

[2020] UKFTT 437 (TC)



**TC07914**

*STAMP DUTY LAND TAX- Multiple Dwellings Relief - strike out application - time limit for claim for Multiple Dwellings Relief - whether claim can be made for overpayment relief -procedural errors by HMRC- whether appealable decision*

**FIRST-TIER TRIBUNAL**

**Appeal number: TC/2020/00551**

**TAX CHAMBER**

**BETWEEN**

**SMITH HOMES 9 LIMITED**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR**

**HER MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE MARILYN MCKEEVER**

The Tribunal determined the appeal on 26 October 2020 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of the Covid-19 pandemic and the need for social distancing and the Tribunal decided it could decide the matter without a hearing. The documents to which I was referred are a bundle of Tribunal papers, documents and correspondence of 84 pages including the Notice of Appeal dated 20 January 2020, HMRC's Notice of Application to strike out the appeal dated, 30 June 2020, the Appellant's response, submitted by its agent Cornerstone Tax Limited ("Cornerstone") and HMRC's further submissions dated 11 August 2020.

## DECISION

### INTRODUCTION

1. This is an application for the strike out of an appeal against a a closure notice refusing a Stamp Duty Land Tax (“SDLT”) overpayment claim relating to Multiple Dwellings Relief. The application relates to the preliminary issue of whether the Appellant is able to make a claim for the repayment of overpaid tax and is made under Rule 8(3) (c ) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. HMRC contends that, in accordance with Rule 8(3) (c ) “there is no reasonable prospect of the appellant’s case, or part of it, succeeding”.
2. References to “paragraphs” below are to paragraphs of Schedule 10 Finance Act 2003 unless otherwise stated.

### THE FACTS

3. The appellant purchased an office building, Shield House, in Harlow, Essex for £1,299,188. The property was purchased on 6 March 2017 and an SDLT return was submitted on 20 March 2017. The bundle did not contain a copy of the return itself; only the submission receipt was included. HMRC state that the SDLT return classified the property as “non-residential” and tax of £54,495 was self-assessed and paid. This is not disputed by the appellant and I accept it as a fact.
4. Some 14 months later, on 24 May 2018, Cornerstone, on behalf of the appellant, made a claim under paragraph 34 of Schedule 10 which is a claim for relief for overpaid tax. The letter stated “...it [presumably the SDLT return] was completed incorrectly. There has been an overpayment of SDLT as our client did not know, or could not reasonably have known, that Multiple Dwellings Relief (“MLR”) was available.
5. The letter states that the property had the benefit of permitted development to convert the office building to residential units and that Harlow District Council approved a development proposal for 33 residential units on 16 January 2017. The copy approval in the bundle related to 35 units and was dated 3 July 2017. While this might be relevant for the substantive claim to MDR, I do not need to resolve the issue for the current application.
6. Cornerstone’s letter asserted that MDR was due which would mean that the appellant was liable to pay a lower amount of SDLT than it had, in fact, paid. The amount of SDLT said to be payable was £38,976.
7. The letter applied for a repayment of SDLT as the land transaction return was completed incorrectly. It went on to set out what should have been entered in certain boxes in the return.
8. The refund claimed was the difference between the SDLT paid (£54,459) and the SDLT said to be due after applying MDR (£38,976), that is £15,483.
9. I discuss various procedural issues below, but I note here that the Notice of Appeal was an appeal against HMRC’s decision that the appellant cannot claim MDR as set out in their Review Conclusion Letter of 23 December 2019. The appellant made an in time appeal against that decision.

## HMRC'S GROUNDS FOR THE STRIKE OUT APPLICATION

10. Although the the appellant's claim under paragraph 34 was made within the four year time limit, paragraph 34 is subject to paragraph 34A which provides for "cases" where HMRC is not liable to give effect to the claim.
11. Case A, set out in paragraph 34A (2), provides "Case A is where the amount paid...is excessive by reason of -
  - (a)...
  - (b) a mistake consisting of the making or giving, or *failing to make or give, a claim or election*" (emphasis added).
12. Section 58D Finance Act 2003 introduces Schedule 6B Finance Act 2003 which provides for MDR and subsection (2) provides "Any relief under that Schedule must be claimed in a land transaction return or an amendment of such a return".
13. Paragraph 6(3) provides that "...an amendment [to a land transaction return] may not be made more than twelve months after the filing date". Paragraph 2(1) provides that the filing date in relation to a land transaction return is the last day of the period within which the return must be delivered. Under section 76 Finance Act 2003, that period was, at the time, 30 days from the effective date.
14. The effective date is the date of purchase, ie 6 March 2017. The filing date was therefore 5 April 2017.
15. It is common ground that the land transaction return submitted on 20 March 2017 did not include a claim for MDR.
16. The return could only be amended up to 5 April 2018. The return was not amended by that date.
17. A claim for MDR can only be made in accordance with section 58D Finance Act. No such claim was made and the appellant is now out of time to make a valid claim for MDR.
18. The failure to make the claim falls within Case A of paragraph 34A, so the appellant cannot circumvent the time limit by submitting a repayment claim under paragraph 34 as HMRC are not liable to give effect to the claim where Case A applies.
19. HMRC argued that this was consistent with the case of *Secure Service v HMRC* [2020] UKFTT 59. In that case, the appellant made a late claim for MDR. They did not make a claim for overpayment relief, but the Tribunal considered whether the late claim for MDR could be treated as an in time overpayment relief claim.
20. The Tribunal said, at paragraph 48:

"48. I have found that no claim for overpayment relief was made but I also consider that even if a specific claim for overpayment of SDLT had been made in relation to the claim for multiple dwellings relief that the legislation is clear that HMRC would not be liable to give effect to that claim. This follows logically; it would be inconsistent with the aims of the legislation if a twelve month time limit could be circumvented simply by describing a claim for relief as a claim for a refund of an overpayment."

## THE APPELLANT'S CONTENTIONS IN ITS RESPONSE

21. Cornerstone submit that the appellant did not know and had not been advised that it could make a claim for MDR at the time of the transaction. They also assert that there was a lack of public guidance on the matter and that the appellant would not have

known that they were eligible to make a claim for MDR on their land transaction return.

22. They do not consider that HMRC can exclude the claim under Case A of paragraph 34A because the appellant could not reasonably have known before the end of the twelve month period that such relief was available. They assert that it follows that since the information about the availability of the relief and the ability to claim it was absent from HMRC guidance then the appellant did not make a mistake in failing to make or give a claim or election within Case A.
23. They therefore claim that the paragraph 34 claim should be allowed and the strike out application should be disregarded.

#### **DISCUSSION**

24. I have found as a fact that the appellant was out of time to make a valid claim for MDR.
25. Contrary to the appellant's submission, HMRC's manuals and other information on their website, all of which is in the public domain, provide guidance on the conditions which apply to MDR, make it clear that it is up to the taxpayer to decide whether to claim or not and that a claim can be made in a land transaction return. There is also guidance about the amendment of returns and the time limits for doing so.
26. There is clearly a substantial amount of publicly available guidance available on MDR. HMRC is under no obligation to inform taxpayers about the availability of a relief and one might expect a company in the construction industry to be aware of, or to seek advice about, potential reliefs.
27. It cannot be argued that the appellant could not reasonably have known before the end of the twelve month period that such relief was available. It is not true to say that information about the availability of the relief and the ability to claim it was absent from HMRC guidance. It cannot be argued on that ground that the appellant did not make a mistake in failing to make a claim within Class A, and so was entitled to make an overpayment claim under paragraph 34. In other words, in my view, the failure of the appellant to make a claim falls within Case A in paragraph 34A so that it cannot succeed in a repayment claim under paragraph 34.
28. In any event, what the appellant knew or did not know about the possibility of making a claim for MDR is not relevant to Case A. Even if the appellant could not reasonably have know about MDR (and I do not consider that that was the case) it would not affect the position.
29. All that Case A requires is that the taxpayer made the mistake of failing to make a claim. If the taxpayer falls within Case A, they are not entitled to succeed in their claim for a repayment of tax.
30. Case A may be contrasted with Case C which applies where the claimant could have sought relief within a period which has expired and and knew or ought reasonably to have known before the end of the period that such relief was available.
31. Case C could apply to the appellant as well as Case A. Even if it did not know about the relief, it ought reasonably to have done so within the time limit.
32. I agree with the comments in the *Secure Service* case, although it is not binding on me, that it would be inconsistent with the scheme of SDLT and its reliefs if the legislation were construed to allow a twelve month time limit to be circumvented by making a claim for a refund of tax overpaid.

33. In conclusion, I do not consider that HMRC are liable to give effect to the claim under paragraph 34.
34. In summary; the appellant did not make a claim for MDR and is out of time for making a valid claim. HMRC is not liable to give effect to the claim for repayment of overpaid tax under paragraph 34 because Case A and/or Case C of paragraph 34A applies. Accordingly, even if the transaction met the conditions for MDR (which HMRC dispute) the appellant would be unable to obtain the relief and the appeal must fail. There is no reasonable prospect of the appellant's case succeeding.
35. Before disposing of the appeal, there are further procedural issues that I need to consider.
36. HMRC opened an enquiry, purportedly under paragraph 12, on 1 January 2019. It purported to be a "check of amendment to Stamp Duty Land Tax Return". An enquiry into an amendment of a land transaction return must be made within nine months of the filing date.
37. There was further correspondence which was not in the bundle.
38. HMRC then sent a letter on 17 September 2019 which acknowledged the error in the 1 January letter and stated that the letter should have said that the enquiry was being opened under paragraph 7 of Schedule 11A of Finance Act 2003 into the repayment claim. The time limit for opening such an enquiry is nine months from the date of the claim. The letter purported to be a closure notice and concluded that the transaction was not eligible for MDR and so there had been no overpayment.
39. Cornerstone appealed this decision on 11 October 2019 contending that MDR was applicable. It seems that HMRC remained of the view MDR did not apply and offered a review, (the correspondence was not in the bundle) which Cornerstone accepted by a letter of 12 November 2019.
40. HMRC's review letter of 23 December 2019 made a further error stating that the decision under appeal was "a closure notice issued on 17 September 2019...disallowing the company's claim under paragraph (sic) 6B [presumably Schedule 6B Finance Act 2003 which relates to MDR]. It stated that the "sole point at issue" was whether the purchase was a multiple dwelling transaction within Schedule 6B Finance Act 2003 and purported to uphold the original (17 September) decision which related to the claim for relief for tax overpaid.
41. It seems to me that the enquiry opened on 1 January 2019, which would have been in time, was invalid as it purported to be an enquiry into an amendment to an SDLT return and there was no amendment. The enquiry notice was issued under the wrong provision.
42. The enquiry notice issued on 17 September 2019 was made made under the right provision, as was the closure notice, but an enquiry notice under paragraph 7 of Schedule 11A must be sent within nine months of the claim being made. The claim was made on 24 May 2018, so the enquiry notice should have been sent by 24 February 2019. It was sent on 17 September 2019. Accordingly this enquiry notice was invalid as it was out of time. It follows that the closure notice was also invalid as there was no valid enquiry in existence to determine by a closure notice.
43. There was therefore no valid decision for the reviewing officer to review so the review conclusion was also invalid. In addition, the reviewing officer addressed the wrong

question: whether the transaction qualified for MDR and not whether HMRC should give effect to the repayment claim.

44. Under paragraph 35, an appeal may be brought against an amendment of a self-assessment by HMRC, a conclusion stated by a closure notice, a discovery assessment, an assessment to recover excessive repayment or a Revenue determination. The only category which is relevant in this case is a conclusion stated by a closer notice. As there is no valid closure notice, there is no appealable decision and the appellant's appeal is not therefore valid.
45. Paragraph 6 of Schedule 11A provides that subject to an enquiry being made into a claim "as soon as practicable after a claim is made ...the Inland Revenue shall give effect to the claim...by discharge or repayment of tax." On the face of it, if there is no valid enquiry and HMRC are out of time for opening one, they must make the repayment claimed.
46. However, the reference to a "claim" must be to a valid claim to which HMRC are required to give effect. Paragraph 6 cannot apply to a claim to which HMRC is not required to give effect by virtue of paragraph 34A.
47. For the reasons set out above, I concluded that the appellant's claim fell within paragraph 34A and therefore, HMRC is not obliged to give effect to it. Accordingly, paragraph 6 of Schedule 11A does not apply to the claim and the appellant is not entitled to the refund of tax claimed.

#### **DECISION**

48. For the reasons set out above I have concluded that the appeal is not valid as HMRC had not made an appealable decision so that there is no appeal to strike out. I have also concluded, on this basis, that the appellant is not entitled to the repayment of tax sought.
49. In the event that I am wrong and the appeal is valid, for similar reasons I have concluded that there is no reasonable prospect of the appeal succeeding and I therefore grant the strike out application.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

50. 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.

**MARILYN MCKEEVER**

**TRIBUNAL JUDGE**

**Release date: 31 OCTOBER 2020**