[2018] UKFTT 0520 (TC)

TC06690

Appeal number: TC/ 2017/07622

PROCEDURE – strike out application by HMRC - stamp duty land tax – appellant bought a second property on a divorce – appellant's name still on the title of the first property – higher rate of stamp duty land tax on purchase of second property – whether jurisdiction to hear appeal - no

FIRST-TIER TRIBUNAL
TAX CHAMBER

SOPHIE COLE **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in public at Cambridge Magistrates Court, on 14 June 2018

The Appellant appeared in person

Ms A Jose, Presenting Officer, HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an application by the Respondents ("HMRC") to strike out the appeal of Ms Sophie Cole, the Appellant, ("Ms Cole") under Rule 8(2) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") on the basis that this Tribunal does not have jurisdiction to hear the appeal.

The facts

2. The facts in this case are as follows.

3. On 8 August 2016, Ms Cole purchased a property in a village a few miles to the north-east of the Cambridge ("the second property").

4. When Ms Cole bought the second property, she also owns an interest in another property ("the first property"), which had been her former matrimonial home. Ms Cole went through divorce proceedings and, after her divorce had been finalised, her name remained on title of the first property.

5. The conveyancer acting for Ms Cole applied the higher rate of stamp duty land tax ("SDLT") for what might loosely be termed "second properties" which was introduced in the Finance Act 2016. The land transaction return was received by HMRC on 10 August 2016.

6. On 10 August 2016, the SDLT return ("the return") for the purchase of the second property was filed with HMRC. The tax returned was £14,820.

7. HMRC did not seek to amend the return and did not open an enquiry into it. Indeed, HMRC's position is that the return was correctly made.

8. Ms Cole wrote to HMRC in an undated letter which was received by HMRC on 19 October 2016. She referred to the fact that she had recently purchased the second property and had had to pay the higher rate of stamp duty on the purchase. She said she had informed her conveyancer that in her opinion she should only be paying the normal rate of stamp duty. She explained that she owned part of another property (the first property) which through a divorce/separation meant that her name was still on the title of the second. Her two children and her former spouse still lived at the previous address. This arrangement was set out "via a solicitor and [was] part of the divorce arrangements." The appellant said that she had no intention of returning to live in the first property. Her children were at a local school and her youngest daughter was disabled and that, therefore, the house had been adapted to suit her needs. She said that she felt discriminated against because she was divorced and had previously agreed to an amicable solution with her former spouse.

9. HMRC acknowledged Ms Cole's letter on 15 November 2016 and enclosed a "factsheet" which gave her information about the options available to her, noting that her solicitor had already filed a land transaction return on her behalf. The letter stated:

> "Unfortunately, I am unable to comment on the information in your letter.
>
> I appreciate that this will not be the response you were hoping for."

10. There was some debate at the hearing as to whether HMRC had in fact provided a factsheet with the 15 November 2016 letter. But it is clear from the terms of the letter that a factsheet was indeed sent. Ms Jose provided me with a copy of the standard HMRC factsheet dealing with amendments to stamp duty land tax returns. Ms Cole queried this but could not produce the factsheet she received. However, I consider that it is more likely than not that the document produced by Ms Jose was indeed factsheet that was provided to Ms Cole. The factsheet stated:

> "**Amend an SDLT return when it's less than 12 months old**
>
> The taxpayer can amend a return within 12 months of the filing date. The filing date is 30 days after the effective date of the transaction. The effective date is usually the completion date.
>
> If you need to amend the return you sent us, you can:
>
> - call our helpline [telephone number] and tell them which changes you want them to make – the helpline adviser will tell you if they can make the changes – if they can't make the changes they'll tell you to write to us with the changes instead
> - write to us with the correct details – our address is on the attached covering letter
>
> If you ask us to make an amendment to a return and the change means a refund is due, you will also need to send us copies of the:
>
> - contract for the land transaction
> - instrument (if any) by which the transaction was affected, for instance the TR1, lease, assignment or similar document."

11. On 19 January 2017 Ms Cole telephoned HMRC to complain. She explained that she had written a letter to the Birmingham Stamp office and was unhappy with the reply. HMRC's note of the telephone conversation stated:

> "[Ms Cole] claims letter advised [her] guidance wasn't read and [the appellant] should follow appropriate procedures.
>
> [Ms Cole] divorced [her former spouse] and now looking to buy a new main residence. [Ms Cole] still has a share in [the] former marital home. [Ms Cole] feels… discriminated against as the higher rates will apply. [Ms Cole] is aware [she] can claim a refund if disposes of that residence within 36 months but still unhappy at having to pay higher rate.
>
> [Ms Cole] had asked to speak to legal department and claims will take [the] case to court. I advised will need to write to BSO with complaint,

> [Ms Cole] claims [the] letter contained complaint and won't write again.
>
> [Ms Cole] has not provided a UTRN as this is general discussions however is demanding a call back regarding this…."

12. On 23 January 2017 HMRC wrote to Ms Cole, referring to the telephone conversation of 19 January, and noted that this had been passed to the Customer Complaints Department for Stamp Taxes.

13. On 7 February 2017, HMRC wrote to Ms Cole referring to the telephone conversation of 19 January 2017 and stated that a formal complaint had been logged. The letter continued:

> "I am sorry that you are dissatisfied with my colleagues letter of 15 November 2016. We always try to achieve a high standard of customer service and are disappointed whenever we are seen as having failed in this respect.
>
> A refund of any higher rates charge paid, can only be claimed
>
> - where it was paid in error because the higher rates didn't actually apply to the transaction
>
> - when the purchaser, or purchasers, dispose of any previous main residence within three years of the date when they purchase their new property – the purchaser, or purchasers, must also have lived in that previous main residence in the three years ending with the date they purchase their new main residence."
>
> There are no reliefs or exemptions from the higher rates nor are there any discretionary powers under which the charge can be waived.

14. HMRC's letter then referred to further information that could be found online and concluded by appreciating that this may not have been the response for which Ms Cole had hoped.

15. Ms Cole wrote again to HMRC – the letter was undated but was received by HMRC on 7 September 2017. The letter stated:

> "I am writing to you to raise a formal complaint for the third and final time before I asked the Parliamentary Ombudsman to investigate this complaint. I have contacted you previously and requested that you reassess my higher rate stamp duty paid last year. You have written back and stated that this should have been addressed by my conveyancer at the time of submission. I have subsequently raised this directly with them and they have now been awarded from the Legal Ombudsman proving my conveyancer did not assess or contact you to discuss my personal position to the higher rate stamp duty paid.
>
> Therefore, I would like the rate I have paid reassessed as although my name is onto property deeds, I only live in one property (the property purchased) the other property was agreed in a divorce financial settlement would stay in my name but be occupied by my [former spouse] and our children (when they stay there). This property has

been adapted to meet the needs of our youngest daughter who is disabled and has severe brain injury. I have no intention of moving back into the original property or getting back with my [former spouse]….

I feel very discriminated against as I have no control over the original agreed details of the financial settlement. I therefore asked for someone to call me to discuss through this as I would like to be able to understand your points rather than just receiving a dismissive letter from you as before."

16. HMRC acknowledged Ms Cole's letter on 14 September 2017 and replied on 27 September 2017, noting that her letter received on 7 September 2017 had been logged as a formal complaint. The letter continued:

"I have reviewed this matter and I am sorry that you feel that you should not have paid this tax in the first place, but there are no reliefs or exemptions from the higher rates nor are there any discretionary powers under which the charge can be waived.

A refund is not due in this case because following the purchase of [the second property] you still owned an interest in your previous main residence. The higher rate of Stamp Duty Land Tax (SDLT) was therefore due. I acknowledge the reason why your name is still on the deeds to your previous main residence however as my colleague explained in her letter of 7 February 2017 [a] refund of any higher rates charge paid can only be claimed:

- where it was paid in error because the higher rates didn't actually apply to the transaction
- when the purchaser, or purchasers, dispose of a previous main residence within three years of the date they purchase a new property – the purchaser, or purchasers, must also have lived in that previous main residence in the three years ending with the date they purchased their new main residence.

…

I appreciate this may not have been the response you had hoped for but I trust that I have been able to answer the queries you have raised.

If you think that a repayment is due you will now need to contact the Tribunal Service directly. The tax tribunal is independent of HMRC and will listen to both sides before reaching a decision.

You usually have 30 days from the date of HMRC's decision, to appeal to the Tribunal service. If you miss the deadline, you will need to explain to the Tribunal Service why you're late."

17. Ms Cole then referred the matter to this Tribunal which, on 18 October 2017 requested further information from Ms Cole, which was provided in an email dated 19 October 2017.

Grounds of appeal

18. In her notice of appeal dated 13 October 2017, Ms Cole gave her grounds of appeal as follows:

> "On purchasing a second property I paid the Higher Rate of stamp duty. Could this be reassessed as although my name is on two property deeds, I only live in one property [the address of the second property]. The other property was agreed in a financial divorce agreement that it would stay in the name due to my [former spouse's] credit rating, it is occupied by my [former spouse] and our children (when they stay there). The property has been adapted to meet the needs of our youngest daughter who is disabled, she has severe brain injury. Therefore selling that property and finding another that suits her needs is not a viable option and would be a great cost to our daughter.
>
> I have no intention of moving back into the original property or getting back with my [former spouse]…. I will make no monetary gain from the original property as I do not receive rent or any form of payment from my [former spouse], our gain to keeping the property is for our daughter's well-being.
>
> When our youngest daughter reaches 21 (she is currently 8) the property will be sold (unless she continues education), as I understand it I will then have to pay capital gains tax on the sale. I appreciate this is an unorthodox position due to our circumstances, but do feel discriminated against because of matters out of our control. I am happy to have paid the normal stamp duty, but the higher rate applied has crippled me financially as this has had to be added onto the mortgage amount borrowed causing unplanned financial hardship.
>
> I would be grateful if you could review the situation."

The relevant statutory provisions

19. The obligation to file an SDLT return is set out in section 76 FA 2003:

> "**76 Duty to deliver land transaction return**
>
> (1) In the case of every notifiable transaction the purchaser must deliver a return (a "land transaction return") to the Inland Revenue before the end of the period of 30 days after the effective date of the transaction.
>
> (2) The Inland Revenue may by regulations amend subsection (1) so as to require a land transaction return to be delivered before the end of such shorter period after the effective date of the transaction as may be prescribed or, if the regulations so provide, on that date."

20. As regards amendments to SDLT returns, paragraph 6 Schedule 10 FA 2003 provides:

> "**Amendment of return by purchaser**
>
> 6(1) The purchaser may amend a land transaction return given by him by notice to the Inland Revenue.

(2) The notice must be in such form, and contain such information, as the Inland Revenue may require.

(2A) If the effect of the amendment would be to entitle the purchaser to a repayment of tax, the notice must be accompanied by—

(a) the contract for the land transaction; and

(b) the instrument (if any) by which that transaction was effected.

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

21. HMRC may enquire into an SDLT return in accordance with paragraph 12 Schedule 10 FA 2003:

"**Notice of enquiry**

12(1) The Inland Revenue may enquire into a land transaction return if they give notice of their intention to do so ("notice of enquiry")—

(a) to the purchaser,

(b) before the end of the enquiry period.

(2) The enquiry period is the period of nine months—

(a) after the filing date, if the return was delivered on or before that date;

(b) after the date on which the return was delivered, if the return was delivered after the filing date;

(c) after the date on which the amendment was made, if the return is amended under paragraph 6 (amendment by purchaser)."

22. Although not cited to me, paragraphs 34, 34A and 34B Schedule 10 FA 2003 provide for taxpayers making claims for a refund of SDLT within a four year period, but place restrictions on this right. The provisions, as far as material, are as follows:

"**Claim for relief for overpaid tax etc**

34(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.

34A(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.

(5) Case D is where the claim is made on grounds that—

(a) have been put to a court or tribunal in the course of an appeal by the claimant relating to the amount paid or liable to be paid, or

(b) have been put to Her Majesty's Revenue and Customs in the course of an appeal by the claimant relating to that amount that is treated as having been determined by a tribunal (by virtue of paragraph 37 (settling of appeals by agreement)).

(6) Case E is where the claimant knew, or ought reasonably to have known, of the grounds for the claim before the latest of the following—

(a) the date on which an appeal by the claimant relating to the amount paid, or liable to be paid, in the course of which the ground could have been put forward (a "relevant appeal") was determined by a court or tribunal (or is treated as having been so determined),

(b) the date on which the claimant withdrew a relevant appeal to a court or tribunal, and

(c) the end of the period in which the claimant was entitled to make a relevant appeal to a court or tribunal.

(7) Case F is where the amount in question was paid or is liable to be paid—

(a) in consequence of proceedings enforcing the payment of that amount brought against the claimant by Her Majesty's Revenue and Customs, or

(b) in accordance with an agreement between the claimant and Her Majesty's Revenue and Customs settling such proceedings.

(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.

(9) Case G does not apply where the amount paid, or liable to be paid, is tax which has been charged contrary to EU law.

(10) For the purposes of sub-paragraph (9), an amount of tax is charged contrary to EU law if, in the circumstances in question, the charge to tax is contrary to—

(a) the provisions relating to the free movement of goods, persons, services and capital in Titles II and IV of Part 3 of the Treaty on the Functioning of the European Union, or

(b) the provisions of any subsequent treaty replacing the provisions mentioned in paragraph (a).

Making a claim

34B(1) A claim under paragraph 34 may not be made more than 4 years after the effective date of the transaction.

(2) A claim under paragraph 34 may not be made by being included in a land transaction return."

23. Although not cited to me, the grounds of appeal in respect of SDLT are set out in paragraph 35 Schedule 10 FA 2003:

"**Right of appeal**

35(1) An appeal may be brought against—

(a) an amendment of a self-assessment under paragraph 17 (amendment by Revenue during enquiry to prevent loss of tax),

(b) a conclusion stated or amendment made by a closure notice,

(c) a discovery assessment, . . .

(d) an assessment under paragraph 29 (assessment to recover excessive repayment)[, or

(e) a Revenue determination under paragraph 25 (determination of tax chargeable if no return delivered)].

(2) . . .

(3) [If] an appeal under sub-paragraph (1)(a) against an amendment of a self-assessment [is] made while an enquiry is in progress [none of the steps mentioned in paragraph 36A(2)(a) to (c) may be taken in relation to the appeal] until the enquiry is completed."

24. Schedule 4ZA FA 2003 introduced an additional rate of SDLT of 3% on top of the usual rates of SDLT in the case of second properties.[1]

25. In 2017, Parliament recognised that this could cause unfairness in the case of divorced couple because sometimes one of the parties is required by court order to retain an interest in a former home.[2]

26. Therefore, relation to transactions occurring on or after 22 November 2017, paragraph 9 B of Schedule 4ZA FA 2003 provided relief for divorcing couples as follows:

> "Property adjustment on divorce, dissolution of civil partnership etc
>
> 9B
>
> (1) This paragraph applies where—
>
> (a) a person ("A") has a major interest in a dwelling,
>
> (b) a property adjustment order has been made in respect of the interest for the benefit of another person ("B"), and
>
> (c) the dwelling—
>
> (i) is B's only or main residence, and
>
> (ii) is not A's only or main residence.
>
> (2) A is to be treated for the purposes of this Schedule as not having the interest in the dwelling.
>
> (3) "Property adjustment order" means—
>
> (a) an order under section 24(1)(b) of the Matrimonial Causes Act 1973 (property adjustment orders in connection with matrimonial proceedings),
>
> (b) an order under section 17(1)(a)(ii) of the Matrimonial and Family Proceedings Act 1984 (property adjustment orders after overseas divorce) corresponding to such an order as is mentioned in paragraph (a),
>
> (c) an order under Article 26(1)(b) of the Matrimonial Causes (Northern Ireland) Order 1978 (property adjustment orders in connection with divorce proceedings etc),
>
> (d) an order under Article 21(a)(ii) of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989 (property adjustment orders after overseas divorce) corresponding to such an order as is mentioned in paragraph (c),

[1] Under Schedule 4ZA FA 2003 paragraph 3 (4)(a) one of the requirements ("Condition C") for the additional rate of SDLT is that "the purchaser has a major interest in a dwelling other than the purchased dwelling…"

[2] Until 21 November 2017, such an interest normally counted when a purchaser was tested against Condition C (see footnote 1 above).

(e) an order under paragraph 7(1)(b) of Schedule 5 or paragraph 7(1)(b) of Schedule 15 to the Civil Partnership Act 2004 (property adjustment orders in connection with dissolution etc of civil partnership), or

(f) an order under paragraph 9 of Schedule 7 or paragraph 9 of Schedule 17 to the Civil Partnership Act 2004 (property adjustment orders in connection with overseas dissolution etc of civil partnership) corresponding to such an order as is mentioned in paragraph (e)."

Submissions

27. HMRC now seek to strike out Ms Cole's appeal on the basis that the Tribunal does not have jurisdiction to hear an appeal.

28. Ms Jose, for HMRC, referred to paragraph 6(2A)(c) Schedule 10 FA 2003 which provided that a taxpayer cannot amend a land transaction return more than 12 months after the filing. The taxpayer was now well out of time to amend the return. In addition, HMRC had not enquired into the return. There was, therefore, no closure notice which could be appealed against. Accordingly, the Tribunal had no jurisdiction to hear Ms Cole's appeal.

29. Ms Jose submitted that paragraph 6 (2)(A) Schedule 10 FA 2003 clearly set out the process for amending a return:

"(2A) If the effect of the amendment would be to entitle the purchaser to a repayment of tax, the notice must be accompanied by—

(a) the contract for the land transaction; and

(b) the instrument (if any) by which that transaction was effected.

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

30. Ms Cole, Ms Jose argued, had been given the necessary guidance in the factsheet sent with HMRC's letter of 15 November 2016. She was now out of time to amend her return.

31. Ms Jose recognised that Ms Cole's situation was unfortunate. She did not fall within the relieving provisions for divorced persons (contained in paragraph 9B of Schedule 4ZA FA 2003) which applied only to transactions occurring on or after 22 November 2017.

32. Ms Cole argued that she had done everything that she could have done, making telephone calls and writing letters to HMRC. She thought that there had been no correspondence sent to her which clearly demonstrated the process for amending her return. She argued that no clear guidance had been given to her as to what she needed to do. She considered that the correspondence from HMRC was dismissive in tone. In any event, she considered that she was being discriminated against as a divorced person.

Discussion and decision

33. This application is for a strikeout of this appeal under Rule 8(2) of the Rules which provides that I *must* strikeout an appeal if I do not have jurisdiction to hear it.

34. I am satisfied that, under cover of a letter of 15 November 2016, HMRC sent Ms Cole a factsheet which explained the procedure for amending an SDLT return. The procedure, echoing paragraph 6(2A) Schedule 10 FA 2003, required the taxpayer to send the contract for the land transaction return and the instrument (if any) by which the transaction was effected. It was clear that an amendment of the return could only be made within 12 months after the filing the return.

35. On this basis, therefore, I consider that because no amendment was made to the return and HMRC did not enquire into the return (and no closure notice was issued) and no discovery assessment was made no appeal lies in respect of that return. It is clear from paragraph 35(1) Schedule 10 FA 2003 ("Rights of appeal") that none of the grounds for which an appeal may be brought to this Tribunal under that paragraph apply in this case.

36. In reaching this conclusion I have also considered the provisions of paragraphs 34, 34A and 34B Schedule 10 FA 2003 even though these provisions were not drawn to my attention by the parties. In short, these provisions allow a taxpayer to claim a refund of SDLT, within a four year period, where the taxpayer believes that tax has been overpaid. That is essentially Ms Cole's case in this appeal. Paragraph 34A, however, places restrictions on this right to claim a refund. Paragraph 34A (4) provides:

> "(4) Case C [i.e. where HMRC is not obliged to give effect to a claim under paragraph 34] 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."

37. In my view, Ms Cole could have taken steps to amend her SDLT return within the 12 month period provided for by paragraph 6 Schedule 10 FA 2003. Further, I consider that she ought reasonably to have known, before the end of that 12 month period, that she could have amended her return. The factsheet sent to her by HMRC on 15 November 2016 gave her this information. I express no view as to whether her attempt to amend her return would have been successful – that is not a matter before me. However, it seems to me that, for the reasons given above, I must strike out her appeal because I have no jurisdiction to hear it.

38. I have considerable sympathy for Ms Cole. I express no view as to whether SDLT was due on the purchase of the second property in August 2016, because this is not the issue before me, but Ms Cole's conveyancer considered that she was liable to the higher rate of SDLT and submitted a return on that basis. Parliament subsequently recognised that this was unfair, in circumstances involving divorced persons where the purchase of a second property may well be part of the divorce settlement, to

impose a higher rate of tax. It introduced provisions to deal with this anomaly in in paragraph 9B of Schedule 4ZA FA 2003. These relieving provisions, however, applied only to transactions occurring on or after 22 November 2017 and, therefore, would not help Ms Cole.

39. Finally, if Ms Cole is dissatisfied with HMRC's conduct of her complaint, she may consider contacting the Revenue Adjudicator: www.adjudicatorsoffice.gov.uk.

40. My decision is that this appeal should be struck out.

41. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 29 August 2018