Neutral Citation Number NCN: [2025] UKUT 00022 (TCC)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Applicant: Caleb Brandon Halstead	Tribunal Ref: **UT-2024-000083**
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. The Applicant, Mr Halstead, 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 27 September 2023 ("the FTT Decision").

2. The FTT Decision granted HMRC's application to strike out the Applicant's appeal based upon claims relating to his payment of Stamp Duty Land Tax ('SDLT') on his purchase of two properties.

The Background

3. The Appellant and his wife purchased two properties. The first ("the First Property") on 8 February 2016 and the second ("the Second Property") on 11 May 2018. SDLT returns were filed on 10 June 2018 and 9 March 2016 respectively.

4. Permission to appeal from the FTT Decision is sought only in respect of the Second Property.

5. On 13 October 2021, the Appellant wrote to HMRC (or "the Respondents") to request amendments into the SDLT returns and refunds on the basis that the visiting forces exclusion to SDLT applied under section 74A of the Finance Act 1960 ("FA 1960").

6. On 26 October 2021, the Respondents informed the Appellant that his request had been refused as the 12-month deadline to make an amendment to a return under paragraph 6(3) of Schedule 10 to the Finance Act 2003 ("FA 2003") had expired.

7. On 9 November 2021, the Appellant made a claim for overpayment relief ("the Claim").

8. On 17 January 2022, in response, the Respondents explained that "paragraph 34(3) and paragraph 34A of Schedule 10 FA 2003 make provisions for certain cases in which HMRC are not liable to give effect to a claim made under paragraph 34" and therefore that the Respondents were not liable to give effect to the overpayment relief claim in these circumstances.

9. However, on 18 February 2022, the Respondents noted that they would refer the claim as regards the Second Property to "colleagues in SDLT compliance and they will contact [the Appellant] to discuss the validity of [his] claim".

10. On 29 March 2022, the Respondents opened an enquiry into the Claim as regards the Second Property.

11. On 7 June 2022, the Respondents issued a closure notice as regards the enquiry into the Claim. The conclusion was in essence that the Claim must fail automatically as a result of paragraph 34A(2)(b) of Schedule 10 to the Finance Act 2003. They decided that they were not required to give effect to the Claim and stated as follows: "In your case, the amount to be paid is excessive by reason of the mistake consisting of failing to make a claim as required by Section 74A(3) [FA 1960]…".

The FTT Decision

12. The FTT Decision followed a hearing which was conducted by video on 5 September 2023.

13. The FTT Decision regarding the First Property is not challenged in this application.

14. The FTT decided two issues in respect of the Second Property, one procedural and one substantive.

13. On the substantive issue, the FTT decided that the Applicant was not entitled to any exclusion from SDLT on the two properties he purchased because section 74A Finance Act 1960 did not confer any exclusion on individual members of visiting armed forces purchasing personal properties. It found that the 'visiting forces exclusion' applied only collectively to visiting forces and was not available to individual members for the purchase of personal or private homes - see [49]-[61] of the Decision.

14. The Decision on this substantive issue is the subject of the second, third and fourth grounds of appeal in this application.

15. On the procedural issue, the FTT found that the appeal in relation to amendment of the return in respect of the Second Property and overpayment relief in respect of both properties had no prospect of success let alone a reasonable prospect of success for the purposes of Rule 8(3) - see [89]-[107] of the Decision. It summarised its reasoning at [105]-[106]:

> 105. If either purchase had met the conditions for an SDLT exclusion which, of course, is disputed, Mr Halstead would be unable to attain the relief or attain repayment of the tax allegedly "overpaid" so an appeal would fail.

106. The reasons why it would fail would include:-
(a) In terms of section 74A(3) FA 60, the relief "must be claimed in a land transaction return or an amendment of such a return".
(b) No relief was claimed for either property in the claims.
(c) The purported amendments in M1 were very far outside the deadline for valid amendments and are therefore invalid. In any event they were not, and could not have been, in the return(s).
(d) Paragraph 34A Schedule 10 FA 03 lists a number of Cases and if a claim for overpayment relief falls within any of those Cases, then HMRC are not liable to give effect to that claim.
(e) Case A applies. Although Mr Halstead claims that the solicitors made the error in not claiming relief, Case A does not distinguish between who makes the error; it is only a question as to whether there was an error. Therefore, even if he were in principle entitled to relief in terms of section 74A FA 60, the relief was nevertheless not claimed validly in terms of section 74A(3).
(f) Mr Halstead has consistently argued that longer limitation periods applied or that there is no limitation because of the operation of international law. I have already addressed international law and the HMRC manuals.
(g) In their letter of 17 January 2022, HMRC were correct to point out that section 39 of the Limitation Act 1980 provides that that Act cannot apply where a period of limitation is included in any other legislation. Paragraph 34 Schedule 10 FA 03 prevents the Limitation Act 1980 from applying so, in summary, the time limits in FA 03 apply.
(h) Given that he does not meet the statutory time limits he would still have a problem in establishing that there is an SDLT exclusion available to individual personnel in the Visiting Forces. For the reasons given, there is not.

16. The Decision on the procedural issue identified in [106](d) & (e) is the subject of the first ground of appeal in this application.

The application for permission to appeal to the UT

17. By a decision dated 26 June 2024 ("the PTA Decision"), the FTT refused permission to appeal to the UT on the grounds of appeal pursued by the Applicant. The Applicant renewed his application to the UT for permission to appeal in-time on 28 June 2024. The Applicant relied upon grounds of appeal in documents dated 10 October 2023, 27 June 2024 and 28 June 2024.

18. I refused permission to appeal to the UT on the papers in a decision dated 24 September 2024. The Applicant requested that permission to appeal to the UT be reconsidered at an oral hearing.

19. On 9 January 2025 I held a hearing by video (CVP) of the renewed application for permission to appeal to the UT. The Applicant was represented by Mr Vallis of counsel and HMRC were represented by Mr Winter of counsel. I am very grateful to them both for the quality of their submissions. I have also taken into account all the written material and submissions made on behalf of the Applicant following the hearing and received on 14 January 2025 which I have considered with care even though I have not found it necessary to refer to each and every argument.

UT's jurisdiction in relation to appeals from the FTT

20. 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.

21. 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.

22. The determination of the FTT which is challenged, to strike out the Applicant's appeal, is a case management decision. In order to set aside or interfere with a case management decision, the appellate court or tribunal must be satisfied that the decision of the first instance court or tribunal is 'plainly wrong' or 'unjustifiable'. This is a high threshold.

23. In *HMRC v Ingenious Games LLP* [2014] UKUT 0062 (TCC), Sales J (as he then was) stated at [56]:

> "*The proper approach for the Upper Tribunal on an appeal regarding a case management decision of the FTT is familiar and is common ground. The Upper Tribunal should not interfere with case management decisions of the FTT when it has applied the correct principles and has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the Upper Tribunal is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the FTT: Walbrook Trustees v Fattal [2008] EWCA Civ 427, [33]; Atlantic Electronics Ltd v HM 18 Revenue and Customs Commissioners [2013] EWCA Civ 651, [18]. The Upper Tribunal should exercise extreme caution before allowing appeals from the FTT on case management decisions: Goldman Sachs International v HM Revenue and Customs Commissioners [2009] UKUT 290 (TCC), [23]-[24].*

24. In *BPP Holdings & ors v HMRC* [2017] UKSC 55, the Supreme Court had to consider whether a barring order made by the FTT against HMRC for a failure to comply with directions was justified. Per Lord Neuberger at [33]:

> '*…the issue whether to make a debarring order on certain facts is very much one for the tribunal making that decision, and an appellate judge should only interfere where the decision is not merely different from that which the appellate judge would have made, but is a decision which the appellate judge considers cannot be justified. In the words of Lawrence Collins LJ in Walbrook Trustee (Jersey) Ltd v Fattal [2008] EWCA Civ 427, para 33:*
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> > *"[A]n appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."*

In other words, before they can interfere, appellate judges must not merely disagree with the decision: they must consider that is unjustifiable.'

[Emphasis Added]

25. Nonetheless, out of an abundance of caution where a substantive error of law is being pursued, I will apply the standard permission threshold (whether there is a material and arguable error of law in the FTT's Decision such that the appeal to the UT holds a realistic prospect of success) in determining this application.

The grounds of appeal

26. The Applicant filed grounds of appeal in documents dated 10 October 2023, 27 June 2024 and 28 June 2024. The grounds of appeal were lengthy and repeated many of the same submissions that were made to the FTT but rejected. I rejected each of these grounds for the reasons given in my decision refusing permission on the papers on 24 September 2024.

27. In support of the renewed permission application Mr Vallis filed a skeleton argument on 6 January 2025 which was dated 3 January 2025. He relied on four grounds of appeal by which he respectfully submitted that the FTT made the following four errors of law:

i. the FTT erred in finding that HMRC, having opened an enquiry into the claim for overpayment relief, must automatically, without even considering the substance of the claim, conclude that the amount claimed is excessive as it fell within Case A (see paragraph [106(d)] of the Decision) and therefore that the Appellant does not have "a realistic prospect of success which carries some degree of conviction" (see [104]) of appealing against the conclusions of the closure notice. The FTT failed to recognise that HMRC, having opened an enquiry, were required to consider the substance of the claim;

ii. the FTT erred in finding that the relief was not available to individual members of a force;

iii. in any event, the FTT erred in its interpretation of section 74A, FA 60 in restricting its analysis to whether it can be read as conferring an exclusion on individuals, where the test in fact requires an analysis of the purpose of the relevant transaction (and not who carried it out);

iv. the FTT erred in failing to consider the argument raised by the Appellant as regards The Visiting Forces and International Military Headquarters (NATO and PfP) (Tax Designation) Order 2012.

Discussion, Analysis and Decision

28. I refuse permission to appeal on the Applicant's four grounds of appeal as they hold no realistic prospects of success. They do not raise any materially arguable errors of law in the FTT Decision.

29. I address in turn the four grounds of appeal contained in the skeleton argument dated 3 January 2025, as developed during the hearing, by which the Applicant challenges the FTT Decision on the procedural and substantive issues identified above.

Ground 1 – the procedural issue

Legislative background

Schedule 11A on claims made outside a return

30. Claims can be made outside a return under schedule 11A to the FA 03.

31. HMRC must give effect to a claim as soon as practicable after the claim is made by virtue of para 6(1), schedule 11A, FA 03. This is subject to para 6(2), schedule 11A, FA 03 which specifies that HMRC shall not give effect to a claim where HMRC enquire into a claim, until the closure notice is issued, at which point HMRC shall give effect to amendments made by a closure notice (see para 13, schedule 11A, FA 03).

32. HMRC can enquire into a person's claim under para 7, schedule 11A, FA 03. However, they are under no obligation to do so.

33. HMRC are required, when they close their enquiry (by para 11(2)(b), schedule 11A, FA 03) to consider whether "the claim is insufficient or excessive". If, in HMRC's opinion, having opened enquiry, the claim is insufficient or excessive, HMRC must amend the claim so as to make good or eliminate the deficiency or excess (see para 11(2)(b), schedule 11A, FA 03).

34. Within 30 days of making an amendment under para 11, HMRC must give effect to the amendment by making an assessment where necessary or by discharge or repayment of tax (see para 13(1), schedule 11A, FA 03).

35. An appeal may be brought against "a conclusion stated or amendment made by a closure notice" – see para 14, schedule 11A, FA 03, which also provides that para 36A schedule 10, FA 03 applies to such appeals. Para 36G schedule 10, FA 03 applies to cases where para 36A applies (see para 36D(1) and 36D(5)). It provides at (4) that: "If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question." Para 14(6), schedule 11A, FA 03 provides that the Tribunal, having decided the matter in question, may then vary the amendment accordingly: "On an appeal against an amendment made by a closure notice, the tribunal may vary the amendment appealed against whether or not the variation is to the advantage of the appellant."

36. If the FTT should vary an amendment, para 13, schedule 11A, FA 03 then applies "in relation to the variation as it applied in relation to the amendment" (see para 14(7), schedule 11A, FA 03).

Schedule 10 – overpayment relief

37. A claim for relief for overpaid tax is made pursuant to para 34(1), schedule 10, FA 03. It 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."

38. Paragraph 34(2) provides:

"(2) The person [who has overpaid tax] may make a claim to the Commissioners for Her Majesty's Revenue and Customs for repayment or discharge of the amount."

39. Paragraph 34(3) provides for exclusions by which HMRC is not liable to give effect to overpayment relief claims: "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."

40. Paragraph 34A(1) schedule 10, FA 03 provides: "The Commissioners for Her Majesty's Revenue and Customs are not liable to give effect to a claim under paragraph 34 if or to the extent that the claim falls within a case described in this paragraph."

41. One of the "cases" described in para 34A(2), , is case A:

> "Case A is where the amount 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".

Applicant's argument

42. In summary, Mr Vallis submits that if a taxpayer should make a claim for overpayment relief (under para 34, schedule 10, FA 03), para 6, schedule 11A, FA 03 provides that the taxpayer is entitled to a repayment as soon as practicable after the claim is made. This automatic right is subject to para 34A, schedule 10, FA 03, which sets out the circumstances (or cases) where claims for overpayment relief do not automatically give rise to a liability on HMRC. Indeed, para 34(2) and (3), schedule 10, FA 03 provide that:

> "(2) The person [who has overpaid tax] 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."

43. He argues that this wording does not prevent someone from making a claim where the cases in 34A apply. Rather, subparagraph (2) makes clear that such a person may make a claim and subparagraph (3) specifies that such claims do not automatically give rise to a liability on HMRC to give effect to the claim.

44. Subparagraph 34(6) of schedule 10 goes on to set out that this is subject to schedule 11A (i.e. which contains the paragraphs as regards closure notices, and giving effect to amendments etc):

> "34(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."

45. Mr Vallis submits that if HMRC should open an enquiry into the claim and issue a closure notice, HMRC are bound to give effect to the amendments made in the closure notice as per para 13, schedule 11A, FA 03. The legislation operates in such a way that the "cases" in para 34A are no longer relevant once an enquiry has been opened. The same applies if the FTT should vary an amendment to a claim.

46. He contends that the above analysis contrasts with the FTT's interpretation of the law. The effect of the FTT Decision was that an appeal against the closure notice in respect of the Second Property would fail because HMRC were bound, by virtue of para 34A, to deem the claim excessive without even considering the claim. This is an error of law. There is nothing in the legislation which says this. On the contrary, he argues:

> i. as set out in the proceedings paragraphs, subparagraphs 34(2) and (3) of schedule 10, FA 03 make clear that a taxpayer may indeed make a claim even where the cases in para 34A apply – the only effect of 34A is that HMRC are automatically not liable to give effect to it;
>
> ii. para 6(2)(a), schedule 11A, FA 03 provides that para 6(1) (which gives rise to a taxpayer's automatic entitlement to a repayment following a claim, which itself is then subject to para 34A, schedule 10, FA 03) only applies subject to paragraph 13, schedule 11A, FA 03, which provides that HMRC must give effect to amendments made by closure notices and FTT variations.

47. If HMRC elect to open an enquiry into a claim (which they are under no obligation to do but did so in this case), they become required to consider only whether "the claim is insufficient or excessive" (para 11(2)(b), schedule 11A, FA 03).

48. In conclusion, Mr Vallis argues that the exclusions in paragraph 34A of Schedule 10, which mean that HMRC are not liable to give effect to a claim for overpayment relief, only operate when no enquiry has been opened by HMRC but once an enquiry is opened HMRC can no longer rely on the exclusions provides such as provided in Case A contained in paragraph 34A(2).

49. Mr Vallis submits that once an enquiry is opened by HMRC into the overpayment relief claim it is too late for HMRC to consider whether there is a provision under paragraph 34A of Schedule 10 which might apply to exclude the claim to overpayment relief and this is not a matter which can be determined in the closure notice. Once an enquiry is opened, HMRC are bound to give effect to the substance of the claim and decide it on the merits.

50. He relies on the distinction between liability to tax and its assessment in *Whitney v IRC [1926] AC 37 ("Whitney")* at [37]. He submits that a taxpayer can make a claim for overpayment relief where they have "been assessed as liable to pay an amount by way of tax…but the person believes that the tax is not due" (see para 34, schedule 10(b), FA 03). Therefore, it follows that, in considering whether a claim is excessive as part of an enquiry, HMRC should consider the first stage, i.e. the liability stage.

51. In other words, the FTT misinterpreted the law in failing to recognise that HMRC were required, by virtue of para 11(2)(b), schedule 11A, FA 03, to consider whether the Applicant's claim for overpayment relief was excessive taking into account, not whether the claim was properly made (including whether it was claimed in the return), but whether the Applicant was

entitled to the relief in the first place (i.e. whether section 74A(2) FA 60 applies to the transaction).

52. Mr Vallis contends that this means that only the substance of the overpayment relief claim can be considered for the purposes of deciding whether the claim is insufficient or excessive for the purpose of para 11(2)(b) of Schedule 11A: ie. HMRC can only decide the following question in its closure notice "did the Appellant overpay SDLT?"

Discussion and Analysis

53. I reject this ground as holding no realistic prospects of success for the five reasons that Mr Winter submitted.

54. The FTT did not err in law in deciding that the claim to overpayment relief was not available to the Applicant despite the fact that HMRC had opened an enquiry into the Claim.

55. There was no error in the FTT accepting that HMRC were exempt from giving effect to overpayment relief by virtue of paragraph 34A as it did at [99]-[103] and 106(d) and (e) of the FTT Decision notwithstanding the fact that HMRC had opened an enquiry into the Claim. The Applicant does not dispute that the exclusion under Case A in paragraph 34A(2) does apply to his case.

56. The Applicant's statutory interpretation holds no realistic prospects for the five reasons submitted by Mr Winter:

a) Paragraph 34A is the key provision. It is extremely broad and intended to deny overpayment relief where the cases set out in para 34A apply. By virtue of paras 34(3) and 34A(1) – HMRC are not liable to give effect to overpayment relief claims in specified circumstances. The more specific provision in paragraph 34A of schedule 10 relating to claims for overpayment relief should be given priority over the general wording in schedule 11A relating to claims made outside returns. The requirement for HMRC to give conclusions on claims in closure notices and decide whether to make amendments pursuant to paragraph 11 of Schedule 11A does not prohibit para 34A applying. If there is any tension between the wording of para 34A of schedule 10 and para 11 of schedule 11A, then the particularity in para 34A prevails;

b) In any event, there is no tension in the language used in the relevant paragraphs in schedules 10 and 11A. Schedule 11A provides general rules for claim outside a return. Para 11(2)(b) of schedule 11A provides that a closure notice must 'if in HMRC's opinion the claim is insufficient or excessive amend the claim so as to make good or eliminate the deficiency or excess'. The claim for overpayment relief can be read as being 'excessive' for the purposes of paragraph 11(2)(b) of Schedule 11A if the underlying relief should not be given effect to by virtue of one of the exclusions in paragraph 34A, schedule 10 applying. The claim for overpayment relief is excessive because HMRC is not liable to give effect to it by of paragraph 34(3) and paragraph 34A of schedule 10. This statutory construction does not involve stretching the language in paragraph 11(2)(b) of schedule 11A beyond what it can reasonably bear.

In any event a purposive construction is justified by virtue of the two further considerations below;

c) It would be an absurd construction that meant HMRC would be denied the full and clearly drafted exclusions from granting overpayment relief that are imposed under paragraph 34A of schedule 10 simply by them opening an enquiry into a return. The opening of an enquiry, which includes an investigation into the substantive and procedural merits of a claim, should not undermine the clear statutory purpose that HMRC should not be giving effect to overpayment relief claims where the exclusions apply;

d) The Applicant's interpretation of schedules 10 and 11A could also lead to perversity and a denial of access to justice. HMRC would only be able to rely on the exclusions in paragraph 34A of schedule 10 before opening or if they never opened an enquiry. If HMRC never open an enquiry into an overpayment relief claim they will never issue a closure notice or make an amendment to a claim and there is then no jurisdiction for the taxpayer to appeal HMRC's reliance on the exclusion to the FTT. That is what HMRC originally attempted to do in its decision on 17 January 2022 before opening an enquiry on 18 February 2022. Paragraph 14 of Schedule 11A only creates a jurisdiction to appeal to the FTT against the conclusions on closure notices and amendments made pursuant to paragraphs 11 and 13. If there is no enquiry (and hence no closure notice) and HMRC rely on a paragraph 34A exclusion but there is a genuine dispute as to whether the exclusion applied (in this case there is no dispute that Case A applies) the taxpayer would have no right of appeal to challenge HMRC's decision. The taxpayer could only judicially review HMRC's decision (at time and cost) and the court's jurisdiction over HMRC's decision that the para 34A exclusion applies would only be supervisory.

It would be perverse if HMRC could only rely on the paragraph 34A exclusions such as Case A if they do not open enquiry and where there would then be no right of appeal against whether they are right to rely on the exclusion. On the Applicant's interpretation, HMRC could refuse to give effect to a claim based upon their own mistake of fact or law as to whether an exclusion applies but the taxpayer would have no right of appeal against this because no enquiry had been opened nor closure notice issued.

I also accept Mr Winter's point, although not directly relevant to statutory construction, that in practice HMRC do and should open enquiries when seeking to rely on the paragraph 34A exclusions (although they did not initially do so in this case) because this is the instruction to HMRC officers in their manual SACM12070. Thereby a right of appeal for the taxpayer is preserved.
"SACM12070 - Overpayment relief:
Exclusions: Overview
Overpayment relief is not available if one of the exclusions listed in the legislation applies. The exclusions are called cases. If you consider an exclusion applies, you must open an enquiry into the claim"; and

The provisions of schedules 10 and 11A are to be interpreted as permitting HMRC to rely on the exclusions in paragraph 34A, schedule 10, after they have opened an enquiry under para 7 of schedule 11A and in a closure notice under paragraph 11. On issuing a closure notice pursuant to paragraph 11(2)(b), schedule 11A, HMRC may reject a claim for overpayment relief as being excessive because HMRC are not liable to give effect to the claim by virtue of one of the exclusions in paragraph 34A of schedule 10 applying. After opening an enquiry on a claim for overpayment relief in relation to SDLT and in issuing a closure notice, if the paragraph 34A exclusions do not apply, then HMRC should go on to consider the substantive merits, accepting or rejecting the claim and concluding whether it is insufficient or excessive.

e) In any event, even if there were any error of law in the above statutory construction, it would not give rise to a material error of law in the FTT's Decision. Even if I am wrong in confirming the FTT's statutory construction, for the reasons set out below, the FTT made no arguable error in deciding that the visiting forces relief provided by section 74A did not apply to the Applicant's case. The prospects of the first ground of appeal succeeding would only be material if the Applicant could also persuade the UT that there were realistic prospects in any of grounds 2-4 also succeeding. I am not satisfied that there is any realistic prospect of any of those grounds succeeding for the reasons I set out below. There was no arguable error in the FTT Decision that the Applicant was not entitled to any overpayment relief based upon the substantive merits of the Claim.

57. I refuse permission to appeal on ground 1.

Grounds 2 and 3 – the substantive issue

The Legislation

58. Section 74A FA 60 provides that:

> *74A.— Visiting forces and international military headquarters (stamp duty land tax exemptions)*
>
> (1) This section has effect with a view to conferring exemptions from stamp duty land tax corresponding to exemptions applicable in the case of Her Majesty's forces in relation to any visiting force of a designated country. In this section "a force" means any such visiting force.
>
> (2) A land transaction entered into with a view to building or enlarging barracks or camps for a force, or to facilitating the training in the United Kingdom of a force, or to promoting the health or efficiency of a force, is exempt from charge for the purposes of stamp duty land tax.
>
> (3) Relief under this section must be claimed in a land transaction return or an amendment of such a return.
>
> (4) Subsection (2) of this section has effect in relation to any designated [international military] headquarters as if–
> (a) the headquarters were a visiting force of a designated country;
> (b) the members of that force consisted of such of the persons serving at or attached to the headquarters as are members of the armed forces of a designated country [.]
> [...]

(5) For the purposes of this section–[...]
(c) "visiting force" means any body, contingent or detachment of [a] country's forces which is for the time being or is to be present in the United Kingdom on the invitation of Her Majesty's Government in the United Kingdom; […]

The FTT Decision

59. The FTT Decision on this issue records at [49]-[61]:

"49. The second is whether section 74A FA 60 can be read as conferring an exemption on individual members of the Visiting Forces.

50. Although Mr Halstead has referred to, and relied upon, section 74 FA 60 (see paragraphs 19 and 27(g) above), that was repealed by paragraph 10(1) Schedule 39 Finance Act 2012. However, it is worth looking at and it reads:-

> "74 Visiting forces and allied headquarters (stamp duty exemptions)
> (1) Subsections (2) to (4) of this section shall have effect with a view to conferring exemptions from stamp duty (corresponding to exemptions applicable in the case of Her Majesty's forces) in relation to any visiting force of a designated country, and in those subsections "a force" means any such visiting force as aforesaid.
>
> (2) There shall be exempted from all stamp duties any contract, conveyance or other document made with a view to building or enlarging barracks or camps for a force, or to facilitating the training in the United Kingdom of a force, or to promoting the health or efficiency of a force….".

51. As can be seen, its provisions have been very largely carried over into section 74A FA 60. The word "allied" has been replaced by the words "international military". It does not refer to individual members and it does not refer to private homes. Nor does section 74A FA 60.

52. Prior to the repeal of section 74 FA 60, HMRC published what I have referred to as the Proposal. I described it as such because that is what it is. It most certainly is not a "HMRC Guidance Memorandum" (see paragraph 40 above) as Mr Halstead argued. Furthermore, the quotations from the Proposal cited by HMRC (see paragraph 39 above) appear in the section headed "Detailed Proposal". I find that those quotations make it explicit that the SDLT exemption relates to headquarters and not to private homes. The other amendments that were proposed (and ultimately enacted) apply to the individual members of the Visiting Forces.

53. The Detailed Proposal follows on from a description of the background. Importantly that states that:-
(a) The measures will affect EU military forces and EU civilian staff, and
(b) The measures ensure that those forces and staff will receive the same tax privileges as those that apply to visiting NATO forces.

54. Schedule 1 made it clear that the substantive change in relation to SDLT was to replace the word "allied" with the words "international military". The Explanatory Note stated that the purpose was to bring the treatment of EU forces and staff into line with the "tax treatment already given" to NATO forces and civilian staff. Under the heading "Details of the Schedule" paragraph 2 reads:
"Paragraph 1 amends section 74A of the Finance Act (FA) 1960 so that the section applies an exemption from Stamp Duty Land Tax (SDLT) not just to land transactions in respect of a NATO headquarters, but also to land transactions in respect of any international military

headquarters designated under an Order in Council. It also deletes the redundant subparagraph 4(c)."

55. Section 74A FA 60 has been in force since 1 December 2003. It can be seen that "visiting force" is clearly defined in section 74A(5)(c) and nowhere in the section is there reference to the individual members of a Visiting Force. For the avoidance of doubt that definition is directly derived from section 12(1) of the Visiting Forces Act 1952.

56. There is no doubt that the Secretary of State for Defence is a Minister of the Crown and therefore, in terms of section 107 Finance Act 2003, any purchases of land, which would obviously be "institutional", for the British armed forces would be exempt from SDLT. Therefore in terms of section 74A(1) FA 60 the exemptions extended to Visiting Forces must correspond to the exemptions applying to the British armed forces, ie it must be at the same level.

57. That also makes sense when looking at the provisions of section 74A(2) FA 60 which refers to barracks and camps. Legislation has to be read as a whole and in context. Mr Halstead is not correct to rely only on the clause in that subsection referring to promoting the health or efficiency of a force. I apply the same rationale to SDLTM29630 (see paragraphs 17 and 18 above).

58. Whilst I have carefully considered all of Mr Halstead's arguments on the Proposal and the wording of section 74A FA 60, nevertheless I cannot accept that the exemption from SDLT extends to individual members of NATO or EU forces. It never has done.

59. The wording of the section itself is clear and there is no need to look behind it. However, the Proposal, upon which Mr Halstead relies not only does not assist him but it makes it very clear that the changes in 2012 related only to "headquarters".

60. HMRC are correct in arguing that the Proposal makes it clear that section 74A FA 60 applies only to headquarters and not to the military personnel of any forces. That has always been the case.

61. That should be the end of the matter, since on that basis there would be no SDLT exemption for individual members of any armed force, but in case I am wrong in that, I must look at the other issues."

The Applicant's argument

60. Mr Vallis argues that the FTT was wrong to find that the visiting forces exemption in s.74A(2) of FA 60 needed to refer expressly to individuals or private homes in order for it to apply to the Applicant.

61. He submits that the exemption provided in s.74A(2) applies to the Applicant's acquisition of the Second Property because it was: "A land transaction entered into with a view … to promoting the health or efficiency of a force" and therefore it was "exempt from charge for the purposes of stamp duty land tax." This argument was made to the FTT during the hearing and as part of the grounds of appeal to the FTT.

62. Mr Vallis contends that when the legislation refers, for example, to "promoting the health…of a force", this is clearly a reference to the health of the individuals of a force: a force, itself, does not have "health," except in a metaphorical sense. He submits that the Appellant's purchase of the second property was with a view to promoting the health of a force because it

promoted the health of the Applicant, a member of the visiting force. Having a home or a residence inevitably promotes the health and efficiency of a member of the force (it provides accommodation which inevitably promotes their health, wellbeing and efficiency) and hence the force as a whole.

63. He argues that the FTT's analysis at [49]-[61] of the Decision involved two errors of statutory interpretation. First, the language of the legislation does not place a restriction on those whose transactions may be subject to the exemption from stamp duty land tax ie. that they need not be corporate or collective entities rather than individuals. The exemption does not restrict who can rely on the exemption: it can be relied upon by anyone as long as the transaction satisfies the test that it was "entered into with a view to [achieving certain aims as set out]".

64. Second, it is the purpose of the transaction, rather than the person who carries it out, which determines eligibility for the relief. Rather than considering the purpose of the transaction, the FTT focused entirely on whether "section 74A FA 60 can be read as conferring an exemption on individual members of the Visiting Forces" (see [49]).

65. Mr Vallis submits that the correct approach should have been to apply the legislation to the facts (although the facts were yet to be established because the matter had not even been allowed to progress to a substantive hearing). It was therefore inappropriate to strike out the appeal before the facts could be established and the law applied.

Analysis and Determination

66. I reject these grounds of appeal because they are not realistically arguable. The FTT did not err in deciding that the exemption in s.74A(2) did not apply to individual members of visiting armed forces in respect of their private or personal homes or residences, and hence not to the Applicant's Second Property, for the reasons it stated at [49]-[61]. There was no error in the FTT's statutory construction. It neither misinterpreted nor misapplied subsection 74A(2) in deciding that the provision did not apply to the land transactions involving the Applicant's properties.

67. There may be some force in Mr Vallis's first point. It may be arguable that there is nothing within the language of s.74A(2) that restricts who may undertake or enter into the relevant land transaction. It may be arguable that the exemption might apply to land transactions entered into or carried out by an individual rather than a visiting force, visiting state or armed force corporately. For example, a transaction to acquire the land in question might conceivably be carried out by a private contractor who is to build the property and own the land but lease it to the visiting force with a view to one of the purposes in subsection 74A(2).

68. However, there is no arguable error in the FTT's finding as to the purpose of such a transaction. It is not arguable that the visiting forces exemption in s.74A(2) applies to a land transaction entered into for individual members of the visiting forces as a private homes or accommodation to reside in. This is for the reasons given by the FTT and the following additional reasons.

69. When interpreting s.74A(2), the FTT properly relied upon the legislative history, extra statutory materials, the provisions of s.74A(1) and (5) and reading the subsection and section as a whole.

70. The FTT properly relied on the legislative history of the provision by reference to section 74 FA 60 at [50]-[52] of the Decision. It was permissible to rely upon the extra statutory material in relation to the Detailed Proposal at [53].

71. Subsection 74A(1) contains a steer, in the phrase 'with a view to' in interpreting the purpose of the section as a whole which would include section 74A(2). Subsection 74A(1) provides that the effect of the section is to confer exemptions from stamp duty land tax for visiting forces corresponding to exemptions applicable in the case of UK armed forces. In the applicable legislation for UK forces, there is no SDLT exemption for personal accommodation or private homes of individual members of the UK armed forces – see the FTT Decision at [56].

72. Subsection 74(1) provide a definition of the words 'a force' used in the three phrases within subsection 74A(2). "A force" is any such "visiting force" defined by reference to subsection 74A(5) as meaning "any body, contingent or detachment of [a] country's forces which is for the time being or is to be present in the United Kingdom…". This defines a visiting force as a collective or corporate body rather than by reference to any individual member of that force. The FTT did not arguably err at [55] in relying upon this definition. In contrast, specific reference is made, when necessary, to individual 'members of that force' when defining a designated international military headquarters in subsection 74A(4). The phrase 'member of that force' is absent from s.74A(2).

73. The FTT therefore properly relied on the absence of any mention of individual members of a force or their private homes or personal accommodation in subsection 74(2) or subsection 74A(2).

74. Subsection 74A(2) must read as a whole and the FTT made no arguable error in doing so. The visiting forces exemption for land transactions includes three different purposes as explained in each of the three phrases in s.74A(2). When reading subsection 74A(2), the first two phrases exempt land transactions entered into with a view 'to building or enlarging barracks or camps for a force," or "to facilitating the training in the United Kingdom of a force". The language of these two exemptions manifestly directed to land transactions that have a purpose which apples to a corporate or collective body of "a force" (which must at least be a reference to more than one member of "a force") rather than any individual member alone. Furthermore, the reference to barracks and camps is specifically to collective accommodation rather than individual accommodation or private homes. The specific reference only to collective accommodation implies that it excludes personal residential accommodation (expressio unius est exclusio alterius).

75. The list of purposes within subsection 74A(2) should be read together and the final phrase in question, "promoting the health or efficiency of a force" be known by its associates (noscitur a sociis). The same reading should be given to the words "a force' within the final phrase "to promoting the health or efficiency of a force". The purpose of an exempted transaction is not to benefit only one individual member of a force alone such as by providing them with personal accommodation or a private home.

76. Therefore it is not realistically arguable that subsection 74A(2) provides an exemption for acquiring individual or personal accommodation or a private home for only one member of "a force" in order to promote the health or efficiency of "a force" corporately or collectively. The

FTT did not arguably err at [57]-[58] of the Decision in reading the legislation as a whole and in context.

77. As to Mr Vallis's point that the FTT conducted a mini-trial or found facts at the strike out stage which should not have been established outside the full hearing of the appeal, there is nothing in this. In applying its interpretation of section 74A to the facts of the case, the FTT was only applying it to undisputed facts. The FTT did not find or rely upon disputed facts or any controversial issues of evidence in making the Decision.

78. Further and in any event, even if the Applicant's interpretation of s.74A(2) is realistically arguable, there could not be any material error in the FTT Decision on the Applicant's lack of entitlement to the substantive exemption under subsection 74A(2). The FTT did not arguably err in concluding at [106](a)-(c) of the Decision that the exemption could not be relied upon in the claim for overpayment relief because it was not made by the Applicant in a land transaction return or an amendment of such a return. Subsection 74A(3) provides a mandatory condition or requirement in order for the visiting forces exemption to be claimed: "(3) Relief under this section must be claimed in a land transaction return or an amendment of such a return."

79. This is not a procedural point in relation to the claim for overpayment relief but a mandatory condition or requirement in order for a taxpayer to claim, and hence be entitled, to the visiting forces exemption. It is indisputable that it was not satisfied. Therefore, the Applicant was not arguably entitled to the exemption. Mr Vallis's argument is not realistic that this is a procedural point that only goes to the manner in which a claim for the exemption is to be made rather than the entitlement to the relief (by analogy to the distinction between liability to tax and its assessment in *Whitney*).

80. I am satisfied that the mandatory restriction stipulated in the subsection governs the substantive entitlement to the exemption as much as it governs the manner in which the claim must be made. To interpret the subsection otherwise would be to deprive it of its effect and render the statutory restriction on when a relief may be claimed to be otiose. It would circumvent the required form for the claim to the visiting forces exemption and undermine the prescribed time limits which apply to making a SDLT return or an amendment thereto. As the FTT found at [97]-[103]: '97. The time limits for SDLT are clearly set out in FA 03…102… "…it would be inconsistent with the aims of the legislation if a twelve month time limit could circumvented (sic) simply by describing a claim for relief as a claim for a refund of an overpayment". 103. I agree entirely.'

81. The FTT's Decision at [106](a)-(c) applying s.74A(3) was also consistent with the Court of Appeal judgment in *Candy v HMRC* [2022] EWCA Civ 1447 at [50]:

> "50…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."

82. I refuse permission to appeal on grounds 2 and 3.

Ground 4

The Applicant's argument

83. The fourth ground of appeal is that the FTT erred in failing to consider the argument raised by the Applicant as regards the Visiting Forces and International Military Headquarters (NATO and PfP) (Tax Designation) Order 2012 ("the 2012 Order").

Discussion and analysis

84. Mr Vallis did not advance this ground in oral argument except to place reliance on the Explanatory Note to the 2012 Order. There is no suggestion that any error in failing to take into account the 2012 Order itself could have made any substantive difference to the FTT's interpretation of section 74A(2). It does not give rise to any realistically arguable error of law in the FTT Decision.

85. I accept the four points made by Mr Winter in reply in rejecting this ground. First, the 2012 Order was first mentioned by the Applicant in May 2023 but it did not establish that any argument was made about it before the FTT during the hearing. Therefore, the FTT did not arguably fail to take the 2012 Order into account. Second, even if the 2012 Order was addressed during the FTT hearing, the FTT stated at [58] of the Decision that it had considered all the arguments on section 74A FA 60. Third, it was not incumbent on the FTT to deal with every point made by the Applicant, particularly peripheral ones, but it needed only to address the central or key arguments relied upon by the Applicant in support of his statutory construction which it did. It rejected the arguments for good reason.

86. Fourth, there is no merit to any substantive argument that the 2012 Order aids the construction of section 74A FA 60. There is no article or other provision relied upon from the body of the 2012 Order itself. At most the Explanatory Note to the 2012 Order (rather than the Note to section 74A) states:

> "The Order provides for tax exemptions for the members of a visiting force of a NATO country listed in Schedule 2 for the members of a visiting force of a PfP country listed in Schedule 3 and for members of those forces who are attached to one of the headquarters listed in Schedule 4."
>
> and
>
> "These exemptions are available under UK law by virtue of the following provisions. Section 303 of the Income Tax (Earnings and Pensions) Act 2003 (c.1) provides for an exemption from income tax on earnings. Section 833 of the Income Tax Act 2007 (c.3) provides for an exemption for non-UK source income. As a result of the designation under section 833 of the Income Tax Act 2007 (c.3), section 11 of the Taxation of Chargeable Gains Act 1992 (c.12) applies to provide for an exemption from capital gains tax. Section 155 of the Inheritance Tax Act 1984 (c.51) provides for an exemption from inheritance tax. Section 74A of the Finance Act 1960 provides for an exemption from Stamp Duty Land Tax."

87. The reference to "tax exemptions for the members of a visiting force" is in the context of a number of different personal taxes that might apply to individual members of the force and is not restricted to SDLT. The Explanatory Note explains that the tax exemptions apply to a wide range of personal taxes as specified in the paragraph. Therefore, even if extra statutory

materials in relation to the 2012 Order can be relied upon to aid interpretation of section 74A, the Note cannot reasonably be read as applying to section 74A FA 1960 rather than to the statutes which impose income tax, capital gains tax or inheritance tax.

Conclusion

88. Permission to appeal to the Upper Tribunal is **refused on all grounds**.

Signed: **Date: 15 January 2025**
JUDGE RUPERT JONES
JUDGE OF THE UPPER TRIBUNAL