Briefing

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Tax

SDLT - Land Pooling

HMRC's views towards the way in which SDLT applies in land pooling arrangements was "clarified" by members of HMRC's stamp taxes policy team at the Stamp Tax Practitioners' Group ("STPG") 2008 Conference. Michael Lyttle and Yasmin Ali, together with Nick John, were asked about the application of SDLT to land pooling arrangements, and their response is in the public domain (for example it was published in the Tax Journal on Monday 27 April 2009 in an article written by Mark Selby, Secretary to the STPG, which had been approved prior to its publication, by HMRC Stamp Tax Policy).

The seminal case on land pooling is *Jenkins v Brown, Warrington v Brown* 1989 STC577.

HMRC describe the ratio of the case in their capital gains tax manual at paragraph 34411.

This states as follows:

"In Warrington (or Jenkins) v Brown L3189, members of a family had put into a trust various pieces of land. The purpose was to maintain the continuity of the family farming unit. The beneficial interests were expressed as a percentage of the value of the property as a whole, calculated by reference to the values of what were originally put in. The court had to decide on the position when a member withdrew the same piece of land as he had put in. Knox J held that there was no disposal because one had to look at the interests in the mass and not at the individual case. It was not a case of every member disposing of their interest in that piece of land. The reasoning of the judge suggests that there would have been no disposal if a different piece had been removed.

The documentation needs to be carefully considered before it is accepted that the decision in Warrington v Brown applies. It follows from what the judge says that this is a situation in which TCGA 1992, s 43 applies. The interest in the mass derives from the original asset put into the pool by the taxpayer, and the asset taken out is derived from the interest in the mass. Subject to rebasing, the cost to the taxpayer when he or she disposes of the asset taken out is the original cost of the first asset."

I have to say I find the extract from the capital gains manual somewhat unhelpful. *Warrington v Brown* looks at the extraction of property where the family had already put various pieces of land into a bare trust. But what is the SDLT position on the introduction of the land into that trust?

The answer to this question, and a considerable clarification of the issue, can be found in the Court of Appeal decision in *Booth v Ellard* [1980] 1WLR1443. This decision was pivotal to the decision in *Warrington v Brown* and warrants further consideration. Indeed HMRC deal with it albeit briefly, at paragraph CG34410 of their CGT manual.

To quote from that extract: *"...shareholders in a company transferred their shares to trustees to hold for their mutual benefit, largely to enable a collective defence to be put forward against a takeover. The trustees exercised voting power on all the shares in accordance with a majority vote. The Court of Appeal held that this was a bare trust..."* therefore Mr Booth had not made a disposal to the trustees.

It is worth, however, looking at some of the extracts from *Booth v Ellard* which were cited with approval in *Warrington v Brown*.

1. Buckley L.J. then comes to the critical part of the argument on behalf of a taxpayer advanced by Mr Nichols, and he rehearses it as follows:

   "In the circumstances of the present case, Mr Nichols submits, all the twelve settlors who contributed shares to the pool comprised in the trust were together collectively and concurrently entitled absolutely to the whole trust fund as against the trustees, within the meaning of [section 46(1)]. Collectively they could put a summary end to the trust and so destroy or override any discretion or power vested in the trustee. They were consequently jointly entitled to the trust property absolutely as against the trustees within the meaning of [section 46(1)]. So one must treat the shares as vested in the settlors and treat the acts of the trustees as the acts of the settlors, with the consequences, as Mr Nicholls contends, that the position must be viewed as though none of the settlors had disposed of his or her or their shares." (NP - emphasis added)

2. Of that, Buckley L.J. says this:

   "The logic of this argument seems to me to be unassailable

unless it can be said that by participating in the pooling arrangement the several settlors lost their existing beneficial interest in their own particular shares and became entitled merely to an undivided or unappropriated share in the pool formed by their several contributions and that, because the latter interest was different from the former, there were dispositions not merely of the shares themselves but of the anterior beneficial ownerships of specified shares."
(NP - emphasis added)

3. Buckley L.J. then continued:

   "…the effect of the trust was to subject all the trust shares to powers and discretions conferred upon the trustees for what was conceived to be the collective benefit of the settlors but, subject to those powers and discretions which the settlors collectively could override, the measure of the beneficial interests of the settlors remained unaffected by the trust. There was no transfer of any beneficial interest from any one of them to any other. This is, in my judgement, the answer to Mr Morritt's first contention to the effect that the taxpayer did not transfer his shares to the trustees in trust for himself alone."

   "On the true view of the facts the taxpayer, in my view, never lost his interest in 55,000 shares of the company. He subjected that interest to certain restraints as did the other settlors in respect of their shares, but it was at all times within their collective power to abolish those restraints, whereupon each settlor would become absolutely entitled to the same number of shares as he had brought into the trust. Mr Morritt's second submission does not, in my opinion, require consideration. It depends upon the premise that the taxpayer's original 55,000 shares were specifically held on trust for him. This was not, in my opinion, the effect of the agreement."

4. In my judgement the heart of that decision lies in two sentences which are to be found at paragraph 416 where he [ie Buckley L.J.] analyses the effect of the trust and says:

   "The effect of the trust was to subject all the trust shares and powers and discretions conferred upon the trustees for what was conceived to be the collective benefit of the settlors but, subject to those powers and discretions which the settlors collectively could override, the measure of the beneficial interests of the settlors remained unaffected by the trust. <u>There was no transfer of any beneficial interest from any one of them to any other.</u>" (NP - emphasis added)

In Booth v Ellard, Lord Justice Oliver said as follows:

"Where several separate owners of property pool their property through the medium of a trust in such a way that their respective beneficial proprietary interests under the trust reflect precisely the individual property interests which they separately had before the creation of the trust, nobody would say, I think, using language in its ordinary sense, that they had disposed of their property except in the purely technical sense that the legal ownership has been transferred to the trustees."

"To tax such a technical disposition as one producing a capital gain would be capricious."

"It seems to me inevitably to follow in the instant case that the trust here under consideration was one where the beneficiaries are, and were at all material times, jointly and absolutely entitled as against the trustees to the assets vested in the trustees, since their interests are both concurrent and qualitively identical and they can collectively, at any time, terminate the trust and direct the actions of the trustees. Transfers to the trustees therefore fall to be ignored, and the question of whether there was a taxable disposition has to be determined as between the beneficiaries themselves. On this analysis there was, for the reasons given by my Lord, Buckley L.J., no such disposal. Their interests in the mass precisely reflect the individual interest which they had before the deed was entered into."

This seems to make the position a great deal clearer. The ratio of *Booth v Ellard* is that when the properties were transferred to the trustees of the pool, there was no transfer. There was no disposal.

Since this was the basis for the decision in Warrington v Brown, (in which the issue concerned properties being extracted from the pool), properties are relieved from tax when they are introduced and when they are extracted.

HMRC have recently suggested that the original opinion given by Michael Lyttle, mentioned above, was not necessarily correct. They are, however, currently reviewing their stance on pooling arrangements, but in the meantime are prepared to accept that the opinion given by him can be applied.

It seems to be, however, that provided pooling arrangements are undertaken on the basis of *Booth v Ellard* and *Warrington v Brown*, the SDLT position is pretty clear. There is deemed to be no transfer of a land interest by the individuals to the trustees, and as per Lord Oliver, the transfers to the trustees therefore *"fall to be ignored"*.

I wonder, therefore, what SDLT would bite on. It is true that it bites on a land transaction rather than a "transfer", so simply saying there is no transfer does not wholly answer the question.

But a land transaction means the acquisition of a chargeable interest, and in the circumstances of pooling, it seems that acquisition could only be by the trustees, or by the other beneficiaries "acquiring" a chargeable interest. It is difficult to see how they could acquire such a chargeable interest if there had been no transfer from the settlors (in the case of the trustees) or from the other settlors (in the case of the settlor beneficiaries).

It is also worth mentioning that references to transfers are littered throughout the SDLT legislation, nowhere more liberally than in Schedule 15 FA 2003 which deals with partnership transactions.

So although we await HMRC's review of their SDLT policy on land pooling, I will be disappointed if it conflicts with a clear Court of Appeal decision that such pooling does not involve a transfer, and thus should not bring with it any SDLT charge either on the introduction to, or extraction from, the pool.

Contact

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