TC01921

Appeal number:TC/2011/4991

SDLT – chargeable consideration – attribution between land and chattels – whether certain items were part of land – application of* Tower MCashback *to closure notice-

FIRST-TIER TRIBUNAL
TAX CHAMBER

GILL ORSMAN **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
NIGEL COLLARD

Sitting in public in Brighton on 7 February 2010

The Appellant in person

Julie Farrell and Elliott Godfrey for the Respondents

DECISION

1. Introduction

1. Miss Orsman appeals against an amendment made to her stamp duty land tax ("SDLT") land transaction return by which the SDLT payable on the acquisition of her house in 2010 was increased from £2,500 to £7,524.

2. In March 2010 Miss Orsman bought a house together with certain chattels for a total of £258,000. Of that amount £8,000 was described as being for "Chattels".

3. The increase in the charge was communicated to Miss Orsman in a letter of 28 February 2001 accompanying a closure notice in respect of the enquiry HMRC had launched in relation to her SDLT return. In that letter the officer said:

> "I have completed my enquiry into your land transaction return. My enquiry has identified that the built-in fitted units in the garage valued at £800 [are] "fixed" item[s] and therefore additional Stamp Duty Land Tax will be due. As a result of this, tax is now due as follows:
>
> Total consideration of £250,800
>
> Appropriate rate of tax 3%
>
> Tax due £7524
>
> Tax paid £2500
>
> Tax outstanding £5024."

4. Miss Orsman requested an independent review of the conclusion of the enquiry. The reviewing Officer upheld those conclusions and Miss Orsman lodged a late appeal against this decision. HMRC did not object to the lateness of the appeal and we considered it fair to hear the appeal.

2. The law relevant to the amount of SDLT payable.

5. FA 2003 imposes a tax on "land transactions". By section 43 a "land transaction" is "any acquisition of a chargeable interest", and by section 48 a chargeable interest is "any estate, interest, right or power in or over land in the United Kingdom". There is no doubt that Miss Orsman's acquisition of her house was a land transaction.

6. Section 55 FA 2003 provides that the tax payable is "a percentage of the chargeable consideration for the transaction". The section specifies the percentage rate. At the time of Miss Orsman's purchase that rate was-

(1) Nil, if the relevant consideration was not more than £125,000;

(2) 1%, if the relevant consideration was more than £125,000 but not more than £250,000;

(3) 3%, if the relevant consideration was more than £250,000 but not more than £500,000.

7. So far as is relevant to this case the "relevant consideration" is equal to the "chargeable consideration" (section 55 (3)). See below.

8. Mrs Farrell described the tax as a "slab" tax. It is not payable at incremental percentages of fixed parts of the consideration like income tax. Thus, for example, if the relevant consideration was £125,000 no tax would be payable, but if it was £125,000.01p then tax of 1% of the whole of that amount would be payable, not just 1% of 1p. Miss Orsman drew our attention to the jump between 1% and 3% -- there was no intervening 2% rate. These features however are what Parliament has decreed. We have no ability to ameliorate or alter them. Thus if the relevant consideration for Miss Orsman's purchase was more than £250,000 SDLT was payable at 3% of the whole of the "chargeable consideration".

9. Schedule 4 FA 2003 provides rules for determining what is the chargeable consideration for a land transaction. By paragraph 1 (1)

> "The chargeable consideration for a transaction is, except as otherwise provided, any consideration in money or money's worth given for the subject matter of the transaction, directly or indirectly, by the purchaser or a person connected with him."

10. Paragraph 4 of the schedule deals with apportionment where there is a single transaction which comprises both a land transaction (i.e. an acquisition of land) and something else (for example an acquisition of chattels). We should set it out in full.

> "4(1) for the purposes of this Part consideration attributable-
>
> (a) to two or more land transactions, or
>
> (b) in part to a land transaction and in part to another matter, or
>
> (c) in part to matters making it chargeable consideration and in part to other matters,
>
> shall be apportioned on a just and reasonable basis.
>
> "(2) If the consideration is not so apportioned, this Part has effect as if it had been so apportioned.
>
> "(3) For the purposes of this paragraph any consideration given for what is in substance one bargain shall be treated as attributable to all the elements of the bargain, even though --
>
> (a) separate consideration is, or purports to be, given for different elements of the bargain, or
>
> (b) there are, or purport to be, separate transactions in respect of different elements of the bargain."

11. As a result, in determining the rate of SDLT and the chargeable consideration by reference to which it is payable, three steps are necessary:

> (1) to determine whether there was one transaction which encompassed both an acquisition of land and something else;

(2) in doing so, to determine what was the extent of the land acquired and what was acquired which was not land; and

(3) if the transaction comprised more than one element to apportion the consideration on a just and reasonable basis between that applicable to the land and that attributable to something else (in this case the chattels).

12. In approaching this apportionment any attribution or apportionment adopted by the parties, or by one party, may be relevant but is not determinative. Our job in an appeal where apportionment is relevant is to determine what apportionment is just and reasonable.

13. The apportionment required is a just and reasonable one. This may well produce a result in which the consideration attributed to the various elements is different from their market value: since it may be that the actual consideration exceeds or falls short of the sum of the market values of the elements sold. Nor need it be the case that the only just and reasonable way to apportion actual consideration is in proportion to market value: the parties may well have had differing views on valuation or desirability and importance; those factors could affect what attribution is just and reasonable.

3. "Land"

14. In FA 2003, and more generally in legal usage, “land" extends to a great deal more than “land” in everyday speech. It includes a house built on the soil, and what has been called "fixtures" - meaning (with some circularity of logic) things which have been so attached to the land as to become in law part of the land.

15. There are two criteria which have been used by the courts for assessing whether something is part of the land or whether it is a chattel distinct from the land. These are: (1) the degree of annexation of an item to the land: is it, and how firmly is it, fixed and what damage will be done by its removal? and (2) the purpose of annexation: was the intention to effect a permanent improvement of the land or buildings; or was it merely to effect a temporary improvement or to enjoy the chattel – or was it put in place better to enjoy the land or the item?.

16. These are not separate tests; they are linked: if something is firmly fixed to the land it suggests that it was so affixed to enjoy it as part of the land. The more damage that would be caused by removing something, the more likely it is to have been intended to be a permanent part of the land. Nor are the tests cumulative: a heavy moveable fire grate, or even removable entrance gates may well be regarded as part of the land even though they rest on its surface and are affixed solely by their own weight. That is because the purpose of their presence was better to enjoy the land rather than better to enjoy the grate or gates.

4. The relevant facts

17. Miss Orsman paid, in total, £258,000 for the house and a large number of items left behind by the previous owner. The contract of sale specified a Purchase Price of £250,000 and a "Chattels Price" of £8,000, and provided that:

"the chattels specified on any attached list are included in the sale to the exclusion of all others and the Buyer is to pay the Chattels Price."

18. Attached to the contract was a list of "fixtures and fittings" (the “List”). This list included items which were plainly not part of the land such as fridges and washing machines, but also included items which might be considered to be part of the land. Included on the List were:

(1) three double semi-fitted wardrobes;

(2) down-lights land flush eyeball lights;

(3) an electric oven [and hob] in the kitchen; and

(4) an up-and-over door motor unit in the garage.

19. In enquiries before contract, Miss Orsman's solicitors replied to a request for confirmation that an additional £8,000 was to be paid for chattels, that "the chattels have been agreed with the buyer and seller".

20. A “TA10 Fittings and Contents” form exchanged between the parties’ lawyers indicated that certain items including light fittings, the dishwasher, the washing machine and the toolshed were included in the sale of the property.

21. In a valuation of the house "for mortgage purposes" RB Holt FRCS opined that the market value of the house was £250,000. The valuation made no reference to the fixtures which were assumed to be part of the house so valued.

22. Following her purchase, Miss Orsman’s solicitors made a land transaction return on her behalf.

23. In May 2010 HMRC wrote to Miss Orsman indicating that they wished to check that return. Although this letter did not use the formal language of paragraph 12 Schedule 10 FA 2003 it was plain that it was giving notice that HMRC were going to enquire into her return.

24. In response to a request from HMRC for details of the price paid for each of the items on the List, Miss Orsman provided an amended version of the List showing for each item a separate monetary amount and including some additional items acquired with the house. The total of the monetary amounts was £8000. The extra items included

"Built in fitted units with worktop £800” in the garage.

The £800 was the amount Miss Orsman attributed to this item.

25. Miss Orsman told us that the individual figures in the List had been determined by her by considering such retail prices that she could find and making some reduction therefrom to reflect their current condition. We accept that in determining these amounts she did her best to provide an apportionment between the items on the List of the global sum of £8,000 which had been agreed with the seller.

26. On receipt of this analysis HMRC discussed with Miss Orsman

(1) the fitted units and worktop in the garage,

(2) the electric oven and hob,

(3) the three semi fitted wardrobes.

27. Miss Orsman replied that the electric oven and hob was not built-in and that the wardrobes were fitted to the wall. On 5 October 2010 HMRC then replied:

> "I have now read and reviewed the list of fixtures and fittings and I confirm that there is no argument with these items being described as chattels with the exception of three - the built in fitted units, the Electric Oven & Gas Hob and the 3 x Double Wardrobes and therefore the value of these items will be chargeable. I am prepared to accept a more realistic estimate of £5,500.00 for the chattels."

28. Miss Orsman then went back to look at the wardrobes. With help of a friend she found that she could move them. They were big and heavy but not fixed. She wrote to HMRC with that information and information about the electric oven and hob. HMRC replied that on the basis of the information she had given them they agreed that the wardrobes were chattels and were not chargeable, but that the electric oven and the garage worktop and units were fixtures and so part of the land. After further correspondence HMRC agreed that the electric oven and hob were chattels. On that basis they assessed the chargeable consideration at £250,000 plus £800 for the garage tops and units. This gave rise to the closure notice of 28 February 2008 against which Miss Orsman appeals. There were no questions from HMRC about the recessed down-lights, the recessed eyeball lights or the remote-controlled garage door motor.

29. Miss Orsman told us the history of the negotiation of her purchase. There had been a series of offers, and acceptances, and hoped-for contracts which had fallen through. Eventually in February 2010 Miss Orsman had offered £250,000 for the house. She went to talk to the seller and they talked about fixtures and fittings. The vendor was downsizing and there was a lot of stuff in the house he did not need. There were a number of things in the house Miss Orsman needed, and a number she did not really want (and would not have chosen). They agreed a round sum figure of £8,000 for these extra items. Then they went ahead with the contract.

30. Miss Orsman told us that she had probably overpaid. This was a novel experience for her. She had not considered the items in detail.

The worktop and units in the garage.

31. Miss Orsman explained that the garage units were arranged in a “C” shape around the far end of the garage. They were surmounted by a worktop fixed on battens mounted on the Wall. The units were not fixed to the walls of the garage but had some attachment to the worktop above them. The freezer and washing machine were also beneath the worktop. The units could be removed without damage to the structure of the house. The floor inside the "C" was tiled, and the area, as a whole,

was able to function as a utility area or workshop. Miss Orsman contended that if the units were removed it would not affect the value of the house.

4. Limitations on the approach of the tribunal in relation to the appeal.

32. As will be will have been seen, HMRC's enquiry related only to three items, and of those they concluded in the closure notice that only one was part of the land and not chattels. The letter of 5 October 2010 was clear that no argument was made in relation to other items.

33. However there are a number of items in the List which may well be part of the land. Discussion of these items had not been part of the correspondence between the parties leading up to the closure notice, and Miss Orsman had not come prepared to discuss them before us.

34. We discuss these items below and set out our conclusions. We then address the question as to whether or not we should take those conclusions into account in our consideration of the appeal.

5. Discussion.

35. We address the questions set out at para [10] above. We then discuss the question of our jurisdiction.

5(1) Was there a single transaction which was in part the acquisition of land and in part the acquisition of something else?

36. There was. It is clear that Miss Orsman's purchase was a single bargain in which she acquired the house and all the things in the house mentioned on the List, and that some of those things were not land.

5(2) Which items were land and which were chattels?

37. We concluded that both the worktop and the units were pland. The worktop was fixed to the house and made it possible to use that part of the garage as a working area. The units had a small degree of affixationbut were in place to make the garage a useful storage and work area -- a facility which enhanced the house.

38. We concluded the following items on the List were part of the land rather than chattels:

(1) the up and over garage door motor.

39. Miss Orsman explained to us that this was a unit designed to assist in the automatic opening of the garage door. A motor unit was fixed to the garage and controlled from a box on the wall and a remote control.

40. There was clearly some attachment of this apparatus to the land, and it was clear to us that the purpose of the attachment was for the enjoyment of the house and garage and not for the better enjoyment of the motor unit.

(2) eyeball down lights. These were in the top floor first bedroom, shower room and a bathroom.

41. Miss Orsman told us that these were partially recessed into the ceiling. It was clear that they were attached to the house for the purposes of enjoying the house.

(3) spotlights.

42. These were fixed lights recessed into the ceilings. They were clearly attached to the house better to enjoy it.

(4) the front doorbell system and shrubs in the garden.

43. These were on normal principles part of the house.

44. We divide the remaining items on the List into those which were clearly not part of the land:

> the movable wardrobes, brass porthole mirrors, a washing machine, a freezer, a dishwasher, a fridge, three large palm trees in pots, a workbench and tools, a lawnmower, pegs for a washing line, electric extension leads, garden hose, wheelie dust bins, recycle bins, and a green compost bin;

and those which were less clearly chattels and might, depending on the precise facts, be part of the land:

> hanging central lanterns, Venetian blinds, curtain rods, radiator covers, a shower curtain and rail, ceiling lights, light sensors, the electric oven and hob, a waterfall feature in the garden, the garden shed, the tool shed, garden lighting, and garden pots.

5(3) How should the consideration be apportioned between those items which were land and those items which were chattels?

45. For the reasons explained in section (4) below we address this question on two different bases.

(a) on the assumption that the only item in the List which was not a chattel and was part of the land was the garage worktop and units.

46. On this assumption we have to apportion the total consideration of £258,000 between the land, (that is to say, the house including the garage worktop and units) and the remaining items on the List.

47. The valuer valued the house at £250,000. It was not clear what fixtures he had included in his valuation, but although this valuation suggests that some of the total consideration of £258,000 related to chattels, it is not conclusive that it is just and reasonable to apportion £8,000 solely to chattels. That is because the direction we are given by the statute is to apportion what was actually paid justly and reasonably and what was actually paid may not have been the same as sum of the market values of the items bought; and in any event valuation is not an exact science.

48. The inclusion of the garage worktop and units within the List indicates that the parties intended some part of the £8,000 to be applicable to them. Miss Orsman's negotiations with the vendors in relation to the List also suggest that some additional consideration over and above the £250,000 should be attributed to these items.

49. The apportionment by Miss Orsman of the £8,000 between the various items on the list was not wholly unreasonable, even though the consideration she attributed to certain items may have exceeded what one might normally have expected to be their secondhand value (for example £230 for a second hand fridge). Miss Orsman told us she may have overpaid, and the question for us is not what was the value of these items but how much of the consideration should be attributed to each item: value is potentially relevant but not decisive.

50. We conclude that it would be just and reasonable to apportion £250,800 of the consideration paid to the house and the garage worktop and units.

51. *(b) on the basis that we are entitled to consider items other than the worktop and units.*

52. The argument is the same here as it was in relation to (a) but the attributed amount is larger. It is just and reasonable that part of the £8,000 should be attributed to those items which are part of the land and accordingly that, of the total consideration of £258,000, more than £250,000 should be attributed to the land. A fair and just apportionment seems to us to be one which recognises the values attributed by Miss Orsman in her annotated List. Accordingly we would take the consideration which could justly and reasonably be attributed to the land as being £250,000 plus the values attributed to the land elements on that List.

5(4) What is the jurisdiction of the tribunal in relation to the closure notice?

53. Paragraph 23 schedule 10 provides that an enquiry is completed when HMRC by a closure notice "inform the purchaser that they have completed their enquiries and state their conclusion.". Paragraph 35 of that schedule provides that an appeal may be brought against "a conclusion stated in an amendment made by a closure notice".

54. These words parallel those of section 28B and section 31(1) TMA 1970 in relation to the closure of enquiries into income tax returns and appeals against such closure notices. These sections were considered by the Supreme Court in *HMRC v Tower MCashback* . The question before their Lordships related to a closure notice which specified HMRC's concern about a particular section of an Act (and said that they had concluded that as a result of the operation of that section a particular relief

was not available), but which also referred to some earlier correspondence which alluded to the possibility of other reasons for making the adjustments set out in the notice. The question for the Supreme Court was whether the tribunal could consider, in reaching its decision, argument in relation to those other matters or whether it was limited to argument about that particular section.

55. Lord Walker, with whom the other four Supreme Court judges agreed, quoted with approval what Henderson J had said in the High Court

> "…If the [tribunal is] is to fulfil [its] statutory duty ... [it] must in my judgement be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and case management, such fresh arguments may be advanced by either side, or may be introduced by the [tribunal] on [its] own initiative.
>
> "That is not to say, however, that an appeal against a closure notice opens the door to a general roving enquiry into the relevant tax return. The scope and subject matter of the appeal will be defined by the conclusion stated in the closure notice and by the amendments (if any) made to the return."

56. Lord Walker also quoted with approval what Moses LJ had said in the Court of Appeal:

> "..It was for the tribunal "to identify what [the relevant provision] describes as the subject matter of the enquiry. The closure notice completes that enquiry and states the inspector's conclusions as to the subject matter of the enquiry. The appeal against the conclusions is confined to the subject matter of the enquiry and the conclusions. But I emphasise that the jurisdiction of the [tribunal] is not limited to the issue whether the reason for the conclusion is correct. Accordingly, any evidence or any legal arguments relevant to the subject matter may be entertained by the [tribunal] subject only to [its] obligation to ensure a fair hearing."

57. We note that whereas Henderson J referred to new legal arguments, Moses LJ extended this to evidence relevant to the subject matter of the enquiry.

58. Lord Walker went on, at [18], to say that in a case in which it is clear that only a single specific point is an issue that point should be identified in the closure notice. But if the facts were complicated and had not fully been investigated then the public interest might require that the closure notice be expressed in more general terms. He accepted that either party could change its legal arguments during the course of the appeal but such a change must not ambush the taxpayer and that it was the job of the tribunal hearing the appeal to prevent this by case management.

59. Lord Hope was the only other member of the court who gave a reasoned opinion. At [85] he said "furthermore while the scope and subject matter of the appeal will be defined by the conclusions and the amendments made to the return, [the Act] does not tie the hands of [the tribunal] to the precise wording of the closure notice when hearing the appeal."

60. In this appeal the closure notice is clear. It alleges only that the worktop and units were fixtures and that the consideration attributable to land was £250,800. The previous correspondence with HMRC was also clear. Only three items were challenged. Everything else was accepted as not being part of the land.

61. In their statement of case HMRC broadened the scope of their arguments by referring to the down-lighters as well as to the units and worktops. Miss Orsman told us that she came to the appeal expecting to argue only about the worktops.

62. It seems to us that in this case the subject matter of the appeal is clear. It is that by reason of the acquisition of the units and worktop as part of the house the consideration of £258,000 should be apportioned as to £250,800 to land, and the rest to chattels. Whilst additional legal arguments could permissibly be raised in relation to those conclusions (arguments for example about the meaning of just and reasonable or as to what is and is not land), the factual focus of HMRC's argument was on the worktops and the units only. It would, in this type of case and in these circumstances, not be fair or just to permit a broadening of the attack on the SDLT return by reference to matters other than the worktop and units. Mrs Farrell accepted this conclusion.

63. We conclude therefore that we are limited to considering whether the chargeable consideration was £250,800 by virtue of the inclusion in the transaction, as part of the land, of the worktop and units.

6. Conclusion

64. We are limited to considering whether, on the assumption that the only fixtures on the List were the garage worktop and units, the consideration justly and reasonably attributable to the land was £250,800 rather than £250,000.

65. In our view, for the reasons given above, it was.

66. We dismiss the appeal.

7. Rights of Appeal.

67. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 28 March 2012