Tax Chamber
First-tier Tribunal for Scotland

[2025] FTSTC 10

Ref: FTS/TC/AP/24/0001 and 0007

Land and Buildings Transaction Tax – transition from SDLT – 2014 Order – Statutory interpretation – extension of lease – whether new lease? – no – term of lease for NPV – commences at effective date

DECISION NOTICE

IN THE CASE OF

Archer (UK) Limited

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: ANNE SCOTT
CHARLOTTE BARBOUR

The hearing took place at George House, Edinburgh on 18 September 2024

Written Submissions for Revenue Scotland dated 6 May 2025

Written Submissions for the Appellant dated 21 May 2025

For the Appellant: Philip Simpson, KC, instructed by Burness Paull LLP

For the Respondent: David Welsh, Advocate

DECISION

INTRODUCTION

1. On 26 March 2024, at the request of the Appellant, and with the consent of Revenue Scotland, these two appeals were conjoined in terms of Rule 5(3)(b) of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 ("the Rules"). Counsel agreed that only one decision should be issued covering both appeals.

2. The two Notices of Appeal are dated 11 January and 15 March 2024 respectively.

The First Appeal

3. This appeal is against a decision by Revenue Scotland in a Closure Notice dated 2 August 2023 and upheld in a Review Conclusion letter dated 15 December 2023. That decision amended the Appellant's tax return to charge additional Land and Buildings Transaction Tax ("LBTT") of £65,352 plus interest. That was on the basis of Revenue Scotland's calculation of the net present value ("NPV") of a lease that had originated under the Stamp Duty Land Tax ("SDLT") regime. That lease had been extended and varied by a Minute of Extension and Variation ("the Minute") dated 9 June and 8 and 10 July 2020.

4. Revenue Scotland treated the Minute as the creation of a new lease for a period of five years commencing on the expiry of the original lease (the "Lease").

5. On 21 December 2020, the Appellant's then solicitors ("the Agents") had filed the LBTT return and paid the LBTT thereby assessed of £89,738 on 23 December 2020. They had quantified the tax on the basis that the NPV fell to be calculated on the basis of a deemed new lease commencing as at the last date of execution of the Minute.

6. At that point both parties accepted that there was a deemed new lease because Article 13 of The Land and Buildings Transaction Tax (Transitional Provisions) (Scotland) Order 2014 ("the 2014 Order") applied to the Minute. The dispute related purely to the calculation of the LBTT.

7. Burness Paull were instructed after the Review Conclusion letter dated 15 December 2023 was issued and they lodged the First Appeal and challenged the existence of a deemed new lease in addition to the method of calculation of LBTT.

The Second Appeal

8. This appeal is against a Closure Notice dated 16 February 2024 wherein Revenue Scotland rejected an overpayment claim in terms of section 107 Revenue Scotland and Tax Powers Act 2014 ("RSTPA") for LBTT already paid of £89,738.

9. That claim had been submitted by Burness Paull on the basis that Article 13 did not apply to the Minute because, in Scots law, as opposed to English law, a document such as the Minute is not a new lease.

10. The parties are agreed that both appeals turn on matters of statutory interpretation, and therefore questions of law, rather than on questions of facts, albeit both submitted that in some issues there was a paucity of evidence provided by the other.

The Hearing

11. We had a Statement of Agreed Facts, a copy of which we annex at Appendix 1. We heard no witness evidence and the witness statements were uncontested.

12. We also had a Joint Bundle of Documents extending to 198 pages, a Joint Bundle of Authorities extending to 1016 pages and Skeleton Arguments for both parties.

13. On the day before the hearing, the Appellant lodged copies of paragraphs 13 and 19 of Schedule 17A Finance Act 2003, Minutes of the Scottish Parliament's Finance Committee dated 4 February 2015 and a spreadsheet that had been omitted from the Skeleton Argument. That was not opposed by Revenue Scotland.

14. In the course of the hearing, since Revenue Scotland had quoted from it in both their Statement of Case and Skeleton Argument but not produced it, at our direction, Revenue Scotland lodged HMRC's Transitional guidance on the introduction of LBTT (the "HMRC Guidance"). It is headed "Land transactions in Scotland". It was published on 13 February 2015. We annex at Appendix 2 the text of section 21.9 which deals with variations of leases.

15. We had the benefit of a transcript of the hearing for judicial use only because, following on a period of ill health, I was only working part-time. During the hearing, the parties were made aware that the decision would not be released within the usual time frame. Unfortunately, further delay in issuing this decision is attributable to a subsequent extended period of sickness leave.

16. Following the issue of the judgment of the Supreme Court in *For Women Scotland Limited v The Scottish Ministers* 2025 UKSC 16 ("For Women") the parties lodged further written submissions on statutory interpretation referencing that decision and this Tribunal's decision in *Anderson v Revenue Scotland* [2025] FTSTC 3 ("Anderson").

The Facts

17. The Statement of Agreed Facts extends to 26 paragraphs. In his Skeleton Argument, Mr Simpson had helpfully identified what he described as the essential facts and we gratefully adopt that. It reads as follows:

> "In summary, the essential facts are:
>
> a) by the Lease, the Appellant became tenant of the Premises. The Lease was executed on 8th and 24th January 2014; notwithstanding that, the date of entry was 17th December 2013. Thus, the lease was completed when SDLT applied in Scotland;
>
> b) the initial ish [Scots law term for the date that a lease expires] was 16th December 2033;

c) by the Minute of Variation, the then parties to the Lease varied the Lease so as to extend its term. The Minute of Variation was executed on 9th June and 8th and 10th July 2020. The new ish was 16th December 2038;

d) the Minute of Variation was in form a variation of the Lease: that is to say, the extension of the term was effected by the parties agreeing to vary an existing provision of the Lease, rather than by the Lease being terminated and a new lease with the later ish being entered into in its place;

e) at the date of the variation, the rent due was £1,273,993.46 p.a."

Other facts found

18. As far as paragraph 11 in the Agreed Statement of Facts is concerned, we find that the extension achieved by the Minute was a *quid pro quo* for the rent free period from 28 May 2020 to 27 November 2020 as the Covid pandemic had adversely affected the Appellant's business.

19. On 17 October 2023, Revenue Scotland issued a penalty of £100 under sections 159 and 160 RSTPA for a failure to submit a 3 year lease review return on time. That was on the basis that the land transaction constituted by the Minute had an effective date of 10 July 2020. The Review Conclusion letter in the First Appeal confirmed that such returns would be required every three years of the anniversary of the effective date.

Summary of the legislative context

20. Section 29 of the Scotland Act 2012 disapplied Stamp Duty Land Tax ("SDLT"), administered by HMRC, and from 1 April 2015, LBTT applied to Scottish land transactions.

21. The SDLT code is to be found in Part 4 of the Finance Act 2003 as amended.

22. Section 52 Land and Buildings Transaction Tax (Scotland) Act 2013 ("LBTTA"), states that Schedule 19 of LBTTA makes provision about the application of LBTTA to leases. It is common ground that it does not provide a general definition of the term of a lease for LBTT purposes.

23. The 2014 Order was made by Scottish Ministers in exercise of their powers conferred by section 67(1) LBTTA.

24. Although it has no direct application in these appeals, Article 12 of the 2014 Order ("Article 12") is relevant and reads:

"**12.— Variation of lease treated as grant of new lease**

(1) This article applies to a lease granted prior to the commencement date (to which the provisions of Schedule 17A to the 2003 Act apply) where there is a variation of the lease after the commencement date to increase the amount of rent, which, if it

had been before that date, would have been a variation to which paragraph 13(1) of that Schedule would have applied.

(2) Where this article applies—

(a) the variation of a lease referred to in paragraph (1) shall be treated as the grant of a lease; and

(b) the chargeable consideration (other than in respect of any premium) shall be the additional rent.

25. Article 13 of the 2014 Order ("Article 13") reads:

"**13.–Extension of lease treated as grant of new lease**

(1) This article applies to a lease granted prior to the commencement date (to which the provisions of Schedule 17A to the 2003 Act apply) where there is a variation of the lease after the commencement date to increase the term of the lease or extend premises let, which, if it had been before the commencement date, would have been for the purposes of that Schedule the grant of a new lease.

(2) Where this article applies—

(a) the variation of a lease referred to in paragraph (1) shall be treated as the grant of a lease; and

(b) the chargeable consideration (other than in respect of premium) shall be the additional rent."

26. Section 6 LBTTA provides that a variation of a lease is not a land transaction unless it falls within paragraph 29 of Schedule 19 LBTTA. That paragraph does not apply to an extension of the term of a lease. Revenue Scotland have conceded that unless Article 13 applies to the Minute then there is no land transaction for LBTT purposes.

27. Schedule 17A Finance Act 2003 ("Schedule 17A"), introduced by section 120 Finance Act 2003, is entitled "Further provisions relating to leases" and it was common ground that:

(a) The SDLT code is contained in Part 4 of the Finance Act 2003, but Schedule 17A is where the majority of the lease provisions in the SDLT code are to be found.

(b) The Lease was a lease within the meaning of Schedule 17A because it was a lease within the meaning of paragraph 1 of the Schedule and the remainder of the Schedule contained provisions that applied to leases as defined.

(c) The Schedule does not provide that a variation of a lease is a new lease.

28. The only two paragraphs of that Schedule to which we were referred were paragraphs 13 and 19. We discuss paragraph 13 at paragraph 91 below and the text

insofar as relevant is included in Appendix 2 since the HMRC Guidance makes reference to it.

29. Paragraph 19 (now repealed) was headed "Provisions relating to leases in Scotland" and went into some detail as to how Scottish leases actually worked since Scots land law and conveyancing differ in many respects from English law. For completeness we annex at Appendix 3 a copy of the version in force immediately prior to repeal. There had been a number of amendments made to it over the years.

30. Lastly, we discuss section 43(3)(d) Finance Act 2003 at paragraph 57 below since it refers to variations of leases and Revenue Scotland relied upon it.

The Issues

31. The Parties had accurately identified the issues as being:

(a) *The First Issue* - the proper interpretation of Article 13 and how that should apply to the Minute. The question underpinning that is - If a document, in the same terms as the Minute, had been executed before 1 April 2015, would it have been deemed to have been a grant of a new lease for the purposes of Schedule 17A?

and

(b) *The Second Issue* - if Revenue Scotland succeed in their arguments on the First Issue, then what is the proper method of calculation of the NPV and thus the LBTT? The underlying questions are - If there was a deemed new lease when did the deemed new lease (in terms of Article 13(2)(a)) commence? Is it from the effective date of the Minute, as the Appellant contends, or is it from the original ish ie 17 December 2033 as Revenue Scotland contend?

32. It is common ground that Article 13 is a deeming provision and it does identify what the rent is but, it does not state what the term of the new deemed lease is and nor does it state when the term of that lease commences.

The History

33. Both parties argued that the other had departed from its previous stance.

34. Since at least the issue of the Closure Notice on 2 August 2023, Revenue Scotland has argued that in the Agents' letter of 5 February 2021 ("the February Letter"), under a heading, "Statutory Position and Uncertainty", it had been accepted that the Minute fell within Article 13. That was because the Agents had said that it was "uncontroversial" that:

(a) Although it was neither the position in Scots law nor explicitly set out in Schedule 17A, it was "common practice" in Scotland that an extension of a lease would be treated as the grant of a new lease.

(b) That was confirmed by HMRC's manual SDLT19030 which, in March 2015, insofar as relevant, read:

> "Leases in Scotland are frequently varied by the execution of a minute which both increases the rent and extends the term. For SDLT purposes, the extension and/or variation of a lease will be treated as the grant of a new lease."

(c) Therefore the Minute fell within Article 13.

35. The Agents had only queried the method of calculation of the LBTT. The subsequent enquiry Closure Notice and review process focused only on that. The correspondence with Revenue Scotland was conducted by the Appellant without the assistance of the Agents.

36. Interestingly, by September 2023, the Appellant had departed from the Agents' stance and had agreed with Revenue Scotland that:

(a) "…the new LBTT lease starts when the original term ends", and

(b) as a matter of Scots Law "the term of the lease is the period in which the possession of the property is associated with the lease…this would be the extended period".

The Appellant's accountant joined one telephone call since at that point the Appellant's view was the only dispute was a matter of "arithmetic".

37. After the Review Conclusion letter dated 15 December 2023 was issued Burness Paull were instructed and they lodged the First Appeal. On 15 January 2024, they lodged the overpayment claim in terms of section 107 RSTPA on the basis that the Minute did not fall within Article 13. That triggered the subsequent enquiry, the Closure Notice in that regard and the Second Appeal.

38. We accept that having changed solicitors and instructed Counsel, the Appellant is entitled to alter its stance.

39. The Appellant argues that Revenue Scotland has also changed its stance having argued at paragraph 54 in the amended Statement of Case (it was also in the original) that:

> "Under the SDLT legislation (FA2003), an extension to the term of a lease amounts to the grant of a new lease. In other words, the SDLT legislation has adopted the English common law approach to the variation of leases. In practice, therefore, the respondent understands that the treatment of lease variations in Scotland was aligned with the treatment in England, i.e. a minute of variation would be regarded as the grant of a new lease for SDLT purposes, notwithstanding that as a matter of Scots law there was no new lease but simply the original lease with an extended term. This treatment did not arise directly from the express terms of the FA2003, nor from the Scottish law of leases. ***Instead, it was a matter of convention between HMRC and the Law Society of Scotland,*** designed to ensure parity between Scottish and English leases for SDLT purposes in the manner intended by Parliament".

40. The emphasis was added by the Appellant when quoting from the Statement of Case in their Skeleton Argument because the Appellant understood Revenue Scotland to be relying on the "convention" ("the Convention"). It is common ground that neither the Finance Act 2003 nor the Scots law of leases provided that an extension of a lease would be the grant of a new lease.

41. Revenue Scotland made it explicit in their Skeleton Argument that their stance had been misunderstood, and it was not their "position that the previous taxation was by convention". The Skeleton Argument suggested that when the Appellant referred to paragraph 54 the reference should rather have been to paragraph 49 of the Statement of Case. Paragraph 49 stated that the Appellant's stance had changed, and the Agents had accepted that it was "common practice in Scotland in relation to SDLT leases that extension or variation of a lease would be treated as the grant of a new lease for the purposes of Schedule 17A".

42. Both paragraphs 49 and 54 of the Statement of Case were derived from the February Letter from the Agents.

43. That letter was written to explain the basis on which the LBTT return had been submitted and to request Revenue Scotland's opinion because there was "uncertainty in the legislation" as to how the NPV fell to be calculated.

44. Having narrated what we have described at paragraph 34 above, the Agents went on to argue at paragraph 19, under a heading "The SDLT Analysis", (which they rejected) that "there is no clear reason why the SDLT treatment should be replicated in LBTT. Indeed, there are good reasons why LBTT should not do this".

45. Paragraph 19 of the February Letter explained the Convention and the differences between Scots and English law. For completeness we annex at Appendix 4 a copy of that paragraph. As can be seen, the paragraph argued at 19(e)(iii) that as far as the Agents were aware, the purpose of Article 13 (wrongly referred to as regulation 13) was simply to ensure that the extension of an SDLT lease was brought into the LBTT regime. In that regard they relied upon, and quoted from, section 21.9 of the HMRC Guidance.

46. It is now argued for Revenue Scotland that the reference to the Convention was simply a reflection of the fact that the Convention demonstrated that the Law Society of Scotland recognised "the purpose and effect of SDLT being applied in the same manner across the whole of the UK".

47. As can be seen from sub-paragraph (a) of paragraph 19 of the February Letter the Agents had asserted that the Convention had applied to Stamp Duty which was the precursor to SDLT. We point out that, in the first instance, Stamp Duty was self-assessed in that the document in question was sent to the Stamp Office with a cheque for the Stamp Duty.

48. For the avoidance of doubt, we are not adopting the Agent's arguments on the Convention but quote from the February Letter to show the derivation of sections of Revenue Scotland's Statement of Case. However, we do agree with, and adopt, the factual analysis of the Scots Law of leases.

49. We observe that in Revenue Scotland's response to the February Letter dated 7 December 2021, Revenue Scotland confirmed that the "SDLT analysis is Revenue Scotland's current approach" to transitional leases. They also acknowledged that the matter was complex and remained under consideration.

50. The Statement of Case was drafted by a solicitor in Revenue Scotland, and, like the Appellant, Revenue Scotland, having instructed Counsel, is not restricted to the arguments that were previously advanced.

Discussion

The First Issue

51. On first reading, the arguments on the First Issue for both parties had a beguiling simplicity but the reality was decidedly complex.

52. In summary, Revenue Scotland argue that the Minute does fall within Article 13 because:

(a) The Lease was granted before the commencement date (to which the provisions of Schedule 17A apply), ie 1 April 2015.

(b) The Minute was dated after the commencement date.

(c) The term of the Lease was increased.

(d) Had the Minute been dated before the commencement date it would have been the grant of a new lease for the purpose of Schedule 17A.

53. The Appellant argues that Article 13 requires that Schedule 17A applies to the Lease and because there is no express wording in Schedule 17A, Article 13 cannot apply to the Minute. Specifically, there is no provision to state that if a lease is varied by extending its term then it would be treated as the grant of a new lease.

54. Accordingly, the Minute did not give rise to a land transaction and therefore no LBTT charge arose.

55. Whilst the Appellant does not dispute the points made in the first three sub-paragraphs in paragraph 52 above, the Appellant argues that, quite apart from the Schedule 17A requirement, the Minute does not fall within Article 13 because:

(a) In Scots law, it would not have been a new lease.

(b) The SDLT manual and other HMRC Guidance did not have the force of law.

(c) The Law Society and HMRC had no mandate to require taxpayers to self-assess to tax where Scots law would not have required a return.

(d) The assertions that there was a common practice to self-assess to SDLT in respect of variations to extend leases has not been proven.

56. In that regard, Revenue Scotland argue that:

(a) The meaning of Article 13 is clear, ie to charge to LBTT any transaction that would have been chargeable to SDLT.

(b) The Minute would have been chargeable because prior to April 2015, the variation of a Scottish lease by extending its term would have resulted in a charge to SDLT.

(c) Therefore, the Scots law on leases was not relevant since the Minute would be deemed to be a new lease. Mr Welsh described Scots law as a "red herring" on the basis that the whole purpose of Article 13 was that what was a "trigger" for SDLT should be a "trigger" for LBTT.

(d) The very existence of Article 13 and the nomenclature of its heading (rightly conceded to be a peripheral matter) underpinned that purpose.

(e) The reference to Schedule 17A in Article 13 simply means any lease that is encompassed by Schedule 17A and because the Lease falls within paragraph 1 of that Schedule, then Article 13 applies, ie so although Schedule 17A makes no reference to extension of leases it applies.

We have added emphasis because the word "would" is key.

57. In that regard Revenue Scotland rely on section 43(3)(d) Finance Act 2003 which, insofar as relevant reads as follows:-

"(3) For the purposes of this Part –

…

(d)The variation of a lease is an acquisition and disposal of a chargeable interest only where –

(i) It takes effect, or is **treated for the purposes of this Part,** as the grant of a new lease, or …".

58. We have added emphasis because there is not a meeting of minds as to what those words mean, although it is accepted that "this Part" means the SDLT code including Schedule 17A.

59. In summary, Revenue Scotland argue that section 43(3)(d) is the "gateway" to Schedule 17A because it brings into the charge to SDLT not only circumstances which are, as a matter of law, the grant of a new lease but also situations which are "treated for the purposes of this Part" as the grant of a new lease. What is relevant there, therefore, is not the common law position but whether, for the purposes of SDLT, the variation is treated as the grant of a new lease.

60. We discuss Schedule 17A in more detail at paragraphs 89-93 below.

61. Revenue Scotland quote the SDLT manual (see paragraph 34 above) in support of that, asserting that there were no known challenges to that approach prior to 2015. We

indicated at paragraph 10 above that due to paucity of evidence, there were some difficulties with some of the "facts"; this is one such.

62. The other major similar challenge is to the assertion that the Convention is evidence of the alleged common practice of treating a variation or extension in Scotland as a new lease.

63. The first point to make is that we agree with the Upper Tribunal in *Edwards v HMRC* [2019] UKUT 131 (TCC) where it quoted with approval, the FTT's findings in *Qureshi v HMRC* [2018] UKFTT 0115 (TC) and the relevant paragraph reads:

> "15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that 'would have' or 'should have' happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate."

64. Secondly, as far as the SDLT manual is concerned, we have seen no evidence establishing the basis for the statement therein. The only "evidence" is the February Letter and by implication the Convention and we will revert to those. However, before doing so it is relevant to consider the status of not only that manual but also the guidance which was relied upon by Revenue Scotland.

Guidance

65. Revenue Scotland's Transitional Guidance LBTT6050 ("the Revenue Scotland Guidance") was referenced by both parties. It explained the replacement of SDLT with LBTT and states that the 2014 Order contains the "transitional rules" that relate to leases granted prior to 1 April 2015. We annex at Appendix 5 quotations from the Revenue Scotland Guidance.

66. We have a problem with this document. When writing this decision, we noted that the version produced in the Authorities Bundle states that it was last updated on 29 September 2022. That was not the version in force when the Closure Notice and Review Conclusion letter were issued as the Guidance was amended on 8 February 2023; indeed the Closure Notice refers to "our recently updated guidance".

67. We do not know what those amendments might have been. Furthermore, we observe that the original version was dated 20 May 2022 but the LBTT return was filed on 21 December 2020. It is not known what guidance was in force then. Revenue Scotland's letter of 7 December 2021 replying to the February Letter refers the Appellant to Revenue Scotland's "current guidance". There is no indication what that might have been.

68. As we have indicated earlier, the Agents had identified section 21.9 of the HMRC Guidance in the February Letter and quoted a paragraph from that. Revenue Scotland duly relied upon, and quoted, that at paragraph 55 of their Statement of Case. That quotation is only the final paragraph in the quotation of section 2.19 that we have included at Appendix 2. We take the view that that final paragraph should be read in context and have therefore quoted the entire section entitled "Variation of leases".

69. In a similar vein, as we have noted at paragraph 34 above, the Agents had quoted from HMRC's manual SDLT19030 and in Revenue Scotland's Skeleton Argument, at 2.24, Revenue Scotland also relied upon that as they have in the hearing.

70. We note that the Revenue Scotland Guidance refers to "the archived SDLT guidance for Scottish leases" and that in turn provides a link to SDLT19030. Neither provides any authority for the statements that extensions of Scottish leases will be treated as the grant of a new lease.

71. We do highlight the fact that the versions of the Revenue Scotland Guidance that we have seen, and we assume that that would apply to all of the versions, state explicitly that the Revenue Scotland Guidance is consistent with the HMRC Guidance. The introduction to the HMRC Guidance states that the references to LBTT legislation in that guidance had been provided by the Scottish Government. Clearly, they were produced in collaboration.

The Status of Guidance

72. We were not referred to the case but Lord Tyre in *Ventgrove Limited v Kuehne-Nagel Limited* [2022] CSIH 40, when discussing the status of HMRC Guidance, stated:

> [35] The status of guidance issued by HMRC was described by Lewison LJ in *Leeds City Council* v *Revenue & Customs Commissioners* at paragraph 4 as follows:
>
> > '...There are many problems of interpretation arising out of the VAT code and HMRC provide the public with their own interpretation of points of difficulty; and information about the practice they adopt in various areas. These are variously contained in Notices, Business Briefs and the VAT Manual. They are not law: they are no more than HMRC's interpretation of the law. ...'
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> In *Revenue & Customs Commissioners* v *KE Entertainments Ltd* [2020] STC 1402, the Supreme Court rejected the taxpayers' argument that a business brief published by HMRC "required" the VAT due on bingo participation fees to be calculated in a particular way. Delivering a judgment with which the other Justices concurred, Lord Leggatt stated (paragraph 60):
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> > '...[T]o suggest that the business brief `required' bingo promoters to use the session by session basis of calculation ascribes to guidance published by HMRC a status which it does not have. Such guidance is not capable of imposing on taxpayers an obligation to calculate tax in a particular way. It represents only HMRC's view or interpretation of the law and, if a taxpayer disagrees with HMRC's view, it can appeal from a decision or assessment based on that view to a tribunal whose function it is to give authoritative interpretations of the law ...'
>
> [36] It was, however, acknowledged in *KE Entertainments Ltd* (paragraph 59) that HMRC guidance was capable of generating a legitimate expectation on the part of a taxpayer that a particular policy or practice would be followed, and that the law

would protect that expectation by preventing HMRC from acting in a way that frustrated it. But there are important limitations on the circumstances in which an expectation aroused in the taxpayer can be said to be a legitimate one giving rise to enforceable rights in law. As Bingham LJ observed in *R* v *Inland Revenue Commissioners, ex parte MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545 at 1569, "[t]he taxpayers' only legitimate expectation is, prima facie, that **he will be taxed according to statute, not concession or a wrong view of the law ..."**. If HMRC find that they need to alter guidance, a taxpayer can only rely on the legitimate expectation that it created where it would be so unfair as to amount to an abuse of power: *R (Hely Hutchinson)* (above), Arden LJ at paragraph 45." (Emphasis added)

73. There is no argument in this appeal about abuse of power or the Tribunal's jurisdiction in relation to legitimate expectation.

74. We have added emphasis to the quotation because that is the argument for the Appellant, ie that even if there was a practice whereby SDLT was charged there is no statutory provision for liability for taxation where a Scottish lease is extended.

75. We directed that the HMRC Guidance be produced because we wished to know if it stated that it had the force of law. It was rightly conceded in oral argument that Revenue Scotland did not rely on the HMRC Guidance because they recognised that it did not have the force of law and it merely reflected HMRC's view.

76. We agree entirely with Lord Tyre and have adopted that approach to the guidance to which we have been referred and also to the SDLT manual since that too is simply HMRC's view.

77. In summary, as the Tribunal has indicated in other decisions, the status of guidance is indeed merely the relevant revenue authority's view of the law. It may or may not be correct. Therefore, the issues with the Revenue Scotland Guidance are not material in the context of these appeals.

The treatment of variations extending leases under SDLT

78. SDLT is a self-assessed tax. Pertinently, as was pointed out for the Appellant, taxpayers either made an SDLT return, in which case they acknowledged that tax was due and payable, or they did not, whether or not they recognised the technical reason why. HMRC would not have known that there was an extension to a lease if no SDLT return was filed.

79. This is a specialist Tribunal and we would anticipate that the majority of those filing SDLT returns in relation to extensions of leases would be either conveyancing solicitors or solicitors involved in corporate reconstructions (where the lease was part of the restructuring). In the absence of evidence to the contrary, we would find it very difficult to accept that many such solicitors have recourse to HMRC's manuals. In fact, in our experience, very few conveyancing solicitors were, or are, even aware of their existence.

80. In a similar vein, in the absence of any evidence to the contrary, we would have considerable difficulty in accepting that many such solicitors would know anything about any agreement between HMRC and the Law Society of Scotland. The only evidence that

we have about that, beyond the submissions from Revenue Scotland, is the February Letter. If the Agents are correct, and they seem to be the only source of information on the topic, it dates back to Stamp Duty. By definition, that is almost a quarter of a century ago if not a lot longer.

81. We understand, but have not checked, that the author of the February Letter is a specialist in property taxation and whilst that author certainly was aware of the Convention, we were not.

82. Patently, even if they knew about the Convention, and there is no evidence about that, Burness Paull, a well regarded firm of solicitors, did not consider that it had any application.

83. Revenue Scotland argued that the Appellant has produced no evidence that Scots lawyers may not have notified minutes of variation or extension to HMRC on the basis that they were not new leases in Scots law. Anecdotally, the Tribunal is aware that there was, and is, a body of opinion that in terms of Scots law no tax would have been payable and accordingly no return would have been made. It is impossible to prove a negative.

84. On the other hand, it is, or should be, possible to prove that there is a common practice, as argued by Revenue Scotland. In a different context, the UK Tax Tribunals have looked at the question of what constitutes a practice generally prevailing because section 29 of the Taxes Management Act 1970 provides that a discovery assessment is not competent where the taxpayer's return was made "on the basis of or in accordance with the practice generally prevailing at the time when it was made".

85. The case was not cited to us but at paragraph 61 in *Hargreaves v HMRC* [2022] UKUT 34 (TCC), the Upper Tribunal confirmed that it was settled law, that for there to be a practice generally prevailing:-

> (1) "The practice has to be one adopted by taxpayers and HMRC alike".
>
> (2) "A practice will not be generally prevailing if it is not agreed, or respected, as a whole, either by HMRC failing to apply every element of the practice in every case where it should be applied, or by taxpayers adopting only those parts that are favourable to them, but disputing others".
>
> (3) "'Mere inactivity' can, in appropriate circumstances, give rise to a practice. However, such an omission must be capable of articulation in the same way as a positive act so as to have both clarity and substance. Its parameters must be clearly defined so that the general acceptance amounts to the same unequivocal understanding".

86. We have considered these factors because of Revenue Scotland's argument on common practice. None of these factors has been established.

87. On the balance of probability, we agree with the Appellant that for the reasons that we have given, the evidence does not support a finding that there was a common practice whereby, if the Minute had been executed before 1 April 2015 and the Agents had not

been acting for the Appellant, SDLT would have been self-assessed. It might have been, as it was by the Agents, but that is a different matter.

88. Revenue Scotland also argue that the Convention merely recognises that the common law position is not relevant because extensions of leases like the Minute were treated as new leases for SDLT purposes, although it is accepted that there is no basis in law for so doing.

89. In support of that Revenue Scotland's position is that:

(a) the authorities cited in the latter part of paragraph 26 of the Statement of Agreed Facts state what English law does not necessarily consider to be the grant of a new lease, ie reducing the term, increasing the rent or decreasing the rent are not equivalent to the deemed surrender and grant of a new lease, and

(b) Schedule 17A was enacted to bring within the scope of SDLT certain transactions which would not otherwise be chargeable; that is why the extension of a lease is not mentioned in Schedule 17A because it would already have been a new lease in English law.

90. The problem for Revenue Scotland is that the Minute was not a surrender and grant of a new lease under Scots law.

91. What is common ground is that paragraph 13 of Schedule 17A is very targeted and brings into the charge to SDLT something (an increase in rent before the fifth year of the lease) that would not have been chargeable in terms of the underlying law whether Scots or English. The Appellant correctly argues that what it does not do is treat extensions as a new lease.

92. As we have indicated, and as can be seen, paragraph 19 of Schedule 17A goes into detail as to how Scottish leases should work in the context of SDLT. We agree with Mr Simpson that that makes it evident that the Westminster Parliament had given detailed thought to the Scots law of leases and how to make SDLT applicable thereto.

93. The Finance Act 2003 has been amended many times but it would appear that HMRC did not seek an amendment to encompass extensions of leases. Both parties have pointed out, accurately, that Schedule 17A was not a transitional provision and made "Further provisions relating to leases". It has no provisions in relation to extensions nor is there anything elsewhere in the statutory SDLT code.

94. We observe that in a footnote to paragraph 19(c) in the February Letter, having stated that the SDLT legislation "simply does not deal with extensions of Scottish leases", the author speculated that there had been a "misapprehension" that the law was the same both north and south of the border. That may well be true and no doubt, if so, that accounts for the statement in SDLT19030.

95. However, by the time that the HMRC Guidance was produced (and it records that the references to LBTT legislation had been "provided by the Scottish Government") clearly there was awareness of the differences in the law. It recognises that a variation of a lease in Scots law does not trigger an SDLT charge.

96. On the evidence we have found that although some taxpayers, through their solicitors, may have self-assessed to SDLT when filing a return relating to a document like the Minute, others would not have done so.

97. Therefore, we find that the answer to the question posed at paragraph 31(a) above is that, looking at the law as it then stood, a document in the same terms of the Minute, if executed before 1 April 2015, may or may not have been deemed to be the grant of a new lease depending on the opinion of the taxpayer or the taxpayer's agent.

98. It was not a new lease.

99. In that context, we have a problem with an argument advanced for the Appellant to the effect that although the Lease began under SDLT, the Minute was a "stand alone" transaction and it did not begin under SDLT. That is a Janus like argument because the Appellant relies on the fact that the Minute did not amount to a new lease in Scots law. In any event, the Minute is inextricably linked to the Lease.

100. English law did not apply to it. There was no statutory requirement for an SDLT return to be made although if one was made then SDLT was payable but only as a result of the self-assessed return. There was no tax liability "according to statute" (see paragraphs 72 and 74 above).

101. That being the case, whilst we observe that although section 43 uses the words "treated for the purposes of this Part", Article 13 does not and it says "would have been" the grant of a new lease for the purposes of Schedule 17A. That presents a problem for Revenue Scotland.

102. We must then look at the issue of statutory interpretation.

The Question of Statutory Interpretation

103. Both in his Skeleton Argument and in oral submissions, Mr Welsh relied on Lady Rose at paragraph 3 in *Moulsdale v HMRC* [2023] UKSC 12 which reads:

> "3. Drafting tax legislation is a difficult and complex task so it is not surprising that sometimes the legislation does not quite work. It is common ground that this appeal arises because of one such occasion. Problems can arise in particular where, as here, provisions that were drafted in an enactment for one purpose are incorporated by cross-reference into a different enactment dealing with something else. The drafter does not spot that there might be a circumstance in which the imported provisions which work perfectly well in their original setting, create a conundrum in their new setting. If that circumstance arises, it falls to the court to decide how the legislation applies, giving effect to Parliament's intention and the purpose for which the provisions relevant to the appeal were enacted".

104. Article 13 cross-references Schedule 17A which was not enacted as a transitional measure. In passing, we observe that, as we have indicated, we are not persuaded that Schedule 17A worked "perfectly well" originally in relation to extensions of Scottish

leases. However, the issue is the interpretation of Article 13 which incorporates the reference to Schedule 17A.

105. Mr Welsh's primary argument is that a "plain reading" of Article 13 is that it is intended to "catch" all extensions of leases and if the Appellant is correct then the article would be an "absurdity" because none would fall within its provisions. Mr Simpson takes the opposite view and argues that whilst Article 13 would not apply to the Appellant's situation there are other circumstances where it would apply.

106. Both parties argue that the binding decision of the Supreme Court in *For Women,* in relation to statutory interpretation, aligns with the submissions that they had previously made. Both cannot be wholly correct!

107. During the hearing, we were referred to numerous diverse authorities on statutory interpretation. We do not propose to rehearse the arguments in relation to all of those authorities. In addition, we now have the written submissions, and, to an extent, those have superseded some of the earlier argument.

Overview of the Appellant's approach to statutory interpretation

108. The written submission states that:

> "…the proper approach to statutory interpretation is to focus on the words in their context in the legislation in question; to construe the words purposively; to the extent that the purpose of the words is not clear, to take into account relevant context and contextual materials…and to have regard to the need for the persons who are subject to the law to be able to ascertain its meaning".

109. In that regard the Appellant concedes that the Policy Note produced by Scottish Government in relation to the 2014 Order is relevant but argues that HMRC's Guidance and SDLT manual, the Revenue Scotland Guidance and the Convention are not relevant.

Overview of Revenue Scotland's approach to statutory interpretation

110. Identifying the context of a statutory provision is a preliminary stage which is necessary in all cases of statutory interpretation. It is not necessary to identify an ambiguity in the wording. Part of that process is examining external aids but only within limited parameters. The Tribunal must identify the whole context within which Parliament chose the words that it chose to use and the purpose for which the provision was enacted and then the words should be interpreted within that context and with that purpose in mind. Clarity and ambiguity are assessed not from the literal reading of the provision but from the construction of the provision in its relevant context which includes its historical context.

111. In that regard the Policy Note does not supplant Article 13 but provides the detail that is required in order to adopt a purposive approach to interpreting Article 13.

For Women

112. For completeness, we annex at Appendix 6 the full text of paragraphs 9 to 14 from the judgment of Lord Hodge DPSC, Lady Rose and Lady Simler in *For Women* but we summarise some of the key points from those paragraphs here:

(a) At paragraph 9 the Court confirmed that the general approach to statutory interpretation in the United Kingdom is well established and quoted with approval paragraphs 29, and parts of 30 and 31 of the judgment of Lord Hodge DPSC in *R (O) v Secretary of State for the Home Department and R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255. In particular, the following principles are noted:

(i) At paragraph 29:

"The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used'… 'Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections'….'Citizens…are intended to be able to understand parliamentary enactments …They should be able to rely upon what they read in an Act of Parliament'".

(ii) At paragraph 30:

"External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions…The context is relevant…whether or not there is ambiguity and uncertainty…But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity….".

(iii) At paragraph 31:

"Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered…".

(b) At paragraph 10 the Court cited with approval Lord Bingham of Cornhill in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13 where he said:

"The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

(c) At paragraph 11 the Court explained that whilst Parliament chooses the words which are used to express the purpose of the legislation, if there is doubt then external aids must be given sufficient weight and can themselves alert the court to ambiguity in the provision "… but they cannot displace the meanings conveyed by

the clear and unambiguous words of a provision construed in the context of the statute as a whole".

(d) At paragraph 12, the Court endorsed Lord Hope DPSC where he had stated in a case in 2012 that:

> "The best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable. This will be achieved if the legislation is construed according to the ordinary meaning of the words used."

(e) Lastly, at paragraphs 13 and 14 the Court endorsed the presumption that a word is presumed to have the same meaning throughout a single piece of legislation but the weight to be given to that presumption depends upon the context.

113. At paragraph 81, the Court made it clear that "…the use to which the courts should put explanatory notes is limited to the context of the legislation and the mischief to which its provisions are aimed".

114. At paragraph 96, the Court discussed *Fowler v HMRC* [2020] UKSC 22 (upon which Mr Simpson had relied in his Skeleton Argument) in relation to the approach to be taken to interpreting and applying statutory deeming provisions which they described as creating a "legal fiction". The Court noted the guidance from Lord Briggs that a deeming provision should be construed in its context "to ensure that it does not produce effects 'clearly outside' the purpose for which it is included in the legislation".

Other authorities

115. Both parties referred to Lord Briggs, at paragraph 24, in *Balhousie Holdings Ltd v HMRC* [2012] UKSC 11 ("Balhousie") where he made it explicit that the usual principles for the interpretation of statutory material in tax cases "merely exemplify a general rule" which he described as:

> "The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

He went on to say that rule has been approved in a number of cases including *Barclays Mercantile Business Finance Limited v Mawson* [2004] UK HL 51 ("Barclays") to which both parties also referred.

116. We agree that the statutory provisions must be interpreted in that context.

117. The Appellant also relied on paragraph 6 in *Balhousie* pointing out that Lord Briggs had approached the statutory wording in question from the point of view of "A reasonably intelligent and well-informed reader". We agree. That is reinforced in *For Women* see paragraph 112(a)(i) above).

118. It was also argued for the Appellant that because Lord Briggs had said at paragraph 38 that:

> "It is sometimes said, and HMRC submits, that if the court cannot discern the purpose of a statutory provision, then it must just do the best it can with the words used….So the identification of a purpose behind paragraph 36(2) is not strictly necessary for that conclusion."

then a purposive approach is not always strictly necessary because the words used in the statute limit what the statute means. The words must be given a "reasonable" meaning and it is when there is a choice of meanings that the statute must be construed purposively.

119. As can be seen from paragraph 108 above, the Appellant argues that purposive statutory interpretation only comes into play "to the extent that the purpose of the words is not clear" whereas Revenue Scotland argues (see paragraph 110 above) that "it is not necessary to identify an ambiguity in the wording". Revenue Scotland are correct and that is borne out by the quotation from *For Women* at paragraph 112(a)(ii) above.

120. We do not accept that a purposive construction comes into play only where there is a choice of meanings. We agree with Lord Hodge at paragraph 12 in *RFC 2012 Plc v Advocate General for Scotland* [2017] UKSC 45 where he said

> "…the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose…".

121. At paragraph 10 in *Hurstwood Properties (A) Limited and Others v Rossendale Borough Council and Another* 2021 UKSC 16 ("Hurstwood"), Lords Briggs and Leggatt stated that identifying the purpose of legislation is of "central importance" in construing it. Thereafter they went on to say that, in the context of fiscal legislation, Lord Nicholls of Birkenhead at paragraph 32 in *Barclays* had identified the "essence" of that approach as being:

> "to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description".

122. Mr Welsh relied on paragraph 16 of *Hurstwood* which reads:

> "Both interpretation and application share the need to avoid tunnel vision. The particular charging or exempting provision must be construed in the context of the whole statutory scheme within which it is contained. The identification of its purpose may require an even wider review, extending to the history of the statutory provision or scheme and its political or social objective, to the extent that this can reliably be ascertained from admissible material.

We agree.

123. In the course of the hearing we pointed out that the Tribunal had considered the boundaries of statutory interpretation in *Goudie and Sheldon v Revenue Scotland* [2018] FTSTC 3 ("Goudie") and we heard submissions in that regard.

124. The Tribunal had referred to *Barclays* stating in conclusion that "The question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found".

125. The Tribunal went on to say:

> "46. Another case to which we were not referred but which is relevant is *Inco Europe and Others v First Choice* [[2004] UKHL 51] in which Lord Nicholls of Birkenhead referred to the court's role in correcting obvious drafting errors in discharging its interpretative function but he made it clear that the power was strictly confined '…to plain cases of drafting mistakes':
>
> > 'The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation …'".
>
> 47. Lord Nicholls went on to say that even where these three conditions were met the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament.
>
> 48. We have underlined, what are to us, the crucial words. We were referred to no drafting mistakes as such but, rather to the assertion that if it suffices that the first appellant had cohabited for the purposes of the imposition of ADS then clearly that should be relevant for the conditions for repayment ie an implicit drafting mistake. Although this quotation relates to drafting mistakes, the principles hold good for statutory interpretation generally.
>
> 49. We take the view that normal rules of statutory interpretation apply. In the first instance, words should be given their everyday meaning insofar as consistent with Parliament's discernible intent. The recent case of *UBS AG v HMRC* [[2016] UKSC 13] makes it clear that the ultimate question is whether the relevant statutory provision, viewed purposively, was intended to apply to the transaction, viewed realistically.
>
> 50. We were not referred to the case, but we agree with Judge Gammie at paragraphs 63 and 64 in *Bloomsbury Verlag GmBH v HMRC* [[2015] UKFTT 0660 (TC)] ("Bloomsbury") where at paragraph 63 he cites with approval Lord Dunedin in *Whitney v HMRC* [[1926] AC 37]:

> ‘63. … A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable.’
>
> 51. …
>
> c. Deeming provisions are by no means uncommon in taxation legislation but operate only to the extent specified by the relevant legislation.”

Discussion on the interpretation of Article 13 in the light of these authorities

126. Since both parties referred to the Policy note that is our starting point.

The Policy Note

127. As can be seen, the Supreme Court in *For Women* refers to Explanatory Notes. In this case, however, we are dealing with a Policy Note which is not the same thing, albeit the paragraph relating to Articles 12 and 13 is written in identical terms.

128. It is for that reason that we have quoted Article 12, which is not applicable in these appeals, at paragraph 24 above.

129. An Explanatory Note, whether at Holyrood or Westminster does not form part of the subordinate legislation as it is intended to give the lay reader a short, clear statement of the substance and purpose of the instrument. The Explanatory Note is always supposed to be neutral in tone and should not seek to explain or justify policy; in short, it should simply say what the change to the law is, rather than why it is being changed.

130. At devolution, Scottish Ministers recognised that an Explanatory Note was unlikely to be sufficient for Committees of the Parliament to form a view on Scottish Statutory Instruments when scrutinising them. As a result, they introduced a further accompanying document which was originally called an Executive Note. When the Scotland Act 2012 changed the name “Scottish Executive” to “Scottish Government”, Executive Notes were renamed Policy Notes.

131. The function of a Policy Note is largely the same as an Explanatory Note. However, as the name suggests a Policy Note explains the reasons for making changes to the law and sometimes explains the intended effect. By definition, it is a more discursive document and usually gives more information about the background as, indeed, it has in this case.

132. Both parties agreed that the Policy Note relating to the 2014 Order issued by Scottish Government was relevant to statutory interpretation. Under the heading “Policy background”, having narrated that LBTT would be replacing SDLT in Scotland with effect from 1 April 2015, it stated that:

> “The purpose of this order is to make provision for certain transactions that began under SDLT but have an effective date on or after commencement of LBTT. The intention is to ensure that through the transitional period where SDLT is disapplied in Scotland and LBTT is introduced, **such transactions are not taxed twice (by**

> **both SDLT and LBTT) but are subject to one of the taxes or to ensure that where no tax would otherwise be payable, it is payable under LBTT if it would have been payable under SDLT.** The order makes provision to achieve that purpose for 13 different types of land transactions or arrangements involving land transactions:
>
> …
>
> *x.* Variations and extensions of the term or premises of leases - Articles 12 and 13 provide that variations and extensions of leases that were initially granted prior to the commencement date are to be treated as grants of a new lease for LBTT purposes with schedule 19 to the LBTT(S)A 2013 applying."

133. We observe that paragraph x. is precisely replicated in the Explanatory Note that accompanied the 2014 Order.

134. We have added emphasis since Mr Simpson relies on the fact that in the course of the hearing, Revenue Scotland accepted that the words in bold indicated the purpose of Article 13. They do.

135. That is supported by the terms of "*The Report of the Finance Committee of the Scottish Parliament dated 4 February 2015*".

136. At the Committee meeting, John Swinney, then deputy First Minister, explained the purpose of the subordinate legislation relating to LBTT. As far as the 2014 Order was concerned, he stated:

> "The purpose of the order is to make provision for certain transactions that began under SDLT but which have an effective date on or after the commencement of LBTT. The intention is to ensure, first, that during the transitional period in which SDLT disapplied in Scotland and LBTT is introduced, such transactions are not taxed twice under SDLT and LBTT but are subject to one of them; and, secondly, that if the outcome of the provisions in the 2012 act (sic) is that no tax would be payable, tax is payable under LBTT if it would have been payable under SDLT".

137. On the basis of both the Policy Note and the Report, it is uncontroversial that the primary purpose of the 2014 Order was to avoid double taxation. That is not an issue in these appeals.

138. We agree with Mr Welsh that x. in the Policy Note must be read with the introduction as context and particularly with reference to "payable under SDLT" since otherwise there would be no point in including extensions of leases.

139. We find that it is clear from the Policy Note at x. that the Scottish Government believed that tax would have been payable under SDLT and for that reason the other purpose of the 2014 Order was to bring variations and extensions of leases which commenced under SDLT into the transitional provisions.

140. Looking at the wording of Article 13, as *For* Women requires us to do, if the words "which if it [the variation] had been before the commencement date, would have been for the purposes of that Schedule the grant of a new lease" had not been included then the purpose would have been achieved. However, the Scottish Parliament chose to use

those words and specifically the words “would have been”. Those words were not softened by stating “would have been treated as being”.

141. We have already indicated that it is accepted by both parties, as it has to be, that there is nothing in Schedule 17A or Scots law that imposed a liability to SDLT and therefore rendered SDLT payable in relation to an extension of a lease.

142. It is for that reason that we referred the parties to *Goudie* and specifically the quotation at paragraph 46 from *Inco Europe*.

143. Having read the decision over lunchtime, Mr Welsh’s response was to state that paragraphs 46 and 51 were entirely consistent with Revenue Scotland’s approach to statutory interpretation. However, and in our view crucially, he said that Revenue Scotland were not asking the Tribunal to “close an eye to particular words in legislation or add in extra words to legislation”. He said that that was not necessary and the Tribunal should not embark on such an exercise.

144. Earlier on, in oral submissions, he had made it clear that Revenue Scotland were not asking the Tribunal to read in or strike out any of the language in Article 13.

145. His argument was that “Article 13 works on its face” and, in summary, that was because section 43(3)(d) Finance Act 2003 said that variations and extensions “would have been treated for the purposes of” the SDLT code as the grant of a new lease and the SDLT manual demonstrated that that was the case.

146. We have explained that we disagree with that argument. As Lord Tyre confirmed (see paragraph 72 above) taxes can only be imposed by statute.

147. Mr Welsh advanced an argument in support of the SDLT manual to the effect that in any transaction one should look at the treatment for the purposes of land law but “more relevantly one should look at the treatment of the transaction for tax purposes”.

148. We have already explained that the SDLT manual was simply HMRC’s view. Perhaps, or presumably, that was based on the Convention, but HMRC and the Law Society of Scotland had, and have, no mandate to agree any taxation treatment. They certainly cannot impose a liability to taxation.

149. It is trite law but, for the avoidance of doubt, we quote Lord Dunedin in *Whitney v Commissioners of Inland Revenue* [1925] UKHL TC 10 88 (“Whitney”) where he said that:

> “…there are three stages in the imposition of a tax**: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable.** Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay.”

150. We have added emphasis because that is the point that is at the heart of this appeal. For tax to be payable there must be a liability and that liability can only be imposed by statute.

151. We have difficulty with the assertion for Revenue Scotland in their Skeleton Argument that, relying on *Balhousie* at paragraph 24, the conclusion would be that:

> "Bearing in mind the transactional nature of SDLT and LBTT, it is reasonable to determine that a variation of a lease to extend its duration is substantially the same as the grant of a new lease".

We cannot accept that proposition because the law of Scotland simply does not support that conclusion. At paragraph 115 above, we have quoted Lord Briggs at paragraph 24 of *Balhousie* and he says that the transaction must be viewed realistically. It is not realistic to ignore the law of the land.

152. As can be seen from paragraph 147 above, Mr Welsh's argument is that the "tax treatment" based on the SDLT manual should predominate. In our view he is wrongly attempting to "divorce" the tax treatment of variations of leases from the underlying Scots law of leases. We use the term divorce deliberately because it is the converse of the oft expressed intention of the Scottish Parliament when introducing LBTT to "marry" the tax better with Scots law.

153. What then of a purposive interpretation of Article 13? We agree entirely that a purposive approach must be taken. We have identified the clear purpose from the Policy Note at paragraph 139 above. We looked closely at the words that the Scottish Parliament chose to use. Neither party argues that there is a drafting mistake. Indeed, both counsel said clearly that there was not a drafting mistake. Mr Simpson pointed to there being a "gap in the legislation".

154. We agree with the Tribunal in *Goudie* when it said at paragraph 48 that the quotation from *Inco Europe* held good for statutory interpretation generally (see paragraph 125 above). In particular we have in mind the words that the Tribunal in *Goudie* underlined that in interpreting legislation a court "must abstain from any course which might have the appearance of judicial legislation".

155. We say that because we also agree with the quotation from *Whitney* at paragraph 50 of *Goudie.*

156. We find that there is a crucial omission/direction in Article 13 in that by stating that a variation "would have been for the purposes of that Schedule [17A] the grant of a new lease" it was implied that SDLT would have had to have been payable and of course that ties in with the purpose set out in the Policy Note.

157. As there was no statutory basis for a liability to SDLT in relation to the variation of a Scottish lease, for the reasons given we find that no SDLT would have been payable albeit some was paid.

158. Looking at the third matter cited by Lord Nicholls in *Inco Europe* we would need to be "abundantly sure" of the substance of the provision that the Scottish Parliament would

have made and even if we were, we might be inhibited from interpreting Article 13 in accordance with the intention of the Scottish Parliament.

159. We are sure that the Scottish Parliament wished to impose a liability to LBTT However, that is in a situation where, as we have found, there was no statutory liability to SDLT.

160. We are uncomfortable with the logical sequitur to that. Were we to attempt to read into the Article the imposition of statutory liability to SDLT, that would cross the boundary between construction and legislation.

161. The Tribunal is a creature of statute and has only the powers given to it by statute. The Scottish Parliament chose to reference Schedule 17A. As was made clear in *For Women*, citizens and their advisers are intended to be able to understand parliamentary enactments. For the reasons we have given, a Scots lawyer knowing that a variation of a lease did not mean a new lease, and looking at Schedule 17A which had no mention of variations for extensions of leases but mention of other matters at paragraphs 13 and 19 of the Schedule that would attract SDLT, would be entitled to think that Article 13 did not apply.

162. For all these reasons we find that the answer to the question posed in relation to the First Issue is that a document such as the Minute, if lodged prior to 1 April 2015, should not have been deemed to be the grant of a new lease. Accordingly, the appeal is allowed on the First Issue.

The second issue

163. This issue only falls to be considered if we are wrong in finding that the Minute did not gave rise to a land transaction that consisted of the grant of a new lease.

164. Revenue Scotland argue that Article 13(2) makes it clear that the chargeable consideration is the additional rent payable as a result of the extension of the Lease. SDLT has already been paid in relation to the period between the Minute being executed and the extension commencing on 17 December 2033. Therefore the relevant lease term is a period of five years. That calculation gives rise to a LBTT liability of £155,090.

165. By contrast, the Appellant argues that if any liability to LBTT did arise then the calculation of the NPV of the rent due under the deemed new lease is to be carried out on the basis that year one of the deemed new lease begins on the last date on which the Minute was executed, ie 10 July 2020. The Appellant's argument is that the legislation does not specify the start date of the deemed new lease so that too is a matter of statutory interpretation. The Appellant's calculation gives rise to a LBTT liability of £89,738.

166. Although Revenue Scotland state in their Skeleton Argument that it is largely a mathematical issue, we disagree. The outcome is a mathematical calculation but the issue turns on interpretation of the formula used to arrive at that.

167. It is common ground that the NPV of the rent payable over the term of the Lease, is calculated according to the following formula which is to be found in paragraph 6,

Schedule 19 LBTTA. However, the parties do not agree as to how the formula operates in the circumstances of this appeal.

168. Paragraph 6 reads:

$$\mathrm{NPV} = \Sigma_{i=1}^{n} \frac{r_i}{(1+T)^i}$$

where -
• ri is the rent payable in respect of year i,
• i is the first, second, third etc. year of the term of the lease,
• n is the term of the lease, and
• T is the temporal discount rate

169. It is also common ground that the rent in question is the additional rent payable as a result of the extension of the lease (Article 13(2)). We agree with Revenue Scotland that that is the only possible conclusion because the rent due in terms of the Lease has already been subject to SDLT and the policy objective of the legislation seeks to avoid double taxation.

170. The temporal discount rate is fixed by paragraph 7 Schedule 19 LBTTA.

171. Revenue Scotland argue that the phrase "the term of the lease" must have the same meaning for both "i" and "n". We agree and for the avoidance of doubt, that is made explicit in *For Women* at paragraphs 13, 14 and 176. However, the issue is what that means.

172. The Appellant rightly argues that, in order to apply that formula, the taxpayer requires to identify year i (ie when the lease starts) and the term of the lease. Article 13 identified neither. The issue between the parties is whether, as the Appellant argues, the commencement is the date of execution of the Minute because that is the effective date for LBTT purposes and the deemed grant of a new lease or whether, as Revenue Scotland argue, it is when the original lease terminates. In round terms, if it is the former then the term would be 18 years and for the latter it would be five years.

173. It does not appear to be disputed that the purpose of taxing the NPV rather than the unadjusted rental amounts is that the LBTT charge should reflect the diminution in value of the rents over time.

174. Effectively Revenue Scotland's argument is that if they succeed on the First Issue there is a new lease and that the new lease can only be the extension period of five years. There are not concurrent leases. We certainly agree that there cannot be concurrent leases.

175. This cannot be a new lease in terms of Scots law so what is the basis for saying that it is a new lease? The logical sequitur to the arguments in the HMRC Guidance and the Revenue Scotland Guidance is that it must be English common law because that was the trigger for SDLT.

176. The relevant part of paragraph 26 of the Agreed Statement of Facts tells us the position in English common law and it reads:

> "English common law has effect such that an agreement between the landlord and tenant under an existing lease to extend the term of that lease is treated as the grant of a new lease. The deemed surrender of the existing lease and grant of a new lease both take effect the moment the variation agreement is executed. At the same moment, the previous lease ceases to exist."

177. Paragraph 26 is unequivocal in its terms and we accept that it is an accurate statement of English common law.

178. Unsurprisingly, the Appellant founds on that in arguing that the deemed new lease commenced at the date of execution.

179. However, Revenue Scotland have always argued, in these appeals and in their guidance, that the term of the new lease is linked to the extension period because the Appellant's possession of the premises is linked to the "SDLT lease". Whilst we certainly accept that SDLT would have been paid on the Lease under the SDLT regime, we do not consider that that assists. Had there been no transition to LBTT, the deemed new lease in terms of English law would have allowed a taxpayer in that position to claim overlap relief.

180. We find that there are logical inconsistencies in Revenue Scotland's arguments. Firstly, if the only reason that there is deemed to be a new lease is because historically there has had to be consistency with English common law then (because the SDLT position is a deemed surrender and regrant) it simply cannot be correct that the English law is ignored and the surrender and regrant only take effect on the expiry of the original period of the lease.

181. Secondly, if the deemed "new lease" is simply the extension period of five years there would be no reason for Article 13(2)(b) since that would be the only rent in terms of that deemed new lease.

182. Furthermore, it is common ground that the effective date of the transaction, being the last date of execution of the Minute, brought the Appellant into the 3 year LBTT Return provisions in paragraph 10, Schedule 19 LBTTA. Indeed, Revenue Scotland has imposed a late filing penalty on the Appellant (see paragraph 19 above). It has been paid.

183. We find that that is inconsistent with Revenue Scotland's argument, which is also included in the Revenue Scotland Guidance, that the term of the deemed new lease cannot antedate 2033. To use the effective date for the purposes of penalties but to ignore it for the purposes of the NPV calculation is illogical. As can be seen, the outcome of Revenue Scotland's approach is to significantly increase the tax burden in a context where, as we have described at paragraph 172 above, the purpose is to reflect the diminution in value of the rents over time.

184. The answer to the questions posed in relation to the Second Issue is that if there was a deemed new lease in terms of Article 13, it commenced on the effective date of the Minute.

185. Accordingly, the appeal on the Second Issue is allowed.

Decision

186. For all these reasons, the Appellant succeeds. In terms of section 244 RSTPA Revenue Scotland's view of the matter in relation to:

(a) the interpretation of Article 13 of the 2014 Order,
(b) the method of calculation of the NPV, and
(c) the rejection of the overpayment claim in terms of section 107 RSTPA

is cancelled in each case.

187. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has the right to apply for permission to appeal on a point of law pursuant to Rule 38 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017. In terms of Regulation 2(1) of the Scottish Tribunals (Time Limits) Regulations 2016, any such application must be received by this Tribunal within 30 days from the date this decision is sent to that party.

ANNE SCOTT

President

RELEASE DATE: 10 July 2025

Appendix 1

Statement of Agreed Facts

The Statement reads:-

"1. Copies of documents referred to in this statement will form part of the joint bundle.

2. All documents in the joint bundle are true copies of the originals. Documents are what they bear to be. Documents that bear to be correspondence were sent on the day on which they bear to have been sent, by and to the persons who bear to have been the sender and recipient(s) respectively.

3. The witness statements of David Bald and Barbara Kennie are to be admitted into evidence.

4. The Appellant is Archer (UK) Limited. It is a company incorporated in Scotland, having registered number SC229291 and having its registered office at 2 Marischal Square, Broad Street, Aberdeen AB10 1DQ.

5. By lease dated 8th and 24th January 2014, the Appellant leased premises at Blackburn Business Park, Aberdeen, registered in the Land Register under title number ABN114120, from Ropemaker Properties Limited. The date of entry was 17 December 2013. The term was for 20 years, and thus until 16 December 2033. At the start of the lease, the rent was £1,080,430 per annum. Per the rent review terms in the lease, the rent was increased with effect from 17 December 2018 to £1,273,993.46.

6. The Appellant entered possession of the Premises on or around 17 December 2013.

7. At the date of entry, the transaction was subject to Stamp Duty Land Tax (SDLT) in terms of Part 4 of the Finance Act 2003. SDLT subsequently ceased to apply to land transactions in Scotland when LBTT was introduced with effect from 1 April 2015.

8. On 30 June 2015, Ropemaker Properties Limited sold the Premises to Archer Investments Limited (an entity unrelated to the Appellant).

9. By minute of extension and variation of lease ('the Minute') dated 9 June and 8 and 10 July 2020 ("the Minute"), Archer Investments Limited, the Appellant and Archer Assets UK Limited, the parties agreed that the lease was to be varied in accordance with provisions set out in the schedule to the minute.

10. The variations ('the Variations') were as follows:

'1. In respect of the review of Annual Rent under the Rent Review Provisions due to take place on 17 December 2023, the parties agree that there shall be no uplift in Annual Rent such that the Annual Rent shall remain ONE

MILLION TWO HUNDRED AND SEVENTY THREE THOUSAND NINE HUNDRED AND NINETY THREE POUNDS AND FORTY SIX PENCE (£1,273,993.46) STERLING per annum exclusive of any Value Added Tax chargeable thereon until the next Review Date thereafter.

2. The Term of the Lease shall be extended by 5 years such that the Term will expire on 16 December 2038, in lieu of 16 December 2033, notwithstanding the dates hereof.

3. For the avoidance of any doubt, 17 December 2033 shall be a Review Date on which the Annual Rent shall be reviewed in accordance with the Rent Review Provisions.

4. The reference to "the unexpired residue of the Term" in clause 24.3(a)(v) of the Lease shall mean the Term as extended by this deed.

5. For the avoidance of doubt, the periodic cycles for decoration of the Property contained in Clause 7.1.1 of the Lease shall apply throughout the Term of the Lease as extended by this deed, and as if references to the last year of the Lease were references to the last year of the such extended Term.'

11. By letter dated 8 July 2020, Archer Investments Limited granted the Appellant a rent-free period from 28 May 2020 to 27 November 2020. The letter stated that it did not constitute a variation of the lease.

12. On 21 December 2020, the Appellant's agents filed a land transaction return in respect of the Minute. The return reference was RS6225600CVHR. The basis on which the land transaction return was filed was that (a) in respect that the Variations extended the term of the lease, that constituted a land transaction pursuant to Article 13 of the Land and Buildings Transaction Tax (Transitional Provisions) (Scotland) Order 2015 (S.S.I. 2015 No. 377) ('the Transitional Provisions Order') and (b) the net present value of the rent due under the new lease deemed to have come into existence by that provision was to be calculated on the footing that the term of the new lease started on the effective date of the land transaction in question (that is to say, the last date of execution of the Minute. On that footing, the LBTT due was £89,738. That amount was received by the Respondent from the Appellant on 23 December 2020.

13. By letter dated 5 February 2021, the Appellant's agents wrote to the Respondent, stating that this was the basis on which the land transaction return had been filed, and LBTT had been calculated and paid, and seeking an opinion from the Respondent in respect of the return. The letter explained that the return related to the extension of an SDLT lease and how the NPV of the extension is to be calculated for the deemed new LBTT lease. The Appellant's agents considered there to be an uncertainty in the legislation on this point. The return was submitted in accordance with what the Appellant's agents considered to be the correct interpretation of the legislation. However, given the uncertainty in the legislation, the Respondent was asked to confirm that the approach taken was correct.

14. The Respondent provided its opinion on the matter by letter dated 7 December 2021. The letter explained that the SDLT analysis was Revenue Scotland's current approach to transitional leases, as reflected in the guidance available on its website. That view remained unchanged and the respondent considered the SDLT analysis to be correct. However, the matter remained under consideration and the Respondent undertook not to seek to raise any additional tax due until it reached a definitive position.

15. By notice dated 1 July 2022, a designated officer of the Respondent gave notice, in terms of section 85 of the Revenue Scotland and Tax Powers Act 2014 ('the RSTPA'), of his intention to open an enquiry into the Appellant's land transaction return. Further information was requested to assist with the enquiry.

16. By closure notice dated 2 August 2023, the Respondent amended the land transaction return so as to show an amount of LBTT calculated on the footing that the new, deemed lease would not commence until 17 December 2033. On that footing, the LBTT due was £155,090 (an additional £65,352). The reasons for the enquiry officer's decision were set out in detail in the closure notice.

17. By email dated 29 September 2023, the Appellant requested a review.

18. By letter dated 27 October 2023, the Respondent provided its view of the matter to the Appellant.

19. By review conclusion letter dated 15 December 2023, the Respondent upheld the conclusion it had reached in the closure notice. The detailed reasons for the review officer's decision were set out in the letter.

20. By notice of appeal dated 11 and lodged 12 January 2024, the Appellant appealed to the Tribunal.

21. By claim dated 15 January 2024, the Appellant made a claim to the Respondent for overpayment relief. The claim was on the footing that LBTT should have been calculated on the basis that the transaction effected by the Minute was not within Article 13 of the Transitional Provisions Order so as to give rise to a deemed land transaction. On that basis, no land transaction would have occurred, and LBTT would have been nil.

22. By notice of enquiry dated 8 February 2024 and issued under paragraph 13(1) of schedule 3 of the RSTPA, the Respondent opened an enquiry into the claim.

23. By closure notice dated 16 February 2024 and issued under paragraph 14 of the RSTPA, the Respondent refused the claim. The basis for refusal was section 113(1) and (5) of the RSTPA, namely that the claim was made on grounds that had been put to the Tribunal in the course of an appeal. Revenue Scotland refused the claim.

24. By notice of appeal dated and lodged 15 March 2024, the Appellant appealed against the refusal of the claim.

25. By direction dated 26 March 2024, the Tribunal conjoined the appeals.

26. English common law has effect such that an agreement between the landlord and tenant under an existing lease to extend the term of that lease is treated as the grant of a new lease. The deemed surrender of the existing lease and grant of a new lease both take effect the moment the variation agreement is executed. At the same moment, the previous lease ceases to exist. Relevant authorities to support these propositions are *In re Savile Settled Estates* [1931] 2 Ch 2010 (per Maugham J at 217) and *Baker v Merckel* [1960] 1 QB 657 (per Sellers LJ at 665, and Pearce LJ at 667). Reducing the length of the term of the lease, increasing the rent (*Friends Provident Life Office v British Railways Board* [1996] 1 All E.R. 336), or decreasing the rent (*Crowly v Vitty* (1852) 7 Exch. 319) does not, of itself, necessarily give rise to a deemed surrender of the lease and grant of a new lease."

Appendix 2

HMRC's Transitional guidance on the introduction of LBTT

Land Transactions

…

"21.9 Variations of leases – Increases of rent treated as grant of new lease (para. 13 of Schedule 17A); Increase in the term of a lease or the extension of premises treated as the grant of a new lease

A variation of a lease of land in Scotland which falls within the terms of para. 13 will not be treated as the grant of a lease for SDLT purposes where the effective date of such a grant would be on or after 1 April 2015.

Under Article 12 of The Land and Buildings Transaction Tax (Transitional Provisions) (Scotland) Order 2014, a variation of a lease of land in Scotland involving an increase of rent will be treated as the grant of a new lease for LBTT purposes.

Under English law and SDLT legislation, the increase in the term of a lease or the extension of the premises counts as the grant of a new lease. This is not the case under Scottish law. This means that (in the absence of a transitional provision), if such an event happened after 1 April 2015, such a lease would leave the SDLT regime but not enter the LBTT regime. Accordingly, Article 13 of The Land and Buildings Transaction Tax (Transitional Provisions) (Scotland) Order 2014 provides that such an event is to be treated for the purpose of LBTT as the grant of a new lease and therefore chargeable to LBTT. However, because SDLT will have already been charged on the rent to that date of the grant of the new lease, LBTT is charged only on any increase in rent."

As can be seen that refers to paragraph 13 Schedule 17A Finance Act 2003 so it is appropriate to quote that also. It reads:

Paragraph 13, Schedule 17A Finance Act 2003

13(1) Where a lease is varied so as to increase the amount of the rent as from a date before the end of the fifth year of the term of the lease, the variation is treated for the purposes of this Part as if it were the grant of a lease in consideration of the additional rent made payable by it.

SCHEDULE 17A

FURTHER PROVISIONS RELATING TO LEASES

Provisions relating to leases in Scotland

19 (1) In the application of this Part to Scotland—

(a) any reference to the term of a lease is to the period of the lease, and

(b) any reference to the reversion on a lease is to the interest of the landlord in the property subject to the lease.

(2) Where in Scotland there is a lease constituted by concluded missives of let ("the first lease") and at some later time a lease is executed ("the second lease"), the first lease is to be treated for the purposes of this Part as if it were a lease granted—

(a) on the date the missives of let were concluded,

(b) for a period which begins with that date and ends at the end of the period of the second lease, and

(c) in consideration of the total rent payable over that period and any other consideration given for the first lease or the second lease.

(2A) Where sub-paragraph (2) applies the grant of the second lease is disregarded for the purposes of this Part except section 81A (return or further return in consequence of later linked transaction).

(2B) For the purposes of section 81A—

(a) the grant of the first lease and the grant of the second lease are linked (whether or not they would be linked by virtue of section 108),

(b) the lessee under the second lease (rather than the lessee under the first lease) is liable for any tax or additional tax payable in respect of the first lease as a result of sub-paragraph (2), and

(c) the reference in section 81A(1)(a) to "the purchaser under the earlier transaction" is to be read, in relation to the first lease, as a reference to the lessee under the second lease.

(3) Where in Scotland—

(a) there is an agreement (including missives of let not constituting a lease) under which a lease is to be executed, and

(b) the agreement is substantially performed without a lease having been executed,

the agreement is treated as if it were the grant of a lease in accordance with the agreement ("the notional lease"), beginning with the date of substantial performance.

The effective date of the transaction is when the agreement is substantially performed.

(4) Where sub-paragraph (3) applies and at some later time a lease ("the actual lease") is executed, this Part applies as if the notional lease were a lease granted—

(a) on the date the agreement was substantially performed,

(b) for a period which begins with that date and ends at the end of the period of the actual lease, and

(c) in consideration of the total rent payable over that period and any other consideration given for the agreement or the actual lease.

(4A) Where sub-paragraph (4) applies the grant of the second lease is disregarded for the purposes of this Part except section 81A (return or further return in consequence of later linked transaction)."

(4B) For the purposes of section 81A—

(a) the grant of the notional lease and the grant of the actual lease are linked (whether or not they would be linked by virtue of section 108),

(b) the lessee under the actual lease (rather than the lessee under the notional lease) is liable for any tax or additional tax payable in respect of the notional lease as a result of sub-paragraph (4), and

(c) the reference in section 81A(1)(a) to "the purchaser under the earlier transaction" is to be read, in relation to the notional lease, as a reference to the lessee under the actual lease.

(5) References in sub-paragraphs (2) to (4) to the execution of a lease are to the execution of a lease that either is in conformity with, or relates to substantially the same property and period as, the missives of let or other agreement.

(6) Where sub-paragraph (3) applies and the agreement is (to any extent) afterwards rescinded or annulled, or is for any other reason not carried into effect, the tax paid by virtue of that sub-paragraph shall (to that extent) be repaid by the Inland Revenue.

Repayment must be claimed by amendment of the land transaction return made in respect of the agreement.

Appendix 4

Paragraph 19 of the February Letter

19. Pegging the term of the deemed new lease to the first day of the extended term would broadly replicate the SDLT treatment of extensions of Scottish leases pre-April 2015. However, there is no clear reason why the SDLT treatment should be replicated in LBTT. Indeed, there are good reasons why LBTT should not do this.

a. The SDLT treatment of extensions of Scottish leases does not directly arise from the terms of Finance Act 2003, nor from the Scottish law of leases. Instead it was a position agreed between HMRC Stamp Taxes and the Law Society of Scotland which continued the treatment which had applied under stamp duty, where extensions to Scottish leases were treated as the grant of a new lease for the purposes of stamp duty, even though in Scots property law the extension of a Scottish lease is not the grant of a new lease. It was also intended to ensure parity between Scottish and English leases.

b. We understand that the practice of treating the term of the deemed new lease as equal to the extended period was to ensure that there was no SDLT difference between extending an English lease and granting a reversionary lease, i.e., granting an additional lease between the same parties to begin after the first lease expires. For English property law reasons, it is common practice to deal with extensions by granting reversionary leases rather than extending the existing lease (by way of a deemed surrender and regrant). Extensions of English leases are relatively rare.

c. The extension of an English lease is a deemed surrender and regrant as a matter of law, but the extension of a Scottish lease is not. This is because a Scottish lease is a contract (as opposed to being the grant of an estate or interest in land like an English lease) so its term can be varied. If a Scottish lease was extended after the first five years then without an agreed SDLT treatment it is questionable whether the extension of a Scottish lease would have been subject to SDLT at all. The SDLT legislation simply does not deal with extensions of Scottish leases. This would have resulted in varying SDLT treatments between Scotland and the rest of the UK, which is not desirable in a UK wide tax.

d. The extension of Scottish leases was therefore – by convention – treated as being subject to SDLT on the same basis as the extension of an English lease. And the extension of an English lease was treated (by HMRC) on the same basis as the grant of a reversionary lease in order to ensure parity between different forms of English transaction. Unlike in England, the standard practice in Scotland is to extend a lease using a minute of variation rather than by granting a reversionary lease.

e. We contend that there is no underlying Scots law or policy reason to treat the extension of a Scottish lease as equivalent to the grant of an English reversionary lease.

i. As a matter of Scots law, there is no new lease arising. The extended lease is simply the original lease with a later end date. The term of the lease as

extended begins on the date of grant and ends on the revised end date. Unlike an assignation – where the term of the lease is fixed by paragraph 27(2)(a) – there is no statutory LBTT provision which fixes a different term for the lease.

ii. One of the stated purposes of the LBTT leases regime is to properly reflect the Scots law of leases, which the SDLT regime was unable to do. In that context it is difficult to see what reason there would be for taxing a fundamentally Scottish form of transaction (a lease extension) as if it was a completely alien one (the grant of a reversionary lease).

iii. As far as we are aware, the purpose of regulation 13 is simply to ensure that the extension of an SDLT lease is brought into the LBTT regime. This policy objective is met equally well by any of the three approaches outlined above. This rationale is set out in paragraph 21.9 of HMRC's document "Land transactions in Scotland: Transitional guidance on the introduction of Land and Buildings Transaction Tax".

Under English law and SDLT legislation, the increase in the term of a lease or the extension of the premises counts as the grant of a new lease. This is not the case under Scottish law. This means that (in the absence of a transitional provision), if such an event happened after 1 April 2015, such a lease would leave the SDLT regime but not enter the LBTT regime. Accordingly Article 13 of The Land and Buildings Transaction Tax (Transitional Provisions) (Scotland) Order 2014 provides that such an event is to be treated for the purpose of LBTT as the grant of a new lease and therefore chargeable to LBTT. However, because SDLT will have already been charged on the rent to that date of the grant of the new lease, LBTT is charged only on any increase in rent.

iv. We are not aware of any policy intention that regulation 13 should tax the variation of a transitional lease in exactly the same way as it would have been taxed under SDLT. If this was the intention it would have been easy to include drafting in the TP Order to that effect.

f. If the Scottish Parliament had intended to substantially depart from the Scots law of leases to define the term of the new lease when introducing article 13, they could have easily done so – as is evidenced by the terms of paragraph 27(2)(a) of Sch 19.

Appendix 5

Revenue Scotland's Transitional Guidance LBTT6050

1. Under the Heading "Introduction", insofar as relevant, it reads:

"Land and Buildings Transaction Tax ("LBTT") replaced Stamp Duty Land Tax ("SDLT") in Scotland from 1 April 2015 (the commencement date). Special transitional rules are set out in [the 2014 Order]. The purpose of the [2014 Order] (as set out in the Policy Note) is to ensure that different types of land transactions or arrangements involving land transactions in Scotland are not taxed twice (by both SDLT and LBTT) but are subject to one tax or the other where appropriate, rather than no tax at all. As Scottish leases executed prior to 1 December 2003 (within the Stamp Duty ("SD") regime) fall within the scope of leases subject to SDLT, they are covered by the TPO in certain circumstances, see below for further detail.

This guidance aims to provide additional detail on how Revenue Scotland interprets the legislation. This interpretation is consistent with the HMRC Transitional Guidance, the Revenue Scotland transitional examples and how Revenue Scotland have interpreted the rules since the introduction of LBTT.

…

- Extension of lease - Article 13 applies where there is an extension of the term or premises of a lease. The variation is treated as a grant of a new lease for LBTT purposes".

2. Under the heading "General principles" insofar as relevant, it reads:

Articles 12 and 13 of the [2014 Order] provide that certain variations and extensions of leases that were granted prior to 1 April 2015 ("a pre-implementation lease") are to be treated as the grant of a new lease for LBTT purposes.

The relevant variations or extensions are where, after the 1 April 2015:-

…

- there is an extension of the term or premises of a pre-implementation lease (Article 13)

Therefore, where Schedule 17A FA 2003 would have applied before 1 April 2015 to a relevant variation or extension of a pre-implementation lease (but can no longer apply due to Sections 29(5) of the Scotland Act 2012 disapplying SDLT after 1 April 2015), LBTT applies.

The new lease is an acquisition of a new chargeable interest that is chargeable under Section 4 and Section 6(1)(a) LBTT(S)A. Therefore, all of the rules that follow from the creation of a new lease follow this (such as the availability of the nil rate band).

The subject matter of the lease: The relevant part of the varied lease contract

that is treated as a new lease under the LBTT rules is the part related to the variation or extension. The part of the lease contract that was subject to SDLT (the "SDLT lease" does not enter the LBTT regime.

The effective date: is the date of signature of the variation or, in the less common case, the date of conclusion of the missives which constitutes the variation i.e. where no formal minute of variation will be entered into. This is in accordance with Sections 63 and 64 of the LBTT(S)A.

The rent: As the original lease will already have been subject to SDLT, LBTT will only be liable on the additional rent which results from the variation or extension.

The term: The term of the new lease is the period in which possession of the property or rent in relation to the new terms can be linked. The start date of the new lease is the start date of the relevant term. There may be a number of changes to the lease when it enters this period. The tenant does not have possession under the new LBTT lease until possession is under those terms. The tenant may have possession of the premises during the period between the effective date and the start of the term of the new lease but this possession is linked to the SDLT lease.

The relevant date: is usually the effective date as LBTT6002 – Effective date for lease transactions | Revenue Scotland."

…

Article 13 – extension of a lease

Where a lease is varied by an extension to its term, the 'term' for the purposes of the new LBTT lease is the period by which the lease contract has been extended. The new lease starts when the original term ends.

…

Where the tenant does not take possession of the additional premises in advance of the minute of variation the effective date is the date the minute of variation is signed. The start of the new lease is the start date agreed in the minute of variation and it runs until the end of the lease contract.

The additional rent is the **full** rent related to the extended period or the additional premises."

3. Under the heading Net Present Value (NPV) calculation having set out the formula it reads:

"As set out above, the term where Articles 12 or 13 of the [2014 Order] apply is the duration of the new LBTT lease. The lease starts when there is possession under the new LBTT lease and so may be different from the effective date

Appendix 6

For Women

Paragraphs 9 to 14

9. The general approach to statutory interpretation in the United Kingdom is well established. The House of Lords and this court have set out the basic approach on a number of occasions, including in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349. Most recently, this court set out the approach in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255 in which Lord Hodge DPSC, giving the leading judgment, stated (paras 29-31):

> "29. The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson International Ltd v Papierwerke WaldhofAschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context' (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397: 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'
>
> 30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. …

> 31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. …"

10. In *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, Lord Bingham of Cornhill warned against giving a literal interpretation to a particular statutory provision without regard to the context of the provision in the statute and the purpose of the statute. He stated (para 8):

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

11. The general approach of focussing on the words which Parliament has used in a provision is justified by the principle that those are the words which Parliament has chosen to express the purpose of the legislation and by the expertise which the drafters of legislation bring to their task. But where there is sufficient doubt about the specific meaning of the words used which the court must resolve, the indicators of the legislature's purpose outside the provision in question, including the external aids described in para 30 of *R (O)* quoted above, must be given significant weight. As Lord Sales has stated in an extra-judicial writing, "sometimes the purpose for which legislative intervention was required may be the very prominent focus for the legislative activity which follows from it, and thus may frame in a particularly strong way the context in which that activity takes place" (see *"The role of purpose in legislative interpretation: inescapable but problematic necessity"*, Presentation at the Oxford University and University of Notre Dame Seminar on Public Law Theory: Topics in Legal Interpretation, 19 September 2024). Such aids can explain the meaning of a statutory provision which is open to doubt and can themselves alert the court to ambiguity in the provision, but they cannot displace the meanings conveyed by the clear and unambiguous words of a provision construed in the context of the statute as a whole.

12. Lord Nicholls' important constitutional insight in *Spath Holme*, that citizens with the help of their advisers should be able to understand statutes, points towards an interpretation that is clear and predictable. As Lord Hope DPSC stated in *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61; 2013 SC (UKSC) 153, at para 14:

> "The best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable. This will be achieved if the legislation is construed according to the ordinary meaning of the words used."

13. The presumption that a word has the same meaning throughout the Act when used more than once in the same statute is consistent with this principle: see *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020) para 21.3. That presumption is based on the idea that the drafters of the statute were seeking to create a coherent statutory text. The weight to be given to the presumption depends upon the context in which the word or phrase appears in the instrument: *Assange v*

Swedish Prosecution Authority [2012] UKSC 22; [2012] 2 AC 471, Lord Phillips of Worth Matravers PSC at para 75.

The presumption may be stronger where a word is defined in the Act. In *R (Good Law Project) v Electoral Commission* [2018] EWHC 2414 (Admin), Leggatt LJ stated (para 33):

> "It is generally reasonable to assume that language has been used consistently by the legislature so that the same phrase when used in different places in a statute will bear the same meaning on each occasion – all the more so where the phrase has been expressly defined."

14. Whether Parliament intended a word to have a different meaning in different sections of an Act must be determined by looking at the context of the section in question and the Act as a whole.