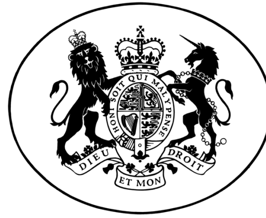
[2012] UKFTT 569 (TC)



TC02246

Appeals number: TC/2011/02295 & TC/2011/02296

CAPITAL GAINS TAX – whether first appellant sold shares on two occasions for consideration stated on stock transfer forms – held yes – appeal in relation to sales of shares dismissed

INCOME TAX and CAPITAL GAINS TAX – whether sale of house in course of trade – held no - whether house only or main residence of appellants – held yes – appeals in relation to house allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN REGAN
SYLVIA REGAN — **Appellants**

- and -

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

TRIBUNAL: JUDGE GREG SINFIELD
LESLEY STALKER

Sitting in public at 45 Bedford Square, London on 22 and 23 May 2012

Ms Sadiya Choudhury, counsel, instructed by ODT Solicitors LLP for the Appellant

Mr Peter Williams, of HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This is an appeal by John and Sylvia Regan who are husband and wife. Mr and Mrs Regan appeal against the following assessments raised by the Respondents ("HMRC"):

> (1) Two assessments issued to John Regan for the years ending 5 April 1999 and 5 April 2002 for £29,506.80 and £27,732 respectively for capital gains tax ("CGT") on the sale of shares in a company known as Electricity Direct (UK) Limited ("EDL").
>
> (2) Two assessments issued to John and Sylvia Regan for the year ending 5 April 2007 for £13,227.60 each being income tax on the sale of their jointly-owned property, 93 Rowan Avenue, Hove, East Sussex.
>
> (3) An assessment issued to John Regan for the year ending 5 April 2009 for a chargeable gain of £63,350 arising on the disposal of a property, 4 Stoneleigh Close, Brighton, Sussex.

2. At the hearing both parties agreed that the Tribunal should adjourn the appeal in relation to Stoneleigh Close to enable Mr Regan to provide evidence of expenditure so that, it was hoped, the appeal could be resolved without the need for a hearing. We do not consider Stoneleigh Close further in this decision but give leave to the parties to apply to the Tribunal in the event that agreement on the issue cannot be reached.

3. HMRC consider that, in the year ended 5 April 1999, Mr Regan sold 99 shares in EDL for a consideration of £100,000 and that in the year ended 5 April 2002 he sold his remaining share in the company for a consideration of £184,000. Mr Regan accepts that £30,000 was paid to one of his businesses in respect of the sale of the 99 shares but denies receiving any other money in respect of the sale of the shares.

4. Mr and Mrs Regan sold 93 Rowan Avenue in the year ended 5 April 2007. Mr and Mrs Regan claim that the property was their home and, accordingly, no charge to tax arose on its disposal. HMRC contend that the sale of 93 Rowan Avenue was a trading transaction. If the sale was not in the course of trading then HMRC say that it was liable to CGT as it was not Mr and Mrs Regan's main or only residence.

Issues

5. In summary, the issues in this appeal are

> (1) Whether Mr Regan sold 99 shares in EDL for £100,000 in 1998/9 and his one remaining share in EDL for £184,000 in 2001/2.
>
> (2) Whether the sale of 93 Rowan Avenue was a trading transaction or, if not, whether 93 Rowan Avenue was the only or main residence of Mr and Mrs Regan.

6. The assessments were discovery assessments made under section 29 Taxes Management Act 1970 ("TMA"). It was submitted on behalf of Mr Regan that HMRC were not entitled to raise the assessments in relation to the EDL shares because the conditions in section 29 TMA were not met. We discuss this further below. The parties agreed that if the amounts of tax were due in relation to 93 Rowan Avenue then HMRC were entitled to raise discovery assessments on Mr and Mrs Regan for the tax concerned and, accordingly, the appeal turned on the substantive issue.

7. As the two issues concern completely different facts and issues, we deal with them separately.

Evidence

8. Witness statements were produced by Mr John Regan and by Mr Paul Healey of HMRC. They were admitted as evidence in chief. Both witnesses gave oral evidence and were cross-examined. We were provided with a bundle of documents. On the basis of the documents and oral evidence we find the facts in relation to each issue to be as set out below.

9. By way of general background, Mr Regan was, at the relevant time, a director and shareholder of various companies, namely:

(1) Birch Restorations Limited, which carried on a construction and property development business;

(2) Regan Construction Limited, another construction business;

(3) Two Oaks Leisure Limited, which operated a club in Hove; and

(4) Lowlands Kennels Limited, which trained and raced greyhounds.

EDL shares - facts

10. In 1997, Mr Regan was approached by a friend, Glenn Mackay, who had an idea to set up a company to sell electricity following the liberalisation of the energy supply market. Mr Regan, Mr Mackay and another person, Arthur Wingrove, set up EDL in which each of them had 100 shares funded by a loan from a bank which they guaranteed. Shortly after, Mr Regan took a less active part in EDL in order to concentrate on his other businesses.

11. On 7 July 1998, Mr Regan entered into an agreement to sell 99 of his shares to Mr Mackay. Under the agreement, Mr Mackay paid Mr Regan £30,000 and undertook to "service, pay and discharge" Regan Construction Limited's loan of £70,000 from Midland Bank. This loan was secured by a sub-charge on 91 Surrenden Road which was wholly owned by Mrs Regan. A stock transfer form dated 7 July 1998 confirms the details of the share sale. The £30,000 paid for the shares was paid into Lowland Kennels to help keep it afloat although the company went into liquidation shortly after. Mr Mackay and Mr Wingrove had a separate agreement under which Mr Wingrove agreed to be equally liable for the £70,000 in return for the transfer of 49 shares to him. Mr Regan retained one share and it was informally

agreed that, if the company were to be sold, he would receive £1 million for that share.

12. On 2 August 1999, 91 Surrenden Road was sold. Mr and Mrs Regan's solicitor transferred £55,000 to Midland Bank which was put in a suspense account as security for Regan Construction Limited's loan. It had become clear that Mr Mackay and Mr Wingrove had not paid off the loan. Mr Regan demanded his shares back as a result of the default on the agreement to pay off the loan, pursuant to Clause 5 of the July 1998 agreement which gave him the right to buy his shares back for £30,000. Mr Mackay said that Mr Regan could not buy the shares back because he (Mr Mackay) had pledged them to a company called Premium Credit. It was agreed that Mr Mackay and Mr Wingrove would pay Midland Bank the sum of £1,000 per month to cover the interest in the meantime. When they did not do this, Midland Bank applied the £55,000 held in the suspense account to reduce the loan which left £18,093.36 owing.

13. There were further discussions about the repayment of the loan by Mr Mackay and, on 24 January 2000, Mr Regan wrote to Mr Mackay's solicitor enclosing what was referred to as "a loan release" which Mr Regan had signed but not dated. The letter stated that it was subject to final payment being agreed with Mr Mackay and that "the cheque will need to be made out to Sylvia. This has been agreed with Simon." The name Simon was a reference to Mr Simon Paul, who was brought in to the business by Mr Mackay.

14. On 25 January 2000, Mr Regan wrote to Mr Mackay setting out what was agreed namely that (a) he and Mr Wingrove were in default of the previous agreement regarding the £70,000, (b) Mr Regan would waive his right to have the shares back at that stage and (c) Mr Mackay would agree to fund an action on Mr Regan's behalf against HSBC (formerly the Midland Bank) to recover damages. If that claim failed, Mr Regan would get £1 million as per the original agreement for the one remaining share.

15. On 23 February 2000, Mr Mackay, Mr Wingrove and Mr Paul as directors of EDL entered into a deed. The deed recited the terms of the July 1998 agreement and that Mr Mackay had paid Mr Regan £30,000. It then stated that Mr Paul had paid the balance required to discharge the indebtedness of Regan Construction under the loan account with Midland Bank, thereby discharging the liability of Mr Mackay to Mr Regan. The deed provided that, in consideration of having discharged the liability, Mr Paul would receive shares in EDL. Mr Regan's signed release (provided with his letter of 25 January to Mr Mackay's solicitor but now dated 23 February) stated that Mr Mackay had paid and discharged all monies due under the July 1998 agreement and that Mr Regan had no further claim against Mr Mackay.

16. Mr Regan's evidence was that the deed of 23 February did not reflect what actually happened. He says that £58,840 (£55,000 plus interest) was paid to Mrs Regan and, separately, Mr Paul loaned £15,000 to Mr Mackay. Mr Regan claimed that the payment of £55,840 to Mrs Regan was compensation for her loss when, as a result of the default by Mr Mackay and Mr Wingrove, the bank withheld £55,000

from the proceeds of sale of 91 Surrenden Road. The loan to HSBC Bank at that time was £73,840. Mr Regan stated that the loan with the bank was actually paid off by him or Birch Restorations Limited some time later. We prefer the evidence of the correspondence and the deed to that of Mr Regan. Our finding is that Mr Paul paid an amount equal to the outstanding loan to Mr Regan although, as requested by him in his letter to Mr Mackay's solicitor, the cheque was probably made out to Mrs Regan. That amount was paid to discharge the obligations of Mr Mackay to Mr Regan under the July 1998 agreement for the transfer of the 99 shares in EDL.

17. On 25 September 2001, Mr Regan signed a stock transfer form transferring his remaining share to Mr Mackay. The consideration for the transfer of this share was £184,000. Mr Regan says that the stock transfer form was signed in the context of discussions to sell EDL to Enron for around £70 million and that he told Mr Mackay to hold the form until a deal with Enron had been agreed. There was no evidence, apart from Mr Regan's testimony, that the sale of the shares was conditional on EDL being sold to Enron. The deal with Enron never happened and Mr Regan said that he never received any money for the share. In view of the clear wording and effect of the stock transfer form and the evidence considered below as to receipt of a payment of £84,000 on account, we do not accept that the sale of the remaining share by Mr Regan to Mr Mackay was conditional.

18. In 2002, Mr Mackay and Mr Wingrove sold EDL to British Energy for approximately £49 million. Mr Regan states that he did not receive any money for his share from this deal but he did not take any action to recover the monies due to him because

> (1) he was still pursuing his claim against HSBC and it was agreed that he would not take any action while it was still ongoing; and
>
> (2) he had an informal understanding with Mr Mackay that he would provide financial assistance if Mr Regan or his company needed it.

19. Mr Regan's evidence was that, as a result of the informal understanding, Mr Mackay agreed to lend Regan Construction Ltd £84,000 at some point in 2002 as it was struggling financially at the time. Mr Regan said that the money was not payment for his remaining share in EDL. He said that it was always the intention that Regan Construction Limited would repay that money but it became insolvent before it could do so. We were told that Mr Mackay was repaid a dividend of £3,500 under the company's voluntary arrangement.

20. In 2005, Mr Regan concluded, on legal advice, that his claim against HSBC for damages was bound to fail. On 23 May 2005, Mr Regan wrote to Mr Mackay claiming payment of money due to him within 12 months. The letter set out the position as follows:

> "The agreed debt now due to me from you/[Mr Wingrove] is as follows:
> due on or before 31/07/99 £100,000
> due on sale of company £1,000,000
> personal loan to Glenn

Mackay from [Mr Regan] Feb 2004	£27,000	
		£1,127,000
LESS payments received		
Mid 1998	£30,000	
February 2000 (payment made to [Mrs Regan])	£70,000 (approx)	
Payment made on A/C following sale of [EDL]	£84,000	
		£184,000
Balance due		£943,000"

21. Mr Regan's evidence was that the amounts of £30,000 and £70,000 shown as received were amounts due from Mr Mackay under the July 1998 agreement. He said that the £30,000 had been paid into Lowland Kennels. He accepted that this money was consideration for the sale of the 99 shares and that he had received it in that it had been paid into Lowland Kennels by Mr Mackay at his request. His evidence was that the £70,000 had never been received by him and that he had written it off under the February 2000 agreement. Mr Regan also said that the £84,000 was not a payment in respect of the transfer of his remaining share on 25 September 2001 but was the amount loaned by Mr Mackay under their informal agreement. As discussed, further below, we do not accept Mr Regan's evidence about the amounts of £70,000 and £84,000. Mr Mackay was eventually made bankrupt in August 2005 and Mr Regan made a claim against his estate for £943,000.

22. As a result of an enquiry into Birch Restorations Limited's tax return for the year ending 5 April 2006, Mr Healey of HMRC opened enquiries into Mr Regan's tax returns for the years ending 5 April 1999, 5 April 2002 and 5 April 2003 in relation to the disposal of the shares in EDL. HMRC concluded that the consideration for the disposal of the 99 shares pursuant to the July 1998 agreement was £100,000 of which £30,000 was paid to Lowland Kennels and the rest was paid to discharge the loan owed by Regan Construction Limited to Midland Bank. HMRC further concluded that Mr Regan sold his remaining share to Mr Mackay in September 2001 for £184,000.

EDL shares - legislation

23. Section 1 of the Taxation of Chargeable Gains Act 1992 ("TCGA") states:

> "Tax shall be charged in accordance with this Act in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to the person on the disposal of assets."

24. Section 28 CGTA is as follows

> "(1) Subject to section 22(2), and subsection (2) below, where an asset is disposed of and acquired under a contract the time at which the disposal and acquisition is made is the time the contract is made (and not, if different, the time at which the asset is conveyed or transferred).

> (2) If the contract is conditional (and in particular if it is conditional on the exercise of an option) the time at which the disposal and acquisition is made is the time when the condition is satisfied."

25. Section 28 provides that the disposal is treated as taking place at the time that the contract is made. This is subject to section 22 under which a disposal arising from the receipt of a capital sum in one of the circumstances mentioned the section is treated as taking place when the capital sum is received. The circumstances do not include a sale of shares.

26. At the relevant time, section 48 of the TCGA provided:

> "In the computation of the gain consideration for the disposal shall be brought into account without any discount for postponement of the right to receive any part of it and, in the first instance, without regard to a risk of any part of the consideration being irrecoverable or to the right to receive any part of the consideration being contingent; and if any part of the consideration so brought into account is subsequently shown to the satisfaction of the inspector to be irrecoverable, such adjustment, whether by way of discharge or repayment of tax or otherwise, shall be made as is required in consequence."

27. The effect of section 48 TCGA is that consideration is not discounted where the right to receive part of it is deferred or because of any risk that any part of it may be irrecoverable although an adjustment will be made where an amount is shown, to the satisfaction of HMRC, to be irrecoverable.

28. The assessments were raised under section 29 TMA. Section 29(1) provides that a discovery assessment to make good a loss of tax can be made if one of two conditions set out in section 29(4) and (5) is satisfied. The two conditions are as follows:

> "(4) The first condition is that the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board—
>
> > (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
> >
> > (b) informed the taxpayer that he had completed his enquiries into that return,
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above."

29. Where the conditions are met, section 36 TMA provided at the relevant time that the time limit for raising an assessment is 20 years after the 31 January next following the year of assessment to which it relates.

EDL shares - discussion

30. Ms Sadiya Choudhury, for Mr Regan, submitted that no amounts were ever received by Mr Regan for the disposal of his shares except for the £30,000 paid to his company, Lowland Kennels, pursuant to the 1998 agreement. She submitted that no payment was ever made in satisfaction of the undertaking to pay off the loan from Midland Bank to Regan Construction Limited. Mr Regan wrote off the £70,000 he was due under the 1998 agreement after the February 2000 agreement, as explained in his evidence. It was submitted that the £55,000 paid by Mr Paul under the 2000 agreement to Mrs Regan was not part payment of the £70,000 owing for the share but was compensation paid to Mrs Regan for the loss she had suffered as a result of Mr Mackay and Mr Wingrove defaulting on their obligation to pay off the company loan.

31. As we have made clear in our findings of fact, we do not accept Mr Regan's description of the payments made by Mr Paul. We conclude that the payment by Mr Paul of £73,840 was in satisfaction of Mr Mackay's obligation under the 1998 agreement to pay off the loan by Midland Bank to Regan Construction. We consider that part of the payment (£55,840) was probably paid to Mrs Regan to put her in the position that she was before the bank enforced its charge but that does not mean that the payment was not consideration for the shares. Accordingly, we find that Mr Regan received £100,000 for the disposal of the shares in 1999.

32. We further find that Mr Regan transferred his remaining share to Mr Mackay in 2001 for £184,000 but, on the basis of the evidence, he only received £84,000. We do not accept that the amount of £84,000, described by Mr Regan in his letter of 23 May 2005 as a payment on account following the sale of EDL, was in reality an informal loan from Mr Mackay. In our view, the payment was exactly as Mr Regan described it in his letter. We do not regard the fact that Mr Mackay was a creditor in this company's voluntary arrangement and received a dividend under it as evidence that the payment of £84,000 was a loan. In fact, no evidence about the dividend was ever put forward. There was also no evidence from which we could determine whether the balance of £100,000 was paid. It was no part of Mr Regan's case before us that an adjustment should be made under section 48 TCGA on the ground that the £100,000 is irrecoverable.

33. In the event that we found that a liability to CGT arose on the sale of the shares, Ms Choudhury submitted that HMRC were not entitled to raise the discovery assessments for the years ending 5 April 1999 and 5 April 2002 because the condition in section 29(5) TMA 1970 was not satisfied. The disposal of Mr Regan's shares in EDL was considered as part of the enquiry into his tax return for the year ending 5 April 2001 which was closed in May 2004 with no amendments made to his tax return. In those circumstances, Ms Choudhury submitted that HMRC had the information available necessary for making an assessment.

34. Mr Williams submitted that HMRC were entitled to raise the assessments because the only reference in the previous enquiry that related in any way to this matter was mention of a loan from Mr Mackay of £84,000 at a meeting in February 2003. There was no reference to any sale of shares. HMRC submitted that they are only prevented from assessing where they have been clearly alerted to the insufficiency of the tax for the year of assessment which was not the case here. We agree with HMRC. The note of the meeting and the subsequent correspondence do not show that HMRC had been aware of the gain in relation to the shares during the inquiry into the year ending 5 April 2001.

EDL shares - decision

35. Our decision in relation to this issue is that the two assessments for the years ending 5 April 1999 and 5 April 2002 for CGT of £29,506.80 and £27,732 on the sale of shares in EDL should be upheld. Mr Regan's appeal on this issue is dismissed.

93 Rowan Avenue - facts

36. Mr and Mrs Regan lived at 91 Surrenden Road, Brighton until it was sold on 2 August 1999. At that point they had nowhere to live so they stayed with friends until they bought 95 Rowan Avenue, Hove from their son, Daniel Regan, for £110,000 in May 2000. A family company, Two Oaks Leisure Limited, owned the Hyde Club which was located on land at the back of 95 Rowan Avenue and it was convenient to live there in order to run the club. Mr and Mrs Regan lived at 95 Rowan Avenue from May 2000 until June 2003.

37. In September 2002, Mr and Mrs Regan purchased 7 Woodland Drive, Hove with the aid of a mortgage. At that time, 7 Woodland Drive was uninhabitable. Throughout the next two years, Mr and Mrs Regan carried out works to the house, funded by further advances from the bank.

38. In February 2003, Two Oaks Leisure Limited obtained planning permission to develop the site of the Hyde Club. One of the conditions of that permission was that the access road had to be widened, which made it necessary to demolish 95 Rowan Avenue. Also in February 2003, the house next door to 95 Rowan Avenue, 93 Rowan Avenue, was put up for auction. Mr and Mrs Regan bought 93 Rowan Avenue by private contract before the auction. At around the same time, Mr and Mrs Regan sold 95 Rowan Avenue to Birch Restorations Limited. Birch Restorations Limited subsequently demolished the house to provide access to the development on land occupied by the Hyde Club.

39. Before moving into 93 Rowan Avenue and while still living in 95 Rowan Avenue, Mr and Mrs Regan carried out some work to make 93 Rowan Avenue habitable as it needed complete modernisation. It had no heating, a very old fashioned bathroom and an old fashioned kitchen. They installed a new kitchen, bathroom and gas central heating. They also decorated it, laid new carpets and installed double-glazed windows. Mr and Mrs Regan moved into 93 Rowan Avenue in June 2003 and lived there until April 2004.

40. In April 2004, Mr and Mrs Regan moved into 7 Woodland Drive, Hove. After they had moved out, Mr and Mrs Regan added an extension to 93 Rowan Avenue. On 29 August 2006, Mr and Mrs Regan sold 93 Rowan Avenue for £249,950. HMRC contend that the disposal of 93 Rowan Avenue was a trading transaction and the proceeds are subject to income tax. Alternatively, if the disposal was a capital transaction, HMRC contend that 93 Rowan Avenue was not Mr and Mrs Regan's only of main residence so that no relief from CGT arises under Section 222 TCGA.

93 Rowan Avenue – legislation

41. Section 5 of the Income Tax (Trading and Other Income) Act 2005 provides that income tax is charged on the profits of a trade. "Trade" is not defined in the Income Tax Acts except that, at the time of the sale, it included "every trade, manufacture, adventure or concern in the nature of trade" (section 832(1) of the Income and Corporation Taxes Act 1988).

42. In relation to the alternative argument, In relation to the first issue, section 222(1) TCGA states as follows:

> "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."

43. The relief itself is provided by section 223(1) TCGA which states:

> "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."

Was the sale of 93 Rowan Avenue a trading transaction?

44. Whether the sale of 93 Rowan Avenue was a trade, adventure or concern in the nature of trade is a question of fact, to be determined on the evidence. The courts have developed the various "badges" as characteristics of a trade. According to Lightman J in *Barnett v Brabyn* [1996] STC 716 at 724c:

> "The proper course for the court in each case, no doubt after first identifying the individual badges of potential significance, is to form an overall view giving due weight to the relative significance of the various badges in the particular context."

45. Both parties made submissions about the nature of the disposal of 93 Rowan Avenue based on the various badges of trade i.e. the subject matter of the realisation, the length of period of ownership, the frequency or number of similar transactions by the same person, supplementary work on or in connection with the property realised, the circumstances that were responsible for the realisation and motive.

46. Both parties submitted that the first badge, the subject-matter of the realisation, was not conclusive in this case as land can be held both as trading stock and as an investment. We agree.

47. The second badge is the length of period of ownership. HMRC said that they did not attach great weight to the length of ownership. In the case of land, HMRC submitted that it could be held for a relatively long time and still be trading. We also agree with HMRC's observations on land as an asset and do not find the period of ownership or occupation by Mr and Mrs Regan indicative of trading (or otherwise).

48. The third badge, namely the frequency or number of similar transactions by the same person, may be more significant in this case. HMRC rely on it because Mr Regan is a builder by trade and they consider that 93 Rowan Avenue was bought and sold by him as part of his trade. HMRC point to the fact that Mr and Mrs Regan's previous property, 95 Rowan Avenue, ended up as part of a development. We do not regard the number and frequency of transactions in this case as indicative of trading. We accept the evidence of Mr Regan that he and his wife bought 93 because they had nowhere else to live and that, at that time, there was no planning permission for any development.

49. HMRC also rely on the fourth badge, namely supplementary work on or in connection with the property realised. Mr Regan's evidence was that he has always kept the properties that form part of his trade separate from those for his personal use. He also stated that the initial works needed to be carried out in order to make the property habitable. The building of an extension after occupation ceased also, say HMRC, was above and beyond what a private owner would do. Mr Regan said that the extension was added to the property but this was not particularly large and was in keeping with the rest of the houses on the road. The activity in relation to the property (modernising and extending it) can clearly form part of a trade in property development. The question in this case is not, as HMRC put it, whether the works were more than a typical private owner would carry out (after all, Mr Regan was a builder) but is whether the activity was consistent with a trade. Our view is that this badge is met although, given that Mr Regan is a builder and the work was done through his business, that is hardly surprising.

50. HMRC submitted that the fifth badge, the circumstances that were responsible for the realisation, also indicated that the disposal was in the course of a trade. Mr and Mrs Regan owned the property for 41 months and only lived in it for ten months. Most of the works were done while they were not in the property.

51. Where there is doubt, the motive for acquiring the asset can also be a factor to be considered (see *Iswera v Comr of Inland Revenue* [1965] 1 WLR 663 per Lord

Reid at 668). HMRC submitted that there was no evidence in the documents to indicate motive which is only relevant if the nature of the transaction was ambiguous. On behalf of Mr and Mrs Regan, it was submitted that their motive in purchasing 93 Rowan Avenue was to acquire a home for themselves and their motive in selling it was to get rid of a property which they no longer needed because they had managed to carry out works to 7 Woodland Drive and could thus move into it. On balance, we are not certain that we need to examine motive but, if we do, we find that, on the evidence, the main motive for acquiring 93 Rowan Avenue was to have somewhere to live convenient for the work on the development that was then about to start.

52. Weighing up the various factors, our conclusion is that the balance tips towards the disposal of 93 Rowan Avenue not being a trading transaction or an adventure in the nature of a trade.

53. In case we are wrong, we record that, at the hearing, HMRC agreed that, if the Tribunal were to find that the sale of 93 Rowan Avenue was a trading transaction or an adventure in the nature of a trade, Mr and Mrs Regan would be entitled to deduct the expenses incurred in relation to the property which have not been taken into account in raising the assessments under appeal.

Was 93 Rowan Avenue Mr and Mrs Regan's only or main residence?

54. We have found that between June 2003 and April 2004 Mr and Mrs Regan lived at 93 Rowan Avenue. Although they owned 7 Woodland Drive, at that time it was uninhabitable. The issue in this appeal is not whether 93 Rowan Avenue was Mr and Mrs Regan's only or main residence but whether it was ever their residence at all. HMRC contend that, on the evidence, 93 Rowan Avenue never became a residence of Mr and Mrs Regan.

55. Residence is not defined in the TCGA and, therefore, has its ordinary meaning. For an individual, HMRC submits that the ordinary meaning of residence is the dwelling in which that person habitually lives: in other words, his home. In *Frost v Feltham* [1981] STC 115, where the court was asked to decide which of an individual's residences was his main residence, Nourse J stated at 117 that "a residence is a place where somebody lives".

56. HMRC rely on two authorities for the submission that residence also requires a degree of permanence or continuity. In *Goodwin v Curtis* [1998] STC 475, Millett LJ relied on a dictum from Viscount Cave LC's speech in *Levene v IRC* 13 TC 486 at 505 to hold that "reside" is an ordinary word of the English language. Lord Cave had stated, "…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."

57. The meaning of the word residence was also considered in the non-tax case of *Ricketts v Registration Officer for the City of Cambridge* [1970] 2 QB 463. Under the Representation of the People Act 1948, entitlement to vote was given to persons resident in a constituency on a qualifying date. The question to be decided was

whether students should be resident in the constituency of the University that they attended. In the Court of Appeal, Lord Widgery commented,

> “This conception 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. In the words of the Oxford English Dictionary, it is concerned with something which will go on for a considerable time. 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.”

58. In our view, the need for permanence or continuity should not be overstated. In *Moore v Thompson* [1986] STC 170, Millett J commented at 176 that

> "… the Commissioners were alive to the fact that even occasional and short residence in a place can make that a residence; but the question was one of fact and degree."

We consider that the issue of whether a property is or has been a residence is a matter of fact that should be determined by reference to the quality (and not merely the length) of the occupation.

59. In his submissions, Mr Colin Williams for HMRC acknowledged that the occupation of 93 Rowan Avenue by Mr and Mrs Regan was closer to the line than in *Goodwin* where the taxpayer took up temporary residence, having separated from his wife, for five weeks until he found somewhere to live. Mr Williams submitted that 93 Rowan Avenue was a stop gap (the term used in *Goodwin*) until Mr and Mrs Regan could live in 7 Woodland Drive. We accept that Mr and Mrs Regan always intended to move into 7 Woodland Drive when they could do so. In our view, however, that intention does not disqualify 93 Rowan Avenue from being a residence. Mr Regan’s evidence was that 7 Woodland Drive was uninhabitable from when it was bought until when he and his wife moved in to the property. We accept that evidence and have no doubt that during much of the period that they were in 93 Rowan Avenue, Mr and Mrs Regan would not have known when 7 Woodland Drive would be ready for occupation. In those circumstances and in view of the fact that Mr and Mrs Regan were in occupation at 93 Rowan Avenue for nine to ten months, we consider that it was more than a stop gap or temporary place of occupation but where they lived ie their residence.

60. Mr and Mrs Regan moved out of 93 Rowan Avenue in April 2004 and sold the property in August 2006. As April 2004 fell within the last 36 months of Mr and Mrs Regan’s period of ownership, the fact that they did not live there up to the date of the sale does not affect the availability of the relief from CGT under section 222(1) TCGA. On the facts of this case, Mr and Mrs Regan were entitled to relief from CGT on the sale of 93 Rowan Avenue.

93 Rowan Avenue - decision

61. Our decision in relation to the CGT issue is that Mr and Mrs Regan were entitled to relief from CGT under section 222(1) TCGA on the sale of 93 Rowan Avenue.

62. Mr and Mrs Regan's appeal in relation to 93 Rowan Avenue is allowed.

Decisions on EDL shares and 93 Rowan Avenue

63. Our decision in relation to Mr Regan's appeal against the two assessments relating to the EDL shares is that the appeal is dismissed.

64. Our decision in relation to Mr and Mrs Regan's appeals against the two assessments relating to 93 Rowan Avenue is that the appeals are allowed.

Rights of appeal

65. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's 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.

GREG SINFIELD
TRIBUNAL JUDGE

RELEASE DATE: 21 August 2012