



Neutral Citation: [2022] UKFTT 00374 (TC)

Case Number: TC08623

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/02324

STAMP DUTY LAND TAX – residential and non-residential rates of tax – were the grounds mixed use because of a public right of way – no – appeal dismissed

Heard on: 5 October 2022

Judgment date: 17 October 2022

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

JAMES AVERDIECK and CHARLOTTE AVERDIECK

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Patrick Cannon, of Counsel, instructed by Cornerstone Tax 2020 Limited

For the Respondents: Ms Gemma Truelove, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. The appellants appeal against Closure Notices issued by the respondents (“HMRC”) under Paragraph 23, Schedule 10, Finance Act 2003 (“FA03”) on 29 September 2021 and upheld on review on 16 December 2021.
2. With the consent of the parties, the hearing was conducted by video link using the Tribunal’s video hearing system. A face-to-face hearing was not held because of the difficulty of ensuring the safety of all participants. The documents to which I was referred comprised a Bundle consisting of 243 pages, a photograph, a Filed Plan of Title and a Skeleton Argument for the appellants. I heard evidence from Mr Averdieck.
3. 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.

The history

4. On 28 August 2020, the appellants jointly purchased a property (“the Property”) for £2,999,000.
5. On 4 September 2020, the appellants filed a stamp duty land tax (“SDLT”) return declaring that they were due to pay £258,630 in SDLT based on the property being classed as residential.
6. On 18 December 2020, the appellants’ agent wrote to HMRC stating that having analysed the tax return data they were of the view that the Property was misclassified as being residential and should have been classed as “mixed use”. As a result they wished to amend the SDLT return in respect of the transaction. They amended the return and sought repayment of £119,180 with interest.
7. The basis for the application for repayment was that:-

“The public footpath which runs across the rear of the property is classed as a public highway by the local highway agency and our client is responsible for keeping the footpath safe for all users who pass through their land. The public footpath restricts the use of the land acquired by our client and as such, the public footpath does not contribute to the reasonable enjoyment of the dwelling.”
8. On 13 January 2021, as a result of the amendment to the SDLT return, HMRC repaid the appellants the £119,180.
9. On 2 August 2021, HMRC opened an enquiry into the amended SDLT return seeking further information.
10. On 7 September 2021, the agent responded reiterating that the public footpath meant that the property contained both residential and non-residential elements. They produced the Local Authority Search which confirmed that it was a public footpath.
11. On 29 September 2021, HMRC issued the disputed Closure Notices.
12. On 7 October 2021, the agent wrote to HMRC appealing under paragraph 35(1)(b) Schedule 10 FA03 on the basis that HMRC’s understanding of section 116 FA03 was incorrect. He pointed out that the footpath restricted the appellants’ enjoyment of the land as they were unable to use the land privately for ornamental and recreational purposes. He listed the statutory obligations in relation to the public footpath which he argued could be likened to a form of

lease imposed by statute and was an easement or contractual restriction on a how the land could be used. The obligations were stated to be:-

- (a) Keep the surface of public rights of way which are maintained at public expense in a fit state for public use;
- (b) Make sure obstructions are removed;
- (c) Maintain some bridges over natural watercourses, including farm ditches;
- (d) Provide at least a 25% contribution to landowners' costs for replacing and maintaining structures for the control of animals, eg gates or stiles, on completion of the work to a standard the highway authority is satisfied with;
- (e) Make sure there are not notices that prevent or discourage the use of a public right of way;
- (f) Add signs where a public right of way leaves metalled roads;
- (g) Make sure the public's right to use a public right of way is protected;
- (h) Make sure landowners carry out their duties, and take action if they do not.

13. On 1 November 2021, HMRC issued a View of the Matter letter and in response on 2 November 2021, the agent sought a review of the decision.

14. On 16 December 2021 Review Conclusion letters were issued to the appellants upholding the Closure Notices.

15. On 13 January 2022, the appellants appealed to the Tribunal.

The Law

16. Section 42 FA03 provides that SDLT is charged on land transactions. A land transaction is defined by section 43 to be any acquisition of a chargeable interest. Section 48 defines the chargeable interest as including an estate, interest, right or power in or over land.

17. Section 55 FA03 sets out the amount of tax chargeable in relation to a chargeable transaction. There are differing rates for residential and non-residential or mixed properties. The section contains two tables and Table A applies "if the relevant land consists entirely of residential property". Table B applies "if the relevant land consists of or includes land that is not residential property". HMRC argue that the rates in Table A apply and the appellants argue that the rates in Table B apply.

18. Section 116 FA03 contains a definition of residential property which reads:-

“(1) In this Part ‘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 or 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 right over land that subsists 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.”

19. Both parties rely on Judge McKeever in *Hyman v HMRC* [2019] UKFTT 0649 (TC) (“Hyman 1”) at paragraph 62 which reads:

“62. In my view ‘grounds’ has, and is intended to have, a wide meaning. It is an ordinary word and its ordinary meaning is land attached to or surrounding a house which is occupied with the house and is available to the owners of the house for them to use. I use the expression ‘occupied with the house’ to mean that the land is available to the owners to use as they wish. It does not imply a requirement for active use. ‘Grounds’ is clearly a term which is more extensive than ‘garden’ which connotes some degree of cultivation. It is not a necessary feature of grounds that they are used for ornamental or recreational purposes. Grounds need not be used for any particular purpose and can, as in this case, be allowed to grow wild. I do not consider it relevant that the grounds and gardens are separated from each other by hedges or fences. This may simply be ornamental, or may serve the purpose of delineating different areas of land as being for different uses. Nor is it fatal that other people have rights over the land. The fact that there is a right of way over grounds might impinge on the owners’ enjoyment of the grounds and even impose burdensome obligations on them, but such rights to (sic) not make the grounds any the less the grounds of that person’s residence. Land would not constitute grounds to the extent that it is used for separate, eg commercial purpose. It would not then be occupied with the residence, but would be the premises upon which a business is conducted.”

20. Both parties also rely on *Hyman & Goodfellow v HMRC* [2022] EWCA Civ 185 (“Hyman 3”). HMRC relied on it for the proposition that the test to be applied was not whether the land in question was required for the reasonable enjoyment of the dwelling as argued by Mr Cannon in that hearing. Lord Justice Lewison records at paragraph 11 of the decision that Mr Cannon then asked the court to apply that test and at paragraph 12 he states:

“12. Whether a more prescriptive test would be desirable is, at bottom, a question of policy. We are not concerned with such questions. The only question for us is whether that is what section 116, as enacted, actually means. It is not uncommon for Parliament, even in a taxation context to use course-grained words whose outer limits are left to the courts and tribunals to work out: ‘plant’, ‘emoluments’ and ‘residence’ are but three examples.”

The Appellants’ revised arguments

21. In light of the decision in *Hyman 3*, the argument now advanced by Mr Cannon is that the evidence shows that the land over which the road passes is used for a separate commercial purpose, namely the access to the farm. The extent of the interruption caused to the use of the Property, as a residential property, is sufficiently material for the land affected to fall within what he described as the exception identified by Judge McKeever in the penultimate sentence in paragraph 62 of *Hyman 1*.

22. In addition, he argues that the land is subject to the restrictions and obligations identified at paragraph 12 above and that prevents the land from being used or enjoyed as residential property.

23. Mr Cannon also argued that one could see that the HMRC guidance quoted at paragraph 41 of *Hyman 1* supports that view and it reads that:-

“Generally speaking you should accept that land surrounding a residence which is in the same ownership, is the grounds of the residence, unless it is in use for some other purpose. Land which at the date of disposal is in use for some other purpose, for example, agricultural land, commercial woodlands, land under development or land in use for a trade or business should not be regarded as part of the garden or grounds.”

24. Lastly in that context he pointed to the Review Conclusion letter dated 16 November 2021 where the HMRC officer referred to the guidance in the SDLT Manual SDLTM00475 which stated:-

“‘Hindrances’ on the land, such as rights of way for ramblers, or access by utility companies to pylons etc. will not usually prevent land from being part of the internal ‘garden or grounds’”.

He argued that that meant that HMRC recognised that there was a possibility that a right of way might impinge so seriously that it would stop land being treated as being residential.

25. In summary, whilst he accepts the mere existence of a road or bridleway will not normally affect the residential nature of the land, the interruption, in this case, caused by the commercial use and the restrictions and obligations imposed on its use is material so the Property cannot be classified as wholly residential.

The Property

26. There was in the Bundle the sales brochure from the time when the appellants had purchased the Property. It was described as being “a stunning contemporary home” which offered “modern and spacious living accommodation which flows seamlessly and embraces the outside space with floor to ceiling windows and doors throughout”. The kitchen was described as having “glorious views over the grounds”. The drawing room “benefits from 180 degree views over the grounds”. The guest wing looks out to a single oak tree which is illuminated at night “at the far end of the grounds”. The master bedroom suite is described as having panoramic views. The house is approached “via a sweeping gravel driveway”. The grounds amount to approximately 14 acres with the main garden, which was described as made to lawn, and discreet external lighting enables the outdoor areas to be enjoyed in the evening. There is “plenty of outside parking” within the grounds and a double garage. There is also a garden room/store.

27. The Property is roughly in the shape of a rectangle which is bounded on the south west by the main road. The boundary on the south east is, what was described in correspondence as, the public footpath. In fact it is a road. The other two boundaries are farmland. The road provides access not only to the farm to the north and west of the Property but to five residential homes which were being built at the time when the appellants purchased the Property. For that reason the road acquired a name, Deerlands Lane, hereinafter referred to as the Lane. The sign for it shows that there is no thoroughfare.

28. Access to the Property is from the Lane. Mr Averdieck has constructed a wooden fence which is approximately six feet tall and which commences on the main road for a short distance and then continues into the Lane. It curves into the Property because the gates to the Property are inset off the Lane and could not be seen on the pictures available to me. The fence then curves out of the Property and continues up the Lane for approximately 15 metres. Behind the fence can be seen well-established trees and hedgerow. The pictures suggest that there are well established trees, hedgerow shrubs and other planting that gives a high degree of privacy to the house and gardens.

29. On the main road, where the new fence stops, there is apparently a lower older fence and the pictures suggest that behind that fence there are trees and hedgerows. In the Lane the appellants’ boundary is on the east side of the Lane after the watercourses (“ditches”) or drains which run along that side. The neighbour on that side of the Lane is responsible for the trees and hedgerow beyond the ditch. The appellants are responsible for ensuring that the ditches are clear and where the ditch runs under an access to property that the Lane is maintained above

it. The picture in the sales brochure suggests that on the appellants' side of the Lane, there is a run of very well established hedgerow and trees.

30. Since early 2022, the five houses at the end of the Lane which were under construction at the time of the appellants purchase, have been occupied. Mr Averdieck is contemplating putting speedbumps on the Lane because of the increased traffic of delivery vans going to those homes because they "hurtle" up the Lane. Although he finds the increased traffic, and particularly, the delivery vans and headlights at night to be intrusive, he argues that the biggest interference, as far as he concerned, is the tractors and farm machinery going to the farm. Mr Averdieck estimated that the Lane runs for approximately 500 metres from the entrance to the Property up to the farm.

Discussion

31. Firstly, I disregard the HMRC guidance referred to in *Hyman 1*. It is guidance for the purposes of Capital Gains Tax ("CGT") and the Upper Tribunal in *Hyman v HMRC* [2021] UKUT 0068 (TCC) ("Hyman 2") at paragraphs 43 and 44 made it quite clear that the CGT legislation and guidance were not relevant.

32. Lord Justice Lewison, at paragraph 33 in *Hyman 3*, stated that he agreed with the Upper Tribunal in *Hyman 2* when they found that the words of section 116 are "clear and unambiguous" and that the suggested qualification of a test of "reasonable enjoyment" was "simply wrong".

33. The Lane is used by the appellants since they use it whenever they come in or out of the Property. They can use it for walking as the members of the public do. Certainly, they do have the statutory obligations as does every other owner of a bridleway or public footpath.

34. At the time the Property was purchased, Mr Averdieck knew about the five new houses and the farm and his obligations, so he did try to exclude the Lane from the purchase but that did not prove to be possible. I accept that he never wanted to own it but it was part of the "package".

35. Whilst I note Mr Cannon's reliance on the penultimate sentence in paragraph 62 of *Hyman 1*, it falls to be read in the context of the whole of the paragraph.

36. I agree with Judge McKeever that the existence of burdensome obligations does not make the grounds any the less the grounds of the residence. The fences, hedgerows and trees have a functional purpose of providing the privacy and outlook which is lauded in the sales brochure so the fact that the Lane is beyond those, as is the main road, does not make the Lane less of a part of the grounds.

37. I also agree with Judge McKeever when she says that there is no requirement for active use, so whether or not the appellants use the Lane beyond the point at which they turn off the Lane to drive up to their gates, is irrelevant.

38. Whilst I accept that the farmer's business is a commercial operation, it is conducted on his farm. It is no more conducted in the Lane than it is on the main road. If Mr Averdieck or any of the other five householders who use the Lane for access to their properties were to conduct a business from their homes, they would not be conducting their business from the Lane. The Amazon drivers making deliveries do so in the course of Amazon's business but Amazon's premises do not include the Lane.

39. Mr Cannon argued that the portion of the Lane that was fenced off had no functional use for the Property. Certainly that part of the fence which runs from the main road to his driveway does have a functional use because it is their access but functional use of land is not the test.

40. In summary, whilst I accept that the appellants' maintenance obligations do impose a burden, I do not accept that they impinge so heavily on them that the Lane cannot be residential property. In fact, I find that that argument strays into the question of "reasonable enjoyment" which cannot be considered. As I have indicated, I do not accept that the Lane constitutes a commercial operation. It is like any other public right of way and I find that it forms part of the grounds of the Property.

Decision

41. For all these reasons I dismiss the appeal and uphold the Closure Notices.

Right to apply for permission to appeal

42. 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.

**ANNE SCOTT
TRIBUNAL JUDGE**

Release date: 17th OCTOBER 2020