Neutral Citation Number [2025] UKUT 00024 (TCC)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Applicant: Richard Warner	Tribunal Ref: **UT/2023/000123**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

RECONSIDERATION OF APPLICATION FOR PERMISSION TO APPEAL FOLLOWING ORAL HEARING

DECISION NOTICE

JUDGE RUPERT JONES

Introduction

1. Richard Warner ('the Applicant') applies to the Upper Tribunal (Tax and Chancery) ("UT") for permission to appeal the decision of the First-tier Tribunal (Tax Chamber) ("the FTT") released on 5 September 2023 ("the FTT Decision"). The FTT Decision followed a hearing conducted on 12 June 2023.

2. The FTT struck out the Applicant's appeal to the Tribunal against HMRC's refusal (in July 2018 and subsequently) to consider the Applicant's request made on 3 July 2018 to recalculate his liability to Stamp Duty Land Tax ('SDLT'). The request for recalculation was in order to effect amendments to his original Stamp Duty Land Returns ('SDLRs') dated 1 and 6 June 2016 on the grounds of a claim to Multiple Dwellings Relief ('MDR')[1]. HMRC refused the

[1] The background facts were found at [10] of the FTT Decision:
'10. The background facts were not in dispute and can be summarised as follows:
(1) Mr Warner acquired two adjacent plots of land in the Isle of Wight on 25 May 2016;
(2) On 1 and 6 June 2016, Mr Warner submitted land transaction returns (SDLT 1) for the two properties, which identified then as non-residential property. No claim for multiple dwellings relief (MDR) was included in these returns. The amount of SDLT was £58,500 for one property and £110,00 for the other, amounting to £168,500 for both properties;
(3) On 3 July 2018, Mr Warner wrote to HMRC requesting that SDLT should be recalculated on the basis that he had been unaware at the time of submitting the returns that he could have claimed MDR. He submitted that this would reduce the SDLT to £41,300.
(4) On 19 July 2018, HMRC replied to this letter. I will return to the full details of this letter later, but for the purposes of the background it is sufficient to say that the request was refused.

Applicant's request on the basis it was made out of time – there being a one-year time limit after the filing of the SDLRs in which any amendments may be made by the purchaser. The proposed amendments were sought more than 2 years after the SDLRs and land transactions.

3. The FTT identified the following three issues it needed to determine when considering HMRC's application to strike out the Applicant's appeal at [29] of the Decision:

> (1) Did HMRC make an appealable decision, which requires me to consider:
> (a) Whether an enquiry was opened into the SDLT returns;
> (b) Whether a closure notice was issued;
> (c) If not, can this Tribunal nevertheless direct HMRC to issue a closure notice?
> (2) Does the proviso [in paragraph 6(3) of Schedule 10 to the Finance Act 20023] "except as otherwise provided" extend the time limits for making the amendment [to the returns]?
> (3) Can the claim be treated instead as an "overpayment claim" with its 4-year time limit?

4. In relation to the first issue, the FTT found there was no appealable decision made by HMRC for the purposes of paragraph 35 of Schedule 10 to the Finance Act 2003 ('FA 2003'). Hence the FTT found there were no appealable decisions made by HMRC in relation to a claim for MDR and hence it had no jurisdiction to hear an appeal (see [30] to [53] of the Decision). The FTT found that HMRC's refusal to accede to the Applicant's requests for amendments / claims for MDR did not involve the opening of an enquiry by HMRC, or amendment made by a closure notice or a discovery assessment etc. The FTT concluded: 'Given I have concluded that there was no enquiry opened, there is no question of whether there was a closure notice or a right to require HMRC to issue one' ([52]).

5. In respect of the second issue, the FTT found that there was a strict deadline for filing any amendment to returns under paragraph 6 of Schedule 10 to the FA 2003 which was twelve months after the filing date (see [54] to [64] of the Decision). The FTT found that the Applicant had submitted his amendments by way of letters over two years after filing the original SDLRs so that HMRC's decisions of 2018 and onwards simply confirmed that he was out of time to make the amendments sought / claims for MDR: 'That is what paragraph 6(3) does in the context of a claim for MDR and there is no facility for HMRC, or this Tribunal, to apply a different time limit due to ill health or external circumstances that have occurred after the transaction to acquire the property' ([64]).

6. In respect of the third issue, the FTT found that the Applicant's letters making the claim to MDR in 2018 could not be interpreted as being a overpayment relief claim for the purposes of paragraph 34. Therefore, he was not able to make a claim within a four year period rather than twelve months. HMRC's letters in response to the Applicant's request did not constitute a decision on a claim for relief for over paid tax for the purpose of paragraph 34 of Schedule 10 (see [65] to [71] of the Decision).

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(5) On 12 August 2019, Mr Warner wrote again asking HMRC to reconsider the position, citing ill-health during the period starting September 2016 and requesting leniency, particularly in light of an outstanding bankruptcy proceeding being pursued by HMRC.
(6) On 17 October 2019, HMRC replied, maintaining their rejection of the late MDR claim. The letter referred to the relevant sections of the law, concluding "any request for MDR is time barred under Section 58D(2) and as explained above your SDLT1 returns can't be amended".

7. In the absence of HMRC making any appealable decision, the FTT struck out the Applicant's appeal for lack of jurisdiction (see [72]).

8. By a decision dated 16 November 2023 ("the PTA Decision"), the FTT Judge refused permission to appeal the FTT Decision to the Upper Tribunal on the grounds of appeal pursued by the Applicant.

9. The Applicant renewed his application for permission to the Upper Tribunal in a notice of appeal dated 11 December 2023.

10. On 3 April 2024 I refused permission to appeal to the UT on the papers in relation to all three grounds of appeal then pursued by the Applicant.

11. The Applicant requested that permission to appeal be reconsidered at an oral hearing. That hearing took place on 26 November 2024 in person at the Rolls Building. Mr Warner appeared in person as the Applicant and HMRC officers attended as observers but did not participate in the hearing. After raising a number of further points in oral argument that he was not able to develop, I gave the Applicant permission to file further written submissions by 6 December 2024 which he duly did. I am grateful to him for clarifying the points he now pursues.

UT's jurisdiction in relation to appeals from the FTT

12. An appeal to the Upper Tribunal from a decision of the FTT can only be made on a point of law (section 11 of the Tribunals, Courts and Enforcement Act 2007). The Upper Tribunal has a discretion whether to give permission to appeal. It will be exercised to grant permission if there is a realistic (as opposed to fanciful) prospect of an appeal succeeding, or if there is, exceptionally, some other good reason to do so: Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538.

13. It is therefore the practice of this Chamber of the Upper Tribunal to grant permission to appeal where the grounds of appeal disclose an arguable error of law in the FTT's decision which is material to the outcome of the case or if there is some other compelling reason to do so (including if the appeal raises a point of law of general public importance).

Relevant Legislation

14. Section 58D of the Finance Act 2003 ('FA 2003') deals with transfers involving multiple dwellings and provides for MDR:

> (1) Schedule 6B provides for relief in the case of transfers involving multiple dwellings.
> (2) Any relief under that Schedule must be claimed in a land transaction return or an amendment of such a return.

15. Paragraph 6 of Schedule 10 to FA 2003 deals with amendments of returns by a purchaser and provides as follows:

> (1) The purchaser may amend a land transaction return given by him by notice to the Inland Revenue.
> (2) The notice must be in such form, and contain such information, as the Inland Revenue may require.

(2A) If the effect of the amendment would be to entitle the purchaser to a repayment of tax, the notice must be accompanied by-

(a) the contract for the land transaction; and

(b) the instrument (if any) by which that transaction was effected.

(3) **Except as otherwise provided, an amendment may not be made more than twelve months after the filing date.**

[emphasis added]

16. The filing date is defined under paragraph 2 of the same schedule as the last day of the period within which the return must be delivered.

17. Section 76 of FA 2003 provided (at the relevant time) that this period (the filing date) was 30 days from the effective date of the transaction (it is now 14 days).

18. Paragraph 34 of Schedule 10 to FA 2003 provides the framework for claiming relief for overpaid tax ('overpayment relief'):

(1) This paragraph applies where-

(a) a person has paid an amount by way of tax but believes that the tax was not due, or

(b) a person has been assessed as liable to pay an amount by way of tax, or there has been a determination to that effect, but the person believes that the tax is not due.

(2) The person may make a claim to the Commissioners for Her Majesty's Revenue and Customs for repayment or discharge of the amount.

(3) Paragraph 34A makes provision about cases in which the Commissioners for Her Majesty's Revenue and Customs are not liable to give effect to a claim under this paragraph.

(4) The following make further provision about making and giving effect to claims under this paragraph-

(a) paragraphs 34B to 34D, and

(b) Schedule 11A.

(5) Paragraph 34E makes provision about the application of this paragraph and paragraphs 34A to 34D to amounts paid under contract settlements.

(6) The Commissioners for Her Majesty's Revenue and Customs are not liable to give relief in respect of a case described in sub-paragraph (1)(a) or (b) except as provided-

(a) by this Schedule and Schedule 11A (following a claim under this paragraph),or

(b) by or under another provision of this Part of this Act.

(7) For the purposes of this paragraph and paragraphs 34A to 34E, an amount paid by one person on behalf of another is treated as paid by the other person.

19. Paragraph 34A provides a series of cases in which overpayment relief under paragraph 34 is not to be granted by HMRC including 34A(2) & (4):

34A

…

(2) Case A is where the amount paid, or liable to be paid, is excessive by reason of—

(a)a mistake in a claim or election, or

(b)a mistake consisting of making or giving, or failing to make or give, a claim or election.

…

(4)"Case C is where the claimant-
(a) could have sought relief by taking such steps within a period that has now expired, and
(b) knew, or ought reasonably to have known, before the end of that period that such relief was available."

Discussion, Analysis and Decision

20. The Applicant submits that the FTT erred in law in making the Decision. The Applicant's grounds for seeking permission to appeal relate to the second and third issues addressed in the FTT Decision: whether paragraph 6(3) of Schedule 10 to the Finance Act 2003 could be interpreted and applied in this case to extend the twelve month time limit for making the amendment to the return to include the claim for MDR; whether overpayment relief was available to the Applicant on the facts of this case.

Ground 1

19. The Applicant submits that the words 'except as otherwise provided' in paragraph 6(3) of Schedule 10 have been interpreted by the FTT in an 'overly restrictive manner thereby allowing the general discretion not to apply the strict time limit which it must have been the intention of parliament to confer upon such words when drafting the legislation'.

20. The Applicant argues that the FTT relied on the court of appeal decision in *Candy v HMRC* [2022] EWCA Civ 1447 ("*Candy*") which considered the interplay between paragraph 6(3) and a claim for repayment under section 44(9) of FA 2003 (in which repayment of tax is to be made in an amendment to a land transaction return). Mr Candy had relied on the wording "except as otherwise provided" in order to take his claim outside of the 12-month window. The FTT accepted HMRC's reliance by analogy on paragraphs [50] – [51] of the judgment in *Candy* which state:

> 50. Nor can I see any rational reason why Parliament would have wished to dispense altogether with the generally applicable time limit in paragraph 6(3), enabling taxpayers to make claims for repayment without any time limit, even decades later when memories may have faded and documents relating to the original land transaction may have been lost. There is nothing inconsistent in Parliament providing a right to reclaim tax paid as a safeguard for innocent taxpayers caught by the widely worded charge in section 44(4), but at the same time making that right subject to clear procedural rules, including time limits on the right to reclaim payment. It is of the essence of a self-assessment system that tax effects can be undone by administrative failure and merely meeting the substantive conditions for the grant of a relief is rarely enough to secure that a taxpayer receives the relief in question. Where the relief requires a claim, and the claim is not made in accordance with any procedural requirements, the taxpayer will not be given the relief.
>
> 51. Moreover, hard-edged time limits are a common feature of the self-assessment scheme. Where they govern the availability of a relief, they have the inevitable potential to cause hardship. In the case of section 44(9), a balance between the competing objectives of preventing tax avoidance on the one hand, and relieving innocent transactions caught by section 44(4) on the other, was clearly intended by Parliament. Since the longer the period of substantial performance lasts without completion of the contract, the more likely it is the purchaser will have obtained benefits under the contract in a way that justifies maintaining the SDLT charge, it was rational to strike that balance with a time limit of 13 months for amending the return from the effective date of the transaction giving rise to substantial performance (in other words,

> 12 months after the filing date). This limits the scope for avoidance but is simple to operate (for both HMRC and taxpayers). I can see no good reason why the unambiguous, hard-edged time limit in paragraph 6(3) should yield to section 44(9) as Mr Thomas contended. The consequence of Mr Thomas' construction is to dispense with certainty and finality in the sound administration of SDLT. That would be a surprising result.

21. The Applicant highlights paragraph [5]4] f the decision in *Candy*, which he says is relevant:

> 54. I recognise that the consequence of this conclusion is that the words in paragraph 6(3) "Except as otherwise provided" had no substantive effect on enactment. The presumption that all words in a statutory provision should have substantive effect is a presumption that can be displaced. In any event Mr Thomas does not dispute that those words could have been intended to be forward looking only, to account for future amendments. While that may be regarded as an odd drafting technique since a future amendment could have inserted those words when a subsequent exception was introduced, I agree with the UT that the words are likely to have been included in Part 4 FA 2003 as a helpful aid to the reader, to point out for the future, that the generally applicable time limit might be countermanded elsewhere.

22. The Applicant's case is that the FTT's reliance on *Candy* is flawed. He contends that *Candy* displaced the presumption that the wording "Except as otherwise provided" was intended to be meaningful at the time it was enacted and stated that it had no substantive effect. *Candy* was not concerned with MDR relief, a point which the learned judge in the FTT acknowledged. *Candy* was argued on its own facts and as stated by the court – "*[counsel] does not dispute that those words could have been intended to be forward looking only, to account for future amendments.".*

23. Nevertheless, the Applicant submitted that the FTT proceeded incorrectly to rely on the interpretation that *Candy* made and confined itself to deciding that the interpretation applied to all of Part 4 FA 2003 including MDR. He argued that the Decision of the FTT did not fully address this point. He argued that *Candy* can be differentiated as it was clearly only argued on its own facts. Whether there was another interpretation for "Except as otherwise provided" was not analysed from the context or factual scenario as exists here and as he relied upon in his submissions.

Determination

24. The FTT addressed this argument at [58]-[59] of the Decision:

> 58. Mr Warner is of course correct that *Candy* does not deal with a MDR claim. However, the decision sets out principles for the interpretation of the SDLT provisions and paragraph 6(3) specifically. I cannot see any basis on which I can diverge from it in the context of a [claim for MDR].
>
> 59. In any event, in my view, the words "except as otherwise provided" are intended to provide a reference point to other provisions within the legislation that could provide for a different time limit. They do not allow for a general discretion not to apply the limit, as is suggested by Mr Warner.

[The words in square brackets in [58] are added by me but they are blank in the FTT's Decision]

25. I consider that the FTT was not arguably wrong in its analysis and statutory interpretation. The FTT's construction of paragraph 6(3) does not give rise to an overly restrictive right to

claim a relief in an amendment to a return – a strict time limit for making amendments to a return balances the opportunity to be able to claim a relief within a reasonable timeframe against the imposition of procedural requirements which provide certainty and finality.

26. The words 'except as otherwise provided' do not permit the twelve month time limit from the filing date to be extended unless this is specifically provided in any other provision of any enactment. The phrase is to mean 'except as otherwise provided in legislation' – it does not provide for any general exception or allowance for exceptional circumstances unless other legislation permits it. The phrase in paragraph 6(3) only permits amendments to SDLRs more than a year after they are filed, if this is specifically provided in a provision other than paragraph 6(3) of Schedule 10.

27. No such excepting provision was originally identified by the Applicant in Schedule 10, the FA 2003 or any other enactment relating to SDLRs that would be capable of extending the twelve month time limit for amending a return. No such excepting provision is identified for the purpose of the facts relied upon by the Applicant or as found by the FTT.

28. There is no arguable basis for any contention that parliament intended the words in paragraph 6(3) to have a general or exceptional application to account for differing or mitigating circumstances: eg. in order to accommodate difficulties occasioned by the vagaries of the present planning system as the Applicant originally contended.

29. Both the ratio of *Candy* and the rationale behind it is directly applicable to the facts of this case.

30. Mr Warner raised a new point in post hearing written submissions that he had not relied upon before the FTT or during the permission hearing. He submitted that paragraph 6 of Schedule 6B FA 2003 (on the procedure for making claims for MDR) was an example of an excepting provision to which 'except as otherwise provided' might apply and which might extend the time limit for amending a return further than twelve months after the filing date.

31. However, the paragraph does not say what the Applicant hopes it might say. Paragraph 6 of Schedule 6B states:

> Adjustment for change of circumstances
> 6(1) This paragraph applies if—
> (a) relief under this Schedule is claimed for a relevant transaction,
> (b) an event occurs in the relevant period, and
> (c) had the event occurred immediately before the effective date of the transaction, more tax (calculated according to the effective date of the transaction) would have been payable, whether because the transaction would not have been a relevant transaction or otherwise.
> (2) If this paragraph applies, tax is chargeable on the transaction as if the event had occurred immediately before the effective date of the transaction.
> (3) In that case—
> (a) the purchaser must make a return to Her Majesty's Revenue and Customs before the end of the period of 30 days beginning with the date of the event,
> (b) the return must contain a self-assessment of the tax chargeable in respect of the transaction on the basis of the information contained in the return,
> (c) and

(d) the additional tax payable must be paid not later than the filing date for the return.

(4) The provisions of section 78A and Schedule 10 apply to a return under this paragraph as they apply to a return under section 76, but with references in Schedule 10 to the effective date of the transaction being read as references to the date of the event.

(5) "The relevant period" means the shorter of—

(a) the period of 3 years beginning with the effective date of the transaction, and

(b) the period beginning with the effective date of the transaction and ending with the date on which the purchaser disposes of the dwelling, or the dwellings, to a person who is not connected with the purchaser.

(6) In relation to a transaction effected on completion of a contract that was substantially performed before completion, sub-paragraph (5) applies as if references to the effective date of the transaction were to the date on which the contract was substantially performed.

(7) In this paragraph—

"completion" has the same meaning as in section 44;

"contract" includes any agreement (including, in the case of Scotland, missives of let not constituting a lease);

"event" includes any change of circumstance or change of plan;

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

(8) Section 1122 of the Corporation Tax Act 2010 (connected persons) has effect for the purposes of this paragraph.

32. In summary, paragraphs 6(1) and 6(5) of Schedule 6B provide for adjustments if circumstances change after a claim for MDR is made so long as: a) relief under the Schedule is claimed for a relevant transaction; b) an event occurs in the relevant period of the shorter of three years after the effective date of the transaction or the date on which the purchaser disposes of the dwelling(s); and c) had the event occurred immediately before the effective date of the transaction, more tax (calculated according to the effective date of the transaction) would have been payable. Pursuant to paragraph 6(3) of Schedule 6B the purchaser must make a return to HMRC within 30 days of the event in question, the return must contain a self assessment of the tax chargeable in respect of the transaction and the additional tax payable must be paid not later than the filing date for the return.

33. The Applicant submits that this is an example of where the wording in para 6(3) of Schedule 10 FA 2003 "*Except as otherwise provided,* an amendment may not be made more than twelve months after the filing date" could apply. The provisions allow for an adjustment if there is a change of circumstances. The change set out in paragraph 6 to schedule 6B would be a change to the benefit of HMRC, whereas a claim for overpayment relief would be a change in favour of the taxpayer. But both changes would be examples where the contentious wording would have an effect.

34. This is not arguably right for two reasons. First, paragraph 6(1) of Schedule 6B does not address amendments to returns already filed but to making fresh returns based on subsequent changes of event within three years which give rise to extra tax liabilities. Second, paragraph 6(4) replaces substitutes the 'effective date of transaction' with 'the date of the event [being the change in circumstances]' but it does not alter the time limits which flow from the filing date of SDLRs.

35. Paragraph 6 of Schedule 6B does not explicitly extend the permissible time for amending a land transaction return for the purposes of paragraph 6(3) of Schedule 10. Paragraph 6(4) of Schedule 6B does however stipulate that the provisions of Schedule 10 apply to a return under

paragraph 6 of Schedule 6B but with references in Schedule 10 to the effective date of the transaction being read as references to the date of the event. It does not extend the filing date for a return pursuant to section 76 of the FA 2003 (previously 30 days and currently 14 days from the effective date of the transaction) beyond the 30 days from the date of 'the event' (being the change in circumstances giving rise to additional tax becoming payable). It does not extend the date for the amendment of any return beyond 12 months.

36. Therefore, even if an adjustment return might be made up to 3 years after the date of a land transaction in the specified circumstances of paragraph 6(1) of Schedule 6B, paragraphs 6(4) & 6(5) do not extend time for the amendment of any return beyond a further 12 months after the filing date as provided under paragraph 6(3) of Schedule 10. In summary, paragraph 6 of Schedule 6B is not an example of an excepting provision contemplated by paragraph 6(3) of Schedule 10.

37. Further and in any event, it is not suggested for a moment that paragraph 6 of schedule 6B applies to the facts of this case – it is only relied upon as an example of an excepting provision. There is no suggestion that paragraph 6 of Schedule 6B assists the Applicant in this case.

38. The Applicant has not identified as part of this ground[2] any other relevant excepting provision which extends the time for amending a return provided in paragraph 6(3) of Schedule 10, nor one which is relevant to the facts of his case. The FTT was entitled to reject any argument that the Applicant could rely on the proviso as a general exception to the time limit where the Applicant argued he was subject to exceptional circumstances.

39. In its PTA Decision the FTT has already rejected this ground of appeal against the Decision for the reasons it gave at [4]-[11]. I agree with those reasons. I agree with the FTT that there is no arguable error of law in its reasoning and conclusion at [54]-[64] of the Decision. The Court of Appeal's decision in *Candy* provides strong support for the FTT's interpretation of paragraph 6(3) of Schedule 10 to the FA 2003 as it applies generally to land transaction returns in respect of SDLT and is not restricted to claims other than MDR claims.

40. Permission to appeal is refused on ground 1 as it does not raise any arguable error of law in the FTT's Decision.

Ground 2

41. The Applicant raised a second ground in his post hearing submissions based on the interplay between MDR and overpayment relief.

42. He relies on *Whitney v IRC* [1926] AC 37 at [37] ("*Whitney*"), Lord Dunedin said:

> "Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

[2] However the implication of his argument under ground 2 is that paragraph 34 of schedule 10 may be such an example where a claim by a taxpayer may be construed both as an amendment to a return and a claim for the relief of overpaid tax.

43. The Applicant submits that applying the principles described in *Whitney*, there are different stages in the imposition of tax, and that the question of whether a person is liable to tax is distinct from the process by which that tax may be assessed and recovered. Similarly, the question of whether a person is entitled to a relief is separate from the process by which that relief may be claimed.

44. He argues that overpayment relief, as set out in para 34 of Sch 10, was introduced by the Finance (No. 3) Act 2010 (subsequent to the contentious wording that these submissions relate to). The relevant provision that HMRC have relied on in para 34A(4) of Sch 10 to counter any claim to overpayment relief is case C which sets out when a claim for overpayment relief should fail where the claimant "*(b) knew, or ought reasonably to have known, before the end of that period that such relief was available*".

45. The Applicant's position is that the planning issues – which are recognised by HMRC in their guidance (sdltm29905[3]) outlined earlier – would have impacted on the Appellant's knowledge and, have removed him from having knowledge that the relief should apply.

46. The Applicant accepts that overpayment relief cannot be used to circumvent the time limit for a claim for MDR in all cases, the legislation has safeguards built in in the form of para 34A to limit those circumstances when the relief would be available. He argues that none of the denying provisions set out in Cases A-G in para 34A would apply to the Appellant's case such that he is entitled to overpayment relief.

38. Further, he argues that section 6(3) of Schedule 10 *"Except as otherwise provided, an amendment may not be made more than twelve months after the filing date."* He contends that overpayment relief, is envisaged as an excepting provision for the purpose of paragraph 6(3) of Schedule 10 and is a counter balance to paragraph 6 of Schedule 6B FA 2003 (in the sense that it may reduce the liability to tax payable to HMRC rather than increase it and may apply more than three years after the transaction in question). Accordingly, he argues that the interplay between para 34 and the excepting provision in para 6(3) "except as otherwise provided" allows for the extending of the 12 month time limit for making the claim to MDR in an amendment to a return. Given that the Applicant does not fall within any of the para 34A denying provisions, he submits that there would be no reason for HMRC to deny the relief requested by him in an amendment to a return.

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[3] HMRC's own guidance on MDR at sdltm29905[3] states:

The relief includes provision for "off-plan" purchases where construction or adaptation of the property for residential use may not have commenced by the effective date of the transaction.

HMRC consider "off-plan" to mean a purchase where the subject - matter of the contract is a dwelling that is to [be] constructed but construction has not started at the point the contract is substantially performed. This is distinct from an acquisition of bare land with planning permission but without an obligation to build a dwelling. MDR will apply to the former but not the latter.

The relief also provides for the tax calculation to be adjusted if the number of dwellings involved is reduced within three years of the effective date of the transaction.

[Emphasis added]

39. The Applicant argues that a claim for overpayment relief claim might be one of the excepting provisions contemplated in paragraph 6(3) of Schedule 10: that the excepting provision in paragraph 6(3) of Schedule 10 might be interpreted as permitting longer time limits for the making of an amendment to a return where such a claim may also be interpreted as a claim for overpayment relief pursuant to paragraph 34 of Schedule 10. Therefore the four year time limit (by virtue of paragraph 34B) for making an overpayment claim applies to an amendment to a return and falls within the excepting provision envisaged by paragraph 6(3) of Schedule 10.

Determination

40. For similar reasons to those set out above I refuse permission for the Applicant to argue the ground in this way that he advances it: overpayment relief pursuant to paragraph 34 of Schedule 10 is a separate claim which is to be claimed independently of making an amendment to return and claim MDR (even if entitlement to MDR might conceivably form the basis of a claim to overpayment relief – see *LLO* below).

41. Claims to overpayment relief are governed by an independent scheme provided in paragraphs 34-34E of Schedule 10, including differing qualifying conditions and denying provisions in paragraphs 34-34A (overpayment relief focuses on the payment or assessment to tax rather than claims to MDR which may be advanced when filing a return or amendment) and a differing time limit and prescribed manner in which overpayment relief may be claimed provided by paragraph 34B. Paragraph 34B(2) specifically states that the claim to overpayment relief may not be made in a land transaction return and the implication must be that it may not be made in an amendment to such a return.

42. This is in contrast to section 58D which states that the claim to MDR may only be made in a return or amendment. Therefore, overpayment relief is not expressly or implicitly provided to be claimable in an amendment to a land transaction return. Making a claim to overpayment relief cannot be conceptualised as being made in an amendment to a land transaction return pursuant to section 58D FA 2003 and paragraphs 6(1) and (2) of Schedule 10. Therefore, the claim to overpayment relief cannot be conceived of as an exception to the twelve month time limit for filing amendments contemplated by paragraph 6(3) of Schedule 10.

43. In any event, it would not assist the Applicant even if the relevant provisions of paragraph 34 on claims for overpayment relief could be interpreted as an example of a provision contemplated by the excepting provision in paragraph 6(3) on the deadline for amendments to returns. If the Applicant has made a valid claim for overpayment relief, then he would have made it in the time limit provided for overpayment relief claims, if he has not made a valid claim or does not qualify for overpayment relief then this could not assist in extending the time under paragraph 6(3) in which to make a claim to MDR.

44. The real question raised by this ground is whether the FTT erred in law in deciding that the Applicant had not made a valid claim for overpayment relief and did not qualify for overpayment relief.

45. The FTT made findings of fact and applied them to the law when considering these questions as part the third issue in the strike out application: whether the Applicant had made a valid claim to overpayment relief and whether he qualified for overpayment relief on the basis of entitlement to MDR. It stated relevantly as follows:

> '…
> 65. I turn finally to the possibility of applying the overpayment relief provisions in paragraph 34 of Schedule 10 to FA 2003.
> 66. Mr Warner submits that he can rely on paragraph 34 in order to be able to make his claim within a 4-year period, rather than 12 months and that his letter making the claim could be interpreted as being a paragraph 34 overpayment relief claim.
> 67. HMRC submits that paragraph 34 claims do not override other existing claims rules and that paragraph 34A(4) makes that clear.
> 68. I find that overpayment relief is not relevant in this case. A claim for MDR is not a claim for overpayment relief. The SDLT payable (I note that it was not in fact paid) by Mr Warner was the SDLT set out it in the returns. The avenue for him to reduce that amount through MDR was through an amendment to his returns in accordance with section 58D, not under paragraph 34.
> 69. In any event, if it could have been achieved using an overpayment relief claim, HMRC would have been within their rights to refuse it pursuant to case C because there is a time-limited means of making the claim but Mr Warner did not use it.
> 70. This is aligned with the decision of the First-tier Tribunal in *Secure Service Limited v HMRC* [2020] UKFTT 59.
> 71. Mr Warner raised matters that occurred after the purchase of the two plots of land, including the lender going into liquidation, depressed valuations of the land, delays in the local authority granting permission for the proposed development. I have seen this evidence and for completeness, I note that none of it is relevant to the question at hand, that is whether an appeal can proceed in this Tribunal.'

46. The FTT found that that the Applicant could not arguably rely upon the extended time period (4 years) under paragraph 34B of Schedule 10 in which to make an overpayment relief claim under paragraph 34.

47. First, the FTT found at [68] of the Decision that the claim of entitlement to MDR was not a valid claim for overpayment relief.

48. Second and alternatively at [69] the FTT found that the Applicant did not qualify for overpayment relief: HMRC were right to rely on paragraph 34A(4) of Schedule 10 and Case C as denying the grant of such relief. The FTT found that the Applicant could have sought relief within the period prescribed by taking such steps in a claim for MDR within a period that has now expired (see paragraph 34A(4)(a) of Schedule 10). It found that there is a time limited means of making the section 58D FA 2003 required a claim for MDR to be made in a return or an amendment to a return (within 12 months of the filing date).

49. I consider each of these two conclusions in turn.

50. I consider that it is arguable that the FTT erred in law in respect of each conclusion.

51. The first arguable error of law is that it is arguable that the Applicant's claim that he had overpaid tax by virtue of being entitled to MDR, notwithstanding the fact that the strict procedural requirements of claiming relief under section 58D of FA 2003 had not been followed such that there was no valid claim to MDR, might constitute a valid claim for overpayment relief based upon entitlement to MDR. This would be contrary to the FTT's finding at [68] that overpayment relief was not relevant.

52. It is arguable that the Applicant's letter of July 2018 might constitute a claim by the Applicant for overpayment relief for the purposes of paragraph 34. It is arguable that the procedural requirements under paragraph 34(1) and (2) of Schedule 10 and those in paragraph 11A were satisfied (a claim for relief for overpaid tax) and that entitlement to MDR could be relied upon as a ground even if the strict formal requirements for making a MDR claim for relief pursuant to section 58D FA 2003 were not so satisfied.

53. There is some support for this argument because Judge Redston considered this issue in *L-L-O CONTRACTING LTD & ors v Revenue & Customs* [2023] UKFTT 859 (TC) and held at [18]-[22]:

> '18. Issue 1(b) reads:
>
> > "If the answer to part (1)(a) is 'yes', whether, as a matter of law, an overpayment of SDLT can arise for the purposes of a claim for overpayment relief pursuant to paragraph 34 of Schedule 10, Finance Act 2003 from the purported availability of MDR, in light of the provisions of Section 58D(2) Finance Act 2003 and in the absence of a claim to MDR in a return or an amendment to a return."
>
> …
>
> 21. In my judgment, the answer to this issue can be found in paras 34 and 34A, which operate as follows:
>
> (1) A claim can be made under para 34 if a person believes they have overpaid SDLT, see Issue 1(a).
>
> (2) Para 34(3) then provides that HMRC do not have to consider claims which come under the Cases set out in para 34A,
>
> (3) Case A applies where "the tax paid is excessive" including where a taxpayer failed to make a claim or election, see para 34A(2).
>
> (4) The words "is excessive" only make sense if the SDLT has been overpaid. If, as HMRC submitted, in this situation there was no overpayment because by virtue of s 58D(2) the MDR was nil, the SDLT would not be "excessive".
>
> 22. I therefore decide Issue 1(b) in favour of the Appellants, and find that where a person has failed to claim MDR in accordance with s 58D(2), an SDLT overpayment can arise for the purposes of a claim for overpayment relief under para 34. The answer to Issue 1(b) is therefore "yes".'

54. This passage was considered by the UT in *HMRC v Daniel Ridgway* [2024] UKUT 36 (TCC) at [110]-[114] when deciding a separate point. *LLO* is the subject of an appeal to the Upper Tribunal which is to be heard in the second half of December 2024. It is also worth noting that the FTT in *LLO* went on to find that, notwithstanding the fact that entitlement to MDR might form a ground pursued in a claim for overpayment relief, it was nonetheless to be denied because of the failure to make the MDR claim. The appellant's failure to make a claim for MDR which it could have made in a return fell within Case A of paragraph 34A so, on that basis HMRC was not liable to give effect to the overpayment relief claim – this is the same conclusion reached in *Smith Homes 9 Ltd v HMRC* [2022] UKFTT 5 (TC) ("*Smith Homes*") at [81].

55. Even if the Applicant can demonstrate any error in the FTT's decision, there would be further significant hurdles for the Applicant to overcome in order for his claim to overpayment relief succeeding on the basis of entitlement to MDR.

56. As the FTT observed at [68] the Applicant had not actually paid any SDLT so that he could not qualify under paragraph 34(1)(a) as he had not paid an amount of tax which he could believe was not due. Furthermore, paragraph 34(1)(b) only permits a claim where "a person has been assessed as liable to pay an amount by way of tax, or there has been a determination to that effect, but the person believes that the tax is not due." The natural reading of this paragraph is it requires an assessment to be made by HMRC (under paragraphs 28 or 29) rather than a self-assessment (which is explicitly distinguished throughout Schedule 10).

57. There is some support for the strict interpretation of 'a person has been assessed' in paragraph 34(1)(b) by virtue of [70]-[80] of *Redmount Trust Company Ltd v Revenue and Customs* [2023] UKUT 68 (TCC). In that case the UT decided that the word 'assessment' in paragraph 31 of Schedule 10 did not include self-assessment. Given that the Applicant self-assessed his SDLT liability in the return, it may mean that he did not qualify to make a claim for overpayment relief under paragraph 34(1)(b). However, this point was not taken or argued before FTT and the interpretation of the word 'assessed' in paragraph 34(1)(b) is distinct from 'assessment' in paragraph 31(1) and may require clarification from the UT.

58. The second arguable error of law is that it is arguable that thereafter FTT failed to address how, if entitlement to MDR might be raised in a claim for overpayment relief, the overpayment claim fell within Case C so that the Applicant would be precluded from qualifying for the relief by virtue of paragraph 34A(4).

59. It is arguable that the FTT did not address how the claim for MDR fell within paragraph 34A(4)(b): it arguably made no findings that the Applicant knew, or ought reasonably to have known, before the period of twelve months following the filing date, that such a claim for relief as MDR was available. The Appellant had raised a number of factual circumstances (such as illness and subsequent planning decisions) that he relied upon as set out at [10(5)] and [71] of the Decision as explaining his late knowledge of and claim to MDR. It is arguable that these were relevant to his state of knowledge as to the availability of MDR. Mr Warner also emphasised in his oral submissions to me that the development in question was of a pro-social nature and was not primarily aimed at profit but community generation.

60. Furthermore, there is a further hurdle for the Applicant to overcome. HMRC did not rely on the denying provision in paragraph 34A(2) - Case A on the failure to make a claim - in this appeal before the FTT. This is a provision, that together with Case C has been considered by the FTT to deny overpayment relief in a number of cases in which MDR is relied upon – including *LLO, Smith Homes, Secure Service v HMRC* [2020] UKFTT 59 (TC) ("Secure Service") and *BTR Core Fund JPUT v Revenue and Customs [2024] UKFTT 885 (TC)*. However, as Case A in paragraph 34A(2) was not argued or relied upon before the FTT, I am not prepared to refuse permission to appeal in reliance on this provision.

61. Therefore, permission is granted on the Applicant's second ground of appeal as refined: that the FTT erred in concluding that the Applicant a) could not make a valid claim to overpayment relief based on entitlement to MDR; and b) did not qualify for overpayment relief pursuant to paragraphs 34 and 34A(4) of Schedule 10.

62. I take into account when granting permission that there are a number of decisions made by the FTT on the relationship between claims or entitlement to MDR and overpayment relief but as yet no binding decisions from the UT on the issue of which I am aware.

Ground 3

63. The Applicant further argues that section 3 of the Human Rights Act 1998 requires public authorities to interpret legislation in a way that is compatible with rights provided by the European Convention on Human Rights ('ECHR') – whether they are a court, tribunal or public authority.

64. The Applicant contends that Article 1 of the First Protocol to the ECHR guarantees the right to protection of property but accepts that it is a qualified right and Article 1, Protocol 1, permits taxation to be a lawful interference with the property rights of an individual. However, in interpreting the legislation (on MDR) he submits that the convention rights should be used to assist in interpretation, where there is more than one possible alternative, so as to avoid any unlawful or disproportionate interference with the right.

65. He argues that if he has no way of achieving what he submits is a fair or proportionate outcome, because he is suffering liability to pay tax that is not rightfully due, and the statute is capable of being interpreted in a manner which is compatible with the convention, then the court should adopt a conforming interpretation.

Determination

66. Article 1, Protocol 1 to the ECHR provides that: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.'

67. I am not sure that reliance on section 3 HRA 1998 adds anything to the second ground of appeal as refined, for which I have already granted permission which includes the proper construction of paragraphs 34 and 34A of Schedule 10 and their application to these facts. Nonetheless I grant permission to pursue this ground to the extent it aids the argument concerning the construction of paragraphs 34 and 34A of Schedule 10 to FA 2003 and application to these facts.

68. I refuse permission on this ground in so far as it is relied upon to assist the Applicant's interpretation of paragraph 6(3) of Schedule 10 to extend the scope of the excepting provision. I am satisfied that the interpretation of the paragraph as applied by the FTT, as I have endorsed above, was not in error and does not give rise to any unlawful interference let alone any disproportionate interference with the Applicant's Article 1, Protocol rights. In answering the four questions proposed by Lord Sumption in *Bank Mellat* [2013] UKSC 39 at [20], the imposition of a twelve month time limit for making amendments to the SDLT returns in this case pursuant to paragraph 6(3) of Schedule 10: (i) has an objective which is sufficiently important to justify the limitation of a fundamental right; (ii) it is rationally connected to the objective; (iii) a less intrusive measure could not have been used; and (iv) having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

69. I note the Court of Appeal's observations in *Candy* that a balance has to be struck between competing public interests. In this case they may be conceptualised as: the certainty and finality that procedural and administrative requirements such as statutory time limits impose on amendments to return (and thereby prescribing the way in which claims to relief from tax may be pursued therein) balanced against the collection of only that tax which is properly due.

70. The Court of Appeal at [50]-[51] of *Candy* has already given an indication that paragraph 6(3) of Schedule 10 to the FA 2003 strikes a fair balance which would apply to the fourth question in *Bank Mellat*. While *Candy* was also concerned in part with the different provision in section 44 rather than section 58D FA 2003 and took account the public interest in the reduction of tax avoidance, I am satisfied that the judgment provides authority for the conclusion that the provision in paragraph 6(3) does not create an unlawful or disproportionate interference with Protocol 1, Article 1 as applied to these facts in a claim for MDR. On the facts of this case, the time limits and procedural requirements imposed by paragraph 6(3) strike a fair balance between: the protection or peaceful enjoyment of private property rights by enabling the right of a taxpayer to make amendments to returns and claim reliefs from tax as against the public interest in the finality and certainty that procedural requirements impose on taxpayers in support of the collection of tax.

71. I also agree with the points made by the FTT Judge when refusing permission to appeal on the ground relating to the interpretation and application of paragraph 6(3) of Schedule 10:

> 9. I do not consider that this interpretation is overly restrictive, to the contrary, as I noted in paragraph 63 of the Decision, restricting the right to claim relief by means of a strict time limit is consistent with the granting of the relief, as provided in paragraph 51 of the *Candy* decision.
>
> 10. I also cannot agree that any difficulties caused by planning or other eventualities after the acquisition of property can be used as a basis for an argument that Parliament must have intended to provide a wide discretion. This is for two reasons. Firstly, SDLT is calculated at the effective date of the transaction by applying the law to the property acquired at that time - subsequent planning questions that may determine how many dwellings are to be built are not relevant to the SDLT payable on the acquisition of the property. The number of dwellings to be built after a property is built may be relevant to the SDLT chargeable on the subsequent sale of the property or properties.

Conclusion

72. Permission to appeal to the Upper Tribunal is **refused in relation to Ground 1 but granted in relation to Grounds 2 and 3 on the refined basis that I have outlined above**.

Important consequential matters

73. The Applicant is unrepresented and has worked hard to present his case. Equally, the Tribunal has demonstrated patience in both the listing and format of the permission hearing together with giving the Applicant a further opportunity to present written submissions after the hearing which should have been served well in advance of the hearing. The Tribunal also encouraged Mr Warner to speak to the HMRC officers in court after the hearing was concluded.

74. I also observe that the Applicant should not get his hopes up in respect of any substantive appeal succeeding. The grant of permission to appeal does not provide any guarantee that the

Applicant will be successful following the final appeal hearing – it simply means that the appeal holds a realistic prospect such that it is permitted to proceed to a full hearing.

75. Given the amount of money at stake in the appeal, the parties may wish to consider engaging with one another as to whether the matter can be settled without proceeding to a full appeal hearing.

76. I would also encourage Mr Warner therefore to seek free (pro bono) legal representation in this matter. He may wish to consult organisations such as Advocate, (formerly the Bar Pro Bono Unit), the Revenue Bar Association or the Free Representation Unit and give them a copy of this permission decision, in order to establish whether any of them will advise or represent him in any appeal.

77. The Applicant should also be aware that appeals to the Upper Tribunal are within a costs shifting jurisdiction. This means that the general rule (subject to the Tribunal's discretion to direct otherwise) is that the losing party to an appeal should pay the winning party's legal costs. That means that if the Applicant is unsuccessful at any final appeal, he may be ordered to pay HMRC's legal costs (which may be thousands of pounds and significant in comparison to the sum of money under dispute). In contrast, if the Applicant is successful on appeal, HMRC would be liable to pay his costs (if he remains a litigant in person (unrepresented) then costs are capped / limited).

78. In the event of the appeal proceeding and not being settled, the Applicant may wish to contact HMRC in advance to see if they will waive their right to seek their costs in this case if they are successful. They, of course, are under no obligation to do so.

Signed: **Date: 12 December 2024**
JUDGE RUPERT JONES
JUDGE OF THE UPPER TRIBUNAL