TC04054

Appeal number: TC/2013/06700

CAPITAL GAINS TAX – Appeal against revenue assessment and penalty determination – Sale of residential property owned by Appellant – Appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

LINDSAY MEIKLE **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR ROLAND PRESHO FCMA

Sitting in public in Lincoln on 18 September 2014

No appearance by or on behalf of the Appellant

Mr A Hall, Presenting Officer, for the Respondents

DECISION

Introduction

1. The Appellant appeals against a revenue assessment dated 27 March 2013, made pursuant to sections 29 and 36 of the Taxes Management Act 1970 ("TMA"), assessing him to capital gains tax in the sum of £5,652.40 in respect of the sale of a property in 2006-07.

2. This appeal was heard in Lincoln on 18 September 2014. At the hearing, Mr Hall appeared for HMRC, and produced a documents bundle and a legislation and authorities bundle. There was no appearance by or on behalf of the Appellant. The Tribunal requested the clerk to seek to telephone the Appellant on the contact telephone number given in the notice of appeal, to confirm whether he intended to attend or be represented at the hearing. The Tribunal was subsequently informed by the clerk that she had attempted to telephone the Appellant but that there was a recorded message that the telephone number was unavailable. Neither the Tribunal nor Mr Hall was aware of any alternative telephone number for the Appellant. The Tribunal then asked the clerk to confirm with HMCTS that a notice of the hearing had been sent to the Appellant. It was confirmed that notice of the hearing had been sent to the Appellant at his North Hykeham address on 11 August 2014.

3. The Tribunal informed Mr Hall of this. Mr Hall submitted that the Tribunal should in the circumstances proceed with the appeal in the Appellant's absence pursuant to rule 33 of the Tribunal's Rules.

4. The Tribunal was satisfied that it should do so. It considered that reasonable steps had been taken to notify the Appellant of the hearing. The Tribunal was satisfied that the requirement of Rule 33(a) was met. For purposes of Rule 33(b), the Tribunal was also satisfied that it was in the interests of justice to proceed with the hearing, having regard to the following. The Appellant had not given any indication that he did not intend to attend the hearing and had not sought any adjournment or postponement. The Appellant therefore might not attend the hearing even if the matter were adjourned or postponed. Mr Hall was present and had prepared for the hearing. Unnecessary adjournments or postponements on the day of hearing are inconsistent with the public interest in judicial efficiency. Rule 38 of the Rules makes provision for a decision of the Tribunal to be set aside in circumstances where the appellant or his representative were not present at the hearing, if it is in the interests of justice to do so (Rule 38(2)(d)). The Tribunal accordingly proceeded with the hearing.

Applicable legislation

5. Section 7(1) TMA provides that:

> **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.

…

6. Section 7(8) TMA (as in force in relation to 2006-07) provides that:

(8) If any person, for any year of assessment, fails to comply with subsection (1) above, he shall be liable to a penalty not exceeding the amount of the tax—

(a) in which he is assessed under section 9 or 29 of this Act in respect of that year, and

(b) which is not paid on or before the 31st January next following that year.

7. Section 29(1) TMA (as in force in relation to 2012-13) provides that:

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment —

(a) that any income, unauthorised payments under section 208 of the Finance Act 2004 or surchargeable unauthorised payments under section 209 of that Act or relevant lump sum death benefit under section 217(2) of that Act 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.

8. Section 36(1A) TMA (as in force in relation to 2012-13) provides that:

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

…

(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 (subject to any provision of the Taxes Acts allowing a longer period).

9. Section 38(1) of the Taxation of Chargeable Gains Act 1992 ("TCGA") (as in force in relation to 2006-07) provides that:

38.— Acquisition and disposal costs etc.

(1) Except as otherwise expressly provided, the sums allowable as a deduction from the consideration in the computation of the gain accruing to a person on the disposal of an asset shall be restricted to—

(a) the amount or value of the consideration, in money or money's worth, given by him or on his behalf wholly and exclusively for the acquisition of the asset, together with the incidental costs to him of the acquisition or, if the asset was not acquired by him, any expenditure wholly and exclusively incurred by him in providing the asset,

(b) the amount of any expenditure wholly and exclusively incurred on the asset by him or on his behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset,

(c) the incidental costs to him of making the disposal.

10. Section 39(1) and (2) TCGA (as in force in relation to 2006-07) provides that:

39.— Exclusion of expenditure by reference to tax on income.

(1) There shall be excluded from the sums allowable under section 38 as a deduction in the computation of the gain any expenditure allowable as a deduction in computing the profits or losses of a trade, profession or vocation for the purposes of income tax or allowable as a deduction in computing any other income or profits or gains or losses for the purposes of the Income Tax Acts and any expenditure which, although not so allowable as a deduction in computing any losses, would be so allowable but for an insufficiency of income or profits or gains; and this subsection applies irrespective of whether effect is or would be given to the deduction in computing the amount of tax chargeable or by discharge or repayment of tax or in any other way.

(2) Without prejudice to the provisions of subsection (1) above, there shall be excluded from the sums allowable under section 38 as a deduction in the computation of the gain any expenditure which, if the assets, or all the assets to which the computation relates, were, and had at all times been, held or used as part of the fixed capital of a trade the profits of which were (irrespective of whether the person making the disposal is a company or not) chargeable to

income tax would be allowable as a deduction in computing the profits or losses of the trade for the purposes of income tax.

11. Section 222 TCGA relevantly provides:

> **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 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.

The Tribunal's findings

12. Based on the material before it, the Tribunal finds that HMRC has established on a balance of probability that in 2006-07 the Appellant purchased a property in Lindum Road, Lincoln, for £125,000 and sold it for £165,000. The Appellant himself confirmed this purchase and sale price in a letter dated 9 July 2012, under cover of which he provided a copy of the contract by which he purchased it. The contract is dated 3 November 2006, confirms the purchase price of £125,000, and provides that formal completion of the sale shall be no later than 20 November 2006. The bundle includes evidence from the Land Registry that the property was sold by the Appellant to a company for £165,000, with an effective date of 24 November 2006.

13. The Appellant's grounds of appeal state:

> This was the only property I have ever purchased. I did not buy it as a business but to live in. I spent some £20,000 making the place habitable. The found out it was classed as one of Lincoln's top 4 eyesores. When I signed the contract I was fully responsible for the building till completion. The contract was without any opt out clauses. When I signed the contract for the property I had never agreed to a sale for the property prior to this.

14. The grounds of appeal go on to state that HMRC's contentions to the contrary are untrue.

15. Although the grounds of appeal state that "I did not buy it as a business but to live in", the Appellant does not state as such that he claims to be entitled to principal private residence relief. By virtue of section 222(1) TCGA, the Appellant could only be entitled to principal private residence relief if the property in question was "at any time in his period of ownership …, his only or main residence". The Appellant sold the property almost immediately after he bought it. The Appellant's letter dated 9 July 2012 states that "the place was full of squatters and drug users". The contract by which the Appellant purchased the house states that the property was "in a state of repair such that the property is not fit for human habitation". A letter from the Appellant dated 26 February 2013 states that "the place was a fire hazard … the place

was unsafe". A letter from the Appellant dated 19 July 2013 states that "The property was featured front page Lincoln Echo stating one of Lincoln's worst properties and was a danger so I had to make it safe ie securing and evicting squatters".

16. An HMRC record of telephone conversation with the Appellant dated 27 July 2012 states:

> I [an HMRC official] pointed out that from my records he [the Appellant] sold the property the same day he bought it i.e. 24 November 2006 so it was unlikely that he ever resided in it. He said that he lived in it before he owned it and had spent a lot on it. I asked why he would do that as he didn't own it. He said he always knew he was going to buy it. I pointed out that if he fully intended to use it as his PPR [principal private residence] then I assumed he had informed his bank, GP, dentist, DVLA etc of his new address. He agreed that he hadn't and had never actually moved in. He asked what tax would be due and I explained CGT.

17. Subsequently, a letter from HMRC to the Appellant dated 20 September 2012 stated: "If you are claiming to be resident in the property at any time please let me have dates of residence and evidence to support these dates". However, the Appellant's grounds of appeal (paragraph 13 above), while stating that the Appellant bought the property to live in, do not state that he ever actually lived in it.

18. On its consideration of the material as a whole, the Tribunal is satisfied on a balance of probabilities that the Appellant never lived in the property at any time during his period of ownership. Furthermore, even if he had, as decided in the Court of Appeal, the principle is that in order to qualify for relief a taxpayer must provide evidence that his residence at a property showed some degree of permanence, some degree of continuity or some expectation of continuity (*Goodwin v Curtis* (1998) 70 TC 478). Clearly, this principle is not met, and he is therefore not entitled to principal private residence relief.

19. The Tribunal is thus satisfied that the Appellant is liable to capital gains tax in respect of the sale of the property.

20. The difference between the purchase and sale price of the property was £40,000. The Appellant contends that certain amounts need to be deducted from this sum when calculating the capital gain. The deductions claimed by the Appellant are set out at page 24 of the hearing bundle as follows: (1) solicitors' fees (£1,863); (2) skip hire (£2,000); (3) clearing property (£2,500); (4) repair windows, doors, new locks, new doors (£1,600); (5) security lights and notices (£500); (6) cleaning materials (£750); (7) pressure washer (£130); (8) 24 hour security for approximately 3 weeks due to squatters (£2,100) and (9) miscellaneous (£3,000). The Appellant states that "As paperwork was lost in the flood these figures are the best of my knowledge".

21. The assessment against which the Appellant appeals allowed the claimed deduction for solicitors' fees but disallowed the other claimed deductions. The HMRC statement of case now also accepts that the claimed amount for "repair

windows, doors, new locks, new doors" should also be allowed, but submits that the remaining items should still be disallowed.

22. The HMRC submissions in respect of the remaining items are as follows. First, the other expenses are not expenditure of the kind that falls within section 38(1) TCGA, and therefore cannot be allowed as deductions. Furthermore, the expenditure is of a kind that falls within section 39(1) and (2) TCGA, and for that reason cannot be allowed as deductions. The effect of section 39(1) and (2) TCGA is that revenue expenses (as opposed to enhancements to the property) are not claimable as deductions for capital gains tax purposes. Secondly, the Appellant has provided no evidence of these claimed expenses. Mr Hall said that there was one qualification to these submissions in respect of the claim for security lights. He said that if the security lights had been fixed permanently to the property (as opposed to used temporarily for the period in which 24 hour security was provided), they might be an enhancement to the property. However, he submitted that there was no evidence that this was the case, and no evidence of the claimed expenditure generally.

23. Having considered the material as a whole, the Tribunal finds that these other claimed deductions cannot be accepted since, apart from anything else, there is no evidence to support the claims. The Appellant says that the amounts claimed for each of these items are only to "the best of my knowledge" as he says that papers were lost in a flood. That does not alter the fact that the burden is on the Appellant to establish the amount of claimed deductions on a balance of probability. In the absence of documentary evidence, the Appellant could still have provided oral evidence in support of the claimed amounts. As he did not attend the hearing, no oral evidence was given. The making of claims in his letters is not evidence. For this reason alone, the Tribunal considers that the claim in respect of the other items must fail.

24. In view of this finding, the Tribunal does not need to consider the other HMRC submissions. For completeness, the Tribunal accepts the HMRC submission that the costs of skip hire, clearing the property, cleaning materials, and the pressure washer are not "expenditure reflected in the state or nature of the asset at the time of the disposal" or "expenditure wholly and exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset", for purposes of section 38(1) TCGA. The Tribunal accepts that the same is true in relation to the security lights, in the absence of evidence that the security lights were fixed to the property and remained there when the property was sold.

25. In view of the finding in paragraph 23 above, it is unnecessary to consider whether the costs of security and security lights and notices could be said to be "expenditure wholly and exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset".

26. The Tribunal therefore finds that the capital gain realised by the Appellant on the sale of the property was £36,537 (that is, the sale price of £165,000 less the acquisition cost of £125,000, solicitors' fees of £1,863 and the claimed amount of £1,600 for "repair windows, doors, new locks, new doors".

27. The Appellant has not stated that he seeks to appeal against the penalty imposed. Mr Hall nonetheless made submissions in defence of the penalty imposed, and the Tribunal has considered these. Under section 7(8) TMA the Appellant was liable to a maximum penalty of 100 per cent of the tax assessed under section 29 TMA. The penalty that HMRC imposed in this case was 20 percent of the tax assessed, as HMRC gave 20 percent mitigation for disclosure, 30 percent mitigation for co-operation, and 30 percent mitigation for seriousness. The Tribunal has considered the reasons given in the HMRC letter dated 20 March 2013 for not giving greater mitigation in relation to disclosure and seriousness. The Tribunal has also taken into account Mr Hall's submission that even if all of the Appellant's claimed deductions had been allowed, he would still have had a capital gains tax liability and therefore should have submitted a return. The Tribunal is satisfied that the penalty imposed in this case (20 percent of the tax assessed) was the appropriate penalty.

28. The assessment appealed against was in the sum of £5,652.40, and the 20 percent penalty was £1,130.48. However, the calculation of these figures does not include the Appellant's claimed deduction of £1,600 for "repair windows, doors, new locks, new doors", which HMRC now accept should be allowed. The assessment needs to be revised to take account of this additional deduction, and the penalty needs to be amended to an amount that is 20 percent of the revised assessment.

Conclusion

29. For the reasons above, the appeal is allowed only to the limited extent indicated in paragraph 28 above, but is otherwise dismissed.

30. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 8 October 2014