[2016] UKFTT 0127 (TC)

TC04915

Appeal number: TC/2015/03863

TYPE OF TAX – Capital Gains Tax – Private Residence Relief – Whether short period of occupation sufficient to claim Private Residence Relief – Held not – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MITESH KOTHARI **Appellant**

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT
JANE SHILLAKER

Sitting in public at The Royal Courts of Justice, London on 1 February 2016

Mark Allen, of Zenith Tax Solutions Ltd, appeared for the Appellant

John Corbett, Officer of HMRC, appeared for the Respondents.

DECISION

Background

1. The Appellant was not present at the hearing but had given a letter of authority to Mr Allen to represent him.

2. This was an appeal against HMRC's refusal to grant private residence relief in respect of the disposal of a property at 3 Park Lane Place, London. This disposal generated a gross capital gain of £1,384,657.89 in the tax year 2009-10, against which the Appellant had claimed an amount of £1,174,031.70 for private residence relief and lettings relief under ss 222 and 223 TCGA 1992.

3. It was accepted by HMRC that the property had been occupied by the Appellant between 19 January 2009 and its disposal on 31 July 2009. The question before the tribunal therefore was whether that occupation had the necessary degree of permanence and expectation of continuity for the property to qualify as the Appellant's principal private residence.

Evidence

4. Mr Allen explained that the Appellant had acquired the property on 4 October 2005 and had let it out on a series of short-term lets until 18 January 2007 at which time he had let it on a two year lease to the managing partner of Hamptons International. Mr Allen said that immediately following the termination of this lease, on 19 January 2009, the Appellant had moved into the property, from his property at Meadowgate Close, Mill Hill, with the intention of making it a permanent home for himself and his family. He had moreover made an election that this property should be treated as his principal private residence on 29 January 2009, when he submitted his tax return for 2007-08.

5. Mr Allen said that shortly after the Appellant had moved in, in February 2009, he had been approached by an estate agent who had suggested that it would be possible to obtain a very good price for the property at that time and the Appellant therefore instructed the agent to put the property on the market immediately. There was no written or other evidence as to precisely when the agent had put this proposal to the Appellant or when the agent had been instructed. An offer was received on 5 March 2009 and the property was eventually sold in July.

6. In support of his arguments that the property had become the Appellant's permanent home Mr Allen referred the tribunal to an electricity bill for the property dated 19 May 2009, addressed to the Appellant at Park Lane Place, a TV Licence dated 1 May 2009, addressed to the Appellant's wife at Park Lane Place, and a Council Tax bill for the property, which was addressed to the Appellant, but at his address in Mill Hill. No satisfactory explanation was given as to why the Council Tax bill was addressed to the Mill Hill address.

7. Mr Allen also gave us a copy of a statement from Christopher Hewitt, who he said had been the mortgage broker who had arranged the mortgage on the property. This was slightly confusing in that Mr Hewitt had stated that he had arranged a residential mortgage for the property when it had been purchased, in 2005, and had understood that it was the Appellant's intention to reside there permanently at that time, but in fact it had been let out almost immediately from the date of purchase, and had been remortgaged, some time later, on a buy to let mortgage. Unfortunately, because neither the Appellant nor Mr Hewitt were present at the hearing we were unable to clarify this apparent contradiction.

8. Mr Allen said that it had been intended that the Mill Hill property would be let out once the Appellant had moved to Park Lane Place, but there was no evidence of this and in fact it had been occupied by members of the Appellant's family throughout the period in question.

9. For HMRC, Mr Corbett stated that HMRC did not believe that the Appellant's occupation of the property had the necessary degree of permanence to be his Principal Private Residence. In support of this contention he made the following points:

10. There was a very short period of occupancy by the Appellant before the flat was put on the market.

11. The Appellant had argued that one of his reasons for wanting to move to Mayfair was to be near his offices. However, Mr Corbett said that the offices in question were rented and that they had not been rented until 29 January 2009, ie two weeks after he had moved into Park Lane Place.

12. The Appellant was moving from a four bedroom house in Mill Hill to a two bedroom flat, even though he had a wife and three young children. It was noted that the flat had a floor area of approximately 1,300 sq ft.

13. According to the notes of a telephone conference with HMRC on 19 September 2013 the Appellant had said in relation to his house at Meadowgate Close that he had retained it temporarily because he was waiting to find out whether the family enjoyed living in Mayfair, implying that he had not in fact made a final decision to live at Park Lane Place at that time.

14. The Appellant's income tax return for 2009-10 indicated that the Appellant had rental losses of £210,312 and therefore Mr Corbett suggested that the Appellant could not afford to live at Park Lane Place, because this would mean giving up £96,000 rental income per annum, on top of the already substantial rental losses.

15. The Appellant had not moved his furniture from Mill Hill to Mayfair, other than children's cots, but had instead simply bought the previous tenant's furniture.

16. No change had been made to the eldest child's schooling arrangements, although it was accepted that the move had taken place part way through the school year and the Appellant had said that he did not want to disturb her schooling at that time.

17. There was no other evidence to show an intention to change residence from Mill Hill such as informing the Appellant's bank, or the DVLA.

Legal Framework

18. The relevant legislation, as at the time of disposal, is set out in sections 222 and 223 TCGA 1992 as follows:

"**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 …

223 Amount of relief

(1) No part of a gain to which s 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 36 months of that period.

(2) Where subsection (1) above does not apply, a fraction of the gain shall not be a chargeable gain, and that fraction shall be –

(a) The length of the part or parts of the period of ownership during which the dwelling house or the part of the dwelling house was the individual's only or main residence, but inclusive of the last 36 months of the period of ownership in any event, divided by

(b) The length of the period of ownership.

(3) …

(4) Where a gain to which section 222 applies accrues to any individual and the dwelling house in question or any part of it has at any time in his period of ownership been wholly or partly let by him as residential accommodation, the part of the gain, if any, which (apart from this subsection) would be a chargeable gain by reason of the letting, shall be such a gain only to the extent, if any, to which it exceeds whichever is the lesser of –

(a) The part of the gain which is not a chargeable gain by virtue of the provisions of subsections (1) to (3) above, and

(b) £40,000"

19. As regards the meaning of residence for these purposes Mr Corbett referred us to the case of *Goodwin v Curtis [1998] BTC 176*, a decision of the Court of Appeal. In his judgement in that case, Millett LJ quoted with approval the words of Viscount Cave LC in *Levene v IR Commissioners [1928] AC 215 at p. 222-223*, which he described as "The classic exposition of the meaning of 'residence'". In that case Viscount Cave said:

> "My Lords, the word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have ones settled or usual abode, to live in or at a particular place". No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word 'reside'."

20. Millett LJ noted that the words of Viscount Cave arose in a case involving income tax and counsel for the taxpayer in *Goodwin* had suggested that this definition was not therefore appropriate for capital gains tax. In response Millett LJ stated that he did not agree with this proposition and said:

> "What I derive from Viscount Cave's speech is that the word 'reside' is an ordinary word of the English language and is eminently suitable for a lay tribunal such as the general commissioners to apply."

Discussion and Decision

21. The only issue before the tribunal was whether or not the property at Park Lane Place had at any time been the residence of the Appellant for the purposes of s 222(1)(a) as set out above. If the property had been the Appellant's residence at any time during his period of ownership then HMRC accepted that the Appellant had made a valid election that it should be treated as his sole or main residence and that the appropriate proportion of the gain would be exempt from capital gains tax. In addition the Appellant would be entitled to a deduction of £40,000 from the gain in accordance with s 223(4).

22. The first question for us to determine was whether or not it was necessary for the Appellant to demonstrate that his occupation of the property showed some degree of permanence or continuity, or some expectation of continuity, as contended by HMRC. Bearing in mind the words of Viscount Cave and Millett LJ above we agreed that we should accept this contention.

23. The second question for us to determine was whether or not the evidence which had been presented to us was sufficient to demonstrate that the Appellant's occupation of the property did indeed possess the necessary qualities of permanence or continuity, or expectation of continuity.

24. Having considered the submissions set out above the tribunal decided that the Appellant's occupation of 3 Park Lane Place lacked the necessary degree of permanence or continuity, or the expectation of continuity of residence for the property to qualify as the Appellant's private residence for the purposes of s 222 TCGA 1992. The tribunal therefore decided that the appeal should be dismissed.

25. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 23 FEBRUARY 2016