Briefing

Private client review for April

Speed read

This month, we comment on another string of (mostly) HMRC SDLT tribunal victories in the familiar territory of mixed-use rates and MDR claims, considering *Bonsu*, *Harjono*, *Dreyfus* and a (rare) taxpayer victory in *Newsand Ltd*: overall, these illustrate HMRC's continued scepticism of such claims. We also address another recurring theme of taxpayer behaviour, looking at the recent tribunal decisions in *Thompson*, *Hague* and *Ahmed*, which examine qualities associated with 'deliberate' and 'careless' behaviour. Related to this, *Linington* reminds us of the tribunals' dim view of tax avoidance schemes. Finally, we discuss the recent UT decision in *Sehgal*, particularly, what this means for the future interpretation of 'service' under the remittance basis rules.

Edward Reed
Macfarlanes
Edward Reed is a Partner in the private client team at Macfarlanes. He advises internationally mobile families on their asset structuring, personal tax and succession planning, wills, trusts and personal tax planning. Email: edward.reed@macfarlanes.com; tel: 020 7849 2568.

Sam Epstein
Macfarlanes
Sam Epstein is an Associate in the private client team at Macfarlanes. He advises on a broad range of private client issues including UK tax, trusts, wills, estate and succession planning. The majority of Sam's work has an international element. Email: sam.epstein@macfarlanes.com; tel: 020 7849 2148.

SDLT: familiar themes revisited

There has been a continuing trend of taxpayers challenging higher rates of SDLT, by arguing for the application of mixed-use rates or multiple dwellings relief (MDR) (the latter to be abolished for transactions completing after 31 May 2024, following the 2024 Budget). A flurry of recent tribunal cases (mostly) continues HMRC's success in this area.

Bonsu and another v HMRC [2024] UKFTT 158 (TC) revisits the familiar theme of taxpayers who acquired a leasehold interest in a residential flat, including the right to use a communal garden, arguing that their purchase included non-residential property (i.e. their garden rights) and therefore mixed-use rates should apply. The facts were almost identical to *Sexton v HMRC* [2023] UKFTT 73 (TC) (covered previously), as was the First-tier Tribunal's (FTT's) analysis, i.e. that the garden easement was not a main subject matter of the transaction, but was appurtenant to the leasehold, so mixed-use rates were denied. It is perhaps unsurprising, where the two cases' facts were so similar, that the FTT took the same view as previously: an argument based on the right to use a communal garden appears to have run its course.

Harjono and another v HMRC [2024] UKFTT 228 (TC) presents another déjà vu factual scenario, where the taxpayers argued that a residential property, comprising a paddock subject to a grazing agreement, should be eligible for mixed-use rates. The taxpayers perhaps sought to capitalise on the appellant's success in *Suterwalla v HMRC* [2023] UKFTT 450 (TC) (covered previously), where a similar set of facts had resulted in a taxpayer win. However, the FTT found for HMRC in *Harjono*, concluding that, notwithstanding the grazing agreement, the paddock still fell within the 'grounds' of the main dwelling house and as such, residential rates applied to the whole transaction.

The FTT confirmed that it was wrong to equate a commercial use ingredient with mixed use and that one needed to go further than finding some sort of commercial land use to escape wholly residential rates: it was necessary to look at the 'end use' of the land too. Here, the land was used for grazing a horse: this was the 'paradigm use' of a paddock and was entirely consistent with the use of land as grounds. It may therefore be that when *Suterwalla* is heard by the Upper Tribunal (UT) (as is anticipated), the taxpayers await a less favourable result.

Dreyfus v HMRC [2024] UKFTT 244 (TC) also bears strong factual resemblances to *Dower v HMRC* [2022] UKFTT 170 (TC) (covered previously), both involving claims for MDR where a 'main' residential property was acquired replete with an 'annex' (which was being converted at completion in *Dreyfus*).

As in *Dower*, the FTT considered what qualities an annex would need to make this constitute a separate 'dwelling' for MDR to apply. Similar conditions were discussed, for example, the need for separate water and electricity meters, a fridge in the annex and a secure access point, none of which was found to apply on the facts. It was damning for the taxpayer's argument that, two years after work on the annex had begun, no paying tenants had yet occupied it (as was the taxpayer's intention) and there was only evidence of minimal construction works being undertaken to ensure the conversion. As such, the FTT were not convinced that the 'annex' satisfied the criteria necessary to make it a separate 'dwelling' and MDR was denied.

Finally, however, a procedural case, *Newsand Ltd v HMRC* [2024] UKFTT 221 (TC), may provide some hope to taxpayers still willing to pursue MDR claims. HMRC argued that the taxpayer's case had no reasonable prospect of success and should thus be struck out. In doing so, HMRC relied strongly on the argument that the facts bore a close resemblance to those in a previous case. Whilst the FTT accepted this, there were also some key differences, which deserved a full consideration: as such, the taxpayer's chance of success in an appeal were not merely fanciful and the case will now proceed to a full hearing.

Unsurprisingly, then, each case must be heard on its own merits: where a case does have a strong overlap with a previous (unfavourable) decision, any differences should be carefully scrutinised if taxpayers do wish to pursue a claim. However, potentially spurious claims are likely to be rejected.

Taxpayer 'behaviour': the good, the careless and the deliberate

Familiar themes of taxpayer behaviour have again surfaced at the tribunal. To recap, the 'seriousness' of a taxpayer's offence and their liability to penalties is graded by reference to their behaviour regarding the fault: 'careless' behaviour is judged as a lesser evil than 'deliberate', which can attract the maximum penalties.

In *Thompson v HMRC* [2024] UKFTT 138 (TC), HMRC attempted to attach deliberate behaviour to a taxpayer's actions relating to income not declared on his self-assessment return. However, the tribunal were sympathetic to the taxpayer since it was his first occasion in completing a return, he had engaged an umbrella company (which failed to deduct the relevant taxes) and he had thought his accountant had properly completed the return (albeit the taxpayer was ultimately found to be careless for not reviewing his return properly and not questioning the accountant as to missing income sources).

In *Hague v HMRC* [2024] UKFTT 139 (TC) however, the taxpayer was found to have acted deliberately for failure to pay income tax on wages received from pub work over several years and gains from buying and selling property. What clearly did not help here was the 'unreliable' nature of Mr Hague's evidence and his limited cooperation with HMRC (he only provided information when prompted). We see repeatedly that the tribunals are more willing to give a favourable outcome to taxpayers when they cooperate fully with HMRC and act swiftly to remedy breaches.

Ahmed v HMRC [2024] UKFTT 236 (TC) is a case in point. Here, the taxpayer was found not to have acted carelessly and his application for costs for a successful appeal against a discovery assessment relating to income tax and written-off loans was allowed. It was in the taxpayer's favour that he had actively notified HMRC of the written-off loans (from companies of which he was a director, the accounts of which were signed off after he submitted the relevant tax return) and consequent increase in tax liability promptly through the companies' auditors. HMRC's actions in pursuing the claim against Mr Ahmed were therefore found to be 'unreasonable' and his costs application was successful.

Finally, the UT's robust denial of a protective costs order by a claimant, seeking to cover her potential costs in continuing an appeal against HMRC's rejection of an inheritance tax avoidance scheme relating to the affairs of a deceased taxpayer, for whom she acted as executor – *Linington and another v HMRC* [2024] UKUT 70 (TCC) – is a reminder of the tribunals' distaste for tax avoidance arrangements, such a claim being described as one at which 'the general body of taxpayers would baulk'. It is interesting to speculate how much of this is driven by the ever-increasing pressure to close the 'tax gap' and how the courts' stance may become even stricter, should Labour come into power, given their new announcements on investing heavily in this area.

Sehgal: what does 'service' really mean?

The scope of the remittance basis rules has been considered countless times by the UK courts. Given recent announcements by both the Chancellor and the Shadow Chancellor, it remains to be seen whether this is soon to become a minority sport from April 2025.

The meaning of the word 'remitted' is not limited to physically bringing property to the UK or paying for services received in the UK; it has a much broader application, which can often controversially give rise to uncertainty as to what constitutes a remittance.

The long-awaited appeal in *Sehgal v HMRC* [2024] UKUT 74 (TCC) brings this to the fore. This very technical case was first considered in the FTT in 2022, and a summary of the UT decision (a second loss for HMRC) was included in last week's *Tax Journal* (12 April 2024).

In summary, the UT upheld the decision of the FTT that arrangements under which the taxpayers settled a debt indemnity arising from a share sale did not give rise to a remittance to the UK. Importantly, however, the UT disagreed with certain of the FTT's conclusions.

The key point of disagreement with the FTT was about whether the waiver of a right under an indemnity, and the subsequent waiver of a debt by a third party, constitutes a 'service' (under ITA 2007 s 809L) for remittance purposes.

Disagreeing with the FTT, the UT concluded that the waiver of a debt *would not* constitute a service for remittance basis purposes.

Here, the UT noted that the word 'service' should be understood in the ordinary sense of the word, which normally refers to a service provided on a commercial basis in exchange for payment. Put simply, the benefit conferred on the taxpayers resulting from the transaction did not amount to anything that would fall into the normal understanding of the word 'service'. In the UT's view, 'if Parliament had intended that the conferring of any kind of benefit with a monetary value to the recipient should potentially give rise to a remittance, then it could easily have provided for that with appropriate wording, but it did not do so'. This conclusion (known to be contrary to HMRC's recent stance) provides some comfort that in determining whether a service has been provided, the plain meaning of the word 'service' should be adopted.

> This case provides some welcome clarity on the scope of 'services', including what it means in practice and the location where they are provided

Another fundamental point noted by the UT (albeit not strictly relevant to the taxpayers here) is that the fact that an agreement is governed by UK law is insignificant in determining where a service is being provided. Ultimately, parties can decide to use the law of England and Wales where the connection to the UK is limited.

Similarly, the fact that the debt had a UK situs is not the key question when determining where a service is provided. Rather, the general rule is that services are provided in the location where the provider of the services is located. Here, the company providing the service was a Luxembourg company, and so even if it were determined that were a service being provided in any geographical location, the UT's view is that it would be in Luxembourg, irrespective of the taxpayers being in the UK.

The UT expanded on this point and, illustrating the point from the provision of professional advice from an overseas jurisdiction to a UK resident, concluded it should not be considered as being provided in the UK; rather, it would be provided from where the professional adviser is located. In its view, it is the location of the provider rather than the recipient that is relevant. Clearly, this is likely to be welcomed by remittance basis users.

As a more general point, the UT considered the purpose of the remittance basis rules. HMRC sought to argue that these rules were intended as anti-avoidance provisions and should therefore be interpreted widely. The UT disagreed, and took the view that the normal, narrower rules of legislative construction should apply. In doing so, they clearly take the view that a wider reading of the remittance rules is not likely to be appropriate in most circumstances.

Overall, this case provides some welcome clarity on the scope of 'services', including what it means in practice and the location where they are provided. ■

For related reading visit taxjournal.com

- Cases: *J Harjono and another v HMRC* (2.4.24)
- SDLT MDR: multiple multiple dwellings appeals (M Schofield, 4.11.21)
- What exactly is 'deliberate' behaviour? (H Adams, 26.6.19)
- Cases: *HMRC v R Sehgal and another* (9.4.24)