Field or garden

Whether the garden or grounds of a house are taxed as residential or non-residential property can make a substantial difference to SDLT liability says Patrick Cannon as he reviews HMRC's revised guidance.

n my article 'Keeping it quiet' (Taxation, 18 October 2018, page 12), I explained how HMRC had quietly changed its approach to stamp duty land tax (SDLT) on mixed-use property to make it more difficult to claim the (lower) Table B rates of SDLT in FA 2003, s 55 instead of the much higher rates in Table A on the purchase of a dwelling with a large amount of land.

The amounts at stake can be considerable. For example, the SDLT under Table B on the purchase of a house with land for £5m which is classed as of mixed-use will save up to £424,250 in tax compared with the rates under Table A.

66 In enquiries, HMRC is arguing that all the surrounding land purchased with a dwelling must form part of its grounds."

I argued that HMRC, in denying the benefit of the rates in Table B, was ignoring its published guidance which says that only the land needed for the reasonable enjoyment of the dwelling is to be treated as 'residential property' – see the *Stamp Duty Land Tax Manual* at SDLTM30030 (tinyurl.com/yxrremxb) and SDLTM20070 (tinyurl.com/y5yr5egy).

In practice, in enquiries, HMRC is arguing that all the surrounding land purchased with a dwelling must form part

Key points

- There is a substantial difference between residential and non-residential rates of stamp duty land tax.
- Unless there is commercial activity on part of the land, it will be residential.
- The Hyman case considered what constitutes the 'grounds' of a house.
- The traditional or habitual use of that land can help to establish its true relationship to the building.
- Other factors indicating that land is non-residential include when a non-domestic rateable value for the property has been assessed, when non-domestic rates are collected, or if the property has been classified as agricultural.



of its grounds and was therefore classed as residential for SDLT purposes, unless there was some objectively commercial activity occurring on a part of the land, both before and after the effective date of the land transaction. HMRC claims that its previous guidance is not relevant because it related to the withdrawn disadvantaged areas exemption.

Back to the origins

The 'Keeping it quiet' article also explained why the 'needed for the reasonable enjoyment' test had its origins in the introduction of the statutory definition of 'residential property' in FA 2001, s 92B which was re-enacted as the current definition in FA 2003, s 116(1) and which states (with my emphasis):

'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.'

Indeed, the reason for the introduction of the statutory definition of 'residential property' was to allow for the identification of that part of the grounds of a dwelling that was classed as residential and so was subject to the cap of £150,000 on the exemption for land in disadvantaged areas and to identify that part of the grounds that was non-residential and so was not subject to the cap.

We have also recently had the decision (see tinyurl.com/yxww37z9) of the First-tier Tribunal in *Hyman* (TC7271) on what constitutes the 'grounds' of a house, and I comment on this below.

Updated HMRC guidance

HMRC has now updated its guidance on the meaning of 'garden or grounds' and this guidance is contained in SDLTM00440 to SDLTM00480 (see tinyurl.com/y44eky8z).

Needless to say, this updated guidance does not distinguish between land that is required for the enjoyment of the dwelling and land that is not. Indeed, the manual at SDLTM30030 has been altered so that the statement that grounds includes land which is needed for the reasonable enjoyment of the dwelling has been deleted and replaced with a reference to the updated guidance at SDLTM00440 to SDLTM00480. There is no indication at SDLTM30030 of this alteration, even if we click on the link in the heading to it marked 'see all updates'.

The updated HMRC guidance begins with a statement that it was introduced on 25 June 2019 and the main points can be summarised as follows:

- 1) It states: 'For the purposes of SDLT there is no statutory concept of "reasonable enjoyment" and no statutory size limit that determines what "garden or grounds" means.'
- 2) The guidance notes that another definition of garden or grounds is to be found in the SDLT legislation at FA 2003, Sch 4A para 7(3) (the 15% higher rate), FA 2003, Sch 4ZA para 18(3) (the 3% higher rates for additional dwellings) and FA 2003, Sch 6B para 7(3) (multiple dwellings relief). In those provisions, the definition used is: 'Land that is, or is to be, occupied or enjoyed with a dwelling as a garden or grounds (including any building or structure on that land) is to be taken to be part of that dwelling.' However, FA 2003, s 116(1)(b) refers to 'land that is or forms part of the garden or grounds of a building within para (a) (including any building or structure on such land)'.
- 3) There is a rather confusing passage at SDLTM00450 which states correctly: 'The status of the land in question must be assessed at the effective date of the transaction...' However, it goes on to state: 'But that does not mean that only the use on that day will be considered.' This is followed by the suggestion that: 'We should seek to establish the traditional or habitual use of that land to establish its true relationship to the building.' This guidance is not always followed by HMRC in enquiries. For example, in the case of surplus land that is let commercially for grazing sheep or horses or for hay cutting when the licence ended in the autumn and was not renewed until after the purchaser acquired the property at the end of the year, HMRC says that because the commercial use was not in existence on the effective date, it should be ignored and the land treated as residential property.
- 4) Further confusion is evident at SDLTM00460. There, it is said that the type of use can determine whether or not the land in question forms part of the grounds of the building. But this surely asks the wrong question. The grounds of a dwelling may well include land let for commercial purposes and the consequences will be that while that part remains a part of the grounds, for the purposes of the definition in s 116(1)(b) it will not be classed as residential property.
- 5) Paddocks and orchards will 'usually be residential, unless actively and substantively exploited on a regular basis'.
- Commercial farming and horticulture, commercial woodland, commercial equestrian use or 'some other

- commercial use' indicates that the land may not be residential property.
- 7) The extent and size of the land in question will also be relevant and, in the case of a small country cottage bought with dozens of acres, that land is unlikely to be treated as 'grounds', but may be treated as such in the case of a stately home. Large tracts of fells and moorland and the like when purchased with a dwelling are unlikely to be residential in nature. The test is whether the grounds comprise the grounds of a dwelling (SDLTM00470).
- 8) Other factors indicating that land is non-residential include when a non-domestic rateable value for the property has been assessed, non-domestic rates are collected, or the property has been classified as agricultural and, as such, is exempt from business rates.

Thoughts on the updated guidance

Two principal points come to mind on the subject of the updated guidance.

66 Further confusion is evident at SDLTM00460. There, it is said that the type of use can determine whether or not the land in question forms part of the grounds of the building."

First, the statement referred to in (1) above in SDLTM00440 that there is no statutory concept of 'reasonable enjoyment' is rather disingenuous. While strictly true, that has always been the case and it ignores without explanation HMRC's previous guidance at SDLTM20070 and SDLTM30030 and Statement of Practice 1/03 (see again 'Keeping it quiet') which stated clearly that HMRC applied a 'reasonable enjoyment' test to determine the extent to which the grounds of a dwelling were residential property. No explanation or justification of why this guidance has been changed has been given. In current and future SDLT enquiries, if taxpayers find that investigators are quoting the statement above from SDLTM00440, they should take the investigator to the previous parts of the Stamp Duty Land Tax Manual and Statement of Practice 1/03 and point out that this guidance was given in relation to the same statutory definition of residential property and that nothing material has occurred in the interim period to render such guidance less relevant. The withdrawal of the exemption for land disadvantaged areas is surely not relevant and has no bearing on the meaning of the definition.

Second, the guidance at SDLTM00470, discussed at (7) above, is potentially quite helpful to taxpayers and could be interpreted as re-admitting the 'needed for the reasonable enjoyment' test by another door. This is because, by conceding that physical proximity to the dwelling is a relevant test and also that the extent and size of the land in question are relevant, the guidance, in effect, reintroduces a 'reasonable enjoyment' test. By stating expressly that a small cottage is 'unlikely to command dozens of acres', HMRC is implicitly recognising that some of these dozens of acres purchased with

the dwelling are not residential property. This was also the result of applying the reasonable enjoyment test.

It seems that the previous position when a dwelling is purchased with a large area of land, some of which is not proximate to the dwelling and which, to use HMRC's language, exceeds in extent what is needed for the dwelling 'to command', could, on HMRC's latest guidance, still be an acquisition of mixed residential and non-residential land and as such liable to tax at the rates in Table B. Indeed, the reference in the revised guidance to tracts of fells and moorland not being residential in nature can surely be applied to other types of land such as that surrounding houses nestling in the Sussex Downs or the Norfolk fens.

It will be interesting to see how HMRC responds in current and future SDLT enquiries to taxpayers who are relying on SDLTM00470 in this way.

The Hyman case

Although HMRC's updated guidance is dated 25 June 2019, it does not seem to have been considered in *Hyman* (TC7271) which was heard on 10 July. *Hyman* does not therefore have any direct relevance to HMRC's new guidance and indeed the judge stated that 'HMRC's *SDLT Manual* does not give any guidance on the meaning of grounds...'

Given the existence at the time of SDLTM30030, the archived SDLTM20070, as well as Statement of Practice 1/03, this was a rather unfortunate statement and perhaps these provisions were not brought to her attention. Further, it seems that the origin of the statutory definition of FA 2003, s 116(1)(b) and how it was created for the purpose of distinguishing between grounds that were part of the residential use of the property and grounds that were not may not have been explained to the judge.

The judge in *Hyman* held that 'grounds' has, and was intended to have, a wide meaning. She said that in its ordinary

Planning point

Whether land is residential or non-residential will depend on various factors such as the size of the residence, the nature of the land, whether it is used commercially, and whether it is required for the reasonable enjoyment of the property. meaning, 'grounds' means land that is attached to or surrounding a house, which is occupied with the house, and is available to its owners to use. However, that land would not be grounds to the extent that it is used for a separate, say commercial, purpose because it would not then be occupied with the residence, but would be premises on which a business is conducted. The judge seemed to align herself with the HMRC investigators who argued that all the land bought with a dwelling is residential unless there is some commercial use.

Applying her test, the judge found that, on the purchase of a farmhouse with 3.5 acres, the presence of a meadow and bridleway and a derelict barn could not be classed as mixeduse and was entirely residential property to which the rates in Table A applied.

Conclusion

This case was, on its facts, an easy win for HMRC and the result is perhaps not surprising. However, it will not assist HMRC if the extent of the land purchased with the dwelling is easily more than is required for the reasonable enjoyment of the dwelling or now, to put it in terms of SDLTM00470, in excess of land 'commanded' by the dwelling or there is land akin to 'tracts of fells or moorland'.

It seems, therefore, that Hyman – because of its own particular facts and the updated HMRC guidance – has not drawn a line under claims for mixed use and Table B rates on purchases of dwellings with a large amount of surplus land. The struggle continues.

Author details

Patrick Cannon is a barrister at Old Square Tax Chambers and can be contacted at: www.patrickcannon.net



FIND OUT MORE On Taxation.co.uk

- Keeping it quiet: tinyurl.com/y5mdqjko
- Stamp duty land tax conference 2019: tinyurl.com/ y2ebw8tp
- SDLT multiple dwellings relief: tinyurl.com/y3wrvmwe



Advertise in Taxation

We have several options available, from print and digital packages, video panel discussions, bespoke surveys, reports and recruitment solutions.

For more information, contact advertisingsales@lexisnexis.co.uk

"STEP use Taxation Magazine, e-newsletters and website to advertise the STEP qualifications and events portfolio. The ROI when using Taxation is always good and the targeted publication works well for our niche market. The team at LexisNexis have been great in advising on new ways to reach our target audience and suggesting new channels and publications to use."

Kelly Farrell. Head of Marketing. STEP



TAXATION