Neutral Citation: [2023] UKFTT 859 (TC)

Case Number: TC08960

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal references: TC/2022/01346; TC/2022/01352; TC/2022/02740
TC/2022/02744; TC/2022/01351; TC/2022/01403; TC/2022/11509
TC/2022/13092; TC/2022/13415; TC/2023/00393

SDLT – strike out applications – appellants failed to claim Multiple Dwellings Relief on their SDLT returns or by amendment to those returns within the statutory time limit – overpayment claims under FA 2003, Sch 10, para 34 – whether Case A at para 34A(2) means that HMRC not liable to give effect to the claims – held, Case A applies – appeals struck out

Heard on 28 September 2023
Judgment date: 13 October 2023

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

L-L-O CONTRACTING LTD (1)
EASTCOTE HOMES LIMITED (2)
IPE CLIFFORD ROAD LIMITED (3)
LEOS WIMBLEDON DEVELOPMENTS LIMITED (4)
RYAN & LYZANNE BATCHELOR & PEREIRA (5)
BERKSHIRE CORPORATE DEVELOPMENTS LTD (6)
STONEGATE HOMES (HOVE) LIMITED (7)
HOUSE GROUP DEVELOPMENT LIMITED (8)
FLEXGATE PROPERTIES LIMITED (9)
LEOS NORTH LONDON LTD (10)

Appellants

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant:	Mr Patrick Cannon of Counsel, instructed by Cornerstone Tax
For the Respondents:	Mr Adrian Knowlson, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION AND SUMMARY

1. Each of the Appellants had paid Stamp Duty Land Tax ("SDLT") and subsequently claimed Multiple Dwellings Relief ("MDR"). The relevant legislation is in Finance Act 2003; all references in this decision are to that Act, and the provisions are cited so far as relevant to the matters being considered.

2. Section 58D(2) states that MDR "must be claimed in a land transaction return or an amendment of such a return" and Sch 10 para 6(3) provides that the time limit for such a claim is twelve months from the date the SDLT return was required to be delivered. The Appellants did not make their MDR claims in their SDLT returns or by amendment to those returns, but instead submitted free-standing claims under Sch 10 para 34.

3. Sch 10, para 34A sets out a number of situations ("Cases") when HMRC is not liable to give effect to an overpayment claim. Case A includes those where the overpayment results from "a mistake consisting of failing to make…a claim".

4. HMRC refused the Appellants' overpayment claims on the basis they had each made a mistake by failing to claim MDR in their SDLT returns or by amendment to those returns within the statutory twelve month period, so that Case A applied The Appellants appealed.

5. HMRC made applications to strike out the appeals under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") on the grounds that they had no reasonable prospect of success.

6. The strike out applications were considered on the papers by Judge Poole. He identified two discrete "knockout" points of law, but said that neither had been sufficiently explored in the parties' written submissions so as to enable him "safely to reach a definitive conclusion". He therefore directed that they be considered and decided by the Tribunal as preliminary issues. The first of the two issues was subsequently split into two sub-issues.

7. The purpose of this hearing was to decide the preliminary issues, which were as follows:

> Issue 1(a): Whether Sch 10, para 34 allows a claim to be made for overpayment relief notwithstanding s 58D.
>
> Issue 1(b): Whether as a result of s 58D(2), a person who failed to amend his return for MDR has not "overpaid" any SDLT.
>
> Issue 2: Whether HMRC were not liable to give effect to a repayment of SDLT because Case A applied.

8. The parties agreed that the answer to Issue 1(a) was "yes", and they also agreed that if HMRC won either of the other two Issues, the strike out applications succeeded.

9. I decided Issue 1(b) in favour of the Appellants, but found that HMRC succeeded on Issue 2. As a result, there is no reasonable chance of the Appellants' appeals succeeding, and they are struck out.

THE LAW

10. Section 58D is headed "Transfers involving multiple dwellings", and reads:

> "(1) Schedule 6B provides for relief in the case of transfers involving multiple dwellings.

(2) Any relief under that Schedule must be claimed in a land transaction return or an amendment of such a return."

11. Sch 10, para 6 includes the following provisions:

"(1) The purchaser may amend a land transaction return given by him by notice to the Inland Revenue.

(2)-(2A) …

(3) Except as otherwise provided, an amendment may not be made more than twelve months after the filing date."

12. Section 76 (as amended) provides that from 1 March 2019, the filing date is 14 days from the effective date; this is defined by s 44 as being the earlier of substantial performance of the contract or the date of the conveyance.

13. Sch 10, para 34 is headed "Claim for relief for overpaid tax etc" and so far as relevant, reads:

"(1) This paragraph applies where—

(a) a person has paid an amount by way of tax but believes that the tax was not due, or

(b) a person has been assessed as liable to pay an amount by way of tax, or there has been a determination to that effect, but the person believes that the tax is not due.

(2) The person may make a claim to the Commissioners for Her Majesty's Revenue and Customs for repayment or discharge of the amount.

(3) Paragraph 34A makes provision about cases in which the Commissioners for Her Majesty's Revenue and Customs are not liable to give effect to a claim under this paragraph."

14. Sch 10, para 34A includes the following provisions:

"(1) The Commissioners for Her Majesty's Revenue and Customs are not liable to give effect to a claim under paragraph 34 if or to the extent that the claim falls within a case described in this paragraph.

(2) Case A is where the amount paid, or liable to be paid, is excessive by reason of—

(a) a mistake in a claim or election, or

(b) a mistake consisting of making or giving, or failing to make or give, a claim or election.

(3) Case B is where the claimant is or will be able to seek relief by taking other steps under this Part of this Act.

(4) Case C is where the claimant—

(a) could have sought relief by taking such steps within a period that has now expired, and

(b) knew, or ought reasonably to have known, before the end of that period that such relief was available."

15. Sch 10, para 34B(2) provides that "a claim under paragraph 34 may not be made more than 4 years after the effective date of the transaction".

ISSUE 1(A)

16. Issue 1(a) was as follows:

> "Whether, as a matter of law, a claim for overpayment relief can validly be made pursuant to paragraph 34 of Schedule 10, Finance Act 2003 in respect of a supposed overpayment of SDLT which is said to arise by reason of the availability of multiple dwellings relief, notwithstanding the provisions of section 58D(2) Finance Act 2003."

17. Both parties agreed that the answer to this question was "yes", because para 34 allows a claim to be made if a person has "paid an amount by way of tax but believes that the tax was not due". Thus, all that is required to make a claim under para 34 is that the person believes SDLT has been overpaid.

ISSUE 1(B)

18. Issue 1(b) reads:

> "If the answer to part (1)(a) is 'yes', whether, as a matter of law, an overpayment of SDLT can arise for the purposes of a claim for overpayment relief pursuant to paragraph 34 of Schedule 10, Finance Act 2003 from the purported availability of MDR, in light of the provisions of Section 58D(2) Finance Act 2003 and in the absence of a claim to MDR in a return or an amendment to a return."

19. On behalf of HMRC, Mr Knowlson submitted that:

(1) Section 58D(2) states that MDR "must" be claimed in an SDLT return or in an amendment to that return;

(2) as the Appellants did not follow that statutory requirement, the amount of MDR is "nil"; and

(3) in consequence no overpayment arises.

20. On behalf of the Appellants, Mr Cannon said that as a matter of ordinary language, a person who would have been entitled to MDR if a claim had been made in time, has "overpaid" SDLT.

21. In my judgment, the answer to this issue can be found in paras 34 and 34A, which operate as follows:

(1) A claim can be made under para 34 if a person believes they have overpaid SDLT, see Issue 1(a).

(2) Para 34(3) then provides that HMRC do not have to consider claims which come under the Cases set out in para 34A,

(3) Case A applies where "the tax paid is excessive" including where a taxpayer failed to make a claim or election, see para 34A(2).

(4) The words "is excessive" only make sense if the SDLT has been overpaid. If, as HMRC submitted, in this situation there was no overpayment because by virtue of s 58D(2) the MDR was nil, the SDLT would not be "excessive".

22. I therefore decide Issue 1(b) in favour of the Appellants, and find that where a person has failed to claim MDR in accordance with s 58D(2), an SDLT overpayment can arise for the purposes of a claim for overpayment relief under para 34. The answer to Issue 1(b) is therefore "yes".

ISSUE 2

23. Issue 2 reads:

> "If the answer to Issue 1(b) is 'yes', whether Case A in paragraph 34A of Schedule 10, Finance Act 2003 would, as a matter of law, apply to exclude any claim for relief under paragraph 34 of that Schedule potentially arising from multiple dwellings relief, on the assumption that the taxpayers (and any agents submitting the relevant SDLT returns on their behalf) had no actual awareness or knowledge of the potential availability of multiple dwellings relief on the respective transactions at any time up to the expiry of the deadlines for amending the respective SDLT returns."

The parties' submissions in outline

24. Mr Knowlson said that HMRC were not liable to repay any overpayment because Case A applied: each of the Appellants had made a mistake by failing to make a claim to MDR in accordance with the statutory requirements.

25. The Appellants' case was as follows:

(1) Although Case A provides that HMRC are not liable to give effect to a claim where the SDLT has been overpaid because of a person's mistake in failing to make a claim to MDR in accordance with the statutory requirements, the key issue is the meaning of "mistake".

(2) A person does not make a "mistake" within the meaning of Case A if he fails to make a claim because of ignorance; instead "some awareness or conscious decision" not to claim the relief is required. Thus:

(a) Case A applies where the taxpayer was aware of the relief in question and that it could potentially apply to his transaction, but considered it did not apply, but

(b) Case A does not apply where the taxpayer was unaware of the relief until after the time limit for amending the SDLT return had passed.

Discussion

26. Issue 2 turns on the meaning of the word "mistake" in its statutory context. In establishing the meaning, it was common ground that regard must be paid to the purpose of the provision, as recently reaffirmed by the Supreme Court in *R (oao of PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28 at [40].

The dictionaries

27. The Cambridge Dictionary defines "mistake" as "an action, decision, or judgment that produces an unwanted or unintentional result"; it defines "error of omission" as "a mistake that consists of not doing something you should have done, or not including something such as an amount or fact that should be included".

28. The extract from the Oxford English Dictionary included in the Bundle defines a mistake as "a misconception about the meaning of something; a thing incorrectly done or thought; an error of judgement". The full entry continues by adding the following further definitions: "misapprehension, misunderstanding; error, misjudgement" and "something chosen through an error of judgement; a badly selected thing, a regrettable choice".

29. I agree with Mr Knowlson that these definitions do not support Mr Cannon's submission that, as a matter of ordinary language, a person only makes a "mistake" when he

has an "awareness" of something and goes on to make an incorrect decision: the definitions above include an "unwanted…result", a "thing incorrectly done" and "a badly selected thing". They therefore refer to the *outcome* of a person's decision, and do not import any requirement that he had any sort of prior awareness before making the decision. I therefore find that, as a matter of ordinary language, a person can make a "mistake" by omitting to do something of which he was unaware. In other words, a "mistake" can be made by oversight and/or by ignorance, as well as for other reasons.

The statutory context: Mr Knowlson's submissions

30. Mr Knowlson made the following submissions as to the meaning of Case A in its statutory context. I agree with those submissions for the reasons he gave.

> (1) If the word "mistake" had the limited meaning contended for by Mr Cannon, this would undermine the statutory requirement clearly set out in s 54D(2) that the claim must be made in (or by amendment to) the SDLT return. It would also reward ignorance of the law by allowing a much longer time limit: para 34B(2) allows four years for an overpayment claim compared to the one year allowed by para 6(3) for amending an SDLT return,
>
> (2) The different wording used in Case A and Case C support HMRC's position because:
>
> > (a) Case C concerns reliefs which do not require a claim or election. Mr Knowlson said that there were a number of such reliefs, and identified s 5(1)(ab), (use for a relievable trade); s 67 (reorganisation of Parliamentary constituencies) and s 71 (registered social landlords). Mr Cannon did not dispute any of those examples or the general principle that not all reliefs require a claim or election.
> >
> > (b) Case C provides that HMRC is not liable to give effect to a claim if the person could have sought relief but (i) is now out of time to do so, and (ii) knew or ought reasonably to have known that the relief was available. In other words, HMRC *do* have to consider claims made by those who are out of time to benefit from that type of relief, if it was not reasonable for the taxpayer to have known the relief was available.
> >
> > (c) Had Parliament intended that Case A should likewise exclude persons who could not reasonably have known about a relief for which a claim or election is required (such as MDR) within the statutory time limits, a similar exception would have been included in Case A, but there is no such wording.

The statutory context: Mr Cannon's submissions

31. Mr Cannon submitted that HMRC's argument "leaves no function for the word mistake" and that had Parliament intended Case A to include a failure by a taxpayer to make a claim when he was entirely ignorant of that possibility, the legislation would not have referred to "mistake" at all, but simply said that Case A applied where a person "failed to make" a claim. He said Parliament could have achieved the meaning contended for by HMRC if the references to "mistake" had been omitted, as set out below:

> "Case A is where the amount paid, or liable to be paid, is excessive by reason of—
>
> (a) ~~a mistake in~~ a claim or election, or

(b) ~~a mistake consisting of~~ the making or giving, or failing to make or give, a claim or election."

32. I disagree. Case A starts from the position that the amount of SDLT is "excessive". For that to be the position requires not only a "claim" or a failure to make a claim; it also requires that there is something wrong: in ordinary language a "mistake".

33. Mr Cannon also submitted that HMRC's reading of Case A meant that Parliament's intention in providing taxpayers with a relief for overpaid tax was "hollowed out", because it "leaves little scope" for the provision to operate. I agree that the result of HMRC's reading of Case A is that all taxpayers, including those who are ignorant of the law, are bound by the statutory requirements in s 58D(2) and the related 12 month time limit, but that consequence does not undermine HMRC's reading of the provision. In particular, as Mr Knowlson said, Mr Cannon's interpretation would equate these two types of taxpayer:

(1) those who had failed to meet the statutory obligation to make their claim for relief in a return (Case A); and

(2) those who had failed to apply a different type of relief (Case C), because they reasonably did not know that the relief existed; but Case A does not have a "reasonable ignorance" exception; this is only present in Case C.

The Explanatory Notes

34. Both parties referred to the Explanatory Notes which accompanied the introduction of paras 34 and 34A. Explanatory Notes are drafted under the authority of Parliament and so may cast light on the meaning of particular statutory provisions, see *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 *per* Lord Steyn, and *R (oao O) v SSHD* [2022] UKSC 3.

35. The Notes say, so far as relevant:

"4. New paragraph 34 provides that a person may make a claim for repayment of an amount that they have overpaid by way of SDLT or for discharge of an amount that has been over-assessed as SDLT, subject to restrictions set out in paragraph 34A.

5. New paragraph 34 further provides that the Commissioners for HM Revenue and Customs (HMRC) are not liable to give relief in respect of an overpayment or overassessment of SDLT except as required under Part 4 of FA 2003 – the SDLT legislation.

6. New paragraph 34A sets out cases in which the Commissioners are not liable to give relief

• Case A is where the overpayment or over-assessment is attributable to a mistake concerning a claim or election;

• Case B is where it is possible to take other steps under the SDLT legislation to remedy the overpayment or over-assessment;

• Case C is where the claimant could have taken other steps under the SDLT legislation when they first knew, or ought reasonably to have known, of the overpayment or over-assessment; …"

36. Under the heading "Background Note", the text adds at [21]:

"21. Currently, if a person finds that they have overpaid SDLT due to a mistake in a return which has become final, they may make a claim for relief

> unless the mistake relates to a claim or election or the return was made in accordance with the practice generally prevailing at that time
>
> 22. …
>
> 23. The new rules cover any situation in which a person overpays or is over assessed an amount in respect of SDLT including amounts paid under a contract settlement with HMRC. However, a claim will only be possible where there was no other means of reclaiming the overpayment or reducing the assessment in the SDLT legislation when the person first became aware or ought to have become aware that they could recover the overpayment."

37. Mr Knowlson submitted that the Notes supported HMRC's view of the meaning and purpose of Case A. Mr Cannon sought to rely on para 23, with its reference to the new rules covering "any situation in which a person overpays or is over assessed an amount in respect of SDLT".

38. I again agree with Mr Knowlson. It is clear from para 6 of the Notes that Case A covers all overpayment claims where the overpayment "is attributable to a mistake concerning a claim or election"; para 21 reflects this when it says that the overpayment claims can be made "unless the mistake relates to a claim or election". Para 23 must therefore be read subject to that exception.

The case law

39. In *HMRC v Candy* [2021] UKUT 170 (TCC) ("*Candy*") the UT upheld HMRC's refusal to repay SDLT to a taxpayer who had sought to amend his return after the statutory time limit; Mr Candy's appeal was refused by the Court of Appeal, see [2022] EWCA Civ 1447.

40. Mr Knowlson relied on this passage from the UT judgment at [112] (his emphasis):

> "it does not follow that merely meeting the conditions for the relief is enough to secure that the taxpayer actually gets the relief. The relief requires a claim; and if the claim is not made in the return, the taxpayer will not get it. And nor can para. 34 of Sch.10 to FA 2003 (as it currently stands) ride to the taxpayer's rescue in such a case: see para. 34A(2)(b)."

41. In *Smith Homes 9 v HMRC* [2022] UKFTT 00005 ("*Smith Homes*"), Judge McKeever considered whether to strike out the appeal on the basis that there was no reasonable prospect of success. Like the Appellants, the taxpayer in *Smith Homes* had failed to make its MDR claim in its SDLT return, or to amend that return within the statutory time limit; it instead made a claim under para 34.

42. Having cited para [112] of *Candy,* Judge McKeever held that Case A applied, with the result that HMRC were not liable to repay the SDLT. She said at [82] that:

> "This is entirely consistent with the scheme of the SDLT legislation. The legislation provides a relief where multiple dwellings are acquired and sets out mandatory requirements, including time limits for the relief to be claimed. The appellant cannot circumvent those requirements by submitting a repayment claim under paragraph 34. The provisions of paragraph 34A mean that HMRC is not bound to give effect to the claim in these circumstances."

43. Judge Fairpo came to a similar conclusion in *Secure Service v HMRC* [2020] UKFTT 59. In *Warner v HMRC* [2023] UKFTT 751(TC), Judge McGregor also struck out a claim

for MDR made after the statutory time limit, although some of the reasoning in that case differs from that in *Smith Homes.*

44. Mr Knowlson submitted that these judgments provided strong support for HMRC's analysis. Mr Cannon very fairly accepted that the case law was unhelpful to the Appellants, but submitted that:

(1) the UT in *Candy* had dismissed the possibility of a claim under para 34 in half a sentence;

(2) in both *Secure Service* and *Warner* the appellants were unrepresented and were thus unlikely to be able to make all relevant legal arguments; and

(3) none of these earlier judgments had considered the meaning of "mistake", but had simply assumed that a failure to make a timely claim in an SDLT return or by amendment was a "mistake".

45. I find as follows:

(1) although *Candy* did not consider exactly the same issue, and so is not directly binding on this Tribunal, I agree with Judge McKeever that it is persuasive;

(2) while Mr Cannon is correct that the appellants in two of the cases acted as litigants in person, this was not true of *Smith Homes,* where he represented the appellant, and it was not the case in *Candy,* where the appellant was also represented by counsel; and

(3) although the meaning of "mistake" was not discussed in these other judgments, I have considered it above, and have agreed with HMRC that a failure to make a claim by the statutory time limit in the form required by the legislation was a "mistake" within the meaning of Case A.

Conclusion on Issue 2

46. For the reasons set out above, HMRC succeed on Issue 2. It follows that the Appellants' appeals are struck out under Rule 8(3)(c) on the basis that they have no reasonable prospect of success.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

47. 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 Rules. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE REDSTON
TRIBUNAL JUDGE

Release Date: 13th October 2023