First-tier Tribunal (Tax)

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Case Number: TC09176

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/13330

Stamp duty land tax - higher threshold interest - application of relief - non-qualifying individual occupying property

Heard on: 31 January 2024
Judgment date: 23 May 2024

Before

TRIBUNAL JUDGE MCGREGOR
SIMON BIRD

Between

MAYFAIR AVENUE LIMITED
Appellant
and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Yasir Ali, director of the Appellant

For the Respondents: Kate Birtles, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal by Mayfair Avenue Limited ("MAL") against a closure notice assessing MAL for additional stamp duty land tax ("SDLT") of £70,500 on the acquisition of a residential property.

2. With the consent of the parties, the form of the hearing was video via Tribunal video hearing system. A face-to-face hearing was not held because it was decided a remote hearing was appropriate. The documents to which we were referred were a bundle of 150 pages.

3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

FACTS

4. We find the following facts based on the evidence in the bundle and the oral evidence given by Mr Ali at the hearing.

5. The property in question, 94 Mayfair Avenue, had been Mr Ali's family home for over a decade.

6. The family had decided they needed to move into a larger home and so went about the usual process of putting Mayfair Avenue on the market and looking for a replacement home.

7. They entered into a chain which would have led to the sale of Mayfair Avenue and the purchase of a new home, exchanging contracts on the same day. However, at the last minute, the vendor of the new home pulled out and so the chain collapsed.

8. Mr Ali looked for other options and spoke to a mortgage advisor who advised him that it would be possible to borrow sufficient money to buy a new home without having to find a buyer for Mayfair Avenue if he transferred Mayfair Avenue into a company and took out a mortgage in the company.

9. Mr Ali therefore incorporated MAL on 16 April 2021.

10. On 30 June 2021, MAL bought the Mayfair Avenue property from Mr Ali for the sum of £650,000.

11. The SDLT return was submitted on the same day and £27,000 of SDLT was paid on that day.

12. Mr Ali purchased a new property with a completion date in February 2022. Works were undertaken in that property prior to the family being able to move in.

13. Mr Ali and his family continued to live in Mayfair Avenue until 13 May 2022, when they moved into the new home.

14. On 2 March 2022, HMRC opened a compliance check into the SDLT return.

15. A series of correspondence ensued over the next 2 months.

16. On 25 May 2022, a closure notice was issued by HMRC, resulting in additional SDLT of £70,500.

17. On 10 August 2022, Mr Ali sought a late appeal to HMRC.

18. On 2 September 2022, HMRC accepted the late appeal and issued a view of the matter letter.

19. On 14 October 2022, HMRC issued a review conclusion letter upholding the closure notice in full.

20. On 2 November 2022, Mr Ali appealed to this Tribunal.

THE LAW

21. The matter in dispute relates to the higher rates of SDLT chargeable on certain interests in dwellings found in Schedule 4A to Finance Act 2003 ("FA 2003").

22. Schedule 4A to the FA 2003 sets out the tax rules for determining the transactions to which the higher rate of SDLT applies. Paragraph 1 sets out the meaning of "higher threshold interest" as follows:

> "(1) In this paragraph "interest in a single dwelling" means so much of the subject- matter of a chargeable transaction as consists of a chargeable interest in or over a single dwelling (together with appurtenant rights).
>
> (2) An interest in a single dwelling is a higher threshold interest for the purposes of this Schedule if chargeable consideration of more than £500,000 is attributable to that interest."

23. So far as relevant, paragraph 2 of Sch 4A states:

> "(1) Sub-paragraphs (2) to (8) apply to a chargeable transaction whose subject-matter consists of or includes a higher threshold interest,
>
> (2) If the main subject-matter of the transaction consists entirely of higher threshold interests, the transaction is a high-value residential transaction for the purposes of paragraph 3...."

24. So far as relevant, paragraph 3 of Sch 4A sets out the amount of tax chargeable and the transactions to which the higher rate of SDLT applies as follows:

> "(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...."

25. Paragraph 5 of Schedule 4A to the FA 2003 sets out the circumstances in which relief from the higher rate of SDLT is available. So far as relevant to the present appeal, paragraph 5 states:

> "(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...

> (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 a dwelling on the land."

26. Paragraph 5A of Schedule 4A to the FA 2003 provides the meaning of "non-qualifying individual", so far as relevant to the present appeal, as follows:

> "(1) In paragraph (5) "non-qualifying individual", in relation to a chargeable transaction, means any of the following -
>
> ....
>
> (c) an individual (a "connected person") who is connected with the purchaser...
>
> ....
>
> (10) Section 1122 of the Corporation Tax Act 2010 (connected persons) has effect for the purposes of this paragraph..."

27. Section 1122 CTA 2010 provides that a company is connected with another person if that person has control of the company.

28. HMRC may open an enquiry into an SDLT return within 9 months of the filing date, in accordance with paragraph 12 of Schedule 10 to FA 2003.

29. Once an enquiry is open, it must be closed in accordance with Paragraph 23 of Schedule 10 to the FA 2003 which states:

> "(1) An enquiry under paragraph 12 is completed when the Inland Revenue by notice (a "closure notice") inform the purchaser that they have completed their enquiries and state their conclusions.
>
> (2) A closure notice must either -
>
> (a) state that in the opinion of the Inland Revenue no amendment of the return is required, or
>
> (b) make the amendments of the return required to give effect to their conclusions.
>
> (3) A closure notice takes effect when it is issued."

PARTIES ARGUMENTS

MAL's arguments

30. Mr Ali accepts that he lived in the property after it was transferred to MAL and says that he has never denied it.

31. He considers that the law is deficient because it does not contain a grace period or an opportunity to find out that the amount of SDLT is so high.

32. He received advice from a mortgage adviser about setting up the company to transfer the property to, but he never mentioned a higher rate of SDLT.

33. He had legal advice on the transfer of the property to MAL and his solicitor filled out the SDLT return, but again, he was not told of the higher rate of SDLT.

34. He didn't know that it applied, or he never would have stayed in the property.

35. He has made no financial gain because he paid full market rent to MAL for the period he was living there, as he had been advised to do.

36. His intention all the way through was always to rent out the property, but it was very difficult to find a suitable property to move to and get through to completion. He was also unable to find a suitable property for him and his family to rent during the period.

37. He was taking steps to ensure that the property was rented out from day one, as was required by his mortgage.

38. He feels that HMRC always stick to the point of law but don't consider the human element.

39. He feels that this is very unfair, and that tax should not be there to catch people out.

HMRC's arguments

40. The notice of enquiry was validly issued within the prescribed time limit specified by paragraph 12, Schedule 10 to the FA 2003.

41. The closure notice was validly issued in accordance with the legislation.

42. The 15% higher rate of SDLT for certain transactions set out by paragraph 3 applies to the relevant transaction for the following reasons:

(1) The subject-matter of the transaction consisted entirely of a chargeable interest in a single dwelling.

(2) The chargeable consideration attributable to that interest was in excess of £500,000 (being £650,000), thus the interest is a higher threshold interest.

(3) The subject-matter of the transactions consisted entirely of a higher threshold interest and therefore the transaction is a high-value residential transaction.

(4) The purchaser is a company.

43. Mr Ali is the sole director and shareholder of the Appellant company and as such, has control of the Appellant. He is therefore a connected person and a non-qualifying individual for the purposes of paragraph 5 Schedule 4A to the FA 2003.

44. HMRC accepts that the Mayfair Avenue property was purchased by the Appellant company for the purpose of exploiting it as a source of rental income in the course of carrying on a property rental business as per paragraph 5(1)(a) of Schedule 4A to the FA 2003. However, HMRC submits that following the transaction a non-qualifying individual occupied the "Property" for a period of some 10 months.

45. HMRC contend that paragraph 5(2) of Schedule 4A to the FA 2003 provides that a chargeable interest does not count as being acquired exclusively for one or more of the purposes specified in paragraph 5(1) if it is intended that a non-qualifying individual will be permitted to occupy a dwelling on the land. The intention of the Appellant therefore needs to be considered.

46. It is the Respondents' submission that the circumstances in this appeal indicate that on the date of the relevant transaction it was known that Mr Ali and his family would continue to occupy the Mayfair Avenue property. Therefore, the Appellant intended to allow a non-qualifying individual to occupy the property.

47. The Respondents submit that Mr Ali made a choice to occupy the property beyond the effective date of the transaction, for the reasons stated above, which clearly shows his intention to occupy the property after the relevant transaction date. It is therefore unlikely that this intention had not been established at the effective date of the transaction.

48. At the time of the relevant transaction it was intended that a non-qualifying individual would be permitted to occupy a dwelling on the land and the relevant

transaction did not qualify for relief from the 15% higher rate of SDLT in accordance with paragraph 5(2) of Schedule 4A of the FA 2003.

49. In the alternative, if the Tribunal finds that there was not an intention that a non-qualifying individual would be permitted to occupy the dwelling, HMRC submits that the relief would be withdrawn under Paragraph 5G of Schedule 4A to the FA 2003 on the basis that a non-qualifying individual was permitted to occupy a dwelling on the land within the control period of 3 years after the effective date of the transaction.

DISCUSSION

50. Applying the facts we have found above; we find that the enquiry into the return was opened in accordance with the legislative time limit of 9 months.

51. We also find that the closure notice was issued to MAL and made amendments to give effect to HMRC's conclusion that relief from the higher rates was not allowed.

52. Therefore the closure notice was validly issued.

53. Turning to the question of whether the higher rates of SDLT applied to the transactions, we find the following:

(1) The transaction was a "higher threshold interest" under paragraph 1 of Schedule 4A to FA 2003 because it was an interest in a single dwelling for which chargeable consideration in excess of £500,000 was given;

(2) the main subject matter of the transaction consisted entirely of a higher threshold interest because nothing else was transferred with it and it was not linked to another transaction. This means that the transaction was a high-value residential transaction;

(3) The purchaser in the transaction was a company, being MAL.

54. This means that the conditions within schedule 4A to FA 2003 are met in order to apply the 15% rate of SDLT to the transaction, unless a relief can be applied.

55. The first requirement for the relief is that the property was acquired "exclusively" for one of a specified set of purposes. Those purposes include "exploitation as a source of rents ...in the course of a qualifying property rental business".

56. HMRC accepted that the property was acquired for the purposes of rental and that, absent the caveat discussed below, this condition would have been met.

57. However, there is a statutory carve out. A property cannot be treated as so acquired if "it is intended that a non-qualifying individual will be permitted to occupy a dwelling on the land".

58. A non-qualifying individual includes a person connected to the purchaser.

59. We find that Mr Ali was a non-qualifying individual because he was connected to MAL by virtue of having control of the company.

60. We also find that it was intended by MAL from the effective date of the transaction that Mr Ali would occupy the dwelling. While we accept that it was the long-term intention of MAL to rent out the property, at the time of the effective date of the transaction, Mr Ali, as director of the company, knew that he would be living in the property with his family. The fact that he did not at that time understand that this made him a non-qualifying individual and impacted on the rate of SDLT does not alter the fact that the intention was for it to be occupied by a connected person.

61. Therefore MAL was prevented from applying the relief from the higher rate of SDLT.

62. This means that the 15% rate of SDLT applied to the transaction. We find that HMRC has correctly calculated the SDLT due on the transaction, giving rise to a closure notice for additional SDLT of £70,500.

63. Mr Ali asked us to consider the question from a number of different angles.

64. Unfortunately, any deficiency in the legislation by not providing a grace period is not within the remit of this Tribunal. Only Parliament can change the law.

65. Likewise, any opportunity for identifying the problem during the course of filling out the SDLT return, such as by asking follow up questions or flagging an issue at that time is also not within the remit of this Tribunal.

66. We also note that the statutory conditions do not require that either Mr Ali or MAL to have made any financial gain from the arrangement in order for the higher rate of SDLT to apply. Therefore the lack of financial gain cannot be a reason not to apply the higher rate.

67. With regards to fairness of the tax, this Tribunal has limited powers to consider fairness. Following the decisions of the Upper Tribunal in *Beadle v HMRC* [2019] UKUT 101 and *KSM Henryk Zeman SP Z.o.o. v HMRC* [2021] UKUT 182, we must consider whether there is anything in the statutory regime for appeals against SDLT closure notices that would allow us to consider the grounds of fairness.

68. Mr Ali's right of appeal is set out in paragraph 35(1)(b) of Schedule 10 to FA 2003, which enables him to appeal against "a conclusion stated or amendment made by a closure notice".

69. The powers of this tribunal on such an appeal are set out in paragraph 42 of the same Schedule. These powers allow this Tribunal to determine whether an assessment or self-assessment under or overcharges an amount of SDLT and, if it so finds to increase or decrease the SDLT chargeable. It also provides, in relevant circumstances, for the Tribunal to adjust the amount that is subject to SDLT. However, none of these powers enable this Tribunal to provide discretionary relief or mitigation on the grounds of fairness. We therefore find that the statutory powers do not enable us to consider fairness.

DISPOSITION

70. For the reasons set out above, we dismiss MAL's appeal and uphold the closure notice.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

71. 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.

ABIGAIL MCGREGOR
TRIBUNAL JUDGE

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