Neutral Citation: [2024] UKFTT 871 (TC)

Case Number: TC09301

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2023/00080

SDLT - higher threshold interest – application of relief – non-qualifying individual occupying property

Heard on: 10 June 2024
Judgment date: 26 September 2024

Before

TRIBUNAL JUDGE MCGREGOR
NOEL BARRETT

Between

GMR PROPERTY LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Meganathan Gurunathan

For the Respondents: Louise Hartstill, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal against a closure notice issued by the Respondents under Paragraph 23 Schedule 10 to the Finance Act 2003 (FA 2003), which concluded that the higher 15% rate of stamp duty land tax ("SDLT") should have been paid on the purchase of a property, increasing the amount of SDLT by £77,500 due from GMR Property Ltd ("GMR").

2. With the consent of the parties, the form of the hearing was V (video) by Tribunal video hearing system. A face to face hearing was not held because a remote hearing was appropriate. The documents to which we were referred are a bundle of 200 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 Gurunathan at the hearing. Further findings of fact are found in the discussion below.

5. Mr Gurunathan (MG) and his wife, Rajavallinayaki Meganathan (RM) are both directors and 50% shareholders of GMR.

6. The property in question, "Rosehill", had been MG and RM's home for a number of years. They decided to move into a nicer area and found a house, "Silverwood".

7. GMR was a vehicle through which MG and RM ran a property rental business.

8. GMR bought Rosehill from MG and RM on 18 June 2021.

9. An SDLT return was submitted on the same date and an amount of £35,000 was paid. This was based on the standard residential rates of SDLT.

10. HMRC opened an enquiry into the SDLT return on 1 December 2021.

11. On 7 February 2022, GMR's agent submitted to HMRC a tenancy agreement, renting Rosehill to MG and RM for a period of 12 months from 18 June 2021.

12. On 15 June 2022, HMRC issued a closure notice, increasing the self-assessment by £77,500

13. On 5 July 2022 GMR appealed the closure notice.

14. On 11 August 2022, HMRC issued their view of the matter letter.

15. On 9 December 2022, HMRC issued their review conclusion letter, upholding the closure notice.

16. On 6 January 2023, the Appellant notified its appeal to this Tribunal.

LAW

17. 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").

18. 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."

19. 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…."

20. 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…."

21. 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."

22. 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…"

23. Section 1122 CTA 2010 provides that a company is connected with another person if that person has control of the company or a person, together with persons with whom they are connected, controls the company. A person is connected with their spouse.

24. Paragraph 5B of Schedule 4A provides for an exclusion from the higher rates for trades involving making a dwelling available to the public. It provides as follows:

> (1) Paragraph 3 does not apply to a chargeable transaction so far as its subject-matter consists of a higher threshold interest in relation to which the conditions in sub-paragraph (2) are met.
>
> (2) The conditions are that–
>
> (a) the higher threshold interest is acquired with the intention that it will be exploited as a source of income in the course of a qualifying trade, and
>
> (b) reasonable commercial plans have been formulated to carry out that intention without delay (except so far as delay may be justified by commercial considerations or cannot be avoided).
>
> 5B(3) "Qualifying trade" , in relation to a higher threshold interest, means a trade that–
>
> (a) is carried on on a commercial basis and with a view to profit, and
>
> (b) involves, in its normal course, offering the public the opportunity to make use of, stay in or otherwise enjoy the dwelling as customers of the trade on at least 28 days in any calendar year.
>
> 5B(4) For the purposes of sub-paragraph (3), persons are not considered to have the opportunity to make use of, stay in or otherwise enjoy a dwelling unless the areas that they have the opportunity to make use of, stay in or otherwise enjoy include a significant part of the interior of the dwelling.
>
> 5B(5) The size (relative to the size of the whole dwelling), nature and function of any relevant area or areas in a dwelling are taken into account in determining whether they form a significant part of the interior of the dwelling.

25. 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.

26. 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

27. GMR's grounds of appeal in the notice of appeal were that the higher rate of SDLT did not apply, because GMR could rely on the following exemptions:

(1) The letting of property for rent on a commercial basis;

(2) Making the property available to the public for at least 28 days a year;

28. GMR also stated in their notice of appeal that MG and RM were not living in the property.

29. In a "statement of case" submitted to the Tribunal, GMR stated that:

(1) MG and RM could not move out of Rosehill for two reasons:

(a) GMR could not find a tenant for a few months and the property could not be left empty; and

(b) Some building works were being carried out on Silverwood;

(2) There was not a tenancy agreement with MG and RM because Rosehill was, throughout that time, available for letting on a commercial basis;

(3) GMR found a tenant within a few months and it is let independently;

(4) RM suffers from a number of health problems, including sensitivity to dust, and therefore was unable to move into Silverwood until it was habitable.

30. At the hearing, MG submitted that:

(1) There was no intention to do anything wrong, the intention was to keep things smooth;

(2) MG and RM's intention was simply to find a house in a nicer area to live in and for GMR to rent out Rosehill;

(3) MG conceded that he had made some mistakes on papers, dates and addresses;

(4) Rosehill was in a risky area, so it was necessary to have regular activity at the address in order to prevent anti-social behaviour such as squatting or vandalism at the property. As a result, MG had slept over at the property 3-4 nights a week to protect it, while his wife and children slept at Silverwood;

(5) The family had moved all of their things out of Rosehill and into Silverwood on 18 June 2021;

(6) Silverwood needed quite a bit of work doing to it before it was completely ready for occupation;

(7) When the dust got too much at Silverwood, they would swap around and RM would sleep at Rosehill until the dust had settled;

(8) They were looking for a tenant and found one via word of mouth. It was rented out on a commercial basis for over 60 days in the first year, which exceeds the 28 days required under the legislation.

31. HMRC's contentions were that:

(1) The enquiry was validly opened prior to the final date for enquiry (which would have been 2 April 2022);

(2) the acquisition of the property was a transaction to which the higher rate of 15% should be applied, because:

(a) The freehold interest acquired was a "higher threshold interest" as it was an interest in a single dwelling to which consideration of £750,000 is attributable and therefore the transaction was a "high-value residential transaction";

(b) The purchaser was a company;

(c) The exclusions from the higher rate do not apply.

32. The exclusion under paragraph 5B of Schedule 4A to FA 2003 is not available because GMR has not shown that it is carrying on a qualifying trade and making the property available to the public for 28 days in the year. HMRC also contend that rental on an assured shorthold tenancy is not within the scope of the 5B exclusion.

33. The exclusion in paragraph 5(1)(a) for being a source of rent also does not apply because it is excluded under paragraph 5(2) on the basis that GMR intended to permit non-qualifying individuals to occupy the property, and GM and RM are non-qualifying individuals by virtue of being connected to the company.

DISCUSSION

34. 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.

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

36. Therefore the closure notice was validly issued.

37. 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 GMR.

38. 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.

39. The first requirement for the relief is that the property was acquired "exclusively" for one of a specified set of purposes. Those purposes include:

(1) "exploitation as a source of rents …in the course of a qualifying property rental business"; and

(2) Trades involving making a dwelling available to the public.

40. There did not appear to be a dispute that the long-term intention of GMR was to rent out Rosehill on a commercial basis to residential tenants.

41. However, there is a statutory carve out. A property cannot be treated as acquired exclusively for the purposes of such rental if "it is intended that a non-qualifying individual will be permitted to occupy a dwelling on the land".

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

43. We find that MG and RM were both non-qualifying individuals because they were connected to GMR, pursuant to section 1122(3)(b) of CTA 2010, because:

(1) MG and RM are connected to each other, by virtue of being married (section 1122(5)(a) of CTA 2010); and

(2) Together they control the company through their 50% holding each.

44. We must then answer two questions:

(1) were MG and/or RM "permitted to occupy" the dwelling at Rosehill; and

(2) if yes, was it intended at the time of the purchase that they would be so permitted?

45. The factual circumstances surrounding the use of Rosehill between 18 June 2021 and the date of rental to a 3rd party with effect from 1 April 2022 are far from clear.

46. There are a number of conflicts within the various submissions that have been made by the Appellant:

(1) The original assertion was that it was rented out on a commercial basis;

(2) Then it was argued that RM had had to stay in the property periodically during this period due to her health; and

(3) Finally, he argued that he needed to stay there regularly in order to protect the property.

47. These conflicts are exacerbated by the existence of a tenancy agreement, dated 18 December 2021 which provides that GMR rents the house at Rosehill to MG and RM with effect from that date for a period of 12 months.

48. In his oral evidence, MG stated that this document was not signed on 18 June 2021 as set out in the document, but was signed around the time that HMRC asked to see a tenancy agreement and backdated to that date because that was when he thought it needed to be effective from.

49. He also stated that he was paying a commercial rent of £1500 with effect from 18 June 2021, but it was being set against his director's loan account. However, he stated that this was not being deducted monthly, but would be settled when the accounts were sorted at the end of the year.

50. That tenancy agreement still had several months to run when the 3rd party tenant moved in.

51. Further, MG and GMR's agent sent a letter to HMRC which stated that MG and RM were residing at Rosehill. The date of the letter is February 2021, but all parties agreed that this must have been a mistake and that it was sent in February 2022 in response to HMRC's enquiry. MG submitted that the use of Rosehill rather than Silverwood as their address was a mistake on his agent's side.

52. We were therefore given a number of different permutations as to the use and occupation of Rosehill in the relevant period. However, all of these variations involve MG and/or RM being "permitted to occupy" the house – it doesn't matter whether they were permitted to occupy it because they were renting it formally under a tenancy agreement, were occupying it to keep it from appearing empty or occupying it to protect RM's health. All of these entail permitted occupation of the house.

53. The second question is whether GMR had an intention to allow such occupation at the date of the transaction. As a company entirely owned and controlled by MG and RM, the intentions of the parties are largely indistinguishable.

54. HMRC accepted that GMR had a long-term intention of renting out the property on a commercial basis, but stated that there was an additional intention of allowing non-qualifying individuals to occupy the property.

55. There was no evidence of a break in occupation nor of an immediate intention to find a tenant. On the balance of probabilities, we find that the company had an intention to permit MG and RM to occupy the property from 18 June 2021.

56. On that basis, GMR cannot rely on the relief from the higher rate of SDLT on the basis that it was available for rental.

57. With regards to the "available to the public" exclusion, there was a difference of opinion between the parties about what this was aimed at. GMR submitted that being available for rental under an assured shorthold tenancy for at least 28 days was enough to meet this requirement.

58. HMRC, by contrast, argued that this exclusion was for an entirely different type of venture, such as the opening of a stately home for public visitors. They submitted that, while the legislation does not make that explicit, the fact that there is a requirement for a trade, rather than a property rental business and that there is a separate exclusion for property rental businesses, means that it is intended to be different.

59. The key requirements are that the purchaser is carrying on a trade on a commercial basis with a view to a profit and that this trade involves offering the public the opportunity to make use of, stay in or otherwise enjoy at least a significant part of the interior of the dwelling as customers of that trade.

60. We would agree with HMRC that allowing access to a stately home could meet these requirements, provided it was done a commercial, trading basis and met the other elements of the condition. However, we do not consider that it is limited to such arrangements. Running a hotel or using a dwelling for running craft workshops could equally, provided the other conditions are met, fall within this category. However, we do agree that it is not intended to encompass renting out on an assured shorthold tenancy simply because that exceeds 28 days. We heard no submissions and saw no evidence from GMR to support a submission that it was conducting a trade, rather than a property rental business.

61. We therefore find that the requirements of the exclusion in paragraph 5B were not met.

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 £77,500.

63. For the reasons set out above, we dismiss GMR's appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

64. 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 MCREGOR
TRIBUNAL JUDGE

Release date: 26th SEPTEMBER 2024