[2021] UKFTT 0157 (TC)

TC08126

SDLT – whether a property was partly non-residential by virtue of the grant of a commercial lease on the date of completion of purchase – no – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/00442(V)

BETWEEN

BRANDBROS LIMITED **Appellants**

-and-

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

TRIBUNAL: JUDGE TRACEY BOWLER
MR NOEL BARRETT

The hearing took place on 29 April 2021. With the consent of the parties, the form of the hearing was V (video) and the Tribunal video platform was used. A face to face hearing was not held because of the measures required by the Covid-19 pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Patrick Cannon, Counsel, instructed by Cornerstone Tax Ltd for the Appellant.

Mr Pirimi McDougall-Moore, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents.

DECISION

INTRODUCTION

1. The Appellant ("Brandbros") appeals under paragraph 35 of Schedule 10 Finance Act 2003 ("FA 2003") against a closure notice issued by the Respondents, ("HMRC") under paragraph 23 Schedule 10 FA 2003 refusing a requested repayment of £9,875 of stamp duty land tax ("SDLT"). Brandbros claimed that the property it had bought had been wrongly classified as residential when in fact part of it, namely its garage, was non-residential so that the lower rate of SDLT was properly payable on the purchase. Brandbros say that the grant of a lease of the garage of the property for commercial purposes on the date of completion means that the garage should be treated as non-residential. We have decided that the purchase was correctly treated as a purchase of a residential property for the reasons explained herein.

BACKGROUND

2. On 27 July 2018, Brandbros purchased a property known as 23 Devonshire Road, London ("the Property") for £312,500.

3. On 30 July 2018, Brandbros filed an SDLT return for the acquisition of the Property, self-assessing the SDLT due as £15,000 on the basis that the Property was residential.

4. On 31 August 2018 2018, Brandbros' representative sent a letter to HMRC to amend the SDLT return, claiming that on review Brandbros was of the view the Property was mixed residential and non-residential because Brandbros had granted a lease on the day of completion to SFEP Limited to use the garage to the rear of the property as a storage unit. It was stated that, as a result, £9875 plus interest was owed to Brandbros.

5. On 14 January 2019, HMRC wrote to Brandbros, informing it that HMRC would be enquiring into the claimed amendment to its SDLT return under paragraph 12 Schedule 10 FA 2003.

6. On 21 January 2019, Brandbros' representatives replied to HMRC providing further information about the purchase of the Property.

7. On 17 April 2019, HMRC sent their "view of the matter" letter to Brandbros explaining that the Property was considered to consist of residential elements only and inviting Brandbros to provide more information..

8. On 16 May 2019, Brandbros' representatives replied, submitting that as the commercial lease was granted on the effective date of the transaction that was sufficient for the Property to be classed as mixed-use.

9. On 10 July 2019 HMRC issued a closure notice to Brandbros under paragraph 23 Schedule 10 FA 2003 stating that SDLT was due at the residential rate and consequently a refund was not due.

10. On 1 August 2019 Brandbros' representatives appealed the closure notice. On 27 September 2019 HMRC offered an independent review of the decision, which was subsequently confirmed and 18 December 2019.

11. On 14 January 2020, Brandbros appealed to the Tribunal.

GROUNDS OF APPEAL

12. Brandbros' grounds of appeal submitted with their appeal can be summarised in essence as:

(1) Brandbros acquired a chargeable interest over the Property which included a garage lease to a third party and as such should be classed as "mixed-use";

(2) as there was a commercial lease granted on the effective date of the transaction the land should be classified as mixed-use applying HMRC's own guidance which stated that "the use of the effective date of the transaction overrides any past or intended future uses".

BURDEN OF PROOF

13. The burden is on Brandbros to show that it was entitled to a refund of SDLT on the basis that it had purchased property which was partly non-residential.

14. The standard of proof is the ordinary civil standard, which is the balance of probabilities.

APPLICATION TO ADMIT EVIDENCE

15. At the hearing Mr Cannon applied to admit an email as evidence to show that the lease was entered into on 27 July 2018. The Tribunal had asked about the date of entry into the lease given that it was, unusually, dated with a typed date rather than having been manually dated at the time of signature. Mr Cannon's application was made as a result of those questions. HMRC objected to the provision of evidence at such a late stage, submitting that Mr Cannon's whole argument was predicated upon the timing of the lease.

16. We recognised that the application to admit the evidence was at the very latest point in the proceedings. However, HMRC had not identified any issue with the dating of the lease in their Statement of Case, or skeleton argument and the issue had been raised at the hearing. Having regard to the overriding objective contained in rule 2 of the First-tier Tribunal Procedure Rules 2020, of enabling the Tribunal to deal with cases fairly and justly, we decided to admit the email.

EVIDENCE

17. The evidence therefore consists of: the bundle of documentary evidence running to 168 PDF pages as set out in the index, the email dated 27 July 2018 and the oral evidence of Mr Moshe Brander, a director of Brandbros.

FINDINGS OF FACT

18. The facts set out below are not in dispute. They are found by us on the basis of the documentary and oral evidence.

19. The sales brochure shows that the Property was sold as one three-bedroom end of terrace property with features including a garage to the rear.

20. The Property was sold by Ms Dumashie as personal representative of Mr Dumashie (deceased) and is identified by one Land Registry title.

21. Completion of the purchase of the Property took place on 27 July 2018. Later that day, Brandbros entered into a lease of the garage with SFEP Limited ("SFEP"). The lease is for a period of 25 years at an initial rent of £2000 per year and permits use by the tenant as an office within Use Class B1 or storage and distribution within class B8 in each case of the Town and Country Planning (Use Classes) Order 1987. The intention was that SFEP would use the garage as storage.

22. However, 27 July 2018 was a Friday and SFEP did not start to use the garage as storage until some time during the following week.

23. Although reference is made to planning control in the permitted uses of the garage, no planning permission for change of use has been sought or obtained.

24. There is no evidence that SFEP has registered the garage for business rates.

25. The Property apart from the garage was subsequently let by Brandbros as a residential property.

THE LAW

26. SDLT is a tax applied to specific types of transactions. By virtue of section 42 FA 2003 SDLT is charged on land transactions. Under section 43 FA 2003 an acquisition of a major interest in land is a land transaction and under section 49 FA 2003 a land transaction is a chargeable transaction if it is not exempt.

27. Section 44 FA 2003 sets out the rules to determine the effective date of the chargeable transaction, which in this case, in accordance with section 119 FA 2003, is the date of completion.

28. Therefore the SDLT charge arises on the date of completion by reference to the relevant land transaction.

29. The amount of tax chargeable in respect of a chargeable transaction depends upon whether the relevant land consists entirely of residential property or consists of, or includes, land that is not residential property (section 55 FA 2003).

30. Section 116 FA 2003 sets out the meaning of residential property as follows:

"(1) … "Residential property" means –

(a) a building that is used or suitable for use as a dwelling, or is in the process of being constructed or adapted for such use, and

(b) land that is all forms part of the garden or grounds of a building within paragraph (a) (including any building or structure on such land), or

(c) an interest in or over land that subsist for the benefit of a building within paragraph (a) or of land within paragraph (b)

and "non-residential property" means any property that is not residential property."

31. Further provisions deal with specific types of building, but none of these are relied upon by the parties.

32. The Upper Tribunal decided in the case of *Hyman, Pensfold, Goodfellow* v *Revenue and Customs* [2021] UKUT 0068 (TC) that:

"there is no wording in section 116(1)(b) which imposes, or even hints at, a requirement that land can only be a garden or grounds of a dwelling if the land is needed for the reasonable enjoyment of the dwelling."

THE APPELLANT'S CASE

33. Mr Cannon referred to his skeleton argument in which he submits that:

(1) the effective date in relation to a land transaction is the date of completion, not the time of completion. Therefore if the Property became mixed-use during 27 July 2018 and remained in that condition then it should be regarded as of mixed-use;

(2) HMRC's published guidance states that in their view "the use at the effective date of the transaction overrides any past or intended future uses";

(3) HMRC have relied upon a "scintilla temporis" between completion of the purchase of the Property and the grant of the lease of the garage which was rejected in the context of conveyancing transactions in the case of *Abbey National v Cann* [1990} 1 All ER 1085;

(4) First-tier Tribunal judges have decided that land would not constitute grounds to the extent that it is used for a separate commercial purpose and this approach has been confirmed by the Upper Tribunal in *Hyman, Pensfold, Goodfellow.*

34. Mr Cannon submitted at the hearing that the garage no longer formed part of the garden or grounds of the residential property by virtue of its commercial use and that this change started on the date of completion. The word "use" in section 116 embraces the grant of the lease over the garage for commercial purposes. The fact that the lease was in place and the tenant could therefore use the garage was the key even though the tenant did not in fact move items into the garage as storage until after the date of completion.

35. Mr Cannon submitted that there is no evidence to show that planning permission was needed for the use of the garage and storage, although he recognised that there was no burden of proof on HMRC. However, HMRC had not identified this as an issue in their Statement of Case or skeleton argument.

36. In response to a query raised by Mr Barett, Mr Cannon accepted that the legislation contemplates that a property which had been used for non-residential purposes but was in the process of being adapted for residential purposes would qualify as residential, although there is no provision dealing with the opposite situation of a property used for residential purposes being adapted for non-residential purposes.

HMRC's case

37. Mr McDougall-Moore referred to the Statement of Case and HMRC's skeleton argument in which it is submitted that:

(1) there is no dispute between the parties that the garage was part of the garden or grounds of the Property;

(2) at the time of the transaction in which the Property was purchased it did not include any non-residential elements. It was sold with vacant possession with no lease in place;

(3) in any event the lease did not change the character of the property from residential to non-residential having regard to section 116(1)(b) FA 2003. Reliance is placed upon Judge Swami-Raghavan's decision regarding the application for permission to appeal made by Dr and Mrs Goodfellow following the decision made in their appeal by the First-tier Tribunal. The garage is a building on the grounds of the property and the use to which it is put is irrelevant and insufficient to alter the classification of the interest acquired by Brandbros. That conclusion is further supported by a statement made in the Upper Tribunal decision in *Hyman, Pensfold, Goodfellow*;

(4) the legislation takes precedence over HMRC guidance and, in any event, HMRC's guidance has been updated since the version referred to in the grounds of appeal;

(5) if it is necessary to consider the use of the garage, that use did not change as a result of the lease. It continued to be used for storage which is the normal function of a garage and the grant of a lease was not enough, in itself, for the garage to be treated as non-residential. It did not change the character and use of the Property.

38. At the hearing Mr McDougall-Moore submitted that the First-Tier Tribunal decisions in *Goodfellow* and *Partridge* show that SDLT is a transactional tax. That context is quite different to the conveyancing context dealt with in the case of *Abbey National*.

39. Fundamentally, the garage remained as part of the garden or grounds and was therefore part of the residential property. Judge McKeever had noted in the case of *Hyman* v *Revenue and Customs* [2019] UKFTT 469 (TC) that the definition of residential property was drawn as widely as possible.

DISCUSSION

Did the Property consist of, or include, land that is not residential property?

Section 116(1)(b)

40. We are satisfied that the garage should be treated as a building or structure in the grounds or garden of the Property. Therefore, as a matter of statutory interpretation, the garage is treated as residential property under section 116 regardless of the use to which it is put. Under section 116(1)(a) the house at the Property, which was and continues to be used as a residential property, is treated as "residential property". Section 116(1)(b) then extends that treatment to the garden and grounds of the house, including any buildings or structures and those areas. There is no limitation in section 116(1)(b) to areas which are used for residential purposes.

41. We note that in the case of *Hyman*, Judge McKeever, commented that land would not constitute grounds to the extent that it is used for a separate, e.g. commercial purpose, and would not then be occupied with the residence, but would be the premises on which a business is conducted. However, we are fortified in our conclusion as to the statutory interpretation by the decision made by Judge Raghavan in the application for permission to appeal the First-Tier Tribunal decision in *Goodfellow*, in which Judge Raghavan reaches the same conclusion regarding the lack of limitation of section 116(1)(b) by reference to use. We recognise though that neither of these decisions has any precedential value for this Tribunal.

Transactional nature of SDLT

42. Even if we were to conclude that the use of the garage should be taken into account in determining whether the Property is treated as a residential or non-residential property, we are satisfied that the grant of the lease does not alter the classification of the Property bought by Brandbros for the following reasons.

43. SDLT is a tax on transactions, in contrast to stamp duty which was applied to documents. Therefore whilst it was possible in certain circumstances to avoid the payment of stamp duty by, for example, executing a document outside the UK, such a step does not work in the context of the transactional SDLT.

44. FA 2003 sets out detailed rules for determining when the charge arises on the transactions. Where a contract for a land transaction is completed by a conveyance the effective date of the transaction becomes the date of the conveyance rather than the date of the contract as a result of section 44 FA 2003. Otherwise, the impractical result for most conveyancing would be that the SDLT charge would arise at the time of a contract to purchase the land. The transactional heart of SDLT is reflected in the structure of the taxation set out in FA 2003; for example, section 44(3) provides that where a contract is substantially performed without having been completed the effective date of the transaction is when the contract is substantially performed and there is a set of provisions contained in Schedule 2A dealing with pre-completion transactions.

45. Therefore Section 44 which provides that the date of transaction is the date of completion needs to be interpreted in the context of the operation and design of SDLT.

46. Mr Cannon is, in effect, arguing that the transaction to which the SDLT must be applied should be judged by reference to the characteristics of the Property viewed at the end of the date of completion of the purchase of 27 July 2018, but that ignores the transactional nature of SDLT. The transaction to which the SDLT in dispute in this appeal relates is the purchase of the Property as provided in the contract for purchase and completed by the legal transfer on 27 July 2018. The subject matter of that transaction was of a property which was wholly residential. No lease had been granted over the garage.

47. It was only later, after the completion of the transaction to purchase the Property that another transaction took place, in the form of the grant of the lease over the garage. The fact that the grant of the lease took place on the same day has no effect on the SDLT treatment of the purchase of the Property. Indeed, the grant of the lease over the garage is another separate transaction, subject to SDLT (albeit that while notifiable, no SDLT is due as a result of the amount of rent payable).

Conclusion as to categorisation of the Property

48. For all these reasons we are entirely satisfied that the correct SDLT was paid on 30 July 2018 and no refund is due to Brandbros. We would also comment though, given the detailed engagement by the parties on this issue, (although not necessary for our decision) that we do not consider that the "use" of the garage was altered for the purposes of the SDLT rules simply by virtue of the grant of the lease of the garage.

CONCLUSION

49. Therefore the appeal is DISMISSED. The decision made by HMRC that the chargeable transaction by which the Property was purchased was a transaction which gave rise to SDLT at the residential rate was correct.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

50. 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.

TRACEY BOWLER
TRIBUNAL JUDGE

RELEASE DATE: 17 MAY 2021