[2020] UKFTT 0059 (TC)

TC07555

Appeal number: TC/2018/05682

STAMP DUTY LAND TAX – procedure – whether this Tribunal has jurisdiction to hear an appeal against a refusal by HMRC to allow a claim for multiple dwellings relief to be made late – no – appeal dismissed

FIRST-TIER TRIBUNAL

TAX CHAMBER

SECURE SERVICE LTD **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public at Birmingham on 31 July 2019

Mr Smith, director, for the Appellant

Ms Davies, presenting officer, for the Respondents

DECISION on PRELIMINARY ISSUE

1. This question for this Tribunal is whether the Tribunal has jurisdiction to hear an appeal against HMRC's refusal to accept a late claim for multiple dwellings relief.

Background

2. This matter relates to stamp duty land tax arising from an acquisition of property on 15 January 2015.

3. The Stamp Duty Land Tax (SDLT) return was completed by the appellant on the basis that they were acquiring the property as a property development company and so did not apply the higher rate of 15% that applies to acquisitions of residential properties by companies. It was agreed that the SDLT return completed by the appellant did not include a claim for multiple dwellings relief.

4. The subsequent decision relating to the application of the higher rate of 15% to a part of the acquisition consideration was withdrawn by HMRC and was not discussed in the hearing in any detail.

Chronology of correspondence relating to multiple dwellings relief

5. On 5 November 2015, HMRC opened an enquiry into the SDLT return. On 17 February 2016, HMRC wrote to the appellant's solicitors advising that HMRC intended to apply the higher rate of 15% to the acquisition because a person connected to the appellant was resident at the property.

6. On 29 April 2016 the appellant's solicitor advised HMRC that the acquisition was one of three separate properties and submitted a claim for multiple dwellings relief.

7. On 1 June 2016 HMRC advised the appellant's solicitor that the claim for relief had been made out of time as such a claim requires an amendment to the SDLT return and amendments to such returns cannot be made more than twelve months after filing. The claim was therefore not accepted.

8. The appellant wrote to HMRC on 10 June 2016 stating that they did not understand why a twelve month time limit applied and asking HMRC to confirm that SDLT had been overpaid.

9. HMRC replied on 7 July 2016 setting out the legislation and stating again that they were unable to accept the claim for multiple dwellings relief.

10. The appellant wrote again on 28 July 2016 stating that HMRC should have concluded from the information provided that the relief was available before the

twelve month period had expired and should have advised them that the relief should have been claimed. The letter also explained that their advisers had incorrectly believed that the relief applied only to flats.

11. HMRC responded on 12 August 2016 stating that the SDLT return showed that the property was a single asset and that the marketing material showed a single residential address and that it was not unreasonable for them to take that information at face value. Further, it was not within the scope of HMRC checks to investigate whether the relief was available.

12. The appellant replied on 30 August 2016 stating that HMRC had a duty to advise the appellant that they had overpaid SDLT.

13. HMRC replied on 4 November 2016 and stated that any claim to multiple dwellings relief was out of time.

14. HMRC issued an enquiry closure notice on 6 December 2016 concluding that the value of the acquisition should be apportioned across the three properties in order to apply the 15% rate to that part of the property which they considered was occupied by a connected person.

15. This decision was withdrawn on 27 November 2018 on the basis that the information regarding how the property should be apportioned was not sufficiently clear to support the decision to charge the higher rate of 15% on that particular portion of the consideration.

16. HMRC contended that, as a result of the withdrawal of their closure notice, the appellant's SDLT return stands as submitted by the appellant and that there is no decision which can be appealed by the appellant.

Appellant's case

17. The appellant did not dispute the withdrawal of HMRC's enquiry notice. The appellant argued that decision which they wished to appeal was HMRC's refusal to accept the late claim for multiple dwellings relief.

18. The appellant did not dispute that the claim was made more than twelve months after the SDLT return was filed. However, the appellant argued that the period allowed for the claim that should have been applied by HMRC was four years and made the following submissions.

19. The twelve month limitation is not in the public domain and HMRC should not be allowed to rely on clauses which are not available to the general tax payer. There is no information on the government website about the relief; the information about multiple dwellings relief on HMRC's website does not include any information about the twelve month limitation for claims. In addition, the appellant's advisers believed at the time that the relief only applied to flats.

20. HMRC have discretion to allow a claim which was made only two months late, and have to comply with their own code of conduct which requires that they act fairly and impartially.

21. HMRC knew from their enquiry that the acquisition related three separate properties and did not advise the appellant that they had overpaid SDLT, nor that there was a twelve month window for making a claim for repayment. The estate agent's sales details had been supplied to HMRC and these state that there are three separate properties and include separate energy performance details for each property. Each of the dwellings is registered separately with the council for council tax purposes. HMRC had accepted during their enquiry that the acquisition was one of three properties.

22. At the outset of the enquiry HMRC stated in correspondence that overpaid SDLT would be refunded, with interest. HMRC have also stated that they will amend obvious errors on a return and so should have corrected the SDLT return to show that it was for multiple dwellings.

23. The claim was properly a claim for overpayment of SDLT and so the appropriate window for the claim is four years.

24. Mr Smith's son, who had been dealing with the property, had died unexpectedly and this had meant that the claim for relief had been submitted late.

25. HMRC's argument that the late claim could not be accepted as a result of the case of *Raftopoulou* [2018] BTC 17 ignores the fact that that case relates to income tax and not SDLT and the claim in that case was made several years late and not only a few months late. None of the case law referred to by HMRC related to multiple dwellings relief.

HMRC's case

26. HMRC submitted as follows:

27. A claim for multiple dwellings relief is required to be made on the SDLT return or by amendment of the return (s58D Finance Act 2003). No claim for relief was made on the return.

28. An amendment of an SDLT return cannot be made more than twelve months after the filing date (para 6, Schedule 10, Finance Act 2003. Neither of the two exceptions to this rule apply in this case).

29. The appellant's SDLT return was filed on 12 February 2015. The claim for multiple dwellings relief was made on 29 April 2016 and was therefore made out of time.

30. Para 35(1) Schedule 10 Finance Act 2003 sets out the decisions against which an appeal may be made. This list does not include a refusal to accept a late claim for multiple dwellings relief. The Court of Appeal decision of *Raftopoulou* makes it clear that where the legislation does not give the Tribunal such a power, a refusal by

HMRC to accept a late claim can only be challenged by way of judicial review rather than by an appeal to the First-tier Tribunal.

31. HMRC submitted that the rejection of the late claim did not amount to an enquiry as it was clear on the face of the letter that HMRC did not accept the claim, so that the decision in *Portland Gas Storage* [2014] UKUT 0270 could not be applied to construe any later correspondence as a closure notice in respect of such an enquiry which could be appealed.

32. In response to the appellant's submission HMRC also submitted that it is not the role of HMRC to advise taxpayers that there is a relief which they could claim; it is for the taxpayer to decide whether they will claim a particular relief. The appellant was advised by a solicitor and that it was for the appellant and their adviser to decide whether to claim relief. Until a claim for multiple dwellings relief was made, there would have been no reason for HMRC to consider whether the conditions for the relief were satisfied.

33. Further, in this particular case, the SDLT return was completed on the basis that there was a single property. The subject matter of the transaction was described on the contract as "all that freehold property known as Shafford Barn" and was registered at the Land Registry as a single title. The sales details advertise the property with a single address. Although HMRC accepted later in the enquiry that there were three dwellings at the property, it was submitted that it was not unreasonable for HMRC to have accepted the property details as accurate when the enquiry was opened.

34. Information about multiple dwellings relief is provided within the public domain, as is the relevant legislation. SDLT guidance on the relief is provided on HMRC's website and the examples in that guidance relate to acquisitions of multiple houses, so that it would be clear to anyone looking at the guidance that it is not restricted to acquisitions of flats. Guidance on the completion of SDLT returns also sets out how to amend the return and the time limit for making such amendments.

35. A claim for multiple dwellings relief is not a claim for overpayment of SDLT. No claim for overpaid SDLT has been made by the appellant. Even if a claim for overpayment of SDLT were to have been made by the appellant, HMRC are not liable to give effect to the claim where the overpayment arises as a result of a failure to make an election (para 34A(2) Schedule Finance Act 2003).

36. HMRC noted further, although they had sympathy with Mr Smith's loss of his son, his unexpected death was on 20 March 2016, some time after the time limit for making amendments to the SDLT return.

Decision

37. The decision for this Tribunal was the preliminary issue as to whether this Tribunal has jurisdiction to hear an appeal against HMRC's refusal to accept a late claim for multiple dwellings relief. HMRC put forward arguments in respect of this but in addition other arguments put forward by the parties treated the hearing as more akin to a substantive hearing of the appellant's grounds of appeal.

38. To consider whether the Tribunal has jurisdiction, I need to first consider whether the claim was in fact made late and secondly, if the claim was made late, to consider whether the legislation or case law provides appeal rights in respect of a refusal to allow the claim to be made late.

Was the multiple dwellings relief claim made late?

39. s58D(2) Finance Act 2003 states that "Any [multiple dwellings] relief … must be claimed in a land transaction return or an amendment of such a return."

40. Paragraph 6(3), Schedule 10, Finance Act 2003 states that "an amendment [to an SDLT return] may not be made more than twelve months after the filing date".

41. There are two exceptions to paragraph 6(3): one relates to SDLT returns submitted before 17 July 2013, the other refers to claims made under provisions in Finance Act 2019. Neither exception can apply in this case.

42. It was not disputed that the SDLT return was filed on 12 February 2015 and that the claim for multiple dwellings relief was made on 26 April 2016.

43. The claim for multiple dwellings relief was clearly made out of time as it was made more than twelve months after the filing date.

Could the claim be treated as a claim for overpayment of SDLT?

44. The appellant argued that the claim should be treated as being an overpayment claim, for which the time limit is four years. HMRC argued that no claim for overpayment was made and that, even if the claim for multiple dwellings relief could be considered to be a claim for overpayment, the relevant legislation provisions are such that they would not be liable to give effect to it.

45. Paragraph 34 Schedule 10, Finance Act 2003, permits a person who has "paid an amount by way of tax but believes that the tax was not due" to make a claim to HMRC for repayment of that amount.

46. No specific claim for overpayment was made by the appellant, and I do not consider that a claim for multiple dwellings relief can be interpreted as also or in the alternative being a claim under the provisions dealing with claims for overpaid SDLT. In correspondence the appellant does ask HMRC to confirm that there has been an overpayment of SDLT, but only in reference to the claim made earlier by the solicitor for multiple dwellings relief. I find therefore that there was no claim for overpayment of SDLT under paragraph 34 of Schedule 10, Finance Act 2003.

47. Paragraph 34A of the same Schedule 10 provides that HMRC are not liable to give effect to a claim under paragraph 34 where the amount paid is excessive was a result of failing to make a claim (inter alia).

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.

Whether the Tribunal has jurisdiction to hear an appeal against HMRC's refusal to accept the late claim

49. The appellant's submissions on this point were that the *Raftopoulou* case is concerned with income tax and so is not relevant to SDLT and that the amendment in *Portland Gas Storage* was made years after the SDLT return was filed and so is not relevant in a case where the delay was a matter of months.

50. HMRC submitted that the decision to refuse to accept the late claim does not fall within the range of appealable decisions in respect of SDLT and so the Tribunal does not have jurisdiction to hear the matter, following *Raftopoulou*. They submitted that the principle in *Raftopoulou* was of general application as to Tribunal jurisdiction and not confined to income tax.

51. Paragraph 35(1) Schedule 10 Finance Act 2003 sets out the decisions against which an appeal may be brought, being:

> (a) an amendment of a self-assessment under paragraph 17 (amendment by Revenue during enquiry to prevent loss of tax),
>
> (b) a conclusion stated or amendment made by a closure notice,
>
> (c) a discovery assessment,
>
> (d) an assessment under paragraph 29 (assessment to recover excessive repayment), or
>
> (e) a Revenue determination under paragraph 25 (determination of tax chargeable if no return delivered)

52. As the decision is clearly not within (a), (c), (d) or (e), the question is whether the decision can be regarded as a conclusion stated by an enquiry closure notice. The case of *Portland Gas Storage* (which related to an appeal against a refusal by HMRC to allow a late amendment to an SDLT return) concluded that an enquiry may be regarded as having commenced even where no formal notice of enquiry has been given, if HMRC's actions can be regarded as demonstrating that they have opened an enquiry into a matter (§47). In the case of *Portland Gas Storage*, HMRC had sought policy advice and took steps to examine the claim made (see §46 of the decision).

53. In this case, it is clear from the correspondence between HMRC and the appellant (and their adviser) that HMRC did not take any actions which would demonstrate that they had opened an enquiry into the late claim for multiple dwellings relief. They did not have to go, and did not go, beyond the face of the letters from the appellant and their adviser to respond and, as stated in *Portland Gas Storage* at §44, such a response is not sufficient to amount to an enquiry for which there could be a closure notice. The appellant submitted that the length of the delay in making a claim in *Portland Gas* Storage was considerably longer than in this case. However, I

consider that it is clear that the decision in *Portland Gas Storage* was not related to the length of time which had passed before the claim was made and so I do not consider that there is any reason to distinguish it when considering its application to this case, where the claim was made months late rather than years late.

54. In *Raftopoulou*, the Court of Appeal stated (§40) that "in common with the view of the [Upper-tier Tribunal] in *Portland Gas Storage*, a rejection by HMRC of a claim on the grounds that it is out of time, by reference to no more than the claim itself and a calculation of the applicable time limit, does not involve any use by HMRC of their statutory powers to enquire into the claim nor does it constitute notice of an intention to do so".

55. The appellant submitted that *Raftopoulou* is not relevant to this case because it relates to income tax. However, I consider that it is clear that the principles set out in the decision in *Raftopoulou* can and should be applied when considering the interpretation of paragraph 35(1) Schedule 10, Finance Act 2003. Indeed, as noted above, the Court of Appeal referred with approval to *Portland Gas Storage* in reaching their decision.

56. I find that HMRC's response in each piece of correspondence following the solicitor's letter of 29 April 2016 was a statement of fact that the claim was made out of time and not a conclusion to an enquiry as to whether the claim was out of time.

57. I find that the claim was made out of time and that there are no circumstances in which the refusal to accept the late claim for multiple dwellings relief could be considered to be a conclusion stated by a closure notice in respect of an enquiry into that late claim. The refusal is not, therefore, one of the decisions which may be appealed under paragraph 35(1) of Schedule 10.

58. It follows, therefore, that I find that this Tribunal does not have jurisdiction to hear an appeal against HMRC's refusal to allow the late claim for multiple dwellings relief and the appeal is therefore dismissed.

Submissions on other points

59. The appellant made a number of submissions on other points as if the hearing was a full hearing of the appeal and, as HMRC replied to those submissions, I have considered these briefly below to properly reflect the matters put forward by the parties at the hearing.

Could HMRC have used their discretion to allow the claim to be made late

60. The appellant argued that HMRC should have used their discretion to allow the claim to be made late as it was not particularly late and was also made late because of the death of Mr Smith's son.

61. There is no provision in the legislation for HMRC discretion to allow a claim to be made late. The appeal rights in paragraph 35(1) of Schedule 10 do not include any right of appeal against a failure by HMRC to exercise discretion generally. Following the case of *Hok* [2012] UKUT 363 (TCC) it is clear that "the First-tier Tribunal's

jurisdiction [is limited] to those functions conferred on it by statute. It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC's conduct".

62. Accordingly, although the Tribunal has sympathy with Mr Smith's loss, this Tribunal would have no jurisdiction to hear an appeal on the basis that HMRC should have exercised a free-standing discretion to allow the claim to be made late. Such appeals can only be made by way of judicial review.

Are HMRC required to advise a taxpayer that a relief is available?

63. The appellant argued that HMRC should have realised that multiple dwellings relief was available, from the marketing material sent to them before the twelve month period expired, and advised the appellant that the relief was available. They also argued that HMRC's own correspondence confirmed that HMRC would correct overpayments and repay overpaid SDLT, and that they would amend obvious errors on the return.

64. As with the question of discretion, there is no provision in the legislation which allows this Tribunal to consider whether HMRC should have reviewed material to determine whether the appellant was entitled to an unclaimed relief or whether their correspondence should be construed as promising to do so. Accordingly, this Tribunal would have no jurisdiction to hear an appeal on that basis. That would, again, be a matter for judicial review.

Whether HMRC can rely upon clauses which are not in the public domain

65. The appellant argued that the material cited by HMRC was not in the public domain and not on HMRC's website and so HMRC should not be able to rely upon it.

66. This is not a sustainable argument. As set out above, the relevant time limits and mechanism for making a claim for multiple dwellings relief are set down in legislation. All such legislation is publicly available. The fact that the appellant and his advisers were not aware of the availability of the relief until sometime after the time limit for claiming the relief had passed does not prevent HMRC from being able to rely on the legislation.

Decision

67. This Tribunal has no jurisdiction to hear an appeal against HMRC's refusal to allow a late claim for multiple dwellings relief and, accordingly, the appeal is dismissed.

68. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

ANNE FAIRPO

TRIBUNAL JUDGE

RELEASE DATE: 31 JANUARY 2020