SDLT – Schedule 4ZA Finance Act 2003 - relief from higher charge for replacement residence – two apartments bought from different vendors a few weeks apart with the intention of amalgamating to form one –was each one intended to be the purchaser's only or main residence – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/03700

BETWEEN

MEHDI MOAREF AND ARMAGHAN MOZHDEH **Appellants**

-and-

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

TRIBUNAL: JUDGE TRACEY BOWLER
MR CHARLES BAKER

The hearing took place on 3 August 2020. With the consent of the parties, the form of the hearing was V (video) and the Tribunal video platform was used. A face to face hearing was not held because of the measures required by the Covid-19 pandemic. It was not in the public interest during the pandemic to hold a face to face hearing open to the public and it was in the public interest for the hearing to go ahead remotely, which by necessity meant it must be in private.

Mr Patrick Cannon, instructed by Harris & Trotter LLP for the Appellant

Dr Jeremy Schryber, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellants appeal under paragraph 35 of the Finance Act 2003 ("FA 2003") against a closure notice issued by HMRC refusing a requested repayment of £222,000 of SDLT paid at the relevant higher rate by the Appellants on the purchase of a residential property ("Number 38") in June 2017. The Appellants had bought an adjoining property ("Number 31") in May 2017. The relevant higher rate of SDLT was paid on both purchases and the Appellants have claimed a reduction of each amount of SDLT on the basis that the purchases of Number 31 and Number 38 both fell within the exception for a purchased dwelling which is a replacement for the purchaser's only or main residence. HMRC granted the refund in relation to the SDLT paid on Number 31. HMRC's view now is that that was incorrect, but HMRC recognise that the time to correct that refund has expired. It is accepted by HMRC that the two properties were bought by the Appellant with the intention of combining them to form one residential property where they would live with their family, but maintains that that intention is insufficient to satisfy the requirements for the purchase of Number 38 to fall within the replacement dwelling exemption.

BACKGROUND

2. The Appellants paid SDLT at the rate applicable to "higher rates transactions" on each of the purchases of Number 31 and Number 38 made on 24 May 2017 and 6 June 2017 respectively.

3. On 05 Jun 2018 the Appellants sold their previous residence.

4. On 30 July 2018 the Appellants submitted SDLT16 forms (Request for repayment of the higher rates on additional residential properties) seeking to amend the SDLT return for each of Number 31 and Number 38.

5. On 19 October 2018 HMRC opened enquiries into both returns under paragraph 12 Schedule 10 FA 2003.

6. On 17 December 2018 HMRC closed the enquiries by way of closure notice under paragraph 23 Schedule 10, accepting the Appellants' amendment of the SDLT return in respect of Number 31, but rejecting it for Number 38.

7. On 19 December 2018 the Appellants' representative wrote to HMRC to say that the date for the sale of the Appellants' previous residence was incorrectly stated as 5 June 2017 rather than 5 June 2018 in the closure notice.

8. On 11 January 2019 the Appellants' representative appealed on their behalf against the closure notice for Number 38.

9. On 08 Mar 2019 HMRC wrote to the Appellants to set out their view of the matter and offered a review of the decision. That offer was accepted. In the letter it was accepted that the date of sale of the Appellants' previous residence was wrongly stated in the closure notice and that was corrected.

10. On 24 April 2019 the review conclusion upheld the decision in the closure notice.

GROUNDS OF APPEAL

11. The Appellants' grounds of appeal can be summarised in essence as:

(1) Number 31 was purchased with the intention of it becoming the Appellants' main residence and the conditions for it to be treated as a replacement for the Old Dwelling under Schedule 4ZA FA 2003 ("Schedule 4ZA") were met;

(2) while paragraph 8(2) Schedule 4ZA provides that the sale of the old main residence relied upon to enable a refund of the SDLT higher rates on Number 31 cannot also be taken into account for the purposes of claiming a refund in respect of another purchase that occurs after the sale of the old main residence, in this case the other purchase took place before the sale of the old main residence. Therefore that "double counting" rule does not apply to the Appellants' circumstances;

(3) as Number 38 was also purchased as a replacement for the Appellants' main residence, the purchase also qualified as a main residence replacement. There is no express requirement limiting the exemption to one purchase in the case of purchases made before the sale of the old main residence.

BURDEN OF PROOF

12. The burden is on the Appellants to show that they were entitled to the refunds of the SDLT claimed.

13. The standard of proof is the ordinary civil standard, which is the balance of probabilities.

EVIDENCE

14. The evidence consists of the bundle of documentary evidence running to 334 PDF pages as set out in the index, as well as the oral evidence of Mr Moaref. The bundle includes a witness statement from Mr Davidson, who has been employed as an architect by the Appellants in connection with the plans to combine Numbers 31 and 38 into one dwelling. It had been agreed between the parties that it was not necessary for Mr Davidson to attend the hearing to adopt his evidence. His evidence is accepted.

FINDINGS OF FACT

15. The Appellants owned a dwelling in Dubai ("the Old Dwelling") which they lived in as their only or main residence from 15 August 2014 until 28 August 2016.

16. On 24 May 2017 the Appellants purchased an apartment - Number 31 - for £5,175,000, paying £690,000 SDLT.

17. 06 Jun 2017 the Appellants purchased another apartment - Number 38 - which adjoins Number 31, together with an associated mews property for £7,400,000, paying £1,023,750 SDLT.

18. The main rooms in Number 31 are a master bedroom and ensuite bathroom, a second bedroom and ensuite bathroom, a kitchen and a living room.

19. Number 38 has three bedrooms and two living areas. The kitchen is smaller than that in Number 31.

20. Each of Number 38 and Number 31 was a single dwelling when purchased by the Appellants. The properties were purchased from two different vendors.

21. The Appellants bought Number 31 and Number 38 with the intention of combining the two apartments to make one larger apartment: a third bedroom with an ensuite bathroom was to be created from the two smaller bedrooms in Number 38; the kitchen would be kept as such

from Number 31; while the kitchen and living areas in number 38 would be replaced. It would be a major refurbishment and conversion of the two apartments to form one.

22. The Appellants bought Number 31 and Number 38 to replace their main residence in Dubai. If they had been able to find an apartment larger than either Number 31 or Number 38 that met their requirements they would have bought that instead. If a property developer had previously turned Number 31 and Number 38 into one larger apartment they would have purchased that if it was at a price they were prepared to pay. The Appellants did not consider either Number 31 or Number 38 on its own to be a suitable residence for them and their family. They only bought the apartments on the basis that they would carry out works to convert them into one residential property.

23. Works have not yet commenced to amalgamate Number 31 and Number 38. Planning permission was obtained on 7 December 2017, but the Appellants wanted to amend the plans. They therefore instructed the firm of architects at which Mr Davidson works. He submitted a second planning application in 2019 which has been granted. However, permission is also required from the Crown Estate which has not yet been granted.

24. The Appellants have been living in Number 31 and Number 38 since the purchase of the properties, using an outside balcony to connect them. Their children sleep in Number 38 and they sleep in Number 31. They generally use the kitchen and living area in Number 31. If they have guests they sometimes sit in the living area of Number 38; and if guests stay overnight, the guests stay in Number 38.

THE LAW

25. The relevant legislation is set out in the Appendix.

26. Under section 43 FA 2003 an acquisition of a major interest in land is a land transaction for the purposes of SDLT and under Section 49 FA 2003 a land transaction is a chargeable transaction if it is not exempt.

27. Section 128 of the Finance Act 2016 introduced changes to the SDLT regime which imposed an additional 3% charge on specified chargeable transactions ("higher rates transactions"). Those transactions are specified in Schedule 4ZA. Very broadly speaking purchases of residential property where the purchaser already owns a residential property are treated as higher rates transactions. The legislation in Schedule 4ZA is structured by providing sets of conditions which, when met, cause the transaction to be a higher rates transaction.

28. In this case the parties agree that the relevant provisions are contained in paragraph 3 Schedule 4ZA which deals with the purchase of a single dwelling in a chargeable transaction.

29. Provisions are contained in paragraph 5 of Schedule 4ZA to deal with the purchase of two properties in one chargeable transaction, which the parties recognise cannot apply as there were two chargeable transactions when the Appellants purchased Number 31 and Number 38.

30. Paragraph 3 provides that where the main subject matter of a chargeable transaction consists of a major interest in a single "dwelling" (as defined in paragraph 18) and Conditions A-D are met, the transaction is a higher rates transaction. The parties dispute the application of Condition D in paragraph 3(5) which applies where the purchased dwelling is not a replacement for the purchaser's only or main residence.

31. Paragraphs 3(6) and 3(7) explain when a purchased dwelling can be treated as a replacement for a purchaser's only or main residence.

32. Paragraph 3(6) deals with the situation where the purchaser had disposed of a major interest in another dwelling in the three years prior to the purchase where that other dwelling had been the purchaser's only or main residence. That provision cannot apply in the

Appellant's case as the Old Dwelling was sold after the purchase of Number 31 and Number 38.

33. Paragraph 3(7) deals with the Appellants' situation where the purchaser of a dwelling sells their only or main residence in the three years after that purchase. The provision states that the purchased dwelling may become a replacement for the purchaser's only or main residence if on the effective date of the transaction (by which the purchased dwelling is bought) the purchaser intended the purchased dwelling to be the purchaser's only or main residence (emphasis added).

34. Section 44 FA 2003 sets out the rules to determine the effective date of the chargeable transaction, which in this case is the date of completion. SDLT arises at that point

35. It is the application of the underlined words which lies at the heart of the appeal before us.

THE APPELLANTS' CASE

36. Mr Cannon referred to his skeleton argument in which he submits that:

(1) If a purchased dwelling is a replacement for the purchaser's only or main residence, then Condition D in paragraph 3(5) Schedule 4ZA will not be met and the higher rates of SDLT will not apply;

(2) Paragraph 3(7) Schedule 4ZA governs what happens in this context when the purchase of a main residence replacement occurs before the disposal of the old main residence. That is the situation in this appeal;

(3) Paragraph 8(2) Schedule 4ZA does not apply. It prevents the sale of an old main residence that has already been taken into account in relation to a prior purchase from also being taken into account to protect a purchase of a further dwelling after the sale of the old main residence (emphasis added). Number 31 and Number 38 were both purchased before the sale of the Old Dwelling.

(4) HMRC in effect contend that there is a lacuna in the legislation which does not deal with the Appellants' situation. HMRC's limitation of the reduction in the SDLT rate to Number 31 in effect read words into paragraph 8(2) Schedule 4ZA that are not there;

(5) It is not the role of the Tribunal to fill in a clear gap in the legislation, which is for Parliament to address as stated by Lord Neuberger in *Lehman Brothers* et al at [2017] UKSC 38;

(6) Lord Hodge's statement in *Project Blue Ltd* v *HMRC* [2018] UKSC 30 should also be considered where he stated:

> *"A purposive construction will not always operate in favour of HMRC and against the taxpayer as MacNiven v Westmoreland Investments Ltd [2003] 1 AC 311 shows. Similarly, if there are lacunas in a statutory regime which enable tax avoidance, a purposive interpretation may not always remove them as the Court of Appeal's judgment in Mayes v Revenue and Customs Comrs [2011] STC 1269 shows."*

(7) The purchase of Number 31 satisfied the provisions for the higher rate to be disapplied and, provided that the purchase of the second property – Number 38 – was also a replacement for the purchaser's main residence, the higher rates also did not apply to that purchase. There is no condition limiting the reduction to just one purchase. The absence of such a limitation has not been relied upon by the Appellants in an attempt to artificially exploit the provisions and generate a double exemption for two physically separate main residence dwellings as part

of a marketed tax avoidance scheme. The transactions concerned are entirely natural and genuine and lead to there being only one replacement main residence that will be occupied by the Appellants as their family home.

(8) If the Tribunal was concerned about the alleged lacuna it is surely right on the facts here to permit the exemption to apply to Number. 38, while at the same time warning that any attempt to exploit the position in the future by tax schemers as part of an artificial tax saving arrangement would be frowned upon and not permitted.

37. At the hearing Mr Cannon submitted that the closure notice included an error which meant that HMRC's analysis was consequently flawed from the start. HMRC had worked on the basis that the Old Dwelling was sold on 5 June 2017, prior to the purchase of Number 38, whereas in fact the Old Dwelling was sold on 5 June 2018, after the purchase of Number 38. This error was identified by Mr Newman in correspondence, but HMRC confirmed in an email that the conclusion remained that repayment of the higher rate was not due in respect of Number 38. It was then only in the course of preparing for the litigation that HMRC's attitude hardened further and concluded that the purchase of Number 31 had not, in fact, qualified for the repayment of the higher rates, although HMRC had recognised that no action could be taken to reclaim the refund given the time limitations set out in the legislation.

38. Mr Cannon submitted that if an "officious bystander" test was applied to the legislation it would be concluded that, on the balance of probabilities, Parliament would have said that a refund of the higher rate SDLT should be available on both Number 31 and Number 38, as they were bought to be amalgamated as one replacement residence and there was no mischief involved.

39. When asked about the requirement in paragraph 3(6)(a) that the "purchaser intends the purchased dwelling to be the purchaser's only or main residence", Mr Cannon submitted that it was a simple and straightforward matter to view both Number 31 and Number 38 as the "only or main" residence.

40. When asked about his submissions regarding the lack of mischief or abuse in the Appellants' case, Mr Cannon submitted that there is no specific anti-avoidance provision which would ward off abuse in the Schedule 4ZA provisions and therefore the Tribunal may be inclined if allowing the appeal to note that the decision was confined to non-abusive situations such as the Appellants'.

41. Mr Cannon submitted that the analogy drawn by Dr Schryber with paragraph 5 of Schedule 4ZA which deals with the acquisition of more than one dwelling in a single transaction is misplaced. The Appellants' situation is completely different as it involved two chargeable transactions composed of two unrelated purchases.

42. Mr Cannon submitted that the definition of "dwelling" in paragraph 18(2)(b) Schedule 4ZA states that a building or part of the building counts as a dwelling if it is in the process of being constructed or adapted for such use. That is exactly what is happening in this case and therefore the application of the exemption does not undermine the structure and policy of the legislation as HMRC submit.

43. Mr Cannon submitted that the provision in paragraph 3(6)(d) Schedule 4ZA is dealing with a different situation.

44. He submitted that Parliament had simply not addressed the situation in the Appellant's case. In contrast, Parliament had specifically addressed the situation if there had been a purchase made before the sale of the Old Dwelling and a purchase after the sale of the Old Dwelling. If a developer had bought Number 31 and Number 38 and combined them before

selling to the Appellants there would have been no doubt that they would have been entitled to the reduction in SDLT. Therefore there is no mischief in applying the rules to give them the same reduction in this circumstance.

45. Mr Cannon submitted that Dr Shryber's example of a property with two floors (where it would not be said that either floor was the whole or main residence) could be countered with an example where the first floor was let out by the owner and the ground floor would then become the whole or main residence.

46. Mr Cannon submitted that account should be taken of the fact that the Appellants have been clear that they have consistently intended that Number 31 and Number 38 should be their main residence.

HMRC'S CASE

47. Dr Schryber referred to his skeleton argument in which he submits that:

(1) Number 31 and Number 38 were each separate single dwellings when they were acquired;

(2) the Appellants did not intend either Number 31 or Number 38 to be their only or main residence as required by paragraph 3(7)(a) Schedule 4ZA and therefore neither could become a replacement for the Old Dwelling. The Appellant's intention was for Number 31 and Number 38 to be merged together to form their only or main residence. Such merged dwelling cannot be said to be either Number 31 or Number 38. The construction was not just a refurbishment, adaption or extension of an existing dwelling, but the construction of a new dwelling from two others;

(3) the words in paragraph 3(7) Schedule 4ZA stating that "the purchaser intended the purchased dwelling to be the purchaser's only or main residence" do not encompass "to be, or to form part of, the purchaser's only or main residence". The purchased dwelling and the dwelling intended to be the purchaser's only or main residence must be the same;

(4) if it was concluded that the Appellants did intend Number 38 to be the Appellants' new residence it was not to be their "only or main" residence given that: (i) Number 31 and Number 38 were broadly of similar size when acquired, the new merged dwelling could not be regarded as being either mainly one or the other; and (ii) if both were acquired to be the Appellants' residence, neither could have been acquired independently to be the Appellants' only or main residence;

(5) HMRC do not argue that the transactions were offensive or abusive. However, when looking at the legislation overall, the higher rates are only disapplied for a one-for-one replacement of the main residence. HMRC primarily relies upon the construction of the words as used in the legislation, but even if a purposive approach is adopted, that would support HMRC's conclusion. Schedule 4ZA works on the basis that the sale of a main residence can only be used to frank the acquisition of one replacement dwelling. So, paragraph 3(6) applies where the replacement is bought after, but within three years of, the sale of the original main residence; and once a replacement has been acquired to be the new main residence, paragraph 3 (6)(d) prevents the sale of the original residence franking the acquisition of another replacement. Similarly, the effect of paragraph 8(2) is to prevent the sale of one dwelling being used to frank the acquisition of two replacement dwellings, where one replacement is acquired before the sale of the original main residence and another afterwards.

(6) Paragraph 5 Schedule 4ZA deals with the acquisition of more than one dwelling in a single transaction and is the most closely analogous situation dealt with specifically by

the legislation. In such a case neither property qualifies to be treated as the replacement of a main dwelling.

48. At the hearing Dr Schryber submitted that HMRC were not seeking to stretch or strain the words of the legislation, or to add words, but to apply the words according to their plain meaning. It is not for the tribunal to speculate on what Parliament would have answered if specifically asked to address the Appellants' situation.

49. It is accepted that the Appellants had a clear intention to combine the two apartments and it is that intention which is relevant, even though the work to merge the properties has not yet taken place. In Mr Moaref's Witness Statement the statements that: "individually the properties were not suitable for my wife and two children", "the properties were always intended to be one residence" and "it was my clear intention from the first time I saw the Properties to amalgamate them into one" support HMRC's position that neither Number 31 nor Number 38 was intended to be the Appellants' only or main residence.

50. Dr Schryber submitted that the keywords in paragraph 3(7) are the words "to be" which should not be read as meaning "to be or be part of". He posed the analogy of a home with two floors where it would not be said that the ground floor or the first floor is the owner's residence; together the ground and first floor are the residence. The words "to be" convey a narrow meaning. The draftsman did not use a broader phrase such as "intend to occupy as".

51. In addition, it is submitted that neither Number 38 nor Number 31 qualifies as the Appellants' "only or main" residence.

DISCUSSION

Assessment of the evidence

52. Much of the evidence in this case has been accepted by HMRC. In addition, we found Mr Moaref to be a consistent and credible witness. We have therefore found the facts set out in this decision on the basis of the facts agreed by both parties and the evidence from Mr Moaref at the hearing.

Closure notice errors

53. The closure notice contains an error. It refers to the sale of the Old Dwelling in June 2017 when in fact it was sold in June 2018. That error was relevant to HMRC's analysis because it meant that HMRC applied the provisions of Paragraph 8(2) Schedule 4ZA which deal with the situation where a purchaser buys a new replacement residence before selling their old one and then buys another new residence after the sale of the old one. The provisions stop the replacement rule being used for both the first purchase and the second. However, in this case the two purchases were made before the sale of the Old Dwelling and therefore Paragraph 8(2) was not applicable.

54. Mr Newman wrote to HMRC about the error on 19 December 2018. HMRC corrected the closure notice error in a letter of 8 March 2019.

55. No issue has been raised by the Appellants regarding the validity of the closure notice in the grounds of appeal or in Mr Cannon's submissions. We have therefore proceeded on the basis that the closure notice as amended by the letter of 8 March 2019 is valid.

Application of the SDLT rules to the purchase of Number 31

56. HMRC's position regarding the treatment of the chargeable transaction by which Number 31 was purchased has altered and HMRC now maintain that it was a higher rates transaction. However, HMRC recognise that it is too late to reverse their previous conclusion that the chargeable transaction concerning Number 31 was not a higher rates transaction.

57. Therefore the SDLT treatment of the purchase of Number 31 is not a subject of this appeal, although our analysis of the SDLT treatment of the Number 38 inevitably touches on the treatment of Number 31.

Application of the SDLT rules to the purchase of Number 38

58. The provisions contained in Schedule 4ZA are highly prescriptive setting out detailed rules for different scenarios. We therefore consider that the correct approach to the application of the rules is to address the specific terms used, giving them their ordinary meaning.

Dwelling

59. Number 38 was a "dwelling" as defined in paragraph 18 at the time of the chargeable transaction by which it was purchased by the Appellants, because it was used, or suitable for use, as a single dwelling at that time.

60. Mr Cannon referred to the provision in paragraph 18(2) referring to a property being a dwelling where it "is in the process of being constructed or adapted for" use as a single dwelling, submitting that was exactly what was happening here. However, we are satisfied that the extension of the meaning provided in paragraph 18(2)(b) applies to a property which would not otherwise be a single dwelling. The extension does not have the effect of meaning that the intention to amalgamate Number 31 and Number 38 caused them to be treated as a single dwelling at the time of the chargeable transaction to purchase Number 38. Number 38 was not in fact "in the process of" being converted at the time of the chargeable transaction by which it was bought. Neither planning permission nor freeholder's consent had been obtained at that point.

On the effective date of the transaction the purchaser intended the purchased dwelling to be the purchaser's only or main residence

61. The effective date of the chargeable transaction by which Number 38 was purchased was the date of completion of the purchase. We have found as a matter of fact that on the effective date of the transaction:

(1) The Appellants did not view Number 38 on its own as a suitable residence;

(2) The Appellants planned to amalgamate Number 38 with Number 31 to provide one enlarged apartment in which they and their sons would reside.

62. As a matter of construction of the words used in the legislation, it is clear that the Appellants did not intend the dwelling which is Number 38 to be their only or main residence. We agree with Dr Schryber that the purchased dwelling must be the same as the dwelling which the purchaser intends should be their only or main residence. In this case the "dwelling" which is Number 38 is not the same as the "dwelling" which the Appellants intended to be their only or main residence. That would be the amalgamated dwelling produced by the conversion of Number 31 and Number 38 into one dwelling.

63. We are not persuaded by Mr Cannon's submissions that HMRC are seeking to fill a lacuna in the legislation by adding words. On the contrary, we agree with Dr Schyrber that the Appellant's approach requires us to read "to be" to mean "to be all or part of". As Mr Cannon submitted, it is not the role of this Tribunal to fill in a gap in the legislation and we therefore do not read in the additional words.

64. Mr Cannon did not seek to argue that the Appellants intended that Number 38 should be their "main residence" and the facts do not lead us to consider that was their position. It was not the case that they intended "mainly" to live in Number 38 judged by reference to time (in other words for more than 50% of the time), or that they intended "mainly" to live in Number 38 by reference to the space occupied.

65. In fact, we do not consider that Number 38 is actually occupied as the "main" residence. Number 31 is no less significant for the family. While we recognise that the children sleep in Number 38, the evidence shows that the rest of the family's activities take place day-to-day in Number 31. Number 38 is used more when entertaining guests. We agree with the submission of Dr Schryber and consider that the current living arrangements are not the determining factor, but the intention at the time of the purchases of Numbers 31 and 38. There is no evidence though to show that the Appellants had any different intention in terms of the relative use of the space in Number 31 and Number 38 when they purchased Number 38 than they have subsequently put into practise.

66. However, given that the Appellants sleep in Number 38 and their children sleep in Number 31 we consider treating either property as their "main" residence to be divorced from reality. The evidence shows that their intention was that neither Number 38 nor Number 31 would the Appellant's only or main residence, but that they would be their only or main residence once combined. In the meantime, they are occupying the two properties on a combined basis.

67. We are not inclined to embark upon the consideration of hypotheticals as invited by Mr Cannon. So, for example, Mr Cannon submits that if the Appellants had purchased Number 31 and Number 38 from a developer who had previously combined them to make one dwelling they would have been entitled to the reduction in SDLT and therefore their situation is close enough to be treated in the same way. However, the Appellants' circumstances could also be compared with the situation specifically addressed in paragraph 5 Schedule 4ZA where two properties are bought in one chargeable transaction and no reduction in the SDLT is available.

68. As we have said, the SDLT legislation in Schedule 4ZA is prescriptive and detailed. The draftsman has not used a principles-based drafting technique which is more susceptible to a less black letter approach. We are therefore satisfied that the correct approach is the one we have set out above, applying the rules as written, rather than to compare with alternative scenarios..

69. However, if we were to look at the structure of the provisions overall, we would conclude that the provisions in paragraph 5 Schedule 4ZA are informative. Generally, where two properties are purchased at the same time (and the chargeable consideration attributable to each property is at least £40,000), the chargeable transaction cannot benefit from the reduction in the SDLT rates and that means the higher rates are applied to the purchase of both of the properties. (There is an exception, in essence, when one dwelling ("A") is situated within the grounds of, or within the same building as, another dwelling ("B") and the amount of the consideration attributable to the purchase of A is less than 2/3 of the total consideration. In that case if B meets the requirements to be treated as a replacement residence, the higher rates do not apply to the chargeable transaction.)

70. Those provisions would provide the clearest guidance in the legislation to the approach to be taken to transactions involving multiple properties were we to look to Schedule 4ZA as a whole for guidance. That guidance does not assist the Appellant's case.

71. Since hearing the case we have noted that the chargeable transaction in which Number 38 was purchased included the purchase not only of Number 38, but also an associated mews house, although the land transaction return form stated that only one property was bought and only one registered title number was stated. There are various possibilities raised by the mews house, but as neither party has relied on the inclusion of the mews house as being a relevant element of the transaction, our decision is made without consideration of it.

CONCLUSION

72. For all these reasons the appeal is dismissed and the decision made by HMRC that the chargeable transaction by which Number 38 was purchased remains a higher rates transaction is CONFIRMED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

73. 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.

TRACEY BOWLER
TRIBUNAL JUDGE

Release date: 10 OCTOBER 2020

Appendix

Schedule 4ZA

2 MEANING OF HIGHER RATES TRANSACTION ETC

(1) This paragraph explains how to determine whether a chargeable transaction is a higher rates transaction for the purposes of paragraph 1.

(2) In the case of a transaction where there is only one purchaser, determine whether the transaction falls within any of paragraphs 3 to 7; if it does fall within any of those paragraphs it is a higher rates transaction (otherwise it is not).

(3) In the case of a transaction where there are two or more purchasers -

(a) take one of the purchasers and determine, having regard to that purchaser only, whether the transaction falls within any of paragraphs 3 to 7, and

(b) do the same with each of the other purchasers.

3 SINGLE DWELLING TRANSACTIONS

(1) A chargeable transaction falls within this paragraph if -

(a) the purchaser is an individual,

(b) the main subject-matter of the transaction consists of a major interest in a single dwelling ("the purchased dwelling"), and

(c) Conditions A to D are met.

(2) Condition A is that the chargeable consideration for the transaction is £40,000 or more.

(3) Condition B is that on the effective date of the transaction the purchased dwelling -

(a) is not subject to a lease upon which the main subject-matter of the transaction is reversionary, or

(b) is subject to such a lease but the lease has an unexpired term of no more than 21 years.

(4) Condition C is that at the end of the day that is the effective date of the transaction -

(a) the purchaser has a major interest in a dwelling other than the purchased dwelling,

(b) that interest has a market value of £40,000 or more, and

(c) that interest is not reversionary on a lease which has an unexpired term of more than 21 years.

5(5) Condition D is that the purchased dwelling is not a replacement for the purchaser's only or main residence.

(6) For the purposes of sub-paragraph (5) the purchased dwelling is a replacement for the purchaser's only or main residence if -

(a) on the effective date of the transaction (the transaction concerned) the purchaser intends the purchased dwelling to be the purchaser's only or main residence,

(b) in another land transaction (the previous transaction) whose effective date was during the period of three years ending with the effective date of the transaction concerned, the purchaser or the purchaser's spouse or civil partner at the time disposed of a major interest in another dwelling (the sold dwelling),

(c) at any time during that period of three years the sold dwelling was the purchaser's only or main residence, and

(d) at no time during the period beginning with the effective date of the previous transaction and ending with the effective date of the transaction concerned has the purchaser or the purchaser's spouse or civil partner acquired a major interest in any other dwelling with the intention of it being the purchaser's only or main residence.

(7) For the purposes of sub-paragraph (5) the purchased dwelling may become a replacement for the purchaser's only or main residence if -

(a) on the effective date of the transaction (the transaction concerned) the purchaser intended the purchased dwelling to be the purchaser's only or main residence,

(b) in another land transaction whose effective date is during the period of three years beginning with the day after the effective date of the transaction concerned, the purchaser or the purchaser's spouse or civil partner disposes of a major interest in another dwelling (the sold dwelling), and

(c) at any time during the period of three years ending with the effective date of the transaction concerned the sold dwelling was the purchaser's only or main residence.

5 MULTIPLE DWELLING TRANSACTIONS

(1) A chargeable transaction falls within this paragraph if -

(a) the purchaser is an individual,

(b) the main subject-matter of the transaction consists of a major interest in two or more dwellings (the purchased dwellings), and

(c) at least two of the purchased dwellings meet conditions A, B and C.

(2) A purchased dwelling meets condition A if the amount of the chargeable consideration for the transaction which is attributable on a just and reasonable basis to the purchased dwelling is £40,000 or more.

(3) A purchased dwelling meets condition B if on the effective date of the transaction the purchased dwelling -

(a) is not subject to a lease upon which the main subject-matter of the transaction is reversionary, or

(b) is subject to such a lease but the lease has an unexpired term of no more than 21 years.

(4) A purchased dwelling meets condition C if it is not subsidiary to any of the other purchased dwellings.

(5) One of the purchased dwellings (dwelling A) is subsidiary to another of the purchased dwellings (“dwelling B”) if:

(a) dwelling A is situated within the grounds of, or within the same building as, dwelling B,

and

(b) the amount of the chargeable consideration for the transaction which is attributable on a just and reasonable basis to dwelling B is equal to, or greater than, two thirds of the amount of the chargeable consideration for the transaction which is attributable on a just and reasonable basis to the following combined:

(i) dwelling A,

(ii) dwelling B, and

(iii) each of the other purchased dwellings (if any) which are situated within the grounds of, or within the same building as, dwelling B.

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(1) This paragraph sets out rules for determining what counts as a dwelling for the purposes of this Schedule.

(2) A building or part of a building counts as a dwelling if:

(a) it is used or suitable for use as a single dwelling, or

(b) it is in the process of being constructed or adapted for such use.

(3) 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 taken to be part of that dwelling.

(4) Land that subsists, or is to subsist, for the benefit of a dwelling is taken to be part of that dwelling.

(5) The main subject-matter of a transaction is also taken to consist of or include an interest in a dwelling if:

(a) substantial performance of a contract constitutes the effective date of that transaction by virtue of a relevant deeming provision,

(b) the main subject-matter of the transaction consists of or includes an interest in a building, or a part of a building, that is to be constructed or adapted under the contract for use as a single dwelling, and

(c) construction or adaptation of the building, or part of a building, has not begun by the time the contract is substantially performed.

(6) In sub-paragraph (5)-

"contract" includes any agreement;

"relevant deeming provision" means any of sections 44 to 45A or paragraph 5(1) or (2) of Schedule 2A or paragraph 12A of Schedule 17A;

"substantially performed" has the same meaning as in section 44.

(7) A building or part of a building used for a purpose specified in section 116(2) or (3) is not used as a dwelling for the purposes of subparagraph (2) or (5).

(8) Where a building or part of a building is used for a purpose mentioned in sub-paragraph (7), no account is to be taken for the purposes of sub-paragraph (2) of its suitability for any other use.