



PROCEDURE – application for referral to Upper Tribunal (Lands Chamber) under paragraph 45 of Schedule 10 Finance Act 2003 - refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/02245
TC/2019/02247
TC/2019/02249
TC/2019/02250
TC/2019/02252
TC/2019/02253
TC/2019/02254
TC/2019/02255
TC/2019/02518
TC/2019/02520

BETWEEN

**LG PARK HT1 LIMITED
UPS SGP LIMITED
LG PARK HT3 LIMITED
LG PARK HT4 LIMITED
LG PARK HT5 LIMITED
LG PARK HT6 LIMITED
LG PARK HT7 LIMITED
LG PARK HT8 LIMITED
LG PARK HT9 LIMITED
LG PARK HT10 LIMITED**

Appellants

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE VICTORIA NICHOLL

**Sitting in public at Taylor House, London on 11 February 2020
Further submissions made on behalf of the Appellants on 11 May 2020**

Rupert Baldry QC and Quinlan Windle, Counsel, instructed by Norton Rose Fulbright LLP, for the Appellants

Hui Ling McCarthy QC and Edward Hellier, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. On 31 December 2013, the Respondents (“HMRC”) issued ten closures notices determining the Stamp Duty Land Tax (“SDLT”) chargeable on the grant of leases on 14 January 2010 to the Appellants (“LG Parks”) as part of the arrangements for the development of the London Gateway. Following years of substantial correspondence and discussion with HMRC, LG Parks appealed against the closure notices on 12 April 2019.

2. On 8 May 2019 LG Parks applied for their joined appeals to be referred to the Upper Tribunal (Lands Chamber) (“the application”). The application was made under paragraph 45 of Schedule 10 Finance Act 2003 (“paragraph 45”) on the grounds that the question in the appeals is “a question of the market value of the subject matter of the land transaction”. HMRC objected to the application on grounds that the terms of paragraph 45 are not met, and that it would not be in accordance with the overriding objective.

BACKGROUND

The following summary of the background to the application is taken from both LG Parks’ and HMRC’s Skeleton Arguments and the transaction documents. It does not represent agreed facts or my findings of fact. The evidence will be considered for this purpose if the matter progresses to a substantive appeal hearing.

3. On 4 September 2000, P&O Ports (Europe) Limited (“P&O Ports”), The Peninsular and Oriental Steam Navigation Company (“POSNCo”) and several subsidiaries of Royal Dutch Shell plc (“Shell”) entered into an agreement relating to the development of a deep-water port (the “Port”) and a logistics site (the “Park”), which together would form the London Gateway. This Master Agreement was conditional on statutory consents for the development of the Port and the Park being obtained.

4. Under the Master Agreement P&O Ports was to acquire the land required to develop the Port (the “Port Land”) by a Port Sale Agreement. The Port Sale Agreement would impose on P&O Ports the ‘minimum port requirement’ (“MPR”), which required P&O Ports to develop the Port, and if it did not, allowed Shell to re-acquire the Port Land for the sale price adjusted for inflation. Under the Master Agreement, if the statutory consents were obtained, Shell and POSNCo would enter into a Development Agreement to develop land (the “Park Land”) into the Park.

5. In 2006, DP World acquired P&O Ports. At the times relevant to these appeals, the ten Appellants were all subsidiaries of DP World, a Dubai headquartered business. One of the Appellants, LG Park HT2 Limited, has since been sold and it is now called UPS SGP Limited. Fifty per cent of another Appellant has also been sold.

6. In 2007, the statutory consents were obtained for the development of both the Port and the Park. At this stage arbitration proceedings were entered into between Shell and DP World regarding a dispute about whether the relevant conditions had in fact been satisfied. This was in part prompted by a rise in the market value of both the Park Land and the Port Land.

7. On 28 February 2008, the Port Sale Agreement was exchanged between a subsidiary of DP World and Shell. The Port Sale Transfer set out (in paragraph 19) a covenant that the MPR had to be satisfied no later than 28 February 2013 and that if the transferee did not comply with the covenant, the transferor may, as agreed compensation and in substitution for a claim for damages, require the transferee to transfer the Port Land back to the transferor (“the MPR Call Option”).

8. In June 2008, the arbitration proceedings relating to the development of the Park were put on hold and the parties began to discuss a buyout whereby DP World would acquire the Park Land from Shell. The removal of the MPR would have been one of the terms of any compromise of the proceedings. If the MPR had not been waived or satisfied Shell would have otherwise been entitled to reacquire the Port Land for a price below market value and without reimbursing DP World for the money spent developing the Port Land.

9. On 31 December 2009, a number of agreements were entered into, including the agreement for Shell to grant 200-year leases over ten plots of the developable part of the Park Land to the ten Appellants (the “Plot Leases”). The division into ten plots was to enable distinct areas of the Park to attract separate investments. The agreement provided that in consideration for the grant of the Plot Leases, the Appellants would (a) pay “the Price” (a total of £112,568,994 plus VAT) and (b) grant Shell land options over the part of the Park Land covered by their respective Plot Lease.

10. The Plot Leases were granted on 14 January 2010.

11. On 15 January 2010, an Omnibus Deed was entered into between Shell and various DP World companies, including LG Parks. The Omnibus Deed provides that with effect from the date of the deed, certain variations to the Port Sale Agreement and the Port Land Transfer should have effect. This includes a provision that paragraph 19 of the Port Land Transfer (summarised in paragraph 7 above) should cease to have effect. This released DP World from the MPR and the MPR Call Option (the “MPR Release”), meaning Shell’s potential right to reacquire the Port Land fell away.

12. Land transaction returns were filed electronically on behalf of LG Parks on 12 February 2010. Copies of the returns are not included in the Tribunal’s bundles. LG Parks state that the SDLT was calculated on the basis that they were granted the Plot Leases in consideration for, in part, their granting options over the land covered by the Plot Leases and that the transaction was therefore an exchange within the meaning of section 47 Finance Act 2003. Paragraph 5, Schedule 4, Finance Act 2003 (as it applied at the time) provides that the chargeable consideration for SDLT purposes is the market value of the Plot Leases.

13. King Sturge had been instructed to provide various valuations in November 2009, and these put the market value of the Plot Leases at £30.56m. SDLT was paid by reference to King Sturge’s market valuation of the Plot Leases, totalling £1,227,636.

14. On 1 March 2010, Norton Rose Fulbright LLP (“NRF”) wrote to HMRC setting out details of the transactions, explaining that the calculation of SDLT in the land transaction returns was by reference to the King Sturge market valuation. The letter went on to explain that the reason for the discrepancy between the consideration paid and the market value of the Plot Leases was that LG Parks were compelled to pay above market value because (i) “the price was the minimum price that Shell was prepared to accept after considerable negotiation” (ii) buying the Park Land was essential to deliver the Port as a viable operation (iii) it was not appropriate for LG Port to acquire the land.

15. On 27 August 2010, HMRC opened enquiries into the LG Parks’ land transaction returns. There followed a period of extended correspondence and further discussions between the parties, including meetings between representatives of DP World and the Valuation Office Agency, and a revised valuation of £38.7m was put forward by DP World following advice from KMPG. It appears from the extracts of the correspondence provided to me that at some time between May and October 2013 DP World raised the claim that the price paid was “representative of a number of factors and not merely value of the subject property”. Their letter of 28 October 2013 cites the removal of the MPR as one factor, which “coupled with the

fact that Shell refused to sell the subject property for less than the price paid, resulted in us being held to ransom with regards to the acquisition price.”

16. On 31 December 2013, HMRC issued closure notices (“the Closure Notices”) to L G Parks stating:

“I have concluded that the open market value of this land interest is equal to the [an amount that over all ten Closure Notices summed to £116,568,994] plot lease premium and paid by [the respective Appellant] to the landlord, [Shell].

I have amended your SDLT return to reflect my conclusion.”

17. There was then a period of over five years of substantial correspondence and discussion between the parties before LG parks appealed to the Tribunal on 12 April 2019. The final paragraph of the notice of appeal reads:

“The question in this dispute is one of the market value of the Plot Lease, and in accordance with paragraph 45 of Schedule 10 Finance Act 2003, that question shall be determined on a reference to the Upper Tribunal. It is the intention of the taxpayer to seek an order for such a reference.”

APPLICATION AND LG PARKS’ SUBMISSIONS

18. On 8 May 2019 NRF wrote to the First-tier Tribunal (Tax Chamber) (“FTT”) to apply for a direction that the proceedings in the ten appeals shall be transferred to the Upper Tribunal (Lands Chamber).

19. Mr Baldry submits that the scope of the appeals is determined by the conclusion in the Closure Notices and that this raises a single issue, the market value of the land in question. As this is the only question that has come to the Tribunal, it is appropriate for the FTT to refer that question to the Upper Tribunal (Lands Chamber).

20. Mr Baldry submits that it is a very short point of law to determine the scope of this appeal in light of the Closure Notices that have been issued. The conclusion of each of the Closure Notices was that the market value of the Plot Lease concerned was greater than the market value that was ascertained (by a valuation for SDLT purposes prepared by King Sturge and later KPMG) and used to calculate the SDLT liabilities reported in their land transaction returns. If LG Parks are correct about the conclusions in the Closure Notices being the single question of the correct market value of the subject matter of the land transactions, then HMRC’s other arguments are outside the scope of the appeals and the appeals should be referred to the Upper Tribunal (Lands Chamber) pursuant to paragraph 45.

21. Mr Baldry referred me to the decisions *D’Arcy v Revenue and Customs Commissioners* [2006] STC (SCD) 543 (“*D’Arcy*”), *Tower MCashback LLP 1 v HMRC* [2011] 2 AC 457 (“*Tower MCashback*”), *Fidex Ltd v Revenue and Customs Commissioners* [2016] EWCA Civ 385 (“*Fidex*”), *B&K Lavery Property Trading Partnership v Revenue and Customs Commissioners* [2016] UKUT 525 (TCC) (“*Lavery*”) and *Towers Watson Limited v HMRC* [2017] UKFTT 846 (TC) (“*Towers Watson*”) to support LG Parks’ application. He submits that these make clear that the Closure Notices should be construed in the context in which they were issued, including the underlying transactions relating to the development of the London Gateway and the correspondence between LG Parks and HMRC.

22. Following the hearing, HMRC drew my attention to the decision of the Court of Appeal in *Investec Asset Finance PLC and Investec Bank PLC v HMRC* [2020] EWCA Civ 579 (“*Investec*”) and NRF made the following further submissions. The decision of the Court of Appeal in *Investec* confirms that the authorities cited above are still good law, and LG Parks’

arguments in relation to the scope of the Closure Notices are not impacted by the decision. In *Investec*, the Respondents sought to rely on alternative arguments that they had raised in the covering letter that accompanied the closure notices. In this case HMRC has not raised alternative arguments in connection with the issuance of the Closure Notices and the Closure Notices were issued on the basis that they had agreed that the transactions in question should be treated as exchanges.

HMRC'S SUBMISSIONS

23. HMRC object to LG Parks' application on the grounds that the terms of paragraph 45 are not met, and that a reference would be a waste of time and money and not in accordance with the overriding objective.

24. Mr Baldry submits that if there is any dispute about the scope of the Closure Notices, this is not a matter to be addressed at the case management hearing. The identification of the conclusion in a closure notice is a question of mixed law and fact, and this must be considered in the context of the enquiry. The FTT has been provided with a limited selection of the enquiry documents for this application and it is not equipped to make any substantive determinations on the scope of the Closure Notices. If the reference were to be made, the scope of the conclusion of the Closure Notices would not be within the jurisdiction of the Upper Tribunal (Lands Chamber).

25. Ms McCarthy submits that although LG Parks have not expressly referred to the their claim that a significant proportion of the consideration paid should be attributed to the release of the MPR Call Option ("the Apportionment question"), and that the MPR Call Option is an exempt security interest, such that its release was not a chargeable land transaction ("the Security Interest question") in their grounds of appeal or their Skeleton Argument, they appear to have raised them in ground 6(b) of their appeal. Ms McCarthy submits that LG Parks' position has changed from one in which they paid one price for one thing, to one in which they now argue that the price that they paid was split between two things. This raises questions of tax law to be determined by the FTT.

26. If however LG Parks concedes that Apportionment and Security Interest questions, and the FTT is willing to make an order limiting the scope of their appeals accordingly, then HMRC will consent to LG Parks' application to have the appeals referred to the Upper Tribunal. In these circumstances the referral to the Upper Tribunal would be on the basis that the entire consideration was paid for the land interest. If these points are not conceded, the FTT should hear and determine LG Parks' argument in relation to these questions before a referral can be made to the Upper Tribunal. It would also be open to the FTT to decide whether or not the exchange rules apply to the transaction if LG Parks' arguments concerning the enforceability of certain contracts calls into question the application of the exchange rules.

RELEVANT LAW

27. The statutory provisions and Tribunal Procedure rules referred to or relied upon in this decision are set out in the Appendix.

DISCUSSION

28. The issue to be determined in this application is whether the question in the dispute on the appeals is "a question of the market value of the subject matter of the land transaction" such that it is appropriate to make a reference for the question to be determined by the Upper Tribunal (Lands Chamber). I have considered this under two headings: (1) the questions in the dispute; and (2) the overriding objective.

Questions in the dispute

29. Mr Baldry submits that the conclusion of each of the Closure Notices is such that the scope of the appeals is the single question of the correct valuation of the Plot Leases, and that all of HMRC's other arguments are outside the scope of the appeals. Mr Baldry referred me to the following authorities to support this submission.

30. In *Tower MCashback* Lord Walker quoted the following passage from Moses LJ's decision in the Court of Appeal stating that it is for the FTT to identify the subject matter of the enquiry and that (at [16]):

“the closure notice completes that enquiry and states the inspector's conclusions as to the subject matter of the enquiry. The appeal against the conclusions is confined to the subject matter of the enquiry and of the conclusions. But I emphasise that the jurisdiction of the special commissioners is not limited to the issue whether the reason for the conclusion is correct. Accordingly, any evidence or any legal argument relevant to the subject matter may be entertained by the special commissioners subject only to his obligation to ensure a fair hearing.”

31. In *Fidex* the Court of Appeal summarised and applied the principles set out in *Tower MCashback* and approved the view of the Upper Tribunal stating (at [51]):

“the closure notice must be considered in context and in light of the enquiry that preceded it.” and

“that it is not appropriate to construe a closure notice as if it were a statute or as though its conclusions, grounds and amendments are necessarily contained in watertight compartment. ... the FTT is not deprived of jurisdiction where it reasonably concludes that a new issue raised on an appeal represents an alternative or an additional ground for supporting a conclusion in the closure notice.”

32. These authorities make clear that the scope of an appeal must be considered in context. In this case the context includes the fact that DP World's letter dated 28 October 2013, shortly prior to the issue of the Closure Notices, states that “the price paid of £112.8m is representative of a number of factors and not merely value of the subject property. ... It was a combination of these non-property related factors that resulted in London Gateway paying over and above market value for the subject property.” LG Parks continued to develop this argument after the Closure Notices were issued, claiming that part of the consideration should be apportioned to the non-chargeable MPR Release.

33. However, at the hearing Mr Baldry described these questions as “issues that were canvassed between the parties in correspondence”, and explained that this application is made by reference to his submissions on the scope of the Closure Notices. If these submissions are accepted, the only issue that is before the Tribunal concerns the market value of the land and those other questions are outside the scope of the appeals. Mr Baldry referred me to extracts in the authorities cited in paragraph 21 above to support his claim that an examination of the Closure Notices makes clear that there is only one issue in question in these appeals, and that the conditions for the referral of the question to the Upper Tribunal are satisfied.

34. Ms McCarthy submits that the scope of the conclusions of the Closure Notices is not a matter for this case management hearing and, as the Tribunal has been provided with only a limited selection of the enquiry documents, it is not equipped to determine the scope of the Closure Notices. HMRC's submission is that the only conclusion made in the Closure Notices, in a legal context, is that the chargeable consideration is £x, and that the amendment of £y

flows from that because that is the result of applying the correct SDLT percentage to the correct amount of chargeable consideration.

35. Ms McCarthy suggested that a timeline of the development of LG Parks' arguments illustrates that the dispute between the parties has changed since the Closure Notices were issued. Beginning with NRF's letter of 1 March 2010 (paragraph 14 above) that referred to the price paid for the Plot Lease, and reading through the selected correspondence in the bundle from October 2013 to 2018 demonstrates that the Security Interest argument was developed after the Closure Notices were issued. It was also noted that LG Parks had previously agreed (but HMRC agree it is not conceded) that the FTT should consider the Security Interest argument, as stated in the following paragraphs from NRF's letters of 19 December 2017 and 25 January 2018:

"We agree that it is sensible to have the legal issues dealt with first before any valuation dispute.

As to the actual questions before the FTT, we agree [that] the security interest question should be heard. ..."

"... we strongly consider that efficiency would be best achieved by postponing any penalties appeal for the time being. This is because we consider that the narrow technical point of the meaning of security interest can be held in a short timeframe with minimal evidence. If [DP World's]¹ position prevails, that would then dispose of the need for further debate on other issues (valuation, apportionment and penalties). Indeed it was HMRC that suggested that we have a hearing on the narrow question of security interest with the penalty position being reconsidered following that decision ..."

36. I have concluded that in order to decide whether it is appropriate to make the reference under paragraph 45, I should consider whether the appeals against the Closure Notices raise one or more questions that should be decided by the FTT before the remaining question of the market valuation can be referred to the Upper Tribunal to determine the appeals. This is not the same question as identifying the scope of the appeals. As the review of the authorities in *Lavery* (at [36] to [40]) makes clear, that exercise requires the FTT to identify, as a question of fact, the context of the enquiry that preceded the closure notice in order to determine the scope and subject matter of the appeal. In the cases cited from *D'Arcy* to *Investec* the FTT was required to identify the subject matter of the appeal because the taxpayers claimed that the scope precluded HMRC's new or further arguments. The authorities confirm that in exercising this power to identify the scope, the FTT must balance the protection that the closure notices provide for the taxpayer with ensuring that the public are not deprived of tax by precluding the FTT's jurisdiction to consider new issues raised by HMRC.

37. In contrast, the question on the facts of this application is whether the taxpayers have raised questions in their appeals against the Closure Notices that should be determined by the FTT (or conceded as HMRC submit) before it is appropriate to refer the question of the market value to the Upper Tribunal. I have not addressed HMRC's question of whether the application of the exchange rules is also in issue at this point because I accept HMRC's submission that it flows from LG Parks' submissions on the reasons why the MPR Release is not chargeable and that it falls away if there are no such questions (in fact or because LG Parks concedes them).

38. I have therefore considered LG Parks' grounds of appeal as the first step to identifying the questions in dispute. The grounds of all ten appeals by LG Parks are in the same terms. Each sets out that the relevant Plot Lease was granted by Shell UK Ltd, that the grant was an

¹¹ Ms McCarthy suggests that this is an error and that the reference should be to HMRC

exchange for SDLT purposes, that HMRC enquired into the SDLT return and issued a closure notice on 31 December 2013. The final paragraphs read as follows:

“6. [LG Parks] disagrees with the open market value contended by HMRC in the closure notice for the various reasons, including:

- (a) A third-party professional valuer was instructed to provide a market value for the Plot Leases as at 31 December 2009 for SDLT purposes and [LG Parks] relied on this valuation for the purposes of assessing the SDLT due; and
- (b) The grant of the Plot Lease formed part of a wider commercial arrangement.

7. SDLT on the grant of the Plot Lease should be assessable by reference to the valuation obtained by [LG Parks] at the time of the transaction, and therefore no further SDLT is due.

8. The question in this dispute is one of the market value of the Plot Lease, and in accordance with paragraph 45 of Schedule 10 Finance Act 2003, that question shall be determined on a reference to the Upper Tribunal. It is the intention of the taxpayer to seek an order for such a reference.”

39. I agree with Ms McCarthy that paragraph 6(b) of the grounds of appeal does not explain LG Parks’ case on this point. An appellant’s pleadings should set out its case and a summary of what it seeks to establish, so that both the respondent and the FTT can identify the issues in dispute. Ms McCarthy noted that the Apportionment and Security Interest questions were not referred to in LG Parks’ Skeleton Argument or in Mr Baldry’s opening. It was therefore of assistance that Mr Baldry was able to provide the following points of explanation of his client’s case [at pages 82-88 of the transcript] on the “wider commercial arrangement” ground of appeal, and the Apportionment and Security Interest points as follows:

(1) LG Parks argued in correspondence that part of the consideration can be properly attributed to the exempt security interest. This means that, for SDLT purposes, part of the consideration is chargeable, because it is purely referable to the land interest, but part of it is not chargeable, because it is referable to an exempt interest.

(2) LG Parks submissions for the hearing relate to the scope of the Closure Notice. If these are right, the only issue that is before this Tribunal concerns the market value of the land in question, and all those other issues raised in correspondence fall away because they are outside the scope of this appeal. This is not a matter of concession. It is simply that the only matter that goes to the Upper Tribunal on this reference is a question concerning the market value of the land in question.

(3) The circumstances and facts about whether any of the consideration is properly attributable to the MPR Release or not may be relevant to determining the market value of the land. The evidence put to the Upper Tribunal will need to address the open market value on an objective basis, taking into account the fact that Shell and London Gateway had entered into these transactions as independent parties. The difference between what LG Parks are saying is the market value and the price paid will need to be addressed and explained, and this will include evidence as to what LG Parks considered they were paying for. Therefore “the evidence to that market value would be similar to the evidence that would be needed to deal with the Stamp Duty Land Tax separate questions about whether there’s an exempt security interest or not”.

40. I take two points from these submissions. First, LG Parks wish to limit the subject matter of the appeal to the market value of the land in question, to the exclusion of the other elements of the bargain. The submission is that the legal arguments on whether there’s an exchange,

whether there's an apportionment of actual consideration, or whether there was an exempt security interest, do not arise because the sole question turns on the market value of the land. Second, while LG Parks submit that the consideration paid for the MPR Release is outside the scope of this appeal, they wish to deploy this evidence and argument before the Upper Tribunal when considering the market value of the land.

41. In short, this ground of appeal 6(b) refutes the conclusion in the Closure Notices that “the market value of this land interest is equal to [the full amount of the consideration] paid” by arguing that this is not the case because some of the consideration is attributable to another matter or element of the bargain that is not within the land transaction because it is an exempt interest. This argument to explain the difference between the consideration paid and the value used for the purposes of the land transaction returns raises the question of the subject matter of the land transactions for which chargeable consideration was given for SDLT purposes and, if there is more than one matter, the question of the apportionment of the consideration for the purposes of paragraph 4 Schedule 10 to that second matter. These are questions of both fact and tax law to be addressed by the FTT before a referral can be made under paragraph 45. Even if these were not questions that prevented the reference under the terms of paragraph 45, it is difficult to envisage how the Upper Tribunal (Lands Chamber) could consider the market value without the prior tax law determination of subject matter of the land transaction for which the chargeable consideration is to be determined for SDLT purposes.

42. Having reached this conclusion that there is at least one other question within the jurisdiction of, and to be addressed by, the FTT before it would be appropriate to refer the valuation question to the Upper Tribunal, I have not gone on to consider what further questions are raised by the appeals. In *Towers Watson* the FTT considered that it was appropriate to determine the scope of the appeal in that case to avoid costs and time being incurred on a point that may be outside the FTT's jurisdiction. My consideration of the grounds of appeal has identified that there is at least one other question raised by the taxpayer that should be addressed by the FTT, and that is sufficient to determine this application without requiring additional evidence of the context of the closure notices and the surrounding circumstances to determine the scope of the appeal. I have addressed the costs and time factors raised by the case management of these points below, in the context of the overriding objective.

Overriding objective

43. This application is made under a statutory provision and is not the exercise of the specific case management power under rule 5(3)(k) of the Tribunal Procedure rules (set out in the Appendix). However, the principle embodied in the overriding objective should be applied by the FTT in considering the exercise of its powers and its duties more generally, and the parties must help the FTT to further the overriding objective (rule 2 is set out in the Appendix).

44. I have considered the practical and case management implications of making a reference to the Upper Tribunal in these circumstances in the light of the overriding objective. For this purpose, I asked Mr Baldry to clarify how he considers the appeals would proceed if a referral were to be made. Mr Baldry suggested that, if the Tribunal were minded to make the referral to the Upper Tribunal, the terms of reference could be agreed between the parties. LG Parks would then make an application to the Upper Tribunal for directions as to how the Upper Tribunal would wish to proceed with the matter, and the Upper Tribunal would either notify the parties how they wish to proceed, or in the absence of any such notification, LG Parks would make an application for a case management hearing before the Upper Tribunal. Once the Upper Tribunal has determined the market value, the FTT would be asked to make any adjustments required to reflect the Upper Tribunal's determination, and that would be determinative of the appeal.

45. Ms McCarthy questioned how the terms of reference to the Upper Tribunal could be agreed or determined at this stage. The Upper Tribunal needs to know whether it is asked to value one subject matter for which one price was paid or are they to consider the transactions on the basis that the price was split between two different subject matters. If LG Parks had been willing to concede the MPR Release and Apportionment questions and agreed that the land transaction returns encapsulate the entire arrangement in respect of which the contract price was paid, HMRC could have agreed that the only question is one of valuation and that can be referred. Alternatively, if LG Parks were to concede the Security Interest question or if the FTT were to determine the Security Interest question in HMRC's favour, this would remove the need to consider the Apportionment question as the entire price would be attributable to chargeable interests. If however LG Parks continues with its "two subject matters and two prices" argument and asks for the referral for the valuation of the land to the exclusion of the other elements of the bargain, then LG Parks has failed to make returns in relation to the land transactions represented by the MPR Release. In these circumstances HMRC would issue discovery assessments in respect of the second set of land transactions.

46. Having considered Mr Baldry's explanation of the ground of appeal that LG Parks wish to put to the Upper Tribunal to explain the "wider commercial arrangement", it is clear is that if I conclude that the conditions to make the reference under paragraph 45 are satisfied, it would entail the further steps set out paragraph 44 above. This does not sit comfortably with the wording in paragraph 45 that suggests that the question in dispute "shall be determined on a reference" as the reference will not determine the questions in dispute as far as HMRC are concerned. What will arise, if Mr Baldry's submissions are accepted, is that the question of whether part of the consideration was paid for an exempt interest or whether that is also chargeable will fall away in this appeal, forcing HMRC to take steps that will result in the bifurcation of the appeals, with the consequent problems that would entail.

47. Lady Justice Rose's decision in *Investec* considers the balance between the interests of the Revenue and the taxpayer in some detail as the case concerned the possibility of HMRC putting forward a case on appeal that would result in a larger adjustment than that set out in the closure notice. The decision cites [at para 60] the following passage from Henderson J's decision in the High Court in *Tower MCashback* that refers to the "venerable principle":

"There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the Commissioners in exercise of their statutory functions to have regard to that public interest. ..."

48. Lady Justice Rose has adopted this terminology in setting the bounds within which the FTT should exercise their power to determine the subject matter of a closure notice and allow HMRC to put forward different arguments, commenting [in para 72] as follows:

"The "venerable principle" is also an important underlying factor in any tax matter. I accept HMRC's submission that proceedings before the FTT are not simply a dispute between two private parties and the venerable principle has a role to play here as the courts have found in the three cases which were cited to us."

49. I have concluded above that the conditions for making a reference under paragraph 45 are not satisfied, but this decision is confirmed by having regard to FTT's duties, including the duty to further the overriding objective, when considering the circumstances of the application. It is consistent with this reading of paragraph 45 that I am not required to refer the question of the market value when there are still questions to be considered by the FTT in order to ensure an efficient, fair and just determination of the appeals, and possibly avoid a second set of

proceedings or satellite litigation, and the consequent risks of costs, overlap and inconsistency, and delay.

Conclusions

50. I have concluded that the questions in the dispute in the substantive appeals are not limited to the market value of the subject matter of the land transaction. Questions of tax law relating to the subject matter of the land transactions for which the chargeable consideration is to be determined must be decided by the FTT before the valuation can be referred. The application for the referral to the Upper Tribunal in these circumstances does not satisfy the conditions of paragraph 45 or meet the requirements of the overriding objective.

DECISION

51. The application is refused for the reasons set out above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

52. 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.

**VICTORIA NICHOLL
TRIBUNAL JUDGE**

Release date: 1 June 2020

APPENDIX

Relevant provisions in the Finance Act 2003 as at the relevant dates

Section 48 Chargeable interests

- (1) In this Part “chargeable interest” means—
 - (a) an estate, interest, right or power in or over land in the United Kingdom, or
 - (b) the benefit of an obligation, restriction or condition affecting the value of any such estate, interest, right or power, other than an exempt interest.
- (2) The following are exempt interests—
 - (a) any security interest;
 - (b) a licence to use or occupy land;
- ...
- (3) In subsection (2)—
 - (a) “security interest” means an interest or right (other than a rentcharge) held for the purpose of securing the payment of money or the performance of any other obligation; and
 - (b) “franchise” means a grant from the Crown such as the right to hold a market or fair, or the right to take tolls.

Schedule 4

Paragraph 4 – Just and reasonable apportionment

- (1) For the purposes of this Part consideration attributable—
 - (a) to two or more land transactions, or
 - (b) in part to a land transaction and in part to another matter, or
 - (c) in part to matters making it chargeable consideration and in part to other matters,shall be apportioned on a just and reasonable basis.
- (2) If the consideration is not so apportioned, this Part has effect as if it had been so apportioned.
- (3) For the purposes of this paragraph any consideration given for what is in substance one bargain shall be treated as attributable to all the elements of the bargain, even though—
 - (a) separate consideration is, or purports to be, given for different elements of the bargain, or
 - (b) there are, or purport to be, separate transactions in respect of different elements of the bargain.

Paragraph 5 - Exchanges

- (1) This paragraph applies to determine the chargeable consideration where one or more land transactions are entered into by a person as purchaser (alone or jointly) wholly or partly in consideration of one or more other land transactions being entered into by him (alone or jointly) as vendor.
- (2) In this paragraph—
 - (a) “relevant transaction” means any of those transactions, and
 - (b) “relevant acquisition” means a relevant transaction entered into as purchaser and “relevant disposal” means a relevant transaction entered into as vendor.
- (3) The following rules apply if the subject-matter of any of the relevant transactions is a major interest in land—
 - (a) where a single relevant acquisition is made, the chargeable consideration for the acquisition is—
 - (i) the market value of the subject-matter of the acquisition, and

- (ii) if the acquisition is the grant of a lease at a rent, that rent;
- (b) where two or relevant acquisitions are made, the chargeable consideration for each relevant acquisition is –
 - (i) the market value of the subject-matter of that acquisition, and
 - (ii) if the acquisition is the grant of a lease at a rent, that rent.
- ...

Schedule 10

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).

Paragraph 23 - Completion of enquiry

- (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.

Paragraph 35 – Right of appeal

- (1) An appeal may be brought against—
 - (a) an amendment of a self-assessment under paragraph 17 (amendment by Revenue during enquiry to prevent loss of tax),
 - (b) a conclusion stated or amendment made by a closure notice,
 - (c) a discovery assessment, . . .
 - (d) an assessment under paragraph 29 (assessment to recover excessive repayment)[, or
 - (e) a Revenue determination under paragraph 25 (determination of tax chargeable if no return delivered). . .

Paragraph 45 - Questions to be determined by the relevant [Upper Tribunal]

- (1) Where the question in any dispute on any appeal under [paragraph 35(1)] is a question of the market value of the subject matter of the land transaction that question shall be determined on a reference by the relevant [tribunal].
- (2) In this [paragraph “the relevant tribunal”] means—
 - (a) where the land is in England . . ., the [Upper Tribunal]; . . .

Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

Rule 2 - Overriding objective and parties' obligation to co-operate with the Tribunal

- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
- (2) Dealing with a case fairly and justly includes—
 - (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Tribunal must seek to give effect to the overriding objective when it—
 - (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.
- (4) Parties must—
 - (a) help the Tribunal to further the overriding objective; and
 - (b) co-operate with the Tribunal generally.

Rule 5 - Case management powers

- (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
- (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
- (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
 - (a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;
 - (b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case (whether in accordance with rule 18 (lead cases) or otherwise);
 - (c) permit or require a party to amend a document;
 - (d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;
 - (e) deal with an issue in the proceedings as a preliminary issue;
 - (f) hold a hearing to consider any matter, including a case management hearing;
 - (g) decide the form of any hearing;
 - (h) adjourn or postpone a hearing;
 - (i) require a party to produce a bundle for a hearing;
 - (j) stay (or, in Scotland, sist) proceedings;
 - (k) transfer proceedings to another tribunal if that other tribunal has jurisdiction in relation to the proceedings and, because of a change of circumstances since the proceedings were started—
 - (i) the Tribunal no longer has jurisdiction in relation to the proceedings; or
 - (ii) the Tribunal considers that the other tribunal is a more appropriate forum for the determination of the case;

...