variation, varied it in that manner or discharged or cancelled it, as the case may be.
>
> (2) Sub-paragraph (1) does not apply if, within 30 days from the date when the agreement was come to, the appellant gives notice in writing to the Inland Revenue that he wishes to withdraw from the agreement.
>
> (3) Where the agreement is not in writing
>
> (a) sub-paragraphs (1) and (2) do not apply unless the fact that an agreement was come to, and the terms agreed, are confirmed by notice in writing given by the Inland Revenue to the appellant or by the appellant to the Inland Revenue, and
>
> (b) the references in those provisions to the time when the agreement was come to shall be read as references to the time when the notice of confirmation was given.
>
> (4) Where
>
> (a) the appellant notifies the Inland Revenue, orally or in writing, that he does not wish to proceed with the appeal, and
>
> (b) the Inland Revenue do not, within 30 days after that notification, give the appellant notice in writing indicating that they are unwilling that the appeal should be withdrawn,
>
> the provisions of sub-paragraphs (1) to (3) have effect as if, at the date of the appellant's notification, the appellant and the Inland Revenue had come to an agreement (orally or in writing, as the case may be) that the decision under appeal should be upheld without variation.
>
> (5) References in this paragraph to an agreement being come to with an appellant, and to the giving of notice or notification by or to the appellant, include references to an agreement being come to, or notice or notification being given by or to, a person acting on behalf of the appellant in relation to the appeal."

22. The statutory provisions relevant to the Second Decision were as follows.

23. Rule 5, so far as material, provides:

> "(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time…"

24. Rule 8, so far as material, sets out the circumstances in which the FTT can strike out an appeal:

> "…
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out."

25. Rule 17 is headed "withdrawal" and provides:

"(1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case—

(a) by sending or delivering to the Tribunal a written notice of withdrawal; or

(b) orally at a hearing.

(2) The Tribunal must notify each other party in writing of its receipt of a withdrawal under this rule.

(3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.

(4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after—

(a) the date that the Tribunal received the notice under paragraph (1)(a); or

(b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b)."

26. Rule 17 is therefore expressly "subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings" e.g. paragraph 37 of Schedule 10.

27. Paragraph 42 of Schedule 10 FA 2003 sets out the statutory requirements imposed on the Tribunal when deciding an appeal. It is headed "Assessments and self-assessments" and provides:

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

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

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

[1] The present appeals, as we understand it, fall within paragraph 35(1).

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

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

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

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

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

the assessment shall be increased accordingly.

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

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

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

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

The First Decision

28. The First Decision resulted from a preliminary hearing (pursuant to directions of the FTT given on 13 September 2018). The issue before the FTT was whether the Appellants' attempt to withdraw their appeals in February 2015 was effective for the purposes of paragraph 37(4) of Schedule 10, in circumstances where HMRC gave notice of their objection to the withdrawal of the appeal to the FTT (which passed on the notice to the Appellants within the 30 day period) rather than directly to the Appellants.

29. The FTT dealt with the evidence of HMRC's witness, Ms Turner who adopted the earlier evidence of another HMRC officer, Mr Williams, who was unable to give evidence before the FTT because he had, by the time of the hearing, been appointed as an FTT judge. The FTT stated:

"32. In his witness statement, Mr Williams said:

"Given that the Tribunal had written directly to HMRC asking for our representations on the letter from the Appellants, I responded to the Tribunal directly, assuming that the Tribunal would also pass on HMRC's response to the Appellants. This was the ordinary course of action for the Tribunal to pass on correspondence in this way."

33. Ms Turner was taken to this paragraph by Mr Elliott during evidence-in-chief, and she said she understood Mr Williams to have made that assumption. Although Mr Hickey did not challenge that evidence in cross-examination, he submitted that Ms Turner's adoption

> of parts of the witness statement was nothing more than hearsay. I make no finding as to Mr Williams' intentions, because I agree with Mr Hickey that one person cannot give reliable evidence as to another's intentions. I return to this issue at §95."

30. Neither party in this appeal challenged the FTT's conclusion on this point.

31. The submissions of counsel included the citation of various authorities: *Hastie & Jenkerson v McMahon* [1990] 1 WLR 1575 ("*Hastie*"), *Ralux N.V./S.A. v. Spencer Mason*, The Times, 18 May 1989, *R (oao Spring Salmon and Seafood Ltd) v IRC* [2004] STC 444 ("*Spring Salmon*"), *Flaxmode v HMRC* [2008] STC (SCD) 666 ("*Flaxmode*") and *R(oao Sword Services Ltd) v HMRC* [2016] EWHC 1473 (Admin) ("*Sword Services*").

32. The crux of the FTT's reasoning in the First Decision was set out at [83]-[96]. The FTT at [84] said that the purpose of paragraph 37(4)(b) was that an appellant who sought to withdraw its appeal should know within 30 days whether HMRC are objecting to that withdrawal and should be told this in writing so that there is a record.

33. Referring to the case law (including *Hastie, Ralux, Flaxmode, Sword Services* and *Spring Salmon*), the FTT considered at [86] that as long as the statutory purpose has been achieved, failure to follow the literal wording of the provision does not invalidate the notices.

34. At [88]-[89] the FTT found that there was a valid parallel to be drawn between the notice in paragraph 37(4)(b) and notices of enquiry in terms of the legal consequences that would flow from each type of notice. The FTT noted at [91] that the authorities in relation to notices of enquiry indicated that no special formality was required for a valid notice.

35. In relation to paragraph 37(5) the FTT concluded at [92] that that paragraph did not suggest that a notice under paragraph 37(4) had to be given directly and at [93] said:

> "The purpose of subpara (5) is simply to provide that settlement negotiations and withdrawal discussions may be carried out by an appellant's agent, as often happens. That subparagraph does not affect the purpose of subpara (4)(b), namely that an appellant must be left in no doubt, after having received a written communication within the time limit, that HMRC objected to the withdrawal."

36. The FTT considered that HMRC's intentions in giving the notice to the FTT were not relevant and said at [95]:

> "I also agree with Special Commissioner Hellier when he said in *Flaxmode* that "what [an appellant] receives must be looked at from the recipient's (or at least a reasonable recipient's) perspective not the inspector's". That is because the purpose of the provision is that the appellant should know, in clear terms, that HMRC had objected. It does not matter what the HMRC officer intended: what matters is whether the message has been received by the appellant."

37. The FTT concluded at [96] that on the facts it was clear that HMRC had objected and that the Appellants had been told of that objection within the 30 day time limit. The reality of the situation was that the Appellants were left in no doubt.

38. For those reasons, the FTT found at [97] that the statutory conditions in paragraph 37(4)(b) were met and that HMRC had validly objected to the withdrawal of the Appellants' appeals.

The Second Decision

39. In the First Decision at [110], the FTT gave directions for the ongoing progress of the Appellants' appeals, and joined them to the appeals of Milltown and Ms Fitzgerald. Thus, as the FTT observed, the starting point for the applications considered by the Second Decision was that the Appellants had "live" appeals before the FTT in which they remained active participants, along with Milltown and Ms Fitzgerald.

40. As we have explained, the Second Decision concerned the Appellants' three applications, viz:

> (1) to strike out the appeals under Rule 8(3)(c) of the First-tier Tribunal (Tax Chamber) Rules ("the Rules") on the grounds that the appeals had no reasonable prospect of success;
>
> (2) to strike out the appeals on the basis that it would be an abuse of process if the appeals continued; and
>
> (3) to exercise its discretion under Rule 5 of the Rules to bring proceedings (i.e. the appeals) to an end.

41. The FTT refused the three applications.

42. First, the FTT considered at [14] the effect of the withdrawal of an appeal if HMRC do not object to the withdrawal. The tribunal noted that paragraph 37 of Schedule 10 provides that the parties are deemed to have agreed that: (i) the assessment under appeal should be upheld without variation; and (ii) the position is the same for all purposes as if the tribunal had determined the appeal and had upheld the decision without variation. Thus the proceedings would come to an end on the basis that HMRC's assessment is final and binding on both parties.

43. Secondly, the FTT explored what would happen if HMRC do object to the withdrawal of an appeal under paragraph 37. At [16] the FTT noted that there was clearly no deemed agreement but observed:

> "that [paragraph 37] does not go on to state what happens next. Rule 17 states that the appellant has withdrawn "the case made by it in the Tribunal proceedings", but does not say that the proceedings come to an end."

44. The FTT referred to a decision of the Upper Tribunal in *HMRC v CM Utilities Ltd* [2017] UKUT 305 (TCC) (Arnold J and Judge Berner) ("*CM Utilities*") concerning

section 54 Taxes Management Act 1970 which contained analogous provisions to those found in paragraph 37. The FTT concluded at [19]

> "Thus, where an in-time objection is received, so that there is no deemed agreement between the parties, the Tribunal may decide to continue with the proceedings in order to exercise its statutory duty under Sch 10, para 42 to reduce assessments if it considers they are too high, and to increase them if it considers they are too low."

45. At [21] the FTT set out the Rule 17 notifications made by the Appellants which were in the following terms:

> "We wish to inform you of our intention to withdraw the above appeal on behalf of [Appellant] on the below terms and to concede liability for the SDLT HMRC assert to be due."

46. At [22] the FTT considered that the withdrawals were therefore conditional on the liabilities set out in the assessments being determined. That condition was not met because of the FTT's decision in the First Decision and, therefore, the withdrawal did not take effect.

47. At [25]-[28] the FTT examined the decision of the Court of Appeal in *Shiner v HMRC* [2018] EWCA Civ 31 ("*Shiner*"), which was relied on by Mr Hickey, and in particular [21] of the judgment of Patten LJ. At [27] the FTT considered that the Court was merely indicating that the FTT was not required by section 50 of the Taxes Management Act ("TMA") to consider all the grounds of appeal put forward by an appellant; it could strike out some (or all) of them. If it did so, the Tribunal could not then rely on those grounds to reduce the assessment. Where HMRC are not arguing for a higher liability (as was the position in *Shiner*), it must follow that "the assessment will govern the tax payable". The FTT concluded at [28]:

> "Striking out the appeal therefore does not always have the effect of crystallising the tax payable as being the figure stated in the assessment under appeal. The Tribunal cannot ignore its statutory obligation to determine the appeals in accordance with TMA s 50 (or Sch 10, para 42)."

48. The FTT rejected the Appellants' submission that, because they accepted the assessments made upon them by HMRC, the Appellants had no reasonable prospect of success and that, therefore, their appeal should be struck out. The FTT accepted (at [30]) the submission of HMRC that the decision in *Project Blue,* where the liability fell on P (i.e. Milltown and Ms Fitzgerald in the present appeals) indicated that the Appellants had a reasonable prospect of success and that was the case even if the Appellants put forward no submissions at the hearing.

49. In relation to the application for the appeals to be struck out as an abuse of process, the FTT noted (at [31]) that in *Shiner* at [19] the Court of Appeal held that the Tribunal's power under Rule 8(3) was wide enough to encompass a power to strike out an appeal for abuse of process. The FTT agreed (at [38]) with HMRC's submission that it could not be "manifestly unfair to a party to litigation" to require an appeal to continue simply because that party has admitted liability. Where HMRC had made a timely objection to

withdrawal under Rule 37 on the basis that the assessments may be incorrect, the Tribunal had a statutory obligation to determine the appeal by reducing, increasing or confirming the assessments; this was clear, the FTT said, from *CM Utilities.*

50. The FTT also considered (at [39]) the Appellants' submission that forcing them to continue with the appeals was unfair because it may render them liable to additional costs. The FTT dismissed this argument noting that if the Appellants decided not to participate further in the proceedings, they could inform the Tribunal. That was unlikely to constitute unreasonable behaviour, such as to support a costs award in favour of HMRC. Moreover, where the legal team are de-instructed, there would be no risk of wasted costs.

51. Therefore, the FTT held [at [40]) that there was no abuse of process if the appeals continued.

52. The Appellants also asked the FTT to exercise its discretion under Rule 5 to "give a direction in relation to…the disposal" of the proceedings.

53. The FTT (at [42]) noted that it was required to exercise its discretionary powers in accordance with the overriding objective to deal with cases fairly and justly (Rule 2). The Rule 5 discretion was, additionally, "subject to the provisions of the [Tribunals, Courts and Enforcement Act 2007] and any other enactment".

54. The FTT's conclusion (at [43]) was that HMRC had put forward a reasonable basis for their concern that the assessments may be incorrect. The FTT considered that it could not exercise its discretion in a way which would conflict with its statutory obligation under paragraph 42 of Schedule 10 to decide whether the assessments appealed against are too high, too low, or correct. The FTT therefore refused the application.

Grounds of appeal

55. In respect of the First Decision, there is one ground of appeal, namely that the FTT erred on the proper statutory construction and application of paragraph 37 of Schedule 10 FA 2003.

56. There were originally four grounds of appeal in respect of the Second Decision, but, shortly before the hearing, two grounds of appeal were withdrawn. The remaining grounds of appeal (Grounds 1 and 4) in respect of the Second Decision were, therefore, as follows (as formulated in the Appellants' skeleton argument):

> (1) that the FTT applied the wrong approach in principle in respect of the interaction of paragraph 42 of Schedule 10 FA 2003 and the effect of the FTT's statutory duty in respect of (i) the strike out application under Rule 8 (3)(c), (ii) a strike out for abuse of process, (iii) the exercise of the FTT's residual power under Rule 5 to permit the withdrawal of the appeals (Ground 1).

(2) That the FTT erred in law by failing to exercise its discretion under Rule 5 to allow withdrawal of the appeals (Ground 4).

Submissions – General

57. Essentially, the Appellants seek to withdraw their appeals and, as Mr Hickey appearing for the Appellants submitted, to accept the liabilities which flowed from the assessments and/or closure notices. Mr Hickey said that the Appellants wished to avoid the consequences of being "locked in" to proceedings in respect of which they had, in effect, admitted liability.

58. Mr Elliott, appearing for HMRC, on the other hand, submitted that HMRC's position on the substantive appeals was that:

(1) as a result of the Supreme Court's decision in *Project Blue*, the person most obviously liable to SDLT was P (i.e. Milltown and Ms Fitzgerald) under section 75A FA 2003; and

(2) there was a further issue concerning the implementation of the arrangements i.e. that it was unclear whether the Appellants were actually financial institutions within the meaning of section 71A FA 2003

(3) in each case, however, the analyses in (1) and (2) above were resisted by P.

59. Therefore, Mr Elliott maintained that the closure notices/assessments in respect of the Appellants were necessary in order to protect the revenue. Given the uncertainty, Mr Elliott submitted that it was appropriate for all of the appeals (i.e. those of the Appellants, Milltown and Ms Fitzgerald) to proceed together to a hearing so that the FTT could determine which party was liable to SDLT in respect of each of the transactions.

60. Mr Elliott noted that Milltown had (in a letter dated 4 May 2018 from its advisers) sought to rely on Albert House's withdrawal of its appeal to argue that Milltown itself could not be held liable for SDLT (notwithstanding that it would be liable on the application of the decision in *Project Blue*). Furthermore, on 25 June 2018 (following the decision of the Supreme Court in *Project Blue*), Milltown's advisers had sent a pre-action protocol letter to HMRC on behalf of Milltown stating that the taxpayer sought judicial review of HMRC's decision not to discharge its SDLT liability following the withdrawal of Albert House's appeal. No claim for judicial review has yet been brought.

61. Mr Elliott also observed that both of the Appellants had been in liquidation since 18 November 2013. No evidence was advanced before the FTT that either Appellant had any assets to pay the SDLT liability which each purported to accept.

62. The clear inference, in Mr Elliott's submission, was that the main purpose of the Appellants withdrawing their appeals was to provide grounds for other taxpayers (i.e. Milltown and Ms Fitzgerald) to argue that HMRC could not impose or enforce any SDLT liability against them in relation to the transactions described above, with the result that no tax at all was paid in relation to those transactions.

63. As the Appellants are in liquidation and it appears that no declaration of solvency has been made, we asked Mr Hickey whether the Appellants had the resources to meet the SDLT liabilities which they were seeking to accept. Mr Hickey said that he had no instructions on this point.

64. We set out below, in outline, the submissions made by the parties in respect of the First and Second Decisions.

Submissions in respect of the First Decision

65. Mr Hickey, appearing for the Appellants, noted that the effect of the First Decision was that the Appellants remained parties to the FTT proceedings, despite the fact that they were not voluntary participants and had accepted the liabilities under the respective closure notices and/or discovery assessments. The FTT had issued directions against the Appellants requiring disclosure of documents, witness statements, skeleton arguments and attendance at a substantive hearing, which would all involve time and costs. Failure to comply with these directions would leave it in breach of the FTT's directions and potentially subject to sanctions under the Rules. Furthermore, the Appellants were potentially subject to costs under Rule 10(1)(a) if HMRC were to allege that its failure to participate in proceedings was unreasonable. Finally, the FTT would incur time in determining whether the appeal should proceed in the absence of the Appellants.

66. Mr Hickey agreed with the FTT's view at [84] that the purpose of paragraph 37(4)(b) was that an appellant should know within 30 days whether HMRC whether HMRC were objecting to the withdrawal of the appeal and on the need for an appellant's position to be certain. Mr Hickey, however, submitted that the FTT fell into error by failing to apply the correct statutory construction to what was required by paragraph 37 in terms of giving the appellant certainty. That statutory provision, Mr Hickey contended, contained a strict requirement that HMRC actually gave notice of its objection directly to an appellant and this requirement was not satisfied by using an unauthorised proxy (i.e. the FTT or the FTT's administration), even where the notice was then passed on to, and received by, the appellant in time. A strict construction was required by the formulaic requirement that notice was to be given in writing. Furthermore, Mr Hickey relied on paragraph 37(5), which required that notifications could be given by or to a person acting on behalf of the appellant in relation to the appeal, as indicating that a valid notice could not be given to another third party. The FTT and its administration were not authorised agents of the Appellants.

67. Thus, Mr Hickey argued that the FTT had failed to recognise that a literal construction of paragraphs 37(4) and (5) of Schedule 10 actually gave effect to the statutory purpose of the paragraph, namely, to give an appellant certainty as to the basis of the withdrawal of the appeal.

68. Mr Hickey submitted that the effect of the First Decision was, contrary to the statutory purpose, actually to create uncertainty by enabling HMRC to use an unauthorised proxy, at the unilateral election of HMRC.

69. Mr Elliott submitted that the FTT had correctly identified (at [84]) the purpose of paragraph 37(4) i.e. that an appellant who seeks to withdraw its appeal should know in writing whether or not HMRC are objecting to that withdrawal and that it should be told this in writing (so there was a record). That construction was consistent with case law on analogous provisions (e.g. enquiry notices).

70. Mr Elliott relied on the FTT decision in *Partito Media Services Ltd v HMRC* [2012] UKFTT 256 (TC) (Judge Redston) at [37]:

> "Finally, it has been held (in *Spring Salmon* at [33] and [37]) that TMA s 115 was not prescriptive, so HMRC can validly serve notice by another means, such as by handing the Notice to a director in person, or by giving it to the company's agent – provided HMRC had thereby carried out "effective intimation" of the content of the Notice to the person. This is in line with *Hastie & Jenkerson v McMahon* [1990] 1 WLR 1575, where the Court of Appeal held that the purpose of serving any document was to ensure that its contents were available to the recipient."

71. Mr Elliott also relied on the decision of Cranston J in *R (oao Sword Services Ltd v HMRC* [2016] 4 WLR 113 at [44] and [71]-[73]:

> "[71] …To my mind, the Parliamentary intention behind that provision [s12AC (1)(a) TMA 1970] is to ensure that the taxpayer knows in writing of the enquiry and so has the opportunity to put its case. There is no particular form prescribed for a notice of enquiry as long as the taxpayer knows of HMRC's decision to conduct an enquiry that is sufficient. In this regard, *Flaxmode* is in my view correct."

72. Mr Elliott contended that in the present case HMRC did object to the withdrawal of the appeals and the Appellants were given actual written notice of that objection – the notice was received by them and the Appellants received the certainty intended by paragraph 37. The FTT had been correct at [96] when it said: "The reality of the situation is that the Appellants were left in no doubt."

Discussion – the First Decision

73. We consider, and understand it to be common ground, that the FTT was correct when it held (at [83]) that the provisions of paragraph 37(4) had to be construed purposively. We might add that that like any statutory provision of this type, the correct starting point is a consideration of its terms, context and purpose: see *HMRC v Raftopoulou* [2018] EWCA Civ 818 per David Richards LJ at [33]. Thus, the requirements for giving a valid notice may differ from one statutory context to another. Nonetheless, we consider that the statutory context, in the authorities that we address below, although of course different, was sufficiently similar to the present case to provide helpful guidance.

74. Furthermore, we agree with the FTT's conclusion (at [84]), which again was common ground, that the purpose of paragraph 37(4)(b) is that an appellant who seeks to withdraw its appeal should know within 30 days whether HMRC are objecting to that withdrawal and should be told this in writing so that there is a record.

75. In our view, the authorities indicate that, in deciding whether notice has been given, particular attention should be given to whether the intended recipient of a notice receives the information intended to be conveyed by the notice. In other words, it is the position of the recipient of the notice, rather than the intention of the sender of the notice, which is the most critical factor.

76. In *R(oao Spring Salmon and Seafood Ltd) v IRC* [2004] STC 444 the Outer House of the Court of Session (Lady Smith) considered whether the taxpayer company had been given a valid notice of enquiry in accordance with paragraph 24 of Schedule 18. The statutory language was: "The Inland Revenue may enquire into a company tax return if they give notice to the company of their intention to do so ("notice of enquiry") within the time allowed." The taxpayer company had a place of business in Reading and its registered office in Edinburgh. The notice was sent to its place of business in Reading and the company argued that it had not been given a valid notice of enquiry.

77. The court held in favour of HMRC – the notice had been validly served because it had been delivered in accordance with section 115 TMA, which provides that any notice or document may be delivered to a person "at his usual or last known place of business". Lady Smith said at [32]:

> "I also agree [with HMRC] that service or intimation of a notice of inquiry does not appear to be a step that calls for special formality but rather falls into the category of cases where it is recognised that the purpose of service of a notice is to see to it that the recipient is informed."[2]

78. Next, *Flaxmode v HMRC* [2008] STC (SCD) 666 was a decision of the Special Commissioners (Mr Hellier). In that case, HMRC had sent the notice of enquiry to a Mr Gibbins, whom they wrongly thought was the nominated partner of a partnership. However, the nominated partner was Flaxmode. HMRC had, instead, informed Flaxmode of the enquiry by sending a "courtesy letter" which read:

> "I am writing to tell you that I intend enquiring into the Tax Return for the year ended 5 April [2004–05] of [J & A Gibbins] of which [you] are a member. I will write to Mr J C M Gibbins, as nominated partner to ask separately for the information needed…if we decide to make enquiries into any non-partnership aspects of [your] return we shall write separately to tell you."

79. The appellant argued that this letter was not a notice of enquiry within the meaning of section 12AC TMA, which provided:

[2] As regards the question whether a valid notice has been given, it should be noted that the word "intimation" or "intimate" is a particular expression used in Scots law and its use as a synonym in the context of a statutory provision, applicable in England and Wales, requiring that notice be given is to be discouraged: see *Credit Suisse Securities (Europe) Ltd Credit Suisse (UK) Ltd Credit Suisse Ag - London Branch Credit Suisse International v HMRC* [2020] UKFTT 86 (TC) at [173].

> "An officer of the Board may enquire into a partnership return if he gives notice of his intention to do so ("notice of enquiry")—
>
> (a) to the partner who made and delivered the return, or his successor,
>
> (b) within the time allowed."

80. The Special Commissioner said at [27]:

> "It does not seem to me that s 12AC requires particular formality about the giving of notice. Chambers English Dictionary (7th edn) defines 'notice' as intimation, announcement, information, warning. It seems to me that the purpose of the notice to be given is to warn the taxpayer that an enquiry is underway so that he knows questions may be asked and that time limits may be affected, and to provide a mechanical activation of the enquiry procedure. This does not require something formal: all that is needed is something in writing which informs the taxpayer that an enquiry is underway. It seems to me therefore that a letter which announces that 'I intend enquiring into' a tax return is sufficient to be a notice for the purposes of s 12AC.

81. At [29] the Special Commissioner said that the HMRC Officer had understood that the section 12AC enquiry had been opened as the result of the letter he sent to Mr Gibbins, and that his letter to Flaxmode was not an enquiry letter. He continued at [30]:

> "Section 12AC is designed to provide the nominated partner with a warning or intimation[3] of an enquiry: what he receives must be looked at from the recipient's (or at least a reasonable recipient's) perspective not the inspector's. If, despite an officer's understanding that he was giving notice of intention, his letter was so vague that it could not be taken by the recipient to be such a warning or intimation, then in my judgment it would not be a notice within s 12AC. But the notice Flaxmode received was quite clear: Flaxmode could not have been in doubt that the officer intended to enquire into its returns."

82. The next authority is the decision of Cranston J in *R(oao Sword Services) v HMRC* [2016] EWHC 1473 (Admin) which involved the issue of partner payment notices under the Finance Act 2014 in relation to tax avoidance arrangements entered into by a number of partnerships. HMRC had delivered enquiry notices to the wrong nominated partner for some of the partnerships, but had sent "courtesy letters" to all the other partners. The true nominated partner did not receive any direct communication about the issuance of the enquiry notices.

83. The passage from *Flaxmode* (at [27] of that decision), set out above at paragraph 80, was cited with approval at [71], where Cranston J said:

> "…there is section 12AC(1)(a) and its requirement that a notice of enquiry into a tax return is to be given to the partner who made and delivered the return. To my mind, the Parliamentary intention behind that provision is to ensure that the taxpayer knows in writing of the enquiry and so has the opportunity to put its case. There is no particular

[3] See note 2 above.

> form prescribed for a notice of enquiry and so long as the taxpayer knows of HMRC's decision to conduct an enquiry that is sufficient. In this regard *Flaxmode Ltd v. Revenue and Customs Commissioners* [2008] STC (SCD) 666 is, in my view, correct."

84. At [73] Cranston J held that the nominated partners knew of the enquiries:

> "As the result of these contacts and the correspondence over a number of years, it simply is not open to the [partnerships] to deny reality: they knew of HMRC's enquiries and of the section 12AC(1)(a) notices"

85. At [75] Cranston J held that the nominated partners:

> "…did not receive formal notices of the enquiry, but since they knew of the enquiry that is sufficient for the purposes of the legislation."

86. In addition, the decision of the Court of Appeal in *Raftopoulou* is instructive and it seems to us that the earlier authorities concerning the question whether a communication constitutes a valid "notice" need to be read in the light of that decision (see at [34]). The case involved the question whether a letter from HMRC constituted both a notice of an intention to enquire into the taxpayer's return and a closure notice. David Richards LJ, with whom Arden LJ agreed, held (at [20] and [36]) that to be effective an enquiry notice must be understood by a reasonable person in the position of the intended recipient, having that person's knowledge of any relevant context, as giving notice of an intention to enquire into a return.

87. We accept that *Raftopoulou* concerned the question whether a communication constituted a "notice". By contrast, the present appeals primarily involve the question whether a notice has been *given*. Nonetheless, the emphasis in *Raftopoulou* on the understanding of a reasonable recipient of the communication is consistent with the proposition that it is the position of the recipient (and the knowledge that he is to be treated as having) and not of the giver or issuer of the "notice" that is relevant.

88. There is no doubt in the present case that the email sent by HMRC to the FTT (and which was then forwarded by the FTT to the respective Appellant) was clear and constituted a notice. Mr Hickey did not seek to argue otherwise. The real question is whether HMRC *gave* notice *to* the Appellants. In our view, HMRC did indeed give notice to the Appellants. The Appellants clearly received, within the 30 day period, a written notice from which they were able to understand that HMRC were objecting to the withdrawal of the appeals. When the statute requires that HMRC must "give the appellant notice in writing" (paragraph 37(4)(b)), construed purposively, the word "give" looks at the position of an appellant (the intended recipient of the notice) and asks: has the intended recipient actually received the written notice? In this case, there is no doubt that the Appellants received the notice from which they were able to inform themselves of its contents. Accordingly, we are clear that HMRC validly gave notice to the Appellants of their objection to the withdrawal of their appeals for the purposes of paragraph 37(4)(b).

89. That conclusion is not, in our view, altered by paragraph 37(5) which provides that the giving of notice or notification by or to the appellant, includes references to an agreement being come to, or notice or notification being given by or to, a person acting

on behalf of the appellant in relation to the appeal. Thus, paragraph 37(5) extends the range of persons to whom a notice can be given to include an agent. That does not, in our judgment, carry with it the restrictive inference that, when notice is given to an appellant, the notice must be given directly to the appellant. It merely extends the range of persons to whom notice can be given irrespective of whether the notice is then received by the appellant itself. In our view the FTT was correct to conclude at [93] that the purpose of paragraph 37(5) was to ensure that settlement negotiations and withdrawal discussions may be carried out by an appellant's agent and did not affect the purpose of paragraph 37(4)(b), viz that an appellant must be left in no doubt that HMRC objected to the withdrawal.

90. Mr Hickey argued that paragraph 37(4) required that the Appellants be given certainty and that this, in turn, meant that notice had to be given directly to the Appellants. We agree that certainty is important, but in the present case it is clear that certainty was achieved. The Appellants received (albeit via the FTT) a clear written notice that HMRC were objecting to the withdrawal of the appeals. The statutory provision contains its own requirements as to formality i.e. the notice must be in writing. This promotes certainty and gives the Appellants a record of HMRC's objection. We see no reason why, when the purpose of the statutory provision has been fulfilled and certainty achieved, a more literal and restrictive meaning should be given to paragraph 37(4).

91. Of course, if HMRC give a notice via a third party such as the FTT, HMRC bear the risk that the third party might fail to pass on the notice to its intended recipient (in this case, the Appellants) or might not do so within the requisite time period. In such a case, HMRC would have failed to give notice because the Appellants would not have received the notice or would not have received the notice in time. But that is not the case in the present appeals.

92. We therefore dismiss the appeal in respect of the First Decision.

Submissions in respect of the Second Decision

93. In relation to Ground 1 (and Ground 4), Mr Hickey submitted that the FTT's application of paragraph 42 of Schedule 10 betrayed an erroneous understanding as to the scope of its application. Paragraph 42 was only engaged, according to Mr Hickey, where there was an appeal which was actually being determined by the FTT at a substantive hearing of the issues of law and fact which were the subject of a Notice of Appeal. In other words, paragraph 42 was only engaged where there was a substantive appeal hearing and was not engaged by interlocutory applications regarding issues such as whether an appeal should be allowed to continue to a substantive hearing. Thus, paragraph 42 had no application to the question whether the FTT should exercise its power to strike out an appeal under Rule 8(3), whether on the grounds that there was no reasonable prospect of success or on the basis of abuse of process. It also had no application to the question of whether the FTT should permit an appellant to withdraw an appeal in the exercise of its case management powers under Rule 5.

94. On the FTT's view of the legal effect of paragraph 42, according to Mr Hickey, the FTT was always under a statutory duty to determine that an assessment was correct and that such an obligation must be borne in mind in the exercise of any of the discretionary powers conferred on the FTT under the Rules. Mr Hickey submitted that that would render paragraph 37 redundant.

95. He also submitted that where an appellant accepted an assessment (as in the present appeals) the FTT was not under a duty imposed by paragraph 42 to investigate and determine whether the assessment should be increased, decreased or discharged. This error of principle, according to Mr Hickey, led the FTT erroneously to conclude that it should not strike out the Appellants' appeals or exercise its power under Rule 5 to allow the appeals to be withdrawn. The logical conclusion of the FTT's position meant that:

> (1) the FTT had no residual jurisdiction to permit an appellant to withdraw an appeal (otherwise it would override the provisions in paragraph 42); and
>
> (2) even where HMRC agreed to the withdrawal of an appeal, then the FTT must always exercise its jurisdiction to refuse an appeal to be withdrawn (otherwise, it would override the provisions of paragraph 42).

96. *CM Utilities* was a case where HMRC opposed the withdrawal of a taxpayer's appeal on the basis that the taxpayer had been under-assessed and, therefore, the decision of the Upper Tribunal was focused on the duty of the FTT to determine whether the assessment should be increased. Mr Hickey submitted that the position was different where an appellant may have been over-charged rather than under-charged. The FTT was not being asked to deal with Rule 17 (as in *CM Utilities*) but rather to exercise its residual discretion to permit the Appellants to withdraw their appeals, so that the proceedings were concluded against each of them, or to strike out the appeals under Rule 8. *CM Utilities* was in Mr Hickey's submission, incompatible with the statutory effect of paragraph 42 which was only engaged when the FTT was required to reach a decision on the substantive issues in dispute between the parties.

97. The FTT also erred, in Mr Hickey's submission, because the power to allow a withdrawal of an appeal under Rule 5 was not subject to or dependent on paragraph 42. The residual power to permit a party to withdraw an appeal meant that there ceased to be an appeal, with the consequence that paragraph 42 had no relevance or application to the scope of the FTT's powers under Rule 5.

98. Mr Hickey relied on the arguments referred to at [41] of the Second Decision and submitted that it was clearly HMRC's position that the Appellants were liable to SDLT (on the basis that they were not financial institutions) and that liability had been accepted by the Appellants. There was, therefore, no reason for requiring the appeals to be heard by the FTT. In addition, the FTT's general error of principle, as referred to in relation to the submissions on Ground 1, was likely to have caused the FTT to decide not to exercise its powers to allow the Appellants to withdraw their appeals.

99. Mr Elliott argued that paragraph 42 of Schedule 10 imposed a general duty on the FTT to determine whether the appellant was overcharged or undercharged to tax, and

to vary the assessment of self-assessment accordingly. Mr Elliott referred to *CM Utilities* at [28], [30], [35] and [36].

100. In Mr Elliott's submission, paragraph 37 of Schedule 10 constituted a specific statutory exception to the FTT's overriding duty under paragraph 42 to determine an appeal. The exception related to the circumstances in which the parties had reached an agreement (or were treated as having reached an agreement). The policy objective behind the exception was obvious – where the parties have agreed the outcome of the appeal there is no need for the FTT to consider the issues. The policy objective also applied in circumstances where an express agreement was reached and where the taxpayer sought to fix its tax liability by withdrawing their appeal and HMRC did not object to the withdrawal. Apart from this specific statutory exception, the general statutory obligation on the FTT under paragraph 42 continues to apply. The FTT correctly understood that its obligations under paragraph 42 were subject to the exception in paragraph 37 (for example, at [38] of the Second Decision).

101. In the Second Decision, according to Mr Elliott, the FTT had correctly identified its statutory duty under paragraph 42 and had appreciated that it had to take account of that duty in exercising its discretion, particularly in circumstances in which HMRC had objected to the withdrawal of the appeals because there was a reasonable basis for considering that the assessments may be incorrect (see at [43] of the Second Decision). The FTT correctly understood that it had a discretion to direct the conclusion of the appeals but declined to do so in the circumstances of the present case.

102. In response to the specific submissions of the Appellants, Mr Elliott submitted first that the FTT's duty under paragraph 42 was not relevant merely to a substantive appeal but applied at all stages of an appeal. This was clear from *CM Utilities* which involved an interim application by the taxpayer to withdraw its appeal.

103. Secondly, in relation to Mr Hickey's argument that the FTT's interpretation of its duty under paragraph 42 was inconsistent with paragraph 37, Mr Elliott submitted that paragraph 37 constituted an express exception to the duty imposed by paragraph 42; Mr Elliott noted that the exception provided that the FTT was deemed to have determined the appeal and, therefore, had satisfied its obligation under paragraph 42.

104. Thirdly, although *CM Utilities* involved an increase in the amount of tax assessed, the FTT's duty to calculate the correct amount of tax applied regardless of whether HMRC was seeking to increase or decrease the amount of tax charged. It was clear from the legislative wording that the duty in paragraph 42 applied irrespective of whether it is argued that the taxpayer has been over or under-charged.

105. Finally, Mr Elliott submitted that it was incorrect to say that the FTT considered that paragraph 42 acted as a complete fetter on its discretion. The FTT recognised that, unless there was an agreement under paragraph 37, the FTT "may" decide to continue with the proceedings (at [9] of the Second Decision).

106. Mr Elliott submitted that even if there was an error of law in relation to the FTT's application of paragraph 42, concluding the proceedings might provide grounds for a

separate claim for judicial review. The FTT held (at [45] of the Second Decision) that if the proceedings continued there was no prospect of satellite litigation in the High Court and that this was a further reason why it should not exercise its discretion in the present case. This part of the decision has not been challenged on appeal.

107. Mr Elliott also argued that the Appellants' points in relation to potential exposure to costs, if they were not permitted to withdraw their appeals, had little merit. The FTT had rejected these arguments (at [39] of the Second Decision) and no grounds had been advanced as to why the FTT's conclusions were erroneous. If the Appellants indicated that they did not wish to participate in the proceedings and did not instruct legal representatives then there was no realistic possibility of a costs order being made against them. Furthermore, Mr Elliott noted that the Appellants were willing to incur the costs of the present appeals (including the risk of an adverse costs order).

Discussion – the Second Decision

108. The FTT relied upon the decision of this Tribunal in *HMRC v CM Utilities* Ltd [2017] UKUT 305 (TCC) (Arnold J and Judge Berner). In that case, HMRC had objected to the appellant's withdrawal (within the statutory time limit provided by section 54 TMA) because they considered the assessment under appeal should be increased by the Tribunal under TMA section 50(7). In our view, the provisions considered by the UT are essentially the same as those concerned in these appeals. Thus paragraph 37 of Schedule 10 is the same as section 54 TMA and paragraph 42 of Schedule 10 (with the exception of paragraph 42(4)) mirrors section 50 TMA. The FTT held a hearing to determine the effects of the withdrawal of the appeal.

109. After referring (at [21] to [24]) to a general principle of tax law to the effect that the FTT (and previously the General and Special Commissioners) had a duty in the public interest to ensure that taxpayers paid the correct amount of tax,[4] the Upper Tribunal said:

> "[30] … Where HMRC have given notice under s 54(4)(b), and put the case for an increase, the FTT continues to have the power, under s 50(7), and indeed the duty, to increase the assessment to the extent that the FTT decides that the appellant is undercharged by the assessment.
>
> …
>
> [35] In our judgment, the effect of statutory provisions of the TMA (and by extension those relating to NICs) is clear and supported by authority. In a case where HMRC give notice of objection to the appeal being treated as withdrawn, and puts the case for an increase, the FTT retains its jurisdiction, and it continues to have a duty, to increase the assessment or determination in accordance with s 50(7) (and analogous 10 provisions) to the extent that it decides that the appellant has been undercharged by the original assessment or determination.

[4] *R v Income Tax Special Commissioners, ex p Elmhirst* [1936] 1 KB 487, approved by Henderson J in *Tower MCashback LLP 1 v HMRC* [2008] STC 3366, at [115] and by the Supreme Court on appeal in that case [2011] 2 AC 457, [2011] STC 1143 at [15] *per* Lord Walker.

> [36] Rule 17 is entirely compatible with that analysis. Not only is it expressly subject to statutory provisions relating to withdrawal or settlement (of which s 54 is plainly one), and says nothing itself about the consequences of withdrawal, it is also drafted in terms that it is the case of the party seeking to withdraw that is the subject of the withdrawal. Where it is the appellant who withdraws, that does not necessarily mean that the whole of the proceedings must be regarded as having come to an end. The proceedings remain to be determined, whether as a matter of statute, as for example, where HMRC do not object, by a combination of s 54(4) and s 54(1), or by a decision by the tribunal, which in relevant circumstances will include consideration of whether the appellant has been undercharged and the assessment should be increased accordingly."

110. We see no justification for distinguishing *CM Utilities* on the basis that, in that case, HMRC was seeking to increase an assessment, whereas in the present case HMRC consider it possible that there may be an over-assessment or at least a lack of clarity as to which taxpayer should bear the burden of SDLT. These are both matters which the FTT is entitled to decide should be determined at a substantive hearing. The duty of the FTT to determine whether there has been an over-charge or an under-charge is the same in each case. In so far as the FTT decided that paragraph 42 imposed a duty to determine the assessments, and that the proceedings should continue for that purpose, we consider that it was correct to do so.

111. Furthermore, we see even less justification for confining the scope of paragraph 42 to a substantive hearing of the issues of law and fact raised by a notice of appeal, as Mr Hickey contended. We do not accept that paragraph 42 can only be engaged in those circumstances. There is no warrant for such a limitation in the statutory wording. Moreover, as Mr Elliott pointed out, *CM Utilities* involved what was effectively a preliminary hearing to determine the effects of the withdrawal of the appellant in that case. Indeed, having concluded in its first decision that the proceedings continued notwithstanding the appellant's purported withdrawal of its appeal, the Upper Tribunal required and was provided with further evidence to support HMRC's case that the appellant in that case had been under-charged before finally determining the assessment in its second (and substantive) decision (see *HMRC v CM Utilities Ltd* [2017] UKUT 378 (TCC)).

112. We also reject Mr Hickey's argument that the FTT's interpretation of paragraph 42 was incompatible with paragraph 37, rendering the latter provision otiose. Viewing the statutory scheme as a whole, it is clear to us that paragraph 37 is an express exception to the general duty imposed by paragraph 42. There is no need for the FTT to determine an assessment where the parties have reached an agreement. In any event, where paragraph 37 does apply to an agreement between the parties (i.e. there is an agreement between the parties to settle an appeal) the agreement is deemed by statute to have all the practical consequences of being a determination by the FTT. The FTT was well aware that the duty under paragraph 42 only arose in circumstances where paragraph 37 did not apply (i.e. where no in-time objection had been made by HMRC). The FTT said at [38] of the Second Decision:

> "Where HMRC have made an in-time objection to withdrawal on the basis that the assessments may be incorrect, the Tribunal has a statutory obligation to determine the appeal by reducing, increasing or confirming the assessments; this is clear from *CM Utilities*."

113. Finally, we also reject the suggestion that the FTT fettered its discretion to allow the withdrawal of an appeal under Rule 5. The FTT was well aware that it had a discretion under Rule 5 but one which had to be exercised judicially (at [43] of the Second Decision). The FTT, correctly in our view, recognised that it could not exercise its discretion in a way conflicted with its statutory obligation under paragraph 42.

114. Accordingly, we consider that the FTT approached the exercise of its discretion correctly and was entitled to reach the conclusion that it did.

Conclusion

115. We have set out above our reasons for dismissing the appeals in respect of the First and Second Decisions.

116. The First and Second Decisions disclose no error and these appeals are dismissed.

Signed original

MR JUSTICE TROWER

JUDGE GUY BRANNAN

RELEASE DATE: 4 January 2021