How should SDLT anti-avoidance measures be interpreted where a scheme uses a combination of a sub-sale and Shari'a-compliant financing?

Patrick Cannon and Oliver Marre of Tax Chambers, 15 Old Square believe the Tribunal still has some way to go when interpreting the SDLT anti-avoidance provisions in the Finance Act 2003,s 75A (FA 2003).

Original news

TC02777: Project Blue Limited [2013] UKFTT 378 (TC)

In 2007 Project Blue Ltd, a Guernsey company, agreed to purchase the freehold of a large army barracks from the Ministry of Defence (MoD). In January 2008 the company entered into a sale and leaseback agreement with a Qatari bank. Two days later the bank and the company entered into put and call options requiring or entitling the company to repurchase the freehold at the end of a 'finance period' (of 999 years and 2 days). The MoD conveyed the freehold to the company. The company conveyed the freehold to the bank, and the bank leased the property back to the company for the 'finance period'. On the following day the company granted a 999-year lease to an associated company.

The company failed to account for SDLT on its acquisition of the property. HMRC began an enquiry, and is-sued an amendment on the basis that SDLT was chargeable on consideration of £959,000,000. The company appealed. HMRC subsequently issued an amendment to their Statement of Case, contending that the effect of FA 2003, s 75A(5) was that the chargeable consideration had in fact been £1,250,000,000 (the amount paid by the bank to the company for the sub-sale of the freehold).

The First-tier Tribunal upheld HMRC's amended Statement of Case, holding that the effect of FA 2003, s 75A was that the company was chargeable to SDLT in respect of a notional land transaction, and that the chargeable consideration in respect of that notional land transaction had been £1,250,000,000.

What did the tribunal decide?

It decided that SDLT was payable on an SDLT scheme used to purchase the Chelsea Barracks from the MoD in 2007/08. The scheme advised on by Clifford Chance combined a sub-sale from Project Blue Ltd (the original purchaser) to Qatari Bank Masraf al Rayan (MAR) with a leaseback from MAR to Project Blue Ltd.

Project Blue Ltd claimed the original purchase fell out of account for SDLT as a sub-sale under FA 2003, s 45(3), and the subsequent sale and leaseback was exempt under the exemption from SDLT for Shari'a-compliant financing in FA 2003, s 71A. The tribunal decided FA 2003, s 75A disregarded the combined sub-sale and sale and leaseback transactions and imposed SDLT on a notional sale from the original vendor (the MoD) to the original purchaser (Project Blue Ltd). The deemed consideration under the s 75A notional transaction was held to be the £1.25bn payable in respect of the sale and leaseback rather than the £970m actually paid to the MoD. Hence the SDLT was £50m and effectively included a financing cost, rather than the £38m it would have been had Project Blue Ltd not appealed HMRC's original assessment.

At key points the judgment seems to leap from a careful analysis to a conclusion that is not clearly derived from that analysis--such as in relation to the identity of 'V' and 'P' and the importance of a tax avoidance motive. This allows for plenty of grounds to appeal this decision.

Does the judgment clarify the meaning of 'in connection with' in FA 2003, s 75A?
To some extent. The tribunal held (correctly) that the word 'involved' qualified 'in connection with' and required more than just a sequential--or 'but for'--connection before separate steps in a series could be connected.
However, the tribunal then went on to apply what looks like a simple 'but for' test in holding that the sub-sale to MAR and the leaseback to Project Blue Ltd were involved in connection with the sale by the MoD. Rather worryingly, the judgment at para [253] confuses MAR and MoD.

Does the judgment assist in identifying 'V' and 'P' for the purpose of s 75A?
Again, the judgment is unsatisfactory because at para [240] the tribunal simply agreed with HMRC's assertion that 'V' was the MoD and 'P' was Project Blue Ltd on the basis that it was the party avoiding tax.

Is motive at all relevant in applying these provisions?
At para [235] the judgment accepts HMRC's submission that a tax avoidance motive and intention are not pre-conditions for the application of s 75A. Again, this sits oddly with HMRC's published guidance which asserts that a tax avoidance motive is needed. The tribunal rejected the taxpayer's submission that s 75A was not engaged where there was a commercial motive and no tax avoidance. The taxpayer may not have helped its case here by using legal privilege to cloak the tax structure paper considered by the board of Project Blue Ltd instead of coming clean that SDLT avoidance played a role.

Would the outcome have been different if the taxpayer had not relied on a combination of two reliefs from SDLT?
The hoped-for SDLT saving could not then have arisen. But what is most unsatisfactory about the judgment are two flaws in its reasoning.
First, there is no such thing as 'sub-sale relief'. FA 2003, s 45 is prescriptive and simply defines the land transactions that are deemed to occur when there is a sub-sale. No relief is claimed and there is deemed to be a notional secondary contract between the original purchaser and the sub-purchaser (compare the new pre-completion sub-sale rules where a relief is claimed). The original transaction is disregarded.
Hence there was not, in reality, a combining of two reliefs because there was in reality only one relief--the exemption for Shari'a-compliant financing in s 71A. The taxpayer's counsel does not appear to have put this argument which is a matter of some regret. Indeed he seemed to accept that there was such a relief as sub-sale 'relief'.
This led to the other flaw in the judges' reasoning which was that s 75A(7) did not prevent s 75A from biting. Section 75A(7) says that s 75A does not apply where the tax saving test is satisfied only by rea-son of the SDLT provisions for Shari'a-compliant financing. The judges held with little argument that the SDLT was nil 'because of the combined effect of both s 45(3) and s 71A'.
In other words it was not only s 71A that led to the tax saving. The correct comparison was between a s 45 transaction that did not claim s 71A relief and one that did--not between a non-s 45 transaction and a s 45 transaction that did claim s 71A relief. Apples have been compared with pears.

Should tax advisers be more cautious about submitting SDLT avoidance scheme notifications in light of this decision?
Possibly. The taxpayer made a tax avoidance schemes (DOTAS) disclosure even though such a disclosure was arguably not required. The tribunal attached significance to this as evidencing that the transaction had been structured to obtain an SDLT advantage.

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