Neutral Citation: [2024] UKFTT 00885 (TC)

Case Number: TC09305

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2022/12796

STAMP DUTY LAND TAX – overpayment relief under paragraph 34 of Schedule 10 to the Finance Act 2003 – multiple dwellings relief under Schedule 6B to the Finance Act 2003 – amount of tax due mistakenly calculated using the higher rates in Schedule 4ZA to the Finance Act 2003 – whether tax was overpaid as a result of a mistake in a claim – yes – whether overpayment relief due – no – appeal dismissed on judge's casting vote

Heard on: 17 June 2024
Judgment date: 1 October 2024

Before

TRIBUNAL JUDGE RACHEL GAUKE
JULIAN SIMS

Between

BTR CORE FUND JPUT

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Hui Ling McCarthy KC, instructed by Sean Randall Tax LLP

For the Respondents: Aidan Knowlson, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Appellant (Cetza Trustees V3 Ltd and Cetza Trustees V4 Ltd as trustees of the BTR Core Fund JPUT, referred to in this decision as "BTR") appeals against HMRC's rejection of a claim for overpayment relief in relation to stamp duty land tax ("SDLT") in the amount of £3,064,633.

2. There is only one matter in dispute in this case, and it is a short point of statutory interpretation. It was common ground that BTR's SDLT return contained a mistake, and that BTR had overpaid tax. There was no dispute as to quantum. HMRC accept that they are liable to repay the overpaid tax unless the overpayment was by reason of a "mistake in a claim" for the purposes of the relevant legislation.

3. For the reasons below, the decision of the Tribunal is that the overpayment did arise by reason of a mistake in a claim, and that therefore BTR's appeal should be dismissed.

4. In this decision, unless stated otherwise, all statutory references are to the Finance Act 2003 ("FA 2003").

HEARING AND EVIDENCE

5. We had a 768-page hearing bundle, a 371-page authorities bundle, a 105-page supplementary authorities bundle, and both parties' skeleton arguments. There were no witnesses.

6. At the hearing, the parties explained that the version of the SDLT return contained in the bundle had been produced by HMRC's computer system for the purpose of the hearing. It appeared that, when HMRC received BTR's claim for overpayment relief, the figures in the return were overwritten to reflect the figures as amended by the claim. The SDLT return in the bundle therefore did not contain the figures entered by BTR when it originally completed the return.

7. Ms McCarthy provided us, at the hearing, with a hard copy of the SDLT return showing the figures originally entered by BTR, and emailed an electronic copy of this return, which we received after the hearing had concluded. Mr Knowlson made no objection to this version of the SDLT return being produced as evidence. In this decision, therefore, when we refer to the SDLT return, we mean the return in the form that was originally submitted by BTR to HMRC, and not the amended version which appeared in the hearing bundle.

BACKGROUND FACTS

8. There is no dispute in this case on any question of fact.

9. On 15 April 2019, BTR acquired the leasehold estate in a property in Manchester known as West Tower (the "Property"), for £98,172,807 plus an overage. The Property consisted of 350 "build to rent" dwellings (one-, two- and three-bedroom flats) and unlet commercial premises on the ground floor.

10. The commercial premises were intended to be let to the separate operators of a coffee shop and a cookery school. This non-residential element of the transaction was worth £541,141 including VAT.

11. BTR submitted an SDLT return in respect of the transaction in which it claimed multiple dwellings relief ("MDR"). BTR paid £4,335,760 of SDLT at the time when it submitted the return.

12. On 1 May 2019, BTR made an SDLT deferral application in respect of the overage payment. The application was granted. Overage of £4,600,000 was paid on 8 July 2020. HMRC were notified of the overage payment on 14 July 2020 and BTR paid an additional £367,126 of SDLT, bringing the total SDLT paid on the transaction to £4,702,886.

13. On 27 January 2021, BTR wrote to HMRC to claim overpayment relief under Sch 10, para 34 in the amount of £2,927,725. The claim was made on the basis that there was an error in the previous SDLT calculation.

14. On 15 March 2021, BTR wrote again to HMRC stating that the letter of 27 January 2021 failed to take account of the overage payment made by BTR on 8 July 2020. This increased BTR's overpayment relief claim to £3,064,633.

15. HMRC gave effect to the claim by making two payments, one on 17 June 2021 and another on 28 September 2021, in a total amount of £3,097,736.02. This amount represented the repayment of SDLT, plus interest.

16. HMRC opened a check into the overpayment relief claim and on 25 March 2022, they issued a closure notice concluding that they were not liable to give effect to the claim. BTR appealed this decision on 8 April 2022 and requested an independent review. HMRC issued their review conclusion letter, upholding the closure notice, on 1 September 2022. BTR appealed to the Tribunal on 21 September 2022.

RELEVANT LAW

17. SDLT is chargeable, by section 42, on a "land transaction", which in turn is defined, by section 43, as an acquisition of a "chargeable interest".

18. It is not disputed that BTR acquired a chargeable interest so as to trigger a charge to SDLT. A "chargeable interest" is defined by section 48(1) to include an estate, interest, right or power over land in England or Northern Ireland.

19. Land transactions are treated, by section 49, as "chargeable transactions", so that they are within the charge to SDLT, unless they are exempt. No question of exemption arises in this appeal.

20. Under sections 76 and 77, a purchaser must notify HMRC of transactions on which SDLT is due, by delivering a "land transaction return" within 14 days of the effective date of the transaction. Land transaction returns are referred to in this decision as "SDLT returns".

21. Section 78 introduced Sch 10, which is concerned with SDLT returns, assessments and related matters. Under Sch 10, para 6, a purchaser may amend an SDLT return by notice to HMRC. Except as otherwise provided, an amendment may not be made more than 12 months after the last date on which the return must be delivered.

22. The effective date of a land transaction is determined by section 119. In this case it was common ground that the effective date of the acquisition of the Property was 15 April 2019.

23. Section 85 provides that the purchaser is liable to pay the SDLT in respect of a chargeable transaction.

24. Section 55 is headed "amount of tax chargeable: general". This sets out a two-step calculation under which specified rates are applied to specified parts of the consideration for the transaction, and the resulting amounts added together. The specified rates are set out in two tables: Table A is for land consisting entirely of residential property, while Table B is for land that consists of or includes land that is not residential property. In this decision the rates set out in Table A at section 55(1B) are referred to as the "residential standard rates".

25. Section 55(4A) provides:

> "(4A) Schedule 4ZA (higher rates for additional dwellings and dwellings purchased by companies) modifies this section as it applies for the purpose of determining the amount of tax chargeable in respect of certain transactions involving major interests in dwellings."

Higher rates transactions

26. Sch 4ZA provides for different, higher rates of SDLT to apply to "higher rates transactions". If a transaction is a higher rates transaction, section 55 applies with a modified version of Table A. The rates of tax in this modified version of Table A are 3% higher than the rates in the unmodified version, and are referred to in this decision as the "higher rates".

27. Sch 4ZA, para 2 provides that, if there is only one purchaser, a higher rates transaction is one that falls within any of paras 3 to 7.

28. Sch 4ZA, para 7(1) provides as follows.

> 7(1) A chargeable transaction falls within this paragraph if—
>
> (a) the purchaser is not an individual,
>
> (b) the main subject-matter of the transaction consists of a major interest in two or more dwellings ("the purchased dwellings"), and
>
> (c) at least one of the purchased dwellings meets conditions A and B.

29. No issue arose in this appeal as to the application of conditions A and B, and we have taken them both to have been met.

Multiple dwellings relief (MDR)

30. MDR was repealed for transactions with an effective date on or after 1 June 2024. This decision is concerned with the legislation applying at the time of the acquisition of the Property.

31. In overview, MDR provided for relief from SDLT for transactions involving the acquisition of more than one dwelling. The relief operated by providing for an alternative method of calculation of SDLT.

32. This alternative method involved determining the SDLT that would be chargeable if the transaction involved only residential property, and the consideration were an amount based on the actual consideration for the transaction. This amount was calculated by identifying the part of the actual consideration that was attributable to dwellings, and dividing this by the number of dwellings. The resulting amount of SDLT was multiplied by the number of dwellings and added to the SDLT that was due on any consideration that was not attributable to dwellings, to give the total amount of tax due on the transaction. Further rules applied to linked transactions, and it was provided that the effective rate of tax on the dwellings could not fall below 1%. Since lower value acquisitions attract SDLT at lower rates, this calculation usually resulted in a lower effective rate of tax overall.

33. MDR was provided for in a group of sections headed "Reliefs". Section 58D provided:

> **"58D Transfers involving multiple dwellings**
>
> (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."

34. Sch 6B, para 1(c) stated that "paragraphs 4 and 5 describe the relief available if a claim is made".

35. Sch 6B, paras 2(1) and 2(2) provided as follows.

> **"2 Transactions to which this Schedule applies**
>
> (1) This Schedule applies to a chargeable transaction that is—
>
> (a) within sub-paragraph (2) or sub-paragraph (3), and
>
> (b) not excluded by sub-paragraph (4).
>
> (2) A transaction is within this sub-paragraph if its main subject-matter consists of—
>
> (a) an interest in at least two dwellings, or
>
> (b) an interest in at least two dwellings and other property."

36. The acquisition of the Property fell within para 2(2)(b) as an interest in at least two dwellings and other property. The transaction was not excluded by para 2(4).

37. Further relevant provisions of Sch 6B were as follows.

> **"3 Key terms**
>
> (1) A chargeable transaction to which this Schedule applies is referred to in this Schedule as a "relevant transaction" […]
>
> (4) A relevant transaction is a "multiple dwelling transaction" if its main subject-matter consists of—
>
> (a) an interest in at least two dwellings, or
>
> (b) an interest in at least two dwellings and other property.
>
> (5) In relation to such a transaction, those dwellings are referred to as "the dwellings".
>
> **4 The relief**
>
> (1) If relief under this Schedule is claimed for a relevant transaction, the amount of tax chargeable in respect of the transaction is the sum of—
>
> (a) the tax related to the consideration attributable to dwellings (see paragraph 5(1) and (2)), and
>
> (b) the tax related to the remaining consideration (if any) (see paragraph 5(7)).
>
> (2) "The consideration attributable to dwellings" is—
>
> (a) for a single dwelling transaction, so much of the chargeable consideration for the transaction as is attributable to the dwelling,
>
> (b) for a multiple dwelling transaction, so much of the chargeable consideration for the transaction as is attributable to the dwellings in total.
>
> (3) "The remaining consideration" is the chargeable consideration for the transaction less the consideration attributable to dwellings […]
>
> (6) "Attributable" means attributable on a just and reasonable basis.
>
> **5 The amount of tax chargeable**

(1) For the purposes of paragraph 4(1)(a), "the tax related to the consideration attributable to dwellings" is determined as follows—

Step 1

Determine the amount of tax that would be chargeable under section 55 on the assumption that—

(a) the relevant land consisted entirely of residential property, and

(b) the relevant consideration were the fraction produced by dividing total dwellings consideration by total dwellings.

Step 2

Multiply the amount determined at Step 1 by total dwellings.

Step 3

If the relevant transaction is one of a number of linked transactions, go to Step 4.

Otherwise, the amount found at Step 2 is the tax related to the consideration attributable to dwellings […]

(3) For a transaction that is not one of a number of linked transactions, "total dwellings consideration" is the consideration attributable to dwellings for that transaction (see paragraph 4(2)) […]

(5) "Total dwellings" is the total number of dwellings by reference to which total dwellings consideration is calculated […]

(6A) In the application of sub-paragraph (1), account is to be taken of paragraph 1 of Schedule 4ZA if the relevant transaction is a higher rates transaction for the purposes of that paragraph.

(7) For the purposes of paragraph 4(1)(b), "the tax related to the remaining consideration" is the appropriate fraction of the amount of tax which (but for this Schedule) would be due in respect of the relevant transaction. […]"

38. Neither party submitted that the acquisition of the Property was one of a number of linked transactions for the purposes of Sch 10.

Overpayment relief

39. Sch 10, para 34 relevantly provides as follows.

"34 Claim for relief for overpaid tax etc

(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."

40. Relevant provisions of Sch 10, para 34A are as follows.

> "**34A Cases in which Commissioners not liable to give effect to a claim**
>
> (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.
>
> […]
>
> (8) Case G is where—
>
> (a) the amount paid, or liable to be paid, is excessive by reason of a mistake in calculating the claimant's liability to tax, and
>
> (b) liability was calculated in accordance with the practice generally prevailing at the time."

41. Sch 10, para 34B provides that a claim under para 34 may not be made more than four years after the effective date of the transaction, and that the claim may not be made in an SDLT return.

42. Sch 11A imposes further requirements in respect of claims that are not included in SDLT returns. Sch 11A, para 4 provides that a claimant may amend their claim by notice to HMRC, but that no such amendment may be made more than 12 months after the claim was made, or during the period of any HMRC enquiry into that claim.

Case law

43. In *Whitney v IRC* [1926] AC 37 at [37] ("*Whitney*"), Lord Dunedin said:

> "Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

44. This passage was recently applied by the Supreme Court in *R (oao Derry) v HMRC* [2019] UKSC 19 ("*Derry*") at [35] in the context of a claim for relief from income tax.

45. This Tribunal has previously considered the application of Case A of Sch 10, para 34A. Under this provision, HMRC are not liable to give effect to a claim for overpayment relief if the amount of SDLT paid, or liable to be paid, is excessive by reason of certain types of mistake. Case A is divided into two sub-paragraphs: sub-paragraph (a) applies where there is a mistake in a claim or election, while sub-paragraph (b) applies where there is a mistake consisting of making or giving, or failing to make or give, a claim or election.

46. This appeal is concerned with sub-paragraph (a) of Case A, and the parties did not identify any previous cases that specifically considered sub-paragraph (a). We were directed to two previous decisions of this Tribunal that were concerned with sub-paragraph (b): *Secure Service v HMRC* [2020] UKFTT 59 (TC) ("*Secure Service*") and *Smith Homes 9 Ltd v HMRC* [2022] UKFTT 5 (TC) ("*Smith Homes*"). In both cases, the appellant had submitted

an SDLT return that did not include a claim to MDR, but had purported to claim MDR subsequently, at a time when it was too late to amend the SDLT return.

47. In *Secure Service*, the appellant did not make a specific claim for overpayment relief, but the Tribunal considered whether the late claim for MDR could be treated as an in-time claim for overpayment relief. The Tribunal considered that a claim for MDR could not be interpreted as a claim for overpaid SDLT and noted that in any event, sub-paragraph (b) provides that HMRC are not liable to give effect to a claim for overpayment relief where the amount paid was excessive as a result (inter alia) of failing to make a claim. The Tribunal then said, at [48]:

> "[48] I have found that no claim for overpayment relief was made but I also consider that even if a specific claim for overpayment of SDLT had been made in relation to the claim for multiple dwellings relief that the legislation is clear that HMRC would not be liable to give effect to that claim. This follows logically; it would be inconsistent with the aims of the legislation if a twelve month time limit could circumvented simply by describing a claim for relief as a claim for a refund of an overpayment."

48. In *Smith Homes*, the Tribunal found that HMRC were not liable to give effect to the repayment claim because of the application of Case C of Sch 10, para 34A (Case C is not relevant to this appeal). At [81] and [82], the Tribunal went on to say:

> "[81] I consider that the appellant's failure to make a claim for MDR which it could have made in a return falls within Case A of paragraph 34A so, on that basis also, HMRC is not liable to give effect to the overpayment relief claim.
>
> [82] 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."

49. The passage from *Smith Homes* at [82] was cited by this Tribunal in the case of *L-L-O Contracting Ltd and others [2023] UKFTT 859 (TC)*. That case was largely concerned with the meaning of a mistake, which is not a matter in contention in the present appeal.

BTR'S CLAIMS TO MDR AND TO OVERPAYMENT RELIEF

50. It was common ground that BTR's SDLT return contained a mistake. We describe here how that mistake came about, by explaining how BTR calculated its claim for MDR, and how the claim was made in the SDLT return. We also describe how HMRC's guidance on the relevant point changed in 2020, leading to BTR's claim for overpayment relief.

BTR's MDR calculation

51. Sch 6B provided that if MDR is claimed, the amount of SDLT on the consideration attributable to dwellings must be determined on the assumption that the relevant land consisted entirely of residential property. Sch 6B, para 5(6A) provided that in that calculation, account is to be taken of Sch 4ZA, para 1 if the relevant transaction is a higher rates transaction for the purposes of that paragraph.

52. When completing its SDLT return, BTR calculated the amount of tax due using the rules in Sch 6B, on the basis that the acquisition of the Property fell within Sch 4ZA, para 7

and was therefore a higher rates transaction. Sch 4ZA, para 7 applies to a chargeable transaction if, among other things, "the main subject-matter of the transaction consists of a major interest in two or more dwellings". Therefore, when performing the calculation required by Step 1 of Sch 6B, para 5(1), BTR used the higher rates in Sch 4ZA, para 1(2), and not the residential standard rates in Table A in Section 55(1B).

The SDLT return

53. As set out above, section 58D(2) provided that MDR must be claimed in an SDLT return. There is no dispute that BTR's claim for MDR complied with this requirement.

54. The SDLT return required only a limited amount of information to be provided for the purpose of making a claim for MDR. We have reproduced below the questions in the SDLT return (using the numbering adopted by that return) in so far as they are relevant to the MDR claim, together with the responses given by BTR when it submitted its return. All these questions and responses appear in a section of the SDLT return headed "tax calculation".

Question in SDLT return	**BTR's response**
9. Are you claiming relief?	Y – Yes
9. Type of relief claimed	33 – Multiple dwellings relief
9. Where relief is claimed on part of the property only what is the amount that remains chargeable?	£98,172,807
10. Total consideration in money or money's worth including any VAT actually payable for the notified transaction	[Left blank]
11. VAT amount included in the total consideration (where applicable)	[Left blank]
12. What form(s) does the consideration take	30 – Cash
14. Total amount of tax due for this transaction	£4,335,760

55. We observe that, as we have set it out here, it appears strange that there are three separate questions all numbered 9, but this reflects the numbering on the SDLT return supplied to us by the parties. There is, in fact, a fourth question, also numbered 9, concerning charities and CIS numbers, which is not relevant here and so we have not reproduced it. In this decision, when we refer to Question 9, we mean all the questions numbered 9 in the SDLT return.

56. As may be seen from the questions and responses reproduced above, there is no requirement for the SDLT return to show any part of the taxpayer's workings in calculating the claim to MDR. There is also no requirement to show what might be described as the amount of relief, in the sense of the difference between the amount of tax due both with and without the benefit of MDR. All that is required is for the taxpayer to state that they are claiming MDR, and then state the amount of tax due.

57. In compliance with these requirements, BTR completed Question 9 to show that it was claiming MDR, and at Question 14 entered the results of its calculation of the amount of SDLT due, as described in paragraph [52] above.

HMRC's guidance and the claim for overpayment relief

58. BTR's MDR calculation was in accordance with HMRC's internal guidance on MDR in the SDLT Manual, as it read at the time of BTR's acquisition of the Property. Page SDLTM29975 of that Manual contained an example to illustrate the operation of MDR. The example involved the purchase of a headlease over five flats and four lock-up shops. This page was updated on 21 November 2018, after which time it included the following wording.

> "The higher rate for additional dwellings will be applicable. More information about the higher rate can be found at SDLTM09730."

59. At some point in 2020, HMRC's interpretation of the law changed, and as a result, they updated the SDLT Manual. On 17 November 2020, the above wording on page SDLTM29975 was amended to read as follows.

> "The higher rates for additional dwellings will not be applicable as the non-residential element of the transaction is not negligible. More information about the higher rates can be found at SDLTM09730."

60. Further guidance on higher rates transactions appeared elsewhere in the SDLT Manual. This, too, was amended to reflect HMRC's new interpretation of the law. Page SDLTM09740 was updated on 16 November 2020, and the new wording included the following.

> "The following transactions will not comprise higher rates transactions and the higher rates will not apply. Purchases of: -
>
> - non-residential or mixed residential and non-residential properties, except for a transaction which incorporates more than one dwelling, when
>
> 1. a "Multiple Dwellings Relief" claim is made in respect of the residential element of the transaction, and
>
> 2. the non-residential element of the transaction is negligible or artificially contrived."

61. The Property comprised both residential and non-residential properties. HMRC now accept that BTR's acquisition of the Property was not a higher rates transaction, and have not contended that the non-residential element was negligible or artificially contrived. If BTR had calculated its claim to MDR in accordance with HMRC's amended guidance, its liability to SDLT would have been much lower.

62. The period in which BTR could have amended its SDLT return, including its claim to MDR, expired on 29 April 2020. So by the time of HMRC's updates to the SDLT Manual in November 2020, it was too late for BTR to amend its claim.

63. BTR therefore claimed overpayment relief instead, as the time limit for claiming overpayment relief did not expire until 15 April 2023. The claim for overpayment relief was made on the basis that there was an error in the self-assessed SDLT calculation, in that the MDR calculation should have used the residential standard rates and not the higher rates.

DISCUSSION

64. The following matters are agreed between the parties.

(1) The flats that formed part of the Property were dwellings for the purposes of MDR.

(2) The higher rates did not apply to BTR's acquisition of the Property, because the main subject-matter of the transaction did not "consist of" a major interest in two or more dwellings for the purposes of Sch 4ZA, para 7(1)(b). Instead, the main subject-matter of the transaction only partly consisted of two or more dwellings, as the Property also included commercial premises.

(3) The SDLT return relating to BTR's acquisition of the Property made a valid claim for MDR. However, the return contained a mistake, in that the amount of SDLT chargeable under Sch 6B, para 5(1) was calculated using the higher rates, when it should have been calculated using the residential standard rates.

(4) As a result of this mistake, BTR paid an amount of tax that was not due. HMRC are liable to repay the overpaid tax under Sch 10, para 34, unless the overpayment relief claim falls within Case A of Sch 10, para 34A.

(5) If Case A of Sch 10, para 34A does not apply, the amount of SDLT which HMRC are liable to repay to BTR is £3,064,633.

(6) Case G of Sch 10, para 34A does not apply for the purposes of this appeal. While HMRC's closure notice contended that both Case A and Case G applied, they have since decided not to pursue this argument.

(7) BTR's claim for overpayment relief under Sch 10, para 34 complied with the requirements of Sch 10, para 34B and of Sch 11A. In particular, the claim was made within the relevant time limit, which was four years from the effective date of the transaction.

65. As the above points are not in dispute, the only question to be decided in this appeal is whether BTR's claim for overpayment relief falls within Case A in Sch 10, para 34A(2).

66. BTR's case is, in brief, that the relevant mistake was not in the making of a claim, but in the calculation of tax chargeable. These, applying the principles in *Whitney* and *Derry*, are different stages in the imposition of tax.

67. HMRC's case is that the calculation of tax is a part of making a claim to MDR. The calculation of SDLT under the MDR provisions in Sch 6B does not operate by amending the normal SDLT calculation or applying some form of discount, but replaces the normal SDLT calculation entirely. As a result, when a taxpayer claims MDR, any mistake in the calculation of tax liability will also be a mistake in the claim. The amount of MDR due cannot be arrived at without following the steps in Sch 6B. According to HMRC, as the consideration of Sch 4ZA will always be in consequence of the claim for MDR and the calculation of tax liability, any mistake in accounting for this additional element will be a mistake in the claim.

68. The decision of the Tribunal was reached by the casting vote of Judge Gauke, in accordance with article 8 of the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 and paragraph 8 of the Practice Statement on the Composition of Tribunals dated 10 March 2009. The dissenting view of Mr Sims is set out at paragraphs [122] to [128] below.

The difference between relief and a claim for relief

69. BTR submitted as follows.

(1) The legislation makes a clear distinction between a relief, and a claim for relief. This is in keeping with the distinction drawn by Lord Dunedin in *Whitney*, when he identified liability and assessment as separate stages in the imposition of a tax. A relief

may reduce the amount of tax chargeable, and is part of determining a person's liability to tax. By contrast, a claim for relief is a mechanical, administrative process, and is part of the process of assessment.

(2) This distinction can be clearly seen in the language of Sch 6B, for instance in para 1(c) which refers to "the relief available if a claim is made". It can also be seen in section 58D, in that section 58D(1) states that Sch 6B provides for relief in certain cases, while section 58D(2) makes provision for how that relief may be claimed. The distinction can also be seen in Sch 10, para 34A, not just in Case A, but in Cases B to G, where the statutory language clearly distinguishes between a relief and a claim.

(3) The structure of the legislation reflects the difference between determining liability on the one hand, and administrative processes on the other. This may be seen in sections 76, 77 and 78, which come under the heading of "returns and other administrative matters", and section 85, which comes under the heading of "liability for and payment of tax". Similarly, Sch 10 is concerned with assessment rather than liability.

(4) In the case of MDR, the relief modifies the calculation of the amount of tax chargeable, which is a matter of liability. This is distinct from the separate stage of assessment, which includes the making of a claim. BTR's mistake was in the calculation of tax chargeable, and was therefore not a mistake in a claim.

70. The Tribunal agrees with Ms McCarthy that, applying the principles described in *Whitney* and *Derry*, there are different stages in the imposition of tax, and that the question of whether a person is liable to tax is distinct from the process by which that tax may be assessed. Similarly, the question of whether a person is entitled to a relief is separate from the process by which that relief may be claimed.

71. In the case of MDR, section 58D(1) and Sch 6B provide for relief from SDLT in the case of transfers involving multiple dwellings. Sch 6B describes the transactions to which MDR applies, and how the SDLT chargeable is to be calculated if a claim for relief is made. The effect of section 58D(2) is that MDR will only apply if it is claimed. The claim must be made in an SDLT return, or in an amendment of an SDLT return. So a person may be entitled to MDR (which may be regarded as a question of liability), but they will only benefit from that relief if they make a claim (which may be regarded as a question of assessment).

72. In the view of the Tribunal, the effect of these provisions is that when a taxpayer performs a calculation in accordance with the rules in Sch 6B, and enters the result of this calculation in their SDLT return, this entry forms part of their claim to MDR. Relief is provided by permitting the taxpayer to calculate their tax liability under the rules in Sch 6B, and that relief is claimed by using the result of this calculation to self-assess the amount of tax due in the SDLT return.

73. The entries BTR made in its SDLT return, so far as relevant to the claim to MDR, are set out above at paragraph [54]. One of these entries is the £4,335,760 given as the response to Question 14 (the amount of tax due), which BTR had calculated using the rules in Sch 6B. While the return did not require BTR to show its workings, the outcome of the calculation was entered into the SDLT return. The Tribunal considers that the response to Question 14 was part of BTR's claim to MDR.

74. Ms McCarthy's position was that a claim for relief is an administrative or mechanical process, and that the calculation of the amount of relief does not form part of that process. According to Ms McCarthy, only this administrative process constitutes the making of a claim, and BTR made no mistakes in this process: the only legislative requirement as to how

an MDR claim must be made is that it must be included in an SDLT return, and BTR complied with this requirement.

75. Even if it is correct to characterise a claim as an administrative or mechanical process, the Tribunal's view is that in the case of a claim to MDR this process includes entering a figure in response to Question 14 in the SDLT return. This figure will be the result of a calculation carried out under the rules in Sch 6B.

76. The Tribunal finds support for this approach from the passage in *Whitney* which is reproduced above. In that passage, Lord Dunedin states that liability is "the part of the statute which determines what persons in respect of what property are liable". The next stage in the imposition of the tax is assessment, and of this Lord Dunedin says: "assessment particularises the exact sum which a person liable has to pay". By entering the result of its Sch 6B calculation in Question 14 of the SDLT return, the Tribunal considers that BTR was particularising the exact sum which it had to pay.

77. Ms McCarthy submitted that by contending that the calculation is an integral part of an MDR claim, HMRC have wrongly merged liability (the calculation of the amount chargeable) and assessment (the statutory machinery for making claims). But the Tribunal considers that it is more consistent with Lord Dunedin's approach to view the entry of the result of the calculation into the SDLT return as part of the process of assessment (or self-assessment, in the case of an SDLT return), than for it to be equated with liability.

78. The Tribunal's approach to the stages described by Lord Dunedin in *Whitney* differs from that put forward by Mr Knowlson. Mr Knowlson suggested that calculation of liability forms part of the steps needed to make a claim in the second stage, but that the term "mistake in a claim" is wide enough to encompass the first stage. However, the Tribunal prefers the interpretation set out above.

79. Ms McCarthy took us in some detail through the judgment of Lord Carnwath in *Derry*, at [1] to [39]. Though relating to income tax legislation rather than SDLT, according to Ms McCarthy the judgment highlights the distinction between liability and claims, which in the case of income tax are separated into different Acts: the Income Tax Act 2007 on the one hand, and the Taxes Management Act 1970 on the other. Ms McCarthy submitted that, although not separated into different Acts, the separation of liability and claims is reflected in the structure of the SDLT provisions in the Finance Act 2003. She further submitted that *Derry* provides support for a proposition that a claim is a mechanical, administrative process.

80. As stated above, the Tribunal agrees that the question of whether a person is entitled to a relief is separate from the process by which the relief may be claimed. The question of whether a person is entitled to a relief may be regarded as a question of liability. However, the judgment in *Derry* does not lead the Tribunal to conclude that entering the result of a Sch 6B calculation into an SDLT return is not part of a claim to MDR. Liability and claims may be separate concepts, but the Tribunal must still determine to which of these concepts BTR's mistake belongs.

81. Mr Knowlson submitted that *Whitney* supports a proposition that HMRC are not bound to give effect to a claim where there is a mistake either in the "formulation" of a claim (including any error in calculation) or in the actions of making the claim. Ms McCarthy objected that the word "formulation" does not appear in the legislation and the Tribunal agrees that it would not be correct to read in this word.

82. The reasoning outlined above leads the Tribunal to the following preliminary conclusion. It was common ground that when BTR calculated the amount of SDLT due using the rules in Sch 6B, it made a mistake. The mistake in the calculation meant that the outcome

of that calculation was also mistaken. BTR claimed MDR in its SDLT return through its answers to Questions 9 and 14, but its answer to Question 14 was the result of the mistaken calculation, and so was wrong. In the Tribunal's view, this means that BTR's claim to MDR contained a mistake.

83. Much of the discussion we heard centred on whether the calculation itself was a part of BTR's claim. However, the Tribunal considers that, to determine this appeal, it is sufficient to decide that the result of the calculation, once entered in the SDLT return, was a part of the claim. A calculation and the result of that calculation are of course intimately connected, and it may be that by deciding that the result of the calculation was a part of BTR's claim, the Tribunal is necessarily deciding that the calculation itself was also part of the claim. But the Tribunal does not consider that it is necessary to answer this question to determine the appeal.

84. This is described as a preliminary conclusion because Ms McCarthy made several further submissions in support of BTR's position. These further submissions, and the Tribunal's responses to them, are set out below. The Tribunal has considered carefully whether, in the light of these further submissions, this preliminary conclusion may have been wrong. In the event, the Tribunal was not persuaded to adopt a different view. The Tribunal's reasoning is explained below.

The nature of the mistake

85. BTR's mistake was to use the higher rates to calculate the amount of SDLT chargeable under Sch 6B, para 5(1), rather than the residential standard rates. It is relevant to look in more detail at the nature of this mistake, as this may cast light on whether that mistake was "in a claim".

86. Ms McCarthy submitted, and the Tribunal accepts, that there is no requirement, when making a claim for MDR, to specify the amount of relief that is being claimed, or the rate of tax used for the purposes of the MDR calculation. All that is required by statute is for the claim to be made in an SDLT return, and all that is required by the SDLT return is for the taxpayer to state that they are claiming MDR, and then state the amount of tax due. Question 14 (the requirement to state the amount of tax due) is not exclusive to cases involving a claim to MDR, or to any other SDLT relief. The amount of tax chargeable must be calculated, and entered in the SDLT return at Question 14, even in cases where no relief applies. The Tribunal accepts that these submissions are correct.

87. Ms McCarthy then contended that it follows from this that a mistake in a claim means either a mistake in complying with the statutory requirements for making a claim (which here means only that the claim must be made in the SDLT return), or a mistake in completing the SDLT return (such as giving the wrong code number for the relief being claimed). According to Ms McCarthy, BTR did neither of these, as BTR's mistake was in the calculation of the relief, or in the calculation of the tax chargeable, due to a misunderstanding of Sch 6B, para 5(6A). This is not the same as a mistake in a claim.

88. The Tribunal does not accept this submission, essentially for the reasons that have already been given. In the Tribunal's view, if an SDLT return containing a claim to MDR gives an incorrect figure for the amount of tax due, there is a mistake in the claim. The fact that the calculation is not made within the SDLT return does not prevent the result of that calculation from being mistaken when it is entered into the return. And the fact that Question 14 must be completed even where no relief is claimed does not prevent the response to that question from being part of a claim to MDR in the case of BTR's SDLT return.

89. Ms McCarthy further submitted that a taxpayer who wishes to claim MDR, and who makes a mistake in calculating the amount of tax due, should be treated in the same way as a taxpayer who is not claiming relief, and who similarly makes a mistake in their calculation. In particular, a taxpayer who uses the wrong rate of tax in an MDR calculation should be treated in the same way as a taxpayer who uses the wrong rate where no relief is being claimed, because the tax rate is fundamental to the calculation of tax, whether relief is being claimed or not. The taxpayer who is not claiming a relief can, upon discovering their mistake, claim overpayment relief under Sch 10, para 34. According to Ms McCarthy, there is no reason why the taxpayer who has claimed MDR and who has similarly used the wrong rate of tax should have their overpayment relief claim disallowed.

90. The Tribunal considers that the flaw in this submission is that these two categories of taxpayer are not in the same position, because only one has made a "claim". There is no dispute that BTR's SDLT return contained a claim to MDR. It is hardly necessary to state that a person who has not made a claim cannot make a mistake in a claim. In BTR's case there is both a mistake and a claim; the only issue is whether the mistake is "in" the claim. In the Tribunal's view, for the reasons given above, the answer is yes.

91. The Tribunal understood that this submission was more to the effect that this would be a sensible outcome rather than being strictly about statutory interpretation. However, the legislation treats taxpayers who have made claims differently from those who have not, leading the Tribunal to conclude that it is in accordance with the intentions of Parliament that these categories of taxpayer should be treated differently in this respect.

Comparison with other reliefs

92. It is appropriate to consider whether there is something particular to MDR, when compared with other types of tax relief, that should lead the Tribunal to conclude that BTR's mistake was not a mistake in a claim.

93. Ms McCarthy drew attention to the ways in which a claim for MDR differs from a claim for some other types of relief, such as corporation tax group relief ("group relief"). She submitted that:

> (1) In the case of group relief, the effect of paragraphs 54 and 68 of Schedule 18 to the Finance Act 1998 ("FA 1998") is that the amount of relief being claimed by each group company must be quantified at the time the claim is made.
>
> (2) FA 1998, Sch 18, paras 66 to 68 clearly distinguish between a relief, and a claim for relief. These provisions are dealing with the mechanical provisions for making a claim for relief; the provisions dealing with eligibility for group relief are elsewhere in the corporation tax code.
>
> (3) FA 1998, Sch 18, para 68 sets out the matters that must be included in a group relief claim, which include a quantified amount of relief. If there is a mistake in one of these matters, it is clear that this would be a mistake in a claim.
>
> (4) Similar considerations arise on an analysis of the judgment in *Derry*, specifically at [15], where Lord Carnwath set out the provisions of section 132 of the Income Tax Act 2007. This section provides that a claim to share loss relief must specify certain matters. If a claim to share loss relief specifies any of these matters incorrectly, that would be a mistake in the claim.
>
> (5) MDR differs from group relief and share loss relief in that the only statutory requirement regarding how relief must be claimed is that it must be claimed in an

SDLT return. This difference supports the contention that in the context of MDR, a "mistake in a claim" means only a mistake in complying with the requirements of statute (or, by extension, a mistake in completing the SDLT return).

(6) In the case of group relief, the relief can be expressed as a specific sum of money, whereas for MDR the essence of the relief is to calculate the tax using the rules in Sch 6B. While it is possible to calculate the difference between the tax that is due with and without MDR, this number is simply a netting-off; it is not the "claim".

94. The Tribunal accepts that the legislation governing group relief and share loss relief sets out matters that must be included in a claim to one of these reliefs, and that the MDR legislation requires only that a claim must be made in an SDLT return. The Tribunal does not, however, consider that it follows from this that the meaning of a "mistake in a claim" should be limited to a mistake in complying with a legislative requirement about the mechanics of claiming relief.

95. A claim for group relief must quantify the amount of that relief, while there is no such requirement when claiming MDR. But it does not follow that the only way in which it is possible to make a mistake in a claim for relief is by quantifying this amount incorrectly. In the case of MDR, making a claim requires the taxpayer to state the amount of tax due, rather than to quantify the amount of the relief. If, in making a claim to MDR, the taxpayer's self-assessment of the amount of tax due is wrong, they have made a mistake in their claim. The fact that the rules for claiming group relief, which appear in a separate part of the tax code, operate differently does not lead the Tribunal to alter this conclusion.

Overpayment relief in the Finance Act 1998

96. Ms McCarthy discussed the history of Sch 10, para 34A, which was introduced by the Finance (No. 3) Act 2010. She drew attention to equivalent provisions that had been introduced in the previous year to the Taxes Management Act 1970 and FA 1998. These provisions include FA 1998, Sch 18, para 51A(2), which is in very similar terms to FA 2003, Sch 10, para 34A(2), and provides as follows.

> "(2) Case A is where the amount paid, or liable to be paid, is excessive by reason of—
>
> (a) a mistake in a claim, election or a notice,
>
> (b) a mistake consisting of making or giving, or failing to make or give, a claim, election or notice,
>
> (c) a mistake in allocating expenditure to a pool for the purposes of the Capital Allowances Act or a mistake consisting of making, or failing to make, such an allocation, or
>
> (d) a mistake in bringing a disposal value into account for the purposes of the Act or a mistake consisting of bringing, or failing to bring, such a value into account."

97. FA 1998, Sch 18, para 54 requires a claim for corporation tax relief to be for an amount which is quantified at the time when the claim is made. There is no equivalent requirement in FA 2003 in relation to SDLT relief.

98. Ms McCarthy said that, when viewed in its historical context, it was possible that provisions had been carried over from the Taxes Management Act 1970 and FA 1998 to Sch 10, para 34A, despite those provisions not being entirely applicable to SDLT. The provisions regarding a "mistake in a claim" were appropriate to, for instance, group relief, with its

mechanical provisions for making a claim, but fit less well with MDR. She suggested that para 34A may be more applicable to other types of SDLT relief, such as freeports relief, where the provisions for making a claim operate differently.

99. Ms McCarthy submitted that given this background, we should not approach para 34A on the basis that it must be possible to make a mistake in a claim for MDR, and that therefore a mistake in the calculation of the tax due must be the type of mistake to which para 34A applies. The only statutory requirement in relation to a claim for MDR is that it must be made in an SDLT return. The Tribunal understood Ms McCarthy's submission to mean that we should not interpret the legislation with the aim of avoiding the outcome that there is no scope to make a mistake in a claim for MDR.

100. The Tribunal's task is to interpret the law as it is enacted. The Tribunal does not accept that this task should be approached differently because similar provisions were previously enacted in relation to a different tax or taxes, even if it could be demonstrated that the SDLT provisions would have been different if the other provisions had not existed.

101. In any event, in deciding that BTR made a mistake in its claim for MDR, the Tribunal has not found it necessary to adopt the reasoning that Ms McCarthy submitted we should avoid. Her own submissions identified some mistakes it would be possible to make in the parts of the SDLT return that are concerned with a claim for MDR, such as giving the wrong code for a relief (at Question 9), or giving the wrong figure for the amount that remains chargeable (also at Question 9).

102. It is not in dispute that BTR answered these questions (in its responses to Question 9) correctly. However, in the Tribunal's view, in the context of a claim for MDR, it is possible to make other mistakes that would also fall within Sch 10, para 34A(2)(a). For the reasons given above, it is the Tribunal's view that entering the wrong figure in response to Question 14 in the SDLT return (the amount of tax due) is also a mistake in the claim.

103. Ms McCarthy also submitted that if HMRC's approach were correct, this would mean that FA 1998, Sch 18, para 51A(2), sub-paragraphs (c) and (d), are otiose. Sub-paragraphs (c) and (d) are reproduced above and concern capital allowances. According to Ms McCarthy, sub-paragraphs (c) and (d) concern matters that are part and parcel of the process of calculating capital allowances, so that if HMRC are right that a "claim" includes the calculation of a relief, these matters would be covered by sub-paragraph (a) (as a mistake in a claim), without the need for additional provisions.

104. Mr Knowlson's response was that capital allowances do not "translate" to SDLT, and that we should only consider MDR in terms of the provisions of FA 2003. According to Mr Knowlson, MDR operates differently from capital allowances, for instance in the way that Sch 6B gives relief by providing alternative rules for calculating the amount of tax due.

105. The Tribunal has approached Ms McCarthy's submission on sub-paragraphs (c) and (d) with a considerable amount of caution, largely for the reasons submitted by Mr Knowlson: that these provisions concern capital allowances, which are in a different part of the tax code from SDLT and operate very differently. For the Tribunal to make a definite finding that Ms McCarthy's argument is correct would require detailed submissions on the operation of the capital allowances regime, which neither party suggested they should provide.

106. The position might be different if the Tribunal considered that this submission was plainly correct, but this is not the case. It appears at least arguable that it would not be accurate to describe the matters dealt with in sub-paragraphs (c) and (d) (such as allocating expenditure to a pool, or bringing a disposal value into account) as being, in every case, part of the calculation of a capital allowance. Not every capital allowance calculation will result in

a claim for relief; sometimes the outcome is a balancing charge. Given that the Tribunal does not consider this matter to be clear, and given the differences between capital allowances and MDR, the Tribunal is not persuaded by this submission.

Explanatory notes

107. Mr Knowlson made submissions concerning the explanatory notes to the Finance (No. 2) Bill 2010, which introduced Sch 10, para 34A. In relation to Case A, the explanatory notes state that "no relief is available if the overpayment or over-assessment is due to a mistake relating to a claim for another relief". According to Mr Knowlson, the words "relating to" in this extract indicate that Parliament intended the term "mistake in a claim" to have a wide meaning.

108. The Tribunal notes, relying on *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 at [5], that we may take the explanatory notes to a Finance Bill into account as an aid to construction to the extent that they cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed. While it would be wrong to read the legislation as though it contained the words "relating to", the Tribunal considers that the explanatory notes provide at least some support for the proposition that the Tribunal should not adopt a narrow or restrictive interpretation of the phrase "mistake in a claim".

Time limits and the scheme of the legislation

109. The effective date of the transaction under which BTR acquired the Property was 15 April 2019. The filing date for the SDLT return was 14 days after that. Therefore, BTR could have amended its return, including its claim to MDR, at any point up to 29 April 2020. BTR first claimed overpayment relief on 27 January 2021.

110. We have reproduced above extracts from the decisions in *Secure Service* and *Smith Homes*. While neither of those decisions are binding on this Tribunal, and while both considered Case A(b) of Sch 10, para 34A(2) rather than Case A(a), this Tribunal agrees with the views in these decisions regarding the aims and scheme of the legislation. Parliament has set time limits for claiming MDR, and it would be inconsistent with the aims of the legislation if these limits could be circumvented through a claim for overpayment relief.

111. In this case, unlike *Secure Service* and *Smith Homes*, BTR made an in-time claim for MDR. By claiming overpayment relief, BTR is effectively seeking to increase the amount of this claim. The Tribunal considers that Parliament would not have intended overpayment relief to be used as a means to circumvent the time limits either for making a new claim for relief, or for increasing an existing claim. The Tribunal's decision that HMRC are not liable to give effect to BTR's claim to overpayment relief is therefore, in the Tribunal's view, consistent with the aims of the legislation.

112. Ms McCarthy submitted that the provision relating to mistakes in a claim has a clear function in relation to standalone claims made pursuant to Sch 11A, as opposed to claims that are made in SDLT returns. Once a standalone claim has been made, the taxpayer has 12 months in which to amend it, after which the matter is closed. While taxpayers similarly have 12 months in which to amend an SDLT return, this is intentionally extended to four years in circumstances where the taxpayer can make a claim under Sch 10, para 34. Therefore, Ms McCarthy argued, there is no equivalent clear Parliamentary intention for returns to be closed for all purposes once the time for amendment has passed; it would be perverse to allow overpayment claims in relation to some errors in the amount self-assessed, but not others.

113. Mr Knowlson contended that nowhere in the legislation does it state that Sch 10, para 34(2)(a) is only to function in respect of standalone claims. He submitted that this provision prevents overpayment relief from being used to extend an express time limit afforded by statute.

114. The Tribunal can see no reason to read the provision relating to mistakes in a claim as being limited in its operation to standalone claims. While the 12-month time limit for amending a return is extended in circumstances where the taxpayer can claim overpayment relief, those circumstances exclude any claim that falls within a case described in Sch 10, para 34A.

115. Ms McCarthy submitted that the overall purpose of Case A of Sch 10, para 34A is to remove a taxpayer's ability to recover overpaid tax in respect of optional or voluntary matters, most obviously in respect of the choice as to whether to claim a relief. Once the time limit for making a claim has elapsed, it is too late for the taxpayer to have second thoughts. Ms McCarthy argued that by contrast, a tax computation is not optional. BTR's mistake was in using the wrong rate of tax, which is not directly about MDR.

116. The Tribunal considers that it would be misleading to describe BTR's mistake as being simply to use the wrong rate of tax. It did use the wrong rate, but it did so in the calculation of its claim to MDR. Mr Knowlson accepted that once BTR had decided to claim MDR, there was only one correct way to perform the calculation, and in the event it got this wrong. However, BTR still had a choice as to whether to claim the relief in the first place.

117. Mr Knowlson noted that BTR would have needed to decide whether it was prudent to claim MDR, given that the Property included non-residential property, which meant that in the absence of a claim the lower, non-residential rates in Table B in section 55 would have been available. There are occasions when Table B can produce a lower liability to tax than a claim to MDR. A taxpayer must make an active decision as to whether to claim MDR, and this will not in every case result in a saving of SDLT. This decision is, to use Ms McCarthy's terminology, optional or voluntary.

118. Mr Knowlson submitted that Case A is intended to apply in circumstances where there is a hard statutory deadline elsewhere in the legislation; the Tribunal understood him to suggest that Case A differs in this respect from other Cases (B to G) in para 34A. The Tribunal has not found it necessary to decide whether it is right to distinguish Case A in this way, but agrees that it is consistent with the scheme of the legislation that taxpayers should not be able to use overpayment relief as a means to circumvent the time limits for making and amending a claim that is made in an SDLT return.

HMRC's guidance: prejudice to compliant taxpayers

119. Mr Knowlson acknowledged that HMRC's guidance has changed over time regarding the interaction between MDR and the higher rates, but submitted that SDLT is a self-assessed tax and that BTR had to assess its claim in accordance with its own view of the law. Mr Knowlson contended that BTR cannot rely on HMRC's guidance to explain the mistake in the MDR claim. In support of this contention, he referred us to *R v CIR ex parte MFK Underwriting Agencies Ltd and others [1990] 1 All ER 91,* and *R (oao Aozora GMAC Investment Ltd) v HMRC [2019] EWCA Civ 1643* (both of which concerned judicial review claims based on legitimate expectation), and the decision of the Upper Tribunal in *Hyman and others [2021] UKUT 68 (TCC).*

120. Ms McCarthy clarified that BTR was not taking any argument in this appeal based on legitimate expectation, and accepted that this Tribunal has no jurisdiction to consider a

challenge made on that basis. She made the more limited submission that, in a case such as this, HMRC's stance would penalise taxpayers who comply with HMRC's published guidance. Taxpayers who may have taken a more aggressive approach and filed returns conflicting with HMRC's guidance at the time would benefit from paying less SDLT, while compliant taxpayers such as BTR would lose out. She described the risk of prejudicing compliant taxpayers as an "additional reason" against interpreting the legislation in the manner contended for by HMRC.

121. While this argument was attractively presented, Ms McCarthy conceded that it was not directly relevant to statutory interpretation, and unfortunately for BTR, the question the Tribunal must decide in this case is entirely concerned with statutory interpretation.

122. The Tribunal's reasons for preferring HMRC's interpretation of the legislation are set out above. To alter this conclusion because of a perceived risk of unfairness in the form of prejudicing compliant taxpayers would be to act outside the Tribunal's powers. In these circumstances it is not necessary to decide whether the Tribunal agrees that this risk exists.

MEMBER SIMS' DISSENTING DECISION

123. The facts and relevant legislation and case law has been helpfully set out by Judge Gauke.

124. I am however persuaded to take a different view of the correct interpretation of whether the mistake made by the claimant was "a mistake in a claim or election" to that taken by Judge Gauke in paragraphs 72 – 84 above.

125. I take the view that in this case the claim under s58D required a binary action and a claim was either made or not made. Once the claim was made, the calculation of the tax flowed arithmetically from that decision. An error in that calculation was therefore not of itself an error in the claim but an error in the calculation of the liability to tax. I therefore take the view that the distinction between the claim and the liability highlighted by Ms McCarthy in *Derry* supports this view and am not persuaded that the decision in *Whitney* is sufficient in clarity on the issue to change this view.

126. I further take the view that the structure and format of the SDLT form which only requires the taxpayer to identify the relief and the final amount of SDLT due is consistent with the approach above.

127. Further, I would believe that the above interpretation is reinforced as being appropriate by the differentiation given in Case G at s34A(8) which clearly differentiates between a "mistake in calculating the claimant's liability to tax" where such "liability was calculated in accordance with the practice generally prevailing at the time".

128. I therefore take the view that as suggested by Ms McCarthy, Parliament clearly differentiated between those situations where a claim or election was a binary decision (to make a claim or not) and those cases where the taxpayer had an option to choose the amount or nature of a claim. If this was not the case, there would not be the need for the legislation to include Case G as such circumstances would simply fall within Case A as a "mistake in the claim". I take the view that the interpretive position for SDLT purposes is not changed by the apparent fact placed before us that all SDLT claims and reliefs are binary rather than allowing the taxpayer an element of choice as to amount.

129. For the reasons above I would therefore find that the appellant did not make "a mistake in a claim or election" for the purposes of the Case A at s34A (2) and find that overpayment relief is available and would therefore allow the appeal.

DISPOSITION

130. For the reasons given, the Tribunal has decided that the amount of SDLT paid by BTR on its acquisition of the Property was excessive by reason of a mistake in a claim, and that HMRC are therefore not liable to give effect to BTR's claim for overpayment relief. The appeal is therefore dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

131. 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.

RACHEL GAUKE
TRIBUNAL JUDGE

Release date: 01st OCTOBER 2024