Briefing

Private client review for April

Speed read

There have been two further victories for HMRC in SDLT 'mixed-use' rates cases. The FTT decision in *Vekaria* demonstrates the importance of following correct procedure in HMRC enquiries. We revisit the popular topics of disclosure in HMRC investigations, considering the case of *Mitchell,* in which the Court of Appeal found that HMRC had discretion to disclose documents pertaining to one taxpayer to another taxpayer, and the decision in *Hitchins* where the FTT held that HMRC's remaining questions were 'fishing expeditions' and ordered HMRC to issue closure notices. Finally, we comment on the positive CGT developments for separating couples introduced by the Spring Finance Bill.

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SDLT: further HMRC victory in relation to 'mixed use' rates

Readers may recall our comments on mixed-use SDLT rates in recent issues. Two more cases have now developed the discussion further: *Faiers v HMRC* [2023] UKFTT 297 (TC) concerns land affected by electricity apparatus, which has not previously been the subject of any judicial decision; and in *The How Development 1 Ltd v HMRC* [2023] UKUT 84 (TCC), the Upper Tribunal (UT) found several errors of law in the First-tier Tribunal's (FTT's) decision relating to a woodland area.

In *Faiers*, the taxpayer bought a house with grounds through which a commercial electricity distribution network ran, comprising a pole and two cables over the property. The taxpayer had originally paid SDLT at the residential rates, but subsequently attempted to claim the lower mixed-use rates on the basis that the presence of the apparatus (along with a wayleave agreement with the electricity provider) precluded part of the land from being wholly residential.

The judge found that the relevant land all formed part of the dwelling's grounds and therefore the (higher) SDLT residential rates applied. In so doing, the judge noted: (a) that the wires and pole did not materially affect the land's layout; and (b) there was no 'no go' zone – although the presence of the cables required some safety measures to be taken by the landowner, he was still able to maintain the land as a single continuous plot, mow the grass, graze sheep, and erect a children's play fort in proximity to the wires and poles. The judge described the electricity distribution network as akin to a right of way, which does not prevent the affected land from being part of the relevant dwelling's grounds.

In concluding, the judge also considered references to electricity sub-stations made by the taxpayer's counsel. Without stating a definitive view on the 'problem of sub-stations', the judge noted that his conclusion was consistent with the position that the presence of a sub-station can give rise to mixed-use land, particularly as sub-stations are buildings which occupy a defined space and which represent a 'no go' area. As this particular question is yet to be litigated, however, it remains to be seen how it will be approached by HMRC.

In *The How Development 1 Ltd*, the UT considered an appeal from the FTT's decision in January 2021. The FTT had decided that certain woodland purchased by the appellant together with a residential property known as 'The How' formed part of the property's grounds. As in *Faiers*, the taxpayer had initially paid SDLT on the basis that The How was entirely residential, but subsequently claimed that in fact the property should have been classified as mixed-use because the woodland was non-residential. The FTT found that the woodland formed part of The How's grounds and the property was therefore residential in nature (under FA 2003 s 116). The taxpayer appealed to the UT.

Some of the taxpayer's grounds of appeal fell away following the decision in *Hyman and others v HMRC* [2022] EWCA Civ 185, discussed previously, and essentially the appeal concerned whether the FTT had made errors of law in its decision regarding the woodland forming part of the The How's grounds.

> This decision demonstrates the difficulties in arguing that woodland purchased alongside a residential property results in a mixed-use classification

The UT dismissed many of the taxpayer's arguments relating to whether the FTT had misapplied the term 'grounds' and whether the test in *Hyman* had been followed correctly, but did find that some errors had been made by the FTT. In particular, the FTT (a) relied on an irrelevant factor insofar as it took into account that the initial SDLT return had been submitted on the basis that the property was entirely residential; (b) was procedurally unfair by seemingly relying on its own views as to the likely position relating to planning consent without giving the parties the opportunity to make submissions on those points; and (c) had failed to give reasons for its conclusion that the woodland did not need to be accessible to be considered part of The How's grounds.

The UT re-made the decision of the FTT and found in HMRC's favour, i.e. the woodland *did* form part of The How's grounds. The UT focused on the fact that the woodland was within the legal title of The How, and there was no evidence of it having any use other than as woodland which provided privacy and security to the property. It was irrelevant that the owner would have been 'no worse off' without the woodland, and the fact that it was relatively inaccessible was taken into account in the balancing process but was not determinative.

This decision emphasises the highly fact-specific nature of the often-thorny question of whether certain land forms part of the 'garden' or 'grounds' of a dwelling for SDLT, and demonstrates the difficulties in arguing that woodland purchased alongside a residential property results in a mixed-use classification.

The importance of following procedure: appeals

Vekaria v HMRC [2023] UKFTT 288 (TC) demonstrates the importance of taxpayers following procedure correctly in an enquiry scenario.

The procedural background and facts were complex, but in essence, HMRC had issued notices of assessment against the taxpayer on 29 April 2019. The assessments included reference to review and appeal rights, including the relevant appeal time limit of 30 days. There followed some confusion whereby letters were addressed to the incorrect HMRC department and therefore took some time to be received by the relevant personnel, including a letter written to HMRC on 1 June 2020 noting that the taxpayer was 'in the process of disputing the assessment'. Ultimately, in December 2020, HMRC wrote to the taxpayer noting that no appeal had been received and that the taxpayer was now out of time, so an application would need to be made to the tribunal.

The tribunal was asked to consider whether a letter written in April 2019 – before the assessments were issued – could constitute an appeal against those subsequent assessments. The judge held that, despite the appellant's 'novel' and 'inventive' arguments, the legislation – specifically, TMA 1970 s 31A – was clear that an appeal must be made after the issue of the relevant assessment and so the letter could not constitute a valid appeal. The judge also emphasised the importance of ensuring that the appeal is sent to the correct officer (HMRC in fact had no record of ever receiving the April 2019 letter from the taxpayer), noting that it would make a nonsense of the legislation if taxpayers could validly lodge appeals pre-emptively to any HMRC office.

The judge also considered whether, under the *Martland* principles ([2018] UKUT 178 (TCC)), a late appeal should be accepted, but considered that there were no grounds for doing so. In particular, the length of the delay was serious and significant (being at least a year), there was no explanation for the delay, and there was no other reason to accept a late appeal.

Following our discussion of *MPTL v HMRC* [2022] UKFTT 472 (TC) and *Golden Grove Trust v HMRC* [2023] UKFTT 27 (TC), in which HMRC's procedural arguments prevailed where deadlines had been missed by the taxpayer (or their advisers), the case serves as an important reminder to taxpayers to ensure that they engage with HMRC correspondence – particularly where that correspondence involves formal assessments with statutory deadlines – in a timely and accurate manner. It also highlights the importance of addressing communications with HMRC carefully and correctly, especially where statutory procedures and time limits are in point.

How far may HMRC go in the disclosure of documents obtained during an investigation?

In February (*Tax Journal*, 17 February 2023), we covered disclosure in HMRC investigations in *HMRC v Taxpayer* [2023] UKFTT 71 (TC), involving a Sch 36 notice. Last month, in *Mitchell v HMRC* [2023] EWCA Civ 261, the Court of Appeal (CA) published a judgment on the disclosure of information concerning a different statutory power.

Whilst there has been increasing public pressure for prominent politicians to publish their tax returns, which Rishi Sunak and Sir Keir Starmer have recently acquiesced to, the starting principle insofar as taxpayers' relationships with HMRC are concerned remains, by and large, one of confidentiality. Rights to privacy in the sphere of tax law tend to trump the open justice principle that justice ought to be seen to be done in public.

The confidentiality principle in HMRC investigations is grounded, conveniently, in a statutory section titled 'Confidentiality' (Commissioners for Revenue and Customs Act 2005 s 18). It begins: 'Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs'. There are then various carve-outs including importantly, in *Mitchell*, when a disclosure 'is made for the purposes of civil proceedings … relating to a matter in respect of which the Revenue and Customs have functions' (s 18(c)).

Once HMRC has obtained a document, as in *Mitchell*, it is much harder to restrict what HMRC can do with it under the generous carve-outs in s 18

In *Mitchell*, HMRC obtained documents during a tax investigation into one party (M) on which it wished to rely in relation to a second party (B). (M) and (B) were factually connected to each other: HMRC had concluded that both were shadow directors of companies in liquidation and had issued personal liability notices to each of them on the basis that deliberate inaccuracies in VAT returns could be attributed to them. The cases against them were joined.

The CA held that HMRC is permitted to disclose documents to (B) notwithstanding that (M) had withheld their consent to do so, under s 18(c), subject to the principles of judicial review. Documents that were either irrelevant to the investigation into (B), or came with a substantial quantity of irrelevant or prejudicial material, should have been excluded but the rest were to be disclosed.

What lesson can be drawn from this? We have seen a string of recent cases resist alleged 'fishing expeditions' by HMRC. Perhaps once HMRC has obtained a document, as in *Mitchell*, it is much harder to restrict what HMRC can do with it under the generous carve-outs in s 18.

Hitchins: another 'fishing expedition'

Sometimes, a judgment best speaks for itself. *Hitchins and others v HMRC* [2023] UKFTT 127 (TC) is a case ultimately relating to whether a £40m dividend, arising in an offshore trust structure, paid in 2003 could give rise to a charge under the transfer of assets abroad legislation, in which the FTT found for the taxpayers. Where the question was whether HMRC had unduly delayed issuing a closure notice to an ongoing HMRC investigation, the judge concluded: 'There was considerable evidence and submissions on whether HMRC had unreasonably protracted their enquiries. These enquiries were first opened in 2014, over eight years ago. These enquiries have gone on far too long. The reasons for the time taken cannot be ascribed solely to the fault of either HMRC or the Applicants … It is for HMRC to show that there are reasonable grounds for refusing the applications for closure notices. I find that HMRC have not so shown.'

The judge described the outstanding questions as a 'fishing expedition'. By way of reminder, HMRC is under a burden of proof to show that requested information under a Sch 36 notice is 'reasonably required' for the purpose of checking the taxpayer's tax position (FA 2008 Sch 36 para 1(1)).

This is a useful reminder for practitioners. If HMRC's reasonable questions have been answered, there are tools available to the taxpayer to compel a closure notice. Judges are often sympathetic to taxpayers in these situations, unless delay is attributable to the taxpayer. Sometimes, due to the actions of particular HMRC case handlers, or a case falling through the gaps, the taxpayer is left in limbo and uncertainty for many months if not years. With potentially large amounts of tax at stake, it can be distressing for taxpayers and affect their financial affairs – for example, keeping substantial liquid assets in reserve to meet a potential tax liability – and the tribunals will often side with the taxpayer in these scenarios.

Spring Finance Bill: positive CGT developments for separating couples

We could not write this month's column without some allusion to the recent Spring Finance Bill (published on 23 March). In a positive development for separating couples, this legislates for transfers to be made without a CGT charge between such couples in certain scenarios.

It is well known that spouses or civil partners can transfer assets freely between each other without triggering an immediate CGT charge on the asset's disposal (known as a 'no gain no loss' transfer). However, couples who are separating or divorcing can be caught out by existing rules which extend this treatment only for the remainder of the tax year in which they separate. Transfers made from the following tax year are deemed to take place at market value and taxed accordingly.

The provisions in the Spring Finance Bill (which were published in draft last July), follow recommendations made by the Office of Tax Simplification in May 2021, although are in fact more generous. Under the new rules, applying to disposals made on or after 6 April 2023, separating spouses or civil partners will be able to continue to make transfers between each other on a no gain no loss basis for:

- up to three tax years after the tax year in which the couple cease to live together (although this period would end earlier if the divorce is finalised before then); or
- an unlimited period where the transfers are made in accordance with a formal divorce agreement or court order.

Special rules are also introduced for individuals who maintain a financial interest in their former family home following separation, including the ability for the non-occupying former spouse or civil partner to claim principal private residence relief on a future sale of the property.

This is positive news for separating couples, giving them more time to reach an agreement on the division of their assets without running the risk of an unwelcome tax bill adding to the stress of separation. ■

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- ▶ Cases: *J Faiers v HMRC* (18.3.23)
- ▶ Cases: *M Mitchell and another v HMRC* (18.3.23)
- ▶ Cases: *J Hitchins and others v HMRC* (7.3.23)
- ▶ Getting closure: the FTT's approach in *Hitchins* (S Rhind & V Braid, 12.4.23)
- ▶ Spring Budget 2023: CGT for separating spouses and civil partners (P Cannon, 15.3.23)