Appeal number: TC/2015/07309
TC/2015/03374
TC/2015/03375
TC/2015/03376

PROCEDURE – SDLT scheme – application by Respondents to stay behind final resolution of Project Blue case and by appellants for hearing of preliminary issues on validity of discovery assessments – stay granted, preliminary issue application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

MILLTOWN LIMITED (1) **Appellants**
ALBERT HOUSE PROPERTY FINANCE PCC LIMITED (2)
(in Members Voluntary Liquidation)

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in public at the Royal Courts of Justice, London on 1 September 2016

Julian Hickey, counsel, instructed by RPC for the Appellant

Marika Lemos, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

Introduction

1. The appellants entered into transactions following SDLT tax planning advice given by a tax advisor seeking to benefit from certain relief provisions in Finance Act 2003 ("FA 2003") (in particular the alternative finance relief provisions in s71A FA 2003 "alternative finance relief"). The appellants' appeals in the substantive matter relate to various closure notices and discovery assessments that were issued. Although not formally a lead case the case is of some importance to more than just the appellant as there some 700 other users of a similar SDLT scheme with an estimated amount of £10 million tax at stake. The transactions were similar but not identical to those which were considered earlier this year by the Court of Appeal in their decision of 26 May 2016 on *Project Blue Ltd (formerly Project Blue (Guernsey) Ltd v HMRC* [2016] EWCA Civ 485. The Court of Appeal decided in the taxpayer's favour, HMRC were refused permission to appeal by the Court of Appeal and currently await the outcome of their application to the Supreme Court for permission to appeal.

2. This decision, given following a one day hearing, deals with HMRC's application to stay the current appeals behind *Project Blue* which is objected to by the appellants. If the stay is not granted the appellants wish to have a preliminary issue hearing on various issues concerned with the validity of the discovery assessments and closure notices which the Respondents object to.

3. For the reasons set out below my decision is that the appeal should be stayed and there should be no preliminary issue hearing.

Background to scheme

4. In order to deal with the parties' respective applications it is necessary to mention something about the nature of the SDLT scheme, the parties' respective arguments and some of the detail of the particular closure notices and discovery assessments which are in issue.

5. In summary Milltown Ltd, the first appellant entered into a contract to purchase interests in Montpelier Mews ("the property") from an unconnected vendor, Montpelier Mews Ltd. As part of Milltown's financial arrangements for funding the acquisition, Milltown entered into an alternative finance arrangement with a qualifying finance company Albert House, who is the second appellant using a sale and leaseback arrangement. On completion of the purchase from Montpellier Mews Ltd, Milltown executed the refinancing arrangements selling the property to Albert House who granted a lease back to Milltown with an option to acquire the freehold at a later date.

6. Put in more generic terms where A is Montpelier, B is Milltown and C is Albert House:

(1) A sold the property to B.

(2) Before or concurrently with completion of the contract with A, B sold the property on to C.

(3) C then leased the property back to B with an option for B to buy the freehold later.

7. The intended net effect was to benefit from the alternative finance provisions s71A, and that no SDLT should be payable either by B on its purchase from A, C from its purchase from B nor any by B on the grant of lease nor on any eventual exercise of the option to buy the freehold.

8. The application of the tax reliefs the appellant relies on is disputed by HMRC. For present purposes it is sufficient to note that there are three potential areas of disagreement:

(1) HMRC's primary case is the alternative finance relief provided for in s71A FA 2003 does not apply because the scheme was not properly implemented and that the sale, leaseback and eventual grant of option as concerns B and C are subject to SDLT. The second appellant, Albert House Property Finance PCC Ltd is a Protected Cell Company incorporated under Guernsey legislation which allows assets in the company to be held within individual cells. HMRC argue that because the Cell of the second appellant (the Brawn Cell), under whose name the transactions were carried out, obtained the wrong licence from the Office of Fair Trading, it was not a "financial institution" within the meaning of the relevant legislation such that s71A FA2003 was not engaged.

(2) In the alternative HMRC argue that the anti-avoidance provisions in s75A FA 2003 apply. The provision contemplates a "notional land transaction" which attracts a greater amount of SDLT than the actual transactions entered into.

(3) Furthermore and in the alternative if the above anti-avoidance provision does not apply then HMRC dispute the application of the relief in s45 FA 2003 ("sub-sale relief") on the basis that a requirement that the A-B transaction was completed "at the same time and in connection with" the B-C transaction was not met as a matter of evidence and also due to logical inconsistency of the argument that the connection requirement was met with the appellants' position as regards the non-applicability of s75A above (which is disputed) that the scheme transactions were *not* in connection with each other.

9. It is my understanding from the correspondence between the parties in relation to draft case management directions that they are agreed that the appeals of Milltown and Albert House be heard together, although no formal direction has been made to this effect. The appellants' case is that to the extent any SDLT liability arises on the disposal of the property the effect of the sub-sale rules in s45 mean the liability is attributed to the second appellant or alternatively that each of the appellants are respectively entitled to the benefit of the alternative finance relief and that the anti-avoidance rules of s75A do not apply.

10. *Project Blue* concerned a substantially similar pattern of transactions but there was no issue raised as to the party equivalent to C as referred to above not being a

"financial institution". For present purposes it is sufficient to note that HMRC sought to rely on the anti-avoidance provisions in s75A and this in turn involved construing the applicability of s71A and the question (see [28] of the Court of Appeal's decision) of whether "the vendor" for the purposes of C's purchase was B under its actual contract with C, or A under the contract as viewed through the sub-sale relief provisions in s45(3). Construing the legislation and applying the Court of Appeal's decision in *DV3 RS LP v Revenue and Customs Comms* [2013] EWCA Civ 907, the Court of Appeal held the "vendor" was the latter, A. The effect of this was that C was liable for SDLT under s45(3) and was not entitled to claim s71A relief. The result was favourable to the taxpayer, B because it meant that a pre-condition that there be less SDLT under the actual transactions as compared with the notional transaction under s75A was not met and therefore the anti-avoidance provisions did not apply. Although the point on s71A was decisive, Patten LJ with whom the other LJs agreed went on to make observations on the interpretation of the anti-avoidance provisions and in particular on the identification of the notional purchaser ("P") and (at [44]) to note the primacy of acquisitions of chargeable interest as distinct from derivations from the interest.

Returns, Closure Notices and Discovery Assessments

11. Returns were filed by the appellant on 11 December 2009 on the sale of the freehold from A to B, the sale of the freehold from B to C and the leasehold transaction between C and B.

12. The Closure Notice and Discovery Assessments under appeal are as follows. In relation to the first appellant:

> (1) A closure notice relating to the acquisition of the property from the unconnected vendor in a letter, dated 17 April 2014 (i.e. B's acquisition from A): on the basis of denying the effect of s.45(3) FA 2003 (sub-sale rules), or as an alternative seeking to apply s.75A FA 2003;
>
> (2) A closure notice relating to the acquisition of a leasehold interest from the second appellant in a letter, dated 17 April 2014 on the basis of denying relief under s.71A FA 2003 (for non-implementation of the scheme), or as an alternative seeking to apply s.75A FA 2003; (i.e. B's acquisition of lease from C); and
>
> (3) A discovery assessment issued under FA 2003, Schedule 10, Part 5, dated 17 April 2014, relating to the alleged failure to submit an SDLT return in respect of a notional acquisition of the property from the original vendor, due to s.75A FA 2003 (i.e. a return relating to the notional acquisition from A).

13. As regards the second appellant, while a closure notice was made relating to the acquisition of the property from B on the basis of denying the effect of s71A FA 2003 (for non-implementation of the scheme) or as an alternative seeking to apply s75A HMRC accept that this notice is not valid due to no enquiry having been opened. A discovery assessment under FA 2003 Schedule 10 Part 5 dated 17 April 2014 was

made relating to the alleged failure to submit an SDLT return in respect of a notional acquisition of the property from the unconnected vendor due to s75A FA 2003 (i.e. a return relating to a notional acquisition from A).

Application to stay

14. HMRC apply to stay the appeals pending the final determination of any appeal from the Court of Appeal's decision in *Project Blue Limited v Revenue and Customs Commrs* [2016] EWCA Civ 485.

15. Given there is also an application by the appellants for a preliminary issues hearing on issues relating to validity which they wish to maintain even if the tribunal were, despite their objection, to order a stay pending the outcome of any permission to appeal application and if appropriate substantive appeal before the Supreme Court, it is convenient in this part of the decision to deal first with the issue of whether the substantive arguments should be stayed.

16. At the hearing I invited the parties to make submissions on the two stage approach taken in *HMRC v RBS Deutschland Holdings GmbH* [2006] ScotCS CSIH 10 considering which is routinely considered in applications to stay behind a nother case namely: 1) whether the decision in the other case would be of material assistance to resolving issues in the current matter, and 2) whether it was expedient to order a stay.

17. As with the transactions in the current appeal the transactions in *Project Blue* concerned the following broad issues (i) s45(3) sub-sale relief ii) s71A alternative finance relief iii) s75A anti-avoidance provisions, but Mr Hickey for the appellants argued their appeals should not be stayed, as they were not on all fours with *Project Blue*. If HMRC were successful in their argument that Albert House was not a "financial institution" then neither s71A or s75A would then be relevant and if the sole legal point were 45(3) then that position was clear from 1) the Court of Appeal's decision in *DV3* 2) the Court of Appeal's endorsement of the decision in *Project Blue*, and 3) the Supreme Court's refusal to give permission to appeal in *DV3* all of which, he submits, go to show that the position on s45(3) set out by the Court of Appeal in *DV3* was good law.

18. It is important to recognise however, that the fact that the factual context and the issues raised by the current appeals are clearly not on all fours with *Project Blue* which means the decision will not necessarily be determinative, does not preclude any Supreme Court decision on *Project Blue* being of material assistance to this tribunal.

19. Even if HMRC were to win on the financial institution point such that the issues on s71A and s75A were no longer relevant any Supreme Court decision is likely to give authoritative guidance on the interpretation of s45(3). (Mr Hickey's submissions acknowledged that the Supreme Court would look at the interaction between s 45(3) and s71A relief. In my view if it undertakes that exercise it is highly likely to have to engage with the interpretation of s 45(3)). Further, if HMRC were to lose on the financial institution point and the Supreme Court disagreed with the Court of Appeal

on the application of 71A and s75A then the Supreme Court's decision on 71A and 75A would, as the appellants conceded, be relevant.

20. In my judgment there is a significant overlap between the complex legal provisions at issue in the two sets of cases and if there is a Supreme Court decision it is highly likely in my view that it would give guidance that will be of material assistance in the interpretation of those legal provisions.

21. As to whether a stay is expedient one element of the appellants' arguments is in essence that HMRC should be held to their previous position that a stay was not appropriate. While this factor is something that can in principle be weighed in the assessment of expediency it is not significant on the facts of this case; in particular it is not clear to me what prejudice the appellants suffered as a result of the change in HMRC's position.

22. The main prejudice to take into account is, as the appellants highlight and HMRC acknowledge, the issue of delay. I was told the Supreme Court's decision on the permission to appeal application is expected in November and Mr Hickey's estimate was that it would not be until some time later next year when a Supreme Court hearing might be listed and a decision issued. The concern is twofold, first that it is desirable that delay in the resolution of disputes should be minimised and second the particular one that Mr Hickey points out there is the concern of evidence becoming stale and witness recollections diminishing. On this second point, while the proceedings in this case have not yet reached the evidential stage, what pleadings there currently are suggest to me that the substantive case will turn on the interpretation of the various transaction documents and resolution of the legal dispute; there is little to indicate at this point that the fundamental contentions in dispute will be resolved by matters of oral evidence.

23. In my judgement the likelihood of material assistance that may be derived from any Supreme Court decision if permission to appeal is granted will outweigh the prejudice caused by delaying the proceedings. I take into account that if permission is not granted, and the case management directions then resume then the delay is minimal in the context of the proceedings. On that basis directions will be issued separately to the parties which run from the date of any refusal of permission. In this regard Mr Hickey's observation that the Supreme Court did not think a point about s45(3) was worth giving permission in *DV3* does not take matters further because if correct it means there is likely to little prejudice in waiting for the outcome of the Supreme Court's permission decision. While it is possible any Supreme Court decision might be issued by the time of any FTT hearing, the likely additional cost to pleadings / restructuring of areas of evidence to be covered together with the risk late changes might compromise any hearing date outweighs the prejudice in terms of delay in my view. Although Mr Hickey highlighted the importance of a decision being issued to a considerable number of similar cases rather than being a reason for why the case should be progressed now this factor points in my view to the desirability of a tribunal deciding the matter on as clear a legal footing as possible.

24. For the above reasons the current appeals ought to be stayed pending the final resolution of the decision in *Project Blue*.

Preliminary issue?

25. As indicated above the issue of whether there should be a stay also of the validity issues is inter-linked with the question of whether there should be a preliminary issues hearing even if there is a stay of the substantive issues.

26. HMRC's primary submission was the applications were premature as the issues had not been pleaded and that in relation to one of the arguments (the validity of the closure notices) it had not even appeared in the appellants' application for a preliminary issue but was mentioned for the first time in the appellants' skeleton.

27. In the event I have not found it necessary to address those concerns and I have been able from the detailed skeletons filed in advance of the hearing, and the oral submissions which took up a day's hearing to make a determination on the issue of whether there should be a preliminary hearing. For the reasons which I explain in more detail below it is my view that the application for a preliminary issue hearing should be refused.

28. As far as the relevant legal approach to adopt both parties agree this was set out in the Upper Tribunal decision in *The Right Honourable Clifton Hugh Lancelot De Verdon Baron Wrottesley v HMRC* [2015] UKUT 637 (TCC).

29. As set out at [14]

> "The FTT has broad case management powers pursuant to rule 5 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "FTT rules"), and rule 5(3)(e) specifically contemplates dealing with a point as a preliminary issue. As with all other powers under the rules, in deciding whether to do so the FTT must seek to give effect to the overriding objective of the FTT rules to deal with cases fairly and justly. This includes dealing with a case in ways which are proportionate to its importance, complexity and the parties' costs and resources, and avoiding delay so far as compatible with proper consideration of the issues (rule 2).

30. The Upper Tribunal (Judges Herrington and Falk) summarised the key principles to be derived from the authorities having considered them in detail, as follows:

> "[28]…:
>
> (1) The matter should be approached on the basis that the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly.
>
> (2) The power should only be exercised where there is a "succinct, knockout point" which will dispose of the case or an aspect of the case. In this context, an aspect of the case would normally mean a separate issue rather than a point which is a step in the analysis in arriving at a conclusion on a single issue. In addition, if there is a risk that the

> determination of the preliminary issue may prove to be irrelevant, then the point is unlikely to be a "knockout" one.
>
> (3) An aspect of the requirement that the point must be a succinct one is that it must be capable of being decided after a relatively short hearing (as compared with the rest of the case) and without significant delay. This is unlikely if (a) the issue cannot be entirely divorced from the evidence and submissions relevant to the rest of the case, or (b) if a substantial body of evidence will require to be considered. This point explains why preliminary questions will usually be points of law. The Tribunal should be particularly cautious on matters of mixed fact and law.
>
> (4) Regard should be had to whether there is any risk that determination of the preliminary issue could hinder the tribunal in arriving at a just result at a subsequent hearing of the remainder of the case. This is clearly more likely if the issues overlap in some way – (3)(a) above.
>
> (5) Account should be taken of potential for overall delay, making allowance for the possibility of a separate appeal of the preliminary issue.
>
> (6) The possibility that determination of the preliminary issue may result in there being no need for a further hearing should be considered.
>
> (7) Consideration should be given to whether determination of the preliminary issue would significantly cut down the cost and time required for pre-trial preparation of for the trial itself, or whether it could in fact increase costs overall.
>
> (8) The tribunal should at all times have in mind the overall objective of the tribunal rules, namely to enable the tribunal to deal with cases fairly and justly."

31. Mr Hickey's submissions which I shall come on to were made by reference to the *Steele v Steele* criteria which were set out at [22] and [23] in full of the UT's decision.

32. As noted by the Court of Appeal's decision in *Hargreaves* ([5] of Arden LJ's judgment with which the other LJJ's agreed) and as pointed out by the appellant the decision of whether to order a trial of a preliminary issue is a case management decision.

33. The legislative backdrop for the potential preliminary issues which the appellant seeks to have determined are the provisions in Part 4 and 5 of Schedule 10 of FA 2003 (extracted in the annex which follows this decision) which deal in particular with revenue determinations and their time limits in situations where no land transaction return is delivered and also the conditions for revenue assessments and their time limits. Paragraph 30 contains the familiar restrictions on the making of discovery assessments (situations attributable to fraudulent or negligent conduct or where the Revenue (it was not in contention that this would be a hypothetical officer under the relevant case law) could not reasonably have been expected to be aware of the situation. Paragraph 31 contains various time limits for assessment, a general one

of four years, extended to six years where a loss of tax was brought about carelessly and a 20 year time limit which HMRC rely on in this case on the basis of a failure to comply with the obligation to notify a land transaction return under s76(1).

34. It is a matter of dispute between the parties as to whether Paragraph 28 permits HMRC to make a discovery assessment even if a return has not been filed (as HMRC argue) or whether it may only be used where a return has been filed (the only avenue open in that situation being a Revenue determination in relation to which HMRC are now out of time) which is the appellants' case.

35. Putting those questions to one side for the moment the particular validity issues raised centre around the question of whether a return was filed for the notional transaction contemplated by the anti-avoidance provision s75A. Mr Hickey explained in his submissions this will involve mixed issues of fact and law much in the way that Morgan J undertook in the UT decision in *Project Blue* at paragraphs [107] to [123] of the UT's decision. The significance of this question as indicated above is that if a return is filed this will trigger the question of the Part 5 provisions and the gateway issues (carelessness, awareness of hypothetical officer) need to be determined and the burden will be on HMRC whereas if a return was not filed then Part 4 applies with the consequence that the only route available to HMRC was to make a "Revenue determination" which is no longer possible due to the four year time limit.

36. Mr Hickey argues validity is a distinct matter of fact and law from the issues of substance whereas Ms Lemos, for HMRC argues the issues are inter-twined and that the validity issues cannot be addressed in isolation from interpreting the sections; in particular the tribunal cannot determine issue of whether return filed without understanding how s75A works to identify who the parties are and what is the relevant chargeable interest. She draws attention to the fact that the UT passages on *Project Blue* from Morgan J concluding there was a return in relation to the notifiable notional transaction were to be read in the context of the FTT having noted at [300] to [304] that the return concerned the same parties and the same interest. The significance of the point as I understand it is that if it later transpires from the Supreme Court decision that the parties and interest were to be identified differently then a conclusion that the right return had been amended would be called into question. Depending on the outcome of 75A analysis in any Supreme Court decision issues of discovery assessment might then fall away.

37. In addition the appellant seeks to argue that on the basis that SDLT regime in FA 2003 is self-contained regime, each closure notice may be regarded as an "assessment" for the purposes of paragraph 31 of Schedule 10. The notices having were issued outside of the 4 year time limit and HMRC have not justified an assessment within the 6 year time limit. It is suggested that *Morris v HMRC* [2007] EWHC 1181 (Ch) and *R (ono Higgs) v HMRC* [2015] UKUT which would appear to stand in the way for this proposition can be put to one side as decisions concerning direct tax). Ms Lemos gives this argument very short shrift saying it totally ignores the framework of appeal and time limit provisions set out in FA 2003.

38. Referring to the *Steele* criteria the Mr Hickey argued: It was right and just to order preliminary issue, the determination of the preliminary issue could dispose of the whole case or at least one aspect in that if the discovery assessments were invalid then the second appellant would have no liability and that if the closure notices were issued in breach of the assessment time limit then the first appellant would have no liability; if the appellants were correct then there would be material waste of resources for the parties and the tribunal if the validity issue issues were taken together at the start of any substantive hearing. The issues were principally points of law and HMRC had to prove the necessary conditions to permit an assessment to be made and that a loss of tax was brought about carelessly by the purchaser or a related person. The questions of fact for the preliminary issue were all capable of being dealt with agreed facts; the issues of fact are narrow and relate to the time of issue of assessments and disclosure of arrangements to HMRC. Mr Hickey estimated the hearing should take no more than one to two days.

39. Ms Lemos drew attention to the protective nature of the discovery assessments; the concern was that a tribunal going through the analysis much like the UT had done in *Project Blue* (in the passages described at [35] above) but concluding on the facts (despite HMRC's views to the contrary) that there was not an appropriate return that had been amended. HMRC's primary case was that Milltown was liable. As regards Albert House, while, as the Court of Appeal had decided, the financial institution was liable the discovery assessment would be relevant, if the Supreme Court reversed that position then the discovery assessment would fall away.

Discussion

40. As can be seen from the legal approach suggested by the case law discussed above and taking account of the parties' submissions a central theme is the identification of "knockout" points, and how their resolution interacts with any remaining issues. I also agree with Ms Lemos' submission that it is appropriate to have an eye to the likelihood of success on the preliminary issues put forward; the stronger an applicant's case on the preliminary points the greater the likelihood of economy in the disposal of the matter.

41. Summarising the preliminary issues put forward these are: 1) The discovery assessment for the second appellant is invalid because a return had not been filed *and* that HMRC can only make Part 4 Revenue determinations in that case, in relation to which they are out of time. 2) Similarly, the discovery assessment for the first appellant Milltown was invalid because the return was not filed, and HMRC can only make a Revenue determination and are out of time to do that (leaving only the closure notice in play). Or, 3) if the analysis is that returns were filed then the Part 5 "gateway conditions" for a discovery assessment were not met and 4) that closure notices may be regarded as "assessments" and that the "gateway conditions" in paragraph 30 are not met for them.

42. The merits of the appellant's argument that HMRC have no power to issue discovery assessments are not clear especially given an ordinary reading of paragraph 28 and given as HMRC highlight paragraph 31(2A)(b) specifically provides for a 20

year time limit in the situation where no return has been filed. The arguments that closure notices are to be regarded as assessments are not without difficulty; there appears to be significant correspondence between the relevant provisions on assessments and closure notices in the Taxes Management Act 1970 and in Schedule 10 FA 2003 and it is not apparent how the higher court decisions in *Morris* and *Higgs* might be sidestepped. (In addition, as Ms Lemos points out, where two concepts e.g. determinations and assessments are intended to be elided for example for enforcement purposes this is done expressly in paragraph 26). While I must bear in mind that I have not had full argument on the point, my current assessment is that the likelihood of 1) the appellant establishing there is no power to make discovery assessments where no return has been filed and 2) that closure notices may be regarded as assessments for the purposes of certain time limits is not high. Further there is nothing to suggest that HMRC would not have at least an arguable case, in relation to the discovery assessments of showing that the relevant conditions were met (if it turned out a notional transaction return was found to have been filed). If HMRC succeeded on the above point 1) and it was found that a return had not been filed there would not appear to be any further obstacle to the discovery assessment applying under the 20 year time limit.

43. The ultimate likelihood therefore that disposal of the preliminary points would represent an economy as compared with dealing with the matters at the same time as the substantive hearing is therefore low. In addition there is the risk that the analysis required to make a conclusion on the return will not benefit from the possible elucidation by the Supreme Court of how s75A should be interpreted. In his reply Mr Hickey's argued in essence that there was no inter-dependence; the position on the notional transaction as regarded the discovery assessment was that as set out by HMRC in those discovery assessments. But, to the extent a tribunal concluded that the construction of the notional transaction was so circumscribed by the way in which HMRC assessed it would in my view first need to first appreciate how the substantive provisions operated more broadly.

44. Furthermore as Ms Lemos points out, in order to deal with the validity points, (apart from that relating to closure notices being regarded as assessments which strikes me as weak for the reasons HMRC suggest) all of these hinge on making an assumption that Albert House is a "financial institution" (the "implementation error" argument).

45. If HMRC are correct on either the implementation error (s71) argument or their argument that if s75A applies then it may be addressed via the closure notice ("correct return amended argument") then the discovery assessment on Milltown will not be necessary. On the basis the discovery assessment against Albert House was clearly stated to have been made in the alternative (to cover off the situation that HMRC was wrong on the implementation error argument, the question of whether a notional land transaction return had been filed and it not being clear who was liable) a discovery assessment on the second appellant would also not prove necessary.

46. The implementation error, and "correct return amended" arguments involve an assessment of the particular facts and/or are mixed questions of fact and law and at

this stage in the proceedings there is no indication on the parties' respective likelihood of success on each. Assuming the position is neutral what is clear however is that if HMRC were to win on *either* of the implementation error *or* "correct return amended" points the discovery assessments would not be relevant whereas the appellants need to win on *both* points for the discovery assessments to be relevant. The scenario where the discovery assessments are irrelevant is therefore inherently more likely than the alternative. While Mr Hickey is correct to highlight that the resolution of the discovery assessment is not academic as far as the second appellant is concerned, the likelihood of its resolution not being one which is necessary to deal with is something that needs to be taken account of. Noting what the UT in *Wrottesley* said above at [30] if there is a risk that the determination of the preliminary issue may prove to be irrelevant, then the point is unlikely to be a "knockout" one.

47. As to the questions of economy, delay and whether the preliminary issues are succinct, Mr Hickey estimates ten days will be required or a full substantive hearing and one to two days for the preliminary. By contrast Ms Lemos estimates five days for the substantive hearing and two to three days for the preliminary hearing. I acknowledge it is difficult to make an accurate estimate without having established the full nature and extent of the evidence in contention but taking the mid-point of the respective estimates, a hearing of two days could not be described as "succinct" when compared to a hearing of seven to eight days. Furthermore there is a risk that determination of the preliminary issues on validity of the discovery assessments prove to be unnecessary to resolve depending on where the tribunal lands on various other substantive points as discussed above.

48. In conclusion while the preliminary issues the appellants seek would dispose of aspects of the case there is a risk that determination of those preliminary issues may prove to be irrelevant. The preliminary issues hearing would not be a succinct hearing as compared with the rest of the case. There is a risk the preliminary issues cannot be divorced from the issues on the substance of the s75A anti-avoidance provisions and that because of the potential overlap of issues there is a risk the matter will not be dealt with fairly and justly. I should make it clear that even if permission to appeal is refused by the Supreme Court a preliminary issues hearing would not in my view be appropriate given it would still remain the case that resolution of the discovery assessment might prove unnecessary given the other arguments that would be raised. It is not clear given the prospects of success and the relevant dependencies of the issues that a preliminary issues hearing would make any significant saving in terms of cost or delay. While in the appellant's favour the overall delay caused by having a preliminary hearing is not significant given the decision above that the substantive issues are to be stayed anyway it seems likely given the importance of the issue that the decision would be appealed and if so the resolution of that would likely lead to further delay in the resolution of the remaining issues of substance.

Conclusion

49. HMRC's application to stay the appeals until the final resolution of *Project Blue* is granted. The appellant's application for preliminary issues hearing is refused. In the event permission to appeal is not granted by the Supreme Court in *Project Blue* the

case should proceed according to the directions which were largely agreed between the parties prior to the issue of the stay and the preliminary issues were raised taking account that there are various matters indicated in the HMRC's submissions for this hearing which ought to be pleaded positively in relation to the discovery assessments. The directions are issued to the parties separately.

50. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

SWAMI RAGHAVAN

TRIBUNAL JUDGE
RELEASE DATE: 15 SEPTEMBER 2016

Annex

Parts 4 and 5 of Schedule 10 Finance Act 2003

Part 4
Revenue determination if no return delivered

Determination of tax chargeable if no return delivered

25—

(1) If in the case of a chargeable transaction no land transaction return is delivered by the filing date, the Inland Revenue may make a determination (a "Revenue determination") to the best of their information and belief of the amount of tax chargeable in respect of the transaction.

(2) Notice of the determination must be served on the purchaser, stating the date on which it is issued.

(3) No Revenue determination may be made more than 4 years after the effective date of the transaction.

Determination to have effect as a self-assessment

26—

(1) A determination under paragraph 25 has effect for enforcement purposes as if were a self-assessment by the purchaser.

(2) In sub-paragraph (1) "for enforcement purposes" means for the purposes of the following provisions of this Part of this Act—

(a) the provisions of this Schedule providing for tax-related penalties;

(b) section 87 (interest on unpaid tax);

(c) section 91 and Schedule 12 (collection and recovery of unpaid tax etc).

(3) Nothing in this paragraph affects any liability of the purchaser to a penalty for failure to deliver a return.

Determination superseded by actual self-assessment

27—

(1) If after a Revenue determination has been made the purchaser delivers a land transaction return in respect of the transaction, the self-assessment included in that return supersedes the determination.

(2) Sub-paragraph (1) does not apply to a return delivered—

(a) more than 4 years after the day on which the power to make the determination first became exercisable, or

(b) more than twelve months after the date of the determination, whichever is the later.

(3) Where—

(a) proceedings have been begun for the recovery of any tax charged by a Revenue determination, and

(b) before the proceedings are concluded the determination is superseded by a self-assessment,

the proceedings may be continued as if they were proceedings for the recovery of so much of the tax charged by the self-assessment as is due and payable and has not been paid.

Part 5
Revenue assessments

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.

(2) The power to make a discovery assessment in respect of a transaction for which the purchaser has delivered a return is subject to the restrictions specified in paragraph 30.

Assessment to recover excessive repayment of tax

29—

(1) If an amount of tax has been repaid to any person that ought not to have been repaid to him, that amount may be assessed and recovered as if it were unpaid tax.

(2) Where the repayment was made with interest, the amount assessed and recovered may include the amount of interest that ought not to have been paid.

(3) The power to make an assessment under this paragraph in respect of a transaction for which the purchaser has delivered a land transaction return is subject to the restrictions specified in paragraph 30.

Restrictions on assessment where return delivered

30—

(1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28 or 29 in respect of the transaction—

(a) may only be made in the two cases specified in sub-paragraph (2) and (3) below, and

(b) may not be made in the circumstances specified in sub-paragraph (5) below.

(2) The first case is where the situation mentioned in paragraph 28(1) or 29(1) is attributable to fraudulent or negligent conduct on the part of—

(a) the purchaser,

(b) a person acting on behalf of the purchaser, or

(c) a person who was a partner of the purchaser at the relevant time.

(3) The second case is where the Inland Revenue, at the time they—

(a) ceased to be entitled to give a notice of enquiry into the return, or

(b) completed their enquiries into the return,

could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 28(1) or 29(1).

(4) For this purpose information is regarded as made available to the Inland Revenue if—

(a) it is contained in a land transaction return made by the purchaser,

(b) it is contained in any documents produced or information provided to the Inland Revenue for the purposes of an enquiry into any such return, or

(c) it is information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 28(1) or 29(1)—

(i) could reasonably be expected to be inferred by the Inland Revenue from information falling within paragraphs (a) or (b) above, or

(ii) are notified in writing to the Inland Revenue by the purchaser or a person acting on his behalf.

(5) No assessment may be made if—

(a) the situation mentioned in paragraph 28(1) or 29(1) is attributable to a mistake in the return as to the basis on which the tax liability ought to have been computed, and

(b) the return was in fact made on the basis or in accordance with the practice generally prevailing at the time it was made.

Time limit for assessment

31—

(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, …

…

(3) An assessment under paragraph 29 (assessment to recover excessive repayment of tax) is not out of time—

(a) in a case where notice of enquiry is given into the land transaction return delivered by the person concerned, if it is made before the enquiry is completed;

(b) in any case, if it is made within one year after the repayment in question was made.

…

(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.

(6) In this paragraph "related person", in relation to a purchaser, means—

(a) a person acting on behalf of the purchaser, or

(b) a person who was a partner of the purchaser at the relevant time.