

[2020] UKFTT 470 (TC)



TC07944

Appeal number: TC/2019/02482

Stamp Duty Land Tax – Penalty for inaccurate SDLT return - application of higher rate to high value residential transaction pursuant to Schedule 4A Finance Act 2003 - whether transaction qualified for relief as property acquired for purpose of redevelopment - yes - whether return inaccurate - no - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FOREST COMMERCIAL SERVICES LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER LESLIE HOWARD**

Sitting in public at The Court House, Bridge Street, Peterborough on 22 January 2020

For the Appellant, Mr Simon Smith, director of the Appellant Company

Mr Paul Hunter, Officer of HM Revenue and Customs, for the Respondents

DECISION

The appeal

1. This is an appeal by Forest Commercial Services Limited (“FCS”) against the conclusion set out in a closure notice decision issued to FCS under paragraph 23 of Schedule 10 Finance Act 2003 (“FA 2003”) on 23 November 2017 in respect of the purchase by FCS of a property at Holwell, St Paul’s Street, Stamford (“the Property”). The decision denied relief from the higher rate of SDLT and amended the SDLT return with the consequence that an additional £46,750 of SDLT was payable. A penalty in the sum of £20,453.12 was issued against FCS for a deliberate inaccuracy on its SDLT return.
2. FCS has accepted the decision that denied relief from the higher rate, but appeals the penalty on the basis that there was no inaccuracy in the SDLT return and relief was only withdrawn because qualifying conditions, entitling relief, did not continue to be satisfied.

The Background

3. FCS was incorporated on 18 March 1996. The Company’s website states that the Company’s purpose is ‘to explore new business opportunities and develop commercial enterprise that provide real value to businesses and consumers’. Mr Simon Smith, the sole director of FCS, said that in practice, its main activities were the redevelopment of land and property.
4. Mr Smith and Mr Paul Jackson, the Company’s accountant, gave evidence for the Company. Officer Azhar Ismail gave evidence for HMRC.
5. In May 2016 Holwell, St Paul’s Street, Stamford, was marketed for sale. The property consisted of a four bedroomed detached bungalow on a generous private plot in a conservation area and was advertised as being in need of updating with development potential. The property is located on the corner of St Paul’s Street and Brazenose Lane. The marketed guide price was ‘best offers over £470,000’. The Property’s rear garden gave access to a potential building plot at the rear of Friary House, the immediately adjoining house to the east, which was also owned by the seller. It was a stipulation in the sales brochure that a strip of land at the southern end of Holwell giving access from Brazenose Street to the potential building plot would be retained by the seller. The strip of land was available by separate negotiation and subject to an overage clause should planning permission be granted for the development of the potential building plot.
6. FCS successfully negotiated its purchase of Holwell, but on the basis that the strip of land would be included in the purchase, with access reserved to the building plot in favour of the seller. The agreed sale price was £525,000.
7. In evidence Mr Smith said that he had been involved in property development for 15 years in addition to his main business, RCS Logistics and had developed five houses in Uppingham and eight houses in St Paul’s Street, Stamford. He was interested in purchasing Holwell with a view to obtaining planning permission to redevelop the site for 2 to 4 houses. He was however aware from early on in negotiations that there could be objections through planning, as the site

was in a conservation zone and had some interest from Historic England. Part of the site is a scheduled monument, the site of the Carmelite or Whitefriars monastery taken down in the reign of Henry VIII on the Dissolution of the monasteries between 1536 and 1541.

8. On 15 June 2016, FCS exchanged contracts in its purchase of Holwell, with an agreed simultaneous completion date.

9. Stamp Duty Land Tax (“SDLT”) was payable on the transaction. Under s 55 FA 2003 as amended, as from 1 April 2016, SDLT was payable as below (on the basis of a £525,000 purchase price) as below:

Up to £125,000.	3%	£3750
Above £125,000 and up to £250,000.	5%	£6250
Above £250,000 and up to £925,000.	8%	<u>£22,000</u>
Total		<u>£32,000</u>

10. In 2012, changes in SDLT had taken place in relation to high-value residential properties purchased by non-natural persons (“NNP’s”). NNP’s are broadly companies, partnerships with companies among their partners and collective investment schemes.

11. As from March 2012, SDLT was charged at 15% on the acquisition of interests in residential dwellings costing more than £2 million, purchased by NNP’s. From 20 March 2014, the Finance Act 2014 s 111 (4) lowered the entry threshold from £2m to £500,000.

12. From 17 July 2013, following the Finance Act 2013, a new series of reliefs from the 15% rate was introduced where property was purchased by a company for (inter alia) letting, trading in and redevelopment [a new paragraph 5AA was inserted into Schedule 4A to FA 2003].

13. The relief is subject to a claw back, if within three years of the effective date of the transaction the property is no longer used for the purpose for which relief was available when purchased, or the property is used personally or for family occupation.

14. A property development business is one that includes developing or redeveloping residential or non-residential property for resale and is run on a commercial basis with a view to profit. Development includes the demolition of an existing dwelling, replacement with new dwellings, refurbishment of property and building extensions.

15. The SDLT return prepared by the solicitors acting for FCS claimed relief on the basis that FCS purchased Holwell for redevelopment. SDLT was therefore calculated at the standard residential rate and £32,000 paid to HMRC. Had SDLT been calculated without relief at 15%, the total duty would have been £78,750.

16. After discussions with South Kesteven Planning Department, Mr Smith decided to demolish the existing bungalow on the site and replace it with a new single dwelling which would then be sold. These discussions appear to have taken place during and soon after completion of Holwell

by FCS. Mr Smith said that prior to the purchase of the property there were no detailed plans or costings for the development of the site.

17. On 29 September 2016, Mr Smith lodged a planning application with South Kesteven Planning Authority for the demolition of Holwell and construction of a single dwelling house with two double garages. The application was submitted by Mr David Heely a Building Design Consultant who acted as Mr Smith's agent. Mr Heely submitted the application in the names of Mr and Mrs Smith, although this was apparently an inadvertent error as it should have been in the name of FCS, the owner and proposed developer. The plans submitted with the application were marked 05/16 and therefore appeared to have been prepared in May 2016, suggesting that the concept of building a single dwelling predated the actual purchase of Holwell, contradicting Mr Smith's statement that no detailed plans had been prepared.

18. In his witness statement, Mr Smith said that around the time he was purchasing Holwell, he was moving from his house in Wing, Oakham, Leicestershire, into a new house, Ancaster House, Marshalls Yard, Stamford, which was still under construction. Ancaster House was one of eight houses being built by another building company of which Mr Smith was also a director. Mr Smith and his wife sold the house in Wing and rented it back for 6 months until Ancaster House was ready for occupation. However, towards the end of the six-month period, it became clear that Ancaster House would not be completed by the time his purchaser wished to take occupation of the house in Wing. By then Mr and Mrs Smith had already put most of their furniture and belongings into storage.

19. Unfortunately, Mr and Mrs Smith could not find a suitable property available for a short-term let. Mr Smith says that his only option was to temporarily use Holwell. The property was very dated and damp inside, so he and his wife, who was expecting a child, did not wish to stay there any longer than necessary. It was a short-term expedient. They moved in, in early July 2016. Mr Smith says they managed with only a limited amount of furniture and barely unpacked any boxes. He did not wish to fall foul of Council Tax regulations and therefore did not claim Council Tax exemption by declaring the property unoccupied, as he otherwise intended to. Ancaster House was finally completed in November 2016 when Mr and Mrs Smith moved into the property.

20. Through the latter part of 2016 and into 2017, Mr Heely assisted in the continuing pre planning discussions relating for the redevelopment of Holwell. He liaised with the Local Planning Authority, Historic England and the Highways Authority in order to address any potential objections. One particular objection from Historic England was that they wanted the a proposed second garage removing from the planning application as it was very near a historic monument site within the boundaries of the property. On 14 March 2017 in an exchange of emails with the Planning Authority Mr Heely said:

“On the question of the second garage which Historic England would like removed; the garages were a specific part of the client's original brief as they have several cars which they need to store securely. In short, they are unwilling to forego this particular part of the proposal.

Mr and Mrs Smith have long been keen to design a building which while meeting their needs, also honoured the history of the site.”

21. The planning process was subject to an architectural impact assessment prepared in June 2017 and Mr Heely's discussions with the planning authority continued for about a further year before planning consent for a single dwelling was finally granted.

22. HMRC say that after reviewing the planning applications and associated documentation, it is apparent that from the outset, the vision for the property was to develop it as a bespoke dwelling for the personal occupation of Mr and Mrs Smith. HMRC say this is clear from pre-planning advice sought only two weeks after the acquisition of the property. The planning application was also submitted in Mr and Mrs Smith's joint personal names. There was little indication from correspondence and drawings that the re-development of Holwell was to be a commercial redevelopment venture.

23. On 23 March 2017, HMRC issued an SDLT enquiry notice to FCS, under Paragraph 12, Schedule 10 to the Finance Act 2003, to check the SDLT return for the purchase of Holwell.

24. There then followed an exchange of correspondence between HMRC's Officer Ismail and Mr Heely. On 5 May 2017, Officer Ismail asked for clarification as to who had used or stayed in Holwell since its purchase in June 2016. On 23 May 2017, Mr Smith replied that the house was empty and no one had lived there. Mr Jackson of Jackson Grimes accountants took over the correspondence in which he reiterated that Holwell had been purchased by FCS for the purpose of its re-development and that the stamp duty calculation had been based on that intention. In other words, that there had never been any intention Mr and Mrs Smith would live in Holwell.

25. During their period of occupation, which lasted for four months, Mr and Mrs Smith used Holwell as their postal address and were registered at the property on the electoral register.

26. Officer Ismail obtained Council Tax records from South Kesteven District Council which showed that full Council Tax had been paid on Holwell from 14 June 2016 until the end of that Council Tax year [31 March 2017]. HMRC say that the date 14 June 2016 is significant, because that was *before* the SDLT return was submitted and therefore it was unlikely that Mr Smith was not aware that he would be occupying the property.

27. In a letter dated 22 January 2018 Mr Jackson said:

"I have now had the opportunity to discuss matters with our client and he acknowledges that he did occupy the property for a short period personally. This was due to him having to vacate the property he had been renting at short notice. Whilst the property was far from satisfactory it did provide accommodation for him in a short-term emergency. Clearly at the time our client did not realise that by occupying the property this would have any bearing on the stamp duty the company had paid when acquiring the property.

However recent developments have now rather overtaken the above events. Given the company's inability to develop the site as originally envisaged and a lack of commercial potential, our client has decided to acquire the property from the company personally and to develop a single dwelling with a view to occupying it."

28. On 25 April 2018, Office Ismail responded, saying that because Mr and Mrs Smith had occupied Holwell it would be necessary to withdraw the relief that had been claimed. They were non-qualifying individuals and therefore the relief was not applicable. Accordingly, SDLT of £78,750 should have been paid. £32,000 had been paid, leaving a balance due of £46,750. Also, as there had been an error on the SDLT, it would be necessary to consider whether a penalty should apply.

29. On 22 May 2018, Mr Jackson replied, saying that having taken his client's instructions, and having discussed the matter with the solicitor who dealt with the transaction, it was clear that the SDLT return had been completed on the basis of FCS acquiring Holwell for re-development. Mr Jackson maintained that the return was in fact correct and that it was only subsequent events that altered the position. At the time of the acquisition, no plans had been prepared and discussions were still taking place with the planning authorities and other interested bodies. Mr and Mrs Smith were not conversant with the technicalities of SDLT and were totally unaware that their moving into Holwell would affect the amount of SDLT payable.

30. Officer Ismail responded saying all the evidence indicated that Mr and Mrs Smith intended to occupy Holwell at some stage. He referred to correspondence from their architect Mr Heeley, which stated that the two "*garages were a specific part of the client's original brief as they have several cars which they need to house securely. In short they are unwilling to forego this particular part of the proposal*". Officer Ismail said this clearly indicated that the plan for the property from the outset was for it to be used by Mr and Mrs Smith and at the time the SDLT return was filed, Mr Smith would have been fully aware that he and his wife would be occupying the property and developing it for their own personal use.

31. On 7 November 2018, Mr Jackson replied, rejecting officer Ismail's conclusions and saying that a penalty was inappropriate. He said that:

- It was not until September 2017 that Mr Smith engaged the architects Harris McCormack to deal with the redevelopment of Holwell and the construction of a single dwelling. It was not until then that Mr Smith's original plans for two properties became impractical due to planning restrictions.
- When FCS purchased Holwell in June 2016, Mr Smith had already acquired Ancaster House.
- Mr and Mrs Smith only occupied Holwell out of necessity, because Ancaster House was not finished and ready for occupation until November 2016. They only lived at Holwell for four months.
- Had it been Mr and Mrs Smith's intention to acquire Holwell as a personal residence from the outset they would not have involved FCS in the project and not paid two lots of SDLT on the same property.
- Having made enquiries of South Kesteven DC, Council Tax was paid for Holwell of £1,496.54 for the period from August 2016 to 31 March 2017. The earlier date of 16 June 2016 referred to by HMRC was the date that the Council would have noted the change of ownership and was not the date when Mr and Mrs Smith moved into the property. It was incorrect for Officer Ismail to suggest that Mr Smith must have known at the time the SDLT return was submitted by solicitor that he was moving into Holwell.

- Mr and Mrs Smith registered Holwell as their address on the electoral register. Neither this, nor the payment of Council Tax were the actions of someone deliberately attempting to avoid SDLT.

32. On 9 November 2018 Mr Heeley provided Mr Smith with a letter of support (copied to Officer Ismail), confirming that it was only after discussions with the planning officer of South Kesteven District Council that Mr Smith decided against building two houses on the site of Holwell, and to build a single property.

33. On 15 November 2018, HMRC issued a closure notice under Paragraph 23, Schedule 10, Finance Act 2003, amending the SDLT return to reflect Officer Ismail's conclusions. 15% SDLT was due on the purchase of Holwell and a balance of £46,750 SDLT payable. Interest calculated to 4 May 2018 of £3,145.29 was also payable. The letter added "*We are treating the error in completing your return as not deliberate. We won't not charge a penalty for this error on this occasion*". Although Officer Ismail's name appeared at the end of the letter, it subsequently transpired that the letter had in fact been written by another caseworker and that it was Officer Ismail's intention to impose a penalty.

34. On 20 November 2018, Mr Jackson asked Mr Ismail to clarify whether "*We won't not charge a penalty for the error on this occasion*", should have read "*We will not charge a penalty...*".

35. On 23 November 2018, Officer Ismail replied that the closure notice had been issued in his absence and that in fact a penalty of £20,453.12 was to be imposed.

36. On 17 December 2018, Mr Jackson responded expressing disappointment that Officer Ismail had not addressed the points raised in his letter of 7 November 2018. He reiterated that Mr and Mrs Smith simply made a mistake moving into Holwell, being totally unaware of the potential SDLT implications. Mr Jackson requested a review of the decision to impose a penalty. FCS would pay the additional SDLT.

37. On 12 March 2019 a review was undertaken by Officer Yuill which upheld Officer Ismail's decision that a penalty of £20,453.12 should be imposed. Officer Yuill explained that Paragraph 1 of Schedule 24 FA 2007 states that where a person submits a SDLT return to HMRC which contains an inaccuracy, that person is liable to a penalty if two conditions are satisfied.

38. The first condition is that the document contains an inaccuracy which amounts to an understatement of liability to tax. The second is that the inaccuracy was deliberate, or careless.

- i. With regard to the first condition, the SDLT return contained an inaccuracy which led to an understatement of tax. This inaccuracy was that the company was not entitled to claim Code 35 relief. This was not under appeal and the additional tax had been paid.
- ii. With regard to the second condition, the inaccuracy in the return was brought about deliberately by the company or a person acting on its behalf. Therefore, the second condition is also met.

39. Officer Yuill informed the appellant that he considered the error in the SDLT return to be ‘deliberate but not concealed’ and the disclosure was considered to be ‘prompted’. The penalty range for ‘deliberate but not concealed’ behaviour and a ‘prompted’ disclosure was between 35% and 70% of the potential lost revenue (“PLR”), which in this case was the underpayment of £46,750. A reduction is given for Giving (30%) Telling (30%) and Helping (40%). HMRC had given Giving 25%, Telling 20%, and Helping 30%, a total disclosure reduction of 75%. Therefore, the reduction percentage for disclosure was $35\% \times 75\% = 26.25\%$. Accordingly, the Penalty percentage to be charged was $70\% - 26.25\% = 43.75\%$. The penalty was therefore $£46,750 \times 43.75\% = £20,453.12$.

40. Officer Yuill said he agreed with the assessment of the quality of disclosure given. Mr Smith had responded to the questions posed to him. However, he only provided the full information once he was shown the evidence held by Officer Ismail that he had been living in the property. Prior to this, he maintained that he had not lived in the property. Therefore, full reductions for telling HMRC about the inaccuracy or helping HMRC to understand it would not be appropriate.

41. On 11 April 2019 FCS lodged a notice of appeal against the penalty with the Tribunal.

Legislation

42. Schedule 4A FA 2003 provides for a higher rate of SDLT to apply to certain “high value residential transactions”. Paragraph 3 is the main charging provision, but there are then various paragraphs that provide relief from the charge at the higher rate. The relevant relief provisions in this appeal are at paragraph 5, 5A and 5G which 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.

5

(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 non-qualifying individual will be permitted to occupy the dwelling.

(3) In this paragraph-

“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;

“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;

5A (1) In paragraph 5 “non-qualifying individual”, in relation to a chargeable transaction, means any of the following-

- (a) the purchaser (other than a purchaser entering into the transaction as a member of a partnership);
- (b) a purchaser who enters into the transaction as a member of a partnership and has a major share in the partnership,
- (c) an individual (a “connected person”) who is connected with the purchaser;

Withdrawal of relief

5G (1) Sub-paragraph (2) applies where relief under paragraph 5 has been allowed in respect of a higher threshold interest forming the whole or part of the subject-matter of a chargeable transaction.

(2) The relief is withdrawn if at any time in the period of three years beginning with the effective date of the chargeable transaction (“the control period”) a requirement in sub-paragraph (3) is not met.

(3) The requirements are that-

- (a) the higher threshold interest (if still held by the purchaser) is held exclusively for one or more of the purposes mentioned in paragraph 5(1),
- (b) any chargeable interest derived from the higher threshold interest that may be held by the purchaser is held exclusively for one or more of those purposes, and
- (c) (if the higher threshold interest or a chargeable interest derived from it is held by the purchaser) no non-qualifying individual is permitted to occupy the dwelling.

(4) The requirements in sub-paragraph (3)(a) and (b) do not apply in relation to times when, because of a change of circumstances that is unforeseen and beyond the purchaser's control, it is not reasonable to expect the purposes for which the higher threshold interest was acquired to be carried out.

(5) Sub-paragraph (6) applies if a higher threshold interest was acquired for a purpose mentioned in paragraph 5(1) but at some time in the control period the activity in question (for instance, exploitation of the interest as mentioned in paragraph 5(1)(a)) -

- (a) has not yet begun, or
- (b) has ceased.

(6) For the purposes of sub-paragraph (3), the interest is taken to be held for the purpose in question only if reasonable steps are being taken to ensure that the purpose in question is carried out.

(7) In this paragraph “non-qualifying individual” (in relation to the chargeable transaction mentioned in sub-paragraph (1)) has the meaning given by paragraph 5A.

Meaning of “dwelling”

7(1) This paragraph sets out rules for determining what counts as a dwelling for the purposes of this Schedule.

(2) A building or part of a building counts as a dwelling if -

- (a) it is used or suitable for use as a single dwelling, or
- (b) it is in the process of being constructed or adapted for such use.

(3) Land that is, or is to be, occupied or enjoyed with a dwelling as a garden or grounds (including any building or structure on such land) is taken to be part of that dwelling.

(4) Land that subsists, or is to subsist, for the benefit of a dwelling is taken to be part of the dwelling.

(5) The subject-matter of a transaction is also taken to include an interest in a dwelling if -

- (a) substantial performance of a contract constitutes the effective date of that transaction by virtue of a relevant deeming provision,
- (b) the main subject-matter of the transaction consists of or includes an interest in a building, or a part of a building, that is to be constructed or adapted under the contract for use as a single dwelling, and
- (c) construction or adaptation of the building, or part of the building, has not begun by the time the contract is substantially performed.

(6) In sub-paragraph (5) “contract”, “relevant deeming provision” and “substantially performed” have the same meaning as in paragraph 7(5) of Schedule 6B.

(7) A building or part of a building used for a purpose specified in section 116(2) or (3) is not used as a dwelling for the purposes of sub-paragraph (2) or (5).

(8) Where a building or part of a building is used for a purpose mentioned in sub-paragraph (7) no account is to be taken for the purposes of sub-paragraph (2) of its suitability for any other use.

43. Schedule 24 FA 2007 contains provisions relating to the raising of penalty assessments.

Error in taxpayer's document

1(1) A penalty is payable by a person (P) where –

- (a) P gives HMRC a document of a kind listed in the Table below, and
- (b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to -

- (a) an understatement of liability to tax,
- (b) a false or inflated statement of a loss ..., or
- (c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

44. A SDLT return under s 76 of FA 2003 is included in the list referred to.

Burden of Proof

45. Under common law the onus of proof rests with the person making the assertion. This is reinforced by s 50(6) TMA 1970.

46. The onus to show that the penalties were issued in accordance with legislation lies with HMRC.

47. The standard of proof is the ordinary civil standard of the balance of probabilities.

The Respondent's case

48. Penalties can be charged under Schedule 24 of the Finance Act 2007 if two conditions are met.

49. The first is an inaccuracy in a return, which HMRC say has been established, FCS having accepted that the property was lived in by Mr and Mrs Smith. The second condition is that the inaccuracy is either careless or deliberate. HMRC contend that the inaccuracy in the appellant's SDLT return should be viewed as deliberate.

50. The appellant submitted an SDLT 1 stating that the property was to be developed.

51. However in the agent's letter dated 7 November 2018 the agent states:

“It was later in 2017 that our client had to reconsider the application...”,

This statement is not correct, as in a letter by Mr Heely, dated 28 March 2017 and in response

to Historic England's letter of 14 March 2017, he states:

“On the question of the second garage, which Historic England would like removed; the garages were a specific part of the client's original brief as they have several cars which they need to house securely. In short they are unwilling to forego this particular part of the proposal”.

52. The letter states “original brief”. The original planning application was submitted on 29 September 2016 and the plans were drawn up on 25 April 2016. If the acquisition of the property was 15 June 2016, then the plans would have been drawn up before the property was purchased and the SDLT 1 was submitted. This being the case, it is clear that the intention at the time of purchasing the property was for it to be used by Mr and Mrs Smith personally, in which case the behaviour is deliberate.

53. When the initial enquiry was opened, for almost a year the appellant's representative maintained that the property had remained vacant and was never occupied.

54. It was only through the diligent work of their investigative officer that Mr Smith eventually admitted that the property had been occupied. If Officer Ismail had not obtained electoral records and Council Tax documents to show occupation, then the residential occupation of the property would have never been uncovered and admitted to by the appellant and their representative.

Ignorance of the law

55. Mr Smith says that he was unaware of the Stamp Duty Land Tax rules, but this statement is not credible as he has 15 years' experience in the building industry, so must have developed a good working knowledge of the SDLT regime.

56. The appellant says that an error was made and the additional SDLT due has now been paid, so it was a careless error at worst.

57. HMRC contend that ignorance of the law cannot be used as a justification for failure to submit an accurate SDLT return, see *Welland v HMRC* [2017] UKFTT 870 (TC) and *Hesketh v HMRC* 120171 UKFTT 871 (TC), in which Judge Mosedale drew from her decisions that that ignorance of the law may only be a reasonable excuse where complex, or at least uncertain, law is involved.

58. This position is further supported by Judge Brannan in the case of *Hart v HMRC* [2018] UKFTT 207 (TC). The obligation to file an accurate SDLT return does not fall into this exception.

59. The application of the law to the appellant's case is clear. There is no suggestion that it was legal uncertainty or complexity which had caused the appellant to file an inaccurate return. Instead it was ‘an action taken consciously’ by the appellant and therefore a deliberate action. *Contractors 4U Ltd and Asset Services North West Ltd v. Revenue and Customs* [2016].

Special Reduction

60. Paragraph 11 of Schedule 24 Finance Act 2007 allows HMRC to reduce a penalty further “if they think it right because of special circumstances”. The legislation does not define the term “special circumstances” except to say that it does not include the ability to pay or the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

61. HMRC’s published guidance on this legislation is in the Compliance Handbook at paragraph CH170600:

- “Special circumstances are something that is not otherwise provided for in the legislation. So, for example, they will not include:
- Matters that amount to a reasonable excuse in the case of failures, or reasonable care in the case of inaccuracies, or
- The usual factors - telling, helping and giving access - which you take into account when you consider reduction of a penalty for quality of disclosure.”

62. HMRC can only make a special reduction where there are special circumstances.

63. Penalty legislation provides for common circumstances and these are therefore taken into account in establishing the liability to and/or level of a penalty.

64. Special circumstances are either;

- Uncommon or exceptional, or
- Where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law.

65. To be special circumstances, the circumstances in question must apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of penalty legislation.

66. Officer Yuill considered the facts of the case and determined that no evidence existed of circumstances that might allow a special reduction to be made.

The Appellant’s case

67. Mr Smith disagrees with HMRC’s interpretation of the appellant’s case. He is not saying that a mistake was made when submitting the SDLT return. At the time the return was submitted it was correct. It was only subsequent events that led to the withdrawal of relief against the higher rate of 15% tax. The balance of tax has now been paid.

68. The question whether a mistake was careless or deliberate does not therefore arise. No mistake occurred. At the time of purchase Mr Smith and his wife had no intention of occupying any dwelling house built on Holwell. The site had been acquired speculatively for development.

69. Mr Smith accepts that in one of his letters to Office Ismail, he said that no one had lived in Holwell (after its purchase by FCS), but he meant that the property had not been rented out. He was not trying to be deceitful. It was a matter of local common knowledge that Mr and Mrs Smith had lived in Holwell for a short period of time, and as pointed out to HMRC, registering Holwell as their address on the electoral register and paying Council Tax because they were occupying the property were hardly the actions of someone being deceitful and trying to circumvent SDLT legislation.

70. Very few people would have known the implications and reporting requirements for stamp duty purposes. They were simply unaware of the SDLT implications of moving into the property. When they were advised of the problem that their occupation of the property had created, the additional tax was readily discharged.

71. Mr Heely, the building design consultant, had no authority to say that *“the garages were a specific part of the client’s original brief as they have several cars which they need to house securely. In short they are unwilling to forego this particular part of the proposal”*. He was only endeavouring to do his job and secure planning permission for the redevelopment of Holwell. In evidence to the Tribunal Mr Smith said that the two garages were required not because it was a personal preference on his part but because it enhanced the development.

72. Had it been Mr and Mrs Smith’s intention from the outset to acquire Holwell as a personal residence, they would not have involved FCS in the project and not paid two lots of SDLT on the same property (i.e. if they acquired it from the company). It would have been much easier to purchase the property in their personal names. At that stage Ancaster House was still under construction and owned by the building company.

73. When FCS purchased Holwell in June 2016, Mr Smith had already agreed to acquire Ancaster House. It was still under construction and was being built to his personal specifications for he and his wife to live in. HMRC appear to be suggesting that all of that was a charade and that the Smiths’ ultimate real intention was to move into a new house built on Holwell, even though no definite plans had been formulated or passed for planning purposes.

74. In oral evidence to the Tribunal, Mr Smith said that Holwell had now been fully redeveloped ready for occupation as a single dwelling house.

75. Information readily available at Companies House shows that FCS changed its registered address to Holwell on 5 May 2020, suggesting that it is in fact now occupied by Mr and Mrs Smith.

Discussion

76. It is common ground that the higher rate of 15% SDLT would have applied to the purchase of Holwell by FCS, as a “high value residential transaction”, had relief not been claimed under paragraph 5A FA 2003 on the basis that the property had been acquired exclusively for development or redevelopment and resale in the course of a property development trade, but that the dwelling would not count as being acquired exclusively for that purpose if it was intended

that a non-qualifying individual would be permitted to occupy the dwelling. Mr and Mrs Smith were of course non-qualifying individuals.

77. HMRC say that the appellant's case is that a mistake was made when making the return; that is why the balance of SDLT has now been paid. A penalty is also payable because the mistake was deliberate.

78. The appellant refutes HMRC's interpretation of its case. FCS maintains that the SDLT return was correct when submitted and it was only a subsequent event, that is, Mr and Mrs Smith's taking occupation of Holwell which triggered the claw-back of SDLT.

79. It is implicit in HMRC's assertions that Mr Smith, a non-qualifying individual, intended to occupy Holwell at the time the SDLT return was submitted.

80. The burden of proof is on HMRC to show on a balance of probabilities that their assertions are correct.

81. HMRC assert that the intention to occupy the property was both, a short term and long-term intention, of Mr and Mrs Smith. The temporary occupation, whilst at the time borne out of necessity, took place only two to three weeks after completion of the purchase and was only part of a grander long-term plan. HMRC say that the temporary occupation of Holwell must have been in their contemplation at the time of its acquisition. The short-term stay would have given something of a feel for Howwell's location. It was also indicative that the Smiths regarded the property as their future home.

82. Mr Smith had, prior to the purchase by FCS of Holwell, agreed to purchase Ancaster House, which was part of an eight-dwelling gated development in the centre of Stamford from a Company of which he was a director. The property was being built to his own specification. His intention was to move into that property with his wife and child. It was no doubt possible for him to have considered selling Ancaster House after a period of three years so that he could move into the redeveloped Holwell without triggering the withdrawal of relief provisions of paragraph 5G (2) FA 2003, (if indeed he was aware of those provisions). That three year period would have expired on 16 June 2019.

83. It is clear that plans existed for the redevelopment of Holwell as a single dwelling house even before FCS exchanged contracts to purchase the property. It is not known whether those plans were commissioned by the seller or Mr Smith. There was no information in our bundle about that, nor any copy planning approvals whether outline or detailed.

84. That there may have been some early discussions with the planners regarding redevelopment of Holwell for two or more houses is not disputed by HMRC, but it is clear that those discussions quickly reverted to the building of a single dwelling, and furthermore in accordance with Mr Smith's design and specification. We accept that Mr Heely's letter to the planning authority of 14 March 2017 is highly indicative that Mr Smith was taking a keen personal interest in the design and specification, but whether that was because he intended to reside in the property is another matter.

85. The fundamental issue is whether the property had been acquired exclusively for development or redevelopment and resale in the course of a property development trade. We therefore have to look at the purchaser's intention at the time of completion. Mr Heely's letter was nine months after completion of the purchase by FCS. Initial intentions to redevelop and sell Holwell, particularly in the face of planning constraints, could easily have changed in the first few months after completion.

86. It does not help Mr Smith's case that on 23 May 2017 he chose to deny that anyone had lived in the property, when in fact he and his wife had lived there for four months between July and November 2016.

87. Further, at the hearing of this appeal on 22 January 2020, Mr Smith said that the redevelopment of Holwell had been completed but made no mention of any plans to occupy the property. Companies House records show that his address changed to Holwell, St Paul's Street, Stamford on 8 May 2019. Holwell has, since at least that date, been the registered office address of FCS.

88. Mr and Mrs Smith therefore appear to have moved into the property within the control period of three years in any event. Had Mr Smith and his wife waited a month or so longer before moving to Holwell, the balance of higher rate SDLT would not have been payable, save for their acceptance that the higher rate was payable as a result of their temporarily occupying Holwell. In other words they may have been able to argue that there was no intention to occupy Holwell when the SDLT return was submitted and they had made a mistake in accepting HMRC's insistence that the 15% SDLT was payable.

89. On the facts, we conclude that the likely scenario was that Mr Smith purchased Holwell via FCS on a speculative basis and with an open mind, to develop it in one way or another. Had property development not been his trade, we may have concluded differently. It may have been in his mind that he and his family could, possibly several years later, move into the property, but it would be wrong to say that could be regarded as an established intention to do so.

90. The SDLT return was submitted relatively quickly after completion on 20 June 2016. We accept that at that stage the Smiths were looking for temporary rented property and their decision to occupy Holwell was taken in early July 2016.

91. For HMRC to prove, even on a balance of probabilities, that occupying the old or new Holwell was Mr Smith's real and true intention from the outset, is obviously very difficult. On an objective basis, in the absence of unequivocal evidence to the contrary, we do not conclude that HMRC have shown any probable intention on the part of Mr Smith to occupy Holwell at the time the SDLT return was submitted.

92. The SDLT return was therefore correct. There was no inaccuracy and so no penalty is payable.

Conclusion

93. The appellant's appeal is allowed and the penalty is discharged.

94. 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.

MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 17 NOVEMBER 2020