Judgments

Smith Homes 9 Ltd v Revenue and Customs Commissioners

[2021] UKFTT 226 (TC)

UK First-tier Tribunal (Tax)

Judge Marilyn McKeever

25 May 2021

Judgment

DECISION

INTRODUCTION

1.†††† As indicated above, this is a re-determination of this matter following the set aside of the initial decision because certain documents had not been sent to the Appellant's representative. In determining the case I have taken into account the documents and submissions I originally considered and the submissions made by Mr Cannon pursuant to the directions made by Judge Poole on 25 January 2021.

2.†††† The matter in question is 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. 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".

3.†††† References to "paragraphs" below are to paragraphs of Schedule 10 Finance Act 2003 unless otherwise stated.

THE FACTS

4.†††† 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.

5.†††† Some 14 months later, on 24 May 2018, Cornerstone Tax Limited ("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."

6.†††† 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.

7.†††† 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.

8.†††† 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.

9.†††† 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.

10.†††† I discuss various procedural issues below, but I note here that the Notice of Appeal was an appeal against HMRC's decision that the appellant cannot claim MDR as set out in

their Review Conclusion Letter of 23 December 2019. The appellant made an in time appeal against that decision.

THE LAW

11.†††† The relevant law in this case is set out in paragraphs 34 and 34A of schedule 10 and paragraphs 6 and 7 of schedule 11A to the Finance Act 2003.

12.†††† Paragraphs 34 and 34A provide, so far as relevant:

"[**Claim for relief for overpaid tax etc**

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(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

14.†††† 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.

15.†††† Case A, set out in paragraph 34A(2), provides “Case A is where the amount paid…is excessive by reason of -

1.†††† (a)…

2.†††† (b) a mistake consisting of the making or giving , or ***failing to make or give, a claim*** or election” (emphasis added).

16.†††† 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”.

17.†††† 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.

18.†††† The effective date is the date of purchase, ie 6 March 2017. The filing date was therefore 5 April 2017.

19.†††† It is common ground that the land transaction return submitted on 20 March 2017 did not include a claim for MDR.

20.†††† The return could only be amended up to 5 April 2018. The return was not amended by that date.

21.†††† 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.

22.†††† HMRC submit that the failure to make the claim falls within Case A of paragraph 34A, so the appellant cannot circumvent the time limit by submitting a repayment claim under paragraph 34 as HMRC are not liable to give effect to the claim where Case A applies.

23.†††† HMRC argued that this was consistent with the case of *Secure Service v HMRC* [2020] UKFTT 59. In that case, the appellant made a late claim for MDR. They did not make a claim for overpayment relief, but the Tribunal considered whether the late claim for MDR could be treated as an in time overpayment relief claim. I note that these comments were not necessary for the decision in that case.

24.†††† The Tribunal said, at paragraph 48:

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

THE APPELLANT'S CONTENTIONS IN ITS RESPONSE

25.†††† Cornerstone submit that the appellant did not know and had not been advised that it could make a claim for MDR at the time of the transaction. They also assert that there was a lack of public guidance on the matter and that the appellant would not have known that they were eligible to make a claim for MDR on their land transaction return.

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

27.†††† They therefore claim that the paragraph 34 claim should be allowed and the strike out application should be disregarded.

MR CANNON'S SUBMISSIONS

28.†††† Mr Cannon referred to the correct approach to a strike out application set out in *Sternlicht and others v HMRC* [2021] 0059 at [20] to [25]. The Tribunal said that the application should be considered on the basis of the current law and it applied the guidance from the Upper Tribunal in *The First De Sales Limited Partnership and others v HMRC* [2018] UKUT 396 (TCC) which included the following at [33]:

“i) The court must consider whether the claimant has a 'realistic' as opposed to a "fanciful” prospect of success: Swain v Hillman [2001] 1 All ER 91 ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8] iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman….”

29.†††† If a claim is made and HMRC are out of time for opening an enquiry into it, HMRC have a legal obligation to give effect to the claim as soon a possible under paragraph 6 of schedule 11A Finance Act 2003 (“paragraph 6”). They cannot simply refuse an overpayment claim without opening an enquiry.

30.†††† If Case C under paragraph 34A is the relevant provision, and does not apply (because the taxpayer did not know and could not reasonably have known that the relief was available), those circumstances of ignorance should not be characterised as a “mistake” within Case A and Case A should not preclude HMRC giving effect to the claim.

DISCUSSION

31.†††† I have found as a fact that the appellant was out of time to make a valid claim for MDR. The issue is whether they can properly make a claim for overpayment relief under schedule 10.

32.†††† HMRC contend that they do not have to give effect to the Appellant's claim under paragraph 34 because the Appellant's case falls within Case A of paragraph 34A.

33.†††† Although Cornerstone did not explicitly refer to Case C in their submissions, they contended that the Appellant did not know and could not reasonably have known, before the end of the 12 month period, that such relief [MDR] was available. Essentially, they were arguing that Case C was the relevant provision.

34.†††† Although HMRC referred to Case A, their further submissions addressed the Appellants contentions based on Case C. I am satisfied that both parties effectively made submissions on Case C, despite HMRC's reference to Case A.

35.†††† 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.

36.†††† 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.

37.†††† 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.

38.†††† I do not consider that I am conducting a “mini-trial” in rejecting the contention that the Appellant could not reasonably have known about MDR within the time limit. 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. I do not consider that the Appellant's circumstances fall within Case C.

39.†††† I accept Mr Cannon's submission that Case A and Case C apply in different circumstances. Case C applies where the taxpayer knows about the relief or was ignorant of the relief but ought reasonably to have known about it. If a taxpayer did not know about the relief and could not reasonably have known about it, Case C does not prevent HMRC giving effect to the claim.

40.†††† I accept Mr Cannon's contention that Case A should not apply to a taxpayer who was unaware of the possibility of a claim and whose ignorance was reasonable as that is not properly characterised as a “mistake”. However, I have found that if the Appellant did not know about the relief, its ignorance was not reasonable in the circumstances. In other words, even if the Appellant did not know about the relief, it ought reasonably to have known that the relief was available within the 12 month period. That is, Case C applies and accordingly, HMRC are not liable to give effect to the claim on that basis. It is not necessary to consider whether the claim is precluded under Case A.

41.†††† 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 C of paragraph 34A applies. Accordingly, even if the transaction met the conditions for MDR (which HMRC dispute) the appellant would be unable to obtain the relief and the appeal must fail.

42.†††† However, in order to dispose of the application there are further procedural issues that I need to consider.

43.†††† HMRC opened an enquiry, purportedly under paragraph 12, on 1 January 2019. It purported to be a “check of amendment to Stamp Duty Land Tax Return”. An enquiry into an amendment of a land transaction return must be made within nine months of the filing date. There had, of course, not been any amendment of the SDLT return.

44.†††† There was further correspondence which was not in the bundle.

45.†††† HMRC then sent a letter on 17 September 2019 which acknowledged the error in the 1 January letter and stated that the letter should have said that the enquiry was being opened under paragraph 7 of Schedule 11A of Finance Act 2003 into the repayment claim. The time limit for opening such an enquiry is nine months from the date of the claim. The letter purported to be a closure notice and concluded that the transaction was not eligible for MDR and so there had been no overpayment.

46.†††† 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.

47.†††† HMRC's review letter of 23 December 2019 made a further error stating that the decision under appeal was "a closure notice issued on 17 September 2019…disallowing the company's claim under paragraph (sic) 6B [presumably Schedule 6B Finance Act 2003 which relates to MDR]. It stated that the "sole point at issue" was whether the purchase was a multiple dwelling transaction within Schedule 6B Finance Act 2003 and purported to uphold the original (17 September) decision which, in fact, related to the claim for relief for tax overpaid.

48.†††† It seems to me that the enquiry opened on 1 January 2019, which would have been in time, was invalid as it purported to be an enquiry into an amendment to an SDLT return and there was no amendment. The enquiry notice was issued under the wrong provision.

49.†††† The enquiry notice issued on 17 September 2019 was made under the right provision, as was the purported closure notice, but an enquiry notice under paragraph 7 of Schedule 11A must be sent within nine months of the claim being made. The claim was made on 24 May 2018, so the enquiry notice should have been sent by 24 February 2019. It was sent on 17 September 2019. Accordingly this enquiry notice was invalid as it was out of time. It follows that the closure notice was also invalid as there was no valid enquiry in existence to determine by a closure notice.

50.†††† There was therefore no valid decision for the reviewing officer to review so the review conclusion was also invalid. In addition, the reviewing officer addressed the wrong question: whether the transaction qualified for MDR and not whether HMRC should give effect to the repayment claim.

51.†††† Under paragraph 35, an appeal may be brought against an amendment of a selfassessment by HMRC, a conclusion stated by a closure notice, a discovery assessment, an assessment to recover excessive repayment or a Revenue determination. The only category which is relevant in this case is a conclusion stated by a closure notice. As there is no valid closure notice, there is no appealable decision and the appellant's appeal is not therefore valid.

52.†††† On the face of it there was no valid enquiry and, as a result, no valid appeal. I must therefore consider the possible consequences of the failure to enquire into the claim.

53.†††† Paragraph 6 of Schedule 11A provides that subject to an enquiry being made into a claim

"as soon as practicable after a claim is made …the Inland Revenue shall give effect to

the claim…by discharge or repayment of tax." On the face of it, if there is no valid enquiry and HMRC are out of time for opening one, they must make the repayment claimed.

54.†††† Mr Cannon submits that that is indeed the case and that HMRC is under a statutory obligation to make the refund once it has been claimed and that if HMRC had wanted to challenge the claim, the appropriate process was to open an enquiry under paragraph 7 of schedule 11A. As no valid enquiry was opened into the claim, the refund claim is now unassailable.

55.†††† In the initial decision, I said that a "claim" for the purposes of paragraph 6 of schedule 11A must be a claim under paragraph 34 which was not excluded by paragraph 34A. That is, HMRC were not required to give effect to a claim (under paragraph 6 schedule 11) to which they were not required to give effect by virtue of paragraph 34A. That clearly must be right.

56.†††† However, Mr Cannon's submissions relate to the machinery by which the question whether the claim is one to which HMRC must give effect is to be determined, i.e. the machinery by which it is determined whether paragraph 34A applies. He argues that if HMRC could simply refuse a claim without opening an enquiry, there would be no enquiry and so no closure notice and no appealable decision which could be challenged be the taxpayer. The taxpayer would therefore have no remedy, except, possibly, an application for judicial review. Accordingly, he contends that if HMRC fail to make an enquiry into a repayment claim within the time limit, they must give effect to the claim by repayment of the tax claimed.

57.†††† This is an important point of statutory interpretation.

58.†††† I consider that Mr Cannon's submission that HMRC have an absolute obligation to give effect to a repayment claim by virtue of paragraph 6 of schedule 11A in circumstances where they have failed to open an enquiry into the claim within the time limit does have a realistic prospect of success within the test set out in *The First De Sales Limited Partnership*. On this basis, I am not satisfied that it is in accordance with the overriding objective, to deal with cases fairly and justly, to strike out the appeal, if there is indeed a valid appeal in existence, on the basis that it has no reasonable prospect of success.

DECISION

59.†††† For the reasons set out above I have concluded that there does not appear to be a valid appeal in existence as HMRC had not made an appealable decision so that there is no appeal to strike out.

60.†††† If and to the extent that there is a valid appeal against HMRC's decision to refuse the overpayment claim I have decided that HMRC has not shown that the Appellant's case has no reasonable prospect of success and I refuse the application.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

3. 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 Firsttier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MARILYN MCKEEVER

TRIBUNAL JUDGE

Release date: 25 May 2021