



TC01871

Appeal number TC/2010/1482

S162 TCGA 1992 – availability of incorporation relief on the incorporation of a lettings business – whether or not there was sufficient activity to constitute a "business" – Appeal Dismissed

**FIRST-TIER TRIBUNAL
TAX**

ELIZABETH MOYNE RAMSAY

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS ("HMRC")**

Respondents

**TRIBUNAL: IAN WILLIAM HUDDLESTON, TRIBUNAL JUDGE
TONY HENNESSEY FCA (MEMBER)**

**The Appellant was represented by her son, Mr. Richard Ramsay
The Respondents were represented by Mr. P. O'Reilly, Officer for HMRC**

Sitting in public in Belfast on 25 July 2011

DECISION

The Appeal

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1. The appeal in this case raises a question of whether relief under Section 162 Taxation of Chargeable Gains Act 1992 ("TCGA") arises on the transfer of a property letting business previously conducted by the Appellant and her husband to a company set up by she and her husband for that purpose.

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2. In particular, the essential question is whether the activities of the Appellant, as a landlord, are sufficient to distinguish the property letting business carried out by her from a normal Schedule A taxable concern.

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3. Section 15 and Schedule A of the Income and Corporation Taxes Act ("ICTA") 1988 defines income assessable under Schedule A where (broadly) it relates to the letting of property as distinct to income from a trade or business which otherwise would be assessable under Schedule D.

Summary of Facts

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4. The property in question, Moat House, Moatlands, Old Holywood Road, Belfast ("the Property") consists of a sizeable Victorian Property which has subsequently been converted into ten flats of which five at the operative time were occupied by tenants.

5. In 1987 the Appellant, Mrs. Ramsay, inherited a one third share in Moat House from her father which she continued to hold in conjunction with two of her brothers.

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6. In 2002 Mrs. Ramsay took over the administration of the Property from the then instructed letting agents.

7. On the 4 February 2003 Mrs. Ramsay gifted 50% of her then one third share to her husband.

8. On the 27 February 2004 Mr. & Mrs. Ramsay purchased the remaining two thirds in Moat House from Mrs. Ramsay's brothers with the assistance of a bank loan.

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9. On the 16 September 2004 both Mr. & Mrs. Ramsay transferred Moat House, subject to a then existing bank loan, into a corporate vehicle, TPQ Developments Limited ("the Company") in exchange for shares in that Company.

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10. On the 1 August 2005 both Mr. & Mrs. Ramsay then gifted their entire shareholding to their son Richard Ramsay who at the date of the Appeal was the sole director and shareholder of the Company.

11. The Appellant submitted her tax return for the year 2004 / 2005 (ie. the year in which the transfer to the Company was effected) on the 26 January 2006 and

incorporated in that return was a claim under Section 162 TCGA in relation to the transfer to the Company.

12. HMRC raised an enquiry notice on the 9 September 2007.

5 13. There then followed considerable discussion and dialogue between HMRC, two sets of accountants and Mr. Ramsay, who in that chain of correspondence and before the Tribunal represented his mother's interest. It is trite to say that HMRC and the Appellant / Mr. Ramsay took diverging views on how the factual circumstances outlined above applied to the law and to the availability of incorporation relief under S162 in particular.

10 14. HMRC concluded its investigations on the 29 October 2009 by issuing a closure notice pursuant to the provisions of Section 28A of the Taxes Management Act 1970 on the grounds that the relief under Section 162 TCGA did not apply.

15. It is that closure notice and the assessment which, upon review, was upheld, that is the subject of this Appeal.

15 **The Appellant's Argument**

16. The Appellant, throughout the correspondence leading up to the closure notice, and in front of this Tribunal, contends that the actions carried out by her in connection to the letting and administration of the Moat House constitute more than passive receipt of rents such as would fall to be assessable under Section 15 / Schedule A
20 ICTA 1988, and that the activities (all of which are detailed below) constitute a business which formed the substance of the transfer to the Company, thus qualifying for incorporation relief in accordance with Section 162 TCGA 1992.

17. The activities which are directly in point were elicited through the chain of correspondence passing between the Appellant and HMRC and also formed the focus
25 of a site visit carried out by an officer of HMRC in the company of Mr. Ramsay.

18. If I could summarise that chain of correspondence and the assertions made on behalf of the Appellant, they are as follows:

30 (1) that upon taking over the administration of the Property in 2002 Mr. & Mrs. Ramsay arranged to meet each of the then five tenants to explain that the rent must be paid on time and to the accountant (who then was responsible for dividing the income between she and (at that point) the other co-owners);

(2) that they took responsibility for the checking and payment of quarterly electricity bills for the communal areas;

35 (3) that upon acquisition of the Property outright they took responsibility for cancelling previous insurance policies and arranging a new policy in Mr. & Mrs. Ramsey's sole names;

(4) that the Appellant attended the Property to unblock the drains (five in number);

- 5 (5) that the Appellant / the Appellant's son oiled and re-attached steel wires on some of the garage doors belonging to the flats, and cleared the debris from previous tenants which had accumulated in other garages;
- (6) that they took responsibility for returning post for previous tenants to the various senders;
- (7) that they confirmed with Belfast City Council compliance with fire regulations and installed / replaced fire extinguishers where applicable;
- (8) that a post and wire fence and hedging was erected at the rear of the Property to segregate it from adjacent land;
- 10 (9) that a flower bed was created in front of the hedge;
- (10) that the shrubs around the property were pruned and leaves swept up and discarded in the local refuse tip;
- (11) that the back garden and car park were weeded on a regular basis;
- (12) that the flagstones to the rear of the building were bleached to ensure the removal of algae;
- 15 (13) that the communal areas were vacuumed and dusted on a regular basis and the mahogany staircase polished;
- (14) that Mr. & Mrs. Ramsay frequently, when passing the property, checked the security of the windows and doors at the rear of the building;
- 20 (15) that on an occasion the Appellant found rubbish dumped in the car park of the building which she took the Council tip;
- (16) that vacated flats were cleaned and cleared of furniture abandoned by previous tenants in preparation for new tenants;
- 25 (17) that additional assistance was provided in particular to one elderly tenant, including dealing with telephone calls from the tenant regarding alleged faulty electricity supply, replacement of a broken window and even liaising with social services in relation to her care package.

19. Overall, the evidence put to the Tribunal was that the Appellant had assessed that she and her husband spent approximately 20 hours per week carrying out the various activities. It was accepted by HMRC that neither Mr. nor Mrs. Ramsay had any other occupation during the relevant period, and that the running of Moat House was, in effect, their sole business activity.

20. Prior to purchasing her brothers' interest in the Property, Mr. & Mrs. Ramsay instructed a surveyor to conduct a survey of the Property and took the advice of a local estate agent.

21. Mr. & Mrs. Ramsay then embarked upon a process of redevelopment and refurbishment by instructing Wayne Storey Associates, a firm of surveyors, to prepare an appropriate plan for refurbishment and to obtain the appropriate listed building consent and planning permission for an extension / redevelopment of the Property. As part of that endeavour Mr. & Mrs. Ramsay also secured the funding they required

from the Ulster Bank both to purchase the remaining two thirds shares, but also to carry out the proposed refurbishment.

22. At all times both Mr. & Mrs. Ramsay returned the income on their returns as Schedule A income subject to the appropriate deductions.

5 23. The Appellant did not appear in person, but the Tribunal had the benefit of the considerable correspondence passing between both the Appellant and HMRC and the Appellant's son and HMRC – in particular the Appellant's letters of the 11 September, 28 November 2007, and 11 December 2009 and Mr. Richard Ramsay's letters of the 17 December 2007, 14 September 2008, 30 April, 24 June, 15 October and 17
10 November 2009 with HMRC's responses in each case.

24. The Tribunal also had the benefit of the appeal notice which was prepared by the Appellant's instructed agents, Messrs. Powrie Appleby LLP, together with correspondence from Messrs. M.B. McGrady & Co., Accountants, and correspondence passing between Messrs. Fitch & Co., Accountants, and HMRC.

15 **HMRC's Case**

25. HMRC, throughout the correspondence referred to above, and before this Tribunal, contend that Section 162 TCGA 1992 requires that, for incorporation relief to apply, a person, transferring to a company, must transfer:

- (1) a business as a going concern;
- 20 (2) the whole of the assets of the business; and
- (3) that the business is exchanged wholly or partly in exchange for shares issued by the Company to the person transferring the business.

26. It is accepted by HMRC, and indeed by the Appellant and Mr. Richard Ramsay, that there is no statutory definition of the word "business".

25 27. HMRC, therefore, contend that the word must take its every day meaning (a contention to which, again, I do not think that Mr. Ramsay objected).

28. HMRC's view, however, is that all of the activities and explanations provided throughout the period lead them to conclude that when the Property was transferred to the Company it was an investment property, the principal purpose for which the receipt of rental income and therefore was not a business to which the provisions of
30 Section 162 TCGA would apply.

29. In short, HMRC take the view that the activities cited are, in the main, those which any owner of an investment property would undertake and, in addition assert that some of the tasks are of a one off nature and do not represent regular ongoing
35 activity.

30. As regards the potential redevelopment / refurbishment proposals, HMRC contend that the principal motivation was to improve rental returns and to enhance the value of the investment, rather than to pursue an active business.

5 31. In short, they contend that the onus of proof is for the Appellant to produce evidence to establish an active business was being undertaken and that she has failed in that endeavour and that, accordingly, the denial of relief under Section 162 TCGA should stand and that the closure notices are, in effect, valid.

The Law

10 32. The legislation covering this issue is, obviously, Section 162 TCGA 1992, which provides as follows:

"Roll-over Relief on Transfer of Business

15 (1) *This Section shall apply for the purposes of this Act where a person who is not a company transfers to a company a business as a going concern, together with the whole assets of the business, or together with the whole of those assets other than cash, and the business is so transferred wholly or partly in exchange for shares issued by the company to the person transferring the business."*

33. Section 15 ICTA 1998 read in conjunction with Schedule A provides as follows:

20 (1) *"Tax is charged under this Schedule on the annual profits arising from a business carried on for the exploitation, as a source of rent or other receipts, of any estate, interest or rights in or over land in the United Kingdom.*

(2) *To the extent that any transaction is entered into for the exploitation, as a source of rents or other receipts of any estate, interest or rights in or over land in the United Kingdom, it is taken to be entered into the course of such a business."*

25 34. The issues which are the subject of this Appeal have been considered in a number of cases to which the Tribunal were referred, namely:

- (1) *American Leaf Blending Co. Sdn Bhd v Director General of Inland Revenue (1978) 3 All ER 1185;*
- (2) *Irshad Mahmood Rashid v M. Garcia SpC 348;*
- 30 (3) *Salisbury House Estates Limited v Fry 15TC266;*
- (4) *Croft v Sywell Aerodrome 24TC126;*
- (5) *Webb v Conelee Properties Limited 56TC149;*
- (6) *Griffiths v Jackson & Griffiths v Pearman 56TC585;*
- (7) *Town Investments Limited v Department of the Environment AC359;*
- 35 (8) *CIR v The Korean Syndicate Limited 12TC181;*
- (9) *Land Management Limited v S P Fox SpC306;*
- (10) *Executors of Moore (Deceased) v IRC 1995 SpC2.*

35. The case which was most cited in the correspondence passing between the parties was *American Leaf Blending Co. Sdn Bhd vs Director General of Inland Revenue* (cited above) and in particular the judgement of the Privy Council as delivered by Lord Diplock.

5 36. At paragraph 21 Lord Diplock states as follows:

10 *"In the case of a private individual it may well be that the mere receipt of rents from property that he owns raises no presumption that he is carrying on a business. In contrast, in their Lordship's view, in the case of a company incorporated for the purpose of making profits for its shareholders, any gainful use to which it puts any of its assets prima facie amounts to the carrying on of a business."*

37. Paragraph 22 carries on:

15 *"The carrying on of a "business", no doubt, usually calls for some activity on the part of whoever carries it on though, depending on the nature of the business, the activity may be intermittent with long intervals of quiescence in between. In the instant case, however, there was evidence before the Special Commissioners of activity in and about the letting of its premises by the Company during each of the five years that had elapsed since it closed down its former tobacco business."*

20 38. The case of *Rashid v Garcia*, a Special Commissioners case, had factual circumstances not dissimilar to the present appeal, insofar as the Appellant, either directly or through his family, spent some sixteen to twenty four hours per week in relation to the letting of four properties, let to both residential and commercial tenants.

25 39. What slightly distinguishes the case is that it was a national insurance case where the Appellant was in fact trying to argue that he was involved in a business for the purposes of certain social security benefits.

30 40. In that case, the Special Commissioner, Dr. John Avery Jones, was of the view that whether a property rental was an investment or a business, was a matter of degree and, in that case, having considered all the evidence, he was of the view that there was insufficient activity for the property letting conducted by the Appellant in that case to constitute a business. Rather, he felt it was an investment which, by its nature, required some activity to maintain it and, on that ground, dismissed the appeal.

35 41. That trend was adopted in *Salisbury House, Sywell Aerodrome Limited, Conelee Properties Limited, Griffiths v Jackson and Griffiths v Pearman* (where the subject business involved the letting of furnished rooms and provision of services) and the case of *Martin & Another v IRC* – a case involving the availability of business property relief under Section 105 Inheritance Tax Act 1984, again in circumstances where the deceased had been letting occupied premises which the executors argued constituted a business – and failed.

40 42. In short, the weight of the case law to which the Tribunal was addressed is against the Appellant insofar as it, firstly, very firmly establishes that where an

individual asserts that a business arises, there is a presumption that unless proof of sufficient activity is established, that it is not a business. That onus of proof rests on the Appellant.

5 43. Secondly, that the activities which are required are those which are over and above the ones which one might be required or expected as incidental to the ordinary maintenance, repair and development of an investment property.

Decision

44. In the present case, I think it is helpful if one looks at what was actually being transferred to the Company.

10 45. In essence what was being transferred was a large former residence which had been converted into ten flats and, from the evidence before us, was ripe for redevelopment / refurbishment.

15 46. At the point of transfer, the Tribunal takes the view that business property relief would not have been available to the Appellant applying Section 105 of the Inheritance Tax Act 1984 and the principles enshrined in *Moore* (cited above).

20 47. The Tribunal finds that the activities which have been cited by the Appellant are those which are normal and incidental to the owning of an investment property. They are not of a unique nature and applying the principles set out in the *Rashid v Garcia* are those which arise by necessity when one owns a property, such as this, which is let out in flats.

48. In terms of historic treatment, it is informative to note that Mrs. Ramsay and then Mr. and Mrs. Ramsay both returned all of the income as Schedule A income (with appropriate deductions for expenses where they arose).

25 49. At no time was a suggestion made that they were carrying on a Schedule D trade or business.

50. HMRC, during its course of correspondence, suggested some of the additional factors which may be required to justify concluding that a business existed.

30 51. This Tribunal does not need to comment on that view, but would express reservations that the items quoted in HMRC's letter, of themselves, would have been sufficient to convert the factual circumstances outlined in this scenario into a business.

35 52. In relation to the Appellant's assertion that the actual number of flats and therefore scale was instrumental in converting the activities into a business, the Tribunal does not agree. The reality was that the Moat House was a single investment property – albeit comprised of ten apartments – and the Tribunal finds that the scale of activities simply were commensurate with that size of property and the number of occupied apartments.

53. The scale of the building, of itself, this Tribunal concludes, does not convert the ownership of a property into a business.

54. In relation to the proposals for refurbishment and/or redevelopment of the Property this Tribunal finds that in the main these were carried on by the Company after incorporation. Admittedly they were commenced by Mr. & Mrs. Ramsay at an earlier stage, but we find that they were undertaken to maintain or enhance an existing investment property and to thereby enhance the available returns by increased rents and have less vacancies than previously.

55. Having so found, and despite Mr. Ramsay's eloquent presentation of the Appellant's case, it logically follows that the appeal is dismissed.

56. No order as to costs.

57. 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.

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IAN WILLIAM HUDDLESTON

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TRIBUNAL JUDGE

RELEASE DATE: 25 January 2012

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