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UT (Tax & Chancery) Case Number: UT-2024-000024

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: The Rolls Building
London EC4A 1NL

Heard on: 18 March 2025
Judgment date: 27 May 2025

STAMP DUTY LAND TAX - procedural requirements under Schedule 10, Finance Act 2003 where ineffective avoidance arrangements caught by s.75A - Enquiry Appeal - validity of notices of enquiry - understanding of reasonable recipient - Assessment Appeal - validity of discovery assessments made under extended time limit in paragraph 31(2A)(b) - whether Appellants failed to file a return in respect of the notional transaction pursuant to s75A

Before

JUDGE RUPERT JONES

JUDGE JONATHAN CANNAN

Between

(1) GIOVANNI SCATOLA AND AMY SCATOLA

(2) PAUL BERMER AND HELEN KATHERINE STODDART

(3) ADRIAN BIRCH AND JAYNE BIRCH

Appellants / Cross Respondents

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents / Cross Appellants

Representation:

For the Appellants: Mr Thomas Chacko of counsel instructed by Spector, Constant and Williams solicitors

For the Respondents: Mr Ben Elliott of counsel instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

INTRODUCTION

1. The Appellants appeal the decision of the First-tier Tribunal ("FTT") dated 15 December 2023 dismissing their appeals: [2023] UKFTT 1044 (TC) ("the Decision"). The appeal concerns the procedural requirements for valid enquiry notices and discovery assessments in relation to Stamp Duty Land Tax ("SDLT").

2. The Appellants are three pairs of unconnected taxpayers and their appeals are lead cases. The background to the appeals involves marketed SDLT avoidance arrangements implemented by a number of taxpayers, including the Appellants, in relation to the acquisition of residential properties in 2010 and 2011 ("the Arrangements").

3. It was accepted by the Appellants prior to the hearing of the FTT appeal that the Arrangements failed to achieve their objective of avoiding SDLT on the relevant acquisitions. Nonetheless, among other issues considered, there were two procedural issues contested before the FTT as to whether HMRC had taken the necessary steps to impose liability on the Appellants by:

   (1) opening enquiries in 2011 under paragraph 12 Schedule 10 Finance Act 2003 ("FA 2003") and then issuing closure notices in 2017 under paragraph 23; and

   (2) issuing discovery assessments in 2017 under paragraph 28 Schedule 10 FA 2003, on a protective basis alternative to the closure notices.

4. The Arrangements implemented by the Appellants were intended to replicate the transactions ultimately considered in *Project Blue Limited v HM Revenue & Customs [2018] UKSC 30*. The transactions were described by the FTT at [9]:

   (1) The Appellants entered into a contract to purchase a property from an independent third-party vendor with the full purchase price to be paid on completion.

   (2) The Appellants agreed to sell the property to a Guernsey protected cell company, Vale Property Finance PCC Limited ("Vale"), which was stated to be a finance institution, at the same price. Vale was a special purpose vehicle established for the sole purpose of the Arrangements.

   (3) Vale agreed to grant a 999-year lease of the property back to the Appellants for a premium equal to the purchase price.

   (4) On completion of the purchase of the property from the vendor, the Appellants sold the freehold of the property to Vale and Vale immediately granted the 999-year lease to the Appellants with an option to purchase the freehold reversion for £1.

(5) The Appellants occupied the property from the date of completion of the contract with the vendor.

5. We describe the intended tax analysis below. Briefly, the Appellants made two land transaction returns for SDLT and Vale also made a land transaction return. The FTT described these as Returns A, B and C. Return A was filed by the Appellants and related to the Appellants' purchase of the freehold from the vendor. Return B was filed by Vale and related to its acquisition of the freehold from the Appellants by way of sub-sale. Return C was filed by the Appellants and related to the Appellants' acquisition of the lease. Return A included a claim for sub-sale relief under s45(3) FA 2003 and showed no SDLT due. Return B claimed alternative finance relief under s71A FA 2003 and showed no SDLT due. Return C also claimed alternative finance relief and showed no SDLT due.

6. The effect of the judgment of the Supreme Court in *Project Blue* however, was that SDLT was due on a notional transaction effecting a purchase of the property by the Appellants from the vendor on which SDLT was due pursuant to the anti-avoidance provision in s75A FA 2003.

7. In relation to issue (1), the FTT upheld the enquiry notices, and the corresponding closure notices, issued to the Appellants by HMRC. It decided that HMRC had lawfully opened enquiries in relation to Return A and Return C by giving notice to the Appellants in letters dated 8 June 2011. The FTT held that the terms of the letters from HMRC to the Appellants and their agents were sufficient to satisfy the requirement in paragraph 12 Schedule 10 FA 2003 to give a valid notice of an enquiry into each return because a reasonable taxpayer would have been informed of the intention of HMRC to enquire into both returns. We set out the FTT's discussion of the issue in more detail below.

8. In relation to issue (2), HMRC relied on the 20 year extended time limit for making a discovery assessment in paragraph 31(2A)(b) Schedule 10 FA 2003 which applies where the taxpayer has failed to make a return. It is HMRC's case that the Appellants failed to make a return in relation to the notional transaction pursuant to s75A. The FTT found that the protective discovery assessments were out of time as the extended time period did not apply. It found that Return A met the requirements of a return for the notional transaction under s75A FA 2003 and there had been no failure to file a return.

9. The Appellants now appeal to the Upper Tribunal ("UT") against the Decision in relation to the validity of the enquiry notices and hence the closure notices issued by HMRC. The Appellants have been granted permission to appeal on two grounds:

   Ground 1: The FTT erred in its approach to the validity of the notices, holding that a notice could be valid even if it contained ambiguities that could not be resolved.

   Ground 2: The FTT erred in holding that a reasonable recipient of the enquiry notices in context would have understood HMRC to be opening enquiries into both Return A and Return C. The relevant letters relied on by HMRC were ambiguous and therefore ineffective.

10. In HMRC's Response, in addition to opposing the Appellants' grounds, HMRC seek to uphold the FTT's decision on an alternative ground. They say that the intended effect of the relevant notices of enquiry was reasonably ascertainable by the persons to whom they were directed and therefore, applying s83(2) FA 2003, they were not ineffective.

11. In addition, HMRC cross-appeal to the UT on a protective basis against the FTT's decision that the assessments were made out of time. They submit that the FTT erred in law in holding that Return A satisfied the requirement to file a return in relation to the notional land transaction under s75A. Therefore, HMRC argue that the FTT erred in finding that the extended time limit in which to make the assessment pursuant to paragraph 31(2A)(b) did not apply.

12. The FTT granted the Appellants permission to appeal in the appeals and HMRC permission to make the cross-appeal. At the time of the FTT proceedings there were approximately 400 similar cases (and there remain over 300), waiting behind the present appeals, all of which are affected by the issues addressed in this appeal.

13. We are very grateful to Mr Chacko who appeared for the Appellants and Mr Elliott who appeared for HMRC for their helpful written and oral submissions, all of which we have considered.

14. For the purposes of this decision:

    (1) The question of whether HMRC opened valid enquiries, which encompasses Grounds 1 and 2 of the Appellants' appeal, and the issue concerning the application of s83(2) FA 2003 raised in HMRC's Response, is referred to as "the Enquiry Appeal";

    (2) The question of whether the assessments were issued within the applicable time limit, comprising HMRC's cross-appeal, is referred to as "the Assessment Appeal".

ENQUIRY APPEAL

The legislation

15. By way of background, s78 FA 2003 provides that Schedule 10 FA 2003 has effect with respect to land transaction returns, assessments and related matters, including enquiries.

16. Pursuant to paragraph 12 Schedule 10, HMRC may enquire into a land transaction return by giving notice of their intention to do so to the purchaser within nine months of the filing date where the return was delivered on or before that date:

> "Paragraph 12 – Notice of enquiry
>
> (1) The Inland Revenue may enquire into a land transaction return if they give notice of their intention to do so ("notice of enquiry")—
>
> (a) to the purchaser,
>
> (b) before the end of the enquiry period.

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

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

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

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

17. An enquiry is completed by the issuing of a closure notice under paragraph 23 Schedule 10:

"23(1) An enquiry under paragraph 12 is completed when the Inland Revenue by notice (a 'closure notice') inform the purchaser that they have completed their enquiries and state their conclusions.

(2) A closure notice must either—

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

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

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

18. Where HMRC have opened an enquiry, they are free to ask for all relevant information and will come to a decision as to whether the amount of tax self-assessed in the return is right or wrong. When they have come to a decision they issue a closure notice under paragraph 23, which the taxpayer can appeal against under paragraph 35.

19. If HMRC do not open an enquiry within the permitted period they can only challenge the amount of tax declared in the return by raising an assessment under paragraph 28 ("a discovery assessment"). We return to the law governing discovery assessments when considering the Assessment Appeal below.

The FTT Decision

20. The Supreme Court handed down judgment in *Project Blue* on 13 June 2018. It held that the transactions in that case gave rise to liability to SDLT under section 75A FA 2003. The interaction between s45 and s71A meant that no SDLT charges arose on either the original purchaser or the finance institution, but that there was a charge on the original purchaser by virtue of s 75A FA 2003. The Supreme Court held that this charge could be levied by way of amendment to the taxpayer's SDLT return, being the equivalent of Return A.

21. On 24 May 2022, the Appellants amended their grounds of appeal to withdraw all arguments relating to liability and instead argued that HMRC had failed to open valid enquiries into the relevant returns because the notices of enquiry did not clearly state

which land transaction returns HMRC were intending to enquire into. The Appellants also challenged the validity of the assessments.

22. References in square brackets [] are to paragraph numbers in the Decision unless the context otherwise requires.

23. The factual and procedural background to the appeals is set out in the Decision at [8]-[11] and [19]-[62]. The FTT's findings were made by reference to the transactions undertaken by Mr and Mrs Rakshit, who were the first appellants before the FTT but have not appealed to the UT. The present parties have continued to refer to the documentation of Mr and Mrs Rakshit for the sake of clarity and we shall do the same. We were told that the documentation is identical in substance for each Appellant.

The Returns

24. The Appellants appointed ELS International Lawyers LLP ("ELS") as their agent. ELS sent a letter to HMRC dated 7 September 2010 headed "Acquisition of Land at 14a Tangier Road, Guildford, Surrey, GU1 2DE". It summarised their analysis as to why no SDLT liability arose on the transactions. In particular, due to the application of s45(3) and s71A, and the fact that s75A did not apply (see [25]). ELS stated that s75A did not apply "because the transaction between [the Appellants and the vendor] was not 'involved in connection with' the Alternative Property Finance mentioned above but was a separate standalone transaction. As such, in our submission, it is not a scheme transaction". The letter concluded "We look forward to hearing from you".

25. Three land transaction returns, Returns A, B and C were filed by ELS on 7 September 2010 (see [26]):

> "Return A" – A land transaction return was filed on behalf of the Appellants in respect of their acquisition of the property from the original vendor on 2 September 2010, claiming sub-sale relief by entering code 28 "other relief" in box 9 of the return. No SDLT was self-assessed in relation to that transaction.
>
> "Return B" – A land transaction return was filed on behalf of Vale in respect of its acquisition of the property from the Appellants on 2 September 2010, claiming relief by entering code 24 ("alternative property finance") in box 9 of the return. No SDLT was self-assessed in relation to that transaction.
>
> "Return C" – A further land transaction return was filed on behalf of the Appellants in respect of the acquisition of an interest under the terms of the 999-year lease on 2 September 2010, claiming relief by entering code 24 ("alternative property finance") in box 9 of the return. No SDLT was self-assessed in relation to that transaction.

26. Overall, no SDLT was self-assessed as being due as a result of the transactions. No separate land transaction return was filed in relation to the notional transaction under section 75A.

The Enquiry Notices

27. Within the time limit for opening an enquiry, HMRC wrote to the Appellants and to ELS enclosing the following two letters, both for the Appellants and for ELS (see [27] and [28]:

(1) A letter dated 8 June 2011 addressed to the Appellants stating:

"Dear Mr & Ms Rakshit

Property: 14A Tangier Road Guildford Surrey GU1 2DE

Thank you for your Land Transaction **Return** in relation to the above. I am writing to tell you that I intend to make some enquiries under Paragraph 12 Schedule 10 Finance Act 2003 ("FA 2003") into **this return**. I have written to your agent ELS International Lawyers LLP and enclose a copy for your attention.

I enclose a copy of our Code of Practice COP 8. It explains how we make enquiries and how we keep our promise of fair treatment under the Revenue's Service Commitment to you. The Code also explains how you may ask for an enquiry to be concluded.

When you have read this leaflet, please contact me if you require further information.

…"

(emphasis added)

(2) A letter also dated 8 June 2011 addressed to ELS stating:

"Dear Sirs,

Customer Name: Mr Pulak Rakshit & Ms Sharmilla Rakshit

Property: 14A Tangier Road Guildford Surrey GU1 2DE

I have today issued to your above named clients **notices** under Paragraph 12 Schedule 10 Finance Act 2003 ("FA 2003") of my intention to enquire into **their land transaction returns**. Copies of the notices are attached.

At this time I am not requesting any further documentation or information in connection with the land transaction, however this may be asked for at a later date.

…"

(emphasis added)

Closure Notices and Discovery Assessment

28. At [31] – [44], the FTT described the correspondence between the ELS and HMRC between 2013 and 2017. On 21 April 2017, HMRC issued the following documents to the Appellants (see [45]-[46]):

(1) A closure notice in relation to the enquiry into Return A, concluding that the acquisition from the vendor by the Appellants did not fall to be disregarded under section 45 or, in the alternative, section 75A applied;

(2) A further closure notice in relation to the enquiry into Return C concluding that no relief was due under section 71A and, in the alternative, section 75A applied;

(3) An assessment under paragraph 28 Schedule 10 in respect of the Appellants' notional acquisition of the property under section 75A. The assessment confirmed that the notional land transaction was a notifiable transaction for which HMRC had not received an SDLT return and therefore the assessment was subject to the extended time limit under paragraph 31(2A)(b).

The FTT's conclusion on the validity of the enquiry notices

29. The Appellants' case was that the enquiry notices were invalid and therefore the closure notices must also be invalid. The FTT considered the validity of the enquiry notices at [66] – [102]. It recorded at [79] that the test to be applied in determining the validity of the enquiry notices was agreed by the parties:

> "79. The parties also agree that the relevant test is an objective one, namely whether a reasonable taxpayer, in the circumstances of the taxpayer in question, would have understood that HMRC intended to open an enquiry into the particular return. As the Upper Tribunal in *Mabbutt* describes (*Mabbutt* [45]):
>
> > The question whether the disputed notice sufficiently makes a taxpayer aware of HMRC's intention to open an enquiry into a particular tax return is an objective one. The test is whether a reasonable taxpayer, in the circumstances of the taxpayer in question, would have understood that HMRC intended to open an enquiry into a particular tax return. It is not a matter of the parties' intentions or actual knowledge. We consider that this objective test applies as much to the question whether certain documents could be said to form part of the notice as it does to the question whether the notice itself sufficiently informed the taxpayer of the intended enquiry to be a valid section 9A TMA notice."

30. The FTT summarised the relevant principles for the validity of an enquiry notice at [78]-[84] & [91]. It recorded at [78] that there is no particular form of notice prescribed by the legislation: see *R (Sword Services Ltd) v HMRC* [2016] EWHC 1473 (Admin); [2016] 4 WLR 113 at [71]) and *Flaxmode v HMRC* [2008] STC (SCD) 666 ("*Flaxmode*"). The position was described in *Mabbutt v HMRC* [2017] UKUT 289 (TCC) ("*Mabbutt*") at [44] in the context of equivalent provisions governing direct tax enquiries:

> "[44] It was common ground between the parties that a s 9A TMA notice did not have to observe any particular formality and that all that was required was a document in writing informing the taxpayer of HMRC's intention to open an enquiry into a particular tax return: see *Flaxmode*…"

31. On the facts of *Mabbutt*, there were two possible interpretations of what was obviously mistaken wording in HMRC's enquiry notice. The notice stated that HMRC intended to enquire into the tax return 'for the year ended 6 April 2009': it either meant the tax year ending 5 April 2009 or the tax year beginning 6 April 2009. The UT decided that the reasonable recipient would understand the intention was to enquire into the return for the tax year ended 5 April 2009. This was partly because the only tax return that the taxpayer had filed had been his return for that year. Applying the objective test, the reasonable recipient would be placed in all the factual circumstances and context of the taxpayer in question.

32. The FTT adopted non-tax case law which illustrates the objective test being applied by reference to the context in which the taxpayer received the disputed notice. The FTT explained at [81]-[83]:

> "81. That objective test must be applied by reference to the context in which the taxpayer received the disputed notice.
>
> 82. For example, in [*Mannai Investment Co. Limited v Eagle Star Life Assurance Co. Limited* [1997] AC 749], the House Lords found that an error in a notice to exercise a break clause under a lease, which referred to 12 January when the applicable break day was 13 January, did not invalidate the notice. Lord Steyn said this (at *Mannai*, p772H):
>
> > "The question is not whether 12 January can mean 13 January: it self-evidently cannot. The real question is a different one: does the notice construed against its contextual setting unambiguously inform a reasonable recipient how and when the notice is to operate under the right reserved?"'
>
> 83. The context may also cause an otherwise valid notice to be treated as invalid. In [*Barclays Bank Plc v Bee* [2002] 1 WLR 332], a case concerning notices under the Landlord and Tenant Act 1954, a tenant received an otherwise valid notice agreeing to a new tenancy at the same time as an invalid notice opposing the grant of a new tenancy. The Court of Appeal found that the otherwise valid notice was invalid. This was because the invalid notice opposing the new tenancy was part of the relevant factual context. A reasonable recipient in receipt of the two notices would have been left in reasonable doubt as to whether or not the landlord intended to oppose the new tenancy (*Barclays* [28]-[34]).'

33. The FTT concluded at [92] – [94] and [101] that the letters sent to the Appellants constituted valid notices of enquiry into both returns for the purposes of paragraph 12 Schedule 10 FA 2003:

> "92. Although the communication with the first appellants, which included the copy of HMRC's letter to the agents, was on its face inconsistent (in referring in the letter to the first appellants to "this return" and in the letter to the agents to "their… returns"), that communication must, as the cases demonstrate, be read in its context. To my mind, that context must include the following facts of which the reasonable recipient must be taken to have been aware:
>
> (1) the recipient had purchased a particular property which was clearly identified in the letters from HMRC;
>
> (2) in relation to the purchase of that property, the recipient had entered into a scheme involving the same pre-planned steps undertaken by the first appellants that are designed to secure a particular tax advantage;
>
> (3) that scheme involved more than one land transaction and required the submission of two SDLT returns by the taxpayer (Return A and Return C).
>
> 93. Against that background, a reasonable taxpayer in receipt of the communication from HMRC would, it seems to me, assume that HMRC intended to enquire into arrangements for the acquisition of the property as a whole and its SDLT treatment. The acquisition of the property was made under a scheme involving pre-planned steps, of which the reasonable recipient would have been aware, and involving the submission of two returns. This is not a case like *Barclays* where the tenant received two separate communications that were entirely inconsistent. On receipt of the two notices, the reasonable recipient would assume that the letter to the agent was correct in referring

> to "returns" in the plural and that any error was in the letter to the taxpayer in referring to a return in the singular. For those reasons, a reasonable taxpayer would have been informed of the intention of HMRC to enquire into both returns.
>
> 94. As I have mentioned above, the test is an objective one. I am fortified in my conclusion by the fact that the first appellants and their agents clearly understood the letters in the same way. Although they disputed whether or not the letters constituted a valid notice for other reasons, which have not been pursued, the first appellants and their agents clearly treated the letters as a notice of an intention to enquire into both Return A and Return C for many years. It was only when prompted to amend their grounds of appeal following the decision of the Supreme Court in *Project Blue*, that the first appellants indicated that they intended to challenge the validity of the disputed notice on this ground (in their Amended Grounds of Appeal filed on 24 May 2022).
>
> …
>
> 101. For the reasons that I have given, the letter of 8 June 2011 to the first appellants together with the enclosed copy of the letter to the agents provided sufficient notice to the first appellants of HMRC's intention to enquire into both Return A and Return C for the purposes of paragraph 12 Schedule 10 FA 2003."

Overview of the parties' cases

Outline of the Appellants' case

34. In summary, Mr Chacko for the Appellants submitted that the FTT erred in law in holding that a reasonable recipient of HMRC's letters dated 8 June 2011, in the position of the Appellants and in context, would have understood HMRC to be opening enquiries into both Return A and Return C. That is because the letters were ambiguous. The letter to the taxpayers stating that an enquiry was being opened, and the letter to the agent enclosed and to be read with it, read in isolation or together, were not sufficiently clear so as to leave no doubt as to which return or returns were being enquired into. The FTT therefore erred in finding that there were lawful notices of enquiry into both returns.

35. The question is whether the letters sent to the taxpayer made it clear, leaving the reasonable recipient in no doubt, which return was, or which returns were, being enquired into. The reasonable recipient would be aware that one of the letters was addressed to them and that it was this letter that was described as a notice of enquiry. The other was a copy of a letter addressed to someone else. However, Mr Chacko accepted that questions as to whether the letter to the taxpayer should be seen as "the notice" with the enclosed letter to the agent as part of the background explaining it, or whether they should both be seen as "the notice" are not really relevant.

36. Mr Chacko observed that neither letter identified the UTR (Unique Tax Reference) number which HMRC allocates to all land transaction returns. The letter addressed to the Appellants stated that an enquiry was being opened into a single tax return in respect of an identified property. However, two returns lodged by the Appellants met that description: Return A and Return C. There was nothing in the letter to the Appellants that indicated which return was the subject of the enquiry.

Outline of HMRC's case

37. Mr Elliott for HMRC submitted that the FTT properly interpreted and applied the law, and arrived at the right conclusion. The reasonable recipient would be in no doubt that the letters sent to the Appellants in June 2011 were notices of enquiry into Return A and Return C. The closure notices in respect of those enquiries were therefore valid.

Discussion and Analysis

Ground 1 – Error in approach as to the validity of the enquiry notices

38. Ground 1 is that the FTT erred in its approach to the validity of the notices. In particular, it wrongly held that a notice could be valid even if it contained ambiguities that could not be resolved. Mr Chacko did not press this ground in his written or oral argument. Rather, he focussed on the way in which the FTT purported to apply the objective test described above, which is Ground 2.

39. In relation to the proper approach, we were taken to the line of authorities beginning with *Baylis (Inspector of Taxes) v Gregory* ("*Baylis*") [1987] STC 297. The Court of Appeal held that an assessment to capital gains tax which identified the tax year 1974-75 could not be construed as an assessment for 1975-76. This was despite the fact that no-one could reasonably have believed that the assessment was intended to relate to any year other than 1975-76.

40. The Court of Appeal also considered s114(1) Taxes Management Act 1970, which permits mistakes or defects in direct tax assessments to be cured in certain circumstances. It was held that the provision did not assist the Inland Revenue in allowing an assessment for the wrong year to be read as if it had been issued for the correct tax year. That was because the relevant year was a fundamental part of the assessment itself and s114 was not wide enough to cure such a defect.

41. In *Baylis*, the Court of Appeal was considering the validity of an assessment, and not a notice of enquiry. It was distinguished by the UT in *GDF Suez Teesside Limited v HMRC* [2017] UKUT 68 (TCC) where a notice of enquiry stating an incorrect financial period was upheld as valid:

> "117. … The recipient of HMRC's letter cannot reasonably have understood it to mean that the writer had no wish to enquire into the return which had been made, but wanted to enquire instead into some other, hitherto unmade, return. On the contrary, despite the error there is no arguable ambiguity about what was meant: the writer intended to enquire into the return whose receipt he was acknowledging. Ernst & Young plainly understood that to be the message. The requirement that the taxpayer be informed of the opening of an enquiry was accordingly met and for that reason, in our view, this issue can be resolved without resort to section 114. If such resort is nevertheless necessary it seems to us clear that, despite the error, the letter was "in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts", as section 114(1) puts it, and its defect is cured.
>
> 118. We do not consider that what was said in *Baylis v Gregory* or in *Sokoya* leads to a different conclusion. The former concerned the validity of a formal demand, for which there is a prescriptive statutory framework, by which a taxpayer is made liable, subject to appeal, to make a payment to the state. One can well understand why protection of the taxpayer demands formality and complete absence of ambiguity in such a case. The latter concerned a penal provision: the taxpayer was said to be liable

> to a penalty for his alleged failure to comply with an information notice by a date which had been incorrectly identified. In other words, he was said to be liable to a penalty for failing to do something which he could not lawfully have been required to do; moreover, it is well established that in a penal context any ambiguity must be construed in favour of the person penalised. We see no true parallel between those cases and this."

42. Mr Chacko referred us to *Mannai Investment Co. Limited v Eagle Star Life Assurance Co. Limited* [1997] AC 749 ("*Mannai*"), *Barclays Bank Plc v Bee* [2002] 1 WLR 332 ("*Barclays*"), and *Bristol & West Plc v HMRC* [2016] EWCA Civ 397 ("*Bristol & West*") which had been considered by the FTT. He emphasised that there was a real difference between cases where there is only one possible action that the giver of a notice was intending to effect and cases where the recipient would be in genuine doubt because there were two or more realistic possibilities as to the effect of the notice. *Mannai* and *Mabbutt* were examples of the former. *Barclays* was an example of the latter.

43. As noted by the FTT, *Mannai* was concerned with the validity of a break notice under a lease. It is authority for the well established proposition that the test is objective and depends on how the reasonable recipient would have understood the notices. In considering that question, the relevant objective context in which the notice was given has to be taken into account. The question is how a reasonable person, in the circumstances of the actual recipient, would have understood the notice. The purpose of the notice is relevant to the construction and validity of the notice. If a notice contains an error, it may be valid if it is sufficiently clear and unambiguous to leave a recipient in no reasonable doubt as to how and when it is to operate. Possible interpretations of a notice which are too improbable will be rejected (see Lord Steyn at p767E to 769A and Lord Hoffmann at p774D to 775A).

44. In *Barclays*, as the FTT noted at [83], contradictory notices were given under the Landlord and Tenant Act 1954. One notice terminated the lease and stated that the landlord would oppose the grant of a new lease. The other notice terminated the lease and stated that the landlord would not oppose the grant of a new lease. Each notice could have been effective on its face. The Court of Appeal held that both notices were invalid because a reasonable recipient would be in doubt as to the landlord's intentions. At [45], Arden LJ as she then was stated:

> "45. The function of a notice is to make a statement on which another party can act. It is of great importance that it is reasonably clear to a reasonable person in the position of the recipient. He should not have to take legal advice or start proceedings to find out if the notice is valid."

45. In *Bristol & West*, HMRC was not bound by a closure notice which was issued in error where HMRC, having realised its mistake, informed the taxpayer in advance that it would receive a notice which had been issued in error. The Court of Appeal stated at [30] that the earlier email was clearly part of the relevant factual context in which the disputed closure notice was received.

46. The FTT accepted the Appellants' submission that a notice of enquiry had to be unambiguous and leave the recipient in no reasonable doubt as to its meaning. Before the FTT, Mr Elliott had submitted that authorities from outside a tax context should be treated with caution. However, the FTT rejected that submission at [85] and had regard to those authorities:

> "85. … I do not accept that submission. It seems to me that the principles derived from those cases are of equal relevance in the present context. All the cases concern whether a notice should be regarded as ineffective where the reasonable recipient of the relevant communication would have some doubt about its effect. In any event, the non-tax cases (principally *Mannai* and *Barclays*) are regarded as good authority by the Upper Tribunal in *GDF Suez* and *Mabbutt* and by the Court of Appeal in *Bristol & West*. I can see no good reason to diverge from that approach."

47. Mr Elliott did not maintain his submission before us, but reserved the right to renew the submission if the appeals were to go further. Aside from that, we do not understand that any of the applicable principles were in dispute before the FTT, nor were they in dispute before us.

48. Given the FTT's express acceptance of the Appellants' submission as to the correct test, and its statements confirming the correct approach, any argument that the FTT made an error of law in adopting the wrong approach is not sustainable.

49. Accordingly, there was no error of law by the FTT and this ground is dismissed.

Ground 2 – Notices of enquiry were ambiguous

50. We shall adopt the principles described above as to the nature of the test to be applied in considering the validity of the notices of enquiry. In doing so, we are satisfied that the FTT did not err in finding that there was no ambiguity in the letters dated 8 June 2011 to the Appellants and their agent. They were effective notices of enquiry into Return A and Return C.

51. The intention of paragraph 12 Schedule 10 FA 2003 is plainly that taxpayers should know that HMRC is opening an enquiry into a particular return so that they may put their case to the Revenue (See *Sword Services* at [71] and *Mabbutt* at [44]). The document giving notice must enable the reasonable recipient in the position of the taxpayer to understand which return HMRC are intending to enquire into.

52. No particular form of notice is prescribed by the legislation. A letter does not need to state that it is a notice of enquiry, nor does it need to refer to the relevant legislation – see, for example, *Flaxmode* (referred to by the FTT) and *Portland Gas v HM Revenue and Customs* [2014] UKUT 270. This is to be contrasted with other statutory contexts where a particular form is required.

53. The objective test is to be considered by reference to the particular circumstances of the taxpayer with their wider knowledge of the relevant background facts. There are examples of an otherwise valid notice being invalidated by context, for example *Bristol & West* and *Barclays*. There are also examples of an otherwise invalid notice being validated by context, for example *Mannai* and *Mabbutt*. All depends on the factual and legal context of the particular case.

54. Where a taxpayer receives more than one document, the documents should be considered together to see if they would clearly inform the reasonable recipient that an enquiry was being opened into a specific return. *Mabbutt* provides a useful illustration at [47] of the need to read a document sent to the taxpayer in light of all documents sent. In that case there was one letter to the taxpayer and one to his accountants, Dickinsons:

> "…As the Special Commissioner pointed out at para 30 in *Flaxmode* the intentions of the issuing HMRC officer are irrelevant. The question is whether a reasonable taxpayer receiving the two letters of 17 January 2011 would have understood them as having to be read together and from that composite communication would have understood that they were intended to give the taxpayer notice of HMRC's intention to open an enquiry into a return. Mr Mabbutt, or to be more precise a reasonable taxpayer, could not reasonably have thought that the copy of the Dickinsons letter sent to him was a separate document, unrelated to the enquiry and provided for some other purpose. Any dispassionate and reasonable reader of the Mabbutt letter would recognise that it could be fully understood only if read together with the Dickinsons letter; the latter was incorporated by reference into the former…"

55. An earlier letter may be incorporated by reference into a later letter and vice versa, where the reasonable recipient would recognise that the letters could only be fully understood if read together.

56. The objective knowledge or understanding of the taxpayer that HMRC intend to open an enquiry must relate to a specific return or specific returns. It is not necessary for the purported notice to identify the return using a reference number that has been allocated to the return. However, it must be sufficiently clear from the document(s) that a specific return is intended as the subject of an enquiry.

57. There must be sufficient clarity as to the type of notice that the sender intends to give and if that is not clear then the notice will be invalid.

58. The reasonable recipient can be treated as having a basic understanding of the legal context in which the notice is sent. This does not mean that they have sought or need advice from a lawyer. For example, in *Mannai*, the recipient was treated as understanding the contract and its clauses. By the same token, the reasonable taxpayer is taken to be aware of the statutory scheme – see *Eastern Pyramid Group Corporation SA v Spire House RTM Company Limited* [2020] UKUT 199 at [38].

59. In reading and seeking to understand the notice, the reasonable recipient must consider the documents before them in the context of all the circumstances. They will reject any interpretation of the documents which is too improbable.

60. Where there are two different interpretations and therefore a potential ambiguity, the ambiguity may be resolved by reference to the factual and legal context so as to remove any reasonable doubt. Ultimately, each case is unique and must be decided on its own facts.

61. Applying these principles, we are satisfied that the FTT was right to conclude that a reasonable recipient of the 8 June 2011 letters would have understood without doubt that the intention of HMRC was to enquire into Return A and Return C.

62. The relevant factual and legal context which would have been known to the reasonable recipient of the letters includes:

(1) The Appellants had entered into the Arrangements which involved pre-planned steps designed to secure a tax advantage on purchasing the property specified in the letters.

(2) The Arrangements involved the Appellants filing two land transaction returns in respect of the property, Return A and Return C.

(3) The letter to the Appellants referred to the letter addressed to their agent and enclosed a copy of that letter. The letters must clearly be read together. Indeed, the letter to the agent was incorporated by direct reference in the Appellants' letter, as well as by the fact of its enclosure.

(4) The statutory framework requires HMRC to give notice of their intention to open an enquiry into a specific return or returns but no specific form is required.

63. Mr Chacko submitted that the letters sent to the Appellants on 8 June 2011 could, theoretically, be read in three different ways, each involving an error, mistake or ambiguity in at least one of the letters which could not be resolved:

(1) A single enquiry notice had been sent into a single return, hence the letter to the Appellants referred to your land transaction "return" and "this return". The letter to the agent referring to "notices" and "land transaction returns" was therefore incorrect. It could not be a valid notice of enquiry into a single return since it did not identify whether Return A or Return C was the subject of the enquiry.

(2) A single enquiry notice had been sent, opening an enquiry into more than one return of the Appellants in relation to the property. The letter to the agent was right in referring to an enquiry into the Appellants' "returns" but wrong when it referred to "notices" because there was only one notice. The letter to the Appellants referring to 'this return' was also wrong.

(3) More than one enquiry notice had been sent in relation to more than one return. The letter to the agent was correct in referring to "notices" but there was at least one notice yet to arrive with the Appellants.

64. The Appellants' case is essentially that the reasonable recipient would know that there was an error in one or both of the letters, but they would not know what the error was or which return(s) were the subject of HMRC's enquiry.

65. We accept Mr Elliott's submission that interpretation (3) is an untenable understanding of the letter to the agent. The agent letter states that the notices are being issued "today" and that "copies of the notices are attached". The agent letter in referring to enclosing "notices" to the taxpayer was correct because more than one notice can be given by the same document. The reasonable recipient would not expect more than one document to be sent simply because HMRC were opening an enquiry into two returns. They would have no reason to think that HMRC might have made a mistake in failing to enclose a second document.

66. In our view, interpretation (2) is the only realistic interpretation of the letters, but not that the letter to the agent was wrong when it referred to "notices". Mr Chacko's submissions rely on reading the letters in isolation and without the benefit of the context known to the reasonable recipient. The reasonable recipient would have no doubt that an enquiry was being opened into both returns. It would be at the forefront of the mind of the reasonable

recipient that, as part of the scheme, they had filed two returns in relation to the purchase and both those returns were the subject of the enquiry.

67. The letter addressed to the Appellants clearly contains an error or ambiguity as to which of the two returns was the subject of the enquiry. Mr Elliott rightly accepted that this letter in isolation could not be a valid notice of enquiry because it did not identify which return was the subject of the enquiry. However, the recipient would go on to read the letter to the agent, which is incorporated by reference and which referred to both returns. In the circumstances, interpretation (1) is not a realistic interpretation.

68. Mr Chacko argued that there would still be an ambiguity as to which of the two inconsistent letters could be relied upon by the reasonable recipient: the taxpayer letter referring to "this return" or the agent letter referring to "returns". We disagree. The FTT rightly rejected the Appellants' argument that the reasonable recipient would be left in reasonable doubt as to HMRC's intention. There was an inconsistency between the taxpayer letter and agent letter but the reasonable recipient would understand that the agent letter should be relied upon as communicating that HMRC were enquiring into both returns.

69. The agent letter was complete and unambiguous on its own terms in that the enquiry was being opened into the "land transaction returns". It referred to "notices" because there must be a separate notice in relation to each return, but the reasonable recipient would know that a single document could open an enquiry into more than once return. In our view, there is no error in the FTT's conclusion at [93] quoted above.

70. Mr Chacko also argued that the FTT erred at [93] in assuming that the reasonable recipient knew that HMRC were likely to challenge the Arrangements and were likely to enquire into arrangements for the acquisition of the property as a whole. He argued that taking into account the taxpayers' understanding of likely challenges is not a legitimate approach. It is not possible to resolve an ambiguity or fill in information either by reference to inferences about what the recipient would have been expecting the sender to do, by assuming that the sender understands the process and does not make mistakes, or by assuming that whatever the sender should do was actually being done by the letter. He relied on *Stobart Group v Stobart* [2019] EWCA Civ 1376 for the proposition that a notice should not be construed on the basis of such assumptions.

71. The issue in *Stobart* was whether a notice of claim had been made under paragraph 6.3 or paragraph 7.1 of a Share Purchase Agreement ("SPA"). The SPA had a covenant pursuant to which the vendor would pay the company's tax liability incurred prior to sale but recognised after the sale. Paragraph 6.3 provided that the vendors would not be liable unless the purchaser had given written notice of the claim within 7 years of completion of the SPA. Paragraph 7.1 set out a claims procedure whereby the purchaser or the company had to give 10-days' notice of becoming aware of a claim by the tax authorities. The High Court at first instance had held that a letter was not an effective notice under paragraph 6.3 but was a notice under paragraph 7.1.:

> "40. As noted above schedule 4 of the SPA draws a distinction between claims that are made by HMRC against SRL and claims that are made by SGL against the vendors. The former may lead to the latter, but they are treated differently in the SPA. Thus, the giving of a paragraph 7.1 notice may give rise to a paragraph 6.3 claim, but it does not

> necessarily mean that a paragraph 6.3 claim will be made, see for a similar distinction in the nature of the contractual obligations those identified by Cooke J in the *Laminates* case (above) at [32] and [33]."

72. The Court of Appeal observed at [43] that the vendors might have expected a paragraph 6.3 claim, but that did not throw "decisive light" on whether the letter was to be construed as a paragraph 6.3 claim. It went on to quote the High Court Judge:

> "Whilst no doubt fully expecting a notice under paragraph 6.3, it was not inconsistent with that expectation to receive a notice or a further notice under paragraph 7.1… receiving the paragraph 7.1 notice might only increase the anticipation that a paragraph 6.3 notice would be received soon thereafter."

73. In the present case there can be no suggestion that HMRC might have been sending anything other than notices of enquiry pursuant to paragraph 12 Schedule 10 FA 2003. The provision was specifically referred to in the letter to the agent.

74. The Court of Appeal in *Stobart* applied *Laminates Acquisition v BTR* [2003] EWHC 2540, noting at [48] that a compliant notice of claim must make clear that a claim is being pursued, rather than indicating a possibility that a claim may be made in the future.

75. Mr Chacko also relied on the decision of Judge Elizabeth Cooke in *Eastern Pyramid Group Corporation SA v Spire House RTM Company Limited* [2020] UKUT 0199 (LC). Judge Cooke explained at [38] that there is no assumption that the sender of a notice has got the procedure right and will not make mistakes:

> 38. As both parties acknowledge, the decision in *Mannai* sets out the important principle that what matters is not what this recipient should have been able to work out from the letter - for example in the light of the history of the dealings between them - but what the reasonable recipient would have understood. The reasonable recipient will not simply assume that the sender of the letter is going to get the procedure right and will not make mistakes. But the reasonable recipient will read the document objectively and is aware of the statutory scheme.

76. Mr Chacko also submitted that the FTT essentially resolved the contradiction in a way that would give effect to what HMRC were likely to want to do. Further, as Arden LJ stated in *Barclays*, a notice should not be approached on the basis that the recipient is taking legal advice on their situation. There was no particular reason to assume that HMRC would challenge every return filed in the context of this transaction. For example, it was never suggested in *Project Blue* that there was an error in the return by the financial institution, in this scheme, Return B made by Vale.

77. We are satisfied that in construing the June letters at [93] the FTT was not making assumptions as to what HMRC were likely to be doing or ought to have been doing in sending the letters. The FTT was not relying on what the reasonable recipient would have assumed to be the nature of HMRC's enquiry and challenges to the Arrangements or the reasons for the enquiry. It might have been better if the FTT had not used the word "assume", but it was not saying that the reasonable recipient would have supposed that HMRC was intending to give notice of enquiry into both returns. When [92] and [93] are

read as a whole, it is clear that the FTT applied the proper test of what a reasonable recipient of the letters in the circumstances of the Appellants would have understood regarding which returns were being enquired into. The reasonable recipient would have been aware of the background, including the Arrangements entered into and the two returns that had been filed by the Appellants. This was the factual context on which the FTT expressly relied at [92]. The FTT opened [93] by stating "Against this background". When it used the word "assume" the FTT was explaining what the reasonable recipient would automatically have understood the letters to mean in light of the background and that they would have had no doubt about this meaning. This did not depend on assumptions about HMRC's intentions or what HMRC might have been expected to do.

78. For the reasons set out above, when considered together and in context, the only tenable reading of the correspondence is that the letters were communicating that HMRC was enquiring into both returns. Taking into account potential or likely intentions or challenges by HMRC was not part of the FTT's analysis. Nor was the FTT making any assumption that no mistakes had been made by HMRC. Indeed it accepted that there was a mistake in one letter, but found that the reasonable recipient would resolve the inconsistency by looking to the wider factual circumstances.

79. As to legal advice, the reasonable recipient would be aware of the statutory scheme. Indeed, the circumstances of these Appellants included that they had taken legal advice from ELS. HMRC were aware of that fact and were also writing to ELS as the Appellants' agent.

80. Mr Chacko put forward what he described as an analogous situation involving similar mistakes to support his argument. However, this is not an area where argument by analogy provides any assistance. It is necessary to look at the particular circumstances of the Appellants and the particular context in which the letters were received.

81. In summary, we agree with the FTT's reasoning and conclusion that a reasonable taxpayer receiving the June 2011 letters would have had no doubt that HMRC were intending to give notices of enquiry into both returns.

82. Mr Chacko further submitted that the FTT erred at [94] where it relied on the correspondence after the June 2011 letters in seeking to resolve ambiguity in the letters. He submitted that the later correspondence was irrelevant in construing the letters. He also argued that the FTT was wrong in its findings as to the parties' subsequent conduct.

83. It is unnecessary for us to determine this point because it is clear to us that the FTT did not rely on the subsequent correspondence or conduct of the Appellants and their agents. It specifically stated that this was 'not strictly relevant' and it only referred to this material to 'fortify' a conclusion it had already reached. The FTT was clearly sense checking that its conclusion was consistent with the reality of how the letters had actually been understood. The Upper Tribunal in *Mabbutt* had adopted a similar approach at [66]. The FTT cannot be criticised in this regard. In any event, to the extent that Mr Chacko sought to challenge the FTT's findings of fact in this regard, that would only be permissible applying the principles in *Edwards v Bairstow* [1956] AC 14. No permission has been given for such a challenge.

84. For the reasons given above, Ground 2 does not establish any error of law by the FTT.

Section 83(2) FA 2003

85. In light of our conclusion above, there is no need to address HMRC's alternative argument that any mistake in the notices was cured by s83(2) FA 2003. The FTT considered the competing arguments on this issues at [95] – [100]. In particular, whether there is any difference between the common law test based on how a reasonable recipient would understand a notice and the test in s83(2) as to what was reasonably ascertainable by the recipient.

86. Section 83(2) provides that a notice for SDLT purposes is not ineffective by reason of any defect or omission if it is substantially in conformity with the requirements of the legislation and its intended effect is reasonably ascertainable by the person to whom it is directed:

> "Section 83 – Formal requirements as to assessments, penalty determinations etc
>
> (1) An assessment, determination, notice or other document required to be used in assessing, charging, collecting and levying tax or determining a penalty under this Part must be in accordance with the forms prescribed from time to time by the Board and a document in the form so prescribed and supplied or approved by the Board is valid and effective.
>
> (2) Any such assessment, determination, notice or other document purporting to be made under this Part is not ineffective—
>
> (a) for want of form, or
>
> (b) by reason of any mistake, defect or omission in it,
>
> if it is substantially in conformity with this Part and its intended effect is reasonably ascertainable by the person to whom it is directed…"

87. Mr Elliott submitted that the ordinary and natural meaning of the term 'reasonably ascertainable' imported a lower level of certainty as to the intended effect of a notice than the common law standard to which the recipient must be satisfied . He also submitted that in applying the statutory test, more weight would be given to the actual understanding of the taxpayer.

88. Mr Chacko submitted that s83(2) added nothing and imported the same test as the common law. The hypothetical reasonable recipient would be in the same position in relation to both tests. While s83(2) FA 2003 applies to a wide range of documents, in the context of a notice there is no real difference between the question whether a reasonable recipient would be left in doubt, and whether the meaning of the notice is reasonably ascertainable. If the reasonable taxpayer reading the documents would have some doubt as to what HMRC intended, then its meaning was not reasonably ascertainable.

89. We were referred to a decision of the FTT in *Coolatinney Development Limited v HMRC* [2011] UKFTT 252. However, it is not clear whether the FTT in that case viewed the test under s83(2) as being any different to the common law test. We were also referred to *GDF Suez* in this context, where the Upper Tribunal indicated that the common law test for validity of a notice should be applied before resorting to the equivalent of s83(2) in s114 Taxes Management Act 1970.

90. Given our conclusion on Ground 1 and Ground 2, we do not need to determine whether there is any material difference in the application of the two tests. We prefer not to express any view on the issue where it does not affect our determination of the appeal.

Conclusion on the Enquiry Appeal

91. For the reasons set out above we dismiss the Appellants' appeals against the FTT's Decision.

THE ASSESSMENT APPEAL

92. Our conclusion on the Enquiry Appeal is sufficient to dispose of the appeals and it is not strictly necessary to address HMRC's cross-appeal. However, having heard full argument on the Assessment Appeal we shall express our views upon it.

93. HMRC issued discovery assessments in 2017 following their enquiries into Return A and Return C. The assessments charged tax pursuant to s75A FA 2003 in order to protect HMRC's position should the enquiry notices be found to be invalid for any reason.

94. HMRC, in their cross-appeal, seek to challenge the Decision and submit that the FTT erred in law in deciding that the discovery assessments were out of time. They argue that the assessments were lawfully made in reliance upon the 20-year time limit in paragraph 31(2A)(b) Schedule 10 FA 2003 because the Appellants had failed to comply with an obligation under s76(1) to file a return in respect of the notional land transaction pursuant to s75A 2003.

The Legislation

The notional land transaction pursuant to s75A 2003

95. Section 75A FA 2003 is applicable to the Arrangements and this was conceded by the Appellants in 2022 following the *Project Blue* litigation.

96. Section 75A was introduced by s71 Finance Act 2007 and applies to disposals and acquisitions taking place on or after 6th December 2006. It applies where one person, V, disposes of a chargeable interest and another person, P, acquires it (or a chargeable interest deriving from it) and there are a number of scheme transactions, the result of which is that the amount of SDLT payable is less than the amount that would be payable on a notional land transaction under which P acquired V's chargeable interest. The effect of section 75A is that all scheme transactions that are land transactions are disregarded and there is deemed to be a "notional land transaction" effecting the acquisition of V's chargeable interest by P on its disposal by V. The consideration for the notional land transaction is determined under subsection (5):

> "Section 75A – Anti-avoidance
>
> (1) This section applies where–
>
> > (a) one person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it,

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

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

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

(a) a non-land transaction,

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

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

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

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

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

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

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

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

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

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

(4) Where this section applies–

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

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

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

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

(b) received by or on behalf of V (or a person connected with V within the meaning of section 1122 of the Corporation Tax Act 2010 by way of consideration for the scheme transactions.

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

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

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

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

(a) sections 71A to 73, or

(b) a provision of Schedule 9."

Notifiable Transactions

97. Section 76 FA 2003 requires the purchaser in relation to "every notifiable transaction" to deliver a land transaction return to HMRC within 30 days of the effective date of the transaction:

> "Section 76 – Duty to deliver land transaction return
>
> (1) In the case of every notifiable transaction the purchaser must deliver a return (a "land transaction return") to the Inland Revenue before the end of the period of 30 days after the effective date of the transaction.
>
> …
>
> (3) A land transaction return in respect of a chargeable transaction must -
>
> (a) include an assessment (a 'self-assessment') of the tax that, on the basis of the information contained in the return, is chargeable in respect of the transaction …"

98. For transactions prior to 12 March 2008, s77 did not specify that a notional land transaction under s75A was a notifiable transaction. However, for transactions, with an effective date on or after 12 March 2008, such as the Arrangements, section 77 (as amended by s94 Finance Act 2008) expressly provides that a notional transaction under s75A is a notifiable transaction:

> "Section 77 – Notifiable transactions
>
> (1) A land transaction is notifiable if it is–
>
> (a) an acquisition of a major interest in land that does not fall within one or more of the exceptions in section 77A,
>
> (b) an acquisition of a chargeable interest other than a major interest in land where there is chargeable consideration in respect of which tax is chargeable at a rate of 1% or higher or would be so chargeable but for a relief,
>
> (c) a land transaction that a person is treated as entering into by virtue of section 44A(3), or
>
> (d) a notional land transaction under section 75A…"

Assessments

99. HMRC may issue discovery assessments pursuant to paragraph 28(1) Schedule 10 FA 2003 where a loss of tax is discovered:

> "Assessment where loss of tax discovered
>
> 28(1) If the Inland Revenue discover as regards a chargeable transaction that—
>
> (a) an amount of tax that ought to have been assessed has not been assessed, or
>
> (b) an assessment to tax is or has become insufficient, or
>
> (c) relief has been given that is or has become excessive,
>
> they may make an assessment (a "discovery assessment") in the amount or further amount that ought in their opinion to be charged in order to make good to the Crown the loss of tax."

100. The general time limit for making an assessment is 4 years after the effective date of the transaction pursuant to paragraph 31(1) Schedule 10 FA 2003. The assessments in this case were made in 2017, over 6 years after the effective date of the transactions. However, where the loss of tax is attributable to a person failing to comply with an obligation under s76, namely an obligation to file a land transaction return in respect of a 'notifiable transaction', the time limit for issuing an assessment is 20 years from the effective date of the transaction by virtue of paragraph 31(2A)(b):

> "Paragraph 31 – Time limit for assessment
>
> (1) The general rule is that no assessment may be made more than 4 years after the effective date of the transaction to which it relates.
>
> (2) An assessment of a person to tax in a case involving a loss of tax brought about carelessly by the purchaser or a related person may be made at any time not more than 6 years after the effective date of the transaction to which it relates (subject to sub-paragraph (2A)).
>
> (2A) An assessment of a person to tax in a case involving a loss of tax—
>
> > (a) brought about deliberately by the purchaser or a related person,
> >
> > (b) attributable to a failure by the person to comply with an obligation under section 76(1) or paragraph 3(3)(a), 4(3)(a) or 8(3)(a) of Schedule 17A, or
> >
> > (c) attributable to arrangements in respect of which the person has failed to comply with an obligation under section 309, 310 or 313 of the Finance Act 2004 (obligation of parties to tax avoidance schemes to provide information to Her Majesty's Revenue and Customs),
>
> may be made at any time not more than 20 years after the effective date of the transaction to which it relates.
>
> …
>
> (5) Any objection to the making of an assessment on the ground that the time limit for making it has expired can only be made on an appeal against the assessment."

The FTT Decision

101. The FTT addressed 'the time limit issue' at [155]-[166]. It concluded at [164]-[166] that the discovery assessments were made out of time because Return A in relation to the Appellants' purchase of the property from the vendor with the benefit of sub-sale relief met the requirement under ss76 and 77 FA 2003 to file a return in respect of the notional transaction under s75A FA 2003. The extended time limit in paragraph 31(2A)(b) was therefore not engaged:

> "164. …As I understand it, [Mr Chacko's] analysis – consistent with the Upper Tribunal's comments in *Brown* (*Brown* [88]-[89]) – is as follows.
>
> (1) Under section 76(1), a return is filed by the "purchaser" in respect of a "notifiable transaction" as defined in section 77(1) FA 2003.
> (2) As the opening words of that section make clear, each notifiable transaction is a "land transaction". A "land transaction" is "any acquisition of a chargeable interest" (section 43 FA 2003). The reference to the "purchaser" in section 76 is to the person acquiring the chargeable interest (section 43(4) FA 2003).

(3) As the Upper Tribunal identified in *Brown*, the matters that are covered by the return are defined by reference to the land transaction i.e. the particular acquisition of a chargeable interest by the particular purchaser. It does not matter whether the acquisition for SDLT purposes takes place pursuant an actual transaction or to a notional transaction under section 75A.
(4) On that analysis, in a case, such as this, where the acquisition of the relevant chargeable interest by the purchaser is the subject of a return made by the same purchaser, that return (i.e. Return A) will meet the requirement to submit a return in respect of the notional transaction for the purposes of section 76 and section 77 FA 2003.
(5) If so, in this case, paragraph 31(2A)(b) Schedule 10 FA 2003 does not apply; the discovery assessments were made outside the time limits in paragraph 31 FA 2003 and are out of time.

165. I should note, however, that the transactions in *Project Blue* (and in *Brown*) took place under a slightly different regime for the notification of land transactions in SDLT returns. In particular, they took place before the introduction in Finance Act 2008 of a new section 77 FA 2003, which included the specific reference to "a notional land transaction under section 75A" (in paragraph (d) of subsection (1)) in the list of notifiable transactions. The effect of that change, in combination with the obligations to file returns in section 76 FA 2003, was to introduce a specific obligation to file an SDLT return in respect of a notional land transaction created by section 75A FA 2003. There was no such specific reference in the prior legislation.

166...However, if I am wrong on that issue [the validity of the enquiry notices], I would agree with Mr Chacko that Return A was a return in respect of the notional transaction under section 75A. Paragraph 31(2A)(b) Schedule 10 FA 2003 does not apply. The discovery assessments are therefore out of time."

102. In these paragraphs the FTT was referring to the decision of the Upper Tribunal in *Brown v HM Revenue & Customs* [2022] UKUT 298. That decision was subsequently upheld by the Court of Appeal at [2024] EWCA Civ 92.

Outline Submissions

103. Mr Elliott's case was that the FTT erred in law in finding that Return A was a return in respect of the notional land transaction under s75A.

104. Mr Chacko's case was that HMRC's position is contrary to the approach both of the Supreme Court in *Project Blue* and of the Court of Appeal in *Brown*. He submitted as follows.

105. In *Project Blue*, Lord Hodge explained at [81] - [84] that where a return showing zero consideration had been filed for the acquisition of the land by Project Blue ("PBL") from the Ministry of Defence ("MoD"), the equivalent of Return A, it could be amended by HMRC to bring in a charge under s75A on the notional transaction, which was the acquisition of the same land by the same purchaser. The s75A notional transaction was part of the tax consequences of the sale in relation to which the return had been filed.

106. In *Brown*, no return had been filed at all. HMRC therefore raised a determination in respect of the taxpayer's acquisition of the property under paragraph 25 Schedule 10 FA 2003. We should note at this stage that if by the filing date no land transaction return has been submitted in relation to a chargeable transaction, HMRC may make a determination pursuant to paragraph 25 of the tax chargeable in respect of the transaction. No determination can be made more than 4 years after the effective date of the transaction, which is usually the date of completion in relation to a property purchase.

107. The taxpayer in *Brown* argued that if HMRC wanted to rely on s75A as the basis for a charge to tax they should have raised two determinations: one for the actual acquisition of the property and one for the notional acquisition of the property. The Court of Appeal disagreed, explaining that s75A is a deeming provision which, at least where the notional transaction involves the same person acquiring the property as the actual transaction, only serves to calculate the proper amount of SDLT due (see Lewison LJ at [68] - [69]) but which does not ignore the real-world acquisition of the property. Therefore, the same determination in respect of that acquisition could be upheld either on the basis that a relief had wrongly been claimed or on the basis that s 75A applied.

108. Mr Chacko contended that in these appeals, the real world purchase was disclosed in Return A. Section 75A operates, as set out in *Brown*, to recalculate the consideration in respect of that acquisition. The consequences of the notional transaction are within the scope of the material in that return, as explained by Lord Hodge in *Project Blue*. The FTT was right, therefore, to find there had been no failure to file the relevant return and para 31(2A)(b) did not apply.

109. Mr Chacko submitted that the Appellants' advisors wrote to HMRC explaining why they did not think a s75A charge applied. Paragraph 31(2A)(b) must be construed purposively, like any other legislation, and it is hard to see how on any realistic view of the facts the understatement of tax here is attributable to a failure to disclose the transaction to HMRC. He argued that on HMRC's case it is not clear how a taxpayer would ever avoid a 20-year assessment window if s75A is in issue. Even if a fourth return had been filed, also for zero consideration, as that was the view the Appellants' advisers had taken, but stating that it was for the notional transaction between the Appellants and the vendor, that would have been a different notional transaction to the one upheld in *Project Blue*. The consideration would be different, and HMRC would presumably still argue that there had been a failure to file a return.

Discussion

110. Whilst it makes no difference to the outcome of these appeals, we agree with Mr Elliott that the FTT did err in law in determining the Assessments Appeal and finding that HMRC's protective discovery assessments were out of time.

111. The starting point is the wording of s77(1), as amended by Finance Act 2008 to specifically identify the notional transaction under s75A as a notifiable transaction. Section 76 therefore requires a taxpayer to file a return in respect of a notional transaction. The wording of the legislation is unambiguous in this regard. In particular, section 76 states that the taxpayer is obliged to deliver a return in relation to "every notifiable transaction". The actual scheme transactions are to be disregarded so there was no obligation to file any returns in respect of those transactions.

112. Mr Chacko sought to argue for a purposive interpretation of ss 75A, 76 and 77. It is right to give the sections a purposive interpretation. The purpose is to inform HMRC of transactions in respect of which liability arises and for the taxpayer to self-assess that liability. In *Project Blue* it was found that HMRC could open an enquiry into a return filed in relation to one of the scheme transactions and issue a closure notice which charged tax pursuant to s75A. That says nothing about the requirement to file a return for the notional land transaction.

113. Failure to file a return for the notional transaction is relevant for the purpose of penalties and also for time limits in relation to assessments. It is clear that Parliament intended there to be an extended time limit for HMRC to make an assessment where no return was filed for the notional transaction.

114. We take into account the following factors relied on by Mr Elliott:

(1) Section 75A is an anti-avoidance provision and where it applies the transactions may be complicated.

(2) The taxpayer is required to identify whether s75A applies, including whether a number of scheme transactions are involved in connection with the disposal and acquisition. That is clearly within the taxpayer's knowledge.

(3) The notional transaction under s75A may involve transactions that are not land transactions, and which are not otherwise notifiable to or known about by HMRC. There may be consideration in respect of those transactions not directly payable in respect of a land transaction and which would not otherwise be included in any other land transaction return.

(4) The notional land transaction may be between different parties. This may be significant if the status of the transferee or transferor gives rise to a different liability. For example, relief for alternative property finance under s71A will not be available on the notional transaction if neither V nor P is a financial institution.

(5) The notional transaction takes place in the absence of other scheme transactions which are "disregarded" under s75A(4)(a). It is treated as being the acquisition of the chargeable interest disposed of by V. This may affect the nature of the transaction and the availability of reliefs arising from subsequent land transactions. For example, in the present case the actual transaction was one where Vale became entitled to call for a conveyance within the meaning of s45 whereas the notional land transaction was a straightforward acquisition of the freehold by the Appellants.

(6) The notional transaction may have a different effective date and be chargeable to tax at a different rate.

(7) If a taxpayer fails to file a return it may take HMRC a number of years to identify that s75A is applicable.

115. Parliament has made provision for an extended time limit, permitting assessments to be made within 20 years where no return for the notional land transaction has been filed. In the context described above, we are satisfied that this was the intention of Parliament in specifically providing that a notional transaction is a notifiable transaction. We do not consider that *Project Blue* or *Brown* support any different conclusion.

116. In *Project Blue*, the taxpayer had filed a return in respect of the actual transaction whereby PBL acquired the property from the MoD, but not in respect of the notional transaction under s75A. The Supreme Court did not hold that the taxpayer had no obligation to file a return in respect of the notional transaction. Rather, it concluded that it was possible for HMRC to impose liability in respect of the s75A notional transaction by making amendments to the return filed in a closure notice following an enquiry into that return. Indeed, the Supreme Court appears to have acknowledged that even before

the amendment to s77 in Finance Act 2008, there was, or at least may have been, an obligation on the taxpayer to file a return for the notional transaction. Lord Hodge stated at [83]:

> "HMRC were entitled to inquire into that sale and, on ascertaining that it was a part of a series of transactions which gave rise to a section 75A charge, to amend the return to reflect the tax due on the notional freehold acquisition under section 75A(5). Any obligation on PBL to submit a return in relation to the notional transaction does not limit the scope of HMRC's power to inquire into the MoD-PBL sale or their power to amend the return under paragraph 23."

117. The power of HMRC to amend a return filed in respect of an actual transaction to impose liability in respect of a notional transaction does not undermine the obligation of the taxpayer to file a return in respect of the notional transaction. It was not argued in *Project Blue* that the return for the actual transaction between the MoD and PBL was in fact a return in relation to the notional transaction so as to justify HMRC's charge to tax under s75A. Indeed, it appears from [82] of the decision that PBL specifically argued that the equivalent of Return A was not a return relating to the notional transaction. HMRC did not challenge that argument but instead relied on the scope of the enquiry into the return for the actual transaction.

118. In *Brown,* Mr and Mrs Brown purchased a property using a SDLT avoidance scheme. They set up a company with sufficient cash to purchase the property. The vendor contracted to sell the property to the company. At the same time as completion of that contract, the company reduced its share capital and distributed the property to Mr and Mrs Brown in specie. The vendor executed a transfer to the company which simultaneously executed a transfer to Mr and Mrs Brown. It was intended that the contract between the vendor and the company would be disregarded by way of sub-sale relief under s45. In the absence of consideration paid by Mr and Mrs Brown for the distribution no SDLT was payable and they were not required to make a return. The company filed a land transaction return claiming sub-sale relief. The Court of Appeal held that a charge did arise under s45 and no sub-sale relief was available.

119. The Court of Appeal went on to consider the position if sub-sale relief had been available. In those circumstances, Mr and Mrs Brown had accepted that s75A would be engaged. However, they raised a procedural question as to whether HMRC's determination could impose liability either under s45 or s75A because HMRC had not specified on what basis tax was chargeable. The Court of Appeal held that the scope of the determination was sufficiently broad to impose liability under either provision in circumstances where the determination identified the property and the date of the transaction and did not specify whether it was imposing liability under s45 or s75A. The Court stated at [67] and [71]:

> "67. I cannot see that this makes any difference. In the notional world prescribed by section 75A(4) Mr and Mrs Brown still acquire the freehold. That acquisition gives rise to a duty to deliver a land transaction return. Since Mr and Mrs Brown delivered no land transaction return, HMRC were entitled to make a determination of the amount of SDLT chargeable in respect of the transaction. The "transaction" is the notional transaction consisting of Mr and Mrs Brown's acquisition of the freehold on a disposal

> by Mr Hamm. But it is still an acquisition of the same freehold. HMRC's determination related to the acquisition of 9 Earlswood. That is precisely what Mr and Mrs Brown acquired, either in the real world, or under the notional land transaction. Either way, I consider that it was within the scope of HMRC's determination."
>
> "71. In the present case, the determination did no more than to identify the acquisition by Mr and Mrs Brown, the property acquired, and the date on which the acquisition took place. It did not set out any legal analysis; and in my judgment on the basis of this determination HMRC were free to advance any legal analysis which justified the determination. It may be that on different facts HMRC make a determination in prescriptive terms, which will cut down their options. But that will have to wait for a case in which it matters."

120. *Brown* was concerned with the scope of HMRC's determination in the same way that *Project Blue* was concerned with the scope of HMRC's enquiry and closure notice. It provides no support for the Appellants' proposition that a land transaction return delivered in relation to the actual transaction which has been disregarded can be treated as a return in relation to the notional transaction.

121. What we must do is consider whether Return A can properly be construed as a return of the notional land transaction. In our view the FTT was wrong to conclude at [166] that Return A was capable of being construed as a return for the notional transaction. Mr Chacko is right to observe that Return A involves the same parties, property and conveyance of the freehold as the notional transaction. Nonetheless, Return A is substantially different in substance to a return for the notional transaction. In particular, a claim to sub-sale relief was made which could not apply to the notional transaction. The tax self-assessed was therefore nil whereas in a return of the notional transaction the correct amount of tax on the basis of the information in the return should have been self-assessed (see s76(3)(a)). The Appellants' agent also sent a letter to HMRC with the return specifically asserting that s75A did not apply. In those circumstances, Return A cannot be construed as a return in relation to the notional transaction.

122. It was suggested by Mr Elliott that the Appellants could have avoided the 20-year extended time limit for a discovery assessment by making a protective return for the notional transaction (see *Redmount Trust Company Limited v HM Revenue & Customs* [2023] UKUT 00068 (TCC) at [43] and [53] – [57]). It is not clear to us that a protective return which was inconsistent with another return submitted by the appellants could have been filed. It does occur to us that the Appellants could have made a return of the notional transaction, self-assessed the tax payable and later amended the return or applied for repayment of tax considered to have been overpaid in connection with the notional transaction. These possibilities were not canvassed during the hearing. In the event, it is not necessary for us to determine what if any options were available to the Appellants. The fact that the Appellants might be unable to avoid the 20-year time limit where there may be a different legal analysis to the one they have relied on, does not mean that they should be treated as complying with an obligation where they have plainly not complied with that obligation. The effect is simply that HMRC have an extended time limit in which to collect the correct amount of tax. It seems to us that this result accords with the purpose of the provisions.

123. Mr Chacko also relied on certain extra statutory materials. These included the Explanatory Notes to Finance Bill 2008, and extracts from Hansard said to relate to the amendment of s77 in 2008 and Parliament's intent at that time as to the need for a land transaction return for the notional transaction. In our view those materials do not assist in construing the plain and natural meaning of the statutory provisions and it is not necessary for us to consider them further.

124. In his skeleton argument, Mr Chacko also suggested that paragraph 31(2A)(b) was not engaged because no loss of tax was attributable to a failure to disclose the transaction to HMRC. He did not really develop this argument in his oral submissions. In any event, the question is not whether the loss of tax was attributable to a failure to disclose a transaction, but whether it was attributable to a failure to comply with the obligation to file a return in respect of the notional transaction. In our view, the loss of tax could clearly be attributed to the Appellants' failure to file a return in relation to the notional transaction which would have included a self-assessment of the tax payable on that transaction.

125. For all these reasons we are satisfied that the FTT erred in law in relation to the Assessment Appeal. It wrongly concluded that Return A was a return in respect of the notional transaction under section 75A. We allow HMRC's cross-appeal. The error of law was material and the Decision in relation to the Assessment Appeal is set aside. We re-make the decision confirming HMRC's discovery assessments as validly made within the extended time limits and the SDLT assessed as lawfully recoverable from the Appellants. The assessments form an additional or alternative basis to the closure notices by which the Appellants are liable to pay SDLT.

CONCLUSION

126. For the reasons set out above, the Appellants' appeal against the Decision is dismissed and HMRC's cross-appeal is allowed.

JUDGE RUPERT JONES JUDGE JONATHAN CANNAN

UPPER TRIBUNAL JUDGES

Release date: 28 May 2025