Constant clashing on mixed usage SDLT

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Stamp Duty Land Tax (SDLT) planning is important when buying a farm or selling part of farms "tax efficiently". SDLT has been both in the headlines and subject to mailshot by "ambulance chasing" tax advisers looking for SDLT refunds. The case of Henderson Acquisitions Ltd v HMRC [2023] (TC8922) is an example of advisers looking for refunds of SDLT following the Bewley (TC6951) case on what qualifies as a derelict/unsuitable building and therefore be able to claim the non-residential rate of SDLT.

The desire for purchasers of houses with land to claim "mixed usage" SDLT on "smallholdings"/large grounds seems insatiable, possibly fuelled by "pushy" tax advice. Many would see a lot of potential tax at stake and relatively "easy" rules to reduce the liability. At the "root" of the clarity on so many mixed usage claims has been the definition of "residential property" for SDLT.

FA 2003, s 116, sets out the criteria for a property to be deemed as 'residential property':

'(1) In this Part "residential property" means –
(a) A building that is used or suitable for use as a dwelling, or is in the process of being constructed or adapted for such use, and
(b) Land that is or forms part of the garden or grounds of a building within paragraph (a) (including any buildings or structure on such land), or
(c) An interest in or right over land that subsists for the benefit of a building within paragraph (a) or of land within paragraph (b);
'and "non-residential property" means any property that is not residential property.'

Where a purchase of property includes non-residential property, the purchase is treated as non-residential for SDLT rates. This is often referred to as 'mixed use'. It could therefore be argued the strength of the claim depends on the definition and "convincing" understanding of the non-residential element, generally a small area of farmland.

The woodland SDLT case of *How Developments* going to Upper Tribunal (UT) (*The How Developments Ltd v CRC* UT/2021/000065) is an example of how far buyers of such properties will go to stop what they clearly see as "spurious claims" for the mixed use rate. There have, however, been a flurry of other SDLT claims going all the way to tribunal, as expanded on below.

The case of Gibson

In *James George Gibson v HMRC* [2023] TC8869, the taxpayer, Mr Gibson, represented himself. He had bought a property in January 2019. It comprised two Land Registry titles – one was formed of a six bedroom house over two storeys, a double garage with an office/studio above it, a two bedroom self-contained barn, an outbuilding containing two stables and a tack room and a garden – altogether about

0.5 acres. The second title represented a paddock of about two acres. Mr Gibson submitted a SDLT return on the basis that the property was mixed use for SDLT. HMRC disagreed, saying the residential rate applied to the whole property. Mr Gibson then submitted a claim for multiple dwellings relief for SDLT which HMRC also rejected, and Mr Gibson appealed.

The First-tier Tribunal (FTT) noted there was no quantitative limit on the extent of the garden or grounds; likewise there was no requirement for it to provide reasonable enjoyment. The FTT found that the paddock and the office/studio were continuous with the 0.5 acres and all the buildings and structures within it. The sales particulars described the property as ‘a beautiful family home with self-contained barn nestling on the edge of this sought-after village with beautiful far-reaching views. It included the buildings, a garden and the paddock “in all about 2.44 acres”’. Once again this emphasises the importance of the contents of the sales brochure, which must be understood.

The tribunal were also of the view that the property was not available in lots but the two parcels of land were sold and bought together so as to provide an ‘appealing country residence’. The judge did not accept that the paddock had a commercial purpose for the provision of grazing, farming or horticulture and found there was no evidence that the paddock was exploited on a regular basis. It was decided that informal grazing by farmers in exchange for joints of lamb did not constitute a commercial agreement and reinforced the view that the paddock did not have a self-standing function. The impact of this case on farming is therefore important for advisers to understand.

On Mr Gibson’s multiple dwellings relief claim, the tribunal said Mr Gibson had failed to amend his return in time. He was therefore precluded from claiming the relief. The point on the swapping of food produce was useful from a farming point of view. For example, in *Suterwalla*, the First-tier Tribunal accepted that a paddock was commercial in nature as there was a formal grazing agreement with monies being received. Where farmers are proposing to sell houses with land they should ensure the land is being used commercially.

The case of Bloom

Another recent SDLT tribunal is *A J and D A Bloom* (TC8866). Mr and Mrs Bloom bought a property which had two registered titles. One was for a house, cottage, swimming pool, garage, stables and equestrian facilities. The other related to 5.6 acres of land on which was situated a sewage treatment plant which facilitated the property and ten neighbouring flats. A tennis court built by Mr and Mrs Bloom was at least partly on the land, although the evidence was unclear as to what extent. There was no history of the disputed 5.6 acres being separate from the property. Mr and Mrs Bloom claimed the property should be classified as mixed residential for SDLT. This was due to 1) the existence of the sewage treatment plant which emitted a repugnant smell which prevented them and their family from enjoying the land, 2) the legal and practical restrictions that the presence of the plant imposed on their residential use of the land and 3) the existence of the commercial arrangements under which they paid for, and were compensated by the owners of the neighbouring properties for the use of the plant. HMRC refused the claim and Mr and Mrs Bloom appealed. Whilst this case is not linked to farming it does highlight how purchasers are encouraged to make ludicrous claims.

Bloom – tennis court too close to repugnant smell

The FTT did not accept Mr and Mrs Bloom's argument that the presence of the plant converted the property from residential to non-residential. It decided that about 50% of the tennis court was wholly within the boundary of disputed land and said: 'Given the 5.6 acres available in which this tennis court could have been erected it did not seem credible that it had been placed so near to a septic tank if it "constantly" emitted a repugnant smell'. The Tribunal had problems accepting the extent to which the repugnant smell might make land 'unusable'. The judge said a well-managed and serviced septic tank plant should not 'constantly' emit pungent smells and noted that this one was serviced four times a year.

The Tribunal found that the agreement with the neighbouring owners was not commercial. It was instead a restrictive covenant which provided for the split of maintenance costs of the septic tank. The Tribunal also noted that the requirement for the tank was mandatory given the lack of mains sewerage drainage, another factor which led it to decide the land formed part of the gardens. The Tribunal ruled that the property was residential, so SDLT should be charged at residential rates as opposed to the non-residential rates. Mr and Mrs Bloom's appeal was dismissed.

The lack of scope for commercial or agricultural activity

Following on from the facts of the uncommercial agreement in *Bloom*, if we return back to consider the case of *How*, the lack of scope for commercial or agricultural activity in the woodland and the fact that it was part of The How's title, were deemed relevant matters to which the tribunals could reasonably consider and attach weight to, which it did.

Furthermore, while the UT in *How* noted the presence of legal restraints connected to the woodland (tree preservation orders), such restraints were not, and are not, unique to the woodland and The How alone, and did not prevent the former from constituting the 'grounds' of the latter. The only material point to note is that the UT determined that no weight should have been given (to the extent that it was by the FTT) to the initial SDLT return when The How was initially purchased. Where farmers are selling cottages with woodland there are strong arguments for ensuring that the woodland is commercial and there can be evidence of this.

The UT in *How Developments* did consider that the FTT made some errors of law:

- Taking into account the basis of the initial SDLT return;
- Relying on its own views concerning planning consent without affording the parties the chance to make submissions on the points;
- Failing to consider oral evidence; and
- In not giving reasons for concluding that the woodland needn't be accessible to be 'grounds' for SDLT purposes (although the latter failing was cured, having been argued on appeal).

This does show how complicated marginal submission can be and the need to ensure historic commerciality is important. Such work can also improve the woodland and provide an income stream.

The UT determined that location and density of the woodland was helpful in determining whether it was ‘grounds’ for SDLT purposes. It also took account of certain oral evidence from an agricultural and rural planning consultant which the FTT was seen as not having considered. This emphasises the key role of agricultural consultants. The consultant made the following comments:

- *The woodland was inaccessible from the property without the aid of industrial machinery, and was dangerous to access*. The UT dismissed this point – it had already been considered by the FTT in its decision.
- *The owner of The How could not exploit the woodland on account of tree preservation orders, nor could they use it differently to how members of the public could use it*. The UT referred to the decision in *Hyman* and underlined that grounds ‘being available to the owners to use as they wish’ did not mean active, ornamental or recreational use, and burdens on an owner’s enjoyment of grounds do not make them any less as part of the owner’s residence. As a result, the UT – on the strength of binding authority – said that third party rights do not prevent land from being ‘grounds’ for SDLT purposes.
- *The woodland could not be used for residential purposes, e.g. picnicking*. As indicated earlier, there was nothing in ‘grounds’ which required them to be ‘residential’.

Many reading this would consider that this was a lot of work over a very marginal case. Again, this emphasises the need for tax advisers to be very cautious of these types of cases. However, there are genuine cases where the non-residential rates apply as was shown by the case of *Gary Withers v HMRC* [2022] TC00433. The land was of greater size and the farming was genuine and evidenced.

Impact on farmers and smallholdings

There are smallholdings being sold that need to ensure the “function” can be proven. Where there are commercial arrangements, it is essential to have formal agreement for a formal activity not “barter” of farming products and real evidence of real farming.

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