[2018] UKFTT 403 (TC)

TC06605

Appeal numbers: TC/2017/06351 & TC/2017/06348

Capital Gains Tax – Extra Statutory Concession D49 – time limits. Whether reliance upon the Concession is precluded altogether if the 12 (or 24 month) periods are exceeded – No.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR GEORGE MCHUGH **Appellants**
MRS MARY MCHUGH

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q. C.
MR. SIMON BIRD.

Sitting in public at 30 Friar Street, Reading on 16 July 2018.

The Appellant Mr. McHugh in person (for himself and Mrs McHugh).

Mrs G. Carwardine, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

The Facts.

1. None of the essential facts of this case are in dispute.

2. Between 30 November 2004 and a date in December 2007, the appellants, Mr and Mrs McHugh, built themselves a new house. HMRC accepted in their Review Decision dated 26 July 2017 that the appellants then occupied that house as their principal private residence between an unspecified day in December 2007 and 27 September 2010, when the house was transferred to purchasers who had agreed to purchase it from Mr Mrs McHugh.

3. Neither appellant's tax return for the fiscal year ended 5 April 2011 contained any entry relevant to capital gains tax.

4. It is not in dispute that subsequently HMRC made a discovery which, it is said, results in capital gains tax being due for that year. The fact that a relevant discovery had been made was not a live issue before us.

5. Further to various enquiries made by HMRC, a Further Assessment for the year ended 5 April 2011 was served upon Mr McHugh in the sum of £22,438.35p accompanied by a Penalty Assessment in the sum of £11,780.13p. On the same date, a Further Assessment was served upon Mrs McHugh but in the slightly lower sum of £22,067.75p. That assessment was accompanied by a Penalty Assessment in the sum of £11,585.56p.

6. Each Penalty Assessment was predicated on the basis that each appellant had deliberately misled HMRC by deliberately omitting reference to a capital gain from his/her tax return.

7. Each appellant requested a statutory review which was concluded by a letter dated 26 July 2017. That review conclusion correctly identified that the principal place of residence exemption from capital gains tax applies only in respect of the period of time for which that property has been occupied as the relevant person's principal place of residence. That much is clear from section 222(1) Taxation of Chargeable Gains Act 1992. There is available, in some circumstances, an additional statutory period under section 223(1) of the 1992 Act, but it is not relevant in this appeal.

8. When the appellants sold their house in September 2010 it was sold, as commonly happens, along with various items. We put the matter in that neutral way because this appeal raised a potential issue as to whether those "items" had become fixtures and fittings (thus passing with the realty) or had remained chattels which the appellants could sell separately to their purchasers.

9. Each Further Assessment was based upon the appellants not being entitled to any principal place of residence relief prior to actually moving in to live at their completed property in December 2007.

10. There is an HMRC Extra Statutory Concession known as D49. When the statutory review was undertaken it was decided that that concession had no application, for reasons to which we refer below.

The Issues.

11. Those fairly straightforward facts have given rise to the following issues which we have to determine :

(1) Whether the Review Officer was correct to decide that the appellant could not take any advantage whatsoever of concession D49.

(2) Whether the appellants, or either of them, had deliberately omitted taxable gains from they are respective tax returns.

(3) Whether the amount allowed by HMRC as representing the price of chattels sold (along with the realty) could properly be different to the price for such chattels agreed between the vendors and the purchasers.

12. We will consider each issue in turn.

The Extra Statutory Concession D49.

13. The text of this concession has been very difficult to track down. Mrs Carwardine told us that it had eluded her and so at the hearing of the appeal we did not have a copy of the actual text before us. What we did have was the Review Officer's assertion as to what it stated (which we accept to have been an entirely fair and reasonable summary).

14. The text of Extra Statutory Concession D49 is :

D49. "Private residence relief: Short delay by owner-occupier in taking up residence. This Concession applies: where an individual acquires land on which he has a house built, which he then uses as his only or main residence where an individual purchases an existing house and, before using it as his only or main residence, arranges for alterations or redecorations or completes the necessary steps for disposing of his previous residence.

In these circumstances, the period before the individual uses the house as his only or main residence will be treated as a period in which he so used it for the purposes of Sections 223(1) and 223(2)(a) TCGA 1992, provided that this period is not more than one year. If there are good reasons for this period exceeding one year, which are outside the individual's control, it will be extended up to a maximum of two years.

Where the individual does not use the house as his only or main residence within the period allowed, no relief will be given for the period before it is so used. Where relief is given under this Concession it will not affect any relief due on another qualifying property in respect of the same period."

15. In the Review Letter it was recognised that this concession allows relief for a period of up to 12 months, but, if there are good reasons outside the control of the individual taxpayer, then that period can be extended for up to 24 months. However, it then went on to say, by reference to an example given in HMRC's Capital Gains Manual, that if the build or renovation period exceeds 24 months, so that the taxpayer does not move into the property for more than 24 months after acquiring it, no part of the extra statutory concessionary period is available to the taxpayer.

16. That proposition is startling. We take the example of a person who cannot point to any good reasons for extending the period beyond 12 months. Thus, if that person takes 366 days to build or renovate his house, upon HMRC's analysis he can take no benefit whatsoever from the extra statutory concession, whereas a person who takes 364 days to accomplish the same building or renovation work can take advantage of it. That is the consequence which the Reviewing Officer thought should flow from a proper application of the Extra Statutory Concession. The Reviewing Officer arrived at that conclusion by reference to an example set out in the Capital Gains Manual which refers, by way of an example, to a dwelling house being purchased in a dilapidated condition in January 2011. It then postulates that refurbishment works take until May 2014, substantially because the owner is short of money, and only then does the owner move into the house to use it as his main residence. The example goes on to say that in those circumstances, the house owner would not have any additional allowable period for relief from capital gains tax, and so the principal place of residence relief would apply only from May 2014.

17. We remind ourselves that extra statutory material of this nature is not to be read as if it is primary or secondary legislation. The essence of the enquiry is to discover the purport and intent of the concession and to construe and apply it so as to give effect to its true purport and intent. We can understand that the use of the words "provided that" in the middle paragraph of the Concession could be read as introducing a proviso to the effect that the concession can and will only apply if the building or refurbishment works are completed within one year. The words "provided that" are equally capable of being read as expressing the intention that the period for building and/or refurbishment works should not be open ended and should, for capital gains tax purposes, be limited to 12 months or, if there are good reasons beyond the control of the taxpayer, to a maximum of 24 months.

18. When we consider which of those constructions is correct, we must begin by looking at the purport and intent of the Concession. It makes it clear that the intention is to extend the relief against capital gains tax in respect of any gain that accrues in respect of a property used as a principal place of residence, to the period between acquisition and occupation, subject to a maximum of 12 months or, if applicable, 24 months. The policy behind such a time limited Concession must be that a landowner who has held a parcel of land for, let us say seven years, cannot relieve the whole of

his capital gain on that land simply because of the end of that period he has obtained planning permission to build a dwelling and has in fact done so (even if he had had that intention seven years ago). The policy is understandably different where a person genuinely purchases land upon which to build a house or buys a house which is to be substantially refurbished or renovated prior to residence being taken up.

19. We remind ourselves that when we construe primary and/or secondary legislation and, we venture to think, Extra Statutory Concessions of public bodies and organs of the state, it is essential that the construction placed upon the text should not lead to a manifestly absurd or unfair result. If such a result would be achieved, that is a very strong contra-indication to that construction being correct.

20. We have already commented that it would be startling if the man who bought a plot of land and built a house upon it and moved into it after 364 days should be able to discount that period of time for capital gains tax purposes, whereas the man who took two days longer to build his house, loses the right to discount that entire 366 day period for capital gains tax purposes. We are in no doubt that the Extra Statutory Concession, lays down a "not more than" concessionary period and that the words "provided that" achieve that intended objective.

21. It follows that it is our judgement that the example set out in the Capital Gains Manual (published 12 March 2016 and updated 09 May 2018) is simply wrong and should not be applied or followed. Indeed, in our judgement, the guidance should be revised to reflect the true position, as explained above.

22. The consequence so far as this appeal is concerned is that each appellant is entitled to have any gain accruing in respect of the property reckoned after taking advantage of Concession D49.

23. At the hearing before us Mrs Carwardine accepted that in each appellant's case there were sufficient good reasons (which we consider it unnecessary to detail), beyond the control of each appellant, to warrant the concessionary period being extended to 24 months. In our view that was a very fair and proper position to adopt.

24. It therefore follows that in respect of each appellant's appeal the period of reckonable gain is to be reduced by 24 months, being the 24 month period immediately prior to the appellants taking up residence in the property in December 2007.

Penalties.

25. In a case where HMRC has levied penalties against the appellants, it bears the onus of proving one or more culpable defaults sufficient to justify any particular penalty.

26. On behalf of HMRC Mrs Carwardine acknowledged that it was difficult to see how it could be concluded that the case of either appellant warranted a conclusion that

there had been a deliberate omission to declare a capital gain. In our judgement that was a fully justified and mature concession.

27. The case, then put on behalf of HMRC, was that the omission was nonetheless careless. This is an appeal in which we have no witness statements from either side. Accordingly we asked Mrs Carwardine to identify the factual basis upon which she sought to argue that any omission, by either appellant, should properly be characterised as careless or negligent.

28. Consistent with her careful and fair approach to this case, Mrs Carwardine told us that the only feature that she could and would rely upon was the fact that each tax return did not disclose a capital gain. It was suggested to her that the mere fact of an omission is not, without more, proof of carelessness, even keeping in mind that the standard of proof is the balance of probabilities, not the criminal standard.

29. We were unhesitatingly of the view that that single fact was not sufficient to allow us to conclude, on the balance of probabilities, that the omission arose by reason of carelessness or negligence. Such omissions are equally consistent with innocent mistake or an honest belief (based upon professional advice) that there was no capital gain to disclose. Accordingly, each penalty is quashed.

Whether the amount allowed by HMRC as representing the price of chattels sold (along with the realty) could properly be different to the price for such chattels agreed between the vendors and the purchasers.

30. This issue arises in this way. When the appellants sold their house in September 2010 the purchasers also purchased various chattels from the appellants. The overall price paid, £1,350,000, included the price agreed between the vendors and the purchasers for those chattels.

31. The appellants contend that they sold to the purchasers the various items set out in an email timed at 11:00 hours on 8 February 2017, which the appellant sent to the officer of HMRC then dealing with the matter. By reference to HMRC's response, contained in a letter dated 15 May 2017 it can be seen that HMRC accepted that the blinds, curtains, carpets and bedroom furniture comprised chattels, which were sold as such to the purchasers. The appellant's say that the purchasers agreed to pay £18,816.58p for those chattels and so that sum should be deducted from the selling price of the house for the purpose of a capital gains tax calculation. The author of the letter then said that because the goods were second-hand it was appropriate to reduce the sum agreed between the vendors and the purchasers, by 50%.

32. Mrs Carwardine commented that that was "an arbitrary" reduction. We agree. Vendors and purchasers are free to enter into agreements between themselves for the sale and purchase of chattels at such prices as they see fit. It is not for HMRC to impose valuations in respect of those items except in cases where manifestly unrealistic prices have been agreed (whether too high or too low) which, it can then be inferred, have been agreed so as artificially to reduce a potential tax liability. For

example, if I agree to sell my house, which is objectively valued at £1,500,000, for £1 million, provided that the purchaser also purchases my rather modest elderly motorcar for £500,000 at the same time, HMRC can justifiably say that that is nothing more than a wheeze to reduce stamp duty land tax and so look at the reality of the transaction rather than its form. We have taken an obviously extreme example and it will be a matter of judgement in any individual case as to whether one or more transactions can properly be characterised as a wheeze rather than a genuine sale at arms' length between vendors and purchasers.

33. We observe that the price agreed between the vendors at the purchasers for these various chattels was at or around the price paid for them as new items and, quite plainly, at the time of sale they were properly characterised as "second-hand" items. That, of itself, does not give rise to HMRC being entitled to impose an arbitrary reduction unless it can establish that each sale is only explicable as an attempt to avoid tax and cannot conceivably be characterised as a genuinely negotiated contract for the sale of chattels at a fair and reasonable price.

34. Mrs Carwardine did not argue or seek to establish that any of these chattel sales could or should be impugned as not being genuine arms' length transactions at prices which did not arouse suspicion that there was some kind of tax wheeze afoot.

35. It follows that the appellants are entitled to the sum of £18,816.58p being deducted from the sale price prior to the capital gains calculation being undertaken, rather than the sum of £9,410, hitherto deducted by HMRC.

36. 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.

Result.

Each appellant's appeal against his/her capital gains tax assessment dated 17 March 2017 is allowed to the extent that the period of reckonable gain is to be reduced by 24 months, being the 24 month period immediately preceding the appellants taking up residence in the property in December 2007. Each assessment must be reduced accordingly.

Each appellant's penalty assessment is quashed.

The appellants between them are entitled to deduct from the sale price of the property £18,816.58p prior to the capital gains calculations being undertaken, rather than the sum of £9,410 hitherto deducted by HMRC.

HMRC must re-work each appellant's capital gains tax assessment. In the event of any dispute about the proper arithmetical calculation of any such liability (based upon the foregoing) either party is at liberty to restore this matter for further hearing.

GERAINT JONES QC.
TRIBUNAL JUDGE

RELEASE DATE: 18 JULY 2018