

SDLT: Points of Controversy 2017

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Agenda

1. When can you get a closure notice? *Frosh v HMRC* [2017]
2. SDLT Follower Notices, APNs and *Crest Nicholson*
3. Is there a gap in the 3% additional rate of SDLT?

When can you get a closure notice?

Frosh v HMRC [2017] UKUT 0320

- Generic SDLT sub-sale scheme with over 700 cases under enquiry
- Scheme provider had supplied full disclosure to HMRC for an agreed sample of 70 cases
- HMRC had written to scheme users in 2013 and 2015 stating their scheme did not work and would be litigated unless they settled
- But HMRC were still insisting on full disclosure of docs for all cases which had not been supplied and refused to issue closure notices
- Could HMRC be forced to issue closure notices?

Closure notices cont'd

- HMRC must give a closure notice *unless* they have reasonable grounds not to: para 24 Sch 10 FA 2003
- Did the invitation to settle letters mean that it was unreasonable for HMRC to prolong the enquiries?
- FTT held no and that absence of requested information was critical as HMRC might wish to raise implementation issues in individual cases
- UT held no error of law by FTT which had made a “value judgment”: v hard to attack a “value judgment” on appeal: *MORI v HMRC* [2015]

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- ***Direction to complete enquiry***

24—

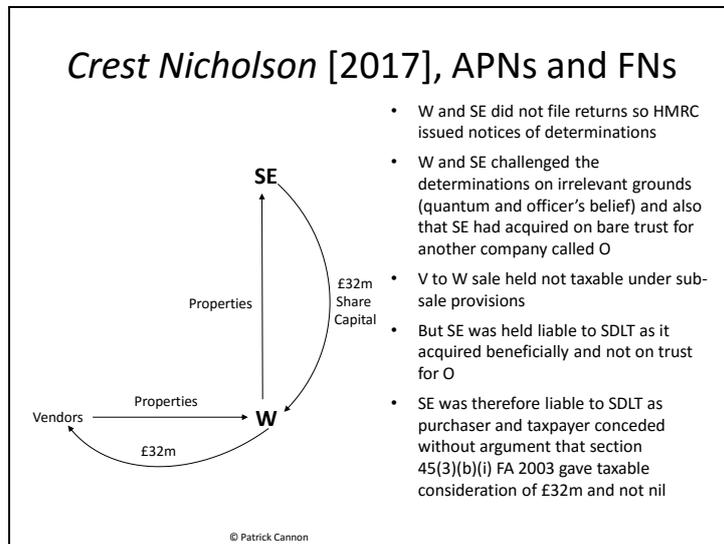
(1) The purchaser may apply to the [tribunal] for a direction that the Inland Revenue give a closure notice within a specified period.

[(2) Any such application is to be subject to the relevant provisions of Part 5 of the Taxes Management Act 1970 (see, in particular, section 48(2)(b) of that Act).]

(3) The tribunal hearing the application shall give a direction unless satisfied that the Inland Revenue have reasonable grounds for not giving a closure notice within a specified period.

- *MORI v HMRC* [2015] STC 1205 at [16]-[17] : deciding whether a party has acted unreasonably is not the exercise of a discretion but a matter of value judgment and on an appeal against such a value judgment the appellate tribunal must approach this with caution as the FTT is the primary maker of the value judgment. This approach applies to closure notices and also where costs are applied for on the basis that the other side have acted unreasonably.

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• **Right of appeal**

35—

(1) An appeal may be brought against—

(e) a Revenue determination under paragraph 25 (determination of tax chargeable if no return delivered).]

Notice of appeal

36—

(1) Notice of an appeal under paragraph 35 must be given—

- (a) in writing
- (b) within 30 days after the specified date,
- (c) to the relevant officer of the Board.

(5) The notice of appeal must specify the grounds of appeal.

(5A) **The only grounds on which an appeal lies under paragraph 35(1)(e) are that—**

- (a) the purchase to which the determination relates did not take place,
- (b) the interest in the land to which the determination relates has not been purchased,
- (c) the contract for the purchase of the interest to which the determination relates has not been substantially performed, or
- (d) **the land transaction is not notifiable (for example, because the land transaction is exempt from charge under Schedule 3).**

- Taxpayers argued that SE acquired the properties for another company O on trust which was liable for the SDLT but that HMRC were now out of time to assess O but FTT held that the trust declaration by SE only affected property held by SE at date of trust 31.10.1991 and not property acquired by SE after this date so SE did not acquire the properties as bare trustee for O but for SE as beneficial owner and so SE was liable for the SDLT

Crest Nicholson cont'd

- Is *Crest Nicholson* is a judicial ruling which is relevant and denies the tax advantage of this type of sub-sale scheme?
- If so follower notices can be issued to other users of similar schemes
- But the technical point was conceded and not argued – does this make a difference?
- No appeal so JR or make representation that ruling not relevant
- Penalty of 50% if appeal not withdrawn and tax paid
- Appeal against penalty on ground that ruling not relevant or reasonable in all the circumstances not to have withdrawn appeal

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204 Circumstances in which a follower notice may be given

- (1) HMRC may give a notice (a “follower notice”) to a person (“P”) if Conditions A to D are met.
- (2) Condition A is that—
 - (a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or
 - (b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax, but that appeal has not yet been—
 - (i) determined by the tribunal or court to which it is addressed, or
 - (ii) abandoned or otherwise disposed of.
- (3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage (“the asserted advantage”) results from particular tax arrangements (“the chosen arrangements”).
- (4) Condition C is that HMRC is of the opinion that there is a judicial ruling which is relevant to the chosen arrangements.
- (5) Condition D is that no previous follower notice has been given to the same person (and not withdrawn) by reference to the same tax advantage, tax arrangements, judicial ruling and tax period.....

205 “Judicial ruling” and circumstances in which a ruling is “relevant”

- (1) This section applies for the purposes of this Chapter.
- (2) “Judicial ruling” means a ruling of a court or tribunal on one or more issues.
- (3) A judicial ruling is “relevant” to the chosen arrangements if—
 - (a) it relates to tax arrangements,
 - (b) the principles laid down, or reasoning given, in the ruling would, if applied to the chosen arrangements, deny the asserted advantage or a part of that advantage, and
 - (c) it is a final ruling.
- (4) A judicial ruling is a “final ruling” if it is—
 - (a) a ruling of the Supreme Court, or
 - (b) a ruling of any other court or tribunal in circumstances where—
 - (i) no appeal may be made against the ruling,
 - (ii) if an appeal may be made against the ruling with permission, the time limit for applications has expired and either no application has been made or permission has been refused,
 - (iii) if such permission to appeal against the ruling has been granted or is not required, no appeal has been made within the time limit for appeals, or
 - (iv) if an appeal was made, it was abandoned or otherwise disposed of before it was determined by the court or tribunal to which it was addressed.
- (5) Where a judicial ruling is final by virtue of sub-paragraph (ii), (iii) or (iv) of subsection (4)(b), the ruling is treated as made at the time when the sub-paragraph in question is first satisfied.

214 Appeal against a section 208 penalty

- (1) P may appeal against a decision of HMRC that a penalty is payable by P under section 208.
- (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P under section 208.
- (3) The grounds on which an appeal under subsection (1) may be made include in particular—
 - (a) that Condition A, B or D in section 204 was not met in relation to the follower notice,
 - (b) that the judicial ruling specified in the notice is not one which is relevant to the chosen arrangements,
 - (c) that the notice was not given within the period specified in subsection (6) of that section, or
 - (d) that it was reasonable in all the circumstances for P not to have taken the necessary corrective action (see section 208(4)) in respect of the denied advantage.

Crest Nicholson cont'd

- Accelerated payment notices will also be issued off the back of the follower notices
- FNs and APNs to be issued imminently to 1,000+ users just as FTT has issued detailed directions for the hearing of lead test cases for various user groups with cases under appeal
- Intended to frustrate the litigation and force users to settle
- Is the FN penalty a breach of the article 6 right to a fair trial given that the penalty means that these are “criminal” proceedings so that the article is engaged?

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219 Circumstances in which an accelerated payment notice may be given

- (1) HMRC may give a notice (an “accelerated payment notice”) to a person (“P”) if Conditions A to C are met.
- (2) Condition A is that—
 - (a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or
 - (b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax but that appeal has not yet been—
 - (i) determined by the tribunal or court to which it is addressed, or
 - (ii) abandoned or otherwise disposed of.
- (3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage (“the asserted advantage”) results from particular arrangements (“the chosen arrangements”).
- (4) **Condition C is that one or more of the following requirements are met—**
 - (a) **HMRC has given (or, at the same time as giving the accelerated payment notice, gives) P a follower notice under Chapter 2—**
 - (i) **in relation to the same return or claim or, as the case may be, appeal, and**
 - (ii) **by reason of the same tax advantage and the chosen arrangements;**
 - (b) the chosen arrangements are DOTAS arrangements;
 - (c) a GAAR counteraction notice has been given in relation to the asserted advantage or part of it and the chosen arrangements (or is so given at the same time as the accelerated payment notice) in a case where the stated opinion of at least two of the members of the sub-panel of the GAAR Advisory Panel which considered the matter under paragraph 10 of [Schedule 43](#) to FA 2013 was as set out in paragraph 11(3)(b) of that Schedule (entering into tax arrangements not reasonable course of action etc).
 - (d) a notice has been given under paragraph 8(2) or 9(2) of [Schedule 43A](#) to FA 2013 (notice of final decision after considering Panel's opinion about referred or counteracted arrangements) in relation to the asserted advantage or part of it and the chosen arrangements (or is so given at the same time as the accelerated payment notice) in a case where the stated opinion of at least two of the members of the sub-panel of the GAAR Advisory Panel about the other arrangements (see subsection (8)) was as set out in paragraph 11(3)(b) of [Schedule 43](#) to FA 2013;
 - (e) a notice under paragraph 8(2) of [Schedule 43B](#) to FA 2013 (GAAR: generic referral of tax arrangements) has been given in relation to the asserted advantage or part of it and the chosen arrangements (or is so given at the same time as the accelerated payment notice) in a case where the stated opinion of at least two of the members of the sub-panel of the GAAR Advisory Panel which considered the generic referral in respect of those arrangements under paragraph 6 of [Schedule 43B](#) to FA 2013 was as set out in paragraph 6(4)(b) of that Schedule.]¹
- (5) “DOTAS arrangements” means—
 - (a) notifiable arrangements to which HMRC has allocated a reference number under [section 311](#) of FA 2004,
 - (b) notifiable arrangements implementing a notifiable proposal where HMRC has allocated a reference number under that section to the proposed notifiable arrangements, or
 - (c) arrangements in respect of which the promoter must provide prescribed information under [section 312\(2\)](#) of that Act by reason of the arrangements being substantially the same as notifiable arrangements within paragraph (a) or (b).
- (6) But the notifiable arrangements within subsection (5) do not include arrangements in relation to which HMRC has given notice under [section 312\(6\)](#) of FA 2004 (notice that promoters not under duty imposed to notify client of reference number).
- (7) “GAAR counteraction notice” means a notice under paragraph 12 of [Schedule 43](#) to FA 2013 (notice of final decision to counteract under the general anti-abuse rule).
- (8) In subsection (4)(d) “other arrangements” means—
 - (a) in relation to a notice under paragraph 8(2) of [Schedule 43A](#) to FA 2013, the referred arrangements (as defined in that paragraph);
 - (b) in relation to a notice under paragraph 9(2) of that Schedule, the counteracted arrangements (as defined in paragraph 2 of that Schedule).]¹

Is there a gap in the 3% additional rate?

Undivided equitable estate held by A and B as joint tenants or tenants in common

Legal title held by A and B on trust of land

The Old Vicarage

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- If a buyer who is an individual already owns a major interest in another dwelling then 3% additional rate charged on new dwelling
- What is a “major interest”?
- *Pollen Estate v HMRC* [2013] tells us that with joint ownership there is only one equitable estate and that is both a chargeable interest and a major interest
- And the equitable estate is held in undivided shares ie that estate is not divided
- So the individual interests of joint tenants are not major interests

Sch 4ZA

Meaning of “higher rates transaction” etc

2

(1) This paragraph explains how to determine whether a chargeable transaction is a “higher rates transaction” for the purposes of paragraph 1.

(2) In the case of a transaction where there is only one purchaser, determine whether the transaction falls within any of paragraphs 3 to 7; if it does fall within any of those paragraphs it is a “higher rates transaction” (otherwise it is not).

(3) In the case of a transaction where there are two or more purchasers—

(a) take one of the purchasers and determine, having regard to that purchaser only, whether the transaction falls within any of paragraphs 3 to 7, and

(b) do the same with each of the other purchasers.

If the transaction falls within any of those paragraphs when having regard to any one of the purchasers it is a “higher rates transaction” (otherwise it is not).

(4) For the purposes of this Schedule any term of years absolute or leasehold estate is not a “major interest” if its term does not exceed 7 years on the date of its grant.

Single dwelling transactions

3

(1) A chargeable transaction falls within this paragraph if—

(a) the purchaser is an individual,

(b) the main subject-matter of the transaction consists of a major interest in a single dwelling (“the purchased dwelling”), and

(c) Conditions A to D are met.

(2) Condition A is that the chargeable consideration for the transaction is £40,000 or more.

(3) Condition B is that on the effective date of the transaction the purchased dwelling—

(a) is not subject to a lease upon which the main subject-matter of the transaction is reversionary, or

(b) is subject to such a lease but the lease has an unexpired term of no more than 21 years.

(4) Condition C is that at the end of the day that is the effective date of the transaction—

(a) the purchaser has a major interest in a dwelling other than the purchased dwelling,

(b) that interest has a market value of £40,000 or more, and

(c) that interest is not reversionary on a lease which has an unexpired term of more than 21 years.

(5) Condition D is that the purchased dwelling is not a replacement for the purchaser's only or main residence.....

Lewison LJ in *Pollen*: “...there is only one equitable estate. It is held by a number of tenants in common in undivided shares; but the crux is that the shares are undivided. Since the shares are undivided, the equitable estate is not divided.” [40] and “It follows that when one comes to identify the ‘subject matter’ of the transaction....one does so by reference to the equitable estate that has been collectively acquired.” and “There is no need to dissect the single land transaction any further.”

Is there a gap in the 3% additional rate? Cont'd

Porterhouse College — Sir Godber Evans

50% 50%



Grantchester Hall

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- HMRC confirmed this approach in August 2007 Technical News: “In addition, we would not wish to argue that an undivided share was a major interest.”
- Contrary indications? Para 16 Sch 4ZA
- But para 6F Sch 4A?
- What about joint purchases of dwellings by charities and individuals? Is the 15% higher rate or the 3% additional rate due?

Major interests in dwellings inherited jointly

16

- (1) This paragraph applies where by virtue of an inheritance—
- (a) **a person (“P”) becomes jointly entitled with one or more other persons to a major interest in a dwelling**, and
- (b) P's beneficial share in the interest does not exceed 50% (see sub-paragraph (4)).
- (2) **P is not to be treated for the purposes of paragraph 3(4)(a) or 6(1)(e) as having the major interest at any time during the period of three years beginning with the date of the inheritance.**
- (3) But if at any time during that period of three years P becomes the only person beneficially entitled to the whole of the interest or P's beneficial share in the interest exceeds 50% P is, from that time, to be treated as having the major interest for the purposes of paragraph 3(4)(a) and 6(1)(e) (subject to any disposal by P).

Sch 4A

6F—

- (1) This paragraph applies where relief under paragraph 5B (trades involving making a dwelling open to the public) has been allowed, in accordance with paragraph 6A(4) or 6B(3), **with respect to the purchase of a major interest in land.**
- (2) The relief is withdrawn if at any time in the period of three years beginning with the effective date of the first transaction (“the control period”) the requirement in sub-paragraph (3) is not met.
- (3) The requirement is that the dwelling is being exploited as a source of income in the course of a qualifying trade.
- (4) The requirement in sub-paragraph (3) does not apply in relation to times when, because of a change of circumstances that is unforeseen and beyond the relevant person's control, it is not reasonable to expect the interest in question to be exploited as mentioned in that sub-paragraph.
- (5) Sub-paragraph (6) applies if at some time in the control period that person—
- (a) has not begun to exploit the interest as a source of income in the course of a relevant trade, or
- (b) has ceased so to exploit it.
- (6) The requirement in sub-paragraph (3) is treated as being met if reasonable steps are being taken to ensure that the relevant interest begins to be exploited as mentioned in that subparagraph, or that such exploitation of the interest is resumed.
- (7) In this paragraph—
- (a) “the relevant person” means the person (other than the financial institution) who enters into the arrangements mentioned in section 71A(1), 72(1), 72A(1) or 73(1);
- (b) **references to a major interest in land include an undivided share in a major interest in land.**

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