[2016] UKFTT 0796 (TC)

TC05521

Appeal number: TC/2016/01706

CAPITAL GAINS TAX – whether principal private residence relief available – whether property became taxpayer's residence

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANDREW OLIVER **Appellant**

- and -

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

TRIBUNAL: JUDGE VICTORIA NICHOLL
HELEN MYERSCOUGH

Sitting in public at Fox Court, London on Friday 4 November 2016

The Appellant in person

Mr Simon Bracegirdle, presenting officer for the Respondents

DECISION

Introduction

1. This appeal is against the decision of the Respondents ("HMRC") on 19 February 2016 to assess the Appellant ("Mr Oliver") to capital gains tax on the gain on the disposal of 45 Fitzjames Avenue London and to refuse principal private residence relief.

2. The assessment was made following a discovery within section 29(1) Taxes Management Act 1970 ("TMA"). Mr Oliver and his accountants did not challenge the application of section 29(5) TMA.

3. Mr Oliver's appeal form was submitted on time but without enclosing HMRC's decision. The appeal was submitted with this decision a few days later and the late appeal was accepted by HMRC.

Background and facts found

4. We found the following facts from the evidence in the tribunal bundle and the oral evidence from Mr Oliver and HMRC's witness, Mr Gardiner. Mr Gardiner is an Inspector of Taxes and the compliance caseworker who made the initial decision following correspondence with Mr Oliver and his accountants.

5. Mr Oliver runs a letting business under two trading names, Andy Oliver Properties and Chiswick Lane. One of his email sign-offs is "Property buyer and landlord in Portsmouth and West London".

6. Mr Oliver's long-term partner, Natasha Barton, is a nursery school teacher and they have two children. Apart from the period under dispute in 2007, Mr Oliver and Ms Barton have lived at 3 Pumping Station Road London as Mr Oliver's principal private residence since 1999.

7. In the spring of 2006 Mr Oliver and Ms Barton had a breakdown in their relationship. They attended counselling sessions at Relate in April and May 2006 and it was concluded that they should have a trial separation. Mr Oliver decided that he needed to find a home for himself, with sufficient room for his children to come and stay with him. Mr Oliver owned between 10 and 20 rental properties at that time but did not consider making arrangements to use any of these properties.

8. At some time in the summer of 2006, the agent selling 45 Fitzjames Avenue, Jason Scott of Tates, suggested to Mr Oliver that he might be interested in it. Mr Scott and Mr Oliver knew each other from previous property management work together. The agent had found that the property was hard to sell because it had a short remaining lease and it did not "view very well" to potential purchasers as the owner was something of a hoarder. Mr Oliver viewed the flat and his offer to buy was accepted on 21 August 2006. As the lease on the property only had some 41 years to

expiry, Mr Oliver asked the vendor to begin the process to extend the lease before exchange of contracts as he would otherwise have had to wait two years before he could make such an application following completion. Mr Oliver negotiated the extension of the lease through his solicitors. This process took longer than Mr Oliver had expected and the eventual £153,000 premium agreed was considerably more than the £80,000 - £90,000 that Mr Scott had advised him the cost might be.

9. Contracts for the purchase of 45 Fitzjames Avenue were exchanged on 6 October 2006. The property purchase was funded with the assistance of a West Bromwich Building Society buy-to-let mortgage with a term of 7 years in the joint names of Mr Oliver and Ms Barton.

10. Mr Oliver had been staying in the spare room at 3 Pumping Station Road over the summer and autumn of 2006, but he spent many nights staying with friends or on his boat during this initial period of trial separation. He spent Christmas at 3 Pumping Station Road with Ms Barton and his children.

11. The purchase was completed on 5 January 2007 at a price of £515,000. An agreement dated 11 December 2006 provided that Mr Oliver and Ms Barton would own 45 Fitzjames Avenue as tenants in common, with Mr Oliver owning 99% and Ms Barton owning 1%. Mr Oliver was assessed on 100% of the gain because of the agreement between Mr Oliver and Ms Barton that he could retain 100% of the proceeds of sale for their children's future.

12. On 2 February 2007 Mr Oliver and Ms Barton resumed their attendance at Relate meetings.

13. On 21 February 2007 the extension of the lease of 45 Fitzjames Avenue was agreed for a premium of £153,000.

14. At some time between 21 February 2007 and early March Mr Oliver instructed three agents, Marsh and Parsons, Tates and Chard, to market 45 Fitzjames Avenue for sale with the benefit of the extended lease. The photographs in the marketing show the flat unfurnished. Mr Oliver claims that he pushed the furniture out of each frame but we find this inconsistent with the absence of any furnishings in the photographs.

15. Mr Oliver carried out no structural or major refurbishment works to the flat between completion of his purchase on 5 January 2007 and marketing the property for sale. He engaged the services of an interior designer but decided not to proceed with her proposals because it was very expensive. He spent a weekend, with friends, rubbing down the woodwork and repainting (with one coat) the kitchen and a bedroom. He accepts that much of the improvement in the marketing photographs can be attributed to fact that the flat was unfurnished in the photographs.

16. On 12 March 2007 Mr Oliver accepted an offer from Mr Boehm to buy 45 Fitzjames Avenue. The contract for the sale of the flat was dated 23 March 2007 with a completion date of 12 April 2007.

17. At a Relate meeting on 16 March 2007 Mr Oliver and Ms Barton agreed to try again with their relationship. They booked a short holiday that day to celebrate this news and went away on 7 April 2007. The family returned to 3 Pumping Station Road after their holiday.

18. The sale of the flat to Mr Boehm and the completion of the extension of the lease both took place on 12 April 2007 so that Mr Oliver could use the proceeds of sale to fund the lease premium. Mr Oliver used his net proceeds of sale to invest in another rental property.

19. Mr Oliver submitted correspondence that was addressed to him at 45 Fitzjames Avenue in support of his claim, including the following:

Date of Document	**Nature of Document**
26 February 2007	Final demand water bill
28 February 2007	Homebase card statement
15 March 2007	Electricity bill
16 March 2007	Completed application for electoral registration
20 March 2007	Postcard sent to him
14 April 2007	Confirmation of application for voter registration
24 April 2007	Citroen invoice
24 April 2007	DVLA registration certificate
30 April 2007	Bank statement for NatWest account
30 April 2007	Sales invoice from Virtual receptionist
2 May 2007	Bank statement for second NatWest account

20. On 14 May 2007 HMRC received notification from Mr Oliver that his main residence was 45 Fitzjames Avenue (and therefore not 3 Pumping Station Road) with effect from 5 January 2007 in accordance with section 222(5) (a) TCGA. The letter is undated. Mr Oliver's self-assessment record shows that his address was changed to 45 Fitzjames Avenue on 14 May 2007 and that it was changed back to 3 Pumping Station Road on 8 August 2007.

21. Mr Oliver submitted his 2007-08 tax return on 29 January 2009. The return included a capital gains tax page that showed the disposal of a property for £859,579

with allowable costs of £744,904. The self-assessed capital gain was nil. The "other information" box included the following statement:

> "45 Fitzjames Avenue, total relief of £114,675.00 has been included in respect of private residence relief"

22. HMRC did not open an enquiry into Mr Oliver's 2007-08 return. HMRC reviewed the 2007-08 return following receipt of a letter from Mr Oliver's accountants, Cranleys, dated 25 February 2011. This began correspondence that concluded with HMRC's 'discovery' in the light of Cranleys letter of 25 November 2011. HMRC's discovery fulfilled section 29(5) TMA as Mr Oliver's 2007-08 return and the two previous tax returns had not provided information that drew HMRC's attention to the short period of ownership of 45 Fitzjames Avenue or the fact that Mr Oliver retained ownership of 3 Pumping Station Road throughout the period.

23. On 30 March 2012 HMRC wrote to Mr Oliver to note that his liability on the disposal of 45 Fitzjames Avenue and his claim for principal private residence relief were subject to further enquiry. HMRC issued a protective assessment on Mr Oliver to capital gains tax and also, in the alternative, on profits arising from trading income. Mr Oliver appealed against this assessment on 18 May 2012.

24. HMRC requested further information about 45 Fitzjames Avenue. Over the course of the correspondence Mr Oliver's accountants, Cranleys, provided HMRC with signed affidavits of Mr Oliver, Ms Barton and Mr Scott, a diary of "Mr Oliver and 45 Fitzjames Avenue", a photograph showing Mr Oliver's daughter at the flat and other supporting documents.

25. On 10 March 2014 HMRC raised the issues of whether (1) Mr Oliver was "engaging in an adventure in the nature of a trade when he purchased the flat, secured a valuable extension to the lease and then re-sold the flat within a period of 97 days"; or (2) the purchase, or any expenditure incurred after the beginning of the period of ownership, wholly or partly for the purpose of realising a gain from the disposal of the flat such that it falls foul of the exception in section 224(3) Taxation Chargeable Gains Act 1992 ("TCGA"). Further correspondence followed but on 20 March 2015 Mr Gardiner of HMRC determined the appeal by issuing a revised assessment to reflect self-employment income and issued a penalty. Mr Oliver requested both a review of this decision and Alternative Dispute Resolution ("ADR"). The ADR was not successful.

26. The assessment and penalty were reviewed on 19 February 2016 by Mrs Harper. The outcome was that the assessment for 2007-08 was varied as it was concluded that the charge under Case 1 Schedule D was not appropriate, but it was decided that principal private residence relief was not due on the gain as the occupation lacked the qualities of permanence, continuity and expectation of continuity. The penalty was also cancelled. Mr Oliver appealed against the review decision of 19 February 2016.

27. We have considered other matters of evidence and made further findings of fact in paragraphs 40 and 41 below.

The law

28. Section 29(1) of the Taxes Management Act 1970 ("TMA") provides:

> "If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment –
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed; or
>
> (b) that an assessment to tax is or has become insufficient; or
>
> (c) that any relief which has been given is or has become excessive;
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax."

29. Section 29 (3) TMA provides that where the taxpayer has delivered a tax return in respect of the relevant year of assessment, one of the conditions is section 29(4) or (5) TMA must be fulfilled. Section 29(4) applies where the situation in section 29(1) was brought about carelessly or deliberately by the taxpayer or the person acting on his behalf. Section 29(5) applies if, at the time when an officer of the Board:

> "(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
>
> (b) informed the taxpayer that he had completed his enquiries into that return,
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above."

30. Section 28(2) Taxation of Chargeable Gains Tax Act 1992 ("TCGA 1992") provides that if an asset is disposed of and acquired under a contract that is conditional, the time at which the disposal and acquisition is made is the time when the condition is satisfied. The capital gain in this case was assessed for the tax year 2007-08 because the contract for the sale of 45 Fitzjames Avenue was conditional on completion of the lease extension.

31. Section 222 TCGA provides:

> "(1) This section applies to a gain accruing to an individual so far as attributable to the disposal of, or of an interest in –
>
> (a) A dwelling-house or part of a dwelling-house which is, or has at any time in his period of ownership been, his only or main residence…
>
> (5) So far as it is necessary for the purposes of this section to determine which of 2 or more residences is an individual's main residence for any period –

(a) the individual may conclude that question by notice to an officer of the Board given within 2 years from the beginning of that period but subject to a right to vary that notice by a further notice to an officer of the Board as respects any period beginning not earlier than 2 years before the giving of the further notice.

[. . .]

32. Section 223 TCGA provides:

> "(1) No part of a gain to which section 222 applies shall be a chargeable gain if the dwelling-house or part of a dwelling-house has been the individual's only or main residence throughout the period of ownership, or throughout the period of ownership except for all or any part of the last 36 months of that period."

33. Section 224(3) TCGA provides:

> "Section 223 shall not apply in relation to a gain if the acquisition of, or of the interest in, the dwelling-house or the part of a dwelling-house was made wholly or partly for the purposes of realising a gain from the disposal of it, and shall not apply in relation to a gain so far as attributable to any expenditure which was incurred after the beginning of the period of ownership and was incurred wholly or partly for the purpose of realising a gain from the disposal."

Submissions

34. Mr Oliver submits that he purchased 45 Fitzjames Avenue because of the breakdown of his relationship with Ms Barton and that he sold it because of their reconciliation. He submits that he made 45 Fitzjames Avenue his home and that he is entitled to principal private residence relief on the gain. Mr Oliver considers that HMRC have been targeting his tax affairs for a number of years. Mr Oliver also stressed the importance to him of his family and that the arrangements for the purchase and sale of 45 Fitzjames Avenue were all made in this context.

35. The quantum of the net gain calculated in the review letter of 19 February 2016 and chargeable to capital gains tax if principal private residence relief is refused is not disputed.

36. Mr Bracegirdle of HMRC submits that Mr Oliver purchased 45 Fitzjames Avenue as an investment, and not as a home, that he incurred expenditure on the lease extension to enhance the investment and that he realised an investment gain on the sale.

37. While HMRC consider it probable that Mr Oliver did spend some time in occupation of 45 Fitzjames Avenue, the occupation was of a temporary and uncertain nature and lacking in the qualities of permanence, continuity and expectation of continuity. HMRC submit that principal private residence relief is not available in these circumstances.

Discussion

38. There is no statutory definition of when a dwelling-house can be treated as an individual's "only or main residence" for the purposes of section 223 TCGA. Mr Bracegirdle referred us to the cases of *Frost (HM Inspector of Taxes) v Feltham* [1981] STC 115 ("*Frost*"), *Moore v Thompson (Inspector of Taxes)* [1986] STC 170 ("*Moore*"), *Goodwin v Curtis (Inspector of Taxes)*[1998] STC 475 ("*Goodwin*"), *Mr David Morgan* [2013] UKFTT 181(TC) ("*Morgan"), Wade Llewellyn* [2013] UKFTT 323 (TC) ("*Wade Llewellyn*") and *Mitesh Kothari* [2016] UKFTT 127 (TC) ("*Mitesh Kothari*").

39. It was found in the cases of *Frost* and *Moore* that it is a question of fact and degree whether occasional and short periods of occupation in a place can make that a residence. In *Goodwin* the Court of Appeal approved the commissioners' application of the test that 'residence' denotes some assumption of permanence, some degree of continuity and some expectation of continuity. In his leading judgement Millet LJ commented that:

> "Temporary occupation at an address does not make a man resident there. The question whether the occupation is sufficient to make him resident is one of fact and degree for the commissioners to decide."

We agreed with Judge Gort's comment (at paragraph 27) in *Morgan* that the intention of the occupier affects the quality of the occupation.

40. We considered all of the relevant facts found from the evidence and applied the guidance in the case-law noted to reach the following conclusions:

(1) Mr Oliver may have stayed at 45 Fitzjames Avenue on occasions, but it was at no stage his intention to reside there. We agree with the comments in Mrs Harper's review letter that Mr Oliver's actions did not amount to a venture in the nature of a trade and that he did not have an intention to sell the flat when he first acquired it as suggested by Mr Gardiner. The use of the flat was uncertain when acquired, but the following extract from Cranleys letter of 3 April 2012 confirms the buy to let intention:

> "The Fitzjames flat was purchased as a buy to let flat which required work to refurbish it (see Tates' property description) to a letable standard and needed its lease to be extended. The plan was to commission the refurbishment of the property once the lease extension negotiations were completed. After which other options would be considered such as being let on a corporate long term tenancy, being let on a room by room basis, or remortgaged.
>
> However, due to Natasha Barton and Andrew Oliver reuniting, the high cost of the lease extension and the long time it took to conclude, the refurbishment never took place and the flat was put for sale."

(2) Certain aspects of evidence provided by Mr Oliver are not consistent and, on the balance of probabilities, we find that they are not reliable and do not support his claim that he resided at 45 Fitzjames Avenue. We are particularly concerned about three aspects of the evidence.

First, Mr Oliver provided a photograph of his daughter in the flat on 21 January 2007 to support his claim. The photograph is exactly the same in every respect as his vendor's sale photograph, including the position of objects on the mantelpiece, other than the inclusion of his daughter. Mr Oliver later corrected his mistake and said that the photograph was taken when viewing the flat in 2006. We find that the photograph does not support Mr Oliver's claim that he resided at the flat.

Second, other than utility bills which would be issued regardless of the occupation of the flat and a Homebase card, the correspondence provided by Mr Oliver (listed in paragraph 19 above) all post-dates Mr Oliver's acceptance of Mr Boehm's offer for the flat on 12 March 2007. We find it unusual that no telephone or internet connections were arranged in 2007. We agree with HMRC that the creation of certain pieces of evidence does not reflect "behaviour which takes place in the normal course of events" and is more in the nature of the creation of a paper trail. For example, Mr Oliver registered to vote at 45 Fitzjames Avenue on 16 March 2007, after he had accepted an offer for sale and had agreed to try again with Ms Barton. This is particularly unusual given that he owned the family home at which he was already registered to vote. Mr Oliver also amended the council tax record to show that the property was occupied on 16 March 2007. We did not find that this evidence supported Mr Oliver's claim.

Third, Ms Barton's involvement in the purchase is difficult to reconcile with Mr Oliver moving to reside at the flat because of their separation. Mr Oliver claims on the one hand that there was no financial risk for Ms Barton given that there was nearly £100,000 between the mortgage amount and valuation, but on the other hand he has stressed the volatility of the property market at that time. We note that if Mr Oliver had not succeeded in the negotiating the lease extension, Ms Barton could have been at risk on the buy-to-let mortgage. We also note that Mr Oliver suggested in a letter dated 29 August 2014 that he could have used his savings and a loan from his mother to pay the lease premium, but these options were not mentioned in the context of purchasing the flat without Ms Barton's assistance. We find that this evidence does not support Mr Oliver's claim that he intended to reside at the flat, but it is consistent with his intention to let as noted in paragraph 40 (1) above.

(3) Mr Oliver's occupation of 45 Fitzjames Avenue was a useful stop-gap place to stay that also allowed him to carry out the limited redecoration, to clear the flat for photographs and to apply for the lease extension necessary for the next stage of letting. The quality of the occupation lacked the assumption of permanence, any degree of continuity or expectation of continuity. We find that the degree of Mr Oliver's occupation was consistent with his intention to let the flat in due course, and that the cost of the lease extension prompted the sale.

41. On the basis of our conclusions we find that Mr Oliver did not persuade us, on the balance of probabilities, that he resided at 45 Fitzjames Avenue as his only or main residence from 5 January 2007 until 12 April 2007.

Decision

42. On the basis of our conclusions on the evidence, principal private residence relief is not available to Mr Oliver on his disposal of 45 Fitzjames Avenue. The appeal is dismissed.

43. 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.

VICTORIA NICHOLL

TRIBUNAL JUDGE
RELEASE DATE: 1 DECEMBER 2016