



STAMP DUTY LAND TAX – application of higher rate to certain high value residential transactions pursuant to Schedule 4A Finance Act 2003 – whether acquisition qualifies for relief for property acquired exclusively for purpose of exploitation as source of rents in course of qualifying property rental business – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TC07251

Appeal number: TC/2017/09281

BETWEEN

CONSULTUS CARE & NURSING LIMITED

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE JEANETTE ZAMAN
IAN ABRAMS**

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 21 June 2019

Peter Seldon, director of the Appellant, for the Appellant

Alex Barrett, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal by Consultus Care & Nursing Limited (“CCN”) against the conclusion set out in a closure notice issued to CCN under paragraph 23 of Schedule 10 Finance Act 2003 (“FA 2003”) on 26 July 2017 in respect of CCN’s purchase of a property at 74 Dry Hill Park Road, Tonbridge, Kent TN10 3BX (the “Property”). That conclusion denied relief from the higher rate of SDLT and amended the SDLT return with the consequence that an additional £102,750 of SDLT is payable.

RELEVANT FACTS

2. HMRC had prepared a bundle of papers for the hearing and Mr Seldon, director of CCN and Mr Ian Thalmessinger, former finance director of CCN, gave evidence for CCN. We have made the following findings of fact; additional findings are set out in the Discussion.

3. The business of CCN is primarily to arrange the provision of self-employed carers to persons needing their services and to receive fees. They provide training courses for carers, and, since 2013, have owned another house locally which is let-out to carers on a short-term basis whilst they attend courses. They have been in business since 1983.

4. The Property had been advertised for sale as family home. CCN’s statement in support of its application for change of use (which was undated but we infer is from around November 2015) records that the proposed use would enable up to 14 individuals to occupy the building on a very short-term basis (typically one or two nights). The carers would have been booked by CCN to care for a client in the client’s own home. The carer would arrive at the site at which point they would then receive details of where they would be travelling to, would stay briefly, and then would leave to work for the client who could be located anywhere within the country.

5. On 15 December 2015 CCN received permission from Tonbridge & Malling Borough Council to change the use of the Property from a dwelling to a temporary residence for residential carers.

6. CCN exchanged contracts with the seller on 15 December 2015 to purchase the Property for £930,000. Completion occurred on 21 December 2015 and this was the effective date of the purchase.

7. CCN filed an electronic SDLT return in relation to the acquisition of the Property in which it claimed relief from the higher rate of 15% that was applicable under paragraph 3 of Schedule 4A to FA 2003 (“Schedule 4A”) to “high value residential transactions”. CCN assessed the SDLT payable as £36,750. The basis for relief being available has changed, but by the date of the hearing both parties acknowledged that relief was being claimed under paragraph 5 of Schedule 4A.

8. CCN refurbished and updated the Property, including by replacing windows, and made additional changes which made it suitable to be let out to a number of occupants (including adding an additional bathroom).

9. Since this work was completed (from about June or July 2016), there has been a good level of occupancy. Carers tend to stay for no more than three to four nights whilst attending one of the training courses provided by CCN. CCN does recruit some carers from South Africa who do not have another base in the UK, and on occasion some of these carers might stay at the Property for up to three weeks. This is outside of the normal occupancy pattern, but does happen.

10. There is a communal kitchen at the Property. CCN provides some breakfast foods such as bread, butter, cereal, milk, tea and coffee to which residents are able to help themselves. This food is not prepared for them, and no separate charge is made for this food.

11. A housekeeper attends the Property daily, and the housekeeper is responsible for cleaning the common areas and cleaning/changing linens in the rooms between occupants. There was no evidence that the housekeeper would be responsible for cleaning rooms during the stay of a guest (as carers generally stayed for no more than three to four nights). Giving evidence, Mr Seldon did not know what the position is on the occasions when a single guest stays for several weeks – he said he would assume that the carer would speak to the housekeeper to obtain clean linen but did not know that this would be the case. Given that these longer stays are infrequent, we do not consider that the lack of information is important.

12. Training courses were and are provided at CCN’s main premises elsewhere in Tonbridge. In July 2016 CCN did for a short period of time use the conservatory in the Property to provide training, but this had not been planned at the time of the purchase, was short-term and was not ideal (as the space was too light). CCN has not repeated this, and has since purchased a property next to its main premises to fit-out as a training centre.

RELEVANT LEGISLATION

13. Schedule 4A provides for a higher rate of SDLT to apply to certain “high value residential transactions”. The main charging provision is paragraph 3, but there are then various paragraphs that provide relief from the charge at the higher rate. The relevant relief in this appeal is at paragraph 5. Paragraphs 3 and 5 are set out below.

“3

(1) Where this paragraph applies to a chargeable transaction—

(a) the amount of tax chargeable in respect of the transaction is 15% of the chargeable consideration for the transaction, and

(b) the transaction is not taken to be linked to any other transaction for the purposes of section 55(1B), (1C) and (4).

(2) This paragraph applies to a chargeable transaction if—

(a) the transaction is a high-value residential transaction, and

(b) the condition in sub-paragraph (3) is met.

(3) The condition is that—

(a) the purchaser is a company,

(b) the acquisition is made by or on behalf of the members of a partnership one or more of whose members is a company, or

(c) the acquisition is made for the purposes of a collective investment scheme.

(4) References in sub-paragraph (3) to a company do not include a company acting in its capacity as trustee of a settlement.

(5) If there are two or more purchasers acting jointly, the condition in sub-paragraph (3) is treated as met if it is met in relation to at least one of those purchasers.

(6) In relation to a transfer of an interest in a partnership that is a chargeable transaction by virtue of paragraph 17(2) of Schedule 15, sub-paragraph (3) has effect as if the following were substituted for paragraph (b) of that sub-paragraph—

“(b) the purchasers (see paragraph 17(3) of Schedule 15) include a company, or”.

(7) In relation to an event that is a chargeable transaction by virtue of paragraph 17A(4) of that Schedule, sub-paragraph (3) has effect as if the following were substituted for paragraph (b) of that sub-paragraph—

“(b) the purchasers (see paragraph 17A(5) of Schedule 15) include a company, or”.

(8) For the purposes of sub-paragraph (3), paragraph 3 of Schedule 16 (bare trustees) applies as if sub-paragraphs (2) and (3) of that paragraph were omitted.

(9) In the case of a transaction for which the whole or part of the chargeable consideration is rent, this paragraph has effect subject to section 56 and Schedule 5 (amount of tax chargeable: rent).

(10) The Treasury may by order amend this paragraph for the purpose of limiting the circumstances in which the condition in sub-paragraph (3) is to be treated as met.

...

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(1) Paragraph 3 does not apply to a chargeable transaction so far as its subject-matter consists of a higher threshold interest that is acquired exclusively for one or more of the following purposes—

(a) exploitation as a source of rents or other receipts (other than excluded rents) in the course of a qualifying property rental business;

(b) development or redevelopment and resale in the course of a property development trade;

(c) resale in the course of a property development trade (in a case where the chargeable transaction is part of a qualifying exchange);

(d) resale (as stock of the business) in the course of a property trading business.

(2) A chargeable interest does not count as being acquired exclusively for one or more of those purposes if it is intended that a nonqualifying individual will be permitted to occupy the dwelling.

(3) In this paragraph—

“excluded rents” has the same meaning as in section 133 of the Finance Act 2013;

“property development trade” means a trade that—

(a) consists of or includes buying and developing or redeveloping for resale residential or non-residential property, and

(b) is run on a commercial basis and with a view to profit;

“part of a qualifying exchange” is to be construed in accordance with section 139(4) of the Finance Act 2013;

“property trading business” means a business that—

(a) consists of or includes activities in the nature of a trade of buying and selling dwellings, and

(b) is run on a commercial basis and with a view to profit;

“qualifying property rental business” has the same meaning as in section 133 of the Finance Act 2013.”

14. The definitions relevant to paragraph 5 are s133 Finance Act 2013 (“FA 2013”) and s205 and 207 Corporation Tax Act 2009 (“CTA 2009”):

“133 Property rental businesses

(1) A day in a chargeable period is relievably in relation to a single-dwelling interest if on that day the interest—

(a) is being exploited as a source of rents or other receipts (other than excluded rents) in the course of a qualifying property rental business carried on by a person entitled to the interest, or

(b) steps are being taken to secure that the interest will, without undue delay, be so exploited in the course of a qualifying property rental business that is being carried on, or is to be carried on, by a person entitled to the interest.

(2) A day is not relievably by virtue of subsection (1) or section 134 in the case of a single-dwelling interest if on that day a non-qualifying individual is permitted to occupy the dwelling.

(3) In this Part “qualifying property rental business” means a property rental business that is run on a commercial basis and with a view to profit.

(4) A business is a “property rental business” for the purposes of subsection (3) if it is a property business as defined in Chapter 2 of Part 4 of CTA 2009, but—

(a) the question whether or not a business is a property rental business for the purposes of subsection (3) is determined without reference to whether or not any profits of the business are chargeable to corporation tax (and section 204(2) of CTA 2009 is therefore disregarded), and

(b) for the purposes of this subsection the “rents or other receipts” referred to in section 207(1) of CTA 2009 are taken not to include excluded rents

(5) In subsection (1)(b) “without undue delay” means without delay except so far as delay is justified by commercial considerations or cannot be avoided.

(6) In this Part “excluded rents” means rents within any of classes 2 to 6 in the table in section 605(2) of CTA 2010.”

“205 UK property business

A company's UK property business consists of—

(a) every business which the company carries on for generating income from land in the United Kingdom, and

(b) every transaction which the company enters into for that purpose otherwise than in the course of such a business.”

“207 Meaning of “generating income from land”

(1) In this Chapter “generating income from land” means exploiting an estate, interest or right in or over land as a source of rents or other receipts.

(2) “Rents” includes payments by a tenant for work to maintain or repair leased premises which the lease does not require the tenant to carry out.

(3) “Other receipts” includes—

(a) payments in respect of a licence to occupy or otherwise use land,

(b) payments in respect of the exercise of any other right over land, and

(c) rentcharges and other annual payments reserved in respect of, or charged on or issuing out of, land.

(4) For the purposes of this section a right to use a caravan or houseboat at only one location is treated as a right deriving from an estate or interest in land.”

SUBMISSIONS

15. The submissions of both parties are outlined below; they are explained in further detail in the context of the Discussion.

16. HMRC challenged the availability of relief under paragraph 5 on two (alternative) grounds:

(1) the Property was not acquired exclusively for the required usage – it was acquired to enhance other aspects of the business, notably the provision of training courses; and

(2) the exploitation of the Property as a source of rents did not comprise a property rental business but was instead a trade.

17. On the distinction between a property rental business and a trade, Mr Barrett emphasised the provision of breakfast and the housekeeping services available at the Property. He noted that CCN’s website marketed the “Carer Houses” (both the Property and the second house acquired in 2013) as accommodation including a light breakfast and as being run with the support of a housekeeper. He submitted this went further than renting out accommodation only. Some of the income was generated from the use of rooms for an overnight stay, and some for the provisions of breakfast and other services.

18. CCN reject these contentions, arguing that carers paying for overnight stays acquire a licence over their room for the duration of their stay, and there is a single activity (provision of accommodation) which encompasses ancillary services and not distinct activities. Mr Seldon referred to *Griffiths v Jackson* [1983] STC 184, emphasising that all amenities at the Property are available on a self-service basis.

DISCUSSION

19. It was common ground that the acquisition of the Property met the conditions necessary to be subject to the charge at the higher rate under paragraph 3 if the relief in paragraph 5 of Schedule 4A was not available as both of the conditions in paragraph 3(2) were met.

20. Paragraph 5(1)(a) provides that the higher rate charge does not apply where the Property is “acquired exclusively” for one or more of the following purposes - “(a) exploitation as a source of rents or other receipts (other than excluded rents) in the course of a qualifying property rental business”.

Acquired “exclusively” for one of specified purposes

21. In explaining the background to the decision to purchase the Property, Mr Seldon explained that the directors of CCN had regard to the good financial position of the company (with surplus cash which was generating very poor returns in bank accounts), the (then) buoyant local property market with prices rising steadily and the fact that CCN was in a position to ensure a high level of occupancy (as carers attending its training courses would be able to stay at the Property). This was confirmed by Mr Thalmessinger, and we have no difficulty accepting this evidence.

22. Mr Seldon and Mr Thalmessinger also explained in their witness statements that, since 2013, CCN has owned another property in Tonbridge which has been made available to trainees at keen prices which have encouraged prospective trainees to sign up for courses. It seemed sensible to extend this practice to a second property.

23. HMRC contended that the Property was acquired to expand the training side of the business of CCN. Mr Seldon denied this, and Mr Thalmessinger explained that the training course are heavily subsidised – on an annual basis, revenue from training courses is around £60,000 (carers employed by CCN do not pay to attend, only self-employed carers are charged) whereas the company’s turnover is around £5 million. They see making the Property available to carers attending courses as low-risk – CCN is able to ensure a good level of occupancy and the carers do tend to behave themselves and look after the Property. CCN now receives rental income of around £150,000 from the two properties which it owns.

24. It is notable that paragraph 5(1) requires that a property is acquired “exclusively” for one of the specified purposes. It is not a main purpose test (which could be satisfied where there was more than one purpose and one of those could be said to be the main purpose). The express language requires that the only purpose of CCN is one of those specified (in this case for exploitation as a source of rents as a qualifying property rental business).

25. On the basis of the evidence, we have concluded that the directors of CCN had (at least) two purposes in acquiring the Property. These were to obtain a better return on the company’s surplus funds than that which was available at the bank, with the rental income expected to be higher, and also to support the provision of training by the business by having cheap accommodation available for carers. The first of these may well have been the main purpose of the directors (and we accept Mr Seldon’s evidence that this was the case) but it is not the only purpose. It is not relevant that the rental income received by CCN from the two properties exceeds the turnover for the provision of training courses (thus illustrating that the provision of training is a smaller component of the business). Accordingly, and whilst acknowledging that the test may be perceived as harsh, this does not meet the “exclusively” requirement of paragraph 5(1) and CCN does not qualify for relief from the higher rate charge.

Qualifying property rental business

26. In the light of our conclusion above, we do not need to make a decision on the question whether the operation of the Property qualifies as a property rental business or as a trade. However, given that this matter was argued before us we have proceeded to consider the matter and reach a conclusion on this alternative ground.

27. The meaning of a “qualifying property rental business” is defined by reference to s133 FA 2013, which provides (at s133(3)) that this means a property rental business that is run on a commercial basis and with a view to profit. Section 133(4) goes on to provide that a business is a “property rental business” if it is a property business as defined in Chapter 2 of Part 4 CTA 2009. (There are caveats to this but they are not relevant.) Section 205 CTA 2009 (which is in Chapter 2 of Part 4 of that Act) provides that a company’s UK property business consists of every business which the company carries on for generating income from land in the UK, and every transaction which the company enters into for that purpose otherwise than in the course of such a business. Finally, s207 CTA 2009 provides that “generating income from land” means exploiting an estate, interest or right in or over land as a source of rents or other receipts.

28. Mr Seldon referred us to *Griffiths v Jackson*, in which the taxpayers had acquired a number of properties in Bristol which they let out as furnished flats or bedsits to students. There were some laundry services provided, and for some properties the taxpayers arranged cleaning of the communal rooms. The General Commissioners had decided that the income was assessable as the profits of a trade under Case I of Schedule D. HMRC appealed, and Vinelott J decided that the income was not trading income but was taxable under Schedule D, Case VI.

29. Vinelott J’s reasoning was as follows:

- (1) It is a cardinal principle of UK tax law that income derived from the exercise of property rights by the owner of land is not income derived from the carrying on of a trade.
 - (2) The income derived by the owner of property from letting the property furnished, whether for short or long term, small or large units, self-contained or with shared kitchen and bathroom, is not income derived from carrying on a trade but is taxable under Schedule A or Case VI of Schedule D.
 - (3) If the owner provides services and the services are separately charged or the receipts can be otherwise apportioned to the provision of services, any profit derived from the provision of services will be taxable as the profits of a trade.
 - (4) He could see nothing on the facts found or the documentary evidence which affords any grounds to take that case before him outside that principle, or which supported the conclusion that the income derived represents the profits of the trade, even though no doubt part of the income did represent payment for services which, if separately charged or apportioned, might have been taxable as the receipts of the trade.
 - (5) It does not follow that someone who is carrying on the business of letting furnished rooms and providing services to the occupiers is therefore carrying on a trade
 - (6) There is a distinction between the landlord of a lodging house (who remains in occupation) and the owner of a property who lets furnished rooms and provides services (the first being a trade, the second not) even though this distinction is a narrow one.
 - (7) In the present case there was no doubt that the taxpayers were letting furnished rooms to tenants and were not carrying on a trade.
30. Mr Seldon submitted that CCN's use of the Property was akin to that in issue in *Griffiths v Jackson*. Accordingly, we should conclude that CCN was generating income from land and this constituted a qualifying property rental business.
31. Mr Barrett submitted that from HMRC's perspective there were two considerations:
- (1) what is the activity giving rise to the payment? and,
 - (2) what are customers paying for - the use of the land or a package of services?
32. He emphasised (in respect of both considerations) the availability of breakfast at the Property and the provision of housekeeping services, submitting that these additional services prevented the business from being purely a property rental business. Furthermore, HMRC expect that a qualifying property rental business would involve tenants on fixed tenancies, with tenants having rights in their capacity as such in respect of the property.
33. We are not convinced that the availability of breakfast and the provision of housekeeping services are such as to transform the use of the Property, viewed on its own, into that of a trade. We accept Mr Seldon's evidence, which was not challenged by HMRC, that the breakfast constitutes various items including tea, coffee, bread, cereal and milk being available in the kitchen to which carers can then help themselves. It is not prepared for them by CCN or anyone on its behalf. As for the housekeeping services, we found that these involved the daily attendance of a housekeeper at the Property who is responsible for cleaning the common areas and cleaning/changing linens in the rooms between occupants. These are both entirely consistent with the letting of furnished rooms (as in *Griffiths v Jackson*) and the statutory definitions in issue of the carrying on of a property rental business and generating income from land.
34. However, on the basis that we have concluded that the Property was not acquired exclusively for the purpose of being exploited to obtain rental income but also to benefit the

wider activities of CCN (in particular to help expand the provision of its training courses), we consider that in assessing whether the Property is used in the course of a qualifying rental business we should also have regard to the other activities of CCN. We note that CCN provides carers to clients in their own homes and provides training services to carers. We consider that the provision of accommodation at the Property forms part of that same business activity and should properly be regarded as trading. This is not to say that running multiple houses along the same lines as the Property would result in them together being trading rather than individually constituting a rental business – this was specifically denied in *Griffiths v Jackson* and we do not doubt that conclusion. Rather, it is to say that CCN’s activities constitute a trade relating to the provision of carers and that the rents from the Property form part of that trade. We do not consider on the facts before us that it is correct to say that CCN conducts both a trade relating to the provision of carers and a separate property rental business.

35. We therefore conclude that CCN is not conducting a qualifying property rental business for the purposes of paragraph 5(1)(a) of Schedule 4A.

CONCLUSION

36. CCN’s appeal is dismissed and the closure notice issued under paragraph 23 of Schedule 10 Finance Act 2003 is confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

37. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**JEANETTE ZAMAN
TRIBUNAL JUDGE**

Release date: 04 JULY 2019