Neutral Citation: [2024] UKFTT 00298 (TC)

Case Number: TC09127

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal reference: TC/2022/02357

CAPITAL GAINS TAX – Private Residence Relief under s 222 Taxation of Chargeable Gains Act 1992 - Appropriation to trading stock by householder before disposal to developer

Heard on: 23 November 2023
Judgment date: 27 March 2024

Before

TRIBUNAL JUDGE MALCOLM FROST
JANE SHILLAKER

Between

ANDREW NUNN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Alan Arenstein of WLH Taxation Ltd

For the Respondents: Kieran Gargan, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal against a closure notice (and related penalty assessment) in which HMRC disallowed the Appellant's claim to Principal Private Residence relief ("PPR relief" or "PPR") in respect of a sale of land. The land had at one stage been part of Mr Nunn's garden, although there is some dispute as to whether it retained that character at the time of disposal.

EVIDENCE AND FACTUAL FINDINGS

2. The documents to which we were referred were:

   (1) A hearing bundle of 260 pages (including witness statements from Mr Nunn and Mr Daly),

   (2) An authorities bundle of 343 pages

   (3) A skeleton argument for Mr Nunn of 4 pages; and

   (4) A skeleton argument for HMRC of 13 pages

3. At the invitation of the Tribunal, the parties made further written submissions following the hearing.

BACKGROUND FACTS

4. On 17 November 1995, Mr Nunn purchased a property in Oxfordshire for £120,000.

5. In 2015, Mr Nunn reached an agreement with a property developer, Michael Daly (acting on behalf of his company, M.A. Daly Building Contractors Ltd) ("Daly's"), for the sale of a part of the land at the rear of the property. The agreed price was £295,000. The land in question was at that stage part of the garden of the property.

6. The area of the residence and land in question amounts to less than 0.5 of a hectare. This is within the 'permitted area' (as defined in the legislation set out below).

7. Mr Daly intended to build two houses on the land. Daly's obtained planning permission for such development on 23 April 2015.

8. Heads of terms for the sale were agreed in late 2015 or early 2016. Mr Nunn and Daly's then instructed their respective solicitors to prepare the formal sale contracts.

9. Mr Nunn's solicitors provided a draft sale contract to Daly's solicitors on 7 January 2016. The sale did not progress at that time, in part because Daly's intended to complete a transaction relating to the adjoining property first.

10. By 2 June 2016 formal contracts had still not been agreed. Daly's were keen to begin work on the development, in order to make progress during good weather.

11. In order to provide some comfort to Mr Daly, Mr Nunn signed a letter from Mr Daly dated 2 June 2016 (the "2 June Letter") which stated:

> "As discussed we have now discharged all conditions relating to the planning consent on your property. We really would like to commence work ahead of contracts being signed as I think this will still take 2-3 months and we are ready to start now.
>
> We have agreed heads of terms which are currently being converted into the contract and the gross purchase price is fixed at £295,000 as planning consent has been granted.

> As we agreed, please sign and return this letter in confirmation that this constitutes a contract ahead of formal contracts being signed. I am sure you appreciate that this is required by me to mitigate the risks of commencing construction at this stage".

12. The proper construction of this letter is considered in more detail later in this decision

13. Following the signing of the 2 June Letter, Daly's erected a fence to partition the land from the remaining garden and began construction work.

14. A formal contract of sale was signed and completed on 7 September 2016. The agreed terms of the sale were that £195,000 would be paid on completion of the land sale and a further £100,000 on the completion of the sale of the second house to be built on the land.

15. The £195,000 initial payment was paid on the 7 September completion date. By this time, development was significantly advanced. The foundations of the houses had been poured and brick walls built sufficiently high that scaffolding had been erected for the construction of the second storey.

16. On 9 January 2018, Mr Nunn submitted his 2016/17 Self-Assessment tax return, declaring sale proceeds of £195,000 and allowable costs of £222,000.00, resulting in a loss of £27,220.00.

17. On 18 December 2018, HMRC notified Mr Nunn that they were opening an enquiry into the 2016/17 tax return under Section 9A Taxes Management Act 1970 ("TMA 1970").

18. On 30 September 2021, after a number of exchanges of correspondence, HMRC issued their closure notice under s 28A TMA 1970. The closure notice disallowed the claim to PPR with the result that the disposal of the land was charged to capital gains tax ("CGT") in the amount of £72,633.80.

19. On 1 October 2021, HMRC issued a notice of a suspended penalty assessment of £20,155.87. The penalty suspension period ended in October 2022 and so at the time of the hearing the penalty has not become payable.

THE LAW

20. The statutory provisions setting out the basic requirements of PPR are relatively brief.

21. Section 222 Taxation of Chargeable Gains Act 1992 ("TCGA") sets out the basic gateway for the relief to be available. It provides (so far as is relevant):

> "222 Relief on disposal of private residence
>
> (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.
>
> (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"

22. In the present case, the land in question was historically part of the garden of the property owned by Mr Nunn. Therefore, it is the gateway in s 222(1)(b) that is relevant.

23. Section 223 TCGA then sets out the amount of relief due, it states (so far as is relevant):

> "223(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 9 months of that period."

24. We note that s 223 only refers to the status of the dwelling house itself and not the garden or grounds. Therefore, if the dwelling house in question has been the individual's only or main residence throughout, then full PPR relief will be available on the garden or grounds so long as the s. 222(1)(b) gateway is engaged.

25. It is common ground that the dwelling house on Mr Nunn's property has been Mr Nunn's main residence throughout the relevant period. As such, if the s 222(1)(b) gateway is engaged, then full relief would be available.

ISSUES

26. The following issues fall to be decided by the Tribunal:

(1) Is the relevant date for determining the status of the land the date of disposal, or some other date?

(2) What was the disposal date (or other relevant date)?

(3) At the relevant date, was the land in question land Mr Nunn had for his own occupation and enjoyment with that residence as its garden or grounds?

(4) If PPR relief is not available, what is the correct rate of CGT to apply?

(5) Should the penalty be upheld?

27. We have dealt with these issues in turn, breaking them down into sub-issues as necessary.

IS THE RELEVANT DATE THE DATE OF DISPOSAL?

28. Section 222(1)(b) TCGA requires that the land in question be land which the taxpayer 'has for their own occupation and enjoyment with their residence as its garden or grounds'. There is some scope for confusion as to the time at which the parties say that this requirement is to be assessed. We therefore begin by clarifying the point.

29. We start by noting that s 222(1) refers to a disposal attributable to the relevant land, indicating that the date of the disposal would be the natural time for assessing the requirement.

30. In the case of the dwelling house itself, that natural starting point is displaced by section 222(1)(a) which effectively provides that the status of the dwelling house is to be assessed by reference to the "period of ownership" of the property. This can be contrasted with s 222(1)(b), which contains no such qualification. The question that must therefore be considered is whether the s 222(1)(a) qualification is also to apply to s 222(1)(b).

31. This question is answered by the case of *Varty v Lynes* 51 TC 419 (Ch D). This case is clear binding authority for the proposition that the words "land which he has for his own occupation and enjoyment with that residence as its garden or grounds" means land which the taxpayer has at the date of the disposal and not land which he has at any time while owning the residence.

32. As such, we consider that the s 222(1)(b) requirement is to be assessed at the date of disposal.

33. It was argued for Mr Nunn that *Varty v Lynes* is not relevant to the present case as in that case the dwelling house was sold first, and after this the garden. It was decided that the

garden was not occupied as part of the residence at the time of the disposal and so no PPR relief was due. Mr Arenstein, for Mr Nunn, suggested that as Mr Nunn continued in occupation of the dwelling house at the time of the sale that the present case could be distinguished.

34. We do not consider that this factual distinction alters the conclusion as to the meaning of *Varty v Lynes*. We would agree that the factual distinction may make a difference as to the outcome once the test is applied, but the principle that the relevant date is the date of disposal remains unaltered.

35. Accordingly, we consider that the date at which the s 222(1)(b) requirement is to be assessed is the date of disposal of the land.

36. However, even though we are content that the disposal date is the relevant date, there is a potential disagreement between the parties as to the meaning of the 'disposal date'.

37. The potential disagreement arises because s 28 TCGA sets out a deeming rule for the time of disposal, it provides (so far as is relevant):

> "...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)."

38. Therefore, if an unconditional contract for the sale of the land in question was entered into on 2 June 2016 but the transfer of the land was not completed until 7 September 2016 then, applying s 28, the disposal date for TCGA purposes would be the earlier date of 2 June.

39. Thus, the 'date of disposal for TCGA purposes' may differ from the actual date on which the land was finally disposed of. We refer to this second date as the 'actual date of disposal' below.

40. HMRC made reference in their submissions to recent case law on the meaning of the "period of ownership" and the potential impact on the disposal date to be applied in PPR cases. HMRC's submissions were not definitive on the point, but we deal with the point to ensure there is no uncertainty.

41. HMRC noted that, in the case of *Lee v HMRC* [2023] UKUT 242 (TCC) the Upper Tribunal said of the term "period of ownership":

> "[41] … we find that no uncertainty arises. The legislation does not specify the end of the ownership period, because it is implicit that the period ends at the point of the relevant disposal."

42. HMRC also drew our attention to the case of *Underwood v HMRC* [2008] EWCA Civ 1423, in which the Court of Appeal outlined their interpretation of the term 'disposal' at [39] & [40]:

> "39. What, then, is a disposal of land for the purposes of capital gains tax? The capital gains tax legislation does not define what is meant by a disposal. What is envisaged is a transfer of an asset (i.e. of ownership of an asset) as widely defined, by one person to another: *Kirby v. Thorn EMI* [1988] 1 WLR 445 at 450, per Lord Nicholls. Except in certain cases where transactions are deemed to be disposals, the word "disposal" bears its "normal meaning": *Berry v Warnett* [1982] 1 WLR 698, 701, per Lord Wilberforce.
>
> 40. The expression "normal meaning" is used in a rather special sense. A house owner who has contracted to sell the house might well regard himself or herself as having disposed of the house. Plainly "disposal" is used in a special sense to refer to a legal concept (just as in the familiar discussion of

> the meaning of "possession" or "ownership" in the traditional texts on jurisprudence), and it was common ground on this appeal that it meant disposal of the entire beneficial interest in the asset."

43. Putting these two cases together, it may be inferred that HMRC consider that the time of 'disposal' for PPR purposes is to be taken to be the date at which the 'period of ownership' ends. This would be the date of the 'disposal of the entire beneficial interest in the asset' - in other words, the actual disposal date rather than the TCGA disposal date. If that is HMRC's view, then we consider this to be incorrect.

44. We consider that where s 222 TCGA uses the term 'disposal', the time of such disposal is to be determined applying s 28 TCGA (and any other relevant statutory provisions).

45. It may well be that the interpretation of the phrase 'period of ownership' may be read as referring to the date of actual disposal (and acquisition), but that simply delineates the beginning and end of the period for determining whether a dwelling house was the taxpayer's only or main residence, rather than altering the disposal date to be used for wider TCGA purposes.

46. The effect of this may be that the date of disposal for TCGA purposes may not align with the end of the period of ownership, but we see no inescapable contradiction in that.

47. We therefore consider that the date upon which the s 222(1)(b) requirement is to be assessed is the TCGA disposal date.

WHAT IS THE DISPOSAL DATE (OR OTHER RELEVANT DATE)?

48. In order to assess whether the s 222(1)(b) requirement is met on the date of disposal, we must first determine the correct date of disposal.

49. It is common ground between the parties that if no disposal had occurred by the date the 7 September contract was executed then the 7 September 2016 would be the date of disposal. The point of dispute is as to whether there was a disposal at an earlier time.

50. Mr Arenstein argued that the 2 June Letter constituted a contract for the disposal of the land. As such, Mr Arenstein submitted, s 28 TCGA would operate such that the date of disposal would be 2 June 2016.

51. Further or alternatively, Mr Arenstein suggested that the 2 June Letter gave rise to a constructive trust under which Mr Nunn held the land for Daly's. In support of this position, Mr Arenstein relied upon statements made by both Mr Daly and Mr Nunn to the effect that they both considered that the effect of the 2 June Letter was to immediately transfer ownership of the land to Daly's.

52. The Tribunal also sought submissions from the parties on the question of whether there had been an appropriation to trading stock prior to the execution of the 7 September disposal contract.

53. There are therefore three sub issues to be determined:

(1) Did the 2 June Letter constitute a contract for disposal?

(2) Did the 2 June Letter give rise to a constructive trust?

(3) Was there an appropriation to trading stock prior to 7 September 2016?

Did the 2 June Letter constitute a contract for disposal?

54. Mr Arenstein submitted that the 2 June Letter was intended by Mr Nunn and Daly's to be a contract of disposal and ought to be treated as such.

55. The 2 June Letter states that it "constitutes a contract ahead of formal contracts being signed". It also states that it is to "mitigate the risks of commencing construction at this stage".

56. There seems to be no clear statement as to what the parties are expected to do in order to give effect to this purported contract. The express reference to 'formal contracts being signed' seems to be an acceptance that a further step is necessary in order to bring about the sale of the land. It might be suggested that the parties were expected to feel compelled to execute the sale agreement in due course. It is a truism that an 'agreement to agree' has no legal effect.

57. In correspondence, HMRC drew Mr Nunn's attention to the words of Lord Wright in *Scammell v Ouston* [1941] AC 251. In his speech in that case, Lord Wright said (at 268/9):

> "It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain."

58. It could certainly be suggested that the 2 June Letter was so vague as to fail this test. However, we do not go that far.

59. The 2 June Letter could be read as an acceptance by the parties that Daly's was to begin work on the land prior to it being transferred and that therefore, if the transfer were not to ultimately complete as expected, there might be some possibility of the recovery of costs of the work. By carrying out work on Mr Nunn's land, Daly's was adding value to that land and putting it in a more saleable condition. If Mr Nunn were to sell the land to a third party with the houses half-built, it might be expected that Daly's would perhaps use the letter as a basis for a claim for a share of the increase in value.

60. We do however consider that the letter did not constitute a contract for the sale of the land. The wording of the letter is focussed on the commencement of development works. There is nothing which we would consider shows a definite intention to bring about the immediate disposal of the land.

Did the 2 June Letter give rise to a constructive trust?

61. Mr Gargan, in his submissions for HMRC, drew our attention to the provisions of s 2(1)) Law of Property (Miscellaneous Provisions) Act 1989 which states that

> "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."

62. Mr Gargan submits that the 2 June Letter does not incorporate all the terms of the sale (making reference to a separate heads of terms). As such, Mr Gargan submits, the 2 June Letter was not legally capable of being a contract for the sale of the land.

63. Mr Arenstein, for Mr Nunn, seeks to counter this suggestion by the ingenious submission that the 2 July Letter gave rise to (or perhaps evidenced) a common intention constructive trust.

64. Mr Arenstein's suggestion relies on the case of *Matchmove Ltd v Dowding and Church*, 2016 EWCA Civ 1233 ("*Matchmove"*). In that case, the Court of Appeal upheld a decision of the High Court that a piece of land was held by the Defendant on constructive trust for the Claimants, despite no formal sale contract having been entered into.

65. The key facts in *Matchmove* were:

(1) Mr Francis, described as 'Matchmove's moving spirit' was a longstanding and trusted friend of the Claimants.

(2) Mr Francis was also known by all parties to be a person who regarded any deal as done and binding on a handshake ("his word was his bond")

(3) As a result, any concluded agreement relating to the land was intended by the Claimants and Martin Francis to be binding immediately.

(4) In reliance on that agreement, the Claimants made numerous steps to their detriment, including paying the full price of the land and selling their existing house.

(5) In the circumstances, the judge decided that the Claimants were entitled to the land in question on the basis of a constructive trust.

66. Mr Arenstein drew the Tribunal's attention to paragraph 29 of the *Matchmove* judgment, where the court stated:

> "There was no dispute between the parties that a common intention constructive trust could arise where (i) there was an express agreement between parties as to the ownership of property (ii) which was relied upon by the claimant (iii) to his or her detriment such that (iv) it would be unconscionable for the defendant to deny the claimant's ownership of the property."

67. Mr Arenstein suggests that the first requirement above was met as both Mr Nunn and Mr Daly had a clear intention that the effect of the 2 June Letter was that Mr Daly took immediate ownership of the land.

68. In his witness statement, Mr Nunn stated:

> "On 2 June 2016, Michael Daly informed me that there were a number of delays in finalising the Contracts but he wanted to make a start on my property and make use of the good weather. He informed me that he had discussed this with his solicitor, and he was advised by his solicitor to produce a written Contract stating that the Heads of Terms had been agreed for the sale of the land... and have both myself and Michael Daly sign this Contract, so neither party could back down from the Agreement. I had no objection with this additional Contract as it was the same Heads of Terms agreed and sent by my Solicitor in January 2016 and all I was doing is cementing by signing the document, was I had sold my land to M A Daly Construction Ltd and I no longer owned it."

69. In his statement, Mr Daly stated:

> "Since we had already agreed Heads of Terms, I asked Andrew Nunn if I could make a start on construction of the houses. He agreed to this as the terms were fixed and would not change. However, it was important to me that I did not expose myself to the risk of commencing construction without the certainty of having a contractual hold on the site.
>
> Consequently, I asked Andrew Nunn if he would be prepared to a sign a letter confirming that the terms were settled for the purchase of the land, which he agreed to. We signed an appropriate letter on 2 June 2016, and I immediately erected a fence which partitioned off the land which I considered now belonged to me for the rest of the land he was retaining. I then commenced construction of the houses."

70. Both Mr Nunn and Mr Daly were adamant in oral evidence that the intention of the agreement was to bring about an immediate transfer of the land. Neither man was able to articulate why the formal contracts could not simply be signed at that time, or why such further contracts would even be necessary. A draft had been provided by Mr Nunn's solicitors in January 2016 and could easily have been made ready for signature in June. The letter from Mr Nunn's solicitors accompanying the January 2016 draft indicated that Mr Daly was waiting to complete a sale in respect of the land adjacent to Mr Nunn's before turning to the transaction with Mr Nunn.

71. The evidence of Mr Nunn and Mr Daly before the Tribunal can be contrasted with statements made in previous correspondence. A number of relevant extracts are set out below.

72. In a letter dated 11 June 2020 from Mr Daly to Mr Nunn's previous accountant, Mr Daly stated:

> "I signed contracts with him in September 2016 but started work in July of the same year. Following advice, I exchanged letters with him before I actually started the work to give me some protection as I did not want to risk losing the cost of the work if something went wrong."

73. In an email dated 25 July 2021 from Mr Nunn to the HMRC officer dealing with the enquiry, Mr Nunn attached a copy of the 2 June Letter and said (emphasis added):

> "I have attached a letter, Mr Rogers received from M A Daly Builders with the Contract letter. You will see he sourced advice before commencing work <u>on my land</u>. I took this to be all above order, and we had a Contract in place"

74. He then went on to say (emphasis added):

> "I hope the contract and the letter gives you a better understanding of why I had no reason to question allowing work to commence <u>on my land</u> before payment was received"

75. In an email dated 29 October 2021 from Mr Nunn to the HMRC officer dealing with the enquiry, Mr Nunn said (emphasis added):

> "I allowed the developer to start work <u>on my land</u> two months prior to contracts being formally entered into"

76. He also said (emphasis added):

> "<u>I had an agreement with the developer prior to going on my land</u> confirming that the sale terms already agreed would be binding, and we had an exchange of letters to document the position"

77. And further (emphasis added):

> "Both you and your predecessor agreed that at no time have I tried to avoid, or evade paying tax unlike the claimants in the precedent cases you quoted. I am guilty of <u>letting a developer start work on my land two months prior to a formal exchange of contracts</u> so he could build his foundations prior to inclement weather. I received no financial, or indeed any other form of reward, and I documented the position"

78. In each of the above extracts our impression is that the parties perceived the agreement as mitigating the risk to Mr Daly of expending resources on developing Mr Nunn's land. There does not seem to be any suggestion that the land actually changed hands at the time.

79. We have also considered the wording of the 2 June Letter itself and find that it gives no indication of an intention to immediately transfer land. It instead shows an intention to

provide Mr Daly with some possibility of recourse in the event that the land sale did not go through.

80. Indeed, the letter states (emphasis added):

> "...we have now discharged all conditions relating to the planning consent on your property. We really would like to commence work ahead of contracts being signed"

81. The letter also refers to itself as being a 'contract ahead of formal contracts being signed'. This is a clear indicator that the parties considered that a further step was necessary to carry out the transfer.

82. Overall, we consider that the evidence on this point is insufficient to establish that the parties intended the 2 June Letter to result in an immediate transfer of the land and, considering the totality of the evidence before us, we find that they did not.

83. In forming a view as to whether a constructive trust should be held to have come into existence, thereby sidestepping the usual formal requirements as set out in 2(1)) Law of Property (Miscellaneous Provisions) Act 1989, we must bear in mind the purpose of that provision. The *Matchmove* judgment explains that the section was enacted in order to implement reports of the Law Commission. The justifications cited by the Law Commission for requiring such formalities to be complied with included the need for certainty, consumer protection, what the Commission described as the "channelling" function of creating a standardised form of transaction, and the uniqueness of land.

84. In that context, the need for certainty and consumer protection means that it would normally be expected that the conventional formalities would be required in all but the most exceptional cases. Accordingly, we consider that a constructive trust would not normally be recognised in the absence of the clearest of evidence of the intentions of the parties.

85. The evidence in the present case falls well short of the level of clarity we would expect. This case is a fairly conventional case of a commercial sale between a developer and a householder. To permit the necessary formalities to be disregarded in such a case would lead to serious uncertainty and undermine the purpose of the statutory regime.

86. For these reasons, we do not consider that the 2 June Letter gave rise to a constructive trust.

Was there an appropriation to trading stock prior to 7 September 2016?

87. We were referred to the case of *Whyte v Commissioners for HMRC* [2021] UKFTT 270 (TC) ("*Whyte*") in which the Tribunal decided that the taxpayer had appropriated a number of building plots to trading stock prior to a sale to a (connected) third party.

88. If there was an appropriation to trading stock by Mr Nunn prior to the sale to Daly's then there would be a deemed disposal pursuant to s 161 TCGA. That section provides (so far as is relevant):

> "161 Appropriations to and from stock
>
> (1)... where an asset acquired by a person otherwise than as trading stock of a trade carried on by him is appropriated by him for the purposes of the trade as trading stock (whether on the commencement of the trade or otherwise) and, if he had then sold the asset for its market value, a chargeable gain or allowable loss would have accrued to him, he shall be treated as having thereby disposed of the asset by selling it for its then market value."

89. If such a deemed disposal occurred at a time when the land in question was land Mr Nunn had for his own occupation and enjoyment with his residence as its garden or grounds then PPR relief may well be available on that deemed disposal. Any further disposal of that land would normally be subject to tax as a trading transaction.

90. We directed that following the hearing the parties could provide any further written submissions on the question of appropriation. Both parties provided such submissions and we are grateful for their assistance.

Relevant authorities

91. Before turning to the submissions of the parties, we summarise the main authorities relevant to the point.

92. The word "trade" is not comprehensively defined in statute and so takes its ordinary meaning. However, section 989 Income Tax Act 2007 provides that it "includes any venture in the nature of trade" (and historic cases often use the rather swashbuckling formulation used in predecessor legislation: "an adventure in the nature of trade").

93. It is generally accepted that the result of expanding the definition to include (ad)ventures is that activities that, in ordinary language, may not be a full-blown trade can nevertheless be within the charge to tax on trade profits.

94. For example, the extended meaning is wide enough to bring within the charge on trade profits:

(1) an isolated transaction; see, for example, *CIR v Fraser* [1942] 24 TC 498, and

(2) a speculative adventure that yields an unexpected profit; see *Wisdom v Chamberlain* [1968] 45 TC 92.

Marson v Morton

95. The report of the Royal Commission on the Taxation of Profits and Income in 1955 identified six "badges" of trade. Since then, the concept has been refined and a useful summary of the badges of trade is contained in *Marson v Morton* (1986) 59 TC 381 Ch D.

96. HMRC provide a helpful list of the badges in their Business Income Manual at BIM20205:

Badge	**Description**
Profit-seeking motive	An intention to make a profit supports trading, but by itself is not conclusive
The number of transactions	Systematic and repeated transactions will support "trade".
The nature of the asset	Is the asset of such a type or amount that it can only be turned to advantage by a sale? Or did it yield an income or give "pride of possession", for example, a picture for personal enjoyment?
Existence of similar trading transactions or interests	Transactions that are similar to those of an existing trade may themselves be trading.
Changes to the asset	Was the asset repaired, modified or improved to make it more easily saleable or saleable at a greater profit?

The way the sale was carried out	Was the asset sold in a way that was typical of trading organisations? Alternatively, did it have to be sold to raise cash for an emergency?
The source of finance	Was money borrowed to buy the asset? Could the funds only be repaid by selling the asset?
Interval of time between purchase and sale	Assets that are the subject of trade will normally, but not always, be sold quickly. Therefore, an intention to resell an asset shortly after purchase will support trading. However, an asset, which is to be held indefinitely, is much less likely to be a subject of trade.
Method of acquisition	An asset that is acquired by inheritance, or as a gift, is less likely to be the subject of trade.

97. In *Whyte* at [458] the Tribunal noted that the more modern approach when considering whether a trade exists is not to place emphasis on the badges of trade and to instead consider the relationship between the individual features and the overall transaction. This is not perhaps so modern an approach. Indeed, in *Marson v Morton*, Sir Nicolas Browne-Wilkinson V.C. noted, after listing the badges, that (at p392):

> "I emphasise again that the matters I have mentioned are not a comprehensive list and no single item is in any way decisive. I believe that in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question - and for this purpose it is no bad thing to go back to the words of the statute - was this an adventure in the nature of trade? In some cases perhaps more homely language might be appropriate by asking the question, was the taxpayer investing the money or was he doing a deal?"

98. The case of *Marson v Morton* itself concerned taxpayers who had never previously bought land but acquired some land with planning permission on the advice of a property developer/estate agent, with the intention of holding it as a medium to long-term investment. Three months later they sold the land at a large profit to a company in which the property developer/estate agent had an interest. The taxpayers had taken no steps in the interim to sell the land. The High Court upheld the decision of the General Commissioners that the disposal was capital in nature – being in the "no-man's land" where different minds could have come to different conclusions on whether there was an adventure in the nature of trade. It was held that the General Commissioners had not misdirected themselves in law given that the case was one of possible investment.

Taylor v Good

99. The case which provides the most direct authoritative guidance on the question to be answered in the present case is *Taylor v Good (Inspector of Taxes)* [1974] STC 148

100. *Taylor* concerned the purchase by a grocer of a house with 9.5 acres of grounds. The grocer lived in a small council flat over one of his shops. The house was being sold by auction and was in a bad state of repair, but he knew the property as both of his parents had

been in service there, and he had worked there occasionally in the school holidays. The taxpayer put in a bid without expecting it to be successful, but to his surprise it was.

101. At the time he bought the house, he did not know what to do with it. He thought about living there, but having inspected the house with his wife, she rejected living there as impractical.

102. He applied for planning permission to demolish the house and build 90 homes on the land. This was eventually granted after a public enquiry. The taxpayer never offered the property for sale, but various unsolicited offers were made to buy the property following the grant of planning permission.

103. The proceeds of the ultimate sale were assessed to income tax, the taxpayer appealed, and the Special Commissioners dismissed the appeal. The matter was appealed to the High Court and then to the Court of Appeal.

104. On initial appeal to the High Court ([1973] STC 383), Megarry J held (at p392):

> "Even if the house was purchased with no thought of trading, I do not see why an intention to trade could not be formed later. What is bought or otherwise acquired (for example, under a will) with no thought of trading cannot thereby acquire an immunity so that however filled with the desire and intention of trading the owner may later become, it can never be said that any transaction by him with the property constitutes trading. For the taxpayer, a non-trading inception may be a valuable asset: but it is no palladium.
>
> The proposition that an initial intention not to trade may be displaced by a subsequent intention, in the course of the ownership of the property in question, is, I think, sufficiently established by *Mitchell Brothers v Tomlinson (Inspector of Taxes)* [(1957) 37 Tax Cas 224]"

105. We note that "palladium" means "something that affords effectual protection or security".

106. Megarry J's comment is often referred to as providing for the concept of a "Supervening Trade" - where the intention of the taxpayer to enter into a trading transaction is sufficient to displace an earlier non-trading intention.

107. In the High Court, Megarry J decided that the Special Commissioners had been entitled to find that a trade existed (at 394):

> "However much the transaction initially lacked the characteristics of trade, once the series of transactions relating to the obtaining of planning permission had begun, there came into existence material on which it was possible for the Special Commissioners to reach the conclusion that thereafter the transaction as a whole fell within the statutory definition of 'trade'. Once the slate had been wiped clean of whatever initial residential aspirations the taxpayer had, there was little to displace, and the new intention certainly had some of the characteristics of trading. Action was being taken and money was being spent with a view to enhancing the value of the property for the purpose of selling it."

108. Megarry J's finding that the actions to obtain planning permission could give rise to a finding of a supervening trade was comprehensively rejected by the Court of Appeal ([1974] STC 148).

109. Russell LJ, giving the leading judgment for the Court of Appeal, held (at p154), after summarising a number of historic authorities:

> "All these cases, it seems to me, point strongly against the theory of law that a man who owns or buys without present intention to sell land is engaged in trade if he subsequently, not being himself a developer, merely takes steps to enhance the value of the property in the eyes of a developer who might wish to buy for development."

110. This gives rise to a starting position that a non-developer landowner is unlikely to have engaged in a trade if they take steps to make their land more attractive to a developer.

111. The position is then slightly softened, first by an acknowledgement that absorption into an existing trade might permit a finding of trading (at p155):

> "But where, as here, there is no question at all of absorption into a trade of dealing in land of lands previously acquired with no thought of dealing, in my judgment there is no ground at all for holding that activities such as those in the present case, designed only to enhance the value of the land in the market, are to be taken as pointing to, still less as establishing, an adventure in the nature of trade. Were the commissioners, on a remission to them, to decide otherwise, it seems to me they would be wrong in law."

112. Russell LJ goes on to accept that the question can be seen as a matter of degree (p155):

> "For the Crown it was further argued that all these cases were matters of degree, and therefore even if the purchase in this case be equated, for example, to an inheritance by the taxpayer, it should be left to the commissioners to determine whether subsequent events amounted to an adventure in the nature of trade. Hereunder reference was made to passages in the Pilkington case, both at first instance and in this court, as suggesting or showing that even in such a case the activities of the landowner on or in connection with the land and its improvement and enhancement in value might of themselves be of such a quality or degree as could properly be regarded as constituting a relevant adventure. Let me assume this to be so. Nevertheless, I cannot think that the activities of the taxpayer in this case subsequent to the purchase, which I have already summarised, could be so regarded by any reasonable body of commissioners versed in the relevant law"

113. Therefore, it appears that the Court of Appeal consider that steps to make 'mere enhancements' such as the seeking of planning permission will not be sufficient to permit a finding of a supervening trade. However, the Court considers that absorption of the land into a preexisting trade could permit such a finding, as could activities of a sufficient degree to constitute an adventure in the nature of trade. We might also borrow the question from Marson and Morton and ask whether the activities of the landowner moved from investing to 'doing a deal'?

Whyte

114. In the case of *Whyte*, the basis for a finding that there had been an adventure in the nature of trade can be summarised as follows.

115. Firstly, there was a considerable extent of developer-like activity (paragraph [487] - emphasis added):

> "487. If Mrs Whyte had merely obtained planning consent for the enabling development, and then sold bare plots, as was the case in Taylor, I would have found that there was no subsequent appropriation of the area of the Plots from capital to stock-in-trade. Given the comments of Russell LJ in his judgment in Taylor that even laying out roads and sewers on land acquired as a capital asset may not give rise to a trade, I would have given Mrs Whyte

> the benefit of the doubt if the work done whilst the Plots were in her ownership was merely obtaining planning consent (and, possibly, building the access road, and bringing utilities to the Plots). However, the evidence is that Mrs Whyte went beyond this, and she had commenced developing the Plots herself, not just by clearing the site of trees and vegetation, draining and filling-in the pond, installing utilities, and constructing the access road, but also by starting construction work on the houses on the Plots, by digging foundations, and in the case of some of the plots, preparing the floor slab for concrete pouring, and laying bricks."

116. Secondly, the taxpayer had historic involvement in the construction trade, and had undertaken development work jointly with her husband (paragraph [488]).

117. Thirdly, the estate in question was acquired with the intention of selling individual plots to fund a larger restoration project (paragraph [489]).

118. It is informative to repeat the overall conclusions of the Tribunal on the trading point. Firstly, on the level of activity (at [490] - emphasis added):

> "490. I find that the construction works in respect of the houses on the Plots went beyond the mere sale of land as a capital asset. These were not the activities of an ordinary landowner who sells parts of an estate which he acquired by purchase. I find that Mrs Whyte was not merely taking steps to enhance the value of the property in the eyes of a developer who might wish to buy it for development. To the contrary, I find that she had actually commenced developing it herself."

119. Secondly, on the point in time that the appropriation took place (at [491]):

> "491. I find that the intention to identify and sell building plots as part of an enabling development existed from the time Mrs Whyte acquired the Estate. I therefore find that as soon as the boundaries of the Plots were identified, the Plots were appropriated from capital to trading stock – namely when the plan showing the six Plots was submitted to RBC on 8 May 2003. I find that from 8 May 2003, Mrs Whyte was engaged in an adventure in the nature of a trade – she was actively engaged in constructing houses with a view to selling the Plots with the benefit of the partially constructed houses upon them. In reaching this finding, I adopt the reasoning in Leach, that Mrs Whyte's activities in relation to Plots 4, 5, and 6 (particularly Plot 4, where the reinforcement mesh for the floor slab was in place at the time of sale, and Plot 6, where the floor slab had been poured and bricks had been laid), informs her earlier trade activities in relation to the other Plots."

Submissions of the parties

120. The *Whyte* decision was included in the bundle of authorities for the hearing. However, the parties had not referred to the question of appropriation to trading stock in their respective skeleton arguments. We therefore directed that the parties could provide any written submissions on the point following the hearing. We are grateful for the time taken by both parties to address the issue.

121. Mr Gargan, for HMRC, submitted that the present case can be distinguished from Whyte as:

(1) There was evidence that an enabling development of part of the estate was being considered before Mrs Whyte acquired the land.

(2) That at the time Mrs Whyte agreed to purchase the estate, she did so with the intention of transferring part of it to Mr Whyte for him to build more homes.

(3) Therefore, although the entire estate was acquired as a capital asset, Mrs Whyte acquired the Estate with every intention of selling plots in order to fund restoration work to the Hall.

(4) Mrs Whyte had gone well beyond obtaining planning permission and selling bare plots, she had commenced developing the plots herself, not just by clearing the site of trees and vegetation, draining and filling in the pond, installing utilities, and constructing the access road, but also by starting construction work on the houses on the plots, by digging foundations, and in the case of some of the plots, preparing the floor slab for concrete pouring, and laying bricks.

(5) Mrs Whyte had a history of involvement in construction trades which the tribunal concluded were very similar to a housebuilding business.

(6) The circumstances of Whyte are significantly different from those which arose in this appeal. There is no evidence before the Tribunal that would support the conclusion that any of the badges of trade weigh in favour of there being an adventure in the nature of a trade carried out by Mr Nunn. Further, there is no evidence that Mr Nunn had any intention to identify and sell building plots from the time that he acquired his residence.

(7) The facts of this appeal align themselves far closer to those in *Taylor*, in as much as Mr Nunn is not a developer and the property was acquired with no thought of dealing. Mr Nunn did not commence any development himself before the sale. The purchaser did commence development before the sale, but only after entering into an agreement in order to provide some degree of protection should the sale subsequently fall through.

(8) Unlike Mrs Whyte, Mr Nunn did not start to develop the land himself before sale and he derived no financial or other benefit from the development which occurred before the sale was completed. Instead, the benefit from the development prior to sale accrued solely to the purchaser who carried out the development.

122. Mr Arenstein, for Mr Nunn, submitted that:

(1) HMRC contended that Mr Nunn sold the plot of land with a building under construction. It follows from this contention that the land was being developed when it was sold. This development was beyond obtaining planning permission or carrying out preparatory work. This suggests that the land now was being used as a trading asset, and from this it can be inferred that the land must have been appropriated to trading stock.

(2) One of the main reasons for the finding in *Whyte* that there had been an appropriation to trading stock was that the land to be sold had been fully identified in preparation for the sale. In Mr Nunn's case, the land to be sold had been fully identified by 2 June 2016. At some stage after 2 June 2016 but before 7 September 2016 – probably in July 2016 - a fence had been put up by Daly's to separate the land from the part retained by Mr Nunn.

(3) The appropriation will have taken place at one of three points in time:

(a) at the time at which Mr Nunn gave permission for the development to take place (i.e. 2 June 2016, when the contract was signed by Mr Nunn and Daly's).

(b) at the time when the land was separated from the remainder of the property by the erection of the fence by the builder.

(c) at the time when the building work was sufficiently advanced.

Conclusion on deemed disposal issue

123. The question of whether or not there exists an adventure in the nature of trade is a highly fact-sensitive one. It is necessary to evaluate all the circumstances and then take a step back and decide whether (in the words of *Marson v Morton*) was the taxpayer investing the money or was he doing a deal?

124. We therefore begin by summarising our relevant findings of fact, before applying the various tests to them:

(1) Daly's was an established and experienced property development company. Mr Nunn was a householder in possession of land. With Mr Nunn's agreement, Daly's had sought planning permission to build two houses on Mr Nunn's land.

(2) Mr Nunn and Daly's entered into an agreement (intended to be legally binding) under which Mr Nunn would retain ownership of the land and Daly's would carry out development pursuant to the planning permission.

(3) Mr Nunn and Daly's expected that Mr Nunn would subsequently sell the land to Daly's for the agreed price for the bare land.

(4) Mr Nunn expected to realise a significant gain as a result of selling his land.

(5) The development would enhance the value of Mr Nunn's land.

(6) Daly's did not expect to charge Mr Nunn for the work being carried out on his land. The agreed price did not include the value of the development.

(7) The land was sold to Daly's on 7 September 2016. By that time, foundations had been dug and poured, walls had been constructed for the ground floor, and scaffolding had been erected to enable bricks to be laid for the second storey.

125. The circumstances here are unusual as a result of the vague nature of the 2 June Letter. If the arrangement were clearly documented, with clear allocation of costs and profit share between the parties, then there would be little room to doubt that a property development trade had commenced.

126. However, the arrangement here is much less clear cut. For example:

(1) Mr Nunn has maintained throughout that he considered that the 2 June Letter disposed of the land, and as such Daly's were carrying out work on their own land. We have found that this was not the case and that the parties in fact perceived the agreement as mitigating the risk to Mr Daly of expending resources on developing Mr Nunn's land.

(2) The expectation of the parties was that the land would be sold to Daly's for the agreed value of the bare land. Therefore, any value added above that figure was expected to pass to Daly's.

(3) There was no provision in the agreement as to what would happen if matters did not proceed as expected. For example:

(a) If Daly's decided not to buy the land after all, would Mr Nunn be obliged to pay for the works carried out? Could Daly's be obliged to return the land to its undeveloped state?

(b) If Mr Nunn had received a better offer for the part-developed land, was he prevented from selling to a third party? Would he have been obliged to share the profits with Daly's?

127. Nonetheless, we have found that there was an arrangement under which Daly's would enter onto Mr Nunn's land in order to carry out development activities. As such, the history and expertise of Daly's will have some relevance to the trading question.

128. The badges of trade will not always provide a useful answer in of themselves, but we nonetheless start by considering their application:

(1) Profit-seeking motive: We consider that the reason why Mr Nunn permitted Daly's to enter upon his land and begin development was in order to unlock the value in his land and make money. We accept HMRC's point that the expectation of the parties was that Daly's would take the benefit of any value added to the land.

(2) The number of transactions: For Mr Nunn, this was a one-off transaction. For Daly's, the work carried out constituted a core part of its property development trade.

(3) The nature of the asset: The asset is land, which can clearly be the subject of both trading and capital transactions. We note that, from at least the point that the land was fenced off and building work began Mr Nunn no longer had any 'pride of possession' in the land. It was a building plot which was intended to be turned to advantage by sale.

(4) Existence of similar trading transactions or interests: Mr Nunn had no similar interests. Daly's carried on a property development trade.

(5) Changes to the asset: The intention of the 2 June Letter was to enable Daly's to begin building houses on the land. Construction was in fact reasonably far advanced when the land was sold to Daly's. By that time, foundations had been dug and poured, walls had been constructed for the ground floor and scaffolding had been erected to enable bricks to be laid for the second storey.

(6) The way the sale was carried out: The sale by Mr Nunn was of part-developed land to the developer who was already on site. Most of the sale terms were agreed prior to Daly's entering onto the land.

(7) The source of finance: The land had long belonged the Mr Nunn. The building materials and labour to carry out the pre-sale works were funded by Daly's from their own resources.

(8) Interval of time between purchase and sale: The original purchase of the land took place many years previously. However, as we are considering the question of whether there is a 'supervening trade', the key interval was the time between entering into an agreement with Daly's and the ultimate sale, which was around 3 months.

(9) Method of acquisition: The land was originally purchased many years previously. In the context of a supervening trade, the 'acquisition' would be the appropriation to trading stock itself. As such, this badge is somewhat circular in its application.

129. The badges of trade do not provide a clear view in themselves. This is perhaps not surprising as in this case there is no doubt that the original acquisition of the land was not as a part of a trade. The question here is whether Mr Nunn had subsequently embarked on an adventure in the nature of trade.

130. We consider that the most helpful tests for answering this question are:

(1) *Taylor*, where the mere obtaining of planning permission would not be sufficient to give rise to a trade, but that activities could be of a sufficient quality or degree to

meet the required standard. In particular, we note that the Court of Appeal made references to the absorption into the trade of a developer, indicating that the engagement of a professional developer would materially alter the analysis.

(2) *Whyte*, where Mrs Whyte was not merely taking steps to enhance the value of the property in the eyes of a developer who might wish to buy it for development but had actually commenced developing it herself. Mrs Whyte was actively engaged in constructing houses with a view to selling the plots with the benefit of the partially constructed houses upon them. In that case the floor slab had been poured and bricks had been laid on at least one of the plots at the time of sale.

131. We accept HMRC's submission that there are factual distinctions between the Whyte case and the present case (primarily related to the existence of an enabling development). However, we do not consider that such differences prevent us from coming to the conclusion that there was an appropriation to trading stock. We must consider matters in the round.

132. We reject HMRC's suggestion that Mr Nunn did not commence any development himself before the sale. Development did commence, as a result of an agreement made by Mr Nunn. Mr Nunn did not dig the foundations or lay the bricks himself, but we don't expect that Mrs Whyte did any of the physical labour either.

133. We fully accept that the position would have been clearer if the agreement had been documented more clearly, providing for what would have been done in the event that the sale fell through and for clear allocation of costs etc. However, we consider that, despite the lamentably vague nature of the 2 June Letter, is tolerably clear that the parties intended Dalys to have some right of recourse if the sale did not go through.

134. We also accept that there is scope for doubt in this case. Mr Nunn was content for Daly's to take all the increase in value that would have arisen as a result of the development activities. This is a factor that points away from the existence of a trade.

135. However, we reject HMRC's suggestion that this means Mr Nunn derived no benefit from the development. The majority of the profit from the initial stages of development would be from the underlying value of the land itself. Therefore, it would not be economically unreasonable for Mr Nunn to be content to forego the potential upside from the early stages of development in order to be sure of taking the larger amount of profit from the land. This diminishes the weight we give to this factor.

136. We find that there was a genuine speculative aspect to the agreement. Both sides were taking a risk by commencing development works. Daly's could not begin development works on Mr Nunn's land without his agreement. Once development commenced in earnest, the land could no longer be used as a part of Mr Nunn's garden and Mr Nunn would likely need to find a buyer if the sale to Daly's fell through. Mr Nunn was willing to take the risk of development works being begun in order to enable the reward of realising a profit on the sale of the land. That was the 'deal'.

137. Our overall view is that the activities undertaken pursuant to the deal were property development activities, being undertaken by (or through an agreement with) a professional property developer. On that basis, we consider that there was an adventure in the nature of trade.

138. We find that the appropriation to trading stock took place on 2 June 2016. This was the date upon which Mr Nunn entered into the agreement with Daly's. This agreement (whether or not legally enforceable) fundamentally altered Mr Nunn's relationship with his land. The result of that agreement was that the land was to be separated from his garden and new

houses built upon it. He held it for the purposes of allowing the development to commence and to sell it, most likely to Daly's.

139. As a result, a deemed disposal of the land for CGT purposes took place on 2 June 2016.

WAS THE LAND GARDEN OR GROUNDS?

140. We have found that the relevant disposal of the land took place on 2 June 2016. Accordingly, we only need determine whether or not the land was land Mr Nunn had for his own occupation and enjoyment with his residence as its garden or grounds on that date. However, in case we are wrong on the deemed disposal issue, we also make findings as to the position on 7 September 2016.

141. The words 'garden' and 'grounds' bear their ordinary everyday meaning.

142. We find that on 2 June 2016, the land in question was land Mr Nunn had for his own occupation and enjoyment with that residence as its garden or grounds. This is because on that date that land had not been separated off and was in essence part of Mr Nunn's back garden.

143. By 7 September, development works had been ongoing for some time. The land had been fenced off. Foundations had been dug, concrete poured and bricks laid. What was being built on the land were new houses, separate dwellings that did not serve to enhance Mr Nunn's enjoyment of his remaining property.

144. As such, we find that on 7 September the land was no longer 'garden or grounds'. We do not consider it necessary to make findings upon whether Mr Nunn continued to hold the land for his own occupation and enjoyment on that date.

145. The result of our finding that on 2 June 2016, the land in question was land Mr Nunn had for his own occupation and enjoyment with that residence as its garden or grounds is that Mr Nunn is entitled to PPR Relief on the deemed disposal that took place on that date.

WHAT IS THE CORRECT RATE OF CGT?

146. As we have decided that PPR applies, it is not necessary for us to decide the correct rate of CGT. If we are wrong on the availability of PPR, no further factual findings need to be made in order for the issue to be determined.

SHOULD THE PENALTY BE UPHELD?

147. As we have decided that HMRC were wrong to conclude that PPR was not available, we do not consider that HMRC have established Mr Nunn acted carelessly. The penalty assessment must therefore be set aside.

GUIDANCE ON PPR POSITION

148. We understand that cases such as this (where a developer wishes to commence development activities on land that has hitherto formed a part of the garden or grounds of a private residence prior to the completion of a sale of the relevant land) are relatively common, but do not often reach the Tribunal.

149. We therefore consider that it may be of assistance to offer some guidance (noting that our decision is not binding on any other Tribunal), in order to enable to taxpayers to make clear decisions as to how to proceed.

150. Steps taken by a developer in accordance with an agreement with a landowner will often (but not always) render the relevant land no longer a part of the garden or grounds.

151. It will often be clear that the developer is acting in the course of a property-development trade.

152. Therefore, if there is a clear agreement that the landowner and developer are jointly undertaking development, an appropriation is likely to have taken place by the time shovels are in the ground. This would be expected to enable PPR Relief to apply at the time of appropriation.

153. If the agreement between the developer and landowner is clearly documented, there is less room for doubt about the tax outcome.

154. In analysing such arrangements, the key matters to establish are

(1) the timings of key events: the making of agreements, the commencement of development works and any ultimate disposal, and

(2) the nature of any agreement entered into between developer and landowner, and any works undertaken as a result.

155. In our view, there are 3 situations that are likely to occur:

(1) The land may retain its character as part of the garden or grounds up until the point of sale. Perhaps being simply demarcated to enable identification of the parcel of land to be sold. In this scenario, PPR would be likely to be available on the sale.

(2) Development of the land may have begun in earnest some time prior to sale. The landowner may well have entered into an arrangement with a professional developer under which development activities are carried out and profits shared. In such circumstances an appropriation to trading stock at the time development commenced may well be the natural conclusion to draw. In this scenario, there is a reasonable likelihood that at the time of final disposal the landowner no longer holds the land as a part of their garden or grounds, but that the land was garden or grounds at the time development commenced. This would mean that (assuming all other requirements are met) PPR Relief would be available at the time of appropriation to trading stock.

(3) A situation falling between 1 and 2 above may be possible. This would be where the land has been clearly dealt with in a way that is contrary to it retaining its character as garden or grounds, but where the extent of development activity, or the intentions of the landowner at the time of such dealing, fall short of giving rise to an appropriation to trading stock. A sale or appropriation subsequent to such dealing would be unlikely to qualify for PPR Relief.

156. In the present case, we consider that the facts fit scenario 2 above.

CONCLUSION

157. We have held that:

(1) The 2 June 2016 Letter was not a contract for disposal of the land,

(2) Nonetheless, there was an appropriation to trading stock on that date,

(3) On 2 June 2016, the land was land Mr Nunn had for his own occupation and enjoyment with his residence as its garden or grounds,

(4) PPR relief is therefore available on the appropriation to trading stock on that date.

158. It is common ground that the original return filed on behalf of Mr Nunn was inaccurate as it shows a loss arising from the disposal. That error therefore needs to be corrected and the correct final figures agreed.

159. We therefore allow the appeal to the extent set out above. We leave it to the parties to agree the final figures for tax due. We give leave for either party to apply to the Tribunal if agreement cannot be reached.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

160. 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.

MALCOLM FROST
TRIBUNAL JUDGE

Release date: 27th MARCH 2024