Entitlement to a Relief -v- The Tax Man

Amanda Perrotton explains everything you always wanted to know about stamp duty land tax

In a straightforward land transaction, stamp duty land tax (SDLT) is charged on the money paid for the property by the purchaser. Introduced in the Finance Act 2003 it largely replaced Stamp Duty with effect from 1 December 2003. It is a self-assessed transfer tax charged on land transactions.
In 2015, the Scottish replaced SDLT with the Land and Buildings Transaction Tax and in Wales it was replaced in 2018 with Land Transaction Tax. Unlike Stamp Duty, SDLT required a return to be filed and so provided HMRC with the ability to enquire into an SDLT return and raise assessments to recover what they considered to be unpaid SDLT.

Current tax rates
For residential and commercial purchases, the current rates in England & Northern Ireland from 23 September 2022 are as follows:

Consideration	**Rate (paid on portion in band)**	**Including additional property surcharge**
Residential Property		
from £40,000 to £250,000	0%	3%
from £250,001 to £925,000	5%	8%
from £925,001 to £1,500,000	10%	13%
over £1,500,000	12%	15%
Non-Residential and Mixed Land and Property		
Up to £150,000	Zero	
£150,001 to £250,000	2%	
£250,001 and above	5%	

Given the above table, SDLT has a very nasty sting in the tail, which many have complained has suppressed areas of the housing market. There has been a stagnation in the number of sales of more expensive properties, and the tax revenue generated through SDLT has declined since 2018.

Between 2003 and 2013 SDLT Schemes quickly sprang up, seeking to avoid the higher rates of tax imposed following the introduction of SDLT. These were countered by the Finance Act 2006 which introduced Section 75A Anti-Avoidance Rules, together with the General Anti-Avoidance Rules in part 5 of the Finance Act 2013. SDLT Schemes operated by breaking down a transaction into sub sales or using loopholes in the legislation which attracted lower SDLT rates. HMRC are still pursuing the recovery of unpaid tax as a result of implementation of these schemes, with cases still coming before the Tribunals 14 years later. On the back of this, SDLT reliefs are highly sought after and when applied correctly can give the purchaser considerable savings.
As a result, considerable time and argument is devoted to pushing back on HMRC and a recent example of this is an appeal against an HMRCs application to strike out, in the matter of Newsand Limited -v- HMRC FTT TC/2023/09861. It came before Judge Ashley Greenbank at the First Tier Tribunal on 1 March 2024 with the decision provided on 13 March 2024.

Background
HMRC had applied to strike out Newsand's appeal against a closure notice on the basis that there were no reasonable grounds for success under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009.
The facts of the case were that Newsand Ltd purchased the freehold interest in a property in December 2021, which completed in February 2022. They had bought a four-storey building in Peterborough, which included shops on the ground floor and offices on the first, second and third floors. There was an existing 2020 notice of prior approval by Peterborough City Council for a change of use under Class O of the General Permitted Development Order, allowing (subject to the prior satisfaction of conditions) the three floors of offices to be converted to 102 residential units. Work commenced for the strip out on the day of completion.
On completion, Newsand submitted the SDLT1 return, claimed multiple dwellings relief and self-assessed to SDLT of £72,769. In November 2022, HMRC gave notice that they would enquire into the return.
On 2 March 2023 HMRC issued a closure notice denying Newsand's claim for MDR and charged them SDLT calculated under non-residential or mixed rate's, stating there was an additional £252,324 to pay.
Newsand's advisers, Cornerstone 2020 Limited, wrote to HMRC and appealed against the decision and following a further exchange, a statutory review was completed on 9 August 2023 which upheld HMRCs decision to deny MDR. Newsand appealed to the FTT.

Grounds of Appeal
The grounds of the appeal centred on the following:

a. Para 2(2) Schedule 6B FA 2003 states that the main property must consist of an interest in at least two dwellings which they considered was met by para 7(2)9b) Schedule 6B which provides a building qualifies under this section if it is 'in the process of being….adapted' for use as a dwelling.
b. Newsand said the property was 'in the process of being….adapted' as the building had been purchased with the benefit of permitted development to convert to residential flats and on the day of completion those works had been commenced.

HMRCs response to this was to apply to the Tribunal to strike out the whole of the proceedings on the grounds that there was 'no reasonable prospect of the appellant's case or any part of it succeeding'. Prior to any striking out Newsand must have an opportunity to make representations under FTR 8(4).
Under these Rules amongst other points, the courts are required to consider if the appellants chances of success are realistic rather than merely arguable. Whilst an entire review of the case is not required, the court must consider what evidence the appellant can and would bring forward at a full hearing and whether or not the Tribunal has sufficient evidence for a 'proper determination of the question'.

Arguments: for and against
HMRCs position was that the Newsand's case had no reasonable prospect of success, citing the UTT decision in Ladson Preston Limited and AKA Developments Greenview Limited v HMRC 2022 UKUT 00301 on which HMRC relied on the following ruling in that case: "*The requirement for a 'physical manifestation' relating to the property being 'in the process of being….adapted' was that the process of the construction needed to be underway at completion; that obtaining planning permission was not deemed to be sufficient to be part of the process; and the application for MDR should be determined by reference to what was acquired at completion. Works that commenced on the same day but after completion itself would not qualify."*
HMRCs argument was that there was no material difference between Ladson Preston and the case before the Tribunal now. They stated that at the time of completion, the property was a commercial building and that no adaption had actually commenced. MDR had to be determined by reference to the nature of the chargeable interest that was acquired at completion and if works had yet to commence then subsequent works became irrelevant.
Patrick Cannon for Newsand Limited set out his reasons why Ladson Preston differed significantly from the matter before the Tribunal.
He stated that in Ladson Preston the UTT was considering what *'activities constituted a process of construction not a process of adaptation'* and in addition there was already a building on the land which he stated was a *'physical manifestation'* which significantly

differed from Ladson Preston. Furthermore, he stated that additional evidence would be brought before a full hearing and the Tribunal had insufficient evidence at a strike out hearing to make a decision now. It was also stated that Newsand was no longer relying on the permitted development rights attributed to the building in support of its argument.

Judge's observations and decision

During the course of the hearing Judge Greenbank considered Ladson Preston and made the following observations:

a. There is a requirement for a physical manifestation on the relevant land, without which irrespective of intention then this cannot be fulfilled.
b. MDR is determined by the nature of the chargeable interest acquired at completion and that works that commence on the same day but after completion has taken place are not relevant.
c. Each case will turn on its own facts and Ladson Preston clearly stated that *'…Future FTTs considering similar issues will therefore be required to answer questions of fact and degree in the light of the correct construction of paragraph 7(2)(b) Schedule 6B FA 2003'.*
d. On the facts before him, the Judge determined that he had not heard all the evidence that Newsand might wish to bring and they should be granted the opportunity to do so.
e. He further stated that 'the process of construction' in Ladson Preston and a 'process of adaption' in this case provided arguable differences, 'not least because in a process of adaption an existing building will always exist and the requirement for there to be "a physical manifestation" of a building in the case of a process of construction does not arise'.

HMRCs application to strike out was duly refused and Newsand's appeal allowed to progress.

From this, it is clear that the following will be applied by the Tribunals:

1. The SDLT payable and any reliefs available are dependent on how the property is classified at the time of completion. The Tribunal will not be concerned with changes post completion, even if they occur on the same day. Has the 'process of construction' or the 'process of adaption' already begun?
2. The decision will turn on the specific facts of each case. Does the calculation apply to bare land, have foundations been put in place or does it relate to an existing building. Is there a physical manifestation?

What's next for Newsand?

The burden of proof lies with Newsand for them to bring sufficient evidence before the Tribunal to show that Multiple Dwellings Relief is available. What will come into play?

1. In their outline argument it was stated that the adaption began on the day of completion itself. If a licence or agreement was in place prior to completion enabling Newsand to scope out the works, bring tools and commence the adaptations rather than simply plan for the adaptations then this could demonstrate that work had commenced prior to the day of completion.
2. What access to the property did the buyers have prior to the day of completion that could in any way demonstrate that the contract had already been substantially performed? Where a contract is 'substantially performed' before completion, by the purchaser taking possession of the whole or a significant part of the building for example then it is clear from s 44(4) FA 2003 that the effective date would be moved forward to this date.
3. What is the nature of being 'in the process of' for both constructing a new building and adapting an existing one? What additions had been made, leading authorities to suggest that stripping out and demolition do not constitute additions, so they will need to bring evidence to counter this.
4. Did the works that had been started form part of the overall adaption? As in 3 above, stripping out and demolition go to clearing the site in readiness for construction or adaptations and do not of themselves form part of that process.
5. What applications had been made to the local authority for works at the site? Was planning permission as well as building regulation consent required and if so, when were these applications made? Evidence of these activities will provide the court with a timeline if works had already started. We are told that permitted development rights were included within the original contract, but that Newsand were no longer relying on these to support their argument.

To conclude

While the complicated tax systems surrounding SDLT remain, including conflicting terminology depending on the reliefs that are claimed, the Tribunals will continue to see before them cases of this nature. HMRC are becoming more eager to challenge and enquire into SDLT returns and have been galvanised in part by the advent of SDLT reclaim companies and their own far-reaching powers. But what are their resources looking like? Forced into a U-turn on plans to close key helplines for six months of the year after an outcry from 'concerned stakeholders', it remains to be seen how a stretched service will respond to the challenge of 'recovering' underpaid SDLT whilst meeting service needs across the board. No doubt a subject we will return to again and again.

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