

[2011] UKFTT 619 (TC)



TC01461

Appeal number TC/2010/08104

Appeal against HMRC's decision that the Appellant was not entitled to Principal Private Residence Relief on two properties – appeal allowed

FIRST-TIER TRIBUNAL

TAX

MR A.J.CLARKE

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: S.M.G.RADFORD (TRIBUNAL JUDGE)
H.MYERSCOUGH ACA, CIOT**

Sitting in public at Portal House, Colchester CO2 7BA on 18 July 2011

Mr J Tile for the Appellant

Mrs E.Gardiner the Respondents

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DECISION

1. This is an appeal against the assessments made by HMRC on 16 January 2009 for the tax year ended 5 April 2003 and on 9 January 2009 for the tax year ended 5 April 2006.
2. The assessments were raised following an enquiry by HMRC which decided that the Appellant was not entitled to Principal Private Residence in respect of two properties, 60 Nayland Road and 58a Nayland Road.
3. The Appellant gave evidence at the Tribunal.

10 **Background and facts**

4. The Appellant was married and has two daughters. Prior to purchasing the properties in Nayland Road he lived at the matrimonial home Oaks Farm.
5. The firm operated by the Appellant was operated from a barn behind Oaks Farm and all mail was addressed and delivered to the offices in the barn or if addressed to the house the postman knew to deliver it to the barn.
6. The Appellant's wife was having an affair and was under the care of a psychologist. During the period that the Nayland properties were owned she attempted and threatened suicide. A letter confirming her fragile state of mind was produced to the Tribunal.
7. The Appellant is now divorced. Prior to the divorce the Appellant purchased 60 Nayland Road on 17 July 2002 improved it and moved in with his elder daughter. Oaks Farm was valued at the same time but the Appellant's wife refused to agree to its sale.
8. 60 Nayland Road was situated on a direct route between Oaks Farm and the children's school.
9. From the time he moved in the Appellant considered Nayland Road to be his main residence and letters were provided to the Tribunal supporting this including letters from his ex-wife's parents.
10. The Appellant purchased the property with a view to permanently leaving Oaks Farm in order to provide a sanctuary for his children away from the very high emotional stress being felt at the matrimonial home.
11. The Appellant gave evidence that the property was immediately habitable having previously been owned by an older person who had died. He moved in as soon as he completed on the property and begged and borrowed furniture so that the children could come and stay for two or three days at a time.
12. He took a twelve month business loan from NatWest bank as this was the fastest and cheapest route for him to raise the funds to purchase the property. He was able to

do this with the backing of his bank manager and had the loan in three days which was far quicker than going the mortgage route which would have taken six to eight weeks. He hoped that by the time the twelve months was up Oaks Farm would be sold.

5 13. His intention was to sell the land attached to the house to pay off the bank loan. He obtained planning permission to build a detached house in the garden on 15 November 2002 but then his business partner suggested that he should develop the land himself. The address of the new property was to be 58a Nayland Road.

10 14. In order to obtain the funds to do this 60 Nayland Road was put on the market in December 2002 and sold in March 2003 and the Appellant went to stay at his mother's. At the same time he attempted to sell the land but the sale fell through.

15 15. The Appellant stated that work commenced on the new property and that he commenced living there in July 2003. He moved from room to room as each room was completed.

15 16. In July 2005 his wife attempted to commit suicide and he felt that he had no option but to move back to the marital home to protect his children. He put 58a on the market and it was sold in November 2005.

20 17. Oaks Farm was eventually sold and his ex-wife moved to Norfolk with her lover. She rarely sees the children and the Appellant now lives in a converted house with his children.

The Legislation

18. Section 222(1) of the Taxation of Capital Gains Act 1992 ("TCGA") states that :

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

25 (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.

19. Section 222(5) of the TCGA states

30 So far as it is necessary for the purposes of this section to determine which of 2 or more residences is an individual's main residence for any period—

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

20. Section 223(1) of TCGA states:

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 36 months of that period.

5 21. Section 224 3) TCGA states:

(3)Section 223 shall not apply in relation to a gain if the acquisition of, or of the interest in, the dwelling-house or the part of a dwelling-house was made wholly or partly for the purpose of realising a gain from the disposal of it, and shall not apply in relation to a gain so far as attributable to any expenditure which was incurred after the beginning of the period of
10 ownership and was incurred wholly or partly for the purpose of realising a gain from the disposal.

HMRC's Submissions

22. HMRC submitted that at no time in the period of ownership was either of the two properties the Appellant's only or main residence and there was no intention for the
15 Appellant to live permanently in either of the properties.

23. If he did reside in either of the properties throughout the period of ownership there was no permanence to this residence and no evidence has been provided to show any degree of permanence or any degree of continuity.

24. HMRC submitted that whilst the Appellant might provide evidence of occupation of either properties but HMRC would contend that is not compelling evidence that he
20 intended the property to be his permanent home.

25. The loan obtained on 60 Nayland Road from NatWest confirmed that the property was purchased with the intention to sell it but to retain the adjoining land for development of a residential property.

25 26. There is no evidence that any correspondence went to the Appellant at either of the addresses in Nayland Road. Any correspondence during this period was sent to the Appellant at his marital home at Oaks Farm or to Unit 8, 11 Grange Way Industrial Estate.

27. No change of address was ever notified to HMRC for either property and no
30 notice had been served on an officer of the board to confirm which residence was the Appellant's main residence under Section 222 (5)(a) TCGA.

28. The health of the Appellant's wife has no bearing on the decision made on these properties.

Appellant's Submissions

35 29. Mr Tile submitted that when the Appellant moved into Nayland Road he considered it to be his main residence.

30. The Appellant intended to dwell permanently at Nayland Road initially in the old the property and then with his children in the new property.

31. Mr Tiles submitted that evidence in the form of statements from friends and family of both the Appellant and his ex wife had been provided to HMRC and the Tribunal to support the fact that he left the home at Oaks Farm permanently to reside at Nayland Road.

5 32. HMRC have accepted that the Appellant resided at Nayland Road in both their letters. He submitted that this changed the case from the argument that he did not live there to an argument regarding his intention to remain with the degree of permanence.

10 33. Mr Tile submitted that the evidence provided demonstrated that the Appellant's ex-wife was clearly having an affair and being manipulated by her lover as described by her psychologist giving compelling evidence that life in the matrimonial home would be arduous if not potentially dangerous for both the Appellant and his ex-wife and children. With such raw emotions and the Appellant's ex-wife determination to continue her affair the atmosphere was intolerable.

15 34. Mr Tile submitted that the letter from Dr Stephen Lovett described the marriage and concern for the children throughout the period in question and pointed out that this letter was written prior to the HMRC investigation.

20 35. Mr Tile said that the Appellant's ex-wife's treatment of her children at this time gave the Appellant grave concerns for them. The Appellant had purchased Nayland Road with a view to permanently leaving Oak Farm and providing sanctuary for his children away from the very high emotional stress being felt at Oak Farm.

36. Mr Tile submitted that the loan obtained on 60 Nayland Road was the fastest and cheapest route by which the Appellant could raise the funds to purchase the property and had the full backing of his bank manager.

25 37. The letter obtained by HMRC had been written by an assistant and was superseded by the letter from his bank manager dated 14 April 2010 which clarified matters.

38. The loan agreement signed by the Appellant and NatWest states that the loan is for the purchase of residential property.

30 39. The Appellant's correspondence continued to go to the office at the rear of Oaks Farm where he could collect it at will and the Appellant had always relied on his agent for notification of his tax affairs. Notifying his change of address was therefore not a priority for the Appellant.

35 40. Mr Tile submitted that no notice is required when there is only one residence in accordance with Section 222(5)(a) TCGA. The Appellant had only one residence at Nayland Road and his ex-wife continued to live at Oaks Farm.

41. The Appellant only eventually returned to Oaks farm for the sake of the children following threats of suicide and then the eventual disappearance and attempted suicide by his ex-wife.

Findings

42. The Tribunal found the evidence by the Appellant to be truthful and credible.

43. The Tribunal found that the correspondence from the Appellant's psychologist provided evidence of the necessity for the Appellant to move away from Oaks Farm to somewhere he could bring his children in order to get them away from their mother.

44. The Tribunal found that at the time the Appellant moved into 60 Nayland Road he intended to live there permanently.

45. We accept that he took a twelve month business loan from NatWest bank as this was the fastest and cheapest route for him to raise the funds to purchase the property and that his intention was to sell the land attached to the house to pay off the bank loan.

46. We found it credible that after planning permission was received he decided to develop the property himself and sold 60 Nayland Road to obtain the necessary funds and moved in with his mother until the new property was habitable for him and he could move in there permanently.

47. We did not attach too much weight to the Appellant's failure to change his address as he continued to attend his offices behind Oaks Farm.

48. We accept that ultimately he had to move back to Oaks Farm after the disappearance and suicide attempt by his ex-wife.

49. We find that the Appellant is entitled to Principal Private Residence Relief in respect of the two properties.

Decision

50. The appeal is allowed.

51. 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.



TRIBUNAL JUDGE
RELEASE DATE: 7 September 2011