[2020] UKFTT 0116 (TC)

TC07609

Appeal number: TC/2018/05350

STAMP DUTY LAND TAX – whether relief available under Para 5B Sch 4A Finance Act 2003 – held yes – whether property mixed use or wholly residential – held solely residential – whether penalties should be applied for deliberate or careless error – held no penalty because appellant took reasonable care to avoid any inaccuracy

FIRST-TIER TRIBUNAL
TAX CHAMBER

PENSFOLD **Appellant**

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT
MICHAEL BELL

Sitting in public at Taylor House, London on 31 October 2019

Graham Callard, counsel, instructed by Cornerstone Tax, for the Appellant

Philip Oborne, officer of HMRC, for the Respondents

DECISION

1. This was an appeal against HMRC's decision, contained in a closure notice and penalty notice dated 10 April 2018, to charge additional SDLT of £293,000 and penalties of £112,805 in respect of the appellant's purchase of Pensfold Farm, Pensfold Lane, Bucks Green, Surrey ("the Farm") on 12 January 2017.

THE FACTS

2. We received a witness statements and oral evidence from Ian Dixon, who acted as the estate and development manager, and potentially the eventual operations director, of the projected development at Pensfold Farm, and Marco Spano, tax adviser to Pensfold. We also received oral evidence from Simon Paget-Brown, a UK solicitor, a long term family friend of the owners of Pensfold and a current director of Pensfold, although he was not a director of Pensfold at the time of its acquisition of Pensfold Farm. We found all witnesses to be reliable and credible witnesses.

3. We did not however receive any direct evidence from any of the directors or shareholders of Pensfold at the time of the purchase, which was not satisfactory.

4. We also received a significant bundle of documents, and from these documents and the witness evidence received, we make the following findings of fact.

5. Pensfold is a limited company registered in the Cayman Islands. We received no evidence as to the ownership or the directors of this company.

6. In late 2016 Mr Dixon was approached by a long term client, who is a member of the family which owns Pensfold, with a view to his taking on a project to develop the property at Pensfold Farm into an eco/agritourism venture.

7. On 12 January 2017 Pensfold acquired the Farm, including 27 acres of land, for £2,825,000 from Marcus and Sally Ashworth.

Procedural Facts

8. The SDLT return submitted on behalf of Pensfold by Morrisons solicitors said that the property was non-residential and also claimed relief from the 15% higher rate of SDLT (known as Code 35). The SDLT declared was £130,750.

9. On 12 May 2017 HMRC opened an enquiry into the return, within the permitted nine month timeframe for opening an enquiry and, after an extensive exchange of correspondence and meetings HMRC issued a closure notice, on 10 April 2018, on the basis that the whole transaction involved residential property and that the higher rate of SDLT of 15% was chargeable on the whole purchase price. This increased the SDLT due to £423,750. On the same day HMRC issued a penalty notice charging a penalty of £112,805, which was 38.5% of the additional SDLT due.

10. Appeals against both the closure notice and the penalty assessment were lodged by Pensfold's accountants on 8 and 10 May 2018. A request for a statutory review was made on 5 July and the reviewer upheld the original decisions.

11. An appeal to the tribunal was lodged on 3 August 2018.

Facts relating to the Acquisition and Development Project

12. There was a delay in commencing the project to develop the Farm because of the need to study the possibilities and the state of the underlying land. There was however no need to apply for planning permission because all the intended development fell within the rules for permitted development.

13. At the outset, Mr Dixon set up a limited UK company, Pensfold Farm Ltd, of which he was the sole director and shareholder, to act as a bare trustee in respect of all the payments and receipts due from and to Pensfold, thus avoiding the need for Mr Dixon to refer to the Cayman Islands for regular income and outgoings. A bank account had been opened in the company's name with Metro Bank and the bank statements showed regular income and outgoings.

14. There was considerable confusion as to the true status of this company because some documents showed it as being active and others as being dormant. Mr Dixon was not closely involved with the formal accounts of this company and was therefore unclear as to its true status. In addition, Mr Paget-Brown indicated that one of the reasons for his appointment was to sort out such issues. We eventually accepted that the company was dormant and that it was acting as a bare trustee in respect of the income and outgoings of the Farm.

15. Mr Dixon said that the intention behind the acquisition, as conveyed to him by members of the family who owned Pensfold, was to develop the Farm into an eco/agritourism business by adding a tennis court and changing facilities in an existing barn, the creation of a new lake, the introduction of alpacas, the introduction of rare breeds of sheep, pigs and cattle plus facilities for ponies and turkeys and an entertainment barn.

16. We were shown extensive plans detailing this development. These set out the following plans in addition to the new features set out above:

(1) The Main Farm house had been extensively renovated by its previous occupiers and with some minor alterations could be made ready to provide short term accommodation to paying guests.

(2) It was hoped that the property would be in a position by mid-August 2017, to accept paying guests from the general public.

(3) To promote the offering, a website was currently under construction, and domain names had been secured and associations have been explored.

(4) The whole of the property would be available for significantly in excess of 28 days per annum.

(5) In addition to the general public, discussions had been held with two children's activity groups (www.littleforestfolk.com, www.ubuntuadv.com)

(6) It was further expected that the company would explore the opportunity to host wedding receptions and fitness retreats.

17. The works envisaged would have required extensive drainage works but this had not been commenced by the time the project was suspended, as explained below.

18. When HMRC started to enquire into the SDLT position of the purchase this caused concern amongst the owners of Pensfold because it might impose an addition financial burden which had not been factored into the original planning. The project was therefore put on hold until this aspect had been resolved. Mr Paget-Brown explained that although he had only recently been appointed a director of Pensfold, in order to sort things out, he had known the family behind Pensfold for most of his life and he was aware that there had been significant discussion within the family as to whether or not they should proceed with this investment. Therefore, when the financial position became less certain because of HMRC's enquiries, the decision was made to suspend the development activity. This was clearly hearsay because we received no direct evidence from Pensfold but we accepted it as a reasonable explanation of the delay.

19. Although the main development project was put on hold a decision was made to prepare the main building for short term letting, in order to offset the continuing overheads of running the estate. The building was therefore furnished with some furniture already owned by a person referred to as Tessa, who was the long term client of Mr Dixon referred to above. This enabled a number of short term lets over the next few months.

20. We were assured by both Mr Dixon and Mr Paget-Brown that none of those letting the property were connected to the owners of Pensfold and HMRC did not challenge these statements which we therefore accept as factually correct.

21. We were also shown a letter from R Harrison and Sons, of Dedisham Farm, Rudgewick, a neighbouring farm. This stated that they used the land for grazing from April to October every year and maintained the land in the intervening winter months. They stated that since 2010 the land had had three different owners and that they had continued to use the land throughout this period. They also stated that they had continued to use the land for grazing since the acquisition by Pensfold.

22. There was however no formal grazing agreement in place for the whole of any year and that the grazing had taken place in accordance with a traditional gentleman's agreement. There was no mention of grazing rights in the brochure advertising the sale of the Farm and there was nothing in the sale and purchase agreement which stated that the purchase was subject to existing grazing rights. Indeed there was a potential conflict if there had been such an arrangement because it was the intention of the new owners that the farm should introduce its own rare breed cattle which would have conflicted with the need of Harrisons.

THE LAW

23. Section 55 Finance Act 2003 sets out the rates of SDLT chargeable for residential and non-residential property respectively as below:

Residential Properties

Consideration up to £125,000	0%
Consideration up to £250,000	2%
Consideration up to £925,000	5%
Consideration up to £1,500,000	10%
Consideration above £1,500,000	12%

Non –Residential Properties

Consideration up to £150,000	0%
Consideration up to £250,000	2%
Consideration above £250,000	5%

24. Section 116(1) FA 2003 defines residential property as below:

> "(1) In this Part "residential property" means—
>
> (a) a building that is used or suitable for use as a dwelling, or is in the process of being constructed or adapted for such use, and
>
> (b) land that is or forms part of the garden or grounds of a building within paragraph (a) (including any building or structure on such land), or
>
> (c) an interest in or right over land that subsists for the benefit of a building within paragraph (a) or of land within paragraph (b); and "non-residential property" means any property that is not residential property."

25. Schedule 4A FA 2003 was introduced to impose a higher rate of SDLT, 15%, on purchases by limited companies of an interest in a single dwelling costing more than £500,000.

26. Importantly however various reliefs are available against this higher rate for purchases by limited companies which, so far as is relevant for this appeal, are set out in para 5B Sch 4A FA 2003, as below:

"**Trades involving making a dwelling available to the public**

5B (1) Paragraph 3 [which imposes the higher rate] 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).

(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.

(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.

(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."

DISCUSSION

27. There are two questions for the tribunal to determine:

(1) Is relief available under para 5B, and

(2) Is the property a wholly residential property or is it "mixed use".

Relief under para 5B

28. Paragraph 5B sets out a number of conditions which must be fulfilled before relief can be granted:

(1) Was the property acquired "with the intention that it will be exploited as a source of income in the course of a qualifying trade" (para 5B(2)(a)), and

(2) Have "reasonable commercial plans been formulated to carry out that intention without delay (except so far as delay may be justified by commercial considerations or cannot be avoided)" (para 5B(2)(b)).

29. Qualifying trade is then further defined as follows:

(1) It is "carried on on a commercial basis and with a view to profit" (para 5B(3)(a)), and

(2) It "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." (para 5B(3)(b)).

30. The claim for relief under para 5B was made by the appellant on the submission of the SDLT1 return by Morrisons (solicitors acting on behalf of the appellant) and therefore it is necessary to consider if the conditions for the relief under para 5B were met at the relevant time.

31. Importantly, HMRC accepted that the property was acquired **with the intention** of setting up a qualifying trade. This was helpful to the tribunal because we had received no direct evidence of this intention from Pensfold itself, although both Mr Dixon and Mr Paget-Brown had confirmed that this was the case from their conversations with the owners of Pensfold.

32. HMRC submitted however that the property did not qualify for relief because:

(1) The short term letting which took place did not form part of the original intentions of Pensfold and did not therefore count towards the 28 days requirement.

(2) The plans must be available on the day on which the property is acquired.

(3) The delay to the start of the required works is not acceptable. Specifically, HMRC do not accept that the opening of their enquiry should constitute a good reason for the project being put on hold.

33. Addressing these issues in turn, we agree that the short term letting which took place was not part of the plans for the project. The short term letting was introduced as a stop-gap measure, to obtain income from the property while the main project had been put on hold. However we do not believe that actual letting and actual making available to the public is a condition of the relief being available.

34. HMRC have accepted that the purchase was made **with the intention** that it will be exploited **in the course of a qualifying trade**. There is nothing in this part of the legislation which requires that the intended trade must be carried on at the time of the claim, or indeed at any time. In our view, the "qualifying trade" for the purposes of para 5B(3) can only mean the **intended** trade. There is no requirement for that trade to have actually been carried on or any requirement that the property is in actual fact made available for not less than 28 days in a calendar year.

35. What is important is the **intention**, and the plans which we were shown for the trade which was envisaged clearly show that the intention was that the property would be available to the public "on at least 28 days in any calendar year".

36. Therefore, even though the property was not made available to the public as part of the original plans, it was the intention that it would be made so available and this is sufficient in our view to fulfil the condition set out in para 5B(2)(a).

37. We must then address HMRC's argument that the plans must be available on the day the purchase is made, which essentially brings in the requirement set out in para 5B(2)(b) that "**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)."

38. We have no first hand evidence as to the precise plans which were in the mind of Pensfold as at the date of purchase but the use of the word "have" in para 5B(2)(b) must in our view mean that **reasonable** plans must have been made before the purchase.

39. In our view, however, this does not mean that the detailed plans which we were shown had to have been available at the date of purchase. What is required is **reasonable** commercial plans. Indeed it would be wholly unrealistic to expect detailed plans to be in place before the purchasers had had the opportunity to examine the property in great detail. The legislation only requires **reasonable** commercial plans to have been in place at the time of the purchase.

40. We do not of course have any direct evidence as to the status of Pensfold's plans at the date of purchase, but we do have Mr Dixon's evidence, which is that he was given sufficient detail as to what Pensfold had in mind that he was prepared to undertake the project. We also have clear statements that Pensfold always intended to develop an eco/agritourism business, and indeed HMRC have conceded this point.

41. In our view this is sufficient to meet the criterion of having reasonable commercial plans in place at the time of purchase. The detailed plans, which were prepared subsequently, were not in our view required to be in place at the time of purchase.

42. There was then a significant delay in implementing these plans, which HMRC argue was too long.

43. The legislation requires that "reasonable commercial plans have been formulated (prior to the purchase) to carry out that intention (to exploit the property as a source of income in the course of a qualifying trade) without delay (except so far as delay may be justified by commercial considerations or cannot be avoided)."

44. HMRC have interpreted this requirement to mean that the actual project must be carried out without delay, but again we cannot find those precise words in the legislation. What did happen was that Pensfold had already lined up Mr Dixon to prepare detailed plans, before the purchase, and they were therefore in a position to

implement their initial plans at the time of purchase, subject to the preparation of detailed plans following a full assessment of the property.

45. There was a delay in the actual implementation and indeed the project has still not been commenced. We must therefore consider whether or not this delay might be "justified by commercial considerations or cannot be avoided" or indeed if the delay before the project was actually implemented is relevant.

46. We cannot find anything in the legislation which requires the project actually to be implemented in order to qualify for the relief. What is important is that there are reasonable plans for the project to be implemented without delay, not that the project is actually so implemented. Nevertheless, for the sake of completeness and in case it is relevant on any subsequent appeal, we will address the matter of the delay in implementing the project below.

47. The first delay, as explained by Mr Dixon, was required for him to study what was realistically possible and to draw up detailed plans for the project. Mr Dixon estimated that this lasted until August/September 2017. We do not consider that delay unreasonable, and, indeed, it must have been envisaged by the owners and directors of Pensfold at the time of purchase.

48. The second, more substantial, delay occurred when Pensfold decided to suspend work on the project when HMRC indicated that they were going to look into the SDLT position, leading to possible additional costs of nearly £300,000, excluding the penalties of £112,000. HMRC say that they do not agree that this is an acceptable reason for Pensfold suspending the project.

49. We do not agree with this. We heard from Mr Paget-Brown that there had been disagreements within the family owning Pensfold as to whether or not they should make this investment in the first place and it seems eminently reasonable to us that if the project was then faced with potential additional costs of £300,000, this might well have caused the owners of Pensfold to call a temporary halt to the project until this uncertainty had been removed.

50. This is not of course conclusive evidence, based as it is on what can only be taken as hearsay evidence, but HMRC were unable to suggest any alternative explanation and it sounds reasonable to us and we therefore accept it as factually correct.

51. We therefore find that although the project was delayed, this was justified by commercial considerations.

52. Therefore, in our view, at the time of making the claim for relief, the conditions in para 5B(2) were met. The tribunal was not asked to consider whether para 5H (withdrawal of relief claimed under para 5B) might apply, and we did not hear submissions from the parties in this regard, but this would seem to be the course of action anticipated by the structure of the legislation in cases where the project did not subsequently take place.

Whether or not Mixed Use

53. Pensfold has claimed that the property was subject to mixed use, as defined in s116(1) FA 2003. This is on the basis that the land was subject to a grazing agreement with Harrison & Sons, who had been using the land for grazing for some years, every year, from April to October.

54. However, at the time of purchase, the land was not being grazed. The marketing brochure advertising the Farm for sale made no mention of the sale being subject to grazing rights, and the sale and purchase contract likewise made no mention of the property being subject to grazing rights. Indeed had the land, all 27 acres of it, been subject to grazing rights that would have made the plans to develop a rare breeds farm rather difficult to implement.

55. We must therefore come to the conclusion that at the time of purchase the property was not mixed use but was wholly residential.

Penalties

56. HMRC have assessed Pensfold to penalties on the basis that any error was a deliberate error.

57. The legislation regarding penalties is set out in Sch 24 Finance Act 2007. In particular para 3 Sch 24 sets out the degrees of culpability for the purposes of raising an assessment to penalties.

> "(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—
>
> (a) "careless" if the inaccuracy is due to failure by P to take reasonable care,
>
> (b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
>
> (c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).
>
> (2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P—
>
> (a) discovered the inaccuracy at some later time, and
>
> (b) did not take reasonable steps to inform HMRC.
>
> (3) Paragraph 47 of Schedule 19 to FA 2016 (special measures for persistently unco-operative large businesses) provides for certain inaccuracies to be treated, for the purposes of this Schedule, as being due to a failure by P to take reasonable care."

58. Perhaps of more direct relevance is para 18 of Sch 24, which provides:

> "(1) P is liable under paragraph 1(1)(a) where a document which contains a careless inaccuracy (within the meaning of paragraph 3) is given to HMRC on P's behalf.
>
> (2) In paragraph 2(1)(b) and (2)(a) a reference to P includes a reference to a person who acts on P's behalf in relation to tax.
>
> (3) Despite sub-paragraphs (1) and (2), P is not liable to a penalty under paragraph 1 or 2 in respect of anything done or omitted by P's agent where P satisfies HMRC that P took reasonable care to avoid inaccuracy (in relation to paragraph 1) or unreasonable failure (in relation to paragraph 2).
>
> (4) In paragraph 3(1)(a) (whether in its application to a document given by P or, by virtue of sub-paragraph (1) above, in its application to a document given on P's behalf) a reference to P includes a reference to a person who acts on P's behalf in relation to tax.
>
> (5) In paragraph 3(2) a reference to P includes a reference to a person who acts on P's behalf in relation to tax.
>
> (6) Paragraph 3A applies where a document is given to HMRC on behalf of P as it applies where a document is given to HMRC by P (and in paragraph 3B(9) the reference to P includes a person acting on behalf of P)."

59. Mr Callard argued that the error was a simple clerical error in that Morrisons, the solicitors who completed the SDLT1 form, ticked the box for non-residential use when they should have ticked the box for mixed use. This was therefore a minor clerical error which should not be penalised. This does not however accord with the documents which were presented to us.

60. Mr Callard also argued that no penalty should be chargeable because Pensfold had taken reasonable care to avoid any inaccuracy.

61. The completion statement from Morrisons to Pensfold, which sets out the amount of the funds required to complete the transaction, states clearly that the SDLT has been calculated on the basis that the property is a farm. Morrisons therefore ticked the box for non-residential use, which might be appropriate if the property were a farm. This was not therefore a clerical error as portrayed by Mr Callard.

62. Pensfold was therefore on notice that Morrisons intended to make the SDLT return on the basis that the property was a farm.

63. However, the question arises as to whether or not Pensfold had taken reasonable care as envisaged by para 18(3) Sch 24 and whether or not it is reasonable to expect them to understand the full implications of Morrisons' completion statement.

64. Pensfold is a Cayman Islands company, owned by a family based in various parts of the world. It is true that Pensfold is represented by a professional firm of trustees in the Cayman Islands and, as Mr Oborne pointed out, some of the replies from Pensfold in the course of the correspondence with HMRC show a good understanding of the law relating to SDLT. We do not however find this surprising. They are professional trustees and would have taken professional advice before replying to HMRC.

65. The question is was it reasonable for Pensfold to have relied on Morrisons to make the SDLT return correctly or should they have been expected to have known the full implications of the statement that the SDLT had been calculated on the basis that the property was a farm.

66. We must make this judgement bearing in mind Pensfold's position and knowledge of UK SDLT. It appointed what it believed to be a reputable firm of solicitors. What more, reasonably, as a company not resident in the UK, could it have done? In our view it would not be reasonable to expect them to do more.

67. We therefore find that Penfolds did take reasonable care to avoid any inaccuracy and that therefore no penalty should be chargeable.

DECISION

68. In summary therefore, for the reasons set out above, we find that this appeal should be PARTIALLY ALLOWED, on the basis that:

(1) Pensfold is entitled to relief from the higher rate of SDLT under para 5B Sch 4A FA 2003.

(2) It is not entitled to treatment of the property as either non-residential or mixed use.

(3) Pensfold should not be charged a penalty because it took reasonable care to avoid any inaccuracy.

69. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 14 NOVEMBER 2019