



TC03037

Appeal number: TC/2012/07072

Joint application by Appellant and Respondent under Section 28Z TMA 1970 - Capital Gains tax - Private residence relief - Sale of part of grounds for residential development - Construction work commenced before contractual disposal - Whether land fell to be regarded as part of grounds - Yes - Whether relief due - Yes

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANNE DICKINSON

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL S CONNELL
ROGER FREESTON FRICS**

Sitting in public at Nottingham MJC Carrington Street Nottingham on 24th April 2013

For the Appellant, Mrs Anne Dickinson and Mr Dickinson

Mr Obourn Officer of HM Revenue and Customs, for the Respondents

DECISION

The Application

- 5 1. This is a joint application by Mrs Anne Dickinson (“the Appellant”) and the Respondents to the Tribunal under Rule 21(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, pursuant to section 28Z Taxes Management Act 1970.
2. The issue which the parties have referred to the Tribunal for determination is whether principal private residence relief is due on the sale of land owned by the Appellant.

10 The Background

3. The Appellant is the owner of land and property at Holly Lodge, High Street, Swineshead Lincolnshire. Holly Lodge is the home of the Appellant and her husband, Mr. Dickinson. It has a large garden and grounds, including a tennis court.
- 15 4. In 2007 the Appellant sold part of the tennis court, comprising 0.16 hectares, to Ilex Developments Limited, a company of which the Appellant was a director, for the sum of £300,000. The land was sold for the development of four dwelling houses, payment of the consideration being deferred and payable by four equal instalments of £75,000 on completion of the sale of each dwelling house.
- 20 5. The background was that many years previously adjoining farmland had been earmarked for future village expansion and in 1989 part of the Appellant’s garden and tennis court, (which was adjacent to the proposed access road to the farmland, King John's Road), was included by the potential developer, in an outline planning application. The application was subsequently approved and over the next 10 years the farmland was developed into a large housing estate. The Appellant renewed the outline permission on her garden/tennis court every three years to keep it
25 current.
6. The Appellant says that in 2006 she learned that the “automatic” right to outline planning permission renewal was unlikely to be continued. She intended to remain living at Holly Lodge, and if she sold the land would probably have little or no control over what was built. She therefore decided to design and build the houses herself. So, with her husband and two friends
30 who had knowledge of the building trade, she formed a company, “Ilex Developments Limited” to manage the project.
7. Later in December 2006 the Appellant had the land valued (at £300,000), and on 14 December 2006, Ilex “agreed”, subject to contract, to buy the land. Solicitors were instructed by each party, Jebb & Tunnard (subsequently Sills & Betteridge) acting for the Appellant and
35 Chattertons for Ilex.
8. At a board meeting on 8 March 2007, it was minuted by Ilex that a provisional start date for commencement of building works had been agreed of Easter 2007.
9. The Appellant signed the contract and returned it undated to her solicitors in readiness for
40 exchange of contracts on or around 19 March 2007. Although the Appellant had signed the contract it was at this stage technically only in draft form. The contract was “approved” by Chatterton's on behalf of Ilex on 3 May 2007. No deposit was to be paid on exchange of contracts. The terms of the contract were that the Appellant would not receive the consideration monies until such time as each of the

dwelling houses were completed and sold. The Appellant says that at this stage she assumed (erroneously) that contracts had been exchanged, and Ilex was given permission to start work on the groundwork for the development, which it did on 7th June 2007.

5 10. Ilex's solicitors searches revealed that the proposed access road King John's Road, had not been adopted by the County Council, even though many years previously it had been included in an agreement under section 38 of the Highways Act 1980 (a road adoption agreement between the developer and Highway Authority), and installed to adoptable standards. It appears that the road was still on "maintenance", and some snagging repairs had to be carried out before the County Council would formally adopt the road. Shortly afterwards, presumably after being
10 contacted by the Council, the developer duly completed the repairs. Ilex's solicitors then obtained assurances from the Council that the road would be adopted and vested in the Highway Authority, as maintainable at public expense. Shortly afterwards on 27 July 2007 contracts were formally exchanged.

15 11. Mrs. Dickinson's 2007-08 tax return was submitted on 14 November 2008. The return did not disclose the land sale. On the basis that Private Residence Relief was applicable under s222 TCGA 1992, no Capital Gain was declared.

20 12. On 9 October 2009 an enquiry under s9A TMA 1970 was opened by HMRC regarding a possible omitted capital gains declaration. However the enquiry was stalled because the Appellant was not prepared to discuss the valuation of the land disposed of with the District Valuer until the issue as to whether private residence relief was resolved. Accordingly the enquiry could not be closed.

13. On the basis of the District Valuer's valuation of the land disposed of, the capital gains tax liability if the Appellant is not entitled to private residence relief is £48,314.20 plus interest.

The Law

25 14. Section 222 of the Taxation of Chargeable Gains act 1992 so far as relevant states:

s. 222 'Relief on disposal of private residence

30 (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.

35 (2) In this section "the permitted area" means, subject to subsections (3) and (4) below, an area (inclusive of the site of the dwelling-house) of 0.5 of a hectare.

40 (3) In any particular case the permitted area shall be such area, larger than 0.5 of a hectare, as the Commissioners concerned may determine if satisfied that, regard being had to the size and character of the dwelling-house, that larger area is required for the reasonable enjoyment of it (or of the part in question) as a residence.

(4) Where part of the land occupied with a residence is and part is not within subsection (1) above, then (up to the permitted area) that part shall be taken to be within subsection (1)

above which, if the remainder were separately occupied, would be the most suitable for occupation and enjoyment with the residence.’

15. S28 TCGA 1992 states:

s.28 ‘Time of disposal and acquisition where asset disposed of under contract

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(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).

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(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’.

16. Section 2 of The Law of Property (Miscellaneous Provisions) Act 1989 states:

s.2 Contracts for sale etc. of land to be made by signed writing.

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(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

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(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.

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(4) Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order.

The Respondent’s case

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17. Private Residence Relief is not available on the land disposal, as it was not available to the Appellant’s garden or grounds at the date of sale. (s222 (1) (b) TCGA 92).

18. The land was already under development as at the date contracts were exchanged. To qualify for relief the land must meet the following conditions *at the date on which it was disposed*:

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- i) It must be land which the owner has for occupation and enjoyment with the residence.*
- ii) It must be the garden or grounds of the residence*
- iii) The area of land must not exceed the permitted area*

As the land was under development at the date of contract, it was not available to the Appellant as “garden or grounds”.

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19. The date of exchange was 27 July 2007. This is the date the contracts are dated, and the date the Appellant's solicitors (Sills & Betteridge) confirmed was the date the contracts were exchanged.

The Appellant's case

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20. The Appellant's case as stated in the written joint application to the Tribunal is:

10 *'1. The conditions set out by The Law of Property (Miscellaneous Provisions) Act 1989, were met on 3 May 2007, before the building work commenced on the land. Private Residence Relief is therefore available against the gains arising from the disposal. The delay in contracts being exchanged was due to the fact that the road, onto which the garden development would have access, had not been adopted by Lincolnshire County Council as it should have done years previously.*

15 *2. No further contracts were produced or signed by either party after this date, and the signed contracts were merely held by the solicitors until 27 July 2007, when they were dated as the date of completion. There were no changes to the contracts in the intervening period and neither party to the contract was involved in any further part of the completion process.*

20 *3. This was clearly the sale of a part of a private garden, which HM Revenue & Customs are seeking to tax on technicalities, without any regard for (a) the reality of the situation (b) what the law was created for, which is to give taxpayers relief (in this case, Principal Private Residence Relief) and (c) "fairness"*

4. It has been the intention of successive governments to promote the building of additional private housing, and to this end the legislation has always encouraged taxpayers to sell surplus garden for infill development.

25 *5. The legislation has been enacted to ensure that taxpayers are protected when selling parts of their garden for such infill development and Capital Gains Tax is not payable.*

6. In this particular case the taxpayer had a situation where a large housing development was developed at the rear of her property and it was an appropriate time to sell part of her garden for infill housing development.

30 *7. This case clearly centres on whether or not contracts were exchanged at a date prior to the commencement of building work and the taxpayer submits that the contracts were signed prior to commencement to this building work.*

35 *8. Because the clear purpose of the legislation is to provide that taxpayers selling part of their garden for infill housing development should not be subjected to Capital Gains Tax.*

9. The Appellant has fully complied with the guidelines set out in respect of such developments.

40 *10. The Appellant has fully complied with the requirements that have been set out in previous correspondence in respect of the contracts drawn up for the sale of this land.*

11. The Appellant always had the right to demand that the property would revert to being a garden should the contract not be completed.'

21. The Appellant attended the Tribunal and reiterated her submissions as contained in the written joint application. Her evidence also clarified a number of issues which were considered to be relevant to the application.

- i. The land disposed of had not been fenced off, as suggested by HMRC. There was a natural demarcation line formed by a hedge between the tennis court and the retained property.
- ii. Although Ilex had been given permission to enter the land and start foundation works no discussions had taken place, or formal terms and conditions agreed, regulating the company's occupation of the land during the period of works.
- iii. Neither the proprietors of the company nor the Appellant considered that the parties had entered into any kind of legal relations at commencement of the works.
- iv. Neither party considered that Ilex had been granted exclusive occupation of the land.
- v. Neither party considered that, in the event of the "agreement" (albeit that contracts had not been exchanged), progressing to completion, Ilex would have any continuing or actionable rights against of occupation against the Appellant.

Conclusions

22. There is no doubt that contracts were formally exchanged on 27th July 2007. The normal practice on exchange of contracts is for there to be a "telephone exchange". That is, the parties' solicitors each agree that exchange of contracts has taken place pursuant the Law Society Protocol, for example using "formula B" where each solicitor holds his clients signed contract. That is what happened as evidenced by the copy contracts included with the evidence.

23. When Ilex entered on to the land and commenced work it is arguable that that constituted an "act of part performance" of the "agreement" between the parties (which at that stage was in draft form only), thus effecting a "disposal" for contractual purposes, at which time the land remained part of the garden and grounds of the property. However, Ilex may have started work on the basis of a mistaken belief held by both parties that a legally binding contract was in place, and in such circumstances it is unlikely that the doctrine of part performance would apply.

24. It is also arguable that because the land had planning permission the commencement of ground works by Ilex constituted a "material start", representing an implementation of the permission, thus permanently changing the legal status or character of the land. However that cannot be so if it was not the intention of the parties. Without an unconditional exchange of contracts, or some other form of pre-contract legally binding agreement permitting entry onto and development of the land, that cannot have been the parties intention.

25. The expression "garden or grounds" in s 222(1)(b) must be given its ordinary everyday meaning. The words "garden and grounds" can include land not given over to gardens or other common domestic usage and may change from time to time. However for land to lose its character as "garden or grounds", the change must be permanent or regarded as permanent. The change cannot be transient or conditional.

26. Ilex was allowed onto the land disposed of to start foundation work on an informal basis. There was no agreement allowing Ilex access onto the land to carry out the works. There was no licence to occupy, nor any provision in the (draft) contract affording such rights. At any stage

prior to formal exchange of contracts, if for example the access problem had proven to be insurmountable, either party was at liberty to “walk away” from the transaction.

5 27. If the transaction had not progressed to completion it could not be suggested that the land had temporarily ceased to be “garden or grounds”, only to have reverted to its original status on the transaction becoming abortive.

28. The conclusion is that Ilex entering onto the land and starting the works did not constitute a disposal of the land. The land therefore retained its character as “garden or grounds” within the meaning of s 222(1)(b) until the time of its disposal on 27 July 2007 when contracts were exchanged.

10 29. The disposal of the land therefore attracts principal private residence relief.

**MICHAEL S CONNELL
TRIBUNAL JUDGE**

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RELEASE DATE: 30 September 2013