



TC06540

Appeal number: TC/2017/03350

Capital Gains Tax – s 222 Taxation of Capital Gains Act 1992 - closure notice assessing gains on sale of residential property - fixed penalties for failure to include gains in self-assessment return - whether principal private residence exemption applied - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PATRICIA LAM

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER AMANDA DARLEY**

**Sitting in public at Tax Appeals Tribunal, Centre City Tower, Hill Street,
Birmingham on 7 March 2018**

Mr Rohan Singh for the Appellant

Mr Darren Bradley, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Patricia Lam ('Mrs Lam') against a Closure Notice issued by the Respondent ('HMRC') for the year to 5 April 2014, in the sum of £10,048.04 representing Capital Gains Tax ('CGT') arising on the sale by Mrs Lam of 12 Barnes Rise, Kings Langley, Hertfordshire ('Barnes Rise'/'the Property').

2. Mrs Lam also appeals the penalty determination, raised under Schedule 24 FA 2007, for the submission of an incorrect tax return for the year to 5 April 2014. The tax geared penalty calculated at 20.25% of the tax, is £2,034.73.

Points at issue

3. It is not disputed that Mrs Lam purchased Barnes Rise on 18 August 2011 for £265,000 or that it was sold, following substantial renovation, on 26 April 2013 for £410,000, realising a capital gain. The issue is whether the proceeds of sale were exempt from CGT by virtue of the principal private residence relief provisions contained at s 222 TCGA 1992.

4. Mrs Lam contends that she purchased the Property with the intention that it would become her main residence and says that she and her husband actually spent time at the Property before certain events persuaded her to resell it.

5. HMRC say that Mrs Lam's main residence throughout the time that she owned Barnes Rise was in fact 28 Corbyn Street, London, where she continues to reside. HMRC accept that she and her husband stayed at Barnes Rise for part of the week before internal damage to the property made the property uninhabitable, but argue that the nature and extent of her occupation until then was insufficient to make the Property her primary residence and thereby qualify for relief under s 222 TCGA 1992.

5. HMRC assert that Mrs Lam was careless in failing to include the capital gain in her 2013-14 tax return and that they were correct to impose a penalty in respect of the omission.

Background

6. Mrs Lam is 75 years of age. She still resides at 28 Corbyn Street, London, N4 3BZ, where she has lived with her husband Mr Yuk Wing Lam since 2010. Mr Lam is 77 years old and suffers from Parkinson's disease. He has also suffered a stroke.

7. In 2008 Mr and Mrs Lam sold their then home, 'Roughdown' in Feldon, Hertfordshire to a developer for £2.8 million. The couple moved into a rental property in Wiggington, Hertfordshire, before moving to 28 Corbyn Street, Finsbury Park, also a rented property, in 2010. They still live there under a 12 month 'rolling' shorthold assured tenancy. Mrs Lam says that they had lived in Kings Langley some 40 years previously; they liked and knew the area well. In fact Feldon, Wiggington and Kings

Langley are all within 10 miles of each other, in the area of Hemel Hempstead and Berkhamsted.

5 8. Mrs Lam purchased 12 Barnes Rise, a two bedroom bungalow, at the price of £265,000. At the time of purchase, the Property was described by the estate agent as in need of up-dating.

9. The Property was purchased in Mrs Lam's sole name, but according to Mrs Lam from funds belonging to her and her husband jointly.

10 10. On 5 December 2011, Mrs Lam submitted a planning application to Dacorum Borough Council. The application, which was for a single storey rear extension and roof alterations to accommodate two upstairs bedrooms, was approved by the Council on 26 January 2012. Despite the addition of two upstairs bedrooms, the Property was to remain two bedroomed, one of the two downstairs bedrooms being altered to accommodate an extended kitchen and the other becoming a 'family room'.

15 11. Mrs Lam says that it was her and your husband's intention upon completion of the alterations to move into the property as their main private residence.

20 12. When purchased, although in need of modernisation, the Property was habitable. Mr and Mrs Lam say they wanted to get 'a feel for the place' before deciding how to renovate the Property. So, between August and December 2011, (when events forced them to leave the Property) according to Mrs Lam, they stayed there five days a week, returning to London, where their children lived, each weekend. The previous elderly owner who had moved to a care home, had left a cooker, fridge, washing machine, studio couch, chairs, TV and a wardrobe. Other than that there was no furniture. They slept in sleeping bags. Mrs Lam said in evidence that 'there was no rush' and she did not want to relocate her furniture at Corbyn Street or purchase any new furniture until
25 the property was fully renovated.

30 13. Mr Lam was not in particularly good health and had been registered with a Chinese GP in London for some time. He had suffered a stroke and had to attend a hospital which was a 30 minute drive from Barnes Rise. Mrs Lam says that they soon realised that Mr Lam would need downstairs sleeping accommodation and that he would therefore have to use the 'family room' as a bedroom.

14. During their period of occupation of the property, Mr and Mrs Lam paid Council tax. Mr and Mrs Lam had plans drawn for their proposed alterations and submitted a planning application/lawful development certificate on 5 December 2011.

35 15. In mid December 2011, turbulent weather and high winds caused damage to the roof of the Property. Around the same time, the Property was flooded when a water pipe in the loft burst during freezing conditions, causing a ceiling to collapse. The burst occurred over a weekend while Mr and Mrs Lam were in London. The Property was unsafe and uninhabitable. Following that, they did not reoccupy the Property and made an application to the rating authority for empty property relief.

16. Mrs Lam had taken out insurance for the Property. This was evidenced by the completion statement provided by her conveyancing solicitor. However she did not make a claim for the storm damage/flood as according to her accountant she forgot that she had insurance cover. Mrs Lam did not supply a copy of the insurance policy for the purposes of these proceedings, but in any event, a claim would probably not have been accepted by the insurers as it is a common condition that a property must be occupied, on a reasonably permanent basis and during any periods of absence the water drained off, to avoid burst pipes in freezing weather conditions.

17. Consent for the Property alterations was granted by the planning authority on 21 January 2012.

18. Building work commenced in early March 2012. Mrs Lam says that they were not “in a rush” and they continued to reside at Corbyn Street.

19. The building work was completed in March 2013. The works took six months longer than expected, mainly because the builders “let them down”, unexpectedly moving off site, in the middle of building operations, to undertake other work in Northern Ireland.

20. When the builders returned and restarted work Mr and Mrs Lam visited the property regularly. Mr Lam would drive. The builders were Chinese and so Mr Lam (who could speak fluent Chinese) would “do the talking”. Mrs Lam says that they did not particularly get on with the neighbours, describing one of them as “unpleasant” and “a nosy neighbour”, having found him one day in the garden of the property, when visiting the property from London.

21. They realised that the Hospital in Watford, which Mr Lam attended following his stroke, was too far away from Kings Langley. Mrs Lam had not driven for some years. They also wanted to stay closer to their children in London. Their daughter, who lived quite close to Corbyn Street, was medically trained in dealing with people who had suffered a stroke. When in London, Mr Lam was treated at The Whittington Hospital, Magdala Avenue, London, only a mile or so away from Corbyn Street. Mrs Lam said in evidence that she realised that for some time Mr Lam had been ‘in denial’ and the concept of them retiring to Kings Langley was unrealistic. They had also heard about a new therapeutic ultrasound treatment for ischaemic stroke, available at The Whittington Hospital.

22. Mrs Lam sold the renovated and extended Property on 26 April 2013 for £410,000.

23. Mrs Lam’s 2013-14 tax return, which she submitted to HMRC on 21 January 2015, did not include the net proceeds of the sale of the Property as either income or a capital gain.

24. On 25 June 2015 HMRC commenced an enquiry under s 9A TMA 1970 into Mrs Lam’s 2013-14 tax return. HMRC’s opening letter stated that the focus of the enquiry was the potential capital gain on the disposal of Barnes Rise.

25. Over the course of the enquiry Mrs Lam provided various documents to HMRC, including estate agent's details and the invoices for building work. Mrs Lam's reason for purchasing and then selling the property was also discussed.

5 26. On 17 October 2016, HMRC concluded its enquiry, finding initially that the purchase, redevelopment and sale of Barnes Rise was a venture in the nature of a trade. A closure notice was issued charging income tax of £15,397 on the net proceeds of the sale. A tax geared penalty of £8,083, representing 52.5% of the culpable tax, was also issued on the basis that Mrs Lam had deliberately omitted the proceeds of the 'business venture' from her 2013-14 tax return.

10 27. HMRC's independent review cancelled the decision to assess the proceeds to income tax, finding that there was insufficient evidence to support this contention and concluded instead that the disposal proceeds were chargeable to capital gains tax, on the basis that although Mrs Lam and her husband had initially intended to occupy the property as their main private residence, they had in fact not occupied it with the
15 degree and expectation of permanence necessary for it to have become their principal private residence. The Review Officer reduced the penalty from "deliberate" based on 52.5% of the culpable tax, to "careless" based on 20.5% of the culpable tax.

28. On 21 April 2017 Mrs Lam appealed the review conclusion to the Tribunal.

Relevant statutory provisions

20 **Taxes Management Act 1970**

Section 8 - Personal returns

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him
25 by an officer of the Board-

- a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and
- 30 b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is-

- (a) the 31st January next following the year of assessment, or
- 35 (b) where the notice under the section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

(2) Every return under the section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

TCGA 1992

Section 222 of TCGA 1992 provides:

(1) This section applies to a gain accruing to an individual so far as attributable to the disposal of, or of an interest in-

- 5 (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.

10 (5) So far as it is necessary for the purposes of this section to determine which of 2 or more residences is an individual's main residence for any period-

 (a) the individual may conclude that question by notice to an officer of the Board given within 2 years from the beginning of that period but subject to a right to vary that notice by a further notice to an officer of the Board as respects any period beginning not earlier than 2 years before the giving of the further notice.

15 (6) In the case of an individual living with his spouse or civil partner-

 (a) there can only be one residence or main residence for both, so long as living together and, where a notice under subsection (5)(a) above affects both the individual and his spouse or civil partner, it must be given by both.

20 (6A) Where an individual has determined, by giving notice under subsection (5)(a), that a residence is the individual's main residence, that determination does not cease to be effective at any time by reason only of the fact that, at that time, another of the individual's residences is treated by section 222B(1) as not being occupied as a residence (or, having been so treated, is no longer so treated).

Section 223 of TCGA 1992 says, in so far as it is relevant:

25 (1) 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 18 months of that period.

Schedule 24 FA 2007

30 1(1) A penalty is payable by a person (P) where-

- (a) P gives HMRC a document of a kind listed in the Table below, and
- (b) Conditions 1 and 2 are satisfied.

1(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to-

- 35 (a) an understatement of a liability to tax,
- (b) a false or inflated statement of a loss, or
- (c) a false or inflated claim to repayment of tax.

1(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

1(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

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Evidence

29. The bundles, prepared by HMRC, included their correspondence with Mrs Lam and her accountants Man & Co; a copy of Mrs Lam's 2013-14 tax return; the enquiry notice; closure notice; notice of penalty assessment; review conclusion letter and Mrs Lam's appeal to the Tribunal; copies of Mr and Mrs Lam's bank statements; relevant legislation and case law authorities. Mrs Lam gave evidence under oath to the Tribunal.

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Mrs Lam's case

30. Mrs Lam says that she and her husband acquired 12 Barnes Rise with the firm and settled intention of living in the property once it had been altered and modernised and that this is not disputed by HMRC. She says that she and her husband stayed and lived in 12 Barnes Rise regularly from her purchase of the property in August 2011 until the storm and water damage in December 2011.

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31. It was not "a series of domestic setbacks, a burst pipe and tiles blowing off the roof" that caused them to change their mind, as HMRC assert, but in fact the logistical problems that presented themselves following Mr Lam's stroke and the medical treatment he needed. Following Mr Lam's stroke, the Hospital in Watford was too far for them to travel; whereas Whittington Hospital was a mile or so from Corbyn Street. The building works had taken much longer than expected and by the time the property was nearing completion, in March 2013, Mr Lam's condition had deteriorated. These were factors which influenced their change of heart but could not have been foreseen when they purchased the property.

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32. Barnes Rise was acquired with the intention that it would become their residence, and because it was occupied as such, albeit for a short period of time, became their principal private residence. As such, the proceeds from its disposal are exempt from capital gains tax.

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33. Although she and her husband moved into the Property with just two sleeping bags, that was because the Property was furnished and habitable. The reason for this was that they wanted to get a feel of the Property, so that they could decide on its eventual design and furnishings to suit their needs and preferences. They were not planning the Property's design and alterations for the purposes of re-sale.

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34. As argued by Mrs Lam's accountants, the case of *Richard Dutton-Forshaw v Revenue and Customs* [2015] UKFTT 478 shows that there is no minimum period of occupation required for an individual to establish a residence. In that case the Tribunal accepted that occupation of a property for just seven weeks was evidence that it had

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become the taxpayer's main residence and that it was his intention to live there permanently.

35. It follows that a penalty is not appropriate as there was no omission of a capital gain from her 2013-14 tax return.

5 **HMRC's Case**

36. The legislation requires every person who is chargeable to income tax or capital gains tax for any year of assessment, to give notice to an officer of the Board that they are so chargeable. (Section 8 TMA 1970).

10 37. Mrs Lam has appealed against the quantum of the assessments, so under common law the onus is on her to show that she has been overcharged.

38. With regard to the tax geared penalty the burden of proof is on HMRC who have to show that Mrs Lam acted carelessly when she omitted the proceeds of the sale of the Property from her 2013-14 tax return.

39. The statutory onus of proof under s 50(6)(b) TMA 1970 also applies.

15 40. The standard of proof is the ordinary civil standard of proof, which is on the balance of probabilities.

41. In order to be entitled to principal private residence relief, Mrs Lam has to show that the bungalow became her main residence. Section 222(1)(a) TCGA 1992 states -

20 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

42. There is no statutory definition of 'main residence'.

25 43. HMRC refer to the following tax cases which address the meaning of the word 'residence' and the quality of occupation required.

44. *Ricketts v Registration Officer for the City of Cambridge* [1970] 2 QB 463. In this Court of Appeal non tax case the meaning of the word 'residence' was considered. Lord Widgery commented:

30 "Some assumption of permanence, some degree of continuity, some expectation of continuity, is a vital factor which turns simple occupation into residence."

45. In *Goodwin v Curtis* [1998] STC 475, another Court of Appeal case, the taxpayer had moved into the property in question, as a stop-gap measure pending finding somewhere else to live, Millet LJ said:

“Temporary occupation at an address does not make a man resident there. The question whether the occupation is sufficient to make him resident is one of fact and degree for the Commissioners to decide.”

Schiemann LJ said in his judgment (at 510):

5 “... in order to qualify for the Relief a taxpayer must provide some evidence that his continuity in the property showed some degree of permanence, some degree of continuity or some expectation of continuity.”

46. In *Moore v HMRC* [2010] UKFTT 445 (TC), the First-tier Tribunal appeal Judge John Walters found that Mr Moore’s occupation of the property lacked the
10 assumption of permanence, degree of continuity and expectation of continuity necessary to turn it into a “residence”.

47. HMRC assert that *Richard Dutton-Forshaw* can be distinguished because the taxpayer had moved in his furniture and possessions, whereas here Mrs Lam had not.

48. HMRC contends that a husband and wife can only have one residence for private
15 residence relief purposes. In the case of Mr and Mrs Lam this residence is 28 Corbyn Street, where they have resided since 2010 and where they continue to reside. All the documentary evidence seen by HMRC shows 28 Corbyn Street as their residence and correspondence address during the period in point.

49. Mr and Mrs Lam’s accountant advised in correspondence that their “stay in
20 sleeping bags was to assess the changes that were required to the Property”. This cannot therefore be regarded as a permanent stay.

50. HMRC also observe that Mrs Lam could have resolved any ambiguity concerning the status of Barnes Rise by notifying HMRC that they wished it to be regarded as their main residence in accordance with s 222(5) TCGA 1992.

25 51. For the principal private residence relief to arise the property in question must have actually been occupied and this occupation must exhibit a degree of permanence and expectation of continuity. The evidence of occupation adduced by Mrs Lam is slight, namely that she and her husband spent a number of nights at Barnes Rise, sleeping on the floor in sleeping bags, whilst planning the restoration/re-configuration
30 of their home to be.

52. The few nights the Lams spent in the unfurnished Barnes Rise - a Property that was subsequently not occupied by them after completion of the building work - does not constitute occupation of the Property as a residence within the meaning of the legislation (s's 222-224 TCGA 1992) and consequently the net proceeds from the sale
35 of the Property fall to be assessed to capital gains tax.

53. A penalty has been charged because Mrs Lam acted carelessly when she failed to declare the capital gain arising on the disposal of Barnes Rise. HMRC acknowledge that no penalty is payable if Mrs Lam is entitled to private residence relief.

Conclusion

54. The Court of Appeal case of *Goodwin v Curtis* and later cases have established that to determine whether a property qualifies as a principal private residence, the following factors must be considered.

- 5 • Whether the property was actually occupied as a residence.
- The nature, quality, length and circumstances of a taxpayer's occupation of the property.
- Whether the occupation was intended to be permanent or merely temporary.
- 10 • Whether there was a degree of continuity or some expectation of continuity to turn mere occupation into residence. The need for permanence or continuity should not be overstated as it is only one of the factors to be taken into account in weighing up all of the evidence.

55. The question of when occupation becomes residence is one of fact and degree for the Tribunal to decide and the word 'reside' and 'residence' are ordinary words of the English language to be interpreted as such. Residence is usually defined as 'the dwelling in which a person habitually lives; in other words, his or her home.' The test of residence is considered to be one of quality rather than quantity.

56. Periods of occupation during, or in readiness for renovation are distinguishable from periods of *living in* a property, as the former would lack the necessary quality to turn mere occupation into residence, in the absence of a lack of a firm and settled intention to do so.

57. There must be sufficient documentary or other evidence to support a claim that the property was occupied as the taxpayer's only or main residence.

25 58. We have considered the facts and evidence adduced by Mrs Lam in support of her appeal and note that:

- i. We have not been provided with evidence of the number of days Mr and Mrs Lam actually lived at the Property. No evidence has been provided in support of their claim that they lived at the Property five days a week between its purchase in August 2011 and December 2011, when it became uninhabitable. Utility bills, for example electricity, gas and water rates have not been produced, despite being requested by HMRC. These could have established with some certainty the length of time Mr and Mrs Lam spent actually living in Barnes Rise and the quality of their occupation, that is, whether they spent time, eating sleeping, relaxing, cooking and washing there. No third party evidence e.g. of neighbours or others has been provided.

5 ii. Mr and Mrs Lam did not move any of their furniture into the Property. We understand the reason for that, but no evidence has been provided to show that they brought any kitchen equipment or modest items of furniture, convenience or personal possessions that would have been essential for them to actually live in the Property and make their occupation more comfortable.

 iii. No evidence has been provided of a change of address, for example bank statements, credit card statements, home insurance, benefit claims (given Mr Lam’s infirmity) or other official documentation, television licence, changes to their registered doctor or dentist.

10 59. Without such evidence it cannot therefore be said that 12 Barnes Rise was Mrs Lam’s “only or main residence” within the meaning of s 222(1)(a) TCGA 1992. There may have been some expectation of continuity of residence, but that was subject to Mr and Mrs Lam getting a feel for the Property and the neighbourhood and implementing unequivocally their intention to make it their home and permanent residence. It is a question of fact and degree and Mrs Lam’s aspirations to make 12 Barnes Rise her new home was, in the event, never realised.

20 60. We concur with HMRC that Mrs Lam acted carelessly when she failed to declare the capital gain arising on the disposal of Barnes Rise. It was of course not deliberate. We accept that it was a simple error, arising out of her mistaken belief that the Property had become her principal private residence. However given the very brief period of her occupation of the Property, that belief was not based on considered reasoning and in our view amounted to carelessness.

61. The Appeal is accordingly refused and the assessment and penalty confirmed.

25 62. 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)”
30 which accompanies and forms part of this decision notice.

MICHAEL CONNELL
TRIBUNAL JUDGE

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RELEASE DATE: 15 JUNE 2018