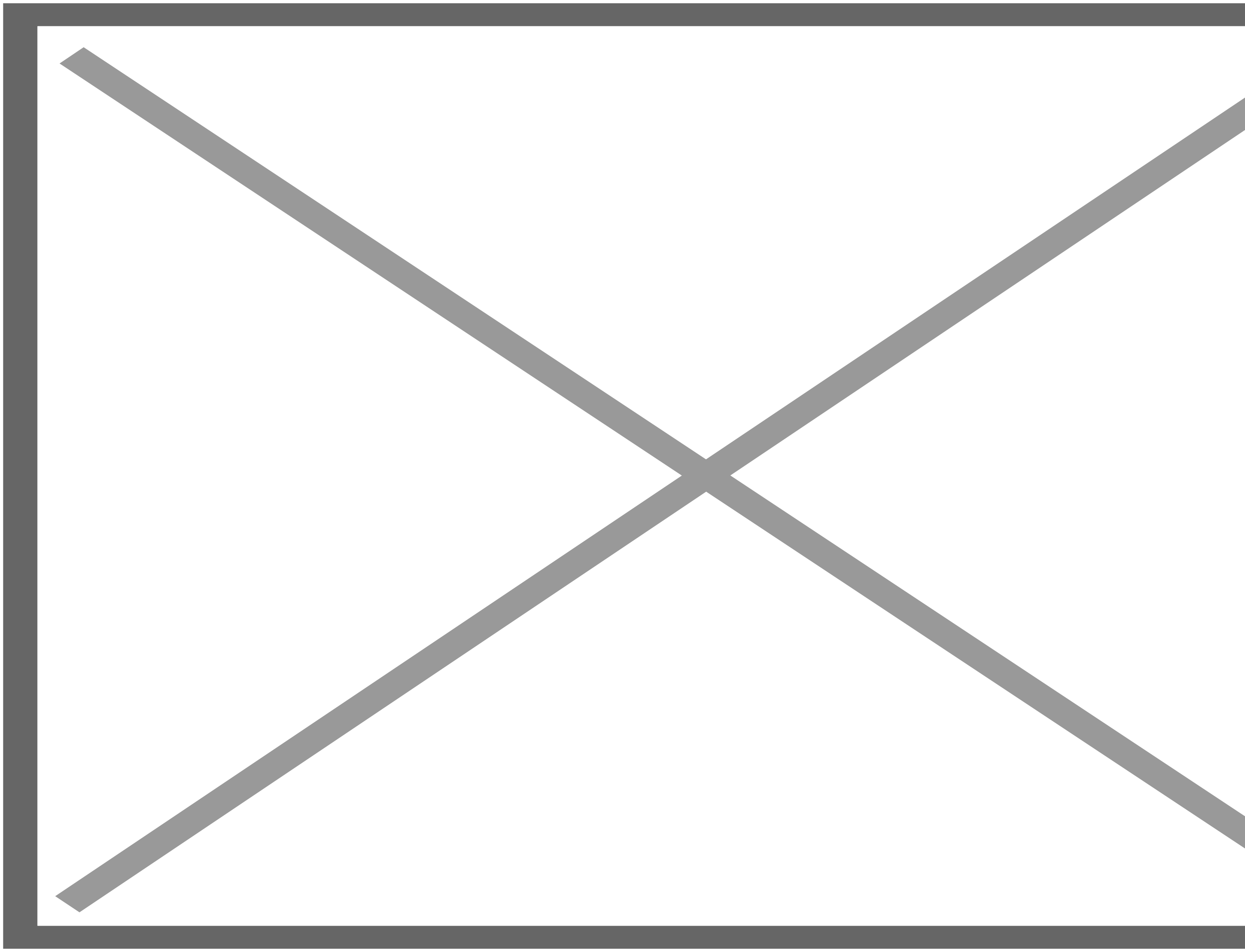
An incoherent outcome

Indirect Tax



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Michael Hunter reviews the SDLT case Project Blue

Key Points

What is the issue?

The application of FA 2003 s 75A, an ‘anti-avoidance’ SDLT provision, has been tested in the case Project Blue

What does it mean for me?

The Upper Tribunal decision in Project Blue not only makes it clear that s 75A can apply to transactions which do not involve any tax avoidance, but also demonstrates that its application can be arbitrary and unclear

What can I take away?

Anyone who advises on stamp duty land tax must be aware that s 75A, and its implications, might apply

The Upper Tribunal decision in *Project Blue Limited v the Commissioners for HMRC* [2014] UKUT 0564 (TCC) is a must-read decision for anyone who advises on stamp duty land tax (SDLT).

The decision concerns Finance Act 2003 (FA 2003) s 75A, a provision labelled as ‘anti-avoidance’, but *Project Blue* confirms that s 75A is not restricted to avoidance. The decision also highlights the practical difficulties in applying the legislation and that the results can be inequitable and arbitrary.

All references in this article are to FA 2003 unless otherwise stated.

Key facts

In April 2007, Project Blue Limited (PBL) contracted to buy the freehold of Chelsea Barracks from the Secretary of State for Defence (SSD). The purchase price was £959 million. To finance the purchase, and some additional expenses, PBL contracted to sell the freehold on to a Qatari Bank, Masraf al Rayan (MAR) for £1.25 billion. Under the PBL-MAR contract, MAR was obliged to grant a lease of 999 years plus two days. PBL and MAR entered into put and call options in respect of the freehold. Both the SSD-PBL and the PBL-MAR contracts were completed on 31 January 2008.

PBL contended that it was not liable to SDLT on its acquisition of the freehold from SSD, as this qualified for ‘sub-sale’ relief under s 45(3); and that it was not liable to SDLT on the leaseback from MAR, because it qualified for the alternative finance exemption under s 71A.

Section 75A

HMRC did not disagree with this SDLT analysis. However, HMRC sought to assess PBL under s 75A.

Section 75A applies where a person (V) disposes of an interest in land; another person (P) acquires that interest, or an interest derived from it; other transactions or steps (referred to as ‘scheme transactions’) occur in connection with this; and the sum of all amounts paid or received by any party is less than the SDLT that would be payable under normal rules.

According to HMRC, s 75A created a notional transaction; against which PBL was P and the total consideration was the £1.25 billion payable under the PBL-MAR sale contract.

Anti-avoidance?

One of PBL’s main arguments was that s 75A did not apply because it did not have a tax avoidance motive.

Both judges in the Upper Tribunal (as well as the First-tier Tribunal) were clear that s 75A can apply, regardless of whether any of the participants have a tax avoidance motive. In fact, according to Morgan J, s 75A effectively defines 'tax avoidance' for itself as being anything that comes within the scope of the provision.

Who is V and who is P?

In applying s 75A, it is fundamental to identify who is P (the person actually liable for the tax) and, to a lesser extent, who is V.

However, the Upper Tribunal wrestled with this concept. Although both judges concluded that P was PBL, they did so on different bases.

Morgan J's reason for selecting PBL as P is worrying. He felt that P could be either PBL or MAR. His reason for selecting PBL seemed to be solely because HMRC had assessed PBL instead of MAR. The implication is that he would have held MAR to be P had HMRC assessed MAR instead. This begs the question of what would have happened if HMRC had assessed both. Would both be liable?

Nowlan J's reasoning did not have this drawback. He felt that you could identify P as the person who has obtained the tax advantage. He also considered that, as a general principle, parliament aimed to tax purchasers rather financiers. Although MAR was acquiring an interest in land, it was clear from provisions such as alternative finance relief that it was not the intention to tax persons acting in that capacity.

The selection of V was less problematic; however, this was only because both HMRC and PBL agreed that SSD was V, and both judges agreed to go along with this (with some hesitation). Had the parties disagreed, it is likely the Upper Tribunal would have encountered at least as much difficulty in identifying V as it had in identifying P.

What is the chargeable consideration?

The intellectual gymnastics required to apply s 75A did not stop with identifying P and V. The next big question for the Upper Tribunal was what the chargeable consideration for the transaction should be.

On the specific facts, this point was of high importance. Had PBL's acquisition not been disregarded as a result of s 45(3), which Nowlan J identified as the statutory 'error' that s 75A was intended to correct, PBL would have been liable to SDLT on £959 million. This was its purchase price under its contract with SSD.

However, in applying s 75A, it is necessary to treat as the chargeable consideration the 'largest amount (or aggregate amount) … given by or on behalf of any person by way of consideration for the scheme transactions, or … received by or on behalf of V (or a person connected with V…) by way of consideration for the scheme transactions'. The highest amount given by a person as consideration for one of the scheme transactions was £1.25 billion (paid by MAR). This would result in PBL being liable for more SDLT than if it had obtained no tax advantage at all.

Both judges differed in their interpretation on this point. Ironically, while Morgan J had been reluctant to apply a purposive approach in selecting P, he adopted what seemed to be a very purposive approach in identifying the chargeable consideration. On the other hand, Nowlan J, who had taken a purposive approach in identifying P, applied the provisions more strictly.

Both decisions revolved around the question of whether you could use the provisions of s 75B, which allows for 'incidental' transactions to be disregarded, to reduce the chargeable consideration from the headline consideration paid by MAR to the amount actually paid by PBL. Nowlan J's view was that you could not. The obstacles he felt could not be surmounted were:

- Section 75B did not apply where the land interest ultimately acquired by P was different to that disposed of by V. On the facts, SSD had disposed of a freehold but, at the end of all the transactions, P was left with a 999 year lease plus two days.
- Even if s 75B did apply, the sale to MAR could not be treated as 'incidental' because it was both a sub-sale to a third person (a transaction listed in s 75A(3)) and part of the process of transactions by which P ended up with its land interest. Both of these are specified under s 75B(2) and 75B(4) as not incidental.
- You could not circumvent either of the above by treating the sale of the freehold from SSD to PBL as the transaction referred to in s 75B(1). The Court of Appeal decision in DV3 RS Limited Partnership v R&C Commrs [2013] STC 2150 makes it clear that you must disregard PBL's acquisition of the freehold pursuant to s 45(3).

However, Morgan J, whose decision took precedence, considered that the chargeable consideration could be reduced to £959 million. This was based on the view that it was possible to treat the transaction referred to in s 75B(1) as the sale of the freehold to PBL (rather than PBL's acquisition of the lease). The sub-sale to MAR could be treated as incidental because it was not a sub-sale by which PBL acquired the freehold. Alternatively, the fact that s 75B(1) is expressed to apply '*if, or in so far as*' a transaction is incidental, together with provisions in s 75B(5) requiring apportionment, indicate that you could disregard the part of MAR's purchase price which represented additional funding over and above PBL's £959 million purchase price.

Conclusions

The main messages are:

- You need to consider s 75A in all but the most 'vanilla' of transactions.
- Section 75A could affect multiple participants – anyone acquiring a land interest is fair game.
- The SDLT payable under s 75A could be more than the 'true' purchase price.

In addition, there is considerable uncertainty as to how you actually apply s 75A. Both judges clearly considered that s 75A is flawed and neither was reluctant to express this.

Finally, while Morgan J's judgment gave what seems to be 'the right result', his reason for reducing the chargeable consideration to £959 million is questionable. In particular, he relies on the sub-sale to MAR not being a transaction within s 75A(3) because PBL does not obtain its freehold by this sub-sale. However, s 75A(3)(b) refers to a 'sub-sale to a third person', not a sub-sale to P. His alternative view that you can apportion part of the £1.25 billion MAR purchase price does not stand up to scrutiny either – the test is whether or not the transaction is incidental (or to what extent it is incidental). The sub-sale in its entirety is treated as not being incidental.