



Neutral Citation: [202*] UKFTT 00412 (TC)

Case Number: TC 08636

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/02159

SDLT: SDLT return, acquisition of two distinct properties from single vendor, claim for mixed use relief in reliance on SDLTM00365, no claim for multiple dwellings relief made in time, whether conditions for mixed use relief satisfied, if not whether multiple dwellings relief is available. Application of section 75A FA 2003. Appeal allowed in part.

Heard on: 12 April 2022

Judgment date: 29 April 2022

Before

TRIBUNAL JUDGE GETHING

Between

DANIEL RIDGWAY

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Ridgway appeared in Person

For the Respondents: Me Michael Farrell, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) both parties attended remotely and we used the Tribunal video hearing system. A face to face hearing was not held because the judge decided a remote hearing was appropriate. The documents to which I was referred are a Hearing Bundle of 301 pages, an Authorities Bundle of 275 pages, a skeleton argument of Mr Ridgway of 9 pages and a skeleton argument of HMRC of 18 pages.
2. 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.
3. This case concerns an appeal against a decision of HMRC not to give Mixed Use Relief from stamp duty land tax (“*SDLT*”) to Mr Ridgway in relation to the acquisition by him of two properties (“*the properties*”) from a married couple (“*the Vendor*”). The properties comprise a semidetached house on Crick Road and a property known as The Old Summer House which is accessed via Norham Road. The two properties abut each other but they have separate titles and land registrations.
4. Mr Ridgway says if he is wrong about the availability of Mixed Use Relief in respect of the properties, Multiple Dwellings Relief should be available
5. Mr Ridgway also appeals against the statutory interest charge on the unpaid SDLT.
6. In 2017 Mr Ridgway was in a bidding war to purchase the properties, and in reliance upon HMRC’s guidance at SDLTM00365 concerning the availability of Mixed-Use Relief, he agreed to acquire the properties for £6.5m provided that the “Old Summer House” was the subject of a commercial lease at completion. The lease was granted and Mr Ridgway completed the sale. He signed and filed the SDLT return claiming mixed use relief within the then 30-day statutory time limit.
7. HMRC enquired into the return just before the end of the statutory period for doing so. HMRC issued a closure notice over 3 years later, denying Mixed Use Relief on the ground that the properties were residential properties within the meaning of section 116 Finance Act 2003. HMRC assessed SDLT at the then residential rates without regard to the availability of Multiple Dwellings Relief because no claim had been made for that relief before the end of the 12-month period for amending a return.
8. A more detailed chronology is set out at [22] below.

FACTS

9. I find the facts set out in paragraphs [10] to [33] below.
10. Mr Ridgway was living in Jersey. He was separated from his wife and his son was scheduled to attend the Dragon school in Oxford the following year. He wished to buy a home in Oxford to be able to spend time with his son when he started school. Through a personal contact he became aware that Crick Road and the Old Summer House were up for sale. There were several bidders for the properties. Mr Ridgway wished to make the best offer he could. He took advice from his solicitor on whether any SDLT savings could be made which he would use to increase the purchase price to secure the properties.
11. The Old Summer House had previously been used as an artist’s studio and Mr Ridgway’s solicitor advised that if the Old Summer House was in commercial use at completion, Mixed Use Relief could be claimed following HMRC’s Guidance at SDLTM00365. Mr Ridgway’s

solicitor advised that if no commercial lease was in place at completion, Multiple Dwellings Relief could be claimed.

12. Mr Ridgway was involved in finding Vine House Studios, a photographic studio business, to take a commercial lease of and occupy the Old Summer House as a studio for 9 months, at a rent.

13. The commercial lease granted to Vine House Studios restricted the use of the Old Summer House to commercial use, prohibited use as a dwelling and prohibited sub-letting.

14. The Old Summer House was originally a garage. I observe from the photographs and plans that it has a section with a pitched roof which houses two rooms described as an office and a large storeroom with a corridor between them which has an outside door at one end with French doors and a large heptagonal space at the other end. The heptagonal room has a large heptagonal sky light in the roof. There is a kitchenette and shower room that form two sides of the heptagon on the lefthand side of the corridor. The doorway into the office, another set of French doors to the outside and a storeroom on the right-hand side of the corridor form three more sides of the heptagon. There is a window in the wall opposite the corridor which forms the seventh side of the heptagon.

15. A photo of the interior of the heptagonal room shows that the window in the seventh side of the heptagon is likely to have been the original side window in the garage as it looks to be at least four feet from the floor. It is a very strange room. The plan states that the room's dimensions are 19 feet six inches and 16 feet five inches (I assume this means at the two most extreme points) but there are doorways on six of the seven sides of the room and the doorways are roughly the length of the side of the heptagon. The radiator occupies the side without a doorway. It is apparent why the Old Summer House has historically been used as an artist's studio and why Vine House Studios took the nine-month lease. In my view this would be a difficult space to use as a living room. A "corridor" would need to be left around the outside to be able to move from the kitchen to the toilet to the office and storerooms and the outside terrace etc, so the actual living space available for sitting and dining would be smaller than the dimensions suggest and there would seem to be no wall space for normal amenities of a living room and dining room such as bookcases, sideboard/dresser, TV, and record player. In my view this property is well suited for use as an artist's studio, although I have no doubt that absent the commercial lease, individuals would be able to occupy the Old Summerhouse as a dwelling.

16. I find as a fact that the Old Summer House was not capable of being lawfully occupied as a dwelling at completion of the purchase of the Old Summer House owing to the existence of the commercial lease.

17. Mr Ridgway's solicitor prepared the land transaction return claiming Mixed Use Relief which Mr Ridgway approved and filed within the then 30-day time limit from the date of the land transaction.

18. Vine House Studios occupied the Old Summer House for nine months until the end of the lease when Vine House Studios moved to cheaper premises.

19. HMRC made an enquiry into the return just within the nine-month time limit.

20. Mr Ridgway and his solicitor provided the lease agreement, the sale agreement and associated documents and information to HMRC before the expiration of the period for amending the return.

21. HMRC notified Mr Ridgway that the Mixed Use Relief claim was denied in the Closure Notice on 8 February 2021 (three years after the end of the period for amending the return) and

although HMRC assert the Old Summer House was a residential property, the amended assessment was made on the basis that Multiple Dwellings Relief was not available because the SDLT return had not been amended before the expiration of the 12 month period following the latest possible filing date of the land transaction.

22. The transactions took place on the following dates:

	Date	Transaction/event
1	09/08/17	Completion of the Grant of the Commercial Lease
2	23/08/17	Completion of the Land Transaction
3	01/09/17	Filing of the Land Transaction Return
4	9/05/18	Expiration of the Commercial Lease
5	29/05/18	HMRC open of the enquiry into the Land Transaction Return
6	23/08/18	Expiration of the time to amend return
7	08/02/2021	Closure Notice issued
8	10/03/21	Notice Appeal and request for review 30 days after receipt of the closure notice
9	13/05/2021	HMRC issue a review conclusion letter
10	12/06/2021	Appeal notified to the Tribunal

23. Mr Ridgway paid SDLT of £314,500 on the basis that mixed use relief applied.

24. If Mixed Use Relief were not available but multiple dwellings relief were available, the SDLT would be £577,500 (an additional £263,000 SDLT would be payable).

25. If neither relief were available, the SDLT would be £888,750 (an extra £574,250 SDLT would be payable).

26. SDLTM00365 stated:

“In most cases, there will be no difficulty in establishing whether or not a property is residential property.

Use on the effective date overrides any past or future use for this purpose. If a building is not in use at the effective date but its last use was as a dwelling, it will be taken to be a ‘suitable for use as a dwelling’ and treated as residential property, unless evidence is provided to the contrary.”

27. DLTM00365 was withdrawn by HMRC in October 2019 (more than 2 years after the effective date. New guidance was issued. The effective date is the completion date of the purchase- 22/08/2017.

28. Mr Ridgway’s solicitor had 25 years’ experience in advising on real estate transactions. He informed Mr Ridgway the guidance at SDLTM00365 had been in existence for as long as he could remember. He relied on this guidance in giving the following advice in July 2017, *“SDLT is assessed on the basis of use at the time of the purchase, so if there is a genuine arm’s length commercial tenancy, that should be Mixed Use, rather than Residential.”*

29. Officer Khanzada in his letter of 8 November 2018 stated that *“In deciding if the property is a dwelling it is only necessary to consider the use of the property at the effective date of the transaction.”*

30. Mr Ridgway was surprised to receive the Closure Notice on 8 February 2021 from Officer Khansada determining the issue of Mixed Use Relief solely on the basis of the physical features of the premises at the effective date without regard to use or rights and obligations affecting the premises.

31. Mr Khansada explained that the reason he did not open the enquiry until May 2018 was pressure of work.

32. Had Mr Ridgway known of HMRC's change of view before the expiration of the twelve-month period to amend his return he would have amended his SDLT return to claim multiple dwellings relief.

33. Notwithstanding that HMRC were aware of Mr Ridgway's reliance on SDLTM00365, and aware that this Tribunal had no jurisdiction to determine a claim based on legitimate expectation, HMRC advised Mr Ridgway that his appeal against the assessment must be made to the Tribunal. Mr Ridgway is now out of time to bring a claim in judicial review.

LEGISLATION RELATING TO SDLT

34. SDLT was introduced in 2003 by the Finance Act 2003 ("**FA 2003**") and imposed a charge to tax to be known as SDLT on transactions in land, in place of stamp duty, which was imposed on documents that completed transactions in land. SDLT is payable by the purchaser of the land, the subject of the land transaction.

35. Subject to some exceptions that are not relevant in this case, a land transaction is subject to SDLT at the rates specified in table A or table B of section 55(1B) of FA 2003.

36. Table A deals with the rates of SDLT on residential property and Table B deals with non-residential property or mixed property. There are two columns in both tables, the left-hand column has the amount of the consideration and the right-hand column the rate is specified. The consideration rises in tranches. The tax is charged at the specified rate for each tranche of the consideration.

37. There are three rates of SDLT for mixed use or non-residential property, 0%, 2% and 5%. The 0% applies to consideration up to £150,000, 2% for consideration between 150,000 to £250,000 and 5% rate applies to consideration of more than £250,000.

38. There are four rates for residential property: 0% on consideration up to and including £500,000, 5% for consideration of £500,000.01 to £925,000, 10% for £925,000.01 to £1,500,000 and 12% for consideration of more than £1,500,000.

39. Where a land transaction comprises two or more residential properties, for the purpose of calculating the SDLT chargeable, the total consideration payable is divided by the number of residential properties comprised in the land transaction and the rates are applied to the tranches of consideration allocated to each residential property. This relief was introduced by section 58B and Schedule 6B in 2011.

40. The term residential property is defined in section 116 FA 2003. It provides as follows:

“(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.

This is subject to the rule in subsection (7) below in the case of a transaction involving six or more dwellings.

(2) For the purposes of subsection (1) a building used for any of the following purposes is used as a dwelling—

(a) residential accommodation for school pupils;

(b) residential accommodation for students, other than accommodation falling within subsection (3)(b);

(c) residential accommodation for members of the armed forces;

(d) an institution that is the sole or main residence of at least 90% of its residents and does not fall within any of paragraphs (a)–(f) of subsection (3).

(3) For the purposes of subsection (1) a building used for any of the following purposes is not used as a dwelling—

(a) a home or other institution providing residential accommodation for children;

(b) a hall of residence for students in further or higher education;

(c) a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder;

(d) a hospital or hospice;

(e) a prison or similar establishment;

(f) a hotel or inn or similar establishment.

(4) Where a building is used for a purpose specified in subsection (3), no account shall be taken for the purposes of subsection (1)(a) of its suitability for any other use.

(5) Where a building that is not in use is suitable for use for at least one of the purposes specified in subsection (2) and at least one of those specified in subsection (3)—

(a) if there is one such use for which it is most suitable, or if the uses for which it is most suitable are all specified in the same sub-paragraph, no account shall be taken for the purposes of subsection (1)(a) of its suitability for any other use,

(b) otherwise, the building shall be treated for those purposes as suitable for use as a dwelling.

(6) In this section “building” includes part of a building.

(7) Where six or more separate dwellings are the subject of a single transaction involving the transfer of a major interest in, or the grant of a lease over, them, then, for the purposes of this Part as it applies in relation to that transaction, those dwellings are treated as not being residential property.

(8) The Treasury may by order—

(a) amend subsections (2) and (3) so as to change or clarify the cases where use of a building is, or is not to be, use of a building as a dwelling for the purposes of subsection (1);

(b) amend or repeal subsection (7) and the reference to that subsection in subsection (1).

Any such order may contain such incidental, supplementary, consequential or transitional provision as appears to the Treasury to be necessary or expedient.

Section 75A - Anti-avoidance

(1) *This section applies where-*

(a) *One person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it.*

(b) *A number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition (“the scheme transactions”), and*

(c) *The sum of the amounts of stamp duty land tax payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V’s chargeable interest by P on its disposal by V.*

(2) *In subsection (1) “transaction” includes in particular-*

(a) *A non-land transaction;*

(b) *An agreement, offer or undertaking to take specified action;*

(c) *Any kind of arrangement whether or not it would otherwise be described as a transaction,*

(d) *A transaction that takes effect after the acquisition by P of the chargeable interest.*

(3) *The scheme transactions may include:*

(a)....

(b)....

(c) *the grant of a lease to a third person subject to a right to terminate.*

(d)....

(e)...

(f) ...

(4) *Where this section applies-*

(a) *any of the scheme transactions which is a land transaction shall be disregarded for the purposes of this Part; but*

(b) *there shall be a notional land transaction for the purposes of this Part effecting the acquisition of V’s chargeable interest by P on its disposal by V.*

(5) *The chargeable consideration on the notional transaction in subsection (1)(c) and (4)(b) is the largest amount (or aggregate amount) –*

(a) *given by or on behalf of any one person by way of consideration for the scheme transactions, or*

(b) *received by or on behalf of V....*

(6) *The effective date of the notional transaction is*

(a) *the last date of completion of the scheme transactions; or*

(b)

(7)

Section 75B Anti-avoidance: incidental transactions

(1)...

Section 75C: Supplemental

(1)...

(2) *The notional transaction under section 75A(4) attracts any relief under this part which it would attract if it were an actual transaction (subject to the terms and restrictions of the relief).*

Mr RIDGWAY's POSITION

41. Mr Ridgway says the primary issue is whether the Old Summer House was a residential property within the meaning of section 116(1)(a) FA 2003 on the effective date and therefore whether the SDLT return was properly filed. He says it was not residential property and mixed-use relief is available for the following reasons:

(1) As the Old Summer House was not in use as a dwelling at the effective date it can only be within section 116(1)(a) if it was "suitable for use" as a dwelling at the effective date. The test does not permit a general assessment of a building. It is focussed on the suitability at the effective date.

(2) At the effective date the Old Summer House was subject to a commercial lease in favour of a third party at a rent which lease prohibited use as a dwelling and prohibited sub-letting, in consequence as it was not capable of being used by the tenant as a dwelling, it cannot logically be regarded as suitable for use as a dwelling at the effective date.

(3) The test of whether a property is suitable for use as a dwelling at the effective date must consider the facts and issues at that date not at some later date. The Old Summer House was being used by Vine House Studios as an office and photographic studio at the effective date so cannot logically be regarded as suitable for use as a dwelling by anyone else at that date.

(4) The Old Summer House may be suitable for use as a dwelling at a later date but not at the effective date.

(5) HMRC considered the actual use at the effective date was the determining factor per their guidance note SDLTM00365. HMRC withdrew this guidance in 2019, when Mr Ridgway could no longer amend his SDLT return. Only if the property is vacant should the suitability of the premises be considered.

(6) Mr Ridgway and his Solicitor reasonably relied on HMRC's guidance. HMRC should be prevented from withdrawing that representation of the state of the law as set out in SDLTM00365.

(7) Mr Ridgway accepts that had the Old Summer House been vacant at the effective date it could have been used as a residential property. But it is not just the physical features which determine whether a property is suitable for use as a dwelling on the effective date. The use at that date must be considered. If actual use is irrelevant there would be no need for Section 116(1)(a) to include the words "used as a dwelling".

(8) There are many properties that have all the features of a dwelling house – kitchen, bathroom and bedroom, privacy etc but are in use as say an aircraft hangar or a doctors' surgery in a modern town house used only as a doctor's surgery. But the purpose of the legislation is not to cause such buildings to be regarded as residential.

(9) The reference in section 116(4) to a property being suitable for two uses at once, in such a case it is the actual use that is taken into account and not the other use for which it may be suitable.

(10) Similarly the reference in section 116(5) to "*where a building that is not in use is suitable for use*" supports Mr Ridgway's position and is consistent with SDLTM00365.

(11) HMRC give examples of Mixed Use property in their Statement of Case, such as a flat attached to a shop and a house which comprises a doctor's surgery. Mr Ridgway accepts these

are examples of mixed use but applying HMRC's interpretation of suitable for use the entire properties would have to be regarded as residential.

(12) The only logical interpretation of section 116(1)(a) is to give priority to actual use and consider suitability if the property is not in use.

(13) No planning permission was obtained to use the Old Summer House as a photographic studio. Mr Ridgway considers that this is irrelevant. Such use is not unlawful. The lack of planning permission is only unlawful if the local authority has issued an Enforcement Notice which is not complied with. Mr Ridgway's solicitor and Oxford City Council confirmed this in August 2017. No Enforcement Notice was issued at the effective date or at all. HMRC's own guidance at SDLTM00475 confirms that planning permission is not determinative. HMRC accept that planning permission is not determinative in their Closure Notice.

42. If the Tribunal considers that the Old Summer House is residential property, Mr Ridgway says that Multiple Dwellings Relief should be available.

43. Mr Ridgway considers the imposition of statutory interest was operating as a penalty in this case and appeals against its imposition.

HMRC's POSITION

44. HMRC consider that:

(1) The Old Summer House was residential property at the effective date because section 116(1)(a) should be given a straightforward meaning – it requires consideration only of whether the property is in use as a dwelling, and if not in use as a dwelling, it requires consideration of whether it is suitable for use as a dwelling. Consideration can also be given to whether the property is in the course of construction of a dwelling and to whether it is in the process of adaptation as a dwelling. In such cases the properties will be regarded as residential.

(2) As the Old Summer House was not in the course of construction, or adaptation for use as a dwelling, these parts of section 116(1)(a) should be disregarded.

(3) HMRC accept that the property was not in use as a dwelling at the effective date so the only issue is whether it was suitable for use as a dwelling.

(4) Section 116(1)(a) does not state that only a building's actual use determines whether a building is residential property in priority to its suitability for use.

(5) HMRC rely on *Keith Fiander and Samantha Bower v HMRC* [2021] UKUT 0156 (TCC) at [47] and [48]. (“*Fiander*”). The case concerns the application of multiple dwellings relief. At [47] the UT dismisses HMRC guidance as it does not inform the proper construction of the statute. At [48] the UT looks at the following factors:

(a) The actual condition of the property not whether it would be suitable with adaptation. Adaptation is only considered if the works have begun at the effective date.

(b) The issue in the case was whether the premises was suitable for use as a single dwelling and so the physical attributes of the property must be considered at the effective date.

(c) It is an objective test. The intention of the parties is irrelevant.

(d) It must be suitable for the generality of people not a particular person.

(e) It must provide the basic requirements for living, a place to sleep, eat, cook and wash.

(f) It is not a one size fits all test.

(g) “*It is a multi-factorial test which should take into account all the facts and circumstances. Relevant facts and circumstances will obviously include the physical attributes of and access*”

to the property, but there is no exhaustive list which can be reliably laid out of relevant factors. Ultimately the assessment must be made by the FTT as the fact-finding tribunal, applying the principles set out above.”

(6) HMRC note that the principles adopted by the UT in *Fiander* were adopted by the UT in *Andrew & Tiffany Doe v HMRC* [2022] UKUT 2 (TCC).

(7) HMRC accept that these two UT decisions concern multiple dwelling relief and in particular whether a property or part is capable of being used as a single dwelling, but the guidance on suitable for use as a dwelling “*is assistive*” notwithstanding that the issue of single dwelling is only significant to the multiple dwelling relief.

(8) The particulars of sale referable to the Old Summer House included all the normal appliances in the kitchenette, a central heating boiler, a shower room and the two rooms specified as “office” and “storage space” in the plan attached to the notice of appeal are referred to as bedrooms in the plan attached to the particulars of sale and so these must be suitable for use as bedrooms.

(9) Although Mr Ridgway informed the Tribunal that the bath and shower room needed repair, that fact alone cannot prevent a building from being suitable for use as a dwelling. HMRC referred to *Fiander* at [6] where the UT disregarded the fact that repairs were needed. The repairs in this case were minor.

(10) There was no planning permission for the use of the property as a photographic studio. HMRC states that only residential use was lawful.

(11) The property could be occupied as a dwelling without adaptation.

(12) An objective observer would consider from its physical attributes that the property was suitable for use as a dwelling and it was distinct and separate from the Crick Road property, it had its own grounds and access, its own private entrance.

(13) Regardless of the terms of the commercial lease over the Old Summer House at the effective date, the property was suitable for use as a dwelling. The grant of the lease did not alter the physical features. It is only the “bricks and mortar” features that are determinative, as determined by *Fiander*, albeit it is a multi-factorial assessment.

(14) HMRC accept the Old Summer House was in commercial use at the effective date, but the lease did not change the physical attributes or character. The lease was a short lease but even a long lease would have no effect on the suitability for use as a dwelling.

(15) Mr Ridgway’s motivation for the commercial lease to be granted was to reduce the SDLT payable. Mr Ridgway must consider that the Old Summer House was otherwise suitable for use as a dwelling.

(16) To argue that the existence of the commercial lease over a property means that a property is not a dwelling is to disregard the second limb of the test in section 116(1)(a). HMRC say the whole purpose of the second limb is to bring properties into the charge of SDLT as a dwelling even if they are vacant or in other use at the effective date.

(17) HMRC point to the FTT decision in *Brandbros Limited v HMRC* (“**Brandbros**”)[2021] UKFTT 157 (TC) at [48] where the FTT considered the grant of a lease of a garage did not affect the test of whether the garage was suitable for use as a dwelling. *Brandbros* concerned a sale of a house and garage. After the transaction was completed and SDLT was paid the taxpayer applied for repayment of SDLT on the garage and relevant surrounding grounds on the basis that the garage was not part of the dwelling as it was subject to a commercial lease. The lease was granted after completion of the sale of the house, albeit on the same day. The

grantee of the lease had not occupied the garage before the effective date or even at the effective date. The FTT did not need to consider the issue of the existence of the lease but commented at [48], “although not necessary for our decision, that we do not consider **the use of the garage** was altered for the purposes of the SDLT rules simply by the grant of the lease of the garage.” [My emphasis added.]

(18) As to HMRC’s guidance at SDLTM 00365, it does not have force of law. It has no value as authority beyond it represented HMRC’s view at the date of publication of the guidance. Notwithstanding that, HMRC consider SDLTM 00365 only relates to the issue of whether a property is used as a dwelling and not to situations where property is suitable for use as a dwelling. HMRC updated the guidance on 12 November 2019.

(19) The Tribunal has no jurisdiction to consider whether Mr Ridgway has a legitimate expectation that HMRC would follow the guidance at SDLTM 00365. HMRC relies on the principles laid down in *HMRC v Hok* 2012 UKUT 363 (TCC)

(20) In consequence the higher residential rates of SDLT in Table A of section 55 FA 2003 should apply in this case.

(21) Although at the effective date multiple dwellings were acquired, and not a mix of residential and commercial property, Multiple Dwellings Relief was not claimed in the land transaction return filed on 01/09/2017 and no amendment was made to the return within the statutory time limit of 12 months from the latest filing date, per Para 6(3) to Schedule 10 to FA 2003. The latest filing date is 30 days after the completion of the land transaction.

(22) Mr Ridgway first raised a claim to Multiple Dwellings Relief in a letter to HMRC dated 10 March 2021 (in response to the closure notice dated 8 February 2021). That was more than 3 years after the last date to amend a return.

(23) HMRC point out that Para 18 of Schedule 10 to FA 2003 also provides for amendment of returns during an enquiry. The enquiry in this case had been closed by the issue of the Closure notice. HMRC state that it is the transactional nature of SDLT which prevents an amendment to an SDLT return in this case, as it was in the case of *HMRC v Christian Peter Candye* [2021] UKUT 0170 (TCC). The period to make a claim for relief within 13 months from the date of the transaction concerned, is regarded as a fair balance being struck between preventing avoidance and providing a tax system that is simple to operate.

(24) The FTT decision in *Secure Service Limited v HMRC* [2020] UKFTT 59 supports the inability of the Tribunal to hear an appeal against HMRC’s refusal to allow a late claim for Multiple Dwellings Relief at [67].

(25) In relation to statutory interest, HMRC state that the interest applies automatically on unpaid tax and there is no right of appeal. If Mr Ridgway were successful in his appeal the statutory interest would cease to be applicable. Mr Ridgway considers he has been adversely affected by the enormous delay in HMRC dealing with their enquiry which has caused interest to increase to a very high level. HMRC point out it was open to Mr Ridgway to pay the SDLT during the enquiry to stop the interest accruing. Although statutory interest is collected as if it were tax, there is no appeal against an assessment to interest where the underlying tax is due.

DISCUSSION

45. To determine whether Mixed Use Relief was available in relation to the land transaction comprising the sale of Crook Road and the Old Summer House requires consideration of whether the Old Summer House constituted residential property or non-residential property within the meaning of section 116(1)(a) Finance Act 2003 at the effective date.

46. Section 116(1) provides as follows:

“(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.”

47. The guidance in the UT decision in *Fiander* at [47] and [48] requires this Tribunal to apply a multi factorial test, consider all facts and circumstances, including the physical attributes of and access to the property. But the UT indicated that there is no “exhaustive list” which can be reliably laid out of relevant factors. The test is an objective one in each case.

48. Looking at the physical attributes of the Old Summer House it has a kitchenette, a shower room (albeit that some repairs were needed) and two rooms that could be used as bedrooms. I have some concerns about the heptagonal area with the heptagonal skylight in the centre which make it eminently suitable to be an artists’ or photographer’s studio rather than a living room, but I accept that it would not be impossible to use it as a sitting and dining area.

49. However, as *Fiander* points out, this Tribunal must consider not just the physical attributes of the property but all the facts and circumstances. That requires this Tribunal to consider the existence and terms of the Commercial Lease granted to Vine House Studios and the restrictive covenants in that lease which prevented the Old Summer House from being used as residential accommodation. The lease was in place on 9 August 2017, two weeks before the effective date. If a person sought to use the property for residential purposes at the effective date, there would be a breach of the term of the lease which would result in forfeiture of the lease and the person seeking to occupy the property as a residential property would be liable to damages or injunctions. The terms of the Commercial Lease and the consequences of breach of the terms, render the Old Summer House not “suitable for use” as a dwelling at the effective date. Mixed Use Relief was available subject to the operation of section 75A and 75C FA 2003.

50. I note HMRC’s representation that the obiter comments by the FTT in *Brandbros* to the effect that the existence of a lease should not be taken into account in determining whether a property is residential property. I do not find those comments helpful. In this case, unlike *Brandbros*, the commercial lease was granted two weeks before the effective date, the property was in use as a photographer’s studio at the effective date, and the lease imposed restrictions on the use of the property by the tenant. I follow the guidance in *Fiander* and consider all the facts and circumstances in determining whether the Old Summer House was suitable for use as a dwelling at the effective date.

51. I consider that the requirements of section 75A FA 2003 are satisfied for the reasons set out below in (1) to (9) below, and in consequence Mixed Use Relief will not be available but SDLT should be assessed on the basis that Multiple Dwellings relief would be available.

(1) I note that Mr Ridgway did intend to reduce his liability to SDLT to enable him to pay the largest price possible for the properties in order to out-bid the other potential purchasers. I also note that although the sub-heading of section 75A refers to “Anti-avoidance”, the section applies whether or not there is a tax avoidance motive. That was made clear in the Supreme Court in *Project Blue Limited v HMRC* [2018] UKSC 30 (“*Project Blue*”) at [42]. All that is required is that a lower amount of SDLT would be payable because of the scheme transactions.

- (2) Section 75A applies where, a person V disposes of a chargeable interest in land to P, a number of transactions including the disposal and acquisition of the property are “involved in connection with the disposal and acquisition”, (referred to as “*scheme transactions*”, and the sum of the amount of SDLT payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the disposal by V to P.
- (3) A “*scheme transaction*” can include the grant of a lease, per section 75A(3)(c), In this case the scheme transactions involved in connection with the disposal and acquisition are (a) the grant of the Commercial Lease of the Summer House to Vine House Studios on 09/08/2017, (b) the disposal and acquisition of the semidetached house in Crick Road and The Old Summer House to Mr Ridgway which completed on 23/08/2017.
- (4) Mr Ridgway was involved in identifying the Vine House Studios as a lessee of the Old Summer House and required that the agreement for disposal and acquisition of the properties was conditional on there being a commercial lease over the Old Summer House in place at completion. The Commercial Lease was “*involved in connection with*” the sale of the properties. In determining whether a transaction is involved in connection with a disposal, the Supreme Court in *Project Blue* considered a realistic view of the facts may be taken. In this case, the grant of the lease was a pre-condition of the sale. The requirement is met, irrespective of whether the facts are viewed realistically.
- (5) The Land Transactions comprising the arrangements must be disregarded under section 75A(4)(a). The Land Transactions to be disregarded are the grant of the Commercial Lease and the disposal by the Vendor and acquisition by Mr Ridgway of the properties.
- (6) A **notional transaction** must be identified pursuant to which P acquires the properties from V (see section 75A(4)(b)). The notional transaction would be a simple sale and purchase of the properties by the Vendor to Mr Ridgway without the grant of the commercial lease to Vine House Studios.
- (7) The consideration for that notional land transaction is the largest consideration given by any person by way of consideration under the scheme transactions and received by V. In this case that is £6.5m, all of which was paid by Mr Ridgway to the vendor.
- (8) Section 75C(2) states that the notional transaction attracts any relief under Part 4 of FA 2003 which it would attract if it were an actual transaction (subject to the terms and restrictions of the relief).
- (9) Multiple Dwellings Relief is granted under section 57A and Schedule 6B of FA 2003. Section 57 A forms part of Part 4 of the FA 2003.
- (10) HMRC accept that the terms of Multiple Dwellings Relief are satisfied. HMRC’s only objection is that the claim was not made in the return or an amendment to a return. I note that Schedule 6B does not contain any requirement to file a return in consequence all the requirements of Schedule 6B are satisfied. As the transaction identified by Section 75A on which SDLT is payable under section 75A is a notional transaction and not an actual transaction, and the Multiple Dwellings Relief is deemed to be available under section 75C as a result of the disregard of the Commercial Lease, and there is no statutory requirement to make a claim for relief in a land transaction return or an amendment to a return. HMRC is entitled however to modify the return to reflect the tax due on the notional transaction under section 75A (see para [83] of *Project Blue*).

DECISION

52. I allow the appeal (against the imposition of SDLT on the basis that Table A of section 55 FA 2003 applies) on the basis that Multiple Dwellings Relief is available on the notional transaction identified at [50(6)] above, under sections 75A and 75C FA 2003.

53. I disallow the appeal against statutory interest on unpaid SDLT.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

54. 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.

**HEATHER GETHING
TRIBUNAL JUDGE**

Release date: 29TH APRIL 2022