



TC02247

Appeal number: TC/2011/01300

CAPITAL GAINS TAX - whether house only or main residence of appellant – held yes –whether failure to include gain in tax return negligent conduct – held no – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DANIEL REGAN

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GREG SINFIELD
LESLEY STALKER**

Sitting in public at 45 Bedford Square, London on 23 May 2012

Ms Sadiya Choudhury, counsel, for the Appellant

Mr Peter Williams, of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Daniel Regan (“Mr Regan”) against an assessment raised by the Respondents (“HMRC”), by notice dated 11 March 2010, under sections 29 and 36 of the Taxes Management Act 1970 (“TMA”) for the year ended 5 April 2001. The primary issue is whether a house at 95 Rowan Avenue, Hove, Sussex was Mr Regan’s only or main residence. If not then, subject to a point on whether the assessment was properly made within the extended time limit, he is liable to pay capital gains tax of £45,415. If the property was his only or main residence then he is entitled to relief under Sections 222 and 223 Taxation of Chargeable Gains Act 1992 (“TCGA”).

Issues

2. There are two issues in the appeal:

(1) whether 95 Rowan Avenue was the only or main residence of Mr Regan.; and

(2) if so, whether Mr Regan was negligent in not including the gain on the sale of 95 Rowan Avenue in his tax return for 2000/01.

Legislation and authorities

3. In relation to the first issue, section 222(1) TCGA states as follows:

“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.”

4. The relief itself is provided by section 223(1) TCGA which 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. Therefore if the dwelling-house in question has been the individual’s “only or main residence” either throughout the period of his ownership or throughout that period except for the last 36 months, there is no liability to capital gains tax on a disposal of the dwelling-house.

6. Residence is not defined in the TCGA and, therefore, has its ordinary meaning. For an individual, HMRC submits that the ordinary meaning of residence is the dwelling in which that person habitually lives: in other words, his home. In *Frost v Feltham* [1981] STC 115, where the court was asked to decide which of an individual's residences was his main residence, Nourse J stated at 117 that "a residence is a place where somebody lives".

7. HMRC rely on two authorities for the submission that residence also requires a degree of permanence or continuity. In *Goodwin v Curtis* [1998] STC 475, Millett LJ relied on a dictum from Viscount Cave LC's speech in *Levene v IRC* 13 TC 486 at 505 to hold that "reside" is an ordinary word of the English language. Lord Cave had stated, "...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 one's settled or usual abode, to live in or at a particular place.'"

8. The meaning of the word residence was also considered in the non-tax case of *Ricketts v Registration Officer for the City of Cambridge* [1970] 2 QB 463. Under the Representation of the People Act 1948, entitlement to vote was given to persons resident in a constituency on a qualifying date. The question to be decided was whether students should be resident in the constituency of the University that they attended. In the Court of Appeal, Lord Widgery commented,

"This conception of residence is of a place where a man is based or where he continues to live, the place where he sleeps and shelters and has his home. It is imperative to remember in this context that 'residence' implies a degree of permanence. In the words of the Oxford English Dictionary, it is concerned with something which will go on for a considerable time. Consequently a person is not entitled to claim to be a resident at a given town merely because he pays a short, temporary visit. Some assumption of permanence, some degree of continuity, some expectation of continuity, is a vital factor which turns simple occupation into residence."

9. In our view, the need for permanence or continuity should not be overstated. In *Moore v Thompson* [1986] STC 170, Millett J commented at 176 that

"... the Commissioners were alive to the fact that even occasional and short residence in a place can make that a residence; but the question was one of fact and degree."

We consider that the issue of whether a property is or has been a residence is a matter of fact that should be determined by reference to the quality (and not merely the length) of the occupation.

10. In relation to the second issue, HMRC were out of time for raising an assessment under the normal time limits provided in the TMA. The assessment was raised under section 29 TMA. Section 29(1) provides that an assessment can be made if one of two conditions set out in section 29(4) and (5) is satisfied. HMRC rely on the first of the two conditions in section 29(4) as follows:

“(4) The first condition is that the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.”

Where the condition is met, section 36 TMA provided at the relevant time that the time limit for raising an assessment is 20 years after the 31 January next following the year of assessment to which it relates.

Evidence

11. Witness statements were produced by Mr Regan and by Mr Paul Healey of HMRC. They were admitted as evidence in chief. Mr Regan gave oral evidence and was cross-examined. A bundle of documents was also produced.

Facts

12. On the basis of the evidence, we find the relevant facts to be as follows.

13. In or around May 1994, Mr Regan, then aged 22, moved out of his parents' house at 91 Surrenden Road, Brighton and into 95 Rowan Avenue as a tenant. One of the reasons that he rented the property was because a family company, Two Oaks Leisure Limited, was considering purchasing the Hyde Club which was located at the back of 95 Rowan Avenue. The company intended to run the Club after first renovating it. Mr Regan would be involved in the renovations and he intended to apply for a licence and manage the club when it re-opened after the renovations so it was convenient for him to live at 95 Rowan Avenue. The company purchased the Club at some point in 1994.

14. After Two Oaks Leisure Limited had purchased the club, 95 Rowan Avenue came on the market for sale. On 30 June 1994, Mr Regan completed and sent a Miras 70 form to HMRC claiming tax relief on his mortgage interest payments. On that form, Mr Regan gave 95 Rowan Avenue as the address of his main home. The sale of 95 Rowan Avenue completed shortly before 21 October 1994 when the mortgage lender wrote to Mr Regan at the property.

15. Mr Regan spent the first year or so working on the renovations to the club and living at the property. The club re-opened for business in October 1995. Mr Regan started working as the assistant manager. By that time, he had applied for and been granted, a licence. The licence required that he be on or near the club at all times. Shortly after the club opened, Asa Hudson was employed as entertainments manager. His employment contract said he could live at 95 Rowan Avenue. He and his wife, Jackie Hudson, moved into 95 Rowan Avenue where they lived with Mr Regan.

16. Mr Regan carried on working at the club full time until Christmas 1996. Mr Regan moved out of the property for two or three weeks over the Christmas period and went to stay with his parents at 91 Surrenden Road. Mr Regan said that he moved out because Mr Hudson had some relatives to stay for Christmas and needed the extra room. Mr Regan returned to live in 95 Rowan Avenue early in the new year.

17. After Christmas 1996, Mr Regan worked part time at the Club and also worked in the construction industry. Around that time, Mr Regan met the young woman who would later become his wife and he began to spend time at her flat. Mr Regan continued to regard 95 Rowan Avenue as his permanent residence. All of Mr Regan's post was sent to 95 Rowan Avenue at this time and that was where he kept his belongings. Although he was spending an increasing amount of time at his girlfriend's flat, Mr Regan always spent some time each week at 95 Rowan Avenue, particularly at weekends because of finishing work late at the Club on Saturday and having to be there for Sunday lunchtime.

18. In April 1998, Mr Regan moved out of 95 Rowan Avenue and moved into 75 Denton Drive with his girlfriend which they had purchased with a joint mortgage. He did not live in 95 Rowan Avenue after April 1998. He did not sell the property to a third party at the time because Mr Hudson and his wife were still living there. He agreed to sell the house to his parents but they did not have the means to purchase it so Two Oaks Leisure Ltd took over the mortgage on it after he had moved out. Mr Regan's evidence was that he eventually sold 95 Rowan Avenue to his parents in May 2000 for £110,000. HMRC say that the property was sold on 30 August 2000. We did not see any direct evidence of the date of the sale and, in view of our findings below, the precise date was not material to our decision.

19. HMRC provided a screen print of the version of Mr Regan's tax return for 2000/01 from HMRC's computer systems (the original having been destroyed some years ago) which seemed to show that the Capital Gains pages, which is where the disposal of the property should have been recorded, were left blank. Mr Regan accepted that he completed and filed a tax return for that year via his accountants. He could not recall if it showed any gain in relation to 95 Rowan Avenue but, as he regarded it as having been his main residence, it seems unlikely. We accept that HMRC have established on the balance of probabilities that Mr Regan failed to include the disposal on his tax return.

20. In 2008, HMRC opened an enquiry into the tax return for the year ending 5 April 2006 for Birch Restorations Limited, of which Mr Regan was a director. He was asked to provide various documents relating to that enquiry, as a result of which the inspector, Mr Healey, began to ask for details relating to the sale of 95 Rowan Avenue.

21. After further correspondence, HMRC raised the assessment under appeal on the grounds that Mr Regan was not entitled to relief from capital gains tax in respect of 95 Rowan Avenue as it had never been his only or main residence. Furthermore, they considered that the £110,000 purchase price paid by Mr Regan's parents for 95 Rowan Avenue did not constitute market value. HMRC therefore calculated the gain arising on the sale by substituting the consideration provided with the figure of £200,000, which they contend was the actual market value at the time of the sale.

Was 95 Rowan Avenue Mr Regan's only or main residence?

22. HMRC contend that, on the evidence, 95 Rowan Avenue was not Mr Regan's only or main residence. HMRC point to certain evidence which we discuss below.

(1) Tax returns and correspondence

HMRC suggested that throughout the relevant period all of Mr Regan's tax returns were submitted from his parent's home at 91 Surrenden Road, Brighton. In fact, this was not correct. After the enquiry, Mr Regan had found a box of old correspondence in the loft of his current house which related to his time at 95 Rowan Avenue. Mr Regan produced several letters from HMRC addressed to him at 95 Rowan Avenue dating from 1996 and 1997, including a tax return for the year ended 5 April 1997. HMRC also suggested that all correspondence from HMRC was sent to Mr Regan at his parents' home and was not returned. This also appears to be incorrect as the examples of letters from HMRC addressed to him at 95 Rowan Avenue show.

(2) Electoral register

HMRC made a number of points based on the electoral register, namely that it showed:

- (a) Mr Regan living at 91 Surrenden Road until he moved to 75 Denton Drive;
- (b) Asa and Jackie Hudson as the occupants of 95 Rowan Avenue from 1994 to 1999;
- (c) Paul and David Evans as the occupants of 95 Rowan Avenue in 1999; and
- (d) Mr Regan's parents as the occupants of 95 Rowan Avenue following their purchase of it in 2000.

Mr Regan said that he was not interested in politics and had not registered to vote. He believed that his parents had put him on the electoral roll at their home when he reached 18 and his girlfriend must have done the same at Denton Drive. He assumed, but did not know, that Asa and Jackie Hudson had registered to vote when they lived at Rowan Avenue. We do not regard this evidence as showing that Mr Regan was or was not residing at a particular place. The details of who was shown on the electoral register as living at 95 Rowan Avenue in 1999 and 2000 are irrelevant to the question of whether Mr Regan was residing there between 1994 and 1998.

(3) Credit arrangements

HMRC submitted that there was no evidence of credit arrangements entered into by Mr Regan from 95 Rowan Avenue. From 1998, Mr Regan had a joint mortgage on 75 Denton Drive and there were a number of credit arrangements showing this address. HMRC did not have any

evidence that Mr Regan gave any address for credit arrangements prior to moving out in April 1998. Mr Regan did, as stated above, have a mortgage in relation to 95 Rowan Avenue and the mortgage lender wrote to him there. While credit agreements may be evidence of a person's address they are not conclusive. Mr Regan said that he did not have any credit cards or loans, apart from his mortgage, when he was living in 95 Rowan Avenue but he did have some after he had set up home with his girlfriend. We do not accept that the absence of credit arrangements is evidence that Mr Regan was not living at 95 Rowan Avenue prior to April 1998.

(4) Date stamps

HMRC contended that the use of Two Oaks Leisure date stamps on correspondence on 16 and 21 October 1997 indicated that Mr Regan had stopped living at 95 Rowan Avenue. This was, of course, within 36 months of the sale of the property and so we do not regard it as relevant. Mr Regan said that he simply used the date stamp when he was opening his post at the club and it did not mean that he did not live at 95 Rowan Avenue. We accept Mr Regan's evidence on this point.

23. Mr Regan told the Tribunal that, some while after the enquiry had begun, he had found some documents relating to his period at 95 Rowan Avenue in the loft of his current home. The documents included the correspondence from HMRC referred to above as well as letters from his accountants. Mr Regan also produced correspondence and statements from the building societies with which he had accounts and which had been sent to him at the property.

24. Mr Regan is entitled to relief from capital gains tax on the disposal of 95 Rowan Avenue if it was his only or main residence between 1994 and 1 September 1997 (ie within 36 months of the disposal even if the sale took place on the later of the two dates given). HMRC submit that Mr Regan never occupied 95 Rowan Avenue in such a way that it became his residence. As the cases make clear, residence for the purposes of section 222(1) CGTA is to be given its ordinary meaning as the place where a person lives. It requires more than temporary occupation and must have a degree of permanence although it is not merely a question of duration of occupation. Our view is that the evidence clearly shows that Mr Regan lived at 95 Rowan Avenue between sometime around May 1994 and April 1998 and that it was his only or main residence during that period. We do not regard his stay at his parents' house over Christmas 1996 as causing 95 Rowan Avenue to cease to be his main residence at that time. Even when Mr Regan was spending much more time at his girlfriend's flat, his evidence, which we accept, was that he stayed some nights at 95 Rowan Avenue every week, it was the place where he had his post sent and where he kept his things (albeit some clothing was kept at his girlfriend's flat for practical reasons). We think that such use of 95 Rowan Avenue demonstrates that it was his main residence as opposed to his girlfriend's flat where the occupation did not have the necessary settled quality. In our view, Mr Regan's period of residence at 95 Rowan Avenue only came to an end when he and his girlfriend bought a property to live in together in April 1998. As April 1998 fell within the last 36 months of Mr Regan's period of

ownership, the fact that he did not live there up to the date of the sale does not affect the availability of the relief. On the facts of this case, Mr Regan was entitled to relief from capital gains tax on the sale of 95 Rowan Avenue.

Was Mr Regan negligent?

25. Our view on the first issue in this case means that it is not necessary to decide whether Mr Regan's failure to include the gain on the property in his tax return for 2000/01 amounted to negligent conduct. In case we are wrong in relation to the first issue and because we heard argument about it, we deal briefly with this issue.

26. HMRC are not alleging that Mr Regan has been fraudulent. They say that the failure to include the gain arising from the sale of 95 Rowan Avenue in his tax return for 2000/01 is evidence that Mr Regan was negligent in preparing the return. The burden of proof is on HMRC to show that Mr Regan, or his accountant acting on his behalf, was negligent in completing his tax return but, they submit, once an error has been established, the burden shifts to Mr Regan to show that he has not been negligent.

27. There is no statutory definition of negligent conduct and so the words should be taken to have their ordinary meaning. The Shorter Oxford Dictionary (Fourth Edition 1993) defines negligent as "inattentive to what ought to be done; failing to take proper, necessary, or reasonable care". If it is correct to regard 95 Rowan Avenue as Mr Regan's only or main residence then there was no failing to take proper care and no question of negligence arises. Even if we are wrong and there was a chargeable gain, although a finding of negligent conduct may follow from a conclusion that a return was incorrect, as in *McEwan v Martin* [2005] STC 993, whether such a finding follows will depend on the circumstances of the case and the nature of the error. In *McEwan*, it was the taxpayer's accountants who were found to be negligent because they did not apply a proper degree of care to the preparation of the computation. In this case, even if 95 Rowan Avenue was not Mr Regan's only or main residence because he was also living with his parents and girlfriend for some of the time, we are not satisfied that Mr Regan was negligent in failing to realise that the property was not his residence and he was not entitled to relief from capital gains tax on the disposal of 95 Rowan Avenue.

Decision

28. Our decision is that Mr Regan was entitled to relief from capital gains tax on the disposal of 95 Rowan Avenue in 2000. Accordingly, the appeal is allowed.

Rights of appeal

29. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's 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.

GREG SINFIELD
TRIBUNAL JUDGE

RELEASE DATE: 22 August 2012