



[2022] UKFTT 00005 (TC)

TC 08358/V

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

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 initially determined the appeal on 26 October 2020 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”). 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. In a decision dated 25 January 2021 Judge Poole, set aside the initial decision on the grounds that certain documents had not been sent to the Appellant’s representative and it was in the interests of justice that the decision was set aside. Judge Poole directed that the Appellant could submit further written submissions and that these should be referred to me and the case should be determined without a hearing. I considered the submissions of Mr Patrick Cannon, counsel for the Appellant, submitted on 21 April 2021, in addition to the documents previously available to me and I made a revised decision which was issued on 25 May 2021. This decision was appealed by HMRC on 20 July 2021. In accordance with Rule 40 of the Rules I considered whether to review the decision under Rule 41. I decided to carry out a review in accordance with Rule 41 and concluded that there was an error of law in the decision. Having informed the parties that I was minded to set aside the decision and remake it, I invited, and received, written submissions from both parties.

DECISION

INTRODUCTION

1. This case concerns an application for the strike out of an appeal against 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 (“the Rules”). 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. As set out above, this case has had a complicated procedural history. I originally decided the case on the papers and took a procedural point which had not been raised by either of the parties, namely, whether HMRC had opened a valid enquiry and, as a consequence, whether there was a valid closure notice and a valid appeal which could be struck out. I concluded (without the benefit of any submissions) that there was no valid enquiry. The submissions in advance of the second decision focussed on the consequences of there being no valid enquiry or appeal and whether HMRC were bound to give effect to the repayment claim in those circumstances.
3. HMRC applied for permission to appeal that decision. Its first ground was that the Tribunal had misdirected itself in law in concluding that HMRC’s enquiry notice of 1 January 2019 (“the Enquiry Notice”) was invalid. Following a review, I concluded that the Tribunal had made an error of law in this respect. Having now had the benefit of submissions from both parties I have concluded, for the reasons set out below, that the Enquiry Notice was valid and that the subsequent closure notice and appeal were also valid.
4. I have therefore decided to set aside the decision of 25 May 2021, and do so, and to remake the decision as set out below.
5. References to “paragraphs” below are to paragraphs of Schedule 10 Finance Act 2003 unless otherwise stated.

THE FACTS

6. 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.
7. 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 (“MDR”) was available.
8. 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.

9. 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.
10. 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.
11. 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.
12. HMRC opened an enquiry on 1 January 2019 and issued a closure notice on 17 September 2019 refusing the claim on the basis that the transaction was not eligible for MDR. The appellant requested a review of that decision.
13. The appellant made an in time appeal against HMRC's Review Conclusion Letter of 23 December 2019 which upheld the decision in the closure notice.

THE PROCEDURAL ISSUE: WAS THERE A VALID ENQUIRY?

14. HMRC opened an enquiry, purportedly under paragraph 12 (which deals with enquiries into land transaction returns), on 1 January 2019. It stated that it was 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 and the letter was within the time limit.
15. There was further correspondence which was not in the bundle, but was later provided.
16. 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 HMRC was checking the Appellant's claim for overpayment relief under paragraph 34 and should have said that the enquiry was being opened under paragraph 7 of Schedule 11A of Finance Act 2003 (which related to enquiries into SDLT claims not included in a return) into the repayment claim. The time limit for opening such an enquiry, as in the case of an enquiry under paragraph 12, is nine months from the date of the claim. The letter also stated that HMRC had completed their check and that the letter was a closure notice. It concluded that the transaction was not eligible for MDR and so there had been no overpayment.
17. 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.
18. 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 pursuant to paragraph 23(1) Finance Act 2003, 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.
19. The enquiry opened on 1 January 2019, was in time but it purported to be an enquiry into an amendment to an SDLT return and there was no such amendment. The Enquiry Notice was issued under the wrong provision.
20. The closure notice of 17 September 2019 purported to correct the error and said that the Enquiry Notice should have referred to Schedule 11A, which was the right provision.

The correction was made more than nine months after the claim. If the closure notice also constituted a new, correct, enquiry notice, it would be out of time.

21. In the original decision I concluded that the enquiry notice of 1 January 2019 was invalid, because it referred to the wrong provision and following on from that, that there was no valid closure notice or review letter against which the Appellant could appeal. The second decision was largely concerned with the consequences of that and in particular whether, not having opened an enquiry HMRC was bound to give effect to the claim. In view of my decision following the review, I do not need to consider that point further.
22. The provisions of paragraph 7 of schedule 11A are set out at [58] below. Schedule 11A applies to claims other than one which is required to be made in a return or an amendment to a return (paragraph 1).
23. HMRC submit that the reference to the wrong statutory provision can be remedied by the application of section 83 Finance Act 2003, which provides as follows:

“83 Formal requirements as to assessments, penalty determinations etc

 - (1) An assessment, determination, notice or other document required to be used in assessing, charging, collecting and levying tax or determining a penalty under this Part must be in accordance with the forms prescribed from time to time by the Board and a document in the form so prescribed and supplied or approved by the Board is valid and effective.
 - (2) Any such assessment, determination, notice or other document purporting to be made under this Part is not ineffective—
 - (a) for want of form, or
 - (b) by reason of any mistake, defect or omission in it,if it is substantially in conformity with this Part and its intended effect is reasonably ascertainable by the person to whom it is directed.”
24. HMRC submit that the Enquiry Notice substantially conformed to the statutory requirements and gave details of the property and the unique transaction reference number and clearly gave notice of HMRC’s intention to enquire. Further, the intended effect of the Enquiry Notice was reasonably ascertainable by the Appellant.
25. HMRC rely on the comments of the Court of Appeal in *HMRC v Raftopoulou* EWCA Civ 818 at [20]

“[20] It was common ground before the UT, and before us, that there was no prescribed form for an enquiry notice or a closure notice. To be effective, an enquiry notice or a closure notice must be understood by a reasonable person in the position of the intended recipient (the taxpayer in this case), having that person's knowledge of any relevant context, as giving notice of an intention to enquire into a claim or close an enquiry (as the case may be).”
26. *Raftopoulou* was dealing with paragraph 7(2) of Schedule 1A of the Taxes Management Act 1970 but the comments are equally applicable here.
27. HMRC also referred to the First Tier Tribunal case of *Ladson Preston Ltd and AKA Developments Greenview Ltd v HMRC* [2021] UKFTT 251 (TC) where the facts were the opposite of the present case: HMRC opened an enquiry into an application to amend an SDLT return, which should have been made under Part 3 of Schedule 10 Finance Act 2003 but the notice said the enquiry was being conducted under Schedule 11A Finance Act 2003 in relation to a claim for overpayment relief. The Tribunal held that the enquiry notice was valid, despite the error, saying, at [100]-[104]:

“100. The error in the enquiry notice is a statement that the enquiry is being conducted pursuant to Schedule 11A FA 2003 into a claim made by AKA for overpayment relief in respect of SDLT. In fact, AKA had not made a claim for overpayment relief pursuant to Schedule 11A, but rather had applied to amend the SDLT return pursuant to paragraph 6 of Schedule 10 FA 2003, and the enquiry was thus in fact to be conducted pursuant to Part 3 of Schedule 10.

101. By virtue of s 83(2) FA 2003, this mistake will not invalidate the enquiry notice, provided that the enquiry notice is nonetheless substantially in conformity with Part 4 FA 2003 and its intended effect was reasonably ascertainable by the Appellant.

102. The Tribunal is satisfied that apart from this error, the enquiry notice was substantially in conformity with the relevant provisions of the FA 2003.

103. The enquiry notice gave the correct details of the property and the unique transaction reference number. The enquiry notice, which was sent following a request made by the Appellant for repayment of an amount of SDLT on the ground that the SDLT return had been incorrectly completed, stated that “I am checking into your claim for overpayment relief regarding their Stamp Duty Land Tax return for the above acquisition”. The Appellant’s agent responded to the enquiry notice on 27 August 2019, providing information that had been requested by HMRC. There is no suggestion in that letter that the agent did not understand what the enquiry was about. On the material before the Tribunal, it is not apparent that there was anything else that AKA could have thought that the enquiry was about. The Tribunal is accordingly satisfied that the intended effect of the enquiry notice was reasonably ascertainable by the Appellant and its agent.

104. The Tribunal therefore finds that the enquiry notice was valid.”

28. The appellant submits that the fact that the enquiry purported to be an enquiry into a non-existent amendment to the taxpayer’s SDLT return and the fact that it was issued under the wrong statutory provision are errors which are too fundamental to be cured by section 83 Finance Act 2003.
29. Mr Cannon, for the Appellant further argues that the letter of 17 September 2019 effectively withdrew the original enquiry notice and acknowledged the invalidity of that notice.
30. Dr Schryber, for HMRC, points out that there is no statutory mechanism for HMRC to withdraw an enquiry notice and there is nothing in the 17 September letter to suggest HMRC was trying to do so. The letter acknowledged that there was a mistake in the Enquiry Notice, but did not suggest it was invalid, and, indeed, the letter was primarily a closure notice in relation to the enquiry opened by the Enquiry Notice.
31. The Appellant also seeks to argue that an estoppel arises in that both parties are prevented from denying that the original enquiry notice was treated as withdrawn and replaced by a new enquiry notice on 17 September 2019. Mr Cannon argues that the Appellant has acted to its detriment in accepting that the enquiry notice of 17 September 2019 replaced the original notice (while maintaining that it was out of time) and pursuing its appeal and opposing HMRC’s strike out application. He contends that HMRC are estopped from arguing that the original enquiry notice was valid under the principle of estoppel by convention as in *Tinkler v HMRC* [2021] UKSC 39. *Tinkler* sets out the principle that an estoppel by convention will arise where the parties have acted upon a common

assumption that a given state of facts or law is true. Each will then be estopped against the other from denying the truth of their common assumption.

32. As Dr Schryber points out, there is nothing to show that the appellant “accepted” that the September letter replaced the Enquiry Notice. It would have been odd if they had as it would have been out of time. Nor did HMRC at any time indicate that they regarded the September letter as a new enquiry notice.
33. There is no suggestion in the correspondence that the appellant did not accept that a valid enquiry had been opened. Indeed, Cornerstone’s letter of 11 October 2019, responding to the 17 September letter, states:

“Please accept this as an appeal against the Closure Notice issued under Paragraph 11 Schedule 11A of the Finance Act 2003...”
34. This indicates that the appellant considered the closure notice to be valid and it is implicit that it must have been the closure of a valid enquiry.
35. Finally, the appellant submits that it would be contrary to the overriding objective in Rule 2 of the Rules to deal with a case fairly and justly to set aside the decision and remake it where the issue of section 83 Finance Act 2003 had not been raised by HMRC at any point until their application for permission to appeal following the second decision.
36. HMRC point out that neither party raised the point about the errors. It was the Tribunal which drew attention to this in the original decision and the first opportunity HMRC had to raise the issue was in its application for permission to appeal.
37. There were also errors in the Review Conclusion letter in that it said that the issue was whether MDR applied, rather than addressing the overpayment relief claim.
38. The Appellant argues that this reinforces the case that there is no appeal to strike out.
39. HMRC submit that the contents of the review conclusion letter cannot affect the validity of the closure notice or the appeal.
40. Dr Schryber notes that paragraph 36F of paragraph 10 deals with the “effect of conclusions of review”. The review conclusion letter has effect as a settlement by agreement of the appeal against the closure notice (paragraph 36F(2) Schedule 10 FA 2003), from which the Appellant could not resile (paragraph 36F(3)), except by notifying the appeal to the Tribunal (paragraph 36F(4)). He contends that once the appellant appealed, the review conclusion letter ceased to have any effect under paragraph 36F(2) by virtue of paragraph 36F(4).

DISCUSSION OF THE PROCEDURAL ISSUE

41. Having considered section 83 Finance Act 2003, which had not previously been drawn to my attention, and in the light of *Raftopoulou* and *Ladson*, I am of the view that section 83 applies in the present case. Apart from the erroneous reference to the amendment of an SDLT return, the enquiry letter was in substantial conformity with the requirements of the 2003 Act. It was clear that the letter was opening an enquiry and that the enquiry concerned SDLT. It contained the correct details of the purchaser, the land concerned, the date of the acquisition and the Unique Transaction Reference Number.
42. I also consider that the intended effect of the 1 January 2019 letter was reasonably ascertainable by Cornerstone, to whom it was directed, as the appellant’s agent. The Enquiry Notice requested information about any building or conversion works that commenced prior to the effective date of the transaction, together with evidence. This related to the basis of the appellant’s claim for overpayment relief as set out in

Cornerstone's letter of 24 May 2018, which was that the SDLT return had been completed incorrectly because MDR was available and so the Appellant had overpaid SDLT.

43. Cornerstone responded with the information requested and there was nothing in any of the correspondence to suggest that there was any confusion as to what the enquiry was about. Indeed, the only claim which the appellant had made in respect of the Shield House property was the overpayment claim, so that was the only matter to which the Enquiry Notice could relate.
44. Far from being fundamental errors, as argued by Mr Cannon, these errors are the sort of thing at which Section 83 is aimed and accordingly, I find that they do not invalidate the Enquiry Notice.
45. Turning to Mr Cannon's other points, I agree with HMRC that the letter of 17 September 2019 was not, and did not purport to be, a new enquiry notice. It corrected the error in the notice of 1 January 2019 by stating that it should have said that the check was into the overpayment claim and referring to the correct statutory provision. It then stated that that check was complete and concluded that MDR was not available so there had been no overpayment. The letter stated that it was a closure notice and it was clear that it was a closure notice in relation to the enquiry opened on 1 January 2019.
46. In relation to the estoppel argument, there was no common assumption that the 17 September 2019 letter constituted a fresh enquiry notice. If anything, there was a common assumption that the Enquiry Notice, the closure notice and the appeal resulting from it were all valid until a doubt was raised in the original decision of the Tribunal. I find that there is no estoppel as suggested by Mr Cannon.
47. Nor do I consider that it is contrary to the overriding objective in Rule 2 to deal with cases fairly a justly to take account of Section 83 and set aside the second decision and remake it. The potential invalidity of the Enquiry Notice and the potential application of Section 83 was not raised by either party up to and including the appeal. This was a point raised by the Tribunal. Both parties have now had the opportunity to make submissions on the matter, Section 83 is clearly relevant to the case and in my view the overriding objective is best served by taking Section 83 into account.
48. I am not persuaded that a review conclusion letter becomes irrelevant if an appellant appeals. It seems to me that the effect of paragraph 36F(2) is that if the appellant takes no action, the conclusions in the review letter constitute a settlement agreement from which the appellant cannot resile, but by virtue of sub-paragraph (4), if the appellant makes an in time appeal, the conclusions are not to be regarded as a settlement agreement, so that the matter may be decided by the Tribunal.
49. Paragraph 36E(2) provides that the nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.
50. Paragraph 36G provides that if HMRC have given notice of the conclusions of a review in accordance with paragraph 36E, the appellant may notify the appeal to the Tribunal.
51. It is acknowledged that the review conclusion letter contained errors in that it referred to Schedule 10 instead of Schedule 11 and it stated that the sole point at issue was whether or not MDR applied to the transaction. However, it was clear that the decision being reviewed was that contained in the closure notice of 17 September 2019 which was that there had been no overpayment of SDLT as the transaction was not eligible for MDR. The reviewing officer upheld that decision.

52. I find that the reference to the wrong statutory provision can be cured by applying Section 83 Finance Act 2003 for similar reasons to those set out above in relation to the Enquiry Notice.
53. As noted, the reviewing officer reviewed the correct decision. At that point, the issue was indeed whether or not MDR applied to the transaction. The question whether an overpayment relief claim could be made in circumstances where the appellant was out of time for claiming MDR had not been raised and has only been raised in the strike out application. Therefore, the substantive matter to be considered was whether MDR applied. Further, the reviewing officer's conclusion was that the closure notice, which did refer to the issue of overpayment, was upheld.
54. I therefore find that the errors in the review conclusion letter do not affect the validity of the appeal.

CONCLUSION ON THE PROCEDURAL ISSUE

55. For the reasons set out above, I have concluded that the Enquiry Notice of 1 January 2019 was valid, that the closure notice of 17 September 2019 was valid and that the errors in the review conclusion letter of 23 December 2019 do not affect the validity of the appeal.
56. Accordingly, I find that there is a valid, substantive appeal by the appellant before the Tribunal.
57. Having found that there is an appeal for the Tribunal to determine, I now turn to HMRC's strike out application.

THE LAW RELATING TO SDLT OVERPAYMENT CLAIMS

58. The relevant law is set out in paragraphs 34 and 34A of schedule 10 and paragraphs 6 and 7 of schedule 11A to the Finance Act 2003. Paragraphs 34 and 34A provide, so far as relevant:

“[Claim for relief for overpaid tax etc

34

(1) This paragraph applies where—

(a) a person has paid an amount by way of tax but believes that the tax was not due, or

(b) ...

(2) The person may make a claim to the Commissioners for Her Majesty's Revenue and Customs for repayment or discharge of the amount.

(3) Paragraph 34A makes provision about cases in which the Commissioners for Her Majesty's Revenue and Customs are not liable to give effect to a claim under this paragraph....

Cases in which Commissioners not liable to give effect to a claim

34A

(1) The Commissioners for Her Majesty's Revenue and Customs are not liable to give effect to a claim under paragraph 34 if or to the extent that the claim falls within a case described in this paragraph.

(2) Case A is where the amount paid, or liable to be paid, is excessive by reason of—

(a) a mistake in a claim or election, or

(b) a mistake consisting of making or giving, or failing to make or give, a claim or election.

(3) ...

(4) Case C is where the claimant—

(a) could have sought relief by taking such steps within a period that has now expired, and

(b) knew, or ought reasonably to have known, before the end of that period that such relief was available....”

13. The material parts of paragraphs 6 and 7 of schedule 11A are as follows:

“Giving effect to claims and amendments

6

(1) As soon as practicable after a claim is made, ... the Inland Revenue shall give effect to the claim or amendment by discharge or repayment of tax.

(2) Where the Inland Revenue enquire into a claim or amendment—

(a) sub-paragraph (1) does not apply until a closure notice is given under paragraph 11 (completion of enquiry), and then it applies subject to paragraph 13 (giving effect to amendments under paragraph 11), ...”

Notice of enquiry

7

(1) The Inland Revenue may enquire into a person's claim ... if they give him notice of their intention to do so (“notice of enquiry”) before the end of the period of nine months after the day on which the claim ... was made.”

HMRC’S GROUNDS FOR THE STRIKE OUT APPLICATION

59. The first ground is that a claim for MDR must be in an SDLT return or in an amendment to such a return. The Appellant’s standalone claim is not in accordance with the legislation and must fail.
60. The second ground is that HMRC do not have to give effect to the overpayment claim because it falls within paragraph 34A.
61. 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” [emphasis added].
62. 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.
63. The effective date is the date of purchase, ie 6 March 2017. The filing date was therefore 5 April 2017.
64. It is common ground that the land transaction return submitted on 20 March 2017 did not include a claim for MDR.
65. The return could only be amended up to 5 April 2018. The return was not amended by that date, or indeed, at all. The Appellant did not purport to amend the return out of time,

but made a standalone claim for overpayment relief on the basis that there were errors in the return because MDR applied.

66. 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.
67. No such claim can now be made.
68. The next question is whether the clear provisions of section 58D can be circumvented by an in time claim for overpayment relief under paragraph 34 of Schedule 10.
69. Although 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.
70. 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].
71. Case C is where the claimant—
 - “(a) could have sought relief by taking such steps within a period that has now expired, and
 - (b) knew, or ought reasonably to have known, before the end of that period that such relief was available....”
72. The Appellant made submissions on the relationship between Case A and Case C before the second decision and HMRC have made submissions on the point in their grounds of appeal.
73. HMRC submit that the present circumstances fall within at least one of the Cases in paragraph 34A, and in particular Case A.
74. The Appellant did not explicitly refer to Case C in their original submissions, but the claim was made on the basis that the appellants did not know and could not reasonably have known, before the end of the 12 month period for amending the SDLT return that MDR was available, which seems to be directed towards disapplying Case C.
75. The Cases are not mutually exclusive. HMRC are not be liable to give effect to a claim where more than one Case applies. HMRC are not liable to give effect to a claim if at least one Case applies.
76. Dealing first with Case C, 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.
77. 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.
78. Cornerstone argued that the Appellant could not reasonably have known before the end of the twelve month period that such relief was available. They said that information

about the availability of the relief and the ability to claim it was absent from HMRC guidance.

79. I reject that contention. Given the amount of information and guidance available on HMRC's website and the Appellant's status as a business engaged in the construction industry, in my view, even if the Appellant did not know about the relief, it ought reasonably to have known about it. Accordingly, Case C applies so that HMRC are not liable to give effect to the repayment claim.
80. Turning to Case A, there is Upper Tribunal authority that Case A can apply where a taxpayer fails to claim an SDLT relief that they could have claimed in a return. In *HMRC v Christian Peter Candy* [2021] UKUT 170 (TCC), the Upper Tribunal said at [112]:

"It is of the very essence of a self-assessment system that tax effects can be undone by administrative failure. Mr Thomas correctly pointed out that, in other contexts where SDLT reliefs were available such as s.58D or 62 of FA 2003, the relevant facts would be known at the effective date of the transaction (and so a return could include a claim for relief). That may be so; but it does not follow that merely meeting the conditions for the relief is enough to secure that the taxpayer actually gets the relief. The relief requires a claim; and if the claim is not made in the return, the taxpayer will not get it. And nor can para. 34 of Sch.10 to FA 2003 (as it currently stands) ride to the taxpayer's rescue in such a case: see para. 34A(2)(b)."

81. I consider that the appellant's failure to make a claim for MDR which it could have made in a return falls within Case A of paragraph 34A so, on that basis also, HMRC is not liable to give effect to the overpayment relief claim.
82. This is entirely consistent with the scheme of the SDLT legislation. The legislation provides a relief where multiple dwellings are acquired and sets out mandatory requirements, including time limits for the relief to be claimed. The appellant cannot circumvent those requirements by submitting a repayment claim under paragraph 34. The provisions of paragraph 34A mean that HMRC is not bound to give effect to the claim in these circumstances.
83. There is support for this in 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.
84. The Tribunal said, at [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."

DISCUSSION

85. I have found as a fact that the appellant was out of time to make a valid claim for MDR.
86. I have also found that the appellant's failure to make such a claim falls within Case A and/or Case C in paragraph 34A so that it cannot succeed in a repayment claim under paragraph 34. HMRC are not liable to give effect to the claim and accordingly have refused to do so.

87. 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 or obtain repayment of the tax allegedly “overpaid” and the appeal must fail. In my view, there is no reasonable prospect of the appellant’s case succeeding.

DECISION

88. I have concluded that the Enquiry Notice was valid and that the appeal which flowed from that enquiry is a valid appeal to be determined by the Tribunal.

89. On that basis, and for the reasons set out above, I have concluded that there is no reasonable prospect of the appeal succeeding and I therefore grant HMRC’s strike out application.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

90. 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: 04 JANUARY 2022