[2018] UKFTT 0361 (TC)

TC06575

Appeal number: TC/2017/03363

CAPITAL GAINS TAX – roll over relief – qualifying asset – only for a period – appeal refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

MAURICE AND SHIRLEY BELL **Appellants**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at Carlisle Magistrates Court on Friday 9 February 2018

Ian Brown and Dean Johnston, of Dodd & Co for the Appellant

Matthew Mason, Officer of HMRC, for the Respondents

DECISION

Preliminary issue

1. The appellants had originally argued that section 28B Taxes Management Act 1970 ("TMA") was not the correct legislation and the Partnership tax return had not been amended in terms thereof so the assessments were not valid. After Mr Mason reviewed the Bundle in detail pointing to the original and amended personal tax returns for the partners and establishing that the relevant amendments had been made, the point was conceded. The appellants' representatives agreed that the assessments had been validly and timeously raised by HMRC.

The substantive issue

2. The matter under appeal is the decision of HMRC dated 30 December 2016 to amend the Partnership return of the Partnership of M & S J Bell to bring into charge part of the disposal of Chapel Mains Farm, being the sale of what was originally known as Andrew's House and latterly Chapel Grange. The impact on the charge to tax was that no further tax was due by the Partnership but Mr Bell was assessed to a further £25,115.44 and Mrs S J Bell to £27,311.48 of tax.

The appellants' arguments

3. The appellants argue that Chapel Grange was a qualifying asset for the purpose of section 152 Taxation of Capital Gains Act 1992 ("TCGA") and the claim for rollover relief should be granted. In the event that that argument was not successful then it was argued that the land on which the property was built was a qualifying asset until the point at which construction work commenced and that therefore the development value was included and eligible for roll-over relief.

HMRC's arguments

4. HMRC argue that Chapel Grange was not a qualifying business asset for the purposes of section 152 TCGA 1992 and as such business asset roll-over relief is not due and the assessments should be upheld.

5. In the event that the land on which the house was built did qualify for a period then it ceased to qualify at the very latest as at the date on which detailed planning permission was granted.

The hearing

6. Neither appellant was present but they were represented by Mr Brown who was the client handling partner, and Mr Johnston who, was the tax partner of their firm of accountants. Mr Osgood, a director of the firm, was also in attendance but did not give evidence. Both Mr Brown and Mr Johnston made submissions.

7. The Tribunal had the benefit of a large Bundle which amongst other things, included copies of the correspondence, the various tax returns and computations, and skeleton arguments for both HMRC and the appellants.

8. Unfortunately the Tribunal had neither the benefit of any witness statements or witnesses, nor a statement of agreed facts. Mr Brown explained the background to the Partnership at some length but there was no opportunity to assess the intentions of the partners at the relevant dates. That was of particular note given the context whereby it had originally been argued that the disposal of Chapel Grange was eligible for Principal Private Residence Relief as it was owned by Andrew Bell and that was notwithstanding the fact that the title was obviously in the name of the appellants.

9. In a letter to HMRC dated 23 September 2016 (more than 20 months after the enquiry commenced) the appellants' agent stated that they understood that the land on which the house was built was "… transferred to Andrew Bell via a declaration of trust prior to any construction work being undertaken. Andrew Bell then built the house to his specification, and the VAT self-build claim was made by him personally …".

10. The Requirements of Writing (Scotland) Act 1995 make it explicit that proof of any transfer of heritage whether via a Trust or otherwise, must be in writing. There is nothing in writing.

11. The letter went on to say that the appellants' solicitors had stated that the entire farm, including Chapel Grange, was held under one title, and sold to one buyer, so the proceeds of £4,174,500 was for the whole farm.

12. The parties sought a decision in principle only.

The facts

13. The 2012/13 tax returns for Mr and Mrs Bell and the Partnership were submitted on 21 January 2014. On 12 January 2015, HMRC intimated that they were checking the Partnership return under section 12(AC) of TMA. Correspondence ensued and the sole unresolved matter is the sale of Chapel Grange and specifically the tax treatment of the proceeds.

14. Mr and Mrs Bell purchased the whole farm consisting of 667 acres in 1994. They farmed in partnership. They had previously been tenant farmers in England on a 130 acre dairy and mixed family farm. Chapel Mains was sheep and arable farming. At that point their son, Andrew Bell, was 18 and attending University. At an unspecified date he returned to the farm and has been employed full-time in farming ever since.

15. At some point he married and a son was born in 1999. He and his family lived in one of two adjoining cottages on the farm. The other was let as holiday lets. The appellants lived in the nearby farmhouse.

16. In 2008, Andrew and his wife separated and he retained custody of the child and continued to live in the cottage. In 2009 he met his now current wife who moved in with her young son. The couple had a baby daughter in February 2010.

17. At some unspecified date in 2008 outline planning permission was obtained for a dwelling house which was to be erected on the sheep pens at the rear of the cottages. Detailed planning permission was granted in April 2010.

18. In May 2010, the building warrant for the property, which was then known as Andrew's House, was granted to Mr Andrew and Mrs Michelle Bell and not to the appellants or to the Partnership.

19. The undated VAT self-build claim by Andrew gives its specification as a 2 storey building with 3 reception rooms, 5 bedrooms, 3 bathrooms and 2 kitchen/utility rooms. That VAT claim explained that some invoices were not in Andrew's name as his parents had accounts with suppliers. It asked that any VAT repaid be paid into the appellants' bank account and not to Andrew. I have no explanation for that. It also stipulated that the Completion Certificate was dated 17 January 2012 and that Andrew had occupied the building from 17 December 2011.

20. In the said letter to HMRC of 23 September 2016 (see paragraph 9 above), the appellants' agents stated:-

> "The loan shown on the balance sheet of the accounts is evidence of the belief that the property was built by Andrew Bell, using a loan from his parents. The transaction would not have been recorded that way if we had thought that Mr and Mrs Bell owned the house. The loan has remained on the balance sheet because it is only during the course of this enquiry we have realised that the house was not owned by Andrew."

The said loan of £201,460 to Andrew is shown in the Partnership accounts as at 30 April 2012, and 5 April 2013, 2014 and 2015.

21. Andrew was an employee of the Partnership until 30 April 2011 and from 1 January 2012. In the intervening period he was a salaried partner in the business and not an employee.

22. On 28 April 2012, Strutt & Parker instructed that the property which was now known as Chapel Grange, with 6.5 acres of ground, be put on the Rightmove website. It was marketed as a new six bedroomed detached property with planning permission for a double garage and land which included one field adjoining the loch in front of the house that was suitable for grazing ponies and a further area of land with the potential for a further housing plot.

23. The farm, including Chapel Grange, was also marketed separately. The sales literature for the sale of the farm made reference to the possible sale of either seven lots or the whole estate. It was sold as a whole. Registers of Scotland show that the property was sold by the appellants with a date of entry on 28 August 2012.

24. It is not in dispute that the capital gain on the sale of Chapel Grange is £225,146.

25. A new farm, Hensol, which had been on the market since August 2011, was purchased with an entry date of 31 August 2012 and was financed by the sale of Chapel Mains and additional borrowings.

26. The entire farm of Chapel Mains was owned for a total period of 18 years and four months which is 220 months and for at least 201 months of that time, the land on which Chapel Grange was built was not used for any other purpose other than farming.

Reasons for Decision

27. I have annexed at Appendix 1 the full provisions of section 152 TCGA. The first issue is whether or not Chapel Grange was an asset which was "used, and used only, for the purposes of the trade throughout the period of ownership". Throughout the correspondence it was argued that following the period when the land was used as sheep pens the construction of the house was necessary as the construction of a farm worker's cottage. Andrew then occupied it in that capacity so it remained necessary for the purpose of the trade.

28. At the hearing it was argued that it was "essential" for the property to be constructed because it would be necessary to have good housing to attract a manager if circumstances changed in the future. That was an assertion wholly unsupported by any evidence.

29. I have difficulty with that assertion. "Essential" is defined in the Oxford English Dictionary as "absolutely indispensable or necessary … fundamental … significant …". That is very different to something which is desirable. Whilst it may well have been desirable, as HMRC concede, for Andrew and his growing family to be housed in larger premises, I do not accept that it was essential to construct Chapel Grange.

30. There has been no suggestion that Andrew would have left the business and, indeed, this house. He still works for the Partnership at Hensol. Furthermore the whole circumstances surrounding the treatment of Chapel Grange do not point to it being a Partnership asset, namely, the facts that:

(a) the building warrant was granted in Andrew and his wife's name,

(b) for years it was thought by the appellants, Andrew and their accountant that Andrew had owned the property,

(c) the funding for the construction was treated as a loan to Andrew in the Partnership accounts, and

(d) it was marketed with 6.5 acres of ground.

These all point to it being less than essential for the Partnership.

31. Accordingly I find that it was not essential to the Partnership and that the house and ground attached were not used, and used only, for the purposes of the trade throughout the period of ownership. It was not a qualifying asset.

32. That therefore leaves the remaining question as to the extent of the roll-over relief available. HMRC concede that the land would have been a qualifying asset up until the point at which planning permission was granted. They argue that the grant of planning permission and construction of the property clearly changed the nature of the asset. At the point at which outline planning permission was granted, the property would have increased in value and again in 2010 when the detailed planning permission was granted. The grant of that planning permission would have significantly increased the value of the land and changed the nature of the asset.

33. However, the land was used as sheep pens and farming land up until its use changed, the sheep pens were demolished and construction started. I have no evidence as to the date(s) for any of those other than that all were probably in April or May 2010.

34. I find that the land was a qualifying asset only until the earliest of those points being the date of grant of detailed planning permission or demolition of the sheep pens or the commencement of construction. On and from the day that the earliest of those occurred, the land was not a qualifying asset.

35. For all these reasons the appeal is dismissed.

36. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 28 JUNE 2018

152 Roll-over relief

(1) If the consideration which a person carrying on a trade obtains for the disposal of, or of his interest in, assets ("the old assets") used, and used only, for the purposes of the trade throughout the period of ownership is applied by him in acquiring other assets, or an interest in other assets ("the net assets") which on the acquisition are taken into use, and used only, for the purposes of the trade, and the old assets and new assets are within the classes of assets listed in section 155, then the person carrying on the trade shall, on making a claim as respects the consideration which has been so applied, be treated for the purposes of this Act—

(a) as if the consideration for the disposal of, or of the interest in, the old assets were (if otherwise of a greater amount or value) of such amount as would secure that on the disposal neither a gain nor a loss accrues to him, and

(b) as if the amount or value of the consideration for the acquisition of, or of the interest in, the new assets were reduced by the excess of the amount or value of the actual consideration for the disposal of, or of the interest in, the old assets over the amount of the consideration which he is treated as receiving under paragraph (a) above,

but neither paragraph (a) nor paragraph (b) above shall affect the treatment for the purposes of this Act of the other party to the transaction involving the old assets, or of the other party to the transaction involving the new assets.

(2) Where subsection (1)(a) above applies to exclude a gain which, in consequence of Schedule 2, is not all chargeable gain, the amount of the reduction to be made under subsection (1)(b) above shall be the amount of the chargeable gain, and not the whole amount of the gain.

(3) Subject to subsection (4) below, this section shall only apply if the acquisition of, or of the interest in, the new assets takes place, or an unconditional contract for the acquisition is entered into, in the period beginning 12 months before and ending 3 years after the disposal of, or of the interest in, the old assets, or at such earlier or later time as the Board may be notice allow.

(4) Where an unconditional contract for the acquisition is so entered into, this section may be applied on a provisional basis without waiting to ascertain whether the new assets, or the interest in the new assets, is acquired in pursuance of the contract, and, when that fact is ascertained, all necessary adjustments shall be made by making [or amending] assessments or by repayment or discharge of tax, and shall be so made notwithstanding any limitation on the time within which assessments [or amendments] may be made.

(5) This section shall not apply unless the acquisition of, or of the interest in, the new assets was made for the purpose of their use in the trade, and not wholly or partly

for the purpose of realising a gain from the disposal of, or of the interest in, the new assets.

(6) If, over the period of ownership or any substantial part of the period of ownership, part of a building or structure is, and part is not, used for the purposes of a trade, this section shall apply as if the part so used, with any land occupied for purposes ancillary to the occupation and use of that part of the building or structure, were a separate asset, and subject to any necessary apportionments of consideration for an acquisition or disposal of, or of an interest in, the building or structure and other land.

(7) If the old assets were not used for the purposes of the trade throughout the period of ownership this section shall apply as if a part of the asset representing its use for the purposes of the trade having regard to the time and extent to which it was, and was not, used for those purposes, were a separate asset which had been wholly used for the purposes of the trade, and this subsection shall apply in relation to that part subject to any necessary apportionment of consideration for an acquisition or disposal of, or of the interest in, the asset.

(8) This section shall apply in relation to a person who, either successively or at the same time, carries on 2 or more trades as if both or all of them were a single trade.

(9) In this section "period of ownership" does not include any period before 31st March 1982.

(10) The provisions of this Act fixing the amount of the consideration deemed to be given for the acquisition or disposal of assets shall be applied before this section is applied.

(11) Without prejudice to section 52(4), where consideration is given for the acquisition or disposal of assets some or part of which are assets in relation to which a claim under this section applies, and some or part of which are not, the consideration shall be apportioned in such manner as is just and reasonable.