TC02811

Appeal number: TC/2013/00261

Capital gains tax – taper relief – gain arising on disposal of residential property used as accommodation for workers in restaurant – whether business asset taper relief available – paragraph 5(1A) of Schedule A1, Taxation of Chargeable Gains Act 1992 – whether property used wholly or partly for the purposes of the restaurant trade – yes – business asset taper relief available – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SHING CHEUNG MAK **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
JOHN COLES

Sitting in public in Oxford on 2 July 2013

Gerald Jackson of Critchleys LLP, chartered accountants, for the Appellant

Gill Carwardine, Presenting Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal mainly concerns the availability of business asset taper relief on a disposal of a residential property which had been used to accommodate workers within the owner's restaurant business.

2. It also addresses the fact that the appeal was notified late.

Permission to appeal out of time

3. We addressed this point as a preliminary issue at the hearing.

4. The Appellant's advisers had been in lengthy correspondence with HMRC about the substantive issue in this appeal and about other matters.

5. The story began, in relation to the matters the subject of this appeal, with an opening letter dated 13 January 2009, in which HMRC gave notice of their intention to enquire into the Appellant's personal tax return for 2006-07. They focused particularly on the capital gains tax aspects. The Appellant had disposed of two properties during the year and HMRC sought further details of the disposals and of the computation reflected in the return.

6. It became apparent quite quickly that there was a dispute about the application of business asset taper relief in the computation. There followed a desultory correspondence over nearly 18 months, in which HMRC's technical CGT specialists were apparently involved behind the scenes. Clearly other events were also taking place, as HMRC then felt it necessary to issue a jeopardy assessment in July 2010, imposing capital gains tax on the basis of no business asset taper relief being available. This was replaced on 8 October 2010 by an amendment to the Appellant's return made on the same basis, and the cancellation of the jeopardy assessment.

7. Critchleys wrote to HMRC on behalf of the Appellant on 13 October 2010 reiterating their client's wish to appeal the amendment and also asking for the disputed amount to be postponed. HMRC wrote on 15 October 2010 agreeing the postponement and stating that "as the amendment was made during the course of the enquiry into Mr Mak's 2006-07 personal tax return, I cannot arrange for a review until the enquiry is closed..... As soon as I am able to issue the closure notice I will then offer to have the matter reviewed by someone who has not previously been involved".

8. On 9 November 2010, Critchleys wrote again, seeking formally to appeal against "the notice of assessment". There were however other aspects of the Appellant's return that were still under consideration, so it was not until 30 November 2010 that HMRC issued their formal closure notice. It transpired that the only amendment to his return reflected in the closure notice was that related to the business asset taper relief dispute about the capital gains tax on the property disposal.

9. In their 30 November 2010 letter, HMRC said they would now refer the appeal for review. Two days later, however, they wrote again, saying that this could not be done because the request for a review predated the closure notice. They invited Critchleys to submit a further appeal and request for a statutory review (assuming they still wished to contest the position).

10. On 14 December 2010, Critchleys wrote to HMRC, confirming they wished to continue with the appeal, and asking for a statutory review.

11. On 28 January 2011, HMRC wrote to the Appellant (there is no evidence of them having written to Critchleys) confirming that they upheld the original decision following the statutory review. In their letter, they gave details of what the Appellant should do if he wished to continue with the appeal.

12. That is when things went wrong. HMRC heard nothing further from the Appellant or Critchleys in response. The matter was passed for debt collection and there is a record of various distraint calls having been made to the Appellant's home, though there is no indication that the Appellant was provided with any specific information about the status of any appeal or how the debt was made up.

13. Mr Jackson could not explain what had gone wrong at Critchleys. He did not dispute that they had received HMRC's review letter, though he did not say when. His only presumption, from his investigations, was that the letter had been simply filed whenever it was received, and that was their mistake. There had been a period of difficulty around that time – they were involved in a number of matters for the Appellant and it appeared there were times when information had not been provided by him and there was also some suggestion that there was a time when they were not being paid and had therefore "downed tools". It was only when the letter had come to light in February 2012, over a year after it had been written, that they picked the matter up again and wrote to HMRC seeking to reiterate their appeal, on the same grounds as before.

14. HMRC have no record of receiving this letter, but we are satisfied that it was sent. Having received no reply, there was again a further delay (during this period, the person who had been dealing with the matter at Critchleys had left) and it was only in November 2012 that Critchleys sent a notice of appeal to the Tribunal.

15. Mrs Carwardine submitted that in considering whether to give permission for a late appeal, the test to be applied by the Tribunal was whether the Appellant had a reasonable excuse for the delay and, on the evidence of what had taken place, he had not.

16. Mr Jackson submitted that the Tribunal was not confined to considering whether there was a reasonable excuse – as he candidly admitted, if that was the test, then he would be in difficulty. He submitted that the Tribunal had a general discretion to permit a late appeal under section 49G(3) Taxes Management Act 1970 ("TMA") and, in the circumstances, that discretion ought to be exercised in favour of his client.

17. We prefer Mr Jackson's interpretation. We find there to be no reasonable excuse for the delay in notifying the appeal to the Tribunal, but that is not the test. As was said by the Upper Tribunal (Judge Berner) in *O'Flaherty v HMRC* [2013] UKUT 0161 (TCC) (considering a similar provision in section 49(2)(b) TMA) at [26], the discretion of the Tribunal in such matters is "at large". We bear in mind the various factors mentioned in that case and in *Data Select Limited v Revenue and Customs Commissioner*s [2012] UKUT 187 (TCC); [2012] STC 2195 which is referred to in it.

18. We find that the situation in relation to the imposition of the tax liability in question was confusing. A jeopardy assessment was raised, then an amendment to the Appellant's return was made and the jeopardy assessment amended to nil. It was only some time later that enquiry was actually closed on the basis of the amendment, and having appealed a number of times already it is perhaps understandable that the question of appealing once again was overlooked with all the activity going on in relation to the Appellant's tax affairs, quite apart from the doubt about when Critchleys became aware of the outcome of the statutory review. There is no doubt that HMRC had been clearly informed of the Appellant's position on the amendment they proposed and there is no evidence that they ever sent the statutory review letter to the Appellant's advisers (despite having communicated with them all along in relation to the matter generally).

19. The prejudice caused to HMRC by the delay does not appear to be great. There is no great dispute about the facts, the argument is largely a technical one and there is no danger of the evidence having become stale over the period of the delay. And the Appellant's argument is not (as will appear from the rest of this decision) entirely without merit.

20. In the exercise of our general discretion, we therefore gave permission for the appeal to proceed in spite of being notified to the Tribunal out of time.

The Facts

21. In relation to the substantive appeal, we find the following facts. The only evidence before us was that contained in the bundle of documents prepared by HMRC. We cannot guess at the reason why the Appellant gave no evidence, but he is perhaps fortunate that HMRC did not substantially dispute any of the facts that emerged from the correspondence. Had they done so, the Appellant's failure to attend or give any evidence might well have caused him grave difficulties.

22. From before 6 April 1998 (when taper relief came into force) until 31 March 2002, the Appellant carried on business as a Chinese restaurateur in Oxford (under the trading style "The Opium Den"). From at least that time until some time after September 2004, he carried on business in partnership as a Chinese restaurateur in Bicester (under the trading style "The Parasol").

23. On 20 September 1995, the Appellant bought a residential property at 4 Botley Road, Oxford for £150,500 plus acquisition costs of £2,296. We were not provided

with any detailed evidence about the nature of the house but we infer it was an unremarkable property.

24. From his acquisition of the house, the Appellant did not live there himself. He bought it and used it specifically to house workers who were employed at his restaurants – initially at The Opium Den in Oxford and, from 31 March 2002 until the beginning of September 2004 (when he bought a more convenient replacement property in Bicester), at The Parasol in Bicester. It was explained to us that this is not rare – ethnic Chinese cooks and waiters from overseas find it difficult to secure and run their own accommodation and it makes it easier to recruit suitable people if accommodation can be offered as part of their employment.

25. The employees paid no rent for their use of the property. HMRC did not dispute that the Appellant had accounted, through the payroll of The Opium Den and The Parasol, for tax and NICs on the benefit in kind of the free accommodation by way of PAYE settlement agreements.

26. The electoral roll showed the Appellant and HY Mak as being registered at Botley Road from 1998 to 2000 and from 2002, but the Appellant explained this was in order to obtain a parking permit for his van and HMRC did not press this point any further.

27. From October 2004, when he moved the employees to the new property in Bicester, Botley Road stood empty until he sold it on 20 October 2006 for £662,500 less disposal costs of £10,934.

28. HMRC and the Appellant agreed that the indexed untapered gain arising on the disposal of Botley Road was £486,546. The dispute arose from their respective approaches to calculating the taper relief applicable to that untapered gain.

29. HMRC issued their amendment to the Appellant's self-assessment on the basis that the only taper relief available was non-business asset taper relief. Critchleys however carried out the calculations on the basis that business asset taper relief was available.

30. Matters are complicated by the availability of other relief and a number of different computations were produced by both parties over the period of correspondence. For this reason, we are hesitant at this stage about issuing a final decision which incorporates a precise final figure for the Appellant's actual tax liability for 2006-07.

The law

31. The only point at issue between the parties is as to the effect of paragraph 5(1A) of Schedule A1 Taxation of Chargeable Gains Act 1992 (" TCGA"), which determines whether, at any particular time, an asset is a business asset (thereby qualifying for the business asset rate of taper relief at that time) or a non-business asset (only qualifying for the non-business asset rate of taper relief). Paragraph 5(1) and (1A) provided, so far as relevant, as follows:

> "**5** – (1) This paragraph applies, in the case of the disposal of any asset by an individual, the trustees of a settlement or an individual's personal representatives, for determining (subject to the following provisions of this Schedule) whether the asset was a business asset at a time before its disposal when it was neither shares in a company nor an interest in shares in a company.
>
> (1A) The asset was a business asset at that time if at that time it was being used, wholly or partly, for the purposes of a trade carried on by--
>
> (*a*) an individual or a partnership of which an individual was at that time a member, or
>
> ....."

32. Apart from a brief reference by Mrs Carwardine to *Mateides & Mateides v HMRC* [2013] UKFTT 347 (TC) (a decision of the First-tier Tribunal released some two weeks before the hearing in this appeal), neither party referred us to any case law authorities.

33. In *Mateides*, the Tribunal was clearly unconvinced on the evidence that the residential property had been used as alleged in the printing trade carried on by the appellants. HMRC had apparently been prepared to concede two years' use for the purposes of the trade could be accepted, allowing some business asset taper relief. The Tribunal considered seriously whether it might disallow that two year period but in the circumstances decided to leave HMRC's decision unaltered.

34. The only relevance to our case of the decision in *Mateides*, which was another First-tier Tribunal decision and therefore not binding on us, was the fact that HMRC had accepted in it that business asset taper relief could be available for a residential property used to accommodate specialist workers, and the Tribunal had not disagreed with that position in principle.

Submissions

35. It can readily be seen, therefore, that the availability of business asset taper relief depends upon the extent to which 4 Botley Road could be said to have been "being used, wholly or partly, for the purposes of" the Opium Den and Parasol restaurant trades.

36. Mrs Carwardine submitted that for an asset to be used "wholly or partly for the purposes" of a trade, it needed to be used as an integral part of that trade. Here, the essence of the trade was the buying, cooking and selling of food. The provision of residential accommodation to the employees of the trade was no part of its core trading activities, understood in this way. Further, it was not shown as an asset of the business in the accounts.

37. Mr Jackson argued that there was no difference in principle between the position of 4 Botley Road and, say, a company car provided to an employee, or the purchase of a staff car park or crèche. In any such case, it was questionable whether

the acquisition of the relevant asset was an integral part of the core trading activities of the business, but it was never suggested that, for example, a business should not be able to obtain capital allowances on the cost of cars. He recognised that a different test applied to capital allowances, and did not seek to draw an exact parallel, but he submitted these examples served to illustrate his point that Mrs Carwardine was taking an unduly narrow view of what assets were used "wholly or partly for the purposes" of the trade.

Discussion and conclusion

38. Given the facts we have found, we consider Mrs Carwardine's argument to be unsustainable.

39. We accept the Appellant's account that the property was used until 31 August 2004 entirely in order to provide free accommodation for ethnic Chinese workers from overseas in his restaurants. There is nothing to contradict the evidence that he received no rent for the property, and the uncontested evidence that PAYE settlement agreements were entered into for the whole of the relevant period in respect of the free provision of the accommodation is very persuasive. Whilst the inclusion of the Appellant's name on the electoral roll for the property for part of the period gave rise to some concern, his explanation as to the reason for this was sufficient to allay that concern in the absence of any other evidence from HMRC – no doubt if the Appellant had given them 4 Botley Road as his address for correspondence over the relevant period for example, or if they had no evidence of any other residential address for him, they would have said so.

40. Interpreting the words in paragraph 5(1A) in line with their natural and ordinary meaning, we accept Mr Jackson's submissions. Paragraph 5(1A) is broadly worded, and we see no reason to restrict its meaning in the way Mrs Carwardine invites us to. We consider that in the absence of some particular circumstance which casts doubt on the true underlying purpose, the provision of accommodation to employees working in a business is capable of being an integral part of its trading activity as a whole and, as such, the use of a residential property for that purpose is capable of being a use which is wholly or partly for the purposes of the relevant trade.

41. There may be situations in which this argument may not hold good – for example, the provision of unnecessarily expensive and luxurious accommodation might lead to a finding that the taxpayer's true "purpose" was solely to shelter potential gains on a luxury property from capital gains tax rather than to provide much needed accommodation for employees; or the provision of accommodation that had no sensible commercial rationale for the trade in question – for example where there was quite simply no need to provide such accommodation. That is not the case here. We find there to have been a perfectly sensible commercial purpose in the use of 4 Botley Road to attract and retain employees.

42. We therefore consider 4 Botley Road was clearly used throughout the period from 6 April 1998 to 31 August 2004 wholly or partly for the purposes of a trade carried on by the Appellant or by a partnership in which he was a partner. It follows

that he is entitled to taper relief on his disposal calculated on a "business asset" basis from 6 April 1998 to 31 August 2004 and on a "non-business asset" basis from 1 September 2004 to 20 October 2006.

43. Given some of the uncertainties surrounding the detailed computations (see above), we do not feel in a position to give a final decision as to the amount of the Appellant's capital gains tax liability for 2006-07. We expect there will be no difficulty in the parties agreeing the final computation, given the content of this decision in principle. We do however grant the parties liberty to apply for a final decision if it proves impossible for any reason to reach agreement as to the final amount of the Appellant's liability.

44. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 30 July 2013