[2021] UKFTT 116 (TC)

TC08097

Stamp Duty Land Tax – property bought by international company – solicitor calculated tax at 7% rate – HMRC opened enquiry – property occupied by non-qualifying individuals– solicitors eventually accepted 15% rate was correct – HMRC raised penalty for carelessness – solicitor's instructions not produced – unsatisfactory evidence of company being asked/checked about who would occupy property – appeal against penalty dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/06641

BETWEEN

MAS FABRICS HONG KONG LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE ALASTAIR J RANKIN
MR IAN SHEARER

The hearing took place on 31 March 2021. With the consent of the parties, the form of the hearing was by video using the Tribunal video platform. A face to face hearing was not held because of the current Covid-19 pandemic. The documents to which we were referred are a Court Bundle prepared by HMRC containing 321 pages, a supplementary Court Bundle also prepared by HMRC containing 17 pages.

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.

Mr Patrick Cannon, counsel instructed by PCB Lawyers LLP for the Appellant

Ms Gemma Truelove, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This was an appeal by MAS Fabrics Hong Kong Limited (the Company) against a Notice of Penalty Determination issued by HMRC under Schedule 24 of the Finance Act 2007 (FA 2007) for submitting a Stamp Duty Land Tax (SDLT) form which contained an inaccuracy which led to an under payment of SDLT of £284,000.00. The penalty was £55,380.00 calculated at 19.5% of the underpaid tax. The liability to underpaid tax itself was a matter of agreement between the parties.

BACKGROUND

2. The Company instructed PCB Lawyers LLP (PCB) to act for it in the purchase of Apartment 59, 23 Albert Embankment, London (the Property) at a purchase price of £3,550,000.00. Completion took place on 11 December 2017. On 12 December 2017 PCB submitted electronically to HMRC forms SDLT1 and SDLT4. PCB calculated the SDLT liability at 7% of the purchase price as they were claiming relief under Schedule 4A of the Finance Act 2003. If the relief did not apply to this transaction SDLT would be payable at 15%.

3. On 15 May 2018 Mrs Blessing Skermer, Officer of HMRC, wrote to PCB enclosing a copy of a notice which she was sending to the Company. The Notice raised ten questions about the purchase transaction including asking for copies of various documents and questions about the Company. The relevant questions for this appeal were as follows:

> "8b Details of all directors and shareholders to include full names, addresses and shareholdings. If any of the above are non-natural persons e.g. corporate, trust etc., please ensure the ultimate shareholder details are provided
>
> 9. Details of who has lived at the property since the date of purchase and who will live in the property in the future if known. Please include full names and their relationship to any of the directors or shareholders (if any)
>
> 11 In all cases, please provide appropriate evidence and full explanation to support any declaration you make that justifies Stamp Duty Land Tax being due at a rate below the prevailing rate of 15%."

4. PCB replied by letter dated 25 June 2018 enclosing their replies to the ten questions. The answers to the above questions was as follows:

> "8b. Enclosed. Please note that the shares owned by MAS Capital (Private) Limited are now owned by MAS Holdings (Singapore) Private Limited which is itself wholly owned by MAS Holdings (Private) Limited. The Amalean Trust owns 100% of the shares in MAS Holdings (Private) Limited and the beneficiaries of the Trust are Mahesh Chandra Dayalal Amalean, Ajaykumar Dayalal Amalean and Sharad Dayalai Amalean (their details are enclosed).
>
> The Directors of MAS Holdings (Singapore) Private Ltd are Sharad Dayalal Amalean, Sudarshan Ahangama (of No. 16, 3rd Cross Lane, Borupana Road, Ratmalana, Sri Lanka) and Roy Lim.
>
> 9. The Apartment is used as a corporate apartment for the use of management staff when they are in London on business.
>
> 11. Exchange of Contracts took place in 2013 and so the Purchaser has the benefit of the Transition Period. Furthermore, the property is used as part of the Purchaser's business (used by employees) and so the lower rate of 7% was applied."

5. Mrs Skermer replied to PCB by letter dated 17 July 2018 by asking two further questions one of which was as follows:

"2. You stated in your letter that the property was used as a corporate apartment by the purchaser's management staff when they are in London on business. Therefore:

a. Please provide me with the list of names of the management staff (employees) that has used the property still date and their employment contracts.

b. Please confirm whether these employees own any shares in the company (MAS Fabrics Hong Kong Limited) and state the amount of shares own. Please provide documentary evidence.

c. Please provide me with supporting evidence including a full breakdown of the timeline(s) of the property usage and documentation (such as return travel tickets)."

6. PCB replied by letter dated 2 August 2018. Their answer to question 2 was as follows:

"2. Our clients advise as follows:

a. No one has used the property as yet. It is mainly used for official business purposes but the employees can make use of it for leisure or health purposes.

Also, MAS Fabrics is a large group and as such it is not possible to send employment Contracts for all those who will make use of the property. The property will be used as and when it is necessary and by prior booking.

b. No shares will be issued to employees.

c. There is no documentation to provide at present."

7. Mrs Skermer replied by letter dated 15 August 2018 including the following:

"However, to satisfy the condition to qualify for SDLT at a lower rate (Exclusion from the 15 per cent higher rate charge), the property should be wholly and exclusively used for the purpose of the business not for leisure or health purposes."

8. Mrs Skermer continued by saying she was not satisfied that the Property was being used solely or mainly for the business and accordingly did not qualify to pay SDLT at a lower rate. She calculated that the additional SDLT amounted to £284,000.00 and advised she was considering whether to charge a penalty for the inaccuracy in the original SDLT return. She also wrote to the Company on the same date enclosing a copy of her letter to PCB and The Human Rights Act CC/FS9 and Penalties Factsheet – CC/FS7a.

9. PCB wrote to Mrs Skermer on 12 September 2018 advising that in their letter dated 25 June 2018 they had stated "the apartment is used as a corporate apartment for the use of management staff when they are in London on business" and that this was still the case. PCB maintained there had been no breach of the original intention as they had been instructed that the property had not yet been used and that when it was used it would only be used by the qualifying employees mainly for the purpose of their trade. PCB further said they were instructed that no non-qualifying individuals (in terms of HMRC internal manual SDLTM09575, to which Mrs Skermer had referred) would occupy the property and the provisions of SDLTM09620 applied to the Property. One of the provisions is that "the dwelling is made available solely or mainly for the purposes of the trade carried on by the purchaser". PCB added that nowhere in the Guidance does it state that the Property should be "wholly and exclusively" used for the purpose of business (as opposed to "mainly" used).

10. Mrs Skermer replied by letter dated 25 September 2018 stating that some of the information in PCB's letters dated 24 June 2018 and 2 August 2018 was contradictory. She therefore asked further questions about the use of the property.

11. By letter dated 23 October 2018 PCB informed Mrs Skermer as follows:

"1. The property had not yet been used as interior decoration work has been taking place since completion on 11th December 2017. The work finished in August 2018.

2. The Deputy Chairman occupied the property between 6th and 10th September 2018.

3. a. The use of the property is to provide accommodation for employees travelling to London for business purposes. Following Completion on 11th December 2017, the property was handed over to an interior decoration company and interior work was completed in August 2018. The Deputy Chairman occupied the property from 6th to 10th September 2018.

b. The property will be used as a living accommodation for employees who travel to London for the company's business purposes and see paragraph "c" below.

c. Meetings and entertainment for the benefit of the company.

d. The Deputy Chairman first used the property from 6th to 10th September 2018.

e. The employees will liaise with the personal assistant to the Deputy Chairman who looks after the reservation book.

f. The property will be used by employees when they need to attend business meetings, business promotions and business entertainment in the UK.

g. Directors and Leadership of the Group can use the property.

h. The Deputy Chairman decides.

i. Bookings will be made through the reservation book kept with the personal assistant to the Deputy Chairman.

j. Employees can check availability with the personal assistant to the Deputy Chairman through e-mail/telephone call.

k. Employees have been informed of the property via formal e-mail and have also been told.

12. Mrs Skermer responded by letter dated 26 October 2018 advising that as the Deputy Chairman was a non-qualifying individual the SDLT exclusion to pay the tax at 7% was withdrawn and the decision in her letter dated 15 August 2018 to charge additional tax was upheld. She referred again to SDLTM09575, but also to SDLTM09580 (which gives additional guidance on the meaning of "non-qualifying individual").

13. PCB wrote to HMRC on 19 November 2018 to state that "given the further information and clarification" the Company would now pay the additional tax.

14. Mrs Skermer wrote to the Company on 20 November 2018 (and a virtually identical letter dated 21 November 2018) noting the agreement to pay the additional SDLT, advising that interest would be due after 30 days from the effective date of the transaction (which was from 11 January 2018) and adding the following:

"Penalties and the Human Rights Act

As I have identified errors which will result in an additional SDLT liability due, I will need you to confirm that you have read and understood the factsheets enclosed in my letter to you dated 15 August 2018. Please find another copy of the enclosed factsheets:

- CC/FS7a - Penalties for inaccuracies in returns or documents
- CC/FS9 - The Human Rights Act and penalties

Please take time to review the enclosed Human Rights factsheet and let me have your confirmation that you have read and understood the contents. If I do not hear from you by 12 December 2018. I will try to contact you to confirm your understanding. If I cannot contact you, and you do not contact me, then I will assume that you understand your rights as defined by Article 6 of the European Convention on Human Rights and proceed on that basis. Please contact me if you need further information regarding the factsheet or your Human Rights.

Once you have read and understood your Human Rights as outlined within FS9 and confirmed your agreement to the factsheets, I require answers to the following questions.

1. In your agent's letter dated 12 September 2018, they stated that you instructed them that the purchase qualified under paragraph 5(1)(a) of Schedule 4A to the Finance Act 2003 because the property was not occupied by non-qualifying individuals. As well as mainly for the purpose of trade carried out by the employees. At the time of purchase in December 2017, why did you believe the purchase was allowable for the relief of the higher rate at this time?

2. Prior to Mr Sharad Dayalal Amalean, the Deputy Chairman of the company, occupying the property, did you seek any advice or consult any guidance? If yes, please provide details.

3. Who completed your SDLT return?

a. If it was yourself, what guidance did you seek before submitting the return?
b. If it was your Agent/Accountant, what information and information/details did you provide to them to ensure the return was accurately completed?

4. Please tell me if you sought any advice from either HMRC about completing the return? If so, how did you contact us (telephone, letter, etc.) and on what date?

5. Did you seek professional advice (for example, from an accountant) during the completion of your return? If so, what advice was given?

6. Were there any factors that affected your ability to complete the return at the time of completion?

7. Is there any additional information or explanations which you think will help to explain why your return was inaccurate? This can include copies of any evidence you have to support your explanation."

15. PCB replied by letter dated 12 December 2018 requesting a meeting in order to "aid understanding of the facts". Mrs Skermer replied by email dated 18 February 2019 "Given that the meeting will not proceed as planned, I will write to you with a list of questions I intend to ask during the meeting in addition to those in my letter dated 20 November 2018." From a subsequent email from PCB it appears the meeting could not proceed as nobody from the Company would be in the country to attend in person, and it was agreed to continue with written representations.

16. Mrs Skermer then wrote to the Company on 21 February 2019 with the following questions:

"1. In your agent's letter dated 23/10/2018, they explained you instructed them that the use of the property was to provide accommodation for the employees travelling to London for business purposes. However, no employees have used it for this purpose yet (As per agent's letter dated 02/08/2018). Therefore please confirm:

a. How often did your employees travel to London for work purposes in any given month before the purchase of the property?

b. What were the arrangements for providing accommodation for their stays?

2. Given the expense, why did you decide to purchase a property rather than continuing with the system already in place?

3. What steps were put in place to in order to make the property available for employees?

4. Who completed the SDLT return?

a. If it was yourself, what guidance did you seek before submitting the return?

b. If it was your Agent/Accountant, what information/details did you provide them to ensure the return was accurately completed?

5. Please tell me if you sought any advice from either HMRC about completing the return? If so, how did you contact us (telephone, letter, etc.) and on what date?

6. Did you seek professional advice (for example, from an accountant) during the completion of your return? If so, what advice was given?

7. Were there any factors that affected your ability to complete the return at the time of completion?

8. In your agent's letter dated 12 September 2018, they stated that you instructed them that the purchase qualified under paragraph 5(1)(a) of Schedule 4A to the Finance Act 2003 because the property was not occupied by non-qualifying individuals. However, in their letter dated 23 October 2018, they confirmed that you instructed them that "Directors and Leadership of the Group can use the property". Therefore, at the time of purchase in December 2017, why did you believe the purchase was allowable for the relief of the higher rate at this time (Given that it was available for "Directors and Leadership of the Group can use the property")?

9. During my enquiry your agent advised me that no employees have used the property yet and confirmed that you knew the qualifying criteria to claim the 15% relief. Therefore:

a. Please explain why you thought the property still qualified for the 15% SDLT exemption (given it has not been used for that purpose)?

10. Prior to Mr Sharad Dayalal Amalean, the Deputy Chairman of the company, occupying the property, did you seek any advice or consult any guidance? If yes, please provide details.

11. Going back to the letter of 12 September 2018. Your solicitor confirmed that you knew the meaning of a non-qualifying individual. It has since been confirmed that a non-qualifying person has been living in the property. Please explain why, as you knew the conditions for claiming relief, and you knew what a non-qualifying person was.

a. Why did you allow a non-qualifying person to occupy the property?

12. Furthermore, in your agent's letter dated 23/10/2018, they said that Mr Sharad Amalean (the deputy director) occupied the property from 6th to 10th September 2018. However, HMRC have received information to confirm that Mr Sharad Amalean has been living in the property since 11/12/2017 and he is liable for council tax.

a. Please explain the reason why you advised HMRC that Mr Amalean occupied the property in September 2018 and not since December 2017.

13. Is there any additional information or explanations that you think will help to explain why your SDLT return was inaccurate? This can include copies of any evidence you have to support your explanation.

14. Have MAS Fabrics Hong Kong Limited acquired any other properties and claimed relief from 15%?

15. Do MAS Fabrics Hong Kong Limited have plans to acquire additional properties in the future?"

17. PCB replied by letter dated 6 March 2019 adopting the same numbering:

"1 a. We are instructed that between 15 -20 people travelled to London for business purposes up to a maximum of 10 times per year.

b. We are instructed that prior to the purchase of the property, employees coming to London on business were accommodated in hotels.

2. We are instructed that the property was for use mainly by employees and, due to its nature it was also to serve as an investment.

3. We were instructed that bookings were made through the reservation book kept with the personal assistant to the deputy chairman. They check availability with the personal assistant via email or telephone call.

4. The SDLT return was completed by us as Agent for our client.

a. n/a

b. We were told prior to preparing the SDLT Return that our client was not intending renting out the property at the time. The relevant person who dealt with the SDLT Return at our firm left some time ago. The understanding, as far as we can tell from the file (based on the fact that we were told that the property was not to be made available for renting out), is that she was told by our client that the property was to be used by employees of our client (which was the reason the relief would been claimed).

5. No advice was sought by us from HMRC before the SDLT return was completed.

6. The client sought professional advice from us in relation to completion of the SDLT Return. The advice given was that relief from the higher rate of SDLT was available based on the information supplied by our client.

7. No factors affected our ability to have the Return completed at the time of Completion.

8. As we advised in response to the initial enquiries (contained in your letter of 15th May 2018), the original intention was for the property to be bought as a corporate apartment for the use of management staff when they come to London for business. So far as we understand use of the property by Directors and Leadership of the Group does not necessarily mean a breach of the criteria for the relief claimed.

9. At the time that the Enquiries were being made by yourselves, the property had not been occupied as it was being refurbished and as previously advised this work finished in August 2018. We had no reason to believe at that time that the 15% Relief did not apply.

10. We refer you to our answer to 6 above.

11. Our letter of 12th September 2018 did not confirm that our client knew the meaning of a non-qualifying individual. Accordingly, our client did not allow a non-qualifying person to occupy the property in the knowledge that the conditions were not met.

12. We are instructed by our client that, as previously stated, Mr Sharad Amalean stayed at the property between 6-10 September 2018 (and did not stay before that date) but has never lived at the property. We are told Mr Amalean was in the UK around the time of

Completion (December 2017) and, following Completion, the property was then handed over to the London Design Team for the interiors to be completed. We understand such works completed in August 2018, hence the brief stay by Mr Amalean the following month. We have only seen evidence in March/April 2018 that the Council Tax records are in our client company's name.

13. Our client is based in Asia and we believe that the language barrier contributed to the misinterpretation. It seems to be the case that the distinction between qualifying and non-qualifying employees was not appreciated when our client explained to us who was intended to occupy the property. An honest mistake was made which led to the belief that the Relief applied. Whilst this is regrettable, there was no intention to claim a relief that was not due and in all the circumstances reasonable care was taken.

14. We are instructed no.

15. We are instructed they have no present intention to acquire additional properties."

18. Mrs Skermer responded to the Company by letter dated 20 March 2019 headed Additional Penalty Explanation:

"I have examined your/your solicitor's response to present to the authorising officer for a penalty decision and concluded the following-

• You advised your solicitor that the intention at the date of purchase was to acquire the property to be used as a corporate apartment for management staff, directors and leadership group.

• You did not seek any advice from HMRC (neither by telephone or online) regarding the completion of the SDLT return and the conditions of any reliefs available

• You then submitted the return with an incorrect claim for a relief to avoid paying SDLT at a higher rate (you've agreed with this view).

• You've explained due to a language barrier you misinterpreted instructions relating to distinguishing between qualifying and non-qualifying employees who occupy the property. This was vital to decide whether the relief was allowed.

• My view is that this should've prompted you to seek advice from HMRC or checked the guidance available online to clarify who the qualifying individuals were and that the relief claimed was accurate. I do not believe you took reasonable care to ensure an accurate return was submitted to HMRC."

19. On 21 March 2021 Mrs Skermer sent the Company a Penalty explanation for £55,380.00. The explanation for the penalty was that HMRC considered the Company's behaviour was careless and that disclosure was prompted. As a result the penalty range would be from 15% to 30%.

20. HMRC continued with the following Stage 2 details:

"Telling

You and your did not tell me all the necessary and relevant information on separate occasion during the course of my enquiry without being prompted. Information were withhold until part way into my enquiry. Therefore, I am giving you a 10% reduction for telling.

Helping

You and your agent assisted me to bring my enquiry to conclusion . Therefore, I am giving you the full reduction for helping.

Giving

You and your agent could not provide me with all the information and supporting documents that I requested in a timely fashion. This caused delay in concluding my enquiry. Therefore, I am giving you a 20% reduction for giving.

Because of this, the total reduction we've allowed is shown below:

Telling us about it	10%
Helping us understand it	40%
Giving us access to records	20%
Total reduction	70%"

The difference between the minimum and maximum is 15% which multiplied by 70% gives a reduction of 10.5%. Accordingly, the penalty percentage would be 19.5%.

21. By letter dated 11 April 2019 PCB wrote to HMRC saying that they disagreed with their conclusion that a penalty was due. First, it was unrealistic to expect the Company to have sought advice from HMRC regarding the completion of the SDLT return. Secondly, it was PCB that had submitted the SDLT return and not the Company. PCB maintained that by appointing them to advise concerning the purchase of the Property and the related SDLT position, the Company had taken reasonable care to ensure that an accurate SDLT return was submitted. The reason for the inaccuracy had already been explained and accepted by HMRC and was due to the language difficulties in understanding the difference between qualifying and non-qualifying individuals. Under paragraph 18(3) of Schedule 24 of the Finance Act 2007 the Company was not liable to a penalty in relation to anything done or omitted by its agent where the taxpayer took reasonable care to avoid the inaccuracy.

22. HMRC Officer Lewis responded by letter dated 29 April 2019 saying that following review of PCB's letter and discussions with the authorising officer she considered that the decision still stood. This letter was followed by a Closure Notice dated 2 May 2019 and a Notice of penalty assessment dated 14 May 2019.

23. By letter dated 12 June 2019 PCB appealed the Notice of penalty assessment on the following grounds:

"1 MAS took reasonable care to avoid the inaccuracy in relation to the completion and submission of the SDL T return because it appointed and relied on the advice of a firm of London solicitors specialising in property conveyancing and experienced in advising overseas clients purchasing expensive London residential property, namely this firm. Accordingly, under paragraph 18(3) Schedule 24 FA 2007 MAS is not liable to a penalty.

2. Under HMRC's Compliance handbook it is stated in relation to reliance on a professional adviser in this context at CH84540 that:

"The benchmark is a person who goes to an apparently competent professional adviser

gives the adviser a full and accurate set of facts

checks the adviser's work or advice to the best of their ability and competence and

adopts it."

3. In this regard it is clear that MAS falls within this benchmark because it supplied this firm with any information that we needed in order to complete the SDLT return and it then relied on this firm to complete and submit the SDLT return for them. At that time it was not appreciated that the presence of an individual within paragraph

5E(4) Schedule 4A, FA 2003 meant that relief from the 15% rate of SDLT would not be available. Although the SDLT return was made in good faith it was not within the ability and competence of MAS to have known or understood that the relief was not available and in relying on professional advisers in this regard they clearly took reasonable care and so the penalty charged is not due."

24. Mrs Skermer responded by writing to the Company on 19 June 2019 as follows:

"I have considered all the points raised. Please find my comments and request for further information and documentations to clarify the issue.

Your first ground of appeal is that you believed you took reasonable care because you appointed and relied on the advised from your agent.

However, just appointing an agent/lawyer does not necessary indicate that reasonable care has been take. The agent/lawyer will rely on you to give them all the accurate facts, information and documentation need for them to give you accurate advice. Failure to provide your agent/lawyer with the accurate fact, information and documentation will affect the advice that you will receive.

Your second ground of appeal is that you gave your agent/lawyer full and accurate set of facts. However, during my enquiry I found some discrepancies in the facts and information that you provided to your agent at the time of completing the SDLT return.

In your agent letter dated 06 March 2019 (4b), they said that at the time of completing the SDLT return you told them that the property would not be made available for renting out but will be used by your employees. Therefore, the relief was claimed based on this information that you provided.

However, during my enquiry, in the said letter, you said that original intention for acquiring the property is to use it as a corporate apartment for the use of management staff, and director and leadership of the group can use the property. Therefore since this was your intention for the property as at the time it was bought, this fact/information should have been given to your agent. This could have enable them to give accurate advice on your position on the 15% relief at the time the SDLT return was completed.

Your third ground of appeal is that at the time of completing the SDLT return you did not appreciate that the presence of an individual within paragraph 5E(4) Schedule 4A, FA 2003 meant that the relief from the 15% rate would not be available.

However, you knew who the employees, directors and leadership of the group were. If you were in doubt and unsure, you should have provided all the facts/information of the individuals and advised your agent about the connection of the individuals (their roles, link(s) and relationship to the company) that the property will be made available for their use. This could have enable them to check these individuals against the criteria set within paragraph 5E(4) Schedule 4A, FA 2003 and advised you correctly.

Additionally, you should have check these individuals against the SDLT Guidance SDLTM09580 and section 1122 CTA 2010.

On the other hand, if you advised your agent about the individuals that the property will be made available to and your agent ignored your instruction. Then went ahead and made a claim from the 15% relief on your behalf. This could have prompted you to check or prompted you to instruct your agent to check SDLT guidance available online to clarify that the relief claimed was accurate. Then you should have corrected the SDLT return when you check it before it was submitted.

Furthermore, to clarify this issue regarding what you told your agent about your original intention for acquiring the property at the time of completing the SDLT and evidence what was done to ensure reasonable care was taken, please provide me with the following:

a. Documentary evidence of the instructions you gave to your agent prior to and at the time of completing the SDLT return.

b. Documentary evidence of what was discussed between you and your agent, such as correspondences to and from your agent prior to and at the time of completing the SDLT return.

c. If face to face meeting(s) were held, please provide me with the minutes of the meeting(s) showing what was agreed at the time of completing the SDLT return.

d. If you checked the SDLT return before it was submitted, please provide me with documentary evidence of what was discussed and agreed prior to submitting the return."

25. PCB replied by letter dated 17 July 2019 as follows:

"In relation to the categories of information listed on page 2 of your letter we do not have any documents relating to a. - b. As regards "c", there was no face to face meeting as our client is based overseas. In relation to "d" we enclose a copy of the print of the HMRC SDLT calculator page that was completed at the time. This shows that the 15% rate was considered but that the 7% rate was used.

Unfortunately, the solicitor who dealt with the purchase of the property no longer works with this firm. However our client subsequently told us that the property was to be used as a "corporate apartment for the management staff to stay when they visit London on business matters". In relation to the other points made in your letter, we refer you again to the points made in our notice of appeal dated 12 June 2019.

We are surprised however at your suggestion that our client should have appreciated the relevance of the distinction between employees and directors and of the importance of their connection to the company. It is in our view unrealistic to expect a lay client to have understood the consequences of such a distinction, particularly a foreign client for whom English is not their first language. Moreover, your assertion that our clients should have checked SDLTM09580 and section 1122 CTA 2010 is one that we are confident the tax tribunal will strongly disagree with if the matter proceeds to a hearing. We should be grateful if you would give the matter further consideration and withdraw the penalty, or if not, refer this case for review by an independent officer.

26. Mrs Skermer replied by letter dated 22 July 2019. She included the following paragraph:

"You have not provided me with the additional documentations (requested in my letter dated 19 June 2019) needed to clarify what you told your agent about your original intention for acquiring the property and evidence of what was done to ensure you took reasonable care when you completed you SDLT return for the property under consideration.

Therefore, I am upholding my decision on the penalty assessment notice dated 14 May 2019 and my explanation in my letter dated 19 June 2019."

27. HMRC Review Officer Warner by letter dated 20 September 2019 upheld the decision to impose a penalty assessment. She rehearsed the facts and additionally stated that the London Borough of Lambeth had advised HMRC on 30 August 2018 that Mr Sharad Alamean had

been living in the Property since 11 December 2017 though PCB had advised that he did not stay in the Property before 6 September 2018 as the Property had been handed over to a London Design team for the interiors to be completed and that work had been completed in August 2018.

28. The Electoral Services Officer of London Borough of Lambeth confirmed to HMRC by email dated 26 September 2018 that they did not have any electors registered at the Property, The Council Tax Officer by email dated 8 October 2018 informed HMRC that they had received an email on 30 August 2018 "on behalf of the landlord informing us that Mr Sharad Amalean has been living in the property since 11.12.2017" but they had no contact details for him. In a further email dated 12 November 2018 the Revenues Officer for Lambeth added "I can advise the tenant, Mr Shard Amalean is liable for council tax unless advised otherwise by the landlord, Mas Fabrics Hong Kong Limited."

29. PCB on behalf of the Company sent electronically to this Tribunal a Notice of appeal dated 17 October 2019 stating the following grounds of appeal:

1. The Appellant took reasonable care to avoid the inaccuracy in relation to the completion and submission of the SDLT return by appointing and relying on the advice of a firm of London solicitors specialising in property conveyancing, and experienced in advising overseas clients purchasing expensive London residential property, namely, PCP Lawyers LLP. Accordingly, under paragraph 18(3), Schedule 24, FA 2007, the Appellant is not liable to a penalty.
2. Under HMRC's Compliance Handbook at CH84540, it is stated that:

   "The benchmark is a person who goes to an apparently competent professional adviser
   • gives the adviser a full and accurate set of facts
   • checks the adviser's work to the best of their ability and competence and
   • adopts it.
   The person will then have taken reasonable care to avoid the inaccuracy on the part of themselves and their agent."
3. The Appellant falls within this benchmark because it supplied the law firm with any information that the firm needed in order to complete the SDLT return and then it relied on the firm to complete and submit the SDLT return on its behalf. At the time, it was not understood by the Appellant that the presence of an individual within paragraph 5E(4), Schedule 4A, FA 2003 meant that relief from the 15% rate of SOLT would not be available, and it was not within the ability or competence of the Appellant to have realised or understood that relief was not available and, in relying on professional advisers in this regard, the Appellant took reasonable care and so the penalty charged by the Respondents is not due."

EVIDENCE AT THE HEARING

30. Among the Court Bundle was a witness statement dated 2 March 2021 from Daniel Griffiths, an officer of HMRC in which he adopted a witness statement of Charlotte Rogers dated 6 November 2020. Mr Griffiths explained that following departmental changes which resulted in Mrs Skermer no longer working for HMRC the case had been assigned to Charlotte Rogers. Subsequently the case had been transferred to him as a tax specialist with experience in penalty rules and the processes that underpinned how Mrs Skermer would have arrived at her view of the compliance check. Charlotte Rogers was not available to attend the hearing.

31. Mr Cannon objected to Mr Griffiths giving evidence as he had not been involved in the decision-making process and his evidence would all be hearsay – in effect second-hand hearsay

evidence. Mr Cannon would be unable to cross-examine Mrs Skermer the original decision maker or any HMRC officer with first-hand knowledge of the facts of this investigation and the decision to impose a penalty. In particular Mr Cannon wished to test in cross-examination the assertions in the Additional Penalty Examination letter dated 20 March 2019 referred to at paragraph 18 above. Although this was a tax penalty case the Company had a right to a fair trial under Article 6 of the Human Rights Act 1998.

32. Ms Truelove acknowledged that Mr Griffiths' evidence would be hearsay but noted that the solicitor who had carriage of the conveyancing transaction in PCB was also not available as a witness and had not even provided a witness statement. It was for the Tribunal to consider how much weight to give to Mr Griffiths' evidence.

33. Although Mr Cannon requested the Tribunal to allow the appeal and cancel the penalty on the basis that the Company was denied a fair trial in the absence of any first-hand witness evidence the Tribunal, after a short adjournment, decided to proceed with the appeal but would consider what weight to give to Mr Griffiths' evidence.

34. Mr Griffiths then stated that he wished to confirm his witness statement dated 2 March 2021. He believed Mrs Skermer's decision to impose the penalty assessment was based on the evidence given by the Company to PCB. He admitted that Mrs Skermer had not asked PCB to produce their file until after she had decided to impose the penalty. According to the London Borough of Lambeth the Deputy Chairman of the Company, Mr Sharad Amalean, had been living in the property from the purchase date.

35. Mr Griffiths then explained how HMRC decided how to calculate the penalty. As the disclosure had been prompted the penalty could be reduced to between 15% and 30%.of the underpaid tax. There were three aspects to the calculation – telling (30%), helping (40%) and giving (30%). Mrs Skermer had decided to allow 10% for giving which equated to a 3% reduction; 40% for helping which equated to 6% and 20% for giving which equated to 1.5% making a total reduction of 10.5%. This resulted in a penalty imposed of 19.5% of the underpaid SDLT.

36. Mrs Skermer had been unable to consider suspending the penalty as the Company had indicated it was not intending to purchase another property within two years.

37. When Ms Truelove asked Mr Griffiths if presented with the same facts would he have come to the same conclusion to which he answered 'yes'. Mr Griffiths considered the SDLT return had not been correctly completed as the Borough Council evidence showed that the Company's Deputy Chairman was already residing in the property from the completion date.

38. Mr Cannon referred Mr Griffiths to the second bullet point in Mrs Skermer's letter dated 20 March 2019 where she stated:

> "You did not seek any advice from HMRC (neither by telephone or online) regarding the completion of the SDLT return and the conditions of any reliefs available."

He asked was it really HMRC's view that an overseas investor should second guess the advice of their professional adviser? Mr Griffiths answered by saying he could not give an answer concerning HMRC's policy but HMRC was available to give advice to anyone worldwide with a United Kingdom tax liability. Mr Cannon asked the Tribunal to note that in his extensive experience when you ask HMRC a particular question their response will be that you should seek advice from your professional advisers.

39. Mr Cannon then referred Mr Griffiths to the fifth bullet point in Mrs Skermer's letter dated 20 March 2019 where she stated:

> "My view is that this should've prompted you to seek advice from HMRC or checked the guidance available online to clarify who the qualifying individuals were and that the

relief claimed was accurate. I do not believe you took reasonable care to ensure an accurate return was submitted to HMRC."

Mr Griffiths admitted that he would have said "could've" instead of "should've".

40. Mr Griffiths admitted there was a possibility that PCB had made the error when completing the SDLT return rather than the Company giving misleading information to PCB though he thought it was more likely that the Company gave the wrong information to PCB. He agreed that the SDLT legislation and especially the reliefs were very complex Mr Griffiths did not know the implications of section 1122 of the Corporation Tax Act 2010 even though Mrs Skermer had referred to this section in her letter dated 19 June 2019.

41. Also included in the Court Bundle was a witness statement by Miss Chiamaka Okeke who was present throughout the video hearing but was not called as a witness by Mr Cannon. In her statement Miss Okeke said she had worked as a solicitor and partner for PCB since 5 March 2018 and that the solicitor who had conduct of the purchase on 11 December 2017 had ceased to work for PCB by the time that HMRC began to make enquiries. All the correspondence from PCB referred to above was sent under Miss Okeke's initials.

42. When asked why PCB's conveyancing file had not been produced Mr Cannon stated that he understood it contained no detailed instructions most of which were given by telephone.

THE LEGISLATION

43. The exemption which the Company had claimed is set out in Schedule 4A of the Finance Act 2003. The relevant sections are as follows:

1 (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.

3 (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) …

(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,

(b) …

(c) …

5D (2) The conditions are that—

(a) the interest is acquired for the purpose of making the dwelling available to one or more qualifying employees or qualifying partners for use as living accommodation, and

(b) the dwelling is to be made available as mentioned in paragraph (a) for purposes that are solely or mainly purposes of the relievable business.

5E (4) In addition, the condition in paragraph 5D(2)(a) is taken not to be met if the individuals, or a class of individuals, to whom it is proposed to make the dwelling available for use as living accommodation include, or are likely to include, an individual employed for the purposes of the relievable business in question who is (or will at the relevant time be)—

(a) entitled to a 10% or greater share—

(i) in the income profits of the relievable business, or

(ii) in any company that is beneficially entitled to the higher threshold interest, or

(iii) in that higher threshold interest, or

(b) …

44. The relevant penalty legislation is contained in Schedule 24 of the Finance Act 2007.

1 (1) A penalty is payable by a person (P) where—

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—

(a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part**.**

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

45. A return under section 76 of the Finance Act 2003 is included in the Table referred to in paragraph 1(1)(a). Paragraph 3 of Schedule 24 states:

3 (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.

46. Ms Truelove submitted that the Company's behaviour for failure to apply the correct SDLT rate was non-deliberate and that the non-deliberate penalty applies unless the Company has a reasonable excuse for their error. Paragraph 18 of Schedule 24 states:

> 18 (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.

47. Finally, section 1122 of the Corporation Tax Act 2010 defines the term "connected person". It is this section which either the Company or PCB failed to understand and resulted in the rate of SDLT applicable to the purchase of the Property being 15% and not 7%.

CASELAW

48. Mr Cannon referred the Tribunal to three decisions. First in *HMRC v Bella Figura Ltd* [2020] UKUT 120 (TCC) Mr Justice Nugee and Judge Jonathan Richards said at paragraph 61(1):

> "(1) … By analogy, a person who instructs a lawyer to act on the purchase of a house might be said to obtain implicit advice to the effect that the documents will operate to convey title simply from the fact that the lawyer prepares those documents and identifies no problem with them.

49. Mr Cannon also referred us to the First-tier decision in *Pensfold v HMRC* [2020] UKFTT 116 (TC) where Judge Gillett said:

> "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."

50. Finally, Mr Cannon referred us to paragraph 143 in *Mansion Estates Ltd v Hayre & Co* [2016] EWHC 92 (CH0 where Judge Saffman stated:

"I am satisfied that it falls within a solicitor's retainer to calculate SDLT accurately."

DECISION

51. Both parties agreed that the onus of proof rested with HMRC to show that the conditions of Schedule 24(1) have been met and that the behaviour that led to the inaccuracy was careless.

52. The Tribunal finds it strange that neither the solicitor who was involved in the purchase transaction and who presumably completed the SDLT return nor the HMRC decision maker neither signed written statements nor attended the hearing. It would have helped us to have had first-hand knowledge of what actually happened. As it is, we must fall back on the extensive correspondence which passed between PCB and HMRC.

53. One of the reasons HMRC has been given the power to impose penalties is to ensure that a taxpayer takes as much care as is reasonably possible when completing a tax return. The Company, which appears to be a successful international operation, is required to take the same amount of care when completing the SDLT form as would be expected from a British company. If it were otherwise there would be a two tier penalty regime.

54. We have considered the decision in *Pensfold* and in particular the passage quoted at paragraph 49 above, which is not binding on us though it is persuasive. We believe more is required from the Company than simply appointing a reputable firm of solicitors. In order to benefit from the lower SDLT rate of 7% PCB should have evidenced more questions and care concerning the intended use of the Property. As PCB has not produced to HMRC or to this Tribunal copies of any correspondence between it and the Company and as the solicitor involved at the time of the purchase has not given any evidence, we do not know what information, if any, was supplied by the Company to PCB. Indeed, Ms Okeke in paragraph 3 of her witness statement said:

"That at the time of the Completion of the purchase, the Stamp Duty Land Tax was paid at a rate reflecting a relief having been applied, with a note on the file recording that the relief was being applied. <u>However, there was no further explanation on the file as to which particular Relief was being applied.</u>" (My underlining.)

We find this last sentence relevant to our decision. It was not sufficient for the Company to appoint PCB to act for them in the conveyancing transaction and then sit back and rely on them to complete the SDLT form correctly. The Company should have informed PCB fully about who was going to occupy the property or at least PCB should have been able to demonstrate a careful approach to questions on this matter.

55. We must assume that PCB asked the Company who was going to occupy the Property otherwise how could PCB know what relief, if any, to claim? As nobody from the Company gave evidence, we think it probable that it was always the Company's intention that directors and senior management would occupy the Property at some stage. We understand that the Property was newly built when purchased and it is therefore unlikely that Mr Amalean actually lived in the property from the day after completion as stated by the Revenues Officer of Lambeth Borough and accepted by HMRC. The Company claimed that the property had been handed over to a London Design team from around the date of completion until August 2018.

However, the Company has accepted that Mr Amalean occupied the Property between 6 and 10 September 2018. As the relief from the higher rate of SDLT applies for three years from the completion date the Company eventually accepted that, following Mr Amalean's occupancy of the property the relief no longer applied.

56. We note that immediately following Mr Amalean's occupancy of the Property in September 2018, PCB wrote to HMRC on 12 September 2018 and included the following paragraph:

> "You referred us to SDLTM09575 which deals with the occupation of the property by non-qualifying individuals which we are instructed is not the case in this instance. Accordingly, this provision does not disqualify our clients from the relief from the 15% higher rate of tax."

We find this at odds with the fact that Mr Amalean, a non-qualifying individual, had just spent almost a week in the Property. Mr Amalean is the Deputy Chairman of the Company. His personal assistant was responsible for the arrangements as to who could occupy the Property and when. As Ms Okeke should have known by this time that SDLT may have been payable at the higher rate presumably she explained to her contact in the Company the requirements in order to avail of the lower rate of SDLT. We have not been told who she received her instructions from, but she has used the word "instructed".

57. Paragraph 18(3) of Schedule 24 to the Finance Act 2007 states that the Company must satisfy HMRC that they themselves have taken reasonable care. In the absence of any evidence of what information passed between PCB and the Company we find that HMRC was correct not to be satisfied that the Company had taken reasonable care. PCB should have informed the Company that there were two rates of SDLT and the requirements in order to avail of the lower rate. It is inconceivable that the Company simply opted to pay at the lower rate without asking for an explanation or if the Company did not ask what the requirements were to qualify for the lower rate, the Company was careless.

58. We consider we can distinguish the decision in *Bella Figura* quoted at paragraph 48 above. As we have already said there is no evidence as to what advice PCB gave to the Company. In order to comply with the passage quoted the Company would need to have been advised that PCB had not identified any problem with the proposal to pay SDLT at the lower rate. PCB would need to have been satisfied that there was no problem, or potential problem, with claiming the lower rate of SDLT. We have seen no evidence that PCB raised any queries with the Company concerning the people who would occupy the Property.

59. Although we were told during the hearing that most of the instructions were given by telephone, we have not been shown what was in the telephone attendances. We therefore do not know what information PCB asked the Company to provide, what the Company's response was or whether the Company checked the SDLT form before it was submitted. If there was a good reason why the solicitor who had carriage of the transaction could not give evidence, presumably someone from the Company could have given evidence as to what the Company's instructions had been.

60. HMRC's Compliance Handbook CH84540 states:

> "The benchmark is a person who goes to an apparently competent professional adviser
> - Gives the adviser a full and accurate set of facts
> - Checks the adviser's work or advice to the best of their ability and
> - Adopts it"

61. HMRC maintain that a prudent overseas investor should have carried out their own research concerning the rates of SDLT and if uncertain as to which rate applied the Company

should have sought guidance from HMRC. We do not consider a multi-national company should have to carry out research having appointed a reputable firm of solicitors.

62. In *Stephen Merrie v HMRC* [2017] UKFTT 684 (TC) Judge Michael Connell said at paragraph 61:

> "The steps taken by the Appellant to ascertain his eligibility to Entrepreneurs' Relief did not include establishing the fundamental point, that is, in which tax year the gain should be declared. He assumed the gain would be chargeable in the year the loan was to be repaid and the shares disposed of. This assumption was not made after seeking expert advice."

63. The Company did not establish the fundamental point when buying the Property as to whether the rate of SDLT was 7% or 15%. The difference amounts to £284,000.00. While the regulations are technical and no doubt baffling to an outsider there was a simple answer to a relatively simple question: who will be occupying the property?

64. We have an impression of casualness. PCB should have advised the Company of the requirements of the legislation in order to avail of the lower rate of SDLT. The Company must have known that non-qualifying individuals were going to occupy the Property and certainly knew that was going to be the case by September before PCB replied incorrectly to HMRC on 12 September 2018.

65. Having decided the appeal had no merits as the Company was careless when instructing PCB to complete the SDLT return, we must go on to consider whether the percentage reductions in the penalty had been properly applied by HMRC. The Appellant did not address this issue at the hearing. We can find no reason to interfere with the percentage reductions which HMRC has applied.

66. Accordingly, we dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

ALASTAIR J RANKIN
TRIBUNAL JUDGE

RELEASE DATE: 20 APRIL 2021