



TC01803

Capital gains tax - whether the Appellant was resident in the UK when a particular disposal of shares was made - Appeal dismissed

FIRST-TIER TRIBUNAL

Reference no: TC/2010/06971

TAX

RUPERT KIMBER

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Respondents

Tribunal: HOWARD M. NOWLAN (Tribunal Judge)
CATHY FARQUHARSON

Sitting in public at The Old Bakery, Queen's Road in Norwich
on 18 January 2012

The Appellant in person
Pascal Donnelly, officer of HMRC, on behalf of the Respondents

DECISION

Introduction

1. This was a simple case, entirely dependent on our judgment of fact as to whether the Appellant had become resident in the UK by the point, on 12 August 2005, when he effected a major disposal of shares, realising a gain on which the liability to Capital Gains Tax would be £96,499.60. The Appellant's contention was that although he had been present in the UK between 17 and 30 July 2005, during that period he was only in the UK for the type of regular holiday in the UK that he and his family had taken during all the years when he had been non-resident. On 30 July, the Appellant and his family then flew to Italy to take a 4-week holiday that had been booked some months before, when he had been living in Japan. On 28 August, the Appellant and his family then returned to the UK from Italy, and it was accepted that from that date onwards, he was indeed UK-resident.

2. Our decision is that the Appellant was UK-resident on 12 August 2005. We reach this conclusion on two different bases, either of which is sufficient to justify our conclusion. We will record both in this decision.

The facts

3. The Appellant had obviously been a partner in Cazenove & Co, and had been the head of Cazenove's Japan office. It was undisputed that he had been non-UK resident between the years 1989 and 1994 and also from 17 September 1997 until at least 17 July 2005. He had been resident in the UK in the intervening period between 1994 and 1997.

4. At some time in the past, Cazenove's Japanese business had been transferred to the firm KBC Financial Products UK Limited ("KBC"), and the Appellant had apparently taken his entire Cazenove team to work for KBC.

5. By early 2005, the Appellant had concluded that he had more than fulfilled his commitment to ensure an orderly handover of the business, and he therefore started to look around for new opportunities. He had known one of KBC's, and presumably at an earlier stage Cazenove's, clients in Polar Capital. The Appellant said that he had known one particular individual in Polar Capital's Japanese arm for approximately 13 years. This individual must have realised that the Appellant was ready to leave KBC and was looking around for new opportunities, because he indicated to the Appellant that he might like to consider joining Polar Capital.

6. Whilst the agreed Statement of Facts omitted to mention this particular visit to the UK, the Appellant mentioned that at some time in April 2005 he had come to London and had visited another company, TT International, for which he was contemplating working in Hong Kong. He must also have visited Polar Capital since he was offered a job by Polar Capital in April. He then returned to Japan.

7. In May, and whilst still in Japan with his family, the Appellant booked up a 4-week vacation in Italy, to be taken between 30 July and 28 August 2005.

8. Whilst the Appellant did not formally hand in his notice at KBC until 11 July, on which date he also signed a Separation Agreement designed to preclude him from divulging confidential information etc., it is fairly clear that KBC must have

appreciated from well before 11 July that the Appellant would resign. We were told that they had endeavoured to persuade him not to resign, and we were also told that the Appellant had gone on a major trip to clients in various countries in order to ensure that his departure from KBC would involve a seamless handover to his successor, as the replacement head of the business. We were also told that the departure was reasonably amicable since KBC appreciated that the Appellant would not be moving to a broking competitor, but to a friendly client of KBC. It rather appeared that this removed the fairly familiar feature of someone who resigned being required to go on "gardening leave" for a period of 6 months. The Appellant would be moving to a client, not a competitor, and this was therefore irrelevant.

9. We were also told that KBC had arranged during June 2005 for the Appellant's furniture and belongings to be shipped to the UK. We were told that these arrived in the UK in September.

10. The Appellant and his family left Japan on 17 July and arrived in the UK on that date. The Appellant had in fact taken a return ticket to Japan which in the event he must have cancelled. We were told that he had surrendered his residency permit on leaving Japan.

11. In the period between 17 July and 30 July, the Appellant and his family were staying in Kent with the Appellant's mother. Whilst this was consistent with many earlier annual holiday visits to the UK, three other facts must be mentioned.

12. First, the Appellant asserted that when he and his family arrived in the UK, it either remained a distinct possibility, or indeed even the greater likelihood, that he would sign up to work for TT International in Hong Kong. Secondly, the Appellant obviously met the relevant individuals within Polar Capital and we were told that before leaving the UK on 30 July, he had signed the agreement to work for Polar Capital in the UK from September onwards. Thirdly the Appellant and his family had been looking for, and had seemingly found, accommodation in the UK.

13. The Appellant's accommodation position was slightly complex. One irrelevant fact was that he owned a property in Eccleston Square Mews in London but both during his period in Japan, and following his return to the UK this property was, and remained to be, let. It is therefore irrelevant.

14. Somewhat more significantly, the Appellant had in 2002 bought from the National Trust a property near Norwich on a 99-year lease basis, called The Old Hall, Aylsham, Norwich. This property was in dire need of renovation, and the work on renovation commenced in 2004. It was not finished when the family returned to the UK in 2005, and indeed was not finished and ready for habitation until 2006. The family were, however, obviously attached to Norfolk because the elder two of their three girls (born in 1999 and 2001) had been enrolled to start school at Greshams School in Norfolk, though their places had been deferred whilst they were still in Japan. Finally, in terms of attachment to Norfolk, the family must obviously have seen a property, namely Squirrelwood Farm, High Keeling, Norfolk, that was available to rent on a furnished basis. The Appellant himself said that he could not remember whether he had indeed seen it during the period between 17 and 30 July, but it seems likely that some member of the family had seen it. This is because the landlord of the property signed the landlord's copy of the Lease in the Channel Isles on 3 August. We were not told how or when the Appellant himself had signed his copy of the lease, or how it had been signed on his behalf. We did however note that

the printing date at the bottom of the first page of the Lease, that naturally contained the correct names and address in Kent of the Appellant and his wife, was 27 July 2005. We cannot therefore definitely say that this Lease, that was to commence on 1 September 2005, had been signed before 30 July, but it is nevertheless very clear that a decision to take the lease must have been taken before 27 July, because were that not so, the eventual lease that was signed in unchanged form would certainly not have been printed out on 27 July. The Appellant did not dispute this.

15. When the Appellant and his family returned from Italy on 28 August, it is clear that they then had only a couple of days to wait before their tenancy of Squirrelwood Farm was due to commence, and before the Appellant was due to commence work at Polar Capital.

16. We should mention one other fact. We were told that the reason why the crucial disposal did not take place until 12 August, rather perhaps than prior to 17 July when on any basis the Appellant would have sustained the contention that he was then non-resident, was that the shares that were disposed of were shares in Cazenove Group Limited, for which there was only a short window period for dealings on two occasions during the year. One occurred on or around 12 August, and it would not have been possible to dispose of the shares before that date.

Our decision

17. As we indicated in the Introduction, we have decided that the Appellant was UK resident by 12 August, the date of the disposal. By saying this, we are conscious that we are pre-supposing the availability of the concession, under which HMRC concede that when a person becomes resident during a tax year, it is permissible (notwithstanding that the technical position may be that the relevant person is resident for the entire year) to split the year and treat the person as resident (in the case of arrivals in the UK) only from the point after residence is established, rather than for the whole year. HMRC had conceded the availability of this concession, and whilst one reference in correspondence had said that if the Appellant appealed to the Tribunal, the Tribunal would have to ignore this concession, we refuse to do that when HMRC had in fact applied the concession and argued the entire case on the basis that UK residence in fact commenced on 17 July, rather than 6 April 2005.

18. The Appellant's case had been that during the period from 17 to 30 July, whilst the Appellant was present in the UK, the Appellant should be treated as being in the UK just for a temporary purpose, and not with a view to taking up permanent residence. We will address that very issue below. At this stage, we point out, however, that the feature that a period of presence in the UK can be regarded as being for a temporary purpose, and therefore something that can be disregarded in judging whether someone has become UK resident, does require that the period remains one for a "temporary purpose".

19. In the present case, prior to the Appellant leaving the UK on 30 July for Italy, the Appellant readily accepted our summary of the facts to the effect that he had agreed to work for Polar Capital, commencing on 1 September, and he had certainly located and at least informally agreed to take the lease of Squirrelwood Farm, in which the Appellant and his family were going to live from 1 September. Beyond this, his two elder daughters would commence school at Greshams School at the beginning of the September term, and it was doubtless implicit that when The Old

Hall, Aylsham was fit for habitation, the family would move to that house, as indeed they did in 2006.

20. Our decision is that even if we accepted that the Appellant came to the UK on 17 July for only a temporary purpose, by the time he left the UK on 30 July, the decision had clearly been made that the Appellant and his family were now returning permanently to the UK.

21. Paragraph 7.4 of HMRC's publication on "Residence" makes it clear that if a person comes to the UK for a temporary purpose, the person may not become resident, but it goes on to clarify that if the circumstances change, then so does the analysis in relation to tax residence. The following paragraph is significant:

"It is possible that after you first come to the UK your circumstances change and you are going to live here permanently or indefinitely, or you are going to remain here for three years or more from the date of your arrival. In such a situation, you will become resident and ordinarily resident in the UK and you should read paragraph 7.7. If your circumstances change and you become resident in the UK, you should tell us as soon as possible to make sure that you are paying the correct amount of tax".

22. Whilst we have quoted that paragraph, it must be self-evident that if a non-resident comes to the UK mid-way through a tax year, and shortly after arrival changes his intentions and decides to take employment and accommodation, and commence education for his children (there being no holiday in Italy), it would be nonsensical to suggest that the relevant person would not become resident in the UK until leaving again for some purpose, and then coming back to the UK with the obvious intention of resuming residence. The notion that one might just test the issue of when someone becomes resident solely on each occasion when they might disembark in the UK from a ship or aircraft, no longer with the intention of merely being in the UK for a temporary purpose, must be quite ridiculous.

23. The first basis of our decision, therefore, is that at some time before 30 July, even if not on 17 July, the Appellant formed the intention to stay in the UK permanently and then became resident. Accordingly he was resident when the 12 August disposal took place.

24. We support our decision in the alternative manner of finding as a fact that the Appellant did intend to return permanently to the UK on 17 July. Of course a holiday that had been planned in advance would still be taken, but the following factors indicate that the Appellant was returning to the UK on a permanent basis on 17 July.

- We do not accept the assertion by the Appellant that when he returned to the UK on 17 July, he regarded it as more likely that he would sign up with TT International and work in Hong Kong. Since he had had discussions with Polar Capital from a very early point in the year, had met them in London in April, knew them well, and signed up in the short period between 17 and 30 July, we simply do not accept that this was a sudden last minute change of plan.
- When we were told that the Appellant's severance with KBC, formally documented on 11 July 2005, was entirely amicable, largely because he was going to work for a friendly client of KBC, we were not told that at that time the assumption was that he was to work for someone other than Polar Capital,

but at least KBC's views of the whole situation remained unchanged at the point (say on 25 July) when they would have gathered that Polar Capital was to be substituted for TT International. The impression that we gained was that on 11 July, KBC knew that the Appellant intended to sign up and work for Polar Capital, and that is what they were happy with.

- We were told that the property The Old Hall, a National Trust property, was one that the Appellant would not be able to sub-let. Were he thus to work for a considerable period in Hong Kong, he would have been faced (as he admitted during the hearing) with completing a doubtless extremely expensive renovation project in 2006, and then having to leave the property vacant, but properly maintained.
- The Appellant's elder two girls had had places booked for them at a chosen school. We accept that the Appellant could have continued to defer those places, though the very fact of having booked education in the part of the UK in which the Appellant and his wife obviously wished to live; having bought a property that they were renovating in that part of the country, and then having sought and found a furnished property in the same part of the country all suggests a strong underlying motivation to move to Norfolk, rather than a last minute reversal of the plan to work in Hong Kong.
- We accept that when the Appellant's belongings left Japan in June, they could not float around in limbo until their destination was decided, but if the Appellant had been more likely to commence work in Hong Kong, rather than London, we find it odd that the belongings were to be shipped to the UK. Admittedly they could have been stored in the UK. We were however not clear that the type of accommodation in Hong Kong for an ex-patriot would have been that different from an ex-patriot's accommodation in Japan, and are therefore curious why the belongings were being transported to the UK, rather than Hong Kong, or why they were not held in Japan until the chosen destination became clear.

25. Our decision, therefore, on the alternative basis of simply addressing the situation when the Appellant and his family arrived in the UK on 17 July was that he was not coming to the UK for a temporary purpose, but knew that with the interval of a pre-booked holiday in Italy apart, he and his family were returning to the UK, and very specifically to Norfolk.

26. The Appellant's appeal is accordingly dismissed.

Right of Appeal

27. This document contains full findings of fact and the reasons for our 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.

HOWARD M. NOWLAN (Tribunal Judge)

Released: 8 February 2012