[2022] UKFTT 00046 (TC)

TC 08398

CAPITAL GAINS TAX – Sections 222 and 224(3) TCGA 1992 – Whether dwelling houses were purchased as part of a trade or venture in the nature of trade and whether income tax should be chargeable – no – Whether the gains on the sale of the properties are capital gains – yes - Whether the Appellant was residing in job-related accommodation – no - Whether the properties were the Appellant's main residence – no – Whether the Appellant is therefore entitled to Principal Private Residence Relief on the disposal of properties – no - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/07925

BETWEEN

MARK CAMPBELL

Appellant

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE NATSAI MANYARARA

The Tribunal determined the appeal on 25 October 2021, without a hearing, under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal (with enclosures) and HMRC's Statement of Case (with enclosures).

DECISION

INTRODUCTION

1. The Appellant is appealing against discovery assessments ('the Assessments'), issued under ss 29 and 36 of the Taxes Management Act 1970 (hereinafter referred to as 'TMA'), as well as a Closure Notice, issued under s 28A TMA, as follows:

Tax Year	Decision	Profits Assessed	Additional Tax	Date of Issue
2012-13	Discovery Assessment	£27,110.00	£8,043.25	17 July 2018
2014-15	Discovery Assessment	£63,089.00	£23,925.69	17 July 2018
2015-16	Closure Notice	£131,438.00	£35,963.35	18 July 2018

2. The Appellant is also appealing against penalties ('the Penalties'), issued pursuant to Schedule 41 of the Finance Act 2008 ('Schedule 41'), for failure to notify liability to tax. The Penalties were issued in consequence of the Closure Notice and the Assessments. The Penalties charged were as follows:

Tax Year	Description	Penalty	Date of Issue
2012-13	Schedule 41	£3,659.67	10 August 2018
2014-15	Schedule 41	£10,886.18	10 August 2018
2015-16	Schedule 41	£25,923.85	10 August 2018
		£40,469.70	

3. The penalty charged for the 2015-16 additional duties was based on the whole liability for the year of £56,975.51 (as the total liability was notified late).

4. The Assessments, Closure Notice and Penalties related to income tax, or Capital Gains Tax ('CGT'), in the alternative. The Appellant was assessed to both.

BACKGROUND FACTS

5. On 29 August 2017, HMRC wrote to the Appellant asking him to submit a self-assessment tax return for 2015-16. This was because HMRC were in receipt of information that the Appellant had disposed of a property, other than his main home. The property was situated at 8 Wigshaw Lane.

6. The Appellant responded on 1 September 2017 by saying that he had disposed of a bungalow, which he described as being the only property that he owned whilst living at his parents' home as his father's carer, and that this was Job-Related Accommodation ('JRA'). The due date for the 2015-16 tax return was deferred to 10 December 2017. The Appellant's tax return for 2015-16 was received on 20 November 2017**.**

7. On 19 December 2017, HMRC disagreed that the Appellant was living in JRA, as claimed. HMRC became aware that the Appellant had bought and sold a total of four properties between 2010 and 2015, as follows.

Address	**Purchase Date**	**Purchase Price**	**Sale Date**	**Proceeds of Sale**
10 Woodhouse Close	17 December 2010	£80,000.00	24 April 2012	£116,000.00
28 Bramshill Close	12 October 2012	£95,000.00	22 January 2015	£125,000.00
2 Bramshill Close	8 February 2013	£100,000.00	20 June 2014	£147,000.00
8 Wigshaw Lane	**17 June 2015**	**£95,000.00**	**31 March 2016**	**£245,000.00**

8. HMRC also obtained Council Tax records, as follows:

10 Woodhouse Close	Long-term empty – Class C
28 Bramshill Close	Long-term empty – Class C (12 October 2012 to 30 March 2014); and Single Person discount (30 March 2014 to 22 January 2015)
2 Bramshill Close	Long-term empty – Class C
8 Wigshaw Lane	Long-term empty – Class C

9. HMRC therefore requested further documents and information from the Appellant, concerning the transactions.

10. On 1 December 2017, the Appellant's agents (Hunter Healey Chartered Accountants) wrote to HMRC in the following terms:

*"**Chronology***

10 Woodhouse Close…

Mr Campbell purchased this property in December 2010 with the intention of refurbishing before moving into the property with his girlfriend. The relationship failed before occupation took place and Mr Campbell then placed the property on the market and sold Woodhouse Close in April 2012.

28 Bramshill Close…

2 Bramshill Close…

This property was purchased in October 2012 with a view to being Mr Campbell's main residence. The property was semi-detached and shortly after the purchase of this property, a detached house became available on the same road at a competitive price and Mr Campbell purchased 2 Bramshill Close in February 2013. Both properties required refurbishment work and following completion of the refurbishment of 28 Bramshill Close this property was placed on the market with a view to selling and Mr Campbell intended to then reside at 2 Bramshill Close. As he was unsuccessful in selling 28 Bramshill Close, and being financially exposed in owning two properties, he also placed 2 Bramshill on the market which sold in June 2014. Mr Campbell occupied 28 Bramshill Close as his main residence during this period as council tax records will show.

We enclose a computation of the gain arising on the sale of 2 Bramshill Close.

Following a worsening in the health of his father, Mr Campbell again returned to his father's home and sold the property at 28 Bramshill Close in January 2015.

Some 6 months later, Mr Campbell purchased a property at 8 Wigshaw Lane… once again with a view to restoration before occupying as his main residence. You will note from Mr Campbell's previous correspondence with yourselves that the property required much more renovation work than was originally anticipated and the scale of the development work lead [sic] *to disputes with the neighbours which escalated to the point where Mr Campbell decided he could not live at that address. The property was then sold on 31st March 2016.*

In order to protect our client's position, we have submitted a 2015/16 tax return reflecting the gain on sale of 8 Wigshaw Lane, however, as outlined above we would contend that the gain should be exempt as Mr Campbell intended to occupy this property as his main residence throughout his period of ownership.

We look forward to your agreement that the exemption from charge confirmed by TCGA92 S222 apply to the property sale at 10 Woodhouse and 8 Wigshaw lane, and hence the only chargeable gain is that relating to 2 Bramshill Close"

11. HMRC issued an Information Notice on 24 January 2018, requesting further information. HMRC further informed the Appellant that an enquiry had been opened into his 2015-16 tax return.

12. Following further exchanges of correspondence, and requests for information, HMRC reached their conclusions and issued the Assessments, the Closure Notice and the Penalties.

THE WRITTEN SUBMISSIONS

13. Neither party has requested an oral hearing.

14. HMRC's case (as set out in the Statement of Case) can be summarised as follows:

(1) The Appellant bought and sold four properties in a period of just over 5 years. The first issue to be decided is whether this represents a "trade activity", or whether it is within the scope of CGT.

(2) Income Tax is chargeable on the profits of a trade, by virtue of s 5 of the Income Tax (Trading and Other Income) Act 2005 ('ITTOIA'). A trade is defined at s 989 of the Income Tax Act 2007. Income Tax is chargeable on the difference between income received and expenses incurred, but with no deduction for expenses that are capital in nature, nor those that are not laid out wholly and exclusively for the purposes of the trade.

(3) The properties purchased by the Appellant were purchased in a need of repair, repaired and then sold at a substantial profit. The repeated nature of the activity suggests that generating a profit was behind the transactions. Making a profit through repeated transactions is systematic and becomes a trade. The badges of trade have been considered. Buying properties in need of repairs/renovation before selling them at a substantial profit points to trading, as opposed to an intention to reside in the properties.

(4) The first property was said to have been purchased so that the Appellant could move into it with his partner. The relationship is said to have ended and the property was sold. The breakdown of a relationship does not mean that a property has to be sold, especially when there is no financial settlement, as the Appellant had done work to improve the property in order to make it habitable.

(5) After the first property was sold, a second property was purchased within eight months. A third property was purchased two months later (on finance). A fourth property was then purchased; which was also in need of repair, before being sold at a substantial profit.

(6) All of the properties were left empty whilst work was being undertaken, before being sold. This is the method of operation of a property developer, with a view to realisation of profits. If the properties were for private occupation, they would not have been turned over in the manner that the Appellant has turned them over.

(7) Three of the four properties were purchased with cash. The mortgaged property had to be sold because the finance was unaffordable. No evidence of the type of finance has been provided. If the finance was short-term, this is indicative of trade.

(8) Should the Tribunal find that the Appellant was not trading, the transactions become capital, in nature, and gains subject to CGT (and any relieving provisions).

(9) The provisions of ITTOIA take precedence over TCGA, by virtue of s 37 Taxation of Chargeable Gains Act 1992 ('TCGA').

(10) Principal Private Residence Relief ('PRR'), pursuant to s 222 TCGA, requires the property to be used as the Appellant's only, or main, residence. The term "residence" implies a degree of permanency, rather than temporary occupation. The properties in this appeal were placed on the market as soon as they were refurbished and there was no permanency about any occupation.

(11) Whilst council tax bills showing single occupancy might demonstrate that a property was lived in, they do not demonstrate that the property was the Appellant's residence. There is no evidence to show that the Appellant changed his driving licence, bank statements or insurance to reflect residence. Any residential use was incidental to the primary objective; namely, disposal of the properties by way of trade.

(12) The only property that was ever occupied was 28 Bramshill. HMRC alternatively submit that the property was acquired for the purposes of realising a gain and, as such, s 224 TCGA would not permit PRR.

(13) Section 222(8) TCGA deems occupancy when an individual resides in JRA. JRA is defined as accommodation that is provided by reason of employment. This does not apply to the Appellant as he is living with his parents, by reason of family relationship and not JRA.

(14) HMRC have been provided with computations which contain large claims for expenditure, but no evidence in support of the sums claimed. All of the expenditure is notes as "estimated" and "from memory".

(15) Extra sums were allowed for the final property, where floors had to be replaced. HMRC have agreed to allow £30,000.00 of expenditure, without any evidence in support of it. The claims made are, however, significant and lacking in evidence.

(16) For 2015-16, an alteration is due as £15,000.00 was allowed in the trading computation of profit. For CGT purposes, HMRC have restricted this to £7,500.00, due to s 39 TCGA, which disallows any enhancement expenditure. The profit for CGT purposes for 2015-16 would therefore be £138,938.00.

(17) In respect of the 2015-16 Closure Notice, the burden is upon the Appellant to show that the figures that HMRC have applied are wrong. There can be no time limit for this as an enquiry was opened under s 9A TMA.

(18) In respect of the Assessments, the burden is upon HMRC to show that a source of income, which should have been taxed but has not been, was discovered; and that the Assessments have been raised within the time-limits. Once this is discharged, it is for the Appellant to displace the amounts assessed.

(19) In respect of the Penalties, the burden is on HMRC to show that a penalty is due, and that the behaviour was as described. The Penalties were charged on the basis of deliberate behaviour, with "prompted" disclosure, in connection with a failure to notify chargeability. The penalty range is 35% to 70%. HMRC gave a 20% deduction for "telling"; 25% for "helping" and 25% for "giving" access to records. The deductions were then applied to the 35% penalty range, resulting in a 24.5% deduction, from the 70% maximum. This leaves a penalty of 45.5%. No special circumstances apply.

15. The Appellant's grounds for appealing (as set out in the Notice of Appeal) can be summarised as follows:

(1) He disagrees with HMRC's decision to tax him as a trader. He has provided evidence to show occupancy, or an intention to occupy the properties, as a main residence.

(2) He has provided photographs of himself, family, furniture and pets at his home. He has also provided a statement from a neighbour.

(3) Photographic evidence shows the water damage to the first property.

(4) He has shown an intention to occupy each property as his main residence, subject to his father's condition. Due to his employment, he had to stay in JRA. He has provided evidence to show why he was unable to move into some properties, as a result of his employment. He is a full-time carer and he was required to spend the night at his parents' address, unless alternative care was available. He has supplied a written statement from his father to show that he is required to live at his parents' property.

(5) He does not believe that Penalties should apply. He would also like HMRC to accept the expenditure figures for each property.

DISCUSSION

16. The Appellant appeals against Assessments, issued under s 29 TMA, for 2012-13 and 2014-15, as well as a Closure Notice, issued under s 28A TMA, for 2015-16. The Appellant further appeals against Penalties that were issued pursuant to Schedule 41, for failure to notify liability to tax. The Assessments, Closure Notice and Penalties related to income tax, or Capital Gains Tax ('CGT'), in the alternative.

17. The issues raised in this appeal are (in respect of the Assessments and the Closure Notice):

(1) Was there a discovery?

(2) Have HMRC correctly issued a Closure Notice for the 2015-16 fiscal year?

18. This will involve consideration of the following questions:

(1) Was the Appellant carrying out an adventure in the nature of trade (i.e., was the repeated activity by the Appellant trade activity)?

(2) If so, what was the profit?

(3) If not, is the gain a capital gain?

(4) If so, is it exempt under s 222 TCGA?

(5) If not, what is the gain?

19. In respect of the Penalties, the issues are:

(1) Was there a failure to notify liability to tax?

(2) If so, was there a reasonable excuse?

(3) If not, was the failure deliberate or non-deliberate?

(4) Have HMRC correctly applied the Schedule 41 Penalties?

20. The burden of proof is on HMRC to establish that there was a discovery and that the Assessments were validly issued. Once this issue is discharged, the onus is on the Appellant to displace the Assessments and Closure Notice by showing that the Assessments are excessive; and to demonstrate any entitlement to relief from being taxed upon any capital gain produced. Finally, it is for HMRC to show that the Penalties have been correctly applied.

21. The standard of proof is the civil standard; that of a balance of probabilities.

22. Section 50(6) TMA provides that if, on an appeal, it appears to the Tribunal that an appellant is overcharged by an assessment, the assessment shall be reduced accordingly but 'otherwise the assessment … shall stand good.'

23. From the papers before me, I make the following findings of fact and give my reasons for the decision:

24. On 29 August 2017, HMRC wrote to the Appellant asking him to complete a tax return, in order for him to declare his income and gains for the 2016 fiscal year. This was because HMRC were in receipt of information that the Appellant had disposed of a property, other than his main home. HMRC gave the Appellant the opportunity to consider whether profits or gains arose in other years, that needed to be disclosed. The Appellant was given three months from the date of the letter to submit his tax return. HMRC were also aware that the Appellant bought and sold four properties, and were in receipt of Council Tax records relating to the properties.

25. By an email dated 1 September 2017, the Appellant wrote to HMRC as follows:

> *"I write to you in reference to a letter I received from you this morning concerning the sale of my bungalow in 2015-16 <u>which was the only property I owned</u>."* [sic]

<u>[Emphasis added both above and below]</u>

26. The Appellant further stated that he was living in JRA, whilst caring for his father.

27. A reminder to complete a tax return was sent to the Appellant by HMRC, on 17 October 2017.

28. On 24 November 2017, HMRC clarified that the Appellant was only being asked to complete a 2015-16 tax return and a computation of any taxable income for each year that he failed to notify his liability to tax. The due date for the 2015-16 tax return was deferred to 10 December 2017. The Appellant's tax return for 2015-16 was received on 20 November 2017.

29. By a letter dated 1 December 2017, the Appellant's agents wrote to HMRC stating that the Appellant had bought the properties with the intention of living in them as his private residence, but that events had conspired against him meaning that he had to sell the properties. The argument presented on the Appellant's behalf by his agents was that the Appellant had occupied 28 Bramshill Close as his main residence, and that he had intended to occupy 10 Woodhouse Close. In respect of 2 Bramshill Close, the agents attached a computation of the gain arising on the sale of that property. The agents explained that in order to protect the Appellant's position, they had submitted a 2015-16 tax return reflecting the gain on the sale of 8 Wigshaw Lane, which they believed should be exempt as the Appellant intended to occupy this property as his main residence.

30. By a letter dated 19 December 2017, HMRC disagreed with the Appellant's position in respect of JRA, and this point was not pursued any further by the Appellant's agents. In respect of the purchase of the properties, HMRC's position was that each property had been in need of repair when purchased by the Appellant, before being improved and sold at a profit. HMRC's position was, ultimately, that this repeated activity bore the hallmarks of trading. HMRC therefore requested the following information from the Appellant:

> *"In order to give this proper consideration please provide the following:*
>
> 1. *Whatever evidence there is to support your contention that he intended for one of* [sic] *more of these properties to be his residence*
> 2. *For each property, please identify the source of funding and provide copies of loan application forms and loan agreements.*
> 3. *Please provide an analysis, with evidence, of the expenditure incurred. This will include copies of bank statements from which the expenditure was met.*
> 4. *A computation of the gain and/or profit derived from each sale."*

31. The Appellant was required to reply by 20 January 2018. HMRC further informed the Appellant that an enquiry had been opened into his 2015-16 tax return.

32. On 24 January 2018, an Information Notice was issued by HMRC, pursuant to Schedule 36 of the Finance Act 2008 ('Schedule 36'). The Information Notice repeated the questions included in the letter dated 19 December 2017. The deadline given to provide the documents requested was 23 February 2018. The Information Notice was issued as HMRC had not received a response to their letter dated 19 December 2017.

33. By a letter dated 1 February 2018, the Appellant's agents said that only 8 Wigshaw Lane had been in need of repair when purchased, whilst the other three properties were habitable. In further amplification of this position, the Appellant's agents said the other three properties were merely updated to the Appellant's style and specification. The Appellant's agents concluded their letter as follows:

> *"Whilst we note your comments regarding the application of S222(8) in this case, we would content that S222(8) would apply save for the family connection between Mr Campbell and his employer and as you are aware the application of S222(8) would remove all properties from charge. Mr Campbell was on each occasion seeking to improve his property with a view to moving in to it as soon as his father's medical condition improved to allow him to do so.*
>
> *Can we therefore agree to take the middle ground and treat each of the chargeable sales as capital gains rather than trading? I attach computations of the gain in each case. As previous, Mr Campbell is claiming PRR in respect of 28 Bramshill as he did occupy the premises as his main residence."* [sic]

34. HMRC requested evidence to support the statements made by the Appellant's agents in respect of the properties.

35. On 6 February 2018, HMRC wrote to the Appellant, enclosing factsheet FS11 (failure to notify) and factsheet FS9 (Human Rights Act).

36. On 12 February 2018, HMRC re-iterated that the Appellant was not living in JRA, therefore relief was not considered to apply. HMRC were of the view that, firstly, the accommodation that the Appellant was living in was not provided by reason of his employment and, secondly, it was not necessary for the proper performance of the Appellant's duties for him to reside in the accommodation. HMRC were, further, not persuaded that the properties were purchased with the intention that the Appellant would move in to the properties.

37. HMRC added that all of the properties had been modernised, due to the amount of enhancement expenditure that had been claimed; and that this was with a view to realising a profit. HMRC further re-iterated that the repeated nature of the activity amounted to trading. In the event that the activity did not amount to trading, HMRC's position was that 28 Bramshill was not covered by PRR because it was never the Appellant's residence. Furthermore, even if it were, PRR would be restricted by s 224(3) TCGA.

38. The Appellant's agents responded, on 22 February 2018, rejecting HMRC's conclusion that the Appellant had been trading during the period of ownership and sale of the properties. The agents were of the view that the Appellant is more of a DIY homeowner, rather than a trader. They added that the Appellant had provided an explanation in respect of the initial purchase of 10 Woodhouse Close, providing photographs showing that the property was not suitable for occupation. A boiler is said to have exploded in the kitchen, bringing down the kitchen ceiling. They further added that ownership of a property for 16 months in order to generate a profit of £17,202.00 would be a meagre return for a professional developer.

39. The agents attached a gain computation in respect of 28 Bramshill Close, which the Appellant is said to have occupied as his main residence. The agents also attached a copy of a council tax bill, together with a statement from one of the Appellant's neighbours, as well as calculations in respect of 8 Wigshaw lane (as set out in the Appellant's 2015-16 tax return). The agents requested that PRR be applied to the gains on the disposal of 28 Bramshill Close. The Appellant was said by the agents to have acknowledged that he purchased 2 Bramshill Close at the same time as owning 28 Bramshill Close, and that he is liable for taxation on this property.

40. HMRC replied on the same date and commented that the computation of the gain/profit included a summary of the work carried out on the properties, but that there was no evidence of the costs incurred. HMRC added that they expected to see invoices that could be cross referenced to the bank statements.

41. By an email dated 23 February 2018, the Appellant's agents said this:

> *"We have not been provided with original invoices by the Client only an analysis of the total expenditure incurred. As the Client was working under the assumption that he was improving his own home& not expecting to have to account to HMRC, he has not retained receipts in respect of the expenditure."* [sic]

42. By a letter dated 28 March 2018, HMRC set out their view as to why the activity amounted to trading. HMRC referred, once again, to the Schedule 36 Information Notice and summarised HMRC's position on the issue of profits or trade and/or CGT.

43. On 20 April 2018, the Appellant's new agents, Brabners LLP, requested an extension of time to 11 May 2018, to respond to the Information Notice. By a further letter, dated 10 May 2018, the Appellant's new agents provided further information concerning all four properties.

44. HMRC then reached its conclusions and issued the Assessments, Closure Notice and Penalties.

45. On 10 August 2018, the Appellant's agents appealed against the Assessments and the Closure Notice. On 22 August 2018, the Appellant's agents also appealed against the Penalties.

46. The Appellant was assessed to income tax or, in the alternative, CGT**.** Before applying the provisions of s 224(3) TCGA, it is necessary to consider the possibility that the Appellant has undertaken an adventure in the nature of trade (i.e., whether an income tax charge may arise on the gains from transactions in the circumstances of this appeal). This is because income tax takes priority over CGT. The question of whether a trade is being carried on with a view to realisation of profit is a subjective test.

47. If the transactions were not trading transactions, it is necessary to consider whether the gains accruing from the sale of the properties was exempt from CGT, as attributable to the disposal of a dwelling-house, which is, or has at any time in the Appellant's period of ownership, been his only or main residence.

Q. Was the repeated activity by the Appellant trade activity?

48. HMRC submit that the Appellant purchased, re-developed and then sold properties, realising a profit as a result, and that this bears the hallmarks of trading. In further amplification of the case on behalf of HMRC, HMRC submit that, on the face of it, the properties were acquired for the purpose of generating a profit, which brings the transactions within the realms of income tax, rather than CGT. If this is correct, none of the provisions of TCGA will apply. HMRC further submit that any residential use of the properties was incidental to the primary objective, which was to dispose of the properties by way of trade. In HMRC's view, all of the properties had been modernised, due to the amount of enhancement expenditure that had been claimed by the Appellant, and that this was with a view to realising profit. HMRC's case is that the repeated nature of the activity amounts to trading.

49. The Appellant's case is that he is not a trader and that the properties were purchased with the intention that he would reside in them. In further amplification of his case, the Appellant submits that he has provided HMRC with photographs showing his pets living at the properties, as evidence that he would therefore have been at the properties each day to care for them. This, he submits, shows continuity of residence. The Appellant's agent added that whilst the Appellant bought all of the properties with the intention of living in them as private residence, events took over resulting in a need for the Appellant to sell the properties. The Appellant's agents were, ultimately, of the view that the Appellant is more of a DIY homeowner, rather than a trader.

50. In *MacMahon & MacMahon v The Commissioners of Inland Revenue* [1951] 32 TC 311 (*'MacMahon'*), the court held that profits were made in carrying on an adventure or concern in the nature of trade. The case concerned sisters who jointly purchased and sold two dwelling houses (one of which they subdivided before sale), a hotel and a block of property comprising

a hotel, licensed premises and shops. They lived in two of the properties while in their ownership. In *MacMahon*, residence was not considered to be conclusive of the case in favour of the appellants in that appeal, on the evidence that had been available to the Commissioners in making the assessments. The fact that a property has been used as a residence is therefore not fatal to a trading argument.

51. Section 5 ITTOIA provides that income tax is charged on the profits of trade, profession or vocation. The Taxes Act do not provide any direct statutory guidance on the meaning of 'trade', apart from the definition in s 989 of the Income Tax Act 2007, which gives the definition of a trade as being "any venture in the nature of a trade".

52. In *Smith Barry v Cordy* [1946] 28 STC 250, Scott LJ said this, at p 258:

> "…that word [trade] must be used in its ordinary dictionary sense…"

53. Case law has developed a number of tests to determine whether someone is carrying out an adventure in the nature of trade, known as "badges of trade".

54. Badges of trade include, *inter alia*, whether there is a profit seeking motive, as well as the frequency and number of similar transactions. The most notable case in this regard is *Pickford v Quirke (H M Inspector of Taxes); Pickford v The Commissioners of Inland Revenue* [1927] 13 TC 251 (*'Pickford'*), which involved the purchase of the shares of a mill-owning company by a syndicate, the liquidation of the company and the formation of a new company to purchase the old company's assets at a profit to the syndicate. The court held that the appellant's participation in the transactions constituted a trade, and that he was assessable to tax, as it was necessary to the Appellant that the transactions should be financially profitable. Furthermore, due to the repeated nature of the transactions, profits were trading profits and taxable as such.

55. In *Pickford*, Rowlat J said this, at p 263:

> "…Now of course it is very well known that one transaction of buying and selling a thing does not make a man a trader, but if it is repeated and becomes systematic, then he becomes a trader and the profits of the transaction, not taxable so long as they remained isolated, become taxable as items in a trade as a whole, setting loses against profits, of course, and combining them into one trade."

56. In relation to modification of the asset in order to make it more profitable, which is a further badge of trade, it is clear that having an intention to make a profit can indicate a trading activity. However, by itself, that is not enough.

57. A further badge of trade includes the nature of the asset. The most notable case in this respect is *Rutledge v The Commissioner of Inland Revenue* [1929] 14 TC 490 (*'Rutledge'*). In *Rutledge*, the taxpayer purchased one million rolls of toilet paper in one single transaction. He then sold them at a profit in another single transaction. This was held to be trading, as there was no justifiable reason to purchase such a large quantity of toilet paper. The conclusion reached was that the purchase could not have been for personal use. A similar conclusion was held in *CIR v Fraser* [1942] 24 STC 498, where a woodcutter purchased a consignment of whisky, which was in excess of that required for self-consumption.

58. Other badges of trade, which have developed over time, include financing arrangements (the source of finance). Determining the source of finance is important when deciding whether a trade is carried on. Finance taken out to purchase an asset may indicate that to repay the debt, the asset would have to be sold: *Wisdom v Chamberlain* [1969] 1 WLR 275. Furthermore, an asset acquired at a market rate could indicate that it has either been purchased for a trade, or an investment: *Taylor v Good* [1974] 1 WLR 556.

59. The length of ownership (interval between purchase and sale) has also been considered to be an important indicator of trade. The longer the period of ownership, the more likely it will be viewed as an investment, rather than a trade. A key case in this respect is *Marson v Morton* [1986] 1 WLR 1343 (*'Marson'*). In *Marson*, the profit on a single transaction in land was held to be a capital receipt, rather than arising from a trade. Land was purchased with the intention to hold it as an investment. No income was generated by the land. However, it did have planning permission. The land was sold later. As the transaction was far removed from the taxpayer's normal activity and was the profit on a single transaction in land, it was held to be a capital receipt, rather than arising from a trade.

60. In *Marson*, Sir Nicholas Browne-Wilkinson V-C held that whether there has been an adventure in the nature of trade is a 'question of fact' which depends on all the facts and circumstances of each particular case. He expanded upon the badges of trade, specifying nine factors to be considered in determining the existence of a trade.

(1) The frequency and number of similar transactions;

(2) The subject-matter of the realisation;

(3) Whether the transaction was carried through in a manner typical of the trade in a commodity of that nature;

(4) What the source of finance for the transaction was;

(5) Whether the transaction was in some way related to the trade which the taxpayer otherwise carries on;

(6) Supplementary work on or in connection with the property realised;

(7) Whether the item purchased was resold in one lot, or broken down into several lots;

(8) Motive;

(9) Whether the item purchased either provided enjoyment for the purchaser, or produced income pending resale.

61. Badges of trade are not to be used as a checklist, but are key indicators that are used to determine whether a particular transaction, or transactions, are trading activity. In some circumstances, the existence of a single badge of trade is enough to show trading.

62. Having summarised the relevant case law, I turn to consider the properties purchased by the Appellant in relation to whether the Appellant's activity amounted to trade activity:

63. It is common ground that the Appellant purchased and sold a total of four properties. This matter is therefore not in issue between the parties, albeit that the parties differ in view as to the outcome that should be reached as a result. The evidence shows that in the period between 12 April 2012 and 31 March 2016, the Appellant made profits/gains, before expenses, of £263,000.00.

64. The Appellant purchased the property at 10 Woodhouse Close on 17 December 2010 and it was sold on 23 April 2012. The Appellant has provided the completion statement relating to the property, showing the purchase price of £80,000.00 and the sale price of £116,000.00.

65. The Appellant subsequently purchased the property known as 28 Bramshill Close, on 8 October 2012. Schedule 2 of the letter dated 10 May 2018 includes completion documents. These show that 28 Bramshill Close was purchased for £95,000.00. Shortly after purchasing 28 Bramshill Close, the Appellant purchased 2 Bramshill Close, on 8 February 2013, for £100,000.00. 2 Bramshill Close was sold on 18 June 2014, for £147,000.00, and 28 Bramshill Close was sold in January 2015, for £125,000.00.

66. The Appellant then purchased a property known as 8 Wigshaw Lane, on 12 June 2015. The property was purchased for £95,000.00 and it was sold on 31 March 2016, for £245,000.00.

67. I find that the Appellant has been very active on the property market over a relatively short period of time, and this does not sit well with the claim that the Appellant was merely looking for somewhere to live, whilst also caring for his father.

68. Whilst the Appellant's case is that he intended to live at 10 Woodhouse Close with his ex-girlfriend, I find that there no documentary evidence to support a finding that he intended to live there with his partner. I find that the Appellant spent time modifying the property. The property is said to have been badly affected by flood damage, resulting from burst pipework. It is further submitted that there was significant delay in dealing with the insurance company and with the repair work. I find that there is remarkably no documentary evidence to show any dealings, or correspondence, with an insurance company. The Appellant has not retained any

paperwork in relation to the work that was carried out in the property, albeit that three photographs have been provided at Schedule 1 of the letter dated 10 May 2018, from Brabners LLP.

69. In respect of 10 Woodhouse Close, I find that apart from the Appellant's assertions that he intended to live there with his girlfriend, there is no evidence, in the form of Land Registry documents, to show that the Appellant's girlfriend had any interest in the property, if that was also to be her home as well.

70. The Appellant then purchased two further properties within a short period of time after selling 10 Woodhouse Close. The Appellant does not, however, explain how the second property differed from 10 Woodhouse Close, which he suggests he could not live in as a result of the end of a relationship. The Appellant purchased 28 Bramshill Close and 2 Bramshill Close within months of one another and within months of selling 10 Woodhouse Close. The letter dated 10 May 2018 describes the purchase of 2 Bramshill Close as *"impulsive"*. I find that the impulsive purchase of a property shortly after the sale of an earlier property and the purchase of another property does not sit well with the claim that the Appellant intended to live in the property, or that he was not seeking to realise a profit.

71. Furthermore, the Appellant took out a mortgage to purchase 2 Bramshill Close, but he did not retain any paperwork relating to the mortgage. The Appellant has, however, provided bank statements showing the mortgage balance and monthly repayments, at Schedule 3 of the letter dated 10 May 2018. I am satisfied, on balance, that a mortgage was taken for the property at 2 Bramshill Close. I find that the bank statements do not, however, shed any light on the length of any finance The Appellant's case is that he struggled to afford the monthly repayments for 2 Bramshill Close and he sold this property mere months before selling 28 Bramshill Close. I find that 28 Bramshill Close was modified, before being sold relatively quickly after 2 Bramshill Close was sold.

72. The Appellant explained that he had purchased 8 Wigshaw Lane without having a survey done, which he described as a *"big mistake"*. He added that the property was uninhabitable, having suffered water damage, meaning that all the floors needed to be removed, as well as the kitchen and bathroom. His case is also that all of the pipework had to be removed. He further added that while the work was being completed, he faced problems with his neighbour. He decided to have a kitchen and bathroom fitted as he was informed that this would make the property more marketable.

73. In relation to 8 Wigshaw Lane, appended to the letter dated 10 May 2018 is Schedule 4, which comprises of a series of photographs purporting to show extensive damage to the property, as well as a copy of the surveyor's report. I do not accept the suggestion that an individual who was looking for a home in order to have his own space away from his parents would purchase a property without carrying out a survey, having spent a considerable amount of money renovating three properties, and having experienced difficulties with the finance for

the third property. The Appellant, further, has not provided any evidence of the actual expenditure required to make the property habitable, as claimed.

74. I have had sight of the survey report, dated 26 March 2015, prepared by James R Lugsden and David N Stanhope, showing the work required on the property and the cost of the work. By his own written evidence, this was not the Appellant's own survey and the report is not, therefore, conclusive of any costs that the Appellant incurred in relation to any expenditure on this property.

75. By his own written evidence, the Appellant made renovations to the final property to make it more marketable. The Appellant, however, also says that both 28 Bramshill Close and 2 Bramshill Close required work. The Appellant's own written evidence does not however sit well with his agent's letter, dated 1 February 2018, that it was only 8 Wigshaw Lane that required work, whilst the other properties were habitable but updated to the Appellant's specifications. I find that this is a material inconsistency which colours the lens through which the Appellant's case is to be viewed.

76. Having considered all of the evidence, cumulatively, whilst the Appellant clearly generated profits from the sale of the properties, and whilst the length of ownership for all but the very first purchase was relatively short, I find that this does not point towards trading. I find, however, that the properties were modified in order to be sold, and that this generated a profit.

77. Whilst a single badge of trade is sufficient to show trading, I find that in the appeal before me, the Appellant's activities had no connection with an existing trade. There is no evidence before me to support a finding that the Appellant had engaged in a similar activity over a protracted period of time. In reaching these findings, I have considered all of the arguments, together with the documentary evidence included in the bundle. I accept that the Appellant is not a professional property developer.

78. In *Salt v Chamberlain* [1979] STC 750, a research consultant made a loss on the Stock Exchange after trying to forecast the market. The loss was made after several years and over 200 transactions. This was not seen as a trade, but was considered to be capital in nature. It was concluded that share trading by a private individual can never have the badges of trade. Connection with an existing trade is a relevant consideration.

79. I find, however, that the Appellant's activities generated gains, which are subject to CGT. I now proceed to consider the capital gains position.

Q. Is the gain a capital gain?

80. If a person is not a trader, they will still be liable to CGT on the gains they have made. In this respect, s 222 TCGA applies to a gain accruing to an individual so far as is attributable to the disposal of an interest in 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. There are, therefore, conditions and restrictions to PRR, including the fundamental requirement that the dwelling house has been the individual's main residence.

81. Any relief under s 222 TCGA is subject to the provisions of s 224(3) TCGA, which prevents relief where the purpose of the acquisition was to realise a gain, or limits the relief where expenditure is incurred for the purposes of realising a gain.

82. Furthermore, s 222(8) TCGA is a deeming provision and creates what is known as a "deemed occupancy". The effect of that is that actual occupancy is not required if there is an intention to occupy. For s 222(8) to apply, the Appellant would however need to show that he resides in JRA (i.e., accommodation provided by reason of employment).

83. The Appellant's case is that he resided at 28 Bramshill Close. Further and alternatively, the Appellant submits that he intended to occupy the other properties as his main residence, and that s 222(8) TCGA should apply to the gains arising on 10 Woodhouse Close and 8 Wigshaw Lane, on the basis that he intended to reside in these properties, but for having to reside in JRA.

84. The case advanced on HMRC's behalf is that the Appellant does not live in JRA, as he is living with his parents in the family home. HMRC's view is that, firstly, the accommodation that the Appellant was living in was not provided by reason of his employment and, secondly, that it was not necessary for the proper performance of the Appellant's duties for him to reside in the accommodation. HMRC were, further, not persuaded that the properties were purchased with the intention that the Appellant would move in to the properties. In respect of the property at 28 Bramshill Close, HMRC's case is that it is unlikely that the Appellant's short occupation would be sufficient to make the property his main residence; and that even if it did, the provisions of s 224(3) would restrict any relief against the gain.

85. I will, firstly, consider whether the Appellant is residing in JRA, before proceeding to consider whether any of the properties was the Appellant's main residence, for the purposes of PRR.

Q. Does the Appellant reside in JRA?

86. The first question which must be answered is whether accommodation has been provided by reason of employment. The test is whether it is necessary for the Appellant to reside in the accommodation in order to perform his employment duties.

87. The Appellant says that he was residing in JRA whilst caring for his father. HMRC do not dispute that the Appellant's father has a diagnosis of front lobal dementia. This matter is, therefore, not in issue between the parties. The issue before me is not whether the Appellant's father is suffering from ill-health, or whether he requires care/assistance. The issue is whether the Appellant resides in JRA.

88. I have had the benefit of reading the letter, dated 10 October 2012, from Dr I M Pomeroy (Consultant Neurologist); the letters dated 6 February 2013 and 23 October 2013, from Dr Rhys Davies (Consultant Neurologist); the letter dated 2 May 2018, from Tracy Clarke (Senior Nurse Practitioner) and the letter, dated 9 May 2018, from Dr D A Royle (GP). I have also considered the letter from the Appellant's mother, Mrs K Campbell.

89. Having considered the medical evidence in totality, I find that the medical evidence provided does not support the claim that the Appellant's parents' home was JRA. What the medical evidence does do is confirm the diagnosis, prognosis and needs of the Appellant's father. I have already found that the Appellant's father's health condition is not in issue between the parties. I find that it would however be a stretch to suggest that the clinicians and healthcare professionals who have written letters were suggesting that the Appellant's parents' home constituted JRA, in the true sense of the expression and the statutory scheme, merely that care was required by the Appellant's father and that this care was being provided by the Appellant.

90. Indeed, the medical evidence refers to the Appellant's residence at his parents' home as residing at *"the family home"*. The letter, dated 9 May 2018, from Dr D A Royle, is in the following terms:

> *"I confirm that Mr Stephen Campbell requires 24 hour care due to his medical condition and that Mr Mark Campbell as his care giver is required to live at the family home to fulfil the level of care needed by the patient."*

91. Similarly, the letter dated 2 May 2018 from Tracy Clarke, Senior Nurse Practitioner, is in the following terms:

> *"...it is necessary for Mr Campbell to live at the family home while that care is provided."*

92. Whilst Ms Clarke refers to the Appellant as being *"employed as Stephen\s carer since April 2010"*, I find that this statement is likely to have been as a result of what was reported to her, as opposed to independent knowledge that there was a legally enforceable contract of employment in place. I find that the suggestion that the Appellant has been employed under a contract of employment/services since 2010 then beggars the question why he purchased 10 Woodhouse Close with the intention of moving into that property with his girlfriend, as suggested, if he was under a contract of employment to provide round the clock care, that is said to have commenced in the same year. This does not sit well with a plan to move in with his girlfriend, which he says was only abandoned when the relationship ended, and not because of his father's health.

93. Whilst there is no suggestion that there have been any improvements to the Appellant's father's condition, I do not consider that the Appellant's own parents would require him to leave their property if the Appellant had nowhere else to reside. This would not be so if the accommodation were JRA as an employer would be under no obligation to continue to provide accommodation once the employment relationship has come to an end.

94. On the issue of whether the Appellant was residing in JRA, I find that by his own written evidence, the Appellant also considered his residence at his parents' property to be residing *"at home"*. In his email to HMRC, dated 1 September 2017, the Appellant said this (in relation to 8 Wigshaw Lane):

> *"Whilst owning the property I owned NO other property and <u>was living at home with my parents</u>.*

95. Reference to *"living at home"* does not sit well with the suggestion that the accommodation was only being provided because of any care needs that the Appellant's father had.

96. The argument that the Appellant resides in JRA further does not sit well with the Appellant's alternative suggestion that one of his motivations for purchasing bungalows was to make them accessible for his father. If the Appellant's parents' home was JRA, then it is not clear why the Appellant would have to select and adapt other properties to facilitate his father's presence at those other properties. This therefore strongly suggests that there was nothing more than a family arrangement.

97. I therefore do not accept that the Appellant was living in JRA, as I do not accept that the accommodation was provided for the purposes of employment. It is then necessary to consider whether the properties were acquired for the purpose of occupying them as a main residence.

Q. Does PRR apply?

98. The requirement for eligibility for PRR on the disposal of an individual's property is the need for that property to be the individual's residence: s 222 TCGA.

99. There is no statutory definition of 'residence', however the question of residence has been the subject of some adjudication. The meaning of ordinary words is, as Lord Reid observed in *Brutus v Cozens* [1973] AC 854, a question of fact. The word should be construed to bear its natural, or ordinary, meaning. The word 'reside' is a familiar English word, which means "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place" (Oxford Dictionary). Case law has established that occupying a property does not, necessarily, make it a 'residence' for PRR purposes.

100. The dictionary definition of 'reside' was adopted by Viscount Cave in *Levene v Inland Revenue Comrs* [1928] AC 217 (*'Levene'*):

> "…the word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place."

101. In *Fox v Stirk and Bristol Electoral Registration Officer* [1970] 2 QB 463, Lord Widgery summarised "residence" as follows:

> "This concept of residence is of a place where a man is based or where he continues to live, the place where he sleeps and shelters and has his home. It is imperative to remember in this context that 'residence' implies a degree of permanence. Consequently, a person is not entitled to claim to be a resident at a given town merely because he pays a short, temporary visit. Some assumption of permanence, some degree of continuity, some expectation of continuity is a vital factor which turns simple occupation into residence."

102. The case therefore established the principle that residence denotes "some degree of permanence, continuity or expectation of continuity". The court held that the question of whether occupation is sufficient to make a person resident is one of fact and degree, having regard to the nature, quality, length and circumstances of the taxpayer's occupation.

103. This approach was adopted in *Goodwin v Curtis* [1998] STC 475 (in which *Levene* was cited), where the appellant had occupied a farmhouse. The issue in *Goodwin v Curtis* was, essentially, whether the appellant's occupation of the farmhouse amounted to 'residence'. The case was complicated by the fact that three days after the taxpayer moved into the farmhouse, he completed on another house, on which he had earlier exchanged contracts. HMRC argued

that it was insufficient simply to own a property, and that residence required some degree of permanence and continuity. The General Commissioners agreed with HMRC.

104. On appeal, the High Court confirmed that the short-lived occupation of the house did not amount to residence, for the purposes of the legislation. The Court of Appeal dismissed the taxpayer's appeal and concluded that there was sufficient evidence to come to the conclusion that the nature, quality; length and circumstances of the taxpayer's occupation of the farmhouse did not amount to residence.

105. Millett LJ gave the leading judgment. and held, at p 480, 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"

> "The substance of the Commissioners' finding taken as a whole, in my judgment, is that the nature, quality, length and circumstances of the taxpayer's occupation of the [property] did not make his occupation qualify as residence."

106. Schiemann LJ added, at p 481, that:

> "I accept, as did the commissioners, the Crown's contention that in order to qualify for the relief a taxpayer must provide some evidence that his residence in the property showed some degree of permanence, some degree of continuity or some expectation of continuity. Before the commissioners the taxpayer contended that at the date when he had acquired an interest in the respective properties, he had intended them to be a permanent residence in each case. That contention explains the phraseology of the General Commissioners when they say in their third finding:
>
> > "We accepted the respondent's contention that on the dates when the appellant moved into respectively the [properties] he did not intend to occupy them as his permanent residence.""

107. The Court of Appeal therefore considered that the nature, quality, length and circumstances of occupation were important questions. The appellant was unsuccessful in his appeal, with the Court of Appeal finding that the farmhouse represented temporary, rather than permanent, accommodation. This was because the appellant's occupation was a "stop-gap" measure, pending completion of the purchase of somewhere else to live.

108. The general principles which can be drawn from Millett LJ's judgment in *Goodwin v Curtis* is that:

(1) The word 'reside' is an ordinary word of the English language.

(2) It is necessary to look at the nature, quality, length and circumstances of a taxpayer's occupation of a property in deciding whether it is a residence.

(3) Temporary occupation at an address does not make a person resident there.

(4) There must be some degree of continuity or some expectation of continuity to turn mere occupation into residence.

(5) The question of when occupation becomes residence is one of fact and degree for the Tribunal to decide.

109. Having considered all of the evidence, cumulatively, I find that the Appellant did not intend that any of the properties would be his main residence. This is because the evidence before me does not support a finding that there was any degree of permanence, continuity or expectation of continuity in relation to any of the properties. In reaching these findings, I have considered the nature, quality, length and circumstances of any occupation relied on.

110. In respect of 10 Woodhouse Close, I have found that the Appellant has not explained why the end of his relationship would have resulted in the need to dispose of the property. Furthermore, apart from the Appellant's assertions, there is no evidence, in the form of Land Registry documents, to show that the Appellant's girlfriend had any interest in the property, if that was also to be her home as well. I find that the Appellant has not provided any evidence to show any connection to this property, apart from the evidence of purchase and sale, as well as the Council Tax records, which do not show occupancy. There is no documentary evidence to show an intended change of correspondence address, or other substantiating evidence.

111. Whilst not binding on this Tribunal, I have considered the following cases, which find to be persuasive on the issue of the breakdown of a relationship:

112. In *David Morgan v HMRC* [2013] UKFTT 02596 (TC), the appellant purchased a property where he intended to live with his girlfriend when they were married. The appellant's relationship ended and the appellant continued with the purchase. He moved in for a period of two weeks, specifically for preparing the house for rental, then moved in with his parents. The tribunal found that this was residence. A key part of the tribunal's decision was the fact that the appellant's former fiancé's name appeared on the mortgage deed as a future resident, meaning that notwithstanding the short period actually lived in the property, the appellant had intended to occupy it as his residence.

113. In *Susan Bradley v HMRC* [2013] UKFTT 131 (TC), the appellant lived in a house which she owned jointly with her husband. She also owned another small house, which was normally let. The appellant decided to leave the matrimonial home and moved into the small house when

it became vacant in April 2008, making some improvements and making it her home. Although the property was on the market, the market was very poor and she expected to live permanently in the property. The appellant later reconciled with her husband and she moved back into the matrimonial home, in November 2008. She subsequently sold the small house in January 2009.

114. In the *Susan Bradlev* appeal, during the period April 2008 to November 2008, she lived in the small house and she was of the view that it would qualify for PRR. The tribunal held that the property was not the appellant's residence, at all. This was because the tribunal found that the appellant had never intended to live permanently in the property; and it was only ever going to be a temporary home (and therefore never her residence). The tribunal considered, and applied, *Goodwin v Curtis*, in relation to the need for there to be a degree of permanence and some expectation of continuity, which were two of Lord Widgery's tests in *Fox v Stirk*.

115. In *Piers Moore v HMRC* [2013] UKFTT 433 (TC), the appellant also had matrimonial difficulties and moved into another property, taking furniture with him from the matrimonial home. He also took all of his clothes and lived in the property from November 2006 to July 2007, spending every night there, unless he was away on business. The tribunal in that appeal found that he did not occupy the property with a sufficient degree of permanence for it to be a residence. It was only temporary accommodation. A material aspect of the evidence in that appeal was a letter that the appellant had written to HMRC stating that he did not choose to make the property his permanent address because it only had two bedrooms; and that he had started to look for another property in January 2007.

116. The Appellant made two further property purchases shortly after he had sold 10 Woodhouse Close. There is no explanation of how these two properties differed from 10 Woodhouse Close, in light of his alternative argument that he wanted properties that his father could also visit. Whilst the Appellant owned 10 Woodhouse Close for 16 months, the only evidence that he has been able to provide is in the form of photographs, which could relate to the interior of any property. There is nothing to point to these photographs being of the interior of 10 Woodhouse Close. The photographs are, therefore, of marginal probative value to the assertion that the Appellant ever resided, or intended to reside, in the property.

117. I find that there is only one photograph of a room, but the photograph does not appear depict the flood damage referred to in the letter dated 10 May 2018. There is also a photograph of three cats sitting in a room, a photograph of a work surface in what may be the kitchen, with kitchen utensils near the sink. The work required to the property had been advanced as one of the reasons why the Appellant did not move into the property. I have found that no documentary evidence has been submitted to show the Appellant's correspondence with the insurance company, or indeed to show the nature and extent of the work that was required to the property. I further find that if the Appellant had intended to occupy the property, then it is reasonable to expect him to have changed his correspondence address to reflect this.

118. In respect of 28 Bramshill Close, I find that any occupation of this address was merely a stop-gap. This is because by his own written evidence, the Appellant had already identified 2

Bramshill Close, which he purchased using finance, before he was compelled to move into 28 Bramshill Close. The Appellant does not suggest that he ever resided at 2 Bramshill Close. Furthermore, the Appellant had already placed 28 Bramshill Close on the market when he moved and he was having difficulty selling it, before he sold 2 Bramshill Close.

119. In relation to 28 Bramshill Close, there is an undated, handwritten letter from J Hill, which simply says:

> *"I WOULD JUST LIKE TO CONFIRM THAT MARK CAMPBELL LIVED AT 28 BRAMSHILL CLOSE"* [sic]

120. I have considered this letter but I find that it is of marginal probative value in light of the remainder of my findings about the absence of any other official evidence of residence or occupation.

121. I find that the Council Tax documentation refers to the property as being Long-term empty. If a person is the owner of an empty property (unoccupied and substantially unfurnished), a Council Tax premium will only be payable after the property has been empty for more than two years. The Council Tax Bill from Warrington Borough Council, for 2014-15, shows council tax for the period 30 March 2014 to 22 January 2015, less 25% discount for single occupancy. I find that this is because the property would have been long-term empty for almost two years by 2014 and this is not, therefore, determination of residence.

122. I find that in respect of 28 Bramshill Close, the reason that the Appellant spent time at the property was because he could not get the property off the market. He had, however, already placed the property on the market prior to moving in. The Appellant has not been able to provide any other evidence, apart from photographs, which I have considered. This is highly indicative of a stop-gap, in relation to 28 Bramshill.

123. Continuity of residence is one factor to consider in the multi-factorial exercise of establishing where the true position lies. Physical presence in a particular place does not necessarily amount to residence where, for example, a person's physical presence there is no more than a stop-gap measure. If the sale of the property is being contemplated and, particularly, if the property has been put on the market for sale before moving in, it will have a bearing on the ability to satisfy the 'permanence' and 'continuity' requirements.

124. In respect of the mortgage for 2 Bramshill Close, the Appellant has not provided any of the documentation relating to the mortgage, but he has provided bank statements. The Appellant was said to have acknowledged that he purchased 2 Bramshill Close at the same time as owning 28 Bramshill Close; and that he is liable for taxation on this property.

125. Whilst it has been suggested that the Appellant experienced problems with neighbours at the final property, this only appears to have related to the work that was being carried out and it is not clear why the Appellant would have then felt obligated to sell the property as the work would not have continued indefinitely.

126. I find that there has been an inconsistency between what the Appellant's previous agents said about whether the properties were habitable and what the Appellant's new agents said. The Appellant's previous agents said that it was only 8 Wigshaw Lane that was in need of repair. This does not however sit well with the evidence that the Appellant has relied on in respect of all of the properties, especially that situated at 10 Woodhouse Close, which was said to have been affected by flood damage.

127. I do not accept that the Appellant would not have changed his correspondence address if he had intended to occupy any of the properties as his main residence. The Appellant has not provided any utility bills or other correspondence. Furthermore, the weight of the evidence supports the finding that the Appellant completed extensive refurbishments and sold the properties as soon as the work was complete. I have not accepted that the Appellant resides in JRA and I find that he did not occupy, or intend to occupy, any of the properties as his main residence. This means that, applying s 222 TCGA, the Appellant's gain on the sale of the properties was outside of the PRR exemption.

128. Having considered all of the evidence, cumulatively, and having regard to the relevant case law, I do not accept that the Appellant has satisfied the requirements of PRR. In reaching my findings, I have considered the overall picture and not just a snapshot. I find that PRR does not apply in relation to any of the properties.

Discovery Assessments: 2012-13 and 2014-15

Closure Notice 2015-16

129. HMRC issued discovery assessments for 2012-13 and 2014-15. The Appellant did not submit tax returns for these years. HMRC however opened an enquiry into the tax return that the Appellant submitted for 2015-16, and issued a Closure Notice. I shall return to consider this later.

130. If HMRC 'discover' income which ought to have, but has not, been assessed for income or corporation tax, they may make an assessment in that amount to make good the loss of tax. The conditions in s 29(3) and s 29(5) do not apply to taxpayers who have not submitted a tax return for the relevant tax year. The conditions therefore do not apply in the appeal before me (in relation to the Assessments) as the Appellant did not submit tax returns for 2012-13 and 2014-15. The normal time-limit for an assessment imposed by s 34 TMA is extended by s 36 TMA.

131. Section 36(1A)(c) TMA provides that an assessment on a person in a case involving loss of income tax or capital gains tax attributable to a failure by the person to comply with an obligation under s 7 TMA may be made at any time, not more than 20 years after the end of the year of assessment to which it relates (subject to any provisions of the Taxes Act allowing a longer period).

132. HMRC raised Assessments, based on the following:

	2012-13	**2014-15**	**2015-16**
Sales	£116,000.00	£272,000.00	£245,000.00
Purchases	£80,000.00	£195,000.00	£95,000.00
Gross Profit	£36,000.00	£77,000.00	£150,000.00
Purchase Costs	£474.00	£1,143.00	£697.00
Selling Costs	£3,416.00	£2,768.00	£2,865.00
Enhancement	£5,000.00	£10,000.00	£15,000.00
Profit	£27,110.00	£63,089.00	£131,438.00

133. Apart from the 2016 tax return which was submitted in relation to 8 Wigshaw Lane, the evidence shows that in the period between 12 April 2012 and 31 March 2016, the Appellant made gains, before expenses, of £263,000.00. HMRC were aware of the purchase and sale of the properties, as well as the Council Tax information. The Appellant did not comply with the obligation under s 7 TMA.

134. I am satisfied that there was a discovery (in relation to the gains referred to above – in circumstances where I have found that JRA and PRR do not apply).

135. The taxpayer has the legal burden of demonstrating that he is overcharged by an assessment. The justification for placing this burden on the taxpayer, even though it may be the Revenue which is asserting that tax is due, is that the taxpayer, and not HMRC, is ordinarily in possession of the relevant facts and figures. It is the taxpayer who is in a position to provide the right and answer.

136. Essentially, HMRC are entitled to call for an explanation from the taxpayer of the circumstances surrounding the determination of his tax position and, ultimately, put the taxpayer to proof of the facts behind those circumstances. In that respect, HMRC may issue an assessment because they are in possession of particular evidence suggesting that the taxpayer's explanation is untrue, but it may also be that HMRC are not satisfied that what the taxpayer is telling them fully explains the particular circumstances with which they appear to be confronted. That is the justification, but it is the particular statutory language used that places

the legal burden on the taxpayer to satisfy the Tribunal that the assessment is wrong and should be reduced or discharged.

137. As explained by Moses LJ in *Tower MCashback LLP 1 v HMRC* [2010] STC 809, at [17] to [18], the taxpayer's self-assessment constitutes the final determination of his liability, subject to three circumstances; namely an amendment to the return, an enquiry by HMRC or a discovery assessment. Thus, a taxpayer making a self-assessment must take care to get the assessments right. He must take care to get it right both as to matters of fact and matters of law.

138. In *T Haythornwaite & Sons v Kelly (HMIT)* (1927) 11 TC 657, Lord Hanworth MR said this, at 667:

> 'Now it is to be remembered that under the law as it stands the duty of the Commissioners [and from 1 April 2009 the Tribunal] who hear the appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to a majority of the Commissioners by examination of the Appellant on oath or affirmation, or by other lawful evidence, that the Appellant is over-charged by any assessment, the Commissioners shall abate or reduce the assessment accordingly; but otherwise every assessment or surcharge shall stand good. Hence it is quite plain that the Commissioners are to hold the assessment as standing goods unless the subject – the Appellant – establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside.'

139. Similarly, in *Moschi v Kelly (HMIT)* (1952) TC 442, in which the Court of Appeal upheld the decision of the General Commissioners that the unexplained source of a taxpayer's wealth was business profits which he had not declared, Somervell LJ said:

> '… of course, the onus was on the taxpayer to satisfy the Commissioners that the assessments were excessive.
>
> …'
>
> 'It seems to me, looking at the matter broadly, as it was before the Commissioners, they were fully entitled to say that the taxpayer had not discharged the onus which lay upon him of establishing his contention that his money came from assets brought in from 1933.'

140. A discovery assessment is not the only way in which HMRC can go behind past assessments to tax, or claims to relief. HMRC can launch an enquiry into a claim for relief, under Schedule 1A TMA. HMRC can also launch an enquiry into a return under section 9A TMA. This is what HMRC have done in the appeal before me. Schedule 1A and s 9A TMA are mutually exclusive mechanisms. Each has a prescribed time-limit within which HMRC must take action. The time-limits for opening an enquiry are part of the checks and balances in the self-assessment system, which aims to give HMRC a right to ensure that a taxpayer has paid the right amount of tax.

141. Under Sch 1A, HMRC can only enquire into a claim which is not included in a return and the time limit is, in broad terms, 12 months from the date of the claim. By contrast, where a claim is included in a return made under s 8 or 8A TMA, the enquiry must be under section 9A. Enquiries under s 9A extend to anything contained in the return or required to be contained in the return, including a claim or election included in the return. The time limit for section 9A enquiries is, again in broad terms, 12 months from the filing of the return. Section 28A TMA provides for the completion of an enquiry opened under s 9A TMA, by way of a closure notice.

142. The Appellant submitted a tax return for 2015-16, on 20 November 2017, and the enquiry was opened on 19 December 2017. In relation to the expenses claimed by the Appellant, by an email dated 23 February 2018, the Appellant's agents responded as follows:

> *"We have not been provided with original invoices by the Client only an analysis of the total expenditure incurred. As the Client was working under the assumption that he was improving his own home& not expecting to have to account to HMRC, he has not retained receipts in respect of the expenditure."* [sic]

143. The agents also added the following:

> *"The calculations therefore use estimated figures that Mr Campbell has provided from memory (save where evidence exists and has been provided with this letter, such as copies of completion statements and solicitors invoices).* [sic]

144. I do not accept that guess-work should be applied by a taxpayer to substantiate any expenditure that has been claimed. The claimed expenditure has not been substantiated with evidence. I find that the Appellant has failed to keep the necessary records and evidence required to substantiate his claims.

145. In *Hull City (Tigers) Ltd v HMRC* [2017] UKFTT 0629 (TC), the tribunal explained the burden of proof in an assessment following an enquiry as follows ([57] – [58]):

> "57. In the case of an appeal within Part 5 TMA against an assessment (and therefore a regulation 80 determination), section 50(6) provides that the tribunal may reduce the assessment if it concludes that the appellant has been overcharged, "*but otherwise the assessment shall stand good*". Section 50(7) allows the tribunal to increase the assessment if it concludes that the appellant has been undercharged to tax. In relation to a section 8 decision, regulation 10 of the 1999 Regulations allows the tribunal to vary the decision if it concludes that it should, "*but otherwise [the decision] shall stand good*".

The significance of an assessment "standing good"

58. This "stand good" language has been part of the Management Acts since at least 30 section 57 of the Taxes Management Act 1880. It is the statutory basis for concluding that the taxpayer has the legal burden of demonstrating that he is overcharged by an assessment. The justification for placing this burden on the taxpayer, even though it may be the Revenue which is asserting that tax is due, is that the taxpayer and not HMRC is ordinarily in possession of the relevant facts and figures. Essentially, HMRC are entitled to call for an explanation from the taxpayer of the circumstances surrounding the determination of his tax position and ultimately put the taxpayer to proof of the facts behind those circumstances. In that respect HMRC may issue an assessment because they are in possession of particular evidence suggesting that the taxpayer's explanation is untrue but it may also be that HMRC are not satisfied that 40 what the taxpayer is telling them fully explains the particular circumstances with which they appear to be confronted. That is the justification but it is the particular statutory language used that places the legal burden on the taxpayer to satisfy the tribunal that the assessment is wrong and should be reduced or discharged.

146. Having considered all of the evidence, I am satisfied that the Closure Notice for 2015-16 was correctly issued.

Schedule 41 penalties

147. HMRC concluded that the Appellant's behaviour was 'deliberate' and that the disclosure 'prompted'. This is because the Appellant did not notify liability and an enquiry had to be opened.

148. I have considered the Appellant's statement, in the email to HMRC, dated 1 September 2017, where the Appellant said this:

> *"Whilst owning the property <u>I owned NO other property</u> and was living at home with my parents."*

149. I find that there is considerable force in HMRC's submission that this email suggests an understanding of CGT by the Appellant.

150. The Appellant failed to keep any evidence of expenditure, or other records. I find that it is not unreasonable to conclude, as HMRC have concluded, that the Appellant should have known that the disposal of multiple properties would have tax implications. The Appellant did not however take any action to notify his liability to tax, or indeed to make enquiries with HMRC as to the likely tax implications. I find that the behaviour in this appeal was deliberate.

151. The penalty range is 35% to 70%. The Appellant was given a reduction of 20%, for 'telling'. A further reduction of 25% was given for 'helping'. The final reduction given was 25%, for 'giving'. The deductions were applied to the penalty range, resulting in a 24.5% deduction from the 70% maximum. This left a penalty of 45.5%. The penalty charged was therefore £56,975.51.

CONCLUSION

152. I find that CGT legislation applies and I uphold the Assessments. I further uphold the Closure Notice. In accordance with para. 8.38 of the Statement of Case, an alteration is due as £15,000.00 was allowed in the trading computation of profit. Subject to the amendments in relation to 8.38 of the Statement of Case, the Penalties are upheld.

153. The amount of the Assessments and the Penalties is remitted to HMRC in light of the submissions at paragraph 8.38 of the Statement of Case.

154. Accordingly, therefore, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

155. 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.

NATSAI MANYARARA
TRIBUNAL JUDGE

Release date: 08/02/2022

APPENDIX

Taxes Management Act 1970

7. Notice of liability to income tax and capital gains tax

(1) Every person who-

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

[(b) falls within subsection (1A) or (1B)]

shall, subject to subsection (3) below, within [the notification period], give notice to an officer of the board that he is so chargeable.

[(1A) A person falls within this subsection if the person has not received a notice under section 8 requiring a return for the year of assessment of the person's total income and chargeable gains.

9A. Notice of enquiry

(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so (notice of enquiry)

(a) to the person whose return it is ('the taxpayer')

(b) within the time allowed.

(2) The time allowed is-

(a) if the return was delivered on or before the filing date, up to the end of the period of twelve months [after the day on which the return was delivered;]

(b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered;

...

29A. Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regarding 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.

[36. Loss of tax brought about carelessly or deliberately etc]

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax-

> *(a) brought about deliberately by the person,*
>
> *(b) attributable to a failure by the person to comply with an obligation under section 7*
>
> *…*
>
> *may be made at any time not more than 20 years after the end of the year of assessment to which it relates…*

Taxes and Chargeable Gains Act 1992

222. Relief on disposal of private residence

(1) This section applies to a gain accruing to an individual so far as attributable to the disposal of, or 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*
>
> *…*

(8) If at any time during an individual's period of ownership of a dwelling-house or part of a dwelling-house he-

> *(a) resides in living accommodation which is for him job-related, and*
>
> *(b) intends in due course to occupy the dwelling-house or part of the dwelling-house as his only or main residence*

this section and sections 223 to 226 shall apply as if the dwelling-house or part of the dwelling-house were at that time occupied by him as a residence.

(8A)(a) Subject to subsections (8B), (8C) and (9) below, for the purposes of subsection (8) above living accommodation is job-related for a person if

> *(a) it is provided for him by reason of his employment, or for his spouse [or civil partner] by reason of [the spouse's or civil partner's] employment, in any of the following cases*
>
> *(i) where it is necessary for the proper performance of the duties of the employment that the employee should reside in that accommodation.*
>
> *(ii) where the accommodation is provided for the better performance of the duties of employment, and it is of the kind of employment in the case of which it is customary for employers to provide accommodation for employment.*
>
> *…*

223. Amount of relief

(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.

224. Amount of relief: further provisions

…

(3) Section 223 shall not apply in relation to a gain if the acquisition of, or the interest in, the dwelling-house or part of the dwelling-house was made wholly or partly for the purpose 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.