FIELD COURT TAX CHAMBERS

FCTC DIGEST

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Welcome to the Digest.

The **first article** by the editor deals with the **SDLT anti-avoidance provisions in FA 2003 s75A-s75C.** In the article I seek to find at what point a scheme ends. To be scheme transactions the transactions must be *part of the context* which led to the acquisition of the land, according to the Supreme Court in *Project Blue*. The editor feels there must be a *sufficient unity* between the transactions to be scheme transactions so they are part of a *plan*. This may provide a workable approach for practitioners.

The second article is by **Patrick Way KC**. He brings practitioners right up to date on the taxation of **footballers and their image rights.** Tucked away in the Budget 2025 publications was a statement from HMRC that they will legislate to clarify the tax treatment of image rights to make it clear that income tax, and employer and employer National Insurance Contributions ("NICs") will be due in respect of image rights. The legislation is to be

included in the Finance Bill 2026-2027 and to take effect from **6th April 2027.**

The third article by **Peter Vaines** looks at the new **IHT provisions in the Finance Bill applicable to pension schemes.** There are (thank goodness) reliefs from double taxation and the original panic over these provisions has now died down. Peter's conclusion is the changes have created "an awful lot of complication for not very much additional tax revenue."

In the fourth article, **Dilpreet K Dhanoa** sets out her views on the effects of the ***Mundan v HMRC*** decision of the Court of Appeal. The Court of Appeal had to determine at what point a building was in such a bad state it could no longer be described as residential property for SDLT purposes (and thus lower rates of SDLT would be applied). This article will help practitioners to know where the line is drawn.

The fifth and final article is by **Lachlan Molesworth** and he looks at two anti-abuse provisions in treaties – namely the requirement for **beneficial ownership and the principal purpose test (the PPT).** With regards to the latter

there has been a recent Upper Tribunal case involving the UK/Eire treaty **(*Burlington Loan Management*)** and the PPT. When relying on treaties – for example to pay interest gross to a Jersey company – practitioners must be prepared for HMRC to raise the PPT.

Note

On this question of the PPT applying and paying interest to an overseas lender, practitioners should be aware of the recent "pause" by HMRC in their long-established practice/concession of allowing interest to be paid gross before treaty clearance is given and only taxing the lost interest when clearance is ultimately given (INTM413230). They are now requiring the 20% tax to be accounted for if the clearance has not been obtained before the interest is paid (to the offshore lender) (see INTM413205).

Patrick C Soares

FCTC

WHAT ARE THE LIMITS ON FA 2003 S75A [ANTI-AVOIDANCE SDLT]

Patrick C Soares

FA 2003 ss75A-75C contain the prime anti-avoidance provisions which apply to SDLT.

They are widely drafted but there are limits.

Even if the mildest form of SDLT planning is adopted the taxpayer must refer to these provisions and for good measure the Cerberus provisions: the GAAR, the *Ramsay* approach to statutory interpretation and DOTAS.

Section 75A applies where:

a) one person (V) disposes of a chargeable interest and another person (P) acquires it, and

b) a number of transactions (including the disposal and acquisition)[1] are involved in connection with the disposal and

[1]Thus, the disposal by V and the acquisition by P can be a scheme transactions. However, if there was a simple sale by V to P the section would not apply as more than one transaction is needed.

acquisition ("the scheme transactions"), and

c) the SDLT payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V.

To amount to scheme transactions the transactions have to be **transactions involved in connection** with the acquisition of the land by P on its disposal by V.

A transaction is widely defined and would include the transfer of a partnership interest, for example (historically a hotbed area for SDLT avoidance along with sub-sales), and includes **any kind of arrangement** (s75A(2)).

In *Snell v HMRC* 78 TC 294, Sir Andrew Morritt stated (author's emphasis):

> "28. I prefer the submission for the Revenue. The ordinary meaning of the word "scheme" is "**a plan** of action

> devised in order to attain some end". Similarly an arrangement is "a structure or combination of things for a purpose", see for both meanings the Shorter Oxford English Dictionary."

Sir Wilfrid Greene, MR in *IRC v Payne* 23 TC 610 at 626 stated (author's emphasis):

> "The word "arrangement" is not a word of art. It is used, in my opinion, in the context in what may be described as a business sense, and the question is: can we find here an "arrangement" as so construed?... It appears to me that the whole of what was done must be looked at ..... one definite scheme**, the essential heads of which could have been put down in numbered paragraphs on half a sheet of notepaper."**

In *Jones v Garnett* 78 TC 597 Lord Hoffmann stated:

> "**49. Some arrangements are planned in minute detail and carried out "with timetables, in**

> **almost military precision"**.....But a high degree of complexity, artificiality and pre-planning is not essential in order to produce an arrangement. ..... in *Crossland* v. *Hawkins* (1961) 39 TC 493 at p 505, where he refers to **"sufficient unity". The** taxpayer's intention to **minimise his tax liability by a "definite scheme, the essential heads which could have been put down in numbered paragraphs on half a sheet of notepaper"** explains the rationale of the sequence of events, and gives it unity."

PROJECT BLUE V R&CC [2018] STC 1355

In this Supreme Court case Lord Hodge held:

> **[42]** ..... The heading of the section, 'Anti-avoidance'..... is relevant to assist an understanding as to the mischief which the provision addresses, **but it says nothing as to the motives of the parties to the scheme transactions.**

There is nothing in the body of the section which expressly or inferentially refers to motivation. The provision was enacted to counter tax avoidance which resulted from the use of a number of transactions to effect the disposal and acquisition of a chargeable interest. **It is sufficient for the operation of the section that tax avoidance, in the sense of a reduced liability or no liability to SDLT, resulted from the series of transactions** which the parties put in place, whatever their motive for transacting in that manner.....

[44] **..... The task is to identify where the tax loss has occurred as a result of the adoption of the scheme transactions in relation to the disposal and acquisition of the relevant interest or interests in land. This in turn involves identifying the person on whom the tax charge would have fallen if there**

had not been the scheme transactions to which sub-s (1)(b) refers and which exploited a loophole in the statutory provisions.

[46] ..... They were nevertheless a 'scheme transaction' within sub-s (1)(b) because they were **involved in connection with the disposal and acquisition** of a chargeable interest and sub-s (2)(d) includes within the definition of 'transaction' under sub-s (1) a transaction which takes place after P acquires the chargeable interest. **They are part of the context in which the scheme transactions, which led to P's acquisition of a chargeable interest on 31 January 2008, fall to be analysed...**

Note

Thus, the connecting factor is the transactions to be scheme transactions must be part of the context which led to the acquisition of the land by P.

Hannover Leasing v R&CC [2019] UKFTT 262 (TC)

In this case, the property was held in a UK LP (Greycoat Partnership) which was owned by a UUT (unauthorised unit trust). If the UUT units had been bought and the property transferred to the new unit holder purchaser no SDLT will have been in issue as the first step will have been ignored under FA 2003 s75C(1) (purchase of shares or deemed shares). However, prior to the unit sale the property was taken out of the LP and into the hands of the UUT and the LP removed from the UUT. This is because the purchaser wanted a "clean" structure. After the unit purchase the property was taken out of the UUT into the purchasing company (Hannover) which then put it into a new German partnership (Hannover Partnership). No reliance could be put on FA 2003 s75C(1) (which excludes a share sale from being a scheme transaction provided it is the first in the series of transactions).

Note for various reasons, the Hannover Partnership was only able to syndicate approximately £12 million of units to investors, out of a proposed total of £70

million. The fund was therefore not viable, and a decision was made by Hannover in August/ September 2012 to sell the property. The property was sold on 19 April 2013 to the trustees of the 30 CP Unit Trust (a subsidiary of a South Korean insurance company). The Tribunal had no difficulty in finding this was not a scheme transaction.

On the face of it each transaction (apart from the one involving the South Korean insurance company) would give rise to little or no SDLT. The transfer of property to the UUT would be SDLT free applying the partnership rules. The sale of units in a UUT is SDLT-free as they are deemed to be shares in a company.

What is the notional transaction?

The tribunal however held the notional transaction was a sale from one partnership (the Greycoat Partnership) to another unconnected partnership (the Hannover Partnership) (editor's emphasis):

> "93. The mechanism of s75A is to compare the SDLT payable as a result of the individual "scheme transactions" identified in s75A(1)(b) with the SDLT

that would be payable on a "notional land transaction". **That notional transaction is in essence a deemed transfer of the property from the person(s) who owned the property at the start of the chain of scheme transactions, to the person(s) who owned the property at the end of that chain.**

The notional land transaction

212. It follows from my factual findings, and adopting the purposive approach indicated by Lord Hodge at [44] in *Project Blue*, **that I find that V is the Greycoat Partnership and that P is the Hannover Partnership.**

213. My reason for determining that the Greycoat Partnership is V is that it is the owner of the property immediately prior to the series of steps that make up the scheme transactions. I find that P is the Hannover Partnership, as it was

always the intended final "destination" for the property."

Note

This is a sensible decision. One looks to where the property is at the start of the scheme transactions and then to where it is at the end. If there had been a direct sale, SDLT would have been payable: if no SDLT is payable because of, say, intermediate scheme transactions, then s75A will operate.

Guidance on linkage (author's emphasis)

On linkage the tribunal held thus:

> "172. HMRC point to the **BLP steps paper**, **the heads of terms**, and the exclusivity agreement as **evidencing the common intention** of the parties that **all of these steps be taken in order…..** there **was a common intention and understanding of all the parties that each of these transactions be carried out in sequence from beginning to end.**

200. I find that the elements in each of Steps One to Four were commercially interdependent, and formed an essential part of the *overall deal*, and were intended to take place in the order in which they actually took place. I find that these steps and the elements within them are "scheme transactions" for the purposes of s75A.

202. I find that the ultimate acquirer of the property was always intended to be the Hannover Partnership."

Brindleyplace Holdings SÀ RL v HMRC [2024] UKFTT 808 (TC)

In this case the purchaser (appellant) wanted to acquire property held by an English LP (BP ELP), 99.8% of which was owned by a UUT (a JPUT – a Jersey Property Unit Trust).

The appellant acquired the partnership interest in BP ELP pursuant to a sale and purchase agreement which completed on 24 March 2015.

As part of the agreement, the appellant discharged BP ELP's existing debt of £71,051,644 that it owed to Barclays Bank plc. On 8 May 2015, the appellant subscribed £71,051,644 for the issue of additional units in a Jersey property unit trust (the 'JPUT') that was a partner in BP ELP and issued a promissory note to the JPUT in satisfaction of the consideration for the issue of the additional units. The JPUT contributed the promissory note to BP ELP by way of capital and BP ELP assigned the promissory note to the appellant in discharge of the debt that had arisen when the appellant had paid Barclays. In accordance with the terms of the trust instrument establishing the JPUT, its trustee distributed its interest in BP ELP in specie to the appellant, and it was wound up. On the same day, properties owned by BP ELP with a market value of £130,730,000 were distributed to the appellant and BP ELP was itself wound up. Following these transactions, the appellant was the sole legal and beneficial owner of the properties.

In this case there was only one actual land transfer although it was preceded by the partnership interest transfer and also substantial monies changed hands.

The tribunal looked at the time of the final land transaction: it was a transfer to the partners and no duty was payable under the partnership rules. One then looks to all the scheme transactions to see what consideration passed. On this approach even if some monies were paid applying s75A it would be ignored in a partnership transaction. So s75A will have had no relevant application and the judge so held.

The HMRC argument was that one must assume the land was transferred directly to the newly funded UUT (unconnected) before the UUT bought the partnership share. In that case the consideration will be a deemed market value sum. The tribunal rejected the approach of Hannover of looking at the position at the beginning of the chain and then at the end of the chain.

Neither of the cases are binding but Hannover seems to be the better decision.

APPLYING THE CASE LAW - THE TEST

If Brindleyplace is good law

If *Brindleyplace* is a correct statement of the law (which the author very much doubts – the s75A

analysis in that case is very cursory) then one looks to the time of the last land transfer and the partnership rules (in that case) provided there was no SDLT charge even if consideration is found to have been paid (as consideration is not taken into account in such transactions).

This is not a binding case and the *Hannover* case (also a non-binding case) held to the contrary.

If Hannover is good law – guidance for practitioners

Under Hannover HMRC will argue the notional land transfer must be treated as taking place at inception (so there was a transfer from one partnership to a wholly unconnected partnership).

The unifying factor of the transactions (to be scheme transactions) is the transactions must be **involved** with the disposal of the land by V and the acquisition of the land by P.

Example

V wants to sell (transaction A) greenacre to P for £1m (transaction E). If the sale simply took place, SDLT

on £1m would be payable by P. Section 75A would not be in point as there would only be one transaction. V enters into intermediate transactions B, C and D concerning the property and P pays £1m and the land is vested in P ostensibly free of SDLT (because of the use of reliefs, exemptions or loopholes). If the transactions (A-E) are scheme transactions P is liable to SDLT on £1m. If they are not he is not liable to any SDLT. The notional transaction is a sale direct from V to P: the SDLT payable if the scheme transactions are looked at separately (transactions A, B and C and the sale and purchase by V and P) is nil so the duty is payable on the £1m (being the higher of nil and £1m) by virtue of s75A(1)(c).

There must be sufficient "unity" in the transactions to amount to scheme transactions.

In *Project Blue* the Supreme Court used the word "context" to find the unifying factor – the transactions must be **part of the <u>context</u> in which the land transactions (including the ultimate land purchase) took place.** HMRC seem to read the judgment in that way: see SDLTM09170.

The Supreme Court also referred to "**the adoption of the scheme transactions** in relation to the disposal and acquisition of the relevant interest or interests in land" which **indicates the existence of a plan at some point in time.**

The existence of a plan in the view of the editor is the unifying or context requirement. It gives meaning to "in connection with" and the word "scheme" in "scheme transactions."

The planned result may be far from certain of attainment according to *Jones v Garnett*.

It may be subject to all sorts of commercial contingencies over which the taxpayer has little or no control. **But if the plan is successful then there may be the necessary context or unity.**

The *Hannover* case indicates one must look at the reports and correspondence as well as the documents and minutes etc to see if a plan existed **and there is no time limit on a plan.**

If a transaction is not part of the plan it would not be a scheme transaction (as in the case of the last transaction in *Hannover)*. The taxpayers must thus

look to see if the papers etc and intentions (evidenced perhaps by company or partnership minutes) show that a plan exists and if so the extent of the plan. Keeping accurate records can be important in this respect as well as the time-gap between transactions in appropriate cases.

AN UPDATE FOR FOOTBALLERS AND THEIR IMAGE RIGHTS

Patrick Way KC

Speed read

Tucked away in the Budget 2025 publications was a statement from HMRC that they will legislate to clarify the tax treatment of image rights to make it clear that income tax, and employer and employer National Insurance Contributions ("NICs") will be due in respect of image rights. The legislation is to be included in the Finance Bill 2026-2027 and to take effect from 6th April 2027.

Currently, HMRC are engaged in disputes with approximately 100 footballers in connection with their existing image rights arrangements. HMRC's principal argument is that the income from an image rights arrangement is trading in nature. This seems tenuous to say the least and therefore it is sensible to continue to discuss the position with HMRC with a view to finding a sensible solution.

In this respect HMRC are more open than previously to the mediation process which I recommend.

Turning now to the new rules which will apply from 6th April 2027 practitioners will need to look at existing image rights agreements and see whether they should be changed in any way. There may be a possibility (remote I think) for arguing that certain footballers have such a distinct personality that their image rights can be separated from their employment as a footballer and therefore the new rules may not apply to them.

Article

Budget announcement – new rules to apply from 6th April 2027

Deep in the Budget publications in October 2025 was the following document:

https://www.gov.uk/government/publications/budget-2025-document/budget-2025-html

And within that document is found the following key wording:-

> "Image rights payments – The government will legislate to clarify the tax treatment of image rights to ensure that all image rights payments related to an employment are treated as taxable employment income and subject to income tax, and employer and employee National Insurance contributions. This will be legislated for in Finance Bill 2026-27 and take effect from 6 April 2027."

So it can be seen that significant changes will be made to the taxation of image rights payments. They will be treated as taxable employment income and therefore subject to:-

(a) income tax;

(b) employer NICs; and

(c) employee NICs.

The new regime will start on the 6th April 2027 and no doubt will have application to image rights income which arises from that date onwards even if the relevant agreement commenced before then. In other words, the change is "retroactive".

There are some words within the extract above which are "doing some heavy lifting" and these are the underlined words in the following phrase: "image rights payments related to an employment".

So, what is meant by "related to"?

I have seen some commentaries which say that those words mean that if one can identify a situation where image rights are not related to employment then the new rules will not apply. We will need to see the legislation, of course, but this view seems to me to be somewhat optimistic: I would expect HMRC to be arguing that the new rules apply "across the board".

However, I could see that if a player is retired then (depending upon the wording of the new legislation) it might be possible to say that the image rights payments did not relate to employment because there was no employment at the time. Also, it might be possible to say, in the case of one or two footballers who have a very distinct image that their image rights income relates to that distinct separate personality, rather than to their employment as a footballer.

We can all think of at least one very high-profile footballer who would have received image rights income for playing football but separately became

such a “star” in his own right that payments to him for using his image might simply relate to his separate personality. David Beckham would seem to me to be a good example of an individual who even when playing for Manchester United had a very distinct image which transcended his image as a footballer.

The obvious warning, however, is that we simply do not know what the legislation will look like.

What we do know, however, is as follows.

From 6th April 2027:-

(a) income related to image rights will be taxed as employment earnings;

(b) in addition Class 1 NICs will also be due.

So there will be an income tax burden. And, in addition, employer NICs at 15% will be charged in circumstances where previously there was no such National Insurance charge. Further, the players themselves will face employee NICs of 2%.

The reality is that this probably means that the standard image rights structure which has been utilised to date will no longer be tax efficient. Instead,

all image rights income will probably be treated as taxable remuneration save in those relatively rare cases where a footballer has created an image which can be said to be separate from his employment as a footballer and which, if you like, arises by virtue of his distinct personality.

How did we get here and why is the change to take effect?

There are two schools of thought as to how we have got here.

First school of thought – HMRC have long wanted to close down image rights structures and their current arguments are by no means compelling – so they need to try something else – hence the 2027 proposed changes.

From my point of view, we can see that over the last ten or fifteen years HMRC have made it their aim to tax as fully as possible all image rights structures both onshore and offshore.

Respectfully, in my view, HMRC have sought to do this in a somewhat random fashion.

Initially, HMRC sought to argue that image rights were not an asset in their own right. Therefore, any

attempt to set up an image rights structure would be bound to fail because no asset was involved.

This struck me as a difficult argument for HMRC to get home, bearing in mind that:-

(a) some of their manuals referred to image rights; and

(b) HMRC argued that the transfer of **assets** abroad (TOAA) legislation would apply to overseas image rights structures. (Income Tax Act 2007, Part 13, Chapter 2, starting at s.714.) But that legislation, of course, requires an **asset** in the first place and therefore HMRC's argument that an image right was not an asset had to be abandoned; and

(c) subsequently, in any event, HMRC entered into formal arrangements with the Premier League as to how image rights should be taxed; so, this was an "admission" that image rights did exist.

Expanding upon the agreement with the Premier League it can be seen that this followed on somewhat belatedly from the *Sports Club* case (*Sports Club v*

HMRC Inspector of Taxes (SpC [2000] SSCD 430 (SpC 253, also known as *Bergkamp & Platt v HMRC Inspector of Taxes* – see Tolley's Tax Cases 2025). In this case two well-known footballers, described as Jocelyn and Evelyn in the anonymised case, had image rights contracts which were held not to produce remuneration and so were not taxable as earnings.

In time, however, even these arrangements between HMRC and the Premier League proved unsatisfactory to HMRC and so they were more or less abandoned. HMRC then took the opportunity to challenge image rights arrangements utilised by a fairly significant number of players.

In line with this challenge, the *Hull City* case (*Hull City AFC (Tigers) Ltd v HMRC* [2019] UKFTT 227 (TC)) was litigated. This finally resulted in HMRC accepting that image rights did exist and therefore the position was simply how to tax them. The *Hull City* case was something of a "slam dunk" for HMRC – given the facts. And so therefore in that case it was relatively easy for HMRC to demonstrate that the sums were remuneration and therefore employment income.

However, one of the interesting points that came out of the case was an admission by both parties – and an acceptance by the judge – that image rights arrangements did create separate taxable structures.

Having said that the Hull City structure was not a particularly good one, but there were many much better ones which have proved more difficult for HMRC to challenge successfully.

Indeed, many of these image rights structures, in my experience, are successful.

More specifically, in my experience, payments of UK-source image rights income into a *UK company* within an image rights structure has very often resulted in corporation tax being paid at 19% and subsequently 25% (only) – and no income tax for the footballer. And then, once the footballer has moved abroad, that footballer could receive the income in the form of a tax-free distribution taking account of the rules which applied to non-residents – and so no income tax for the footballer either.

Separately, HMRC have found difficulties in taxing some *overseas structures*. The position was that provided the player was a non-domiciled individual under the rules which were in existence until 5th April

2025, or provided that he was not a long-term resident in respect of the rules which applied subsequently, then, of course, to the extent that the income which arose was foreign-source income and not remitted, no UK tax would arise.

This led to two forms of "attack" from HMRC.

The first attack that HMRC mounted was to the effect that the income in question (accruing to the overseas structure) was, after all, UK source. In my view, it was because of the difficulty in running this argument successfully that HMRC are now pushing through the new legislation which will apply from 6th April 2027. I say this because HMRC's argument that the income in question was UK source was anything but straightforward. More particularly, on a common sense basis (and also on a technical basis) the income of the foreign structure was almost certainly foreign source (depending on the facts of course) and, in my view, the obvious description of the offshore image rights income was that it was foreign-source royalty income.

Secondly, HMRC argued that having ascertained that the income was foreign source (assuming they could) they would then invoke the TOAA rules on the basis

that the player could not argue that the remittance basis protected that income from UK income tax.

My view, as mentioned, is that the income arising to a foreign structure is governed by rules concerning overseas royalties. Accordingly, such income is not taxed until it is remitted into the United Kingdom so far as a non-domiciled player is concerned.

HMRC resisted the argument, of course, that the image rights income was royalty income.

In order to succeed in the argument, that income was UK-source income after all, even in respect of overseas structures, HMRC, rather tortuously, have sought to argue that the income in question is trading income. This is not despite the fact that they had won the *Hull City* case on the basis that the relevant income was employment income.

The reason, in my view, that they sought to argue that the income in question was trading income was because then that income would accrue to a "single trade" carried on in the United Kingdom. After all, a trade cannot be split into two parts. If any part of it is carried on in the United Kingdom then all of the income (wherever it arises) is taxed as UK-source trading income (Income Tax (Trading and Other

Income) Act 2005 s.6). So, their argument may reasonably be described as "opportunistic".

So, pausing there, my view is that HMRC's arguments to date are fraught with difficulties and that is probably one of the main reasons, in my view, why they have introduced this new rule to say that all image rights payments will be treated as taxable employment income to the extent that the image rights relate to employment.

Second school of thought – it's all Bryan Robson's fault

The second possible reason why HMRC have made these changes relates to a different aspect of tax, namely, the rules in relation to so-called IR35 companies.

This takes us to the case of *Bryan Robson* (*Bryan Robson Limited v HMRC* [2025] TC09408).

Bryan Robson had two sources of income for the purposes of the tax case. One was the income he received as an ambassador for Manchester United; and the other was image rights income.

In the case Judge Beare held two things:-

(a) the income which he received in his capacity as an ambassador for Manchester United was within the scope of the intermediate legislation and therefore subject to income tax (*"bad news" for Robbo*); but

(b) payments made for the exploitation of his image rights were not (*good news*).

The "good news" for Bryan Robson came about because the relevant contract included a distinct provision for Manchester United's exploitation of his image rights, and Judge Beare accepted that those rights had a genuine commercial value. They were not simply a mechanism for arranging for additional remuneration to be paid to him for the services provided. More particularly, the judge held that the image rights income was not in respect of employment-type services which he performed. Rather they were consideration for a separate and assignable intellectual property right, namely, his image. Manchester United had a genuine commercial interest in using his image and had done so in practice.

As others have neatly said the judgment was very much a "game of two halves". In other words, in the second half of the proceedings Bryan Robson won on the basis that image rights existed as a separate distinct asset and the income which arose therefrom was not employment income.

So the second school of thought – as to why the new legislation is being introduced – emanates from the *Bryan Robson* case and the feeling, perhaps, that HMRC wanted to ensure that any form of income which relates to image rights must be taxable as earnings following that case.

Does HMRC "have it in" for footballers?

Separately, some commentators, have queried why HMRC seem to have an "animus" against footballers. Those commentators consider that HMRC may be pursuing something of a vendetta against them. After all, these commentators point out that it is often overlooked that footballers contribute a breathtaking amount of income tax into the system. For example, the recent Sunday Times list of the highest-paid income tax payers showed Erling Haaland as having paid £16.9m. in income tax last year, and Mo Salah paid a not too shabby £14.5m. himself.

Further, when you realise that roughly 47% of a footballer's remuneration is taxable and when you consider that a significant number of those players are earning £300,000 or more per week, you can see that the income tax take from footballers is phenomenal.

The fact that some people consider there is a vendetta against footballers can perhaps be supported by the fact that my understanding is that approximately 100 Premier League (or former Premier League) players are currently under investigation in respect of image rights income contracts.

How to deal with existing problems – go to mediation

As far as dealing with the existing issues that arise from image rights structure where HMRC, as mentioned above, consider that UK-source trading income arises. I would resist this argument. In my view, the income is royalty income and in my view is foreign source if it relates to overseas image rights. Categorically, in my view, it is not trading income.

Further, from a practical point of view I have had recent good experiences with mediation and although the procedure seems odd (at first blush)

because the mediator is an HMRC official – in my experience mediation can produce serious benefits and therefore I would not be dismissive of it.

After all, HMRC do seem, nowadays, to approach mediation in a much more sensible way than previously and with a view to arriving at an appropriate outcome for both parties. In the past I have not been convinced that this was the case and often the mediation was unsatisfactory as it was unnecessarily hostile and uncompromising from the first minute!

How to deal with the forthcoming changes

The forthcoming changes are a little over a year away but nevertheless existing structures should be carefully considered. It seems to me that the reality is that most image rights structures will no longer work from a tax point of view. That is not to say that they should not be entered into because they are very lucrative from the player's point of view. Rather, it just means that income tax and NICs implications arise.

I can see, however, that it may be possible in certain limited cases to say that the image rights do not relate to any employment.

If the player has retired then I could see it would be more difficult for HMRC to argue that the image rights payments relate to employment. It may be, of course, that when we see the new legislation it will encompass both the existing employment and previous employment.

Also, if the player in question really does have a very significant separate personality then I could see that it might be possible that the new rules do not apply to him.

The sensible thing will be to look at image rights agreements closer to the 6th April 2027 in order to ascertain what should be done.

But finally, I would not be inclined necessarily to let the "tax tail wag the dog" (apologies for the cliché) and abandon image rights arrangements all together. Proper bona fide image rights agreements are very remunerative and are worth having even if in due course they turn out to be less attractive from a tax point of view than currently.

Conclusion

We should watch this space to see what is meant by "in relation to". I fear that it probably is intended to

catch all image rights income. But the rules (as yet unpublished) may not apply to retired footballers.

Also, there may be some footballers who have such an independent and strong personality – entirely separate from their employment as a footballer – that it may be worth organising for separate image rights agreements to be entered into for their benefit. These would be image rights which are wholly distinct from their activity as a footballer.

But let's wait for the legislation!

IHT AND PENSIONS

The proposed new charge

Peter Vaines

The Finance Bill has clarified the Chancellor's proposals on the taxation of pension funds and in particular the IHT charge on undrawn pension pots.

On 26th November 2025 as part of the Budget Day press releases it was explained that:

> "The government will introduce legislation in Finance Bill 2025-26 to include the value of unused pension funds and pension death benefits within the member's estate on their death, regardless of whether the pension scheme administrators or scheme trustees have discretion over the payment of any death benefits. The pension death benefits, to which section 5(2) of the Inheritance Tax Act 1984 currently applies where there is no relevant discretion, will be included within the deceased's estate even where relevant discretion exists, with some exceptions.

> Death in service benefits payable from both discretionary and non-discretionary registered pension schemes will be excluded from Inheritance Tax. The existing Inheritance Tax principles providing exemption for death benefits passing to a surviving spouse or civil partner, and registered charities will be maintained.
>
> Legislation will be updated to provide the right framework to allow PSAs and PRs to exchange all the necessary information for Inheritance Tax purposes and Income Tax if due on inherited pensions."

The idea that my pension pot will be charged to IHT at 40% on my death, and the pension would also be charged to income tax at 45% when it is actually paid out was so extreme that they surely could not be serious….could they? It certainly looked like it.

(This was not an 85% charge, feared by some, but an effective rate of 67%.)

The Finance Bill published on 4th December contained the draft legislation whereby a person's interest in a registered pension scheme, a qualifying non-UK

pension scheme or a section 615(3) scheme will be treated as part of their estate for the purposes of Inheritance Tax from 6th April 2027. However it also contained provision for a deduction for the IHT for purposes of income tax.

This was welcomed as a sensible relief but there has been some confusion about how this deduction would operate. For example, would there be a deduction for the IHT in computing the income tax, or would there be a credit from the income tax liability.

The provisions of the Finance Bill are typically impenetrable to us mortals, but it seems that the effect of this deduction will be a credit for the IHT – or at least most of it.

Clause 67 of the Finance Bill inserts a new 567B ITEPA 2003 which applies where IHT is paid in respect of pension death benefit:

> "(1) This section applies if:
>
> (a) there is an amount of taxable pension income ("amount TPI") for a tax year for a pension, annuity or other item of pension income,
>
> (b) amount TPI reflects (to any extent)

the payment to a person ("the beneficiary") of a benefit under a pension scheme on the death of a member of the scheme ("the deceased"),

(c) the benefit is not an excluded benefit, and

(d) at any time (whether before or after the benefit is paid)—

(i) the beneficiary pays an amount of inheritance tax that is attributable to the value of the deceased's notional pension property, or

(ii) the deceased's personal representatives pay an amount of inheritance tax that is so attributable and pass on the burden of that payment to the beneficiary.

(2) A deduction is allowed from amount TPI equal to the lesser of:

(a) the amount of inheritance tax paid

as mentioned in subsection (1)(d), and

(b) so much of amount TPI as reflects the payment to the beneficiary of the benefit.

(3) If the amount mentioned in subsection (2)(a) exceeds the amount mentioned in subsection (2)(b), the excess is to be carried forward to future tax years to be deducted under this section (when applicable) until it has all been deducted.

(4) In this section, "excluded benefit" and "notional pension property" have the same meaning as in the Inheritance Tax Act 1984.

(5) For the purposes of subsection (1)(d) the deceased's personal representatives "pass on the burden" of a payment of inheritance tax to the beneficiary if—

(a) the personal representatives pay a sum to the beneficiary out of the deceased's estate that has been reduced by the amount of

inheritance tax, or

(b) the beneficiary reimburses the personal representatives that amount."

The way the deduction works is found in subsection 2. There is a deduction from the taxable pension income of the lesser of:

a) The IHT paid, and

b) The income payment to the beneficiary.

And subsection 3 provides that any excess IHT is carried forward until it is used up.

So, if the pension pot is £1000 and the IHT is £400, there will only be £600 to be paid out as taxable pension income.

When the £600 is paid out, the first £400 of pension payments will be subject to a deduction of £400 (being the amount of the IHT paid – from (a) above) and the balance of £200 will be taxed as income. So a basic rate taxpayer will pay income tax of £40 on this £200, a 40% taxpayer will pay income tax of £80, and a top rate taxpayer will pay £90.

The taxpayer will therefore end up with a total tax of

£440 or £480 or £490 (which represents an effective combined tax rate of 44%,48% or 49%) depending on his marginal rate of income tax.

That is not great, but not all that bad either. And it is certainly not the 67% which was where we started.

One of the conditions in subsection 1(d) is that the personal representatives must "pass on the burden" of their payment of the IHT to the beneficiary. That will nearly always be the case because the sum paid out to the beneficiary from the deceased's estate will have been reduced by the amount of the IHT – which is the specific requirement under subsection 5.

This is clearly an awful lot of complication for not very much additional tax revenue – especially bearing in mind that in many cases the spouse exemption will mean there will be no additional IHT at all. However, for those cases where IHT does apply, the overall tax may not be very much but there will be a cash flow benefit for the Treasury as the IHT will be paid up front by the personal representatives shortly after the death.

THE "UNINHABITABLE" THRESHOLD:

Mudan and the high bar for non-residential status

Dilpreet K. Dhanoa

"The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, but it is the taxman who decides if the bridge is a 'dwelling' for the purposes of the Finance Act."[1]

Introduction

The recent Court of Appeal decision in *Mudan v HMRC* [2025] EWCA Civ 799 is a reminder that SDLT is an exercise in classification, not impression. The question is objective: as at the effective date, does the subject-matter fall within the statutory definition of "residential property"? In addressing that question, the Court's treatment of "suitable for use as a dwelling" in FA 2003, s.116(1)(a) materially raises the bar for arguments that disrepair can strip a property of its residential character. The practical consequence is that one familiar route out of Table A[2] and into Table B[3] is now markedly narrower –

1 Anatole France, *The Red Lily (Le Lys rouge)*, 1894.
2 Residential rates.
3 Non-residential (commercial) and mixed-use property transactions.

particularly in mixed-use disputes where the supposed “non-residential” element is said to lie in the condition of an annex or outbuilding

This article examines the decision and its practical implications for those seeking to argue that a dilapidated annex or outbuilding constitutes the “non-residential” element required to trigger Table B rates.

The issue: when is a house not a house?

The facts in *Mudan* were stark, if familiar to anyone who has seen an SDLT ‘nudge’ letter in recent years. The taxpayers purchased a property that had been a dwelling but was, at the effective date of transaction (EDT), in a state of significant disrepair. It required complete rewiring, new plumbing, and a new boiler; it suffered from damp and had been vandalised.

The taxpayers argued that these physical defects rendered the property “unsuitable for use as a dwelling” under s.116(1)(a) Finance Act 2003 (FA 2003). If successful, the property would be classified as non-residential, attracting significantly lower SDLT rates (the Table B rates).

The core legal dispute was the interpretation of “suitable for use”. Does it mean “ready for immediate occupation” (a functional test), or does it refer to the building’s physical adaptation and history (a structural test)?

The Decision: fundamental character over immediate comfort

Upholding the Upper Tribunal, the Court of Appeal dismissed the taxpayer's appeal. In doing so, it provided the clearest judicial statement yet on the "suitability" threshold.

Two consequences follow:

First, "suitable" is not the same as "comfortable", "mortgageable", or even "immediately habitable". A property does not cease to be residential merely because it requires repair, renovation, or modernisation – however extensive the shopping list. Defects that are capable of being put right, even at significant cost, do not necessarily change the building's nature.

Second, the Court's approach keeps the spotlight on identity and fundamental characteristics: the sort of thing an ordinary speaker of English would recognise as "the kind of property people lived in". On that view, many defects that loom large in surveyors' reports are legally "transient". They may make occupation unpleasant or unsafe, but they do not – without more – strip the building of its essential residential character.

The Court treated "suitable for use" as an objective, fact-sensitive classification made as at the EDT – but not by a blinkered "habitability snapshot". The enquiry looks to the building's identity and

fundamental characteristics, informed by prior residential use, and may also take account of legal constraints on residential use. A property does not cease to be suitable for use as a dwelling merely because it requires renovation, repair, or modernisation – even if that work is extensive.

Crucially, suitability is not synonymous with "ready for immediate occupation". The judgment draws a sharp line between:

(i) Repairable defects: issues like dangerous wiring, lack of heating, or damp (as in *Mudan*) are deemed "transient". They do not alter the building's nature or its "fundamental characteristics".

(ii) Fundamental unsuitability: to escape the residential definition, the defects must be so severe that they destroy the building's "essential character" as a dwelling.

The Court endorsed the "ordinary speaker of English" test: would such a person characterise the building as the "sort of property that people lived in?" Although the Court cited *Bewley*[4] (where asbestos and structural decay necessitated

[4] *P N Bewley Ltd v HMRC* [2019] UKFTT 65 (TC).

demolition) as a valid example of unsuitability, it set the bar significantly higher than mere dilapidation.

In short: if it looks like a house and was built as a house, it remains a house for SDLT purposes unless it has been physically destroyed or irretrievably altered. That is directionally right as a warning, but the more accurate formulation is this: residential status is "sticky" and difficult to lose. To escape s.116(1)(a), the condition must be so extreme that the building has lost its identity as a dwelling – the kind of case exemplified by *Bewley* (where the state of the building, including contamination/structural issues, was such that demolition was required).

The trap for mixed-use claims

While *Mudan* was a straight "residential vs. non-residential" dispute, its rationale is dangerous for mixed-use planning.

A common strategy involves purchasing a country estate comprising a main house and a dilapidated outbuilding or annex. The argument runs: The main house is residential, but the annex is so derelict that it is 'non-residential' per s.116. Therefore, the transaction consists of both residential and non-residential land, resulting in mixed-use (Table B) rates on the whole.

The practical danger is not merely that *Mudan* makes "derelict annex" arguments harder. It is that, in many estates, the *real* fight is whether the alleged

non-residential element has genuinely escaped the statutory net (including the "garden or grounds" limb) and whether the building has *lost its identity* as residential rather than being temporarily unfit or inconvenient. Post-*Mudan*, anything short of *Bewley*-level facts is unlikely to do the work.

Mudan effectively narrows the route to all but extreme cases (i.e. the most ruinous of structures). If an annex has a roof, walls, and a history of residential use, *Mudan* dictates that it retains its residential character even if it is currently uninhabitable. Consequently, the annex is simply a second dwelling, potentially triggering the 5% Higher Rates for Additional Dwellings (HRAD) surcharge, rather than providing an escape to non-residential rates.

Practitioners must be wary of "hybrid" arguments where a structure is too far gone to be a "dwelling" for MDR purposes, but "non-residential" enough for mixed-use. The courts are increasingly viewing "residential property" as a sticky classification – easy to acquire, very difficult to lose.

Two further practical cautions are worth stating plainly:

(i) Section 116 disputes are rarely only about buildings. In mixed-use cases, the fight may instead (or also) be about whether land falls within "garden or grounds"

(s.116(1)(b)) – an analysis that can defeat "mixed-use" even where there is a non-residential feature somewhere on the estate. *Mudan* does not decide those cases, but it makes it harder to manufacture "non-residential" status via condition alone.

(ii) MDR is not the safety valve it once was. Multiple Dwellings Relief has been abolished for transactions with an effective date on or after 1 June 2024 (subject to transitional provisions), so taxpayers cannot assume that "annex as a second dwelling" will be neutral (or beneficial) rather than expensive.

Practical implications

Three practical implications strike the writer as essential for advisors in the 2026 climate of enforcement and litigation (bearing in mind the case of *Mudan*):

(i) "Uninhabitable" is not a tax test. Surveyors' language – "uninhabitable", "unsafe", "not mortgageable" – is not the statutory language. Those labels may

matter evidentially, but they do not decide the classification. The key question remains whether, viewed objectively at the effective date, the building still reads as a dwelling in its fundamental character. The Court made clear that a property can be legally "suitable for use" even if it is factually unsafe to sleep in on the night of completion.

(ii) Evidence is key: if one is arguing a structure is non-residential due to condition, the evidence must show a fundamental lack of suitability. A quotation for extensive works (even a six-figure one) will rarely be enough. The evidential target is much harsher: collapse, destruction, contamination, or other defects so grave that the building cannot sensibly be described as a dwelling at all – something closer to an "empty shell" than a neglected house awaiting renovation.

(iii) Recent residential use is a powerful indicator: section 116 is drafted in the

alternative – “is used” or “is suitable for use”. Even where “use” is contested at the effective date, *Mudan* underlines that recent use as a home strongly reinforces residential identity and makes a “suitability” challenge harder to sustain. In other words: if the building has only recently been lived in, the tribunal is unlikely to accept that it has ceased to be a dwelling merely because it now needs major works.

Conclusion

Mudan serves as a stark reminder that statutory definitions in tax law often diverge from the ordinary meaning of words. To a lay person, a house with no electricity is “uninhabitable”. To the Court of Appeal, it is simply a residential property awaiting a spark.

For those advising on mixed-use transactions, the message is clear: reliance on the poor condition of subsidiary buildings to secure non-residential status is now a high-risk strategy. The “essential character” of the building will almost always prevail.

INTERPRETATIVE CHALLENGES WITH TREATY-ABUSE MEASURES

Lachlan Molesworth

1 Introduction

States have increasingly become concerned that the network of bilateral double taxation conventions that underpin the international tax system are being subverted by abusive practices. In response, successive layers of anti-avoidance mechanisms have been devised and implemented by legislators both in domestic law and by adoption in bilateral treaties. Two of the most influential are the beneficial ownership limitation, first incorporated into the 1977 OECD Model Convention, and the Principal Purpose Test ("PPT"), developed in 2015 through the OECD/G20 BEPS Project and given multilateral effect by the Multilateral Instrument ("MLI"), now reflected in the wording of the 2017 OECD Model Convention. Although these two anti-abuse frameworks can overlap in the tax mischief they seek to attack – treaty shopping and the artificial redirection of income to access treaty concessions – they operate from

markedly different conceptual standpoints. However, both frameworks suffer from similar interpretative challenges that arise from the inconsistent development of principles and approaches to their application across jurisdictions. This paper undertakes a detailed comparison of the approaches to interpretation and administration to evaluate their respective strengths and administrative challenges. The paper concludes that a pervasive and perhaps unavoidable feature of such anti-avoidance frameworks is the almost inevitable fragmentation of principle and approaches to interpretation even where harmonised guidance exists.

2 Historical context and evolution

The earliest iterations of tax treaties did not make provision for avoidance measures. The first efforts emerged from the UK's bilateral policy in the 1960s: the Supplementary Protocol to the 1945 UK–US Convention (1966) and the 1967 UK–Netherlands Convention which limited reduced withholding to amounts "beneficially owned" by the resident of the treaty partner.[1] These initiatives targeted the routing

[1] Richard Collier, 'Clarity, Opacity and Beneficial Ownership' [2011] BTR 684, 686.

of income through intermediaries holding only bare legal title and bound to pass it on.[2] These rules were promoted by the UK within the OECD and received acceptance in Articles 10–12 of the 1977 Model Convention. The beneficial ownership concept, now widely adopted by states, was refined in the 2003 Model Commentary to provide clarity on the implicit anti-avoidance role and again in 2014 to expressly state its role in "the prevention of fiscal evasion and avoidance".[3]

The PPT, by comparison, is an explicit anti-abuse rule. From a doctrinal standpoint the PPT can be traced to the "guiding principle" that entered the 2003 Model Commentary, which warned that treaty benefits should be refused where a main purpose of the arrangement was to secure an unwarranted advantage.[4] Article 7(1) of the MLI (mirrored in 29(9) of the 2017 Model) consciously codified that idea as a self-standing, two-pronged GAAR: first, a subjective/ objective gateway that asks whether it is reasonable to conclude that obtaining a treaty benefit was one of the

[2] Commentary, 1997 Model Art. 10 [12].
[3] Commentary, 2014 Model Art. 10 [12.1].
[4] Andrés Báez Moreno, 'GAARs and Treaties. Guiding Principle to the PPT' (2017) 45(6/7) *Intertax* 432, 435.

principal purposes of the transaction; and, secondly, an exemption clause that preserves the benefit where it remains consistent with the object and purpose of the relevant provision. As Gosch and Altenburg argue,[5] this architecture lifts the purposive analysis out of ordinary Article 31 VCLT interpretation and puts it into a distinct abuse inquiry. Lang characterises the provision slightly differently as having a "signalling function": it does not create a brand-new anti-avoidance rule so much as compel courts and administrators to apply a purposive construction whenever that purpose threshold is crossed.[6]

3 Beneficial ownership

Beneficial ownership operates as a gateway concept in the dividend, interest and royalty Articles 10–12 of most tax treaties that adopt the 1977 OECD Model Convention or later. Broadly, it requires the recipient of passive income to be the "beneficial owner" to qualify for reduced withholding and acts as an anti-conduit device from the interposition of

[5] Dietmar Gosch and Nadia Altenburg, 'Beneficial Ownership and Tax Treaties' in Florian Haase and Georg Kofler (eds), *Oxford Handbook of International Tax Law* (OUP 2023) 378.
[6] Michael Lang, 'Signalling Function of Article 29(9): The PPT' (2020) 74/4/5 *Bulletin for International Taxation* 264, 268.

intermediary entities.

3.1 Jurisprudence

The OECD Commentary repeatedly emphasises that "beneficial owner" is to be understood in the context of the Convention, not as a reference to any domestic concept.[7] Notwithstanding, domestic courts have invariably looked to domestic law analogies when construing the term. A study of early jurisprudence through to recent decisions reveals a general shift in focus from a purely legal conception of ownership to one of economic ownership.[8] This is evident from old caselaw such as *Royal Dutch Shell*[9] where a UK-resident securities dealer bought dividend coupons attached to shares from a Luxembourg company and claimed a 10-percentage-point refund under Art 10 of the Netherlands–UK treaty. The Hoge Raad found that the dealer had become the legal owner of the dividend rights and was able to freely dispose of the coupons and cash it received. It did not require the beneficiary to have been the shareholder when the dividend was declared, only that it was the

[7] E.g. Commentary, 2014 Model Art. 10(2) [12.1].
[8] Gosch and Altenburg (n 5) 385.
[9] BNB 1994/217.

beneficiary when the dividend became payable. Similar reasoning was adopted by the Austrian Supreme Court in *N AG*[10] albeit coming to an opposite conclusion that the recipients of interest payments were not the beneficial owners based on the legal obligations that existed.

In contrast to earlier jurisprudence the approach of the UK Court of Appeal in *Indofoods*[11] introduced an economic interpretation of "beneficial ownership".[12] The Court stated "it is impossible to conceive of any circumstances in which either the Issuer or Newco could derive any 'direct benefit' from the interest payable".[13] The Court explicitly rejected a "purely legal title" test focusing instead on the practical effect of the obligations to determine that the ability of the recipient to deal with the income was not unconstrained and therefore it was not the beneficial owner. North American courts extended this concept further, and in *Prevost Car*[14] the Canadian Federal Court of Appeal treated a Dutch holding company as the beneficial owner of dividends, finding that it

[10] (2000) 2 ITLR 884.
[11] (2006) 8 ITLR 653.
[12] Gosch and Altenburg (n 5) 381.
[13] *Indofoods* [44].
[14] (2009) 11 ITLR 757 [100].

received dividends for its "own use and enjoyment" and therefore bore commercial risk and was not a mere agent. The same pragmatic approach was recently adopted in *Husky Energy*[15] where a stock lender obliged to pay-on dividends was found not to be the beneficial owner.

This caselaw contrasts with recent Swiss jurisprudence (*A AG*[16] and *X Bank*[17]) which has apparently tightened the concept of beneficial ownership by employing a "dual dependency" test, which looks to both economic as well as legal entitlement to the income. European Union law has also arguably expanded the doctrine further adding an additional stratum. Article 1(4) of the Interest and Royalties Directive incorporates a definition aligned with the OECD Commentary on Articles 10-12. However, the Court of Justice's decisions in *C-115/16 N Luxembourg and related appeals* (six 2019 Danish cases) interpreted the concept through the lens of the general "abuse of rights" doctrine rather than through any explanatory guidance or principle derived from treaty law. There the Court held that intermediate holding companies

[15] (2023) 26 ITLR 797.
[16] (2018) 20 ITLR 625.
[17] (2018) 21 ITLR 285.

with no genuine economic activity could not be the beneficial owners and that Member States must deny Directive and treaty relief. Subsequent domestic cases such as *Takeda*[18] and *NetApp*[19] have reflected these European developments.

3.2 Interpretative challenges

Two key observations arise from an assessment of the jurisprudence on beneficial ownership. First, the indeterminacy of the concept of "beneficial ownership", without any autonomous definition, compels courts to develop functional tests case by case. While the OECD Commentary (particularly from 2017) provides a broad conceptual framework there is no satisfactory and universally-accepted definition, which has resulted in courts filling that vacuum. Second, there remains an issue as to temporal relativity of the relevant guiding principles: as OECD Commentary has evolved, questions arise whether newer guidance should retroactively give meaning to treaties concluded under earlier versions. In *A Sàrl*[20] the Swiss Supreme Court found the 2014 Model Commentary did not necessitate revisiting earlier

[18] (2023) 25 ITLR 729.
[19] (2023) 25 ITLR 396.
[20] (2019) 22 ITLR 435.

principles, but paradoxically came to the opposite conclusion in *A Plc*.[21]

These challenges have produced fragmented interpretations. As Gosh and Altenburg aptly put it: "*Countries are neither following a clear pattern of domestic interpretation or an independent international fiscal understanding, nor one of a legal or economic approach.*"[22] The consequence is that there is a patchwork of domestic rules around which have evolved separate and unique interpretive principles presenting challenges in both interpretation and administration.

4 Principal Purpose Test

The PPT has evolved as a rule in both treaty law and domestic law to attack mischief arising from schemes entered into for a principal purpose of engaging treaty benefits. The most common formulation of the PPT (and that found in Article 29(9) of the 2017 OECD Model) contains two cumulative limbs: a "principal purpose" gateway and a "exclusions clause". The first inquires whether it is reasonable to conclude that obtaining a treaty benefit was one of the principal

[21] (2021) 23 ITLR 864.
[22] Gosch and Altenburg (n 5) 381.

purposes of any relevant arrangement or transaction. The second limb permits the benefit where, despite a tax-driven principal purpose, granting relief is consistent with the object of the treaty.

4.1 Jurisprudence

As the PPT is a reasonably recent policy device to combat avoidance schemes involving treaties, caselaw is limited. The most significant relevant decision to emerge thus far is *Burlington Loan Management* (heard by the UK First-tier Tribunal in 2022[23]; upheld by the Upper Tribunal in 2024[24]). The facts in *Burlington* pre-date the MLI, so the PPT was not directly applicable, but the formulation of Article 12(5) of the UK–Ireland Tax Treaty the subject of the dispute adopts similar language ("main purpose") to the PPT and offers insights into how courts might interpret the PPT.[25]

In *Burlington*, the commerciality of the relevant

[23] (2022) 25 ITLR 31.
[24] (2024) 26 ITLR 1139.
[25] Matthew Green and Guy Bud, 'Wrong kind of interest? Burlington and double tax treaty anti-abuse' *International Tax Review* https://www.internationaltaxreview.com/article/2dgwugcfezihym8w1rwu8/direct-tax/wrong-kind-of-interest-burlington-and-double-tax-treaty-anti-abuse

transaction turned on the fact that, as an Irish resident, Burlington, would be entitled to receive interest gross of UK withholding tax by virtue of Article 12. HMRC contended that "the main purpose, or at least one of the main purposes", of the relevant transaction was to take advantage of the treaty. The First-tier Tribunal rejected that stating (approved by the Upper Tribunal) that "something more is required than simply selling the claim outright, for a market price, which happens to reflect the fact that certain potential purchasers of the debt claim have tax attributes which the seller does not have".[26] That is, the Tribunal found that the mere existence of tax attributes was insufficient to establish a principal purpose of taking advantage of the treaty despite it directly impacting the consideration received. The Upper Tribunal found that the object and purpose of Article 12 was to allocate taxing rights to Ireland unless "there is something abusive" in the circumstances.[27] The Tribunal went on to conclude that "abuse" was not limited to artificiality and proceeded to apply a multifactorial analysis to assess whether securing treaty relief was indeed a main purpose of the

[26] *Burlington* [114].
[27] *Burlington* [65].

transaction. HMRC's argument that tax arbitrage was sufficient to evidence an abusive main purpose was rejected.[28] In dismissing the appeal, the Upper Tribunal stressed the significance of commercial context and held, "[t]he existence of other potential purchasers with different tax attributes…was plainly of relevance".[29] In arriving at these conclusions the Tribunal relied on diverse domestic law concepts and caselaw and not upon international guidance or jurisprudence.

4.2 Interpretative challenges

The Upper Tribunal in *Burlington* explicitly recognised that applying and interpreting the "main purpose" test in Article 12(5) presented serious interpretive difficulties. By way of example, the Tribunal acknowledged the difficulty in distinguishing purpose from background knowledge and economic context, noting that it was necessary to distinguish a person's "purpose" for doing something from that person's understanding of the consequences of doing it.[30] Such subtle distinctions demonstrate the interpretive and administrative challenges of an anti-

[28] *Burlington* [77]-[78].
[29] *Burlington* [78].
[30] *Burlington* [31].

avoidance regime that looks to subjective purpose in obtaining benefits made available to taxpayers to incentivise certain activities. *Burlington* demonstrates the judiciary's reluctance to conflate economic consequences with subjective purpose and is an example of the difficult evidentiary burden that falls on a taxpayer to establish that a relevant principal purpose should not be found.

The challenges identified by the Tribunal in *Burlington* are consistent with and amongst the many broader concerns raised by commentators on the PPT provisions. There is a common theme amongst authors that the indeterminacy of "one of the principal purposes" invites administratively wide discretion and ex post litigation. Scholars such as Elliffe[31] and van Weeghel[32] observe that the absence of a quantitative threshold allows tax authorities to brand almost any tax-efficient structuring as treaty abuse, potentially undermining predictability. Furthermore, as Lang argues, the "object and purpose" exemption mechanism requires recourse to the VCLT

[31] Craig Elliffe, 'Meaning of the PPT: One Ring to Bind Them All?' (2019) 11(1) *World Tax Journal* 47,60.
[32] Stef van Weeghel, 'A Deconstruction of the Principal Purposes Test' (2019) 11(1) *World Tax Journal* 3, 27.

interpretative Articles and to often-contested policy statements.[33]

5 Comparative certainty and administrability

Notwithstanding their formal differences, beneficial ownership rules and the PPT each pose analogous interpretative and practical challenges. Critically, both frameworks reflect inherent tensions between legal certainty and the anti-abuse imperatives of modern treaty law. However, those tensions manifest differently. The beneficial ownership test, as commentators have observed, was not originally conceived as a general anti-abuse rule. Rather, as Moreno explains, it arose "almost by accident" and became a proxy for abuse prevention largely through administrative and judicial practice, especially when applied against conduit companies.[34] Yet its conceptual underdevelopment remains problematic. Beneficial ownership is not defined in the OECD Model and is only loosely given definition in successive Commentaries, meaning that domestic courts have approached its meaning inconsistently. This

[33] Lang (n 6) 265-6.
[34] Moreno (n 4) 774.

indeterminacy has attracted substantial criticism. As Vann has observed, it risks rendering the concept "a GAAR without conditions of application or definition of abuse", leaving it vulnerable to discretionary and unpredictable use by tax authorities.[35]

By contrast, while the PPT offers a superficially clearer framework, it too raises fundamental interpretation issues. Unlike beneficial ownership, the PPT is self-evidently purposive and explicitly formulated as a GAAR. However, as Zahra and Danon both critically analyse, this does not mean it is necessarily more predictable or administrable. The central difficulty with the PPT lies in its two-pronged architecture. The first limb (the principal purpose to obtain treaty benefits) imports a subjective element that is difficult to apply with precision. Although the test is ostensibly framed objectively (asking whether it is "reasonable to conclude"), the underlying inquiry involves sensitive and often contested evaluations of motive and context.[36] Courts must distinguish between transactions which simply generate treaty benefits

[35] Richard Vann, *Beneficial Ownership: What Does History Tell Us*, Sydney Law School Paper 12/66, 31 (2012).
[36] Robert Danon, 'The PPT in Post-BEPS Tax Treaty Law: It Is a GAAR but Just a GAAR' (2020) 74(4/5) *Bulletin for International Taxation* 203, 218-9.

(which are permissible) and those driven by a principal purpose to secure such benefits (which are not). As *Burlington* illustrates, this distinction is difficult to apply, particularly where taxpayers have multiple commercial and fiscal purposes.[37] Moreover, as Moreno notes, the PPT's catch-all nature risks overreach. Without quantitative thresholds, it may allow tax authorities "to brand almost any tax-efficient structuring as treaty abuse".[38] This generates uncertainty for taxpayers planning cross-border investment.

Finally, the consequences of applying each rule add another layer of complexity. Whereas beneficial ownership, as conventionally understood, operates in a limited manner (denying treaty relief in respect of dividends, interest and royalties where no beneficial owner is present) the PPT applies more broadly but with uncertain legal effects. Moreno persuasively describes the PPT's legal consequences as "limited but unclear".[39] While it denies treaty benefits in abusive cases, it does not replace the abusive transaction with

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[37] Ian Zahra, 'The Principal Purpose Test: A Critical Analysis of Its Substantive and Procedural Aspects' (2019) 73 *Bulletin for International Taxation* 609, 212-3.
[38] Moreno (n 4) 774.
[39] Moreno (n 4) 773.

a counterfactual, nor does it definitively resolve whether alternative treaty relief may be available.[40] This differs from many domestic GAARs which generally substitute a non-abusive legal form. Accordingly, the PPT may leave both tax authorities and taxpayers in limbo as to the proper tax treatment following disapplication of treaty benefits. In this sense, the PPT, like beneficial ownership, suffers from a lack of normative clarity about its application and consequences, albeit for different reasons. Beneficial ownership is uncertain because of historical conceptual vagueness; the PPT because of doctrinal overbreadth and undefined operational rules.

6 Conclusion

Viewed comparatively, the difficulties inherent in applying beneficial ownership rules and the PPT reveal a deeper and perhaps unavoidable reality about international anti-abuse rules. Both measures lack a normative anchor and suffer from divergent and fragmented judicial interpretations despite different conceptual underpinnings. Beneficial ownership, as commentators have emphasised, evolved incrementally and was not originally intended to

[40] Moreno (n 4) 779.

perform a general anti-abuse function. Its vagueness has allowed domestic courts and authorities considerable latitude, producing markedly inconsistent approaches as to whether legal control, economic entitlement, or an abuse-focused inquiry governs its application. The PPT, by contrast, was designed from inception as a purposive anti-abuse rule and its language seeks to impose clear conditions on access to treaty relief. Yet, despite this, it too faces acute interpretative difficulties. As authors such as Danon, Zahra and Moreno emphasise, the open-textured nature of the "principal purpose" threshold and the vague operation of the object and purpose carve-out introduce substantial uncertainty and grant wide discretion to revenue authorities. Thus, while arising from opposite historical origins (beneficial ownership as a technical requirement adapted for anti-abuse purposes, and the PPT as a general anti-abuse device) both suffer in practice as difficult-to-administer, indeterminate measures. This parallel fragility reinforces the broader challenge in international tax treaty law: that combating treaty abuse through purposive and undefined standards inevitably risks undermining certainty and coherence, irrespective of whether those standards emerge

through jurisprudential development or development of the treaty text itself.