TC06904

Appeal number: TC/2016/04924

Capital Gains Tax - s 222 Taxation of Capital Gains Act 1992 - discovery assessment of capital gains on sale of residential property and fixed penalty for failure to include the gains in a self-assessment return - whether principal private residence exemption applies - no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SHAREEN BOOTH **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER TONY HENNESSEY

Sitting in public at Tax Appeals Tribunal, Alexandra House, 14-22 The Parsonage, Manchester on 4 July 2018

Mr Liban Ahmed for the Appellant

Mr John Corbett Officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Ms Shareen Booth ('Ms Booth') against a discovery assessment under s 29 TMA 1970, issued on 12 November 2015 by the Respondent ('HMRC') for the year to 5 April 2009 in the sum of £9,584 representing Capital Gains Tax ('CGT') arising on a chargeable gain which accrued upon the disposal of her property at 5 Lorne Buildings, Holburn Street, Aberdeen ('the Property').

2. Ms Booth also appeals the penalty determination, raised under s 7(8) Taxes Management Act 1970 ('TMA'), for her failure to notify HMRC of her chargeability to CGT within the time required by law and for the submission of an incorrect tax return for the year to 5 April 2009. The tax geared penalty calculated at 20 % of the tax due is £1,916.80

Points at issue

3. Ms Booth purchased 5 Lorne Buildings, Holburn Street, Aberdeen for £50,000. The conclusion of missives was on 20 September 2007 with settlement on 2 November 2007. It was sold, following renovation, on 23 April 2008 with settlement on 1 May 2008, for £115,000, realising a capital gain.

4. The issue is whether the proceeds of sale were exempt from CGT by virtue of the principal private residence ('PPR') relief provisions contained at s 222 TOGA 1992.

5. Ms Booth contends that she purchased the Property with the intention that it would become her main residence and says that she and her infant child actually spent time at the property before she decided to resell it.

6. HMRC say that Ms Booth's main residence throughout the time that she owned 5 Lorne Buildings was in fact 649 Holburn Street, her parent's address where she had been living previously and where she continues to reside. HMRC accept that she stayed at 5 Lorne Buildings for part of the time before it was sold, but argue that the nature and extent of her occupation until then was insufficient to make it her primary residence and thereby qualify for relief under s 222 TOGA 1992.

5. HMRC assert that Ms Booth was careless in failing to include the capital gain in her tax return for 2008-09 Tax Return and that they were correct to impose a penalty in respect of the omission.

Background

7. 5 Lorne Buildings is a one bedroom flat located in a building containing 19 flats in total. Ms Booth says that when she acquired the Property it was her intention that it would be her main private residence.

8. Ms Booth says that she replaced the kitchen and bathroom and undertook major renovations between acquiring the Property in November 2007 and March 2008.

9. Ms Booth says that she lived in the Property 'on and off whilst renovations were taking place' with her four year old son and moved in 'permanently' after the upgrading work was completed until April 2008.

10. She retained her parents' address at 649 Holburn Street for postal purposes. Nothing was addressed to her at 5 Lorne Buildings. When essential facilities were not connected or available, she stayed with her parents but estimates that, in total, she only resided with her parents for approximately one week during the period of her ownership of 5 Lorne Buildings.

11. Soon after moving in, she realised that Holburn Street was a busy road and was not a safe place for her son to be living. Within a few months she realised that the property was simply not of sufficient size or standard to make it a viable home for her and her son so she decided to sell it and move on.

12. She says that due to the passage of time it had been difficult for her to obtain any documentary evidence of her occupation of the Property. She was unable to remember who provided her gas, electricity and telephone services whilst at the flat.

13. Ms Booth was however able to show by documentary evidence that she was liable to pay Council Tax to Aberdeen City Council (which included water and sewerage charges) in respect of 5 Lorne Buildings for the period from 6 March 2008 to 30 April 2008. The documentation indicated that the tax was payable in a single sum, due on 12 December 2014, indicating that the Council Tax liability had been assessed somewhat belatedly and had not been levied and paid at the time of her ownership.

HMRC's enquiry

14. On 2 September 2014 HMRC commenced an enquiry into Ms Booth's acquisition and disposal of 5 Lorne Buildings.

15. HMRC considered it improbable that Ms Booth would live with a four year old child in a property requiring significant modernisation and whilst carrying out major renovations, if alternative accommodation was available to her at the time. HMRC questioned her suggestion that she only became aware of its unsuitability as a home after having lived there for a brief period of time. A one bedroom flat would never have been reasonably considered to be a suitable home for her and her young son. She would also have already been familiar with the amount of traffic in the area as her parents resided in a flat in Holburn Street which was a matter of yards away. She would have been aware that the Property was located at the junction of two 'A' roads.

16. The evidence produced in respect of the Council Tax liability for a very limited period (just over 1½ months) increased HMRC's doubts that Ms Booth actually lived in the Property between its acquisition in November 2007 and its sale in May 2008. Ms Booth had only been charged for the period from 6 March to 30 April 2008. She did not appear to have paid any Council Tax for the period from November 2007 to 5 March 2008. Full exemption from Council Tax would only be granted by the Council if the Property was unoccupied whilst undergoing major renovations (up to 12

months) or was otherwise unoccupied and unfurnished (up to 6 months). The Council Tax bills she had provided suggested that the Council were advised that the Property was unoccupied until at least 5 March 2008.

17. HMRC noted that the Council Tax was due and payable on 12 December 2014, which implied that Ms Booth did not notify the Council of her occupation of the Property until shortly before that date. This view was fortified by the indication that Ms Booth had received a letter from the Council on 25 November 2014, advising that she was not a "tenant" in the Property. Although the use of that term was puzzling, it could be inferred that the Council had no record of her occupation of the Property at that time. In HMRC's view, the apparent delay of over six years in notifying the Council of her occupancy meant that the Council Tax bill could not be taken to be reliable evidence of such and, for the period to 5 March 2008, actually suggested the contrary.

18. Having considered the available evidence, HMRC were of the view that it is more probable than not that Ms Booth did not occupy the Property as her main residence or for any extended period. If, contrary to their conclusion, the Council Tax bill accurately reflected her occupation of the property, it would only have been for the two months prior to its sale. Further, it was unlikely that she had not already decided to market and sell the property by this time - and she may indeed have already secured a buyer. Consequently, if she did occupy the flat from 6 March 2008, it would not have been with the requisite degree of permanence and continuity or expectation of continuity to establish the flat as a "residence". HMRC therefore concluded that Ms Booth was not entitled to PRR and informed Ms Booth that the gain accruing on the sale of the Property was chargeable to CGT.

19. HMRC informed Ms Booth that s 29(1) TMA permits an Officer of HMRC to make an assessment if he discovers that any capital gains which ought to have been assessed to CGT has not been assessed.

20. The normal time limit for making an assessment is four years from the end of the year of assessment to which it relates. However, where there has been a failure to notify chargeability for the year within the specified time, s 36(1A)(b) TMA allows HMRC to make an assessment at any time up to twenty years after the end of the year of assessment. (For years up to 2008-09, this extended time limit only applies where the assessment is made for the purposes of making good to the Crown a loss of tax attributable to the person's negligent conduct or the negligent conduct of someone acting on his behalf.)

21. The time limit for notifying chargeability to tax is specified in s 7 TMA. Section 7(1) requires every person who is chargeable to CGT for any year of assessment, but has not been asked to complete a tax return, to notify HMRC within six months of the end of the tax year. Ms Booth did not do this.

22. Section 118(2) TMA provides an exception from the consequences of such a failure in certain circumstances. It provides that a person shall not be deemed to have

failed to notify his chargeability within the specified time if he had a reasonable excuse for the failure.

23. Ms Booth failed to notify her chargeability to CGT for 2008-09. Unless she could demonstrate that she had a reasonable excuse for the failure, HMRC were entitled to assess the tax, provided they can show that, on the balance of probabilities, there was negligent conduct on her part.

24. HMRC concluded that Ms Booth failed to notify her chargeability to CGT within the time allowed and had not demonstrated that she had a reasonable excuse for the failure. It follows that she was liable to a penalty. The penalty provision is at s 7(8) TMA. The maximum penalty chargeable penalty is equal to the CGT that has been assessed that is, £9,584 subject to any abatements.

25. HMRC arrived at the abatements as follows:

- Disclosure (Maximum 20%) - Ms Booth admitted that she had bought and sold the flat but continued to maintain that no tax was due because she occupied the Property as her main residence. A 10% abatement was allowed.

- Co-operation (Maximum 40%) - the maximum abatement of 40% was allowed.

- Seriousness (Maximum 40%) - the amount of tax due was not significant but the gain did form a substantial proportion of Ms Booth's total taxable incomings for the year. An abatement of 30% was allowed.

The aggregate abatement came to 80%, and therefore a penalty of £1916.80, which represents 20%, of the CGT was assessed.

26. On 30 September 2017 Ms Booth appealed HMRC's conclusion to the Tribunal.

27. In November 2017, HMRC and Ms Booth attempted ADR but were not able to reach resolution on the issue of whether she was entitled to PPR relief. The parties were however able to agree on the amount expended by Ms Booth on purchase /sale costs of £2,152 and also the capital cost of improvements which amounted to £6,743. This resulted, after allowing for the applicable CGT annual relief (of £9,600) in a chargeable gain of £46,505.

28. The parties agreed on 16 November 2017 that if the Tribunal finds that Ms Booth is not entitled to PPR relief, a penalty loading of 20% is applicable based on the abatements of 10% for disclosure, 40% for co-operation and 30% for seriousness.

29. Both parties agreed that the outcome of the ADR mediation process may be disclosed to the Tribunal.

30. Subject to the matters agreed following the ADR mediation the only issue for determination was therefore whether Ms Booth was entitled to PPR relief.

Relevant statutory provisions

Taxes Management Act 1970

Section 8 - Personal returns

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board-

a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and

b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is-

(a) the 31st January next following the year of assessment, or

(b) where the notice under the section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

(2) Every return under the section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

TOGA 1992

S 222 of TOGA 1992 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, or

(b) land which he has for his own occupation and enjoyment with that residence as its garden or grounds up to the permitted area.

(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.

(6) In the case of an individual living with his spouse or civil partner-

(a) there can only be one residence or main residence for both, so long as living together and, where a notice under subsection (5)(a) above affects both the individual and his spouse or civil partner, it must be given by both.

(6A) Where an individual has determined, by giving notice under subsection (5)(a), that a residence is the individual's main residence, that determination does not cease to be effective at any time by reason only of the fact that, at that time, another of the individuals residences is treated by section 222B(1) as not being occupied as a residence (or, having been so treated, is no longer so treated).

Section 223 of TOGA 1992 says, in so far as it is relevant:

(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 18 months of that period.

Evidence

31. The bundles, prepared by HMRC, included correspondence between Ms Booth and her accountants; the enquiry notice; closure notice; notice of assessment to CGT and the penalty assessment; the review conclusion letter and Ms Booth's appeal to the Tribunal; Ms Booth gave evidence under oath to the Tribunal.

Ms Booth's case

32. In evidence Ms Booth said that she acquired 5 Lorne Buildings with the firm and settled intention of living in the Property once it had been modernised.

33. She said that properties in Aberdeen are very expensive and it was difficult to get a foot on the property ladder. She had come across the property by accident when out socially. The seller had lived there for fifteen years, but was keen to sell quickly and she was able to negotiate a price which was very happy with. However it was rundown and needed significant modernisation.

34. Ms Booth said that she moved in with her son but had to move out again when a major fault was found with the ceiling in the main living room and it had to be taken down. She moved back in again when most of the work had been done around mid-December 2007, although she was not able to provide any actual evidence of this, for example, by way of utility and council tax bills, or statements from third parties.

35. When she put the Property up for sale, it sold very quickly to a cash buyer and she was able to complete within two weeks of receiving the offer. She had 20 viewings in the first week. Completion took place on 1 May 2008.

36. Miss Booth agreed that she had only paid council tax from 6 March to 30 April 2008, and acknowledged that this gave the impression that she had only lived in the Property for a short space of time.

HMRC's Case

37. The legislation requires every person who is chargeable to income tax or capital gains tax for any year of assessment, to give notice to an officer of the Board that they are so chargeable. (S8 TMA70).

38. Ms Booth has appealed against the assessment, and so under common law the onus is on her to show why the assessment should not have been raised.

39. With regard to the tax geared penalty, the burden of proof is on HMRC who have to show that Ms Booth acted negligently in not submitting a tax return for 2008- 09 disclosing the proceeds of the sale of the Property.

40. The standard of proof is the ordinary civil standard of proof, which is on the balance of probabilities.

41. In order to be entitled to principal private residence relief, Ms Booth has to show that the Property became her main residence. Section 222(1)(a) TOGA 1992 states -

> '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.'

42. There is no statutory definition of 'main residence'.

43. HMRC refer to the following tax cases which address the meaning of the word 'residence' and the quality of occupation.

44. *Goodwin v Curtis* [1998] STC 475. In this case, where the taxpayer had moved into the property in question as a stop-gap measure pending finding somewhere else to live, Millet LJ said:

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

Schiemann LJ said in his judgment (at 510):

> "... in order to qualify for the Relief a taxpayer must provide some evidence that his continuity in the property showed some degree of permanence, some degree of continuity or some expectation of continuity."

45. Ms Booth failed to notify her chargeability to CGT for 2008-09. Unless she can demonstrate that she had a reasonable excuse for the failure, HMRC are entitled to assess the tax, provided they can show that, on the balance of probabilities, there was negligent conduct on her part.

46. To secure entitlement to PPR Ms Booth must be able to demonstrate that the flat was her only or main residence, for at least part of the period of ownership. The test is one of quality rather than quantity. She must be able to demonstrate that she occupied the flat and that the occupation was not intended to be temporary but showed some degree of permanence, some degree of continuity or some expectation of continuity.

47. HMRC also observe that Ms Booth could have resolved any ambiguity concerning the status of 5 Lorne Buildings by notifying HMRC that she wished it to be regarded as her main residence in accordance with s 222(5) TOGA 1992.

48. A penalty has been charged because Ms Booth acted negligently when she failed to declare the capital gain arising on the disposal of 5 Lorne Buildings. HMRC acknowledge that the penalty will fall if Ms Booth is entitled to private residence relief.

Conclusion

49. *Goodwin v Curtis* and later cases have established that in determining whether a property qualifies as a principal private residence the following factors must be considered.

- The nature, quality, length and circumstances of a taxpayer's occupation of a property.
- Whether the occupation was intended to be permanent or merely temporary.
- Whether there was a degree of continuity or some expectation of continuity to turn mere occupation into residence. The need for permanence or continuity should however not be overstated as it is one of the factors to be taken into account in weighing up all of the evidence.

50. Whether or not a property was the taxpayer's only or main residence is a matter of fact. The onus is on the taxpayer to prove (on a balance of probabilities) that this is the case.

51. The question of when occupation becomes residence is one of fact and degree for the Tribunal to decide and the word "reside" and "residence" are ordinary words of the English language to be interpreted as such. Residence is usually defined as 'the dwelling in which that person habitually lives; in other words, his or her home'. The test of residence is considered to be one of quality rather than quantity.

52. Periods of *occupation* during renovation are distinguishable from periods of *living in* a property, as the former would lack the necessary quality to turn mere occupation into residence, in the absence of a lack of a firm and settled intention to do so.

53. There must be sufficient documentary or other evidence to support a claim that the property was occupied as the taxpayer's only or main residence.

54. We have considered the facts and evidence adduced by Ms Booth in support of her appeal and what other evidence she might, but has not adduced.

i. We have not been provided with evidence of the number of weeks Ms Booth spent actually living at the Property. Utility bills e.g. electricity, gas, water rates have not been produced. These would have established unequivocally the length of time Ms Booth spent actually living in 5 Lorne Buildings and the quality of her occupation, that is, whether she spent time actually occupying the Property as a residence, eating sleeping, relaxing, cooking and washing there. No third party evidence e.g. of neighbours or others has been provided.

ii. No evidence has been provided to show that she brought any modest items of furniture, kitchen equipment or personal possession that may have made her stay at 5 Lorne Buildings more suitable and comfortable for herself and her four year old child, given that she had previously been living with her parents and would presumably have had little furniture of her own.

iii. No evidence has been provided of a change of address, for example bank or credit card statements, home insurance, or other official documentation, television licence.

55. We conclude that her stay at the Property in terms of the "nature, quality, length and circumstances" of her time spent there, was not such as to amount to 'residence' for the purposes of s 222 TCGA 1992.

56. We also concur with HMRC that Ms Booth acted negligently when she failed to submit a tax return and declare the capital gain arising on the disposal of the Property.

57. The Appeal is accordingly refused and the assessment and penalties confirmed.

58. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 21 DECEMBER 2018