



Neutral Citation: [2024] UKFTT 00927 (TC)

Case Number: TC09323

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, 88 Rosebery Avenue, London
EC1R 4QU

Appeal reference: TC/2021/09795
TC/2023/00239

STAMP DUTY LAND TAX-pre-completion transactions-assignment of contract-what constitutes substantial performance?-whether contract substantially performed before assignment-double charge to tax-claim for relief-time limit for and method of claim-Multiple Dwellings Relief-time for considering relief

Heard on: 16 September 2024
Judgment date: 18 October 2024

Before

TRIBUNAL JUDGE MARILYN MCKEEVER

Between

**(1) G GOLDSMITH LIMITED
(2) MR GIA GOLDSMITH**

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Mr Elliot Hirsch, of Tourbillon Tax LLP, Tax Advisor

For the Respondents: Mr William Scott, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. These are appeals against an assessment issued to G Goldsmith Limited (the Company) and a discovery assessment issued to Mr Gia Goldsmith (Mr Goldsmith) in relation to Stamp Duty Land Tax (SDLT) on the purchase of a property in Golders Green Road in North-West London (the Property). Mr Goldsmith contracted to buy the Property and subsequently assigned the contract to the Company which duly completed the purchase. HMRC submit that Mr Goldsmith substantially performed the contract within section 44 Finance Act 2003 before the assignment and is accordingly liable for SDLT. HMRC further contend that Mr Goldsmith is also the purchaser under a notional land transaction under paragraph 5 of schedule 23A to the Finance Act 2003 and, as he did not claim relief under paragraph 15 of that schedule, further SDLT is due (although HMRC have confirmed that they would not seek both amounts of tax).

1. HMRC have also assessed the company to SDLT on the purchase of the Property. The Company claimed Multiple Dwellings Relief (MDR).

2. I had before me a Hearing Bundle of 323 pages and an amended Authorities Bundle of 274 pages. I granted an application to admit the amended Authorities Bundle, which included an additional case, following submissions at the start of the hearing. I also heard oral evidence from Mr Mark Goldsmith (Mr Mark Goldsmith), Mr Goldsmith's brother, who had been most closely involved with the transactions.

3. The appeals to the Tribunal by both Appellants were late. HMRC did not object and so far as necessary, I gave permission to both Appellants to appeal out of time.

4. I have carefully considered all the submissions and authorities referred to by the parties although, in the interests of keeping this decision as concise as possible, I have not referred to them all in detail.

5. References to sections, schedules and paragraphs are to sections, schedules and paragraphs of Finance Act 2003 unless otherwise stated.

THE PROCEDURAL FACTS

6. Mr Goldsmith entered into a contract for the purchase of the Property on 19 April 2018 at the price of £1,450,000. The deposit was £115,000 and the completion date was 24 May 2018.

7. The Company was incorporated on 24th May 2018 with Mr Goldsmith as the sole shareholder and director. On 31 May, Mr Goldsmith assigned the purchase contract to the Company. The Company completed the purchase on 5 June 2018.

8. The Company submitted an SDLT return on 7 June 2018 and paid £132,250 SDLT.

9. On 5 December 2018, the Company's agent, Mr Hirsch wrote to HMRC amending the SDLT return and claiming MDR. HMRC refunded £46,252 tax in response. On 30 August 2019 HMRC opened an in time enquiry into the amended return.

10. HMRC issued a closure notice on 10 March 2020 refusing the claim to MDR on the basis that the contract had been substantially performed on 20 April 2018. SDLT of £46,252 was assessed, i.e. the amount of the previous relief repaid.

11. Mr Hirsch appealed against the closure notice on 31 March 2020. Following a statutory review on 18 May 2021, the Company appealed to the Tribunal on 3 September 2021.

12. In the course of the enquiry into the Company's claim to MDR, the officer conducting the statutory review notified Mr le Grange, the officer conducting the enquiry, that the contract for purchase had not been signed by the Company but by Mr Goldsmith. Following further correspondence with the SDLT Technical Team in January 2022, Mr le Grange "discovered" that Mr Goldsmith should have paid SDLT on the Property. He issued a discovery assessment under Part 5 of schedule 10 to Mr Goldsmith on 17 March 2022, assessing SDLT of £132,250 on the basis that there had been an "assignment of rights" under schedule 2A and/or substantial performance triggering completion under section 44.

13. Mr Hirsch appealed against the discovery assessment on 11 April 2022. Following a statutory review on 28 October 2022 Mr Goldsmith appealed to the Tribunal on 21 December 2022.

14. The two appeals were joined on 1 February 2023.

THE SUBSTANTIVE FACTS

15. Mr Goldsmith is one of four siblings who were involved in various development projects in Golders Green. Mr Mark Goldsmith, who gave evidence in this case appeared to be the person most involved with the acquisition and development of the Property although he said that they were "all in business together". When the Property was on the market, there was pressure to exchange and the family decided that Mr Goldsmith should enter into the contract, but their solicitor was asked to ensure that another person could complete the purchase. Mr Mark Goldsmith said, and I accept, that Mr Mark Goldsmith and his two sisters had put up most of the money (or paid most of the mortgage) and that it was intended from the outset that they should have majority shares in the Property.

16. The family had to source finance. The deposit was paid with the assistance of a loan. A mortgage broker advised that the Property should be purchased in the name of a company as he could arrange a mortgage on better terms than would be available to an individual. Completion was delayed to 5 June 2018 because they had not been able to arrange the finance before then.

17. The Company was incorporated on 24 May 2018. Mr Goldsmith was the sole director and continues to be so. Initially, he owned all the shares. A few days before the hearing, the shareholdings were changed to reflect the family's initial intentions and contributions. Mr Goldsmith now holds 1% of the shares in the Company and each of Mr Mark Goldsmith and the two sisters own 33% of the shares.

18. It was common ground that the purchase contract was assigned to the Company on 31 May 2018 although there was no copy of the assignment in the Hearing Bundle.

19. The Company completed the purchase on 5 June 2018.

20. The conveyancing had been dealt with by the family's solicitor who had acted for them for many years. He had not advised them on SDLT and the family had no idea that the transfer to the Company might have tax consequences or that they might need to claim reliefs.

21. It is not clear why the family subsequently sought tax advice, but Mr Hirsch was appointed as the Company's agent and wrote to HMRC to claim MDR on 5 December 2018.

22. The Property was a run-down, four-bedroom, semi-detached house owned by a charity. It was intended to buy the house and convert it into three self-contained flats. Mr Goldsmith and his siblings had carried out similar conversions at four other neighbouring properties. As with the other conversions, once the work was completed, the new flats were let.

23. They wished to start work on the conversion as soon as possible, and before completion. The seller was reluctant to allow this, but following negotiations, a special term was included in the contract. Special Condition 10 provided:

“(a) Both parties agree and confirm that the Property is vacant at the exchange of this contract.

(b) The Seller agrees to allow the Buyer and the Buyer’s workers/contractors access to carry out refurbishment/decorative work as set out in the email dated 17/04/18 and timed at 16:44, a copy of which is attached hereto, but for the avoidance of doubt do not allow works of a structural nature.

(c) The Buyer accepts that any activity carried out pursuant to this clause 10 will not prevent the Property from being considered sold with vacant possession for the purposes of this contract.”

24. The email referred to was sent from Mr Mark Goldsmith’s email and was “signed” by both the brothers. It read:

“Dear Zalmy [the Seller’s solicitor],

Further to our telephone conversation, I confirm that we are not taking possession of the property and that no-one will be residing at the property. The only reason we want access between exchange and completion is simply to refurbish the property to make it look modern. The works we are proposing to do is to repaint the whole house, change the flooring and possibly change the kitchen. We will also remove the ramps outside of the property which is [sic] sitting out the front drive and back garden. I repeat, we will not be taking possession of the property whatsoever.”

25. Further restrictions imposed by the seller were set out in a letter from Mr Hirsch to Mr le Grange dated 25 March 2020 and in Mr Mark Goldsmith’s witness statement.

(1) Works were to be carried out only between 10am and 5pm from Monday to Thursday.

(2) The keys to the Property had to be picked up from the seller and returned at the end of each working day.

(3) The seller remained responsible for insuring the Property and for security throughout the period up to completion.

(4) The utilities remained in the name of the seller up to completion and it was responsible for the electricity/gas bills although the buyer had to reimburse them for the electricity and gas used whilst working on the Property.

26. There was conflicting evidence about what work was carried out and when, but the email of 17 April 2018 was less than truthful about the work which the Appellants intended to carry out.

27. Mr Hirsch emailed Mr le Grange on 29 January 2020 saying “Mr Goldsmith confirms that work to configure the building into 3 flats began immediately after exchange on 19 April 2018 and was substantially complete by the date of completion of 5 June 2018.” Copies of the builder’s invoices were provided as evidence.

28. A further email from Mr Hirsch confirmed that “Mr Goldsmith” had advised that the building work started on or about 20 April 2018.

29. The emails do not specify which Mr Goldsmith made those statements, but I infer it was Mr Mark Goldsmith as he was dealing with the development and gave evidence as the person most closely involved with it.

30. In an email dated 5 July 2022 relating to the discovery assessment, Mr Hirsch stated that the previous correspondence about the date the works began was incorrect. The Appellants' current position is that the builder, Mr Pryce, entered the Property to begin substantial works on 27 May 2018. Mr Mark Goldsmith stated that immediately after exchange of contracts, builders did go into the Property but only to provide quotes, fix a leak in the roof and clear rubbish.

31. The 5 July email goes on to say that the works carried out from 27 May 2018 included:

- (1) The removal of fireplaces.
- (2) The making of holes in the walls, the installation of new wiring and a new electrical system.
- (3) The installation of a new boiler and piping throughout the house, and new heating systems.
- (4) The bricking up of doors.
- (5) The creation of new rooms by building new partitions in the ground floor kitchen.
- (6) The reflooring of the entire house with new tiling, wooden floors and wall tiles, carpeting etc.

32. It was asserted that as the works carried out were greatly in excess of those permitted, the Appellants were trespassers and so could not be in "possession" of the Property.

33. Mr Mark Goldsmith said the conversion works had started at the end of May 2018 as funding was not available before then. The builder put up partitions and commenced pipework. He insisted no walls had come down before completion although Mr Hirsch suggested in correspondence that one wall had been opened up and a new doorway constructed for an en suite shower before completion.

34. The 5 July 2022 email was presumably pursuant to an email from Mr Pryce, the builder, dated 29 June 2022 which was addressed to Mr Gia Goldsmith and stated:

"We started works on the development at the property address as above on the 27/05/18. The scope of the works were as follows. We started the partition works, ie timber stud works, plasterboarding, insulation plastering, plumbing and electrical all 1st fix works."

35. The Hearing Bundle contained four invoices from Mr Pryce.

36. The first was dated 25 May 2018. The "client" was Mr Mark Goldsmith and the works covered were:

"We carried out building works at the address as above including wall removals and new doorways and rubbish loading."

37. There was also an invoice dated 29 November 2018 with the same narrative, addressed to the same client and for the same amount. This was referred to in an undated letter from Mr Pryce which stated:

"Invoice correction regarding an invoice issued for Mr Mark Goldsmith at ...Golders Green Road on 25th of May 2018.

We have determined that this particular invoice was a mistake.

The correct invoice for the work carried out at the aforementioned property was issued on 29th of November 2018. ..."

38. The Appellants sought to explain this by saying that the 25 May 2018 invoice was provided by Mr Pryce after the enquiry into the Company's land transaction had begun and was based on an estimated date. The Appellants asserted that Mr Pryce was a small trader who did not keep original records.

39. The second invoice did not name the client but showed the Property address and was dated 18 June 2018. This invoice referred to work done in each of three flats. The work was similar in each case: building entry partition and painting and building partition for a shower and toilet.

40. The third invoice, addressed to Mr Mark Goldsmith was dated 25 June 2018 and set out the works done:

- (1) Erection of partitions between flats 1 and 2.
- (2) Levelling and finishing the old walls.
- (3) Installed a kitchen in flat 3.
- (4) Tiling of walls and floor and installing appliances.
- (5) Installed bathroom accessories bath, shower, sinks, toilets, etc.

41. The fourth invoice referred to the "client" and the property address and is dated 25 July 2018. It refers to work at flats 1 and 2. In each case, this comprised:

- (1) Levelling and finishing old walls
- (2) Painting walls and ceilings
- (3) Installing new kitchen units and sink and tap
- (4) Tiling kitchen walls
- (5) Shower, sink, toilet and walls and floor tiles.

42. There is also an undated and unsigned statement, presumably made by Mr Pryce, headed "Work carried out between exchange and completion. Per conversation with Mark Goldsmith (17.01/2019)". The works listed were:

- (1) Removed large fireplaces
- (2) Made holes in the walls, installed new wiring and new electrical system
- (3) Installed new boiler and piping throughout the house, and new heating systems
- (4) Bricked up doors
- (5) Created new rooms by building new partition in ground floor kitchen
- (6) Refloored entire house with new tiling, wooden floors and wall tiles, carpeting, etc.

43. Mr Mark Goldsmith sought to explain away the discrepancies and said that the contractor would charge in advance for work which had not yet been done.

44. I have considered the conflicting assertions and evidence. I do not accept that the work referred to in the 25 May 2018 invoice was actually carried out in November 2018 (or shortly before). It is not credible that having divided the property into flats, installed new electrical and plumbing systems, bathrooms and kitchens, fitted appliances and decorated throughout, the builder would then have removed walls and created new doorways.

45. It is much more likely that the initial works were those set out in Mr Hirsch's 5 July 2022 email and the undated "Pre-completion work statement" which included the work referred to in the 25th May 2018 invoice.

46. Nor do I accept that the works referred to in the invoices were carried out after the invoices were issued.

47. On the balance of probabilities, I find as a fact that the contractor carried out major structural work on the Property to convert the house into three flats between exchange of contracts and completion and that the work had been carried out before the invoices were issued.

48. I accept that the substantive works began on or around 27 May 2018. Although it is not clear exactly what was done when, I find that structural work on the conversion had commenced before Mr Goldsmith assigned the contract to the Company and the work was continuing when the Company completed the purchase.

THE ISSUES

49. There are four issues to consider:

- (1) Was the discovery assessment valid.
- (2) Did Mr Goldsmith "substantially complete" the contract?
- (3) Did Mr Goldsmith enter into a "notional land transaction" within schedule 2A on which SDLT was chargeable and was he entitled to relief from SDLT?
- (4) Was Mr Goldsmith and/or the Company entitled to Multiple Dwellings Relief?

THE DISCOVERY ASSESSMENT

50. I am satisfied that Mr le Grange "discovered" that there was an amount of SDLT which ought to have been assessed which was not assessed (schedule 10 paragraph 28). While he was enquiring into the Company's claim for MDR, it came to his attention that the contract had originally been in the name of Mr Goldsmith and that Mr Goldsmith might be liable for SDLT.

51. The assessment was raised within the normal four year time limit from the Effective Date of the Transaction (EDT), and in any event, HMRC, had 20 years to raise the assessment as no land transaction return had been submitted (schedule 10 paragraph 31).

52. As Mr Goldsmith had not delivered an SDLT return, the additional conditions in paragraph 30 of schedule 10 do not apply.

53. I therefore find that the discovery assessment was validly issued.

SUBSTANTIAL PERFORMANCE

54. HMRC submit that Mr Goldsmith "substantially performed" the purchase contract within section 44. Section 44 provides, so far as material, as follows:

"44 Contract and conveyance

- (1) This section applies where a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance.
- (2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.
- (3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction.

In this case the effective date of the transaction is the date of completion.

(4) If the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract.

In this case the effective date of the transaction is when the contract is substantially performed.

(5) A contract is “substantially performed” when—

(a) the purchaser[, or a person connected with the purchaser,] takes possession of the whole, or substantially the whole, of the subject-matter of the contract, or

(b)

(6) For the purposes of subsection (5)(a)—

[(a) possession includes receipt of rents and profits or the right to receive them, and]

(b) it is immaterial whether [possession is taken] under the contract or under a licence or lease of a temporary character.

(7) ...

(8) Where subsection (4) applies and the contract is subsequently completed by a conveyance—

(a) both the contract and the transaction effected on completion are notifiable transactions, and

(b) tax is chargeable on the latter transaction to the extent (if any) that the amount of tax chargeable on it is greater than the amount of tax chargeable on the contract.

(9) ...

(10) In this section—

(a) references to completion are to completion of the land transaction proposed, between the same parties, in substantial conformity with the contract; and

(b) “contract” includes any agreement and “conveyance” includes any instrument.

[(11) [Section 1122 of the Corporation Tax Act 2010] (connected persons) has effect for the purposes of this section]”

55. Before the introduction of SDLT, the predecessor tax, Stamp duty, was charged on documents. A stamp was physically impressed on the document. This allowed avoidance by sellers and buyers “resting on contract” whereby the buyer would go into occupation and pay the purchase price, but no conveyance was executed and so there was no document to stamp.

56. SDLT is a tax on transactions. Section 44 was intended to prevent parties “resting on contract” and avoiding SDLT.

57. The effect of section 44(4) is that if, before completion, a contract for a land transaction is “substantially performed”, the contract itself is treated as the land transaction and the EDT of that deemed transaction is when the contract is substantially performed.

58. The transaction is a notifiable transaction (as is the completion of the transaction) (section 44(8)(a)) which requires the buyer to submit a land transaction return under section 76. Mr Goldsmith did not submit an SDLT return in relation to any transaction.
59. Section 44(5) provides that a contract may be substantially performed in one of two ways:
- (1) The purchaser takes possession of the whole, or substantially the whole, of the subject-matter of the contract; or
 - (2) A substantial amount of the consideration is paid or provided.
60. Section 44 (6) elaborates on what constitutes possession. It includes the receipt of rents or profits and it is immaterial whether possession is taken under the contract itself or under a temporary licence or lease.
61. The Appellants contend that they did not take possession of the Property before completion. The email of 17 April 2018 which was a material consideration for the seller specifically referred to in Special Condition 10 of the contract, expressly stated and emphasised “we will not be taking possession of the property whatsoever”.
62. Mr Mark Goldsmith also stated there was no intention to take possession of the Property.
63. Special Condition 10 gives a licence to the buyer to go into the Property to carry out the works specified. Condition 10(c) expressly states that the works carried out under Condition 10 “will not prevent the Property from being considered sold with vacant possession for the purposes of this contract”. In other words, the buyer could not claim that they were in possession by virtue of the access.
64. The Standard Conditions of Sale (fifth edition) which applied to the contract deal with occupation by the buyer at 5.2. Condition 5.2.2 provides that if the seller allows the buyer into occupation the buyer is a licensee and not a tenant. There are further conditions including that the buyer must not alter the property. Condition 5.2.3 states “The buyer is not in occupation for the purposes of this condition if he merely exercises rights of access given solely to do work agreed by the seller.”
65. The Appellants argue that the work carried out was far in excess of that envisaged by Special Condition 10 and accordingly, they were trespassers on the property (see *Clerk & Lindsell* of Tort (23rd edition at [18-02] and the cases cited). They argue that section 44(6) must relate to lawful acts which are the product of an agreement between the parties and possession cannot include presence as a trespasser.
66. HMRC contend that Mr Goldsmith took possession of the Property and so substantially performed the contract when the contractor entered to begin the work at the property. He “got the keys” when contracts were exchanged and the entry by the builder with the express permission of the seller constituted taking possession so the trespasser argument did not affect HMRC’s case.
67. Mr Scott also cited SDLTM07900 which sets out HMRC’s view that “a contract will be substantially performed where the purchaser obtains “the keys to the door” and is entitled to occupy the property (however this is documented)...”. Mr Scott acknowledged that there is no authority for this statement.
68. It is not clear whether the seller (or its representative) was aware of the extent of the works which were being carried out. Mr Mark Goldsmith said that the seller’s representative visited the Property from time to time to read the meter and collect post. He saw him (the

representative) on two or three occasions. I do not know how often the representative visited or whether he visited between 27 May 2018 and completion on 5 June 2018. Had he visited in that period, he must have been aware of the extent of the works which were being carried out, but I cannot make a finding as to whether that was the case or not.

69. The definition of “possession” is wider for the purposes of section 44(6) than it is for property law purposes. Occupation under a temporary lease or licence would not be considered possession in property law.

70. There was no licence under General Condition 5.2.2 by virtue of 5.2.3. Mr Goldsmith did, however, have a licence to go on the Property under Special Condition 10 which stated, “The Seller agrees to allow the Buyer and the Buyer’s workers/contractors access to carry out refurbishment/decorative work...”

71. It does not follow that every licence confers a right to possession for section 44(6) purposes.

72. The reference in section 44(6)(b) to possession being taken under a contract, lease or licence indicates that the taking of possession must be pursuant to some form of agreement between the parties. This follows from the fact that these provisions relate to the effective fulfilment of the contract of sale which, by definition, is an agreement between the parties to it.

73. If a buyer enters property unlawfully, without the consent of the seller, that cannot constitute “possession” for this purpose.

74. However, I agree with Mr Scott that one must consider the nature of the entry at the time of the entry. If the buyer enters a property under a contract, lease or licence with the permission of the seller in circumstances where that constitutes taking possession, the fact that the buyer’s occupation subsequently goes beyond the terms of the permission and becomes unlawful does not vitiate the lawful possession previously taken.

75. In the present case, the contractor entered the Property under Special Condition 10, which was lawful. The fact that they immediately started doing works which rendered them trespassers does not affect the lawful entry.

76. The substantive question is whether that lawful entry constituted taking possession within section 44(5).

77. I do not agree with Mr Scott’s submission that, “taking a purposive approach to section 44(4), the facts of the present case mirror the intention of the legislation to prevent the avoidance of SDLT by resting on contract.”

78. I consider that it is appropriate to adopt a purposive approach to section 44(4) which is an anti-avoidance provision. It is not uncommon for sellers to allow buyers to enter a property between contract and completion for various purposes. Not every entry will constitute taking possession. Bearing in mind the purpose of the section, in my view “taking possession of the subject matter of the contract” requires the buyer to go into occupation of the property *as if* they had become the owner at that point. They may have to comply with conditions or limitations under the contract, lease, licence or other agreement, but there must be an element of freedom to occupy as and when they wish, including all the time, a right to any rents from the property if relevant (specifically dealt with in section 44(6)(a)) and generally, responsibility for the property and liability for the outgoings. As HMRC puts it in its SDLT Manual, the purchaser “obtains “the keys to the door” and is entitled to occupy the property”.

79. In the present case, Mr Goldsmith did not “obtain the keys to the door” literally or figuratively.

(1) The 17 April 2018 email, which formed part of Special Condition 10 indicated that the seller did not give permission for the buyer to go into possession and the buyer undertook that he would not go into possession. There was no mutual agreement about possession.

(2) Special Condition 10(c) expressly provided that the works to be carried out would not prevent the Property being sold with vacant possession on completion, indicating an agreement that entry to do the works would not constitute possession, or at least, that the seller did not give permission for the buyer to go into possession.

(3) The buyer was only allowed to carry out works on specified days and between specified times.

(4) The buyer had to pick up the key from the seller’s representative on permitted working days and return the key to the representative at the end of the day, as a condition of entry.

(5) The seller remained responsible for insuring the Property, security and overheads up to completion (although the buyer did reimburse the seller for the electricity and gas used whilst in the Property).

(6) I consider the nature of the permitted works (irrespective of the actual works carried out) to be a neutral factor, but the cosmetic nature of the permitted works and the express prohibition of structural work points in the direction of the seller not giving permission for the buyer to take possession.

80. Having considered all the evidence and weighed the various factors, I conclude that Mr Goldsmith did not “take possession” of the Property when his contractor entered it to carry out the conversion works.

81. Accordingly, Mr Goldsmith did not substantially perform the contract to buy the Property within section 44(4) and he did not enter into a deemed land transaction under section 44.

82. No SDLT is due under section 44.

PRE-COMPLETION TRANSACTIONS

83. HMRC’s alternative argument is that the assignment of the contract by Mr Goldsmith to the Company constituted a “pre-completion transaction” within schedule 2A.

84. Paragraph 1 of schedule 2A sets out when the rules apply.

[Pre-completion transactions

1

“(1) This Schedule applies where—

(a) a person (“the original purchaser”) enters into a contract (“the original contract”) for the acquisition by that person of a chargeable interest under which the acquisition is to be completed by a conveyance, and

(b) there is a pre-completion transaction.

(2) A transaction is a “pre-completion transaction” for the purposes of subparagraph (1) if—

- (a) as a result of the transaction a person other than the original purchaser (“the transferee”) becomes entitled to call for a conveyance to that person of the whole or part of the subject-matter of the original contract, and
- (b) immediately before the transaction took place a person was entitled under the original contract to call for a conveyance of the whole or part of that subject-matter....”

85. Paragraph 1 applies in the present context and Mr Goldsmith is the “original purchaser” and the Company is the “transferee”.

86. Paragraph 2 defines a pre-completion transaction as an “assignment of rights” if the transferee’s entitlement is to exercise rights under the original contract. The assignment of the benefit of the contract to the Company was an assignment of rights.

87. Paragraph 4 sets out the consequences of an assignment of rights. It provides, so far as material:

“Assignments of rights: application of rules about completion and consideration

4

- (1) This paragraph applies if the pre-completion transaction is an assignment of rights.
- (2) If the subject-matter of the original contract is conveyed to the transferee, the conveyance is taken to effect the completion of the original contract (despite section 44(10)).
- (3) Sub-paragraphs (4) to (6) apply if—
 - (a) the subject-matter of the original contract is conveyed to the transferee, or
 - (b) the original contract is substantially performed by the transferee.
- (4) The transferee is taken to be the purchaser under the land transaction effected as mentioned in section 44(3), ...
- (5) For the purpose of determining the chargeable consideration for that land transaction, the land transaction is taken to give effect to a contract the consideration under which is—
 - (a) the consideration under the original contract, and
 - (b) the consideration for the assignment of rights.

Paragraph 1 of Schedule 4 has effect accordingly (but this sub-paragraph does not allow any amount of consideration given by a person to be counted twice in determining the chargeable consideration).

(6) ...

(9) In sub-paragraph (5) “the consideration”—

- (a) in relation to the land transaction, means (what is to be taken to be) the consideration for the acquisition of the subject-matter of the land transaction;
- (b) in relation to the original contract, means the consideration for the acquisition of the subject-matter of that contract;
- (c) in relation to the assignment of rights, means the consideration for the transferee's acquisition of the rights to which that contract relates.”

88. As the Property was conveyed to the Company, that is taken as the completion of the original contract under paragraph 4(2). Paragraphs (4) to (6) apply as the Property was conveyed to the Transferee. The Company did not substantially perform the original contract.

89. The Company is regarded as the purchaser under the land transaction which takes place on completion (paragraph 4(4)). The consideration for that land transaction is the aggregate of the consideration under the original contract and the consideration for the assignment of rights (paragraph 4(5)). The consideration is the purchase price of £1,450,000.

90. The EDT is the date of completion, 5 June 2018.

91. HMRC also submit that the assignment of rights gives rise to an additional liability on Mr Goldsmith by reason of paragraph 5 of schedule 2A. Paragraph 5, so far as material, provides:

“Assignment of rights: transferor treated as making separate acquisition

5

(1) Where paragraph 4(4) to (6) applies (assignment of rights: original contract completed or substantially performed) this Part of this Act has effect as if—

(a) the effective date of the land transaction mentioned in paragraph 4(4) (“the transferee's land transaction”) were also the effective date of another land transaction (a “notional land transaction”), and

(b) the original purchaser were the purchaser under that notional land transaction.

The notional land transaction is referred to below as “associated with” the assignment of rights under which the original purchaser is the transferor.

(2)...

(3) For the purpose of determining the chargeable consideration for the notional land transaction, Schedule 4 has effect as if paragraph 1(1) of that Schedule provided that the chargeable consideration is (except as otherwise expressly provided) the total of amounts A and B.

(4) ...

(5) For the purposes of sub-paragraphs (3) and (4)—

A is the total amount of any consideration in money or money's worth given (whether directly or indirectly) by any of the following as consideration under the original contract—

(a) the transferee under the assignment of rights with which the notional land transaction or (as the case requires) the additional land transaction is associated;

(b) ...

(c) a person connected with a person falling within paragraph (a) or (b);

B is the total amount of any other consideration in money or money's worth given as consideration under the original contract (directly or indirectly) by

—
(a) the purchaser (under the notional land transaction ...), or

(b) a person connected with the purchaser;

...

(6) ...

(7)”

92. The connected persons test in section 1122 Corporation Tax Act 2010 applies for this purpose (paragraph 20 of schedule 2A). At the time of completion, Mr Goldsmith was the sole shareholder of the company and therefore controlled it. He and the Company were therefore connected.

93. Applying paragraph 5 to the present case, Mr Goldsmith is treated, under paragraph, 5(1) as if he had entered into a notional land transaction as purchaser, separate from the Company’s purchase, but having the same EDT i.e. 5 June 2018.

94. The consideration for the notional land transaction is the total of the consideration given by the Company and Mr Goldsmith (as connected persons) i.e. £1,450,000.

95. This means that schedule 2A imposes a double charge to tax: once on the Company by reference to the actual purchase and a further charge on Mr Goldsmith by reference to the notional land transaction. The SDLT would be the same on each transaction and the EDT is also the same.

96. Paragraph 15 of schedule 2A provides relief from the tax on the notional land transaction. It provides, so far as material:

“Relief for transferor: assignment of rights

15

(1) This paragraph applies where—

(a) a person would, in the absence of this paragraph, be liable to pay tax in respect of a notional land transaction deemed to take place under paragraph 5(1) ... and

(b) the original contract had not been substantially performed when the assignment of rights mentioned in paragraph 4(1) was entered into.

(2) If the purchaser claims relief under this paragraph in respect of the notional land transaction or additional land transaction, no liability to tax arises in respect of that transaction.

(3) ...

(4) Relief under this section must be claimed in a land transaction return or an amendment of such a return.”

97. HMRC contend that Mr Goldsmith would not have been eligible for relief as he had substantially performed the original contract. I have found that he did not substantially perform the contract, so in principle, the relief is available.

98. Mr Hirsch submitted that Mr Goldsmith is entitled to relief so that no additional SDLT is payable. He further submitted that there was no need for a return as HMRC had been provided with all the details in a letter which satisfied the requirement for a return. He cited SDLTM50250 as authority for his statement that a letter is acceptable in place of a return. That paragraph of the Manual deals with the situation where there is substantial performance of a contract for sale followed by completion and there is a change in the amount of tax due. In these circumstances a “further return” will be required. In context, it is clear that this refers to an amendment to a return which may indeed be made by letter (schedule 10 paragraph 6).

99. Paragraph 15(4) is very clear that relief must be claimed in a land transaction return or an amendment to an SDLT return. An SDLT return must be in the prescribed form (schedule 10 paragraph 1) although an amendment only requires “notice” to HMRC which can be in the form of a letter. Unfortunately, Mr Goldsmith did not submit an SDLT return in relation to any transaction so any details his agent sent to HMRC in a letter cannot constitute an amendment to a return as there is no return to amend.

100. Where the legislation provides for a claim to be made in a return or an amendment to a return, this is a strict and absolute requirement. This point was emphasised by the Upper Tribunal in *HMRC v Ridgway* [2024] UKUT 00036 (TCC). If a relief must be claimed in a return and it is not and the taxpayer is out of time to make a claim, the relief is not available.

101. I accept that the Appellants had no idea that there was any land transaction other than the purchase by the company or that Mr Goldsmith had to submit any returns. Nor it seems did their advisor realise that there were potentially additional liabilities despite Tourbillon Tax LLP being described as “tax specialists”. They should have been aware that the contract was entered into by Mr Goldsmith; Mr Hirsch sent a copy of the contract with his letter of 5 December 2018 claiming MDR for the Company. Indeed, he stated that the purchaser was the Company but requested that the refund should be payable to Mr Goldsmith personally. At that time, Mr Goldsmith could have submitted a late SDLT return claiming relief but he was not advised to do so and is now out of time.

102. In summary, I have concluded that Mr Goldsmith is liable for SDLT on the notional land transaction referred to in paragraph 5 of schedule 2A. He would have been eligible for relief from that charge under paragraph 15 but as he did not make a claim for relief in an SDLT return or an amendment to a return, no relief is available and he remains liable for the SDLT.

MULTIPLE DWELLINGS RELIEF

103. Mr Hirsch contends that, to the extent that SDLT is chargeable, both Mr Goldsmith and the Company are eligible for Multiple Dwellings Relief.

104. Paragraph 2(2)(a) of schedule 6B provides that Multiple Dwellings Relief applies where the subject matter of a transaction consists of at least two dwellings.

105. Paragraph 7 of schedule 6B provides, so far as material, that a building or part of a building counts as a dwelling if:

- “(2)(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.
- ...”

106. Mr Goldsmith argues that if the contract was substantially performed before the assignment of the rights he is entitled to MDR as, once the contractor had entered the Property and carried out works which included the erection of partitions, the Property was “in the process of being constructed and adapted for use as multiple dwellings”.

107. I have decided that Mr Goldsmith did not substantially perform the contract but, for completeness, I will briefly consider the MDR point on the basis that there was substantial performance.

108. The date of the substantial performance of the contract would constitute the Effective Date of the Transaction (EDT).

109. The question is whether the deemed transaction related to two or more dwellings which were, “in the process of being constructed or adapted for such use [as a dwelling]” at the

EDT. The date of substantial performance of a contract constitutes the EDT (see discussion above), but MDR only applies if, at the *moment* of completion, two or more dwellings were acquired (*Ladson Preston v HMRC* [2022] UKUT 301 (TCC)).

110. So far as Mr Goldsmith is concerned, at the moment of completion (assuming that was when the contractors entered the Property) the Property was still a single dwelling, so MDR cannot apply by reference to later events.

111. In any event, section 58D provides “any relief under [schedule 6B i.e. MDR] must be claimed in a land transaction return or an amendment of such a return”. Mr Goldsmith did not at any time submit a land transaction return (and accordingly could not amend a return) and he is now out of time to do so. My comments above about the need for a claim to be made in a return also apply here.

112. I have found that Mr Goldsmith entered into a notional land transaction under paragraph 5 of schedule 2A. The EDT of that transaction is the same as the EDT of the Company’s purchase, 5 June 2018 (paragraph 5(1)(a)). At the time of completion of that transaction, the Property was “in the process of being constructed or adapted for use” as multiple dwellings. Unfortunately for Mr Goldsmith, as no SDLT return had been submitted, there was no valid claim for MDR, as set out above.

113. In conclusion, Mr Goldsmith is not entitled to MDR.

114. Turning to the Company’s claim, I have found that when it completed the purchase on 5 June 2018, the work to convert the Property into three flats had already begun. Therefore, each of the flats was “in the process of being constructed or adapted for [use as a dwelling]”. Accordingly, the subject matter of the Company’s transaction was an interest in three dwellings and the purchase was eligible for MDR.

115. The Company had claimed MDR in an amendment to a land transaction return (Mr Hirsch’s letter of 5 December 2018).

116. The Company is therefore entitled to MDR on its purchase.

117. HMRC now accept that this is the case so that the Company’s appeal should be allowed and it is acknowledged that the Company has paid the right amount of SDLT; £85,998 after MDR.

DECISION

118. I have decided that the Company is eligible for MDR and has already paid the right amount of SDLT.

119. I therefore allow the Company’s appeal.

120. I have decided that HMRC made a valid discovery assessment of Mr Goldsmith’s potential liabilities.

121. I have decided that Mr Goldsmith did not substantially perform the original contract for purchase and is not liable for SDLT under section 44(4).

122. I allow Mr Goldsmith’s appeal to that extent.

123. I have decided that Mr Goldsmith entered into a notional land transaction within paragraph 5 of schedule 2A and that he did not make a valid claim for relief under paragraph 15. Nor did he make a valid claim for MDR. He is therefore liable for the full amount of SDLT of £132,250. It seems extremely harsh of HMRC to seek to tax Mr Goldsmith on the full amount of the SDLT without any reliefs, when the Company has already paid the correct amount of SDLT on the purchase of the Property. Effectively they are collecting double tax

on the same transaction. I recognise that Mr Goldsmith and a company owned by Mr Goldsmith are different legal persons and that Mr Goldsmith could have claimed relief and avoided the charge. HMRC are acting in accordance with the letter of the law, but it is with some reluctance that I dismiss Mr Goldsmith's appeal on the pre-completion transaction point.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

124. 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: 18th OCTOBER 2024