

## An inverse argument (Lecture P1269 – 16.19 minutes)

The Upper Tribunal decision in *Hyman, Pensfold and Goodfellow v HMRC (2021)* relates to three separate appeals which raise the same point of law about the meaning and effect of S116 FA 2003. This provision contains, in S116(1) FA 2003, a definition of ‘residential property’ for SDLT purposes. Remember that the purchase of a property which is classified as ‘residential’ normally attracts a higher rate of SDLT than one which is ‘non-residential’.

It is worth quoting the salient part of the relevant subsection:

“Residential property” means:

- (i) 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
- (ii) land that is or forms part of the garden or grounds of a building within paragraph (i) (including any building or structure on such land); or
- (iii) an interest in or right over land that subsists for the benefit of a building within paragraph (i) or of land within paragraph (ii)

and “non-residential property” means any property that is not residential property.’

Each of the cases involved the purchase of a house together with a significant area of land:

- *Hyman*: land surrounding the property extended to 3.5 acres (1.42 hectares);
- *Pensfold*: land surrounding the property extended to 27 acres (10.93 hectares);
- *Goodfellow*: land surrounding the property extended to 4.5 acres (1.82 hectares).

It should be noted that, in all three of these acquisitions, the main residence relief limit of 0.5 of a hectare was comfortably exceeded. However, this is not a CGT dispute.

Para 2 of the case report summarises the tax position as follows:

‘It was in the interest of the taxpayers . . . to contend that some of the land sold (to them) together with the house was not, and did not form part of, the garden or grounds of the house. That question was determined by the First-Tier Tribunal (at three separate hearings in 2019), in each case adverse to the taxpayers. The taxpayers now appeal with the permission of the Upper Tribunal. The permitted ground of appeal in each case raises essentially one issue as to the interpretation of S116 FA 2003. The taxpayers contend that land can only be part of “the gardens or grounds of” the house if the land is “needed for the reasonable enjoyment of the dwelling having regard to the size and nature of the dwelling”.’

In other words, the taxpayers argued that some of the land surrounding their properties was not part of the ‘garden or grounds’, with the result that the purchase was not wholly residential in which case a lower rate of SDLT should have applied.

As might be expected, HMRC maintained that the entirety of the land on all three properties represented the ‘garden or grounds’ of each house.

An intriguing feature of this appeal is that the arguments are exactly the opposite of what would normally be expected in a CGT context. It would be customary for the vendor of a country house with substantial grounds attached to insist that all of the land was required for the reasonable enjoyment of the property so that his CGT main residence relief could extend to a larger area than 0.5 of a hectare (see S222(3) TCGA 1992). HMRC, on the other hand, would typically take a contrary view.

Here we have HMRC asserting that all the surrounding land was part of each house, while the taxpayers contended that a barn, a meadow, stables, a stable yard and a paddock were emphatically not part of the residential property.

As mentioned above, the First-Tier Tribunal found against all three SDLT payers and the two judges in the Upper Tribunal have confirmed these decisions. Remember that, as far as SDLT is concerned, there is no special area limit and no equivalent of the 'required for the reasonable enjoyment of the dwelling-house' let-out in FA 2003.

Despite the most recent judgment, there are some interesting extracts which can be picked out from the original hearings of the *Hyman* and *Goodfellow* cases. For example:

'In my view, "grounds" has, and is intended to have, a wide meaning. It is an ordinary word and its ordinary meaning is land attached to or surrounding a house which is occupied with the house and is available to the owners of the house for them to use. I use the expression "occupied with the house" to mean that the land is available to the owners to use as they wish. It does not imply a requirement for active use.' (*Hyman v HMRC (2019)*)

'Grounds need not be used for any particular purpose and can, as in this case, be allowed to grow wild. I do not consider it relevant that the garden or grounds are separated from each other by hedges or fences.' (*Hyman v HMRC (2019)*)

'It seems to us, looking at the character of the property as a whole, that the land surrounding the house is very much essential to its character, to protect its privacy, peace and sense of space and to enable the enjoyment of typical country pursuits.' (*Goodfellow v HMRC (2019)*)

How useful might any of these be in future CGT disputes? It should be emphasised that all three passages, although taken from First-Tier Tribunal decisions, were reproduced in full in the Upper Tribunal verdict which presumably indicates a positive level of approval by the two judges there. What will be really interesting is to see whether the boot is on the other foot when, in due course, the *Hymans* and the *Goodfellows* come to sell their respective properties!

There is one further matter which should be highlighted. The taxpayers' barrister had unsuccessfully argued that the test for SDLT should be the same as for CGT, even though S116(1) FA 2003 merely refers to 'land that is or forms part of the garden or grounds' of the property whereas S222(3) TCGA 1992 contains the additional condition that the land is 'required for the reasonable enjoyment of the dwelling-house'.

It is clear that this CGT requirement does not feature in the SDLT legislation which should put the point beyond dispute. However, in April 2003, HMRC had published a Statement of Practice (SP 1/03) dealing with a relief which distinguished between residential and non-residential property but which has since been abolished. In SP 1/03, which was relevant for stamp duty (SDLT not having yet come into being), HMRC said that the test which they would use in the context of residential

property was 'similar to that applied for the purposes of the CGT relief for main residences'. SP 1/03 went on to add:

'The land will include that which is needed for the reasonable enjoyment of the dwelling, having regard to the size and nature of the dwelling.'

SDLT was introduced towards the end of 2003 and, in the following year, a revised Statement of Practice (SP 1/04) was put out dealing with the same relief for SDLT purposes. The wording of the relevant part was essentially identical.

However, in 2019 (i.e. quite some time after the purchases effected by Hyman, Pensfold and Goodfellow), HMRC revised their guidance as to the operation of S116 FA 2003 and the current version does not refer to S222(3) TCGA 1992 and does not repeat the reference to the land being needed for the reasonable enjoyment of the dwelling. The reason for this is that HMRC now accept that their original view expressed in the Statements of Practice was incorrect.

When, for example, Mr and Mrs Hyman acquired their property near St Albans in October 2015 for £1,515,000, they paid the full amount of residential SDLT on this purchase which amounted to £95,550. Two years later, following advice from their agents, the Hymans claimed an SDLT repayment of £34,950, given that a barn and a meadow were not thought to be part of the garden or grounds of the house. HMRC did not agree to this repayment, despite the fact that the stated definition in the second Statement of Practice was still extant. This of course led to the appeal to the First Tier Tribunal which was heard in July 2019. Unfortunately, the point about SP 1/04 does not appear to have been raised at that juncture and, when the matter was raised before the Upper Tribunal, the judges asserted that words in a Statement of Practice could not be relied upon to alter the meaning of a statutory provision such as S116 FA 2003.

It was open to a Court or a Tribunal to say that the Statement of Practice or other guidance contained in the Stamp Duty Land Tax Manual was simply wrong.

They went on:

'It was submitted that the Statements of Practice and guidance prior to 2019 were wrong both as regards the suggested relevance of S222(3) TCGA 1992 and the suggested test that the land must be needed for the reasonable enjoyment of the house.'

This late change of interpretation does not show HMRC in a very favourable light. What about the Hymans' legitimate expectation that the legislation should be construed in line with HMRC's published guidance at the time? Why should they not be entitled to rely on those statements? As one tax expert recently commented:

'This is not an honourable position.'

*Contributed by Robert Jamieson*