TC02700

Appeal number: TC/2012/04442 & TC/2012/04224

Capital Gains Tax – TCGA 1992 – Business Asset Taper Relief ("BATR") on the disposal of investment properties – application of Schedule 1A TGCA 1992 – Para 5 – claim for BATR rejected – Appeal Dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SIDNEY McCAUGHERN & LOUISE McCAUGHERN **Appellants**

- and -

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

TRIBUNAL: JUDGE IAN HUDDLESTON
CELINE CORRIGAN

Sitting in public in Belfast on 17 December 2012

John Corbett, HMRC for the Respondents

Dr. M. Laverty & Glen Nichol on behalf of CR Accountancy, on behalf of the Appellants

DECISION

Appeal

1. This appeal arises out of HMRC's refusal to allow a claim for Business Asset Taper Relief against the disposal proceeds arising on the sale of two properties by the Appellants – one at Douglas Terrace, Ballymena, and the other at Dunclug Gardens, Ballymena, both County Antrim, Northern Ireland (collectively "the Properties").

2. The original decision was notified by a letter of the 6 October 2012 when the Appellants 2007/2008 Tax Return was restated.

3. HMRC's original decision was upheld on review and communicated to the Appellants on the 21 November 2011.

The Facts

4. The facts can be reasonably shortly stated.

5. In 2010 HMRC commenced an investigation into the tax affairs of the Appellants for the tax year 06/04 2007 to 05/04 2008.

6. That investigation covered not just the trading aspects of Mr. McCaughern's car sales business, but also the income and capital tax computations which arose in respect of a portfolio of investment properties. In particular, with relevance to this appeal, the treatment of capital gains related to the disposal of the Properties which were jointly owned by the Appellants came under enquiry.

7. After a good deal of correspondence between the parties relating to the income tax liability arising both for the car sales business and for the property letting business operated by the Appellants, the focus narrowed on the correct tax treatment of the Appellants' disposal of the Properties.

8. HMRC wrote to the Appellants' then agents, DML Turgot, on the 18 November 2010 asking for clarification of the capital gains tax computation advanced by the Appellants in relation to the disposals focusing in particular on the expenditure incurred in the enhancement of both Properties amounting to £8,400 in the case of Douglas Terrace, and the sum of £14,700 in the case of Dunclug Gardens.

9. I should point out at this point that HMRC's letter which was from a Mr. McAreavy (and in which the enhancement expenses were queried) indicated his intention to treat the gains arising as taxable profits under Schedule D, Case 1.

10. Further correspondence ensued and, on the 22 February 2011 DML Turgot submitted receipts for the enhancement expenses – at least insofar as they appeared to be available.

11. On 24 February 2011 HMRC wrote seeking further information in relation to the provision of receipts for the works carried out.

12. In the continued absence of information or detail to provide further clarity in relation to the nature of the receipts and the work done, an Information Notice was issued by HMRC under paragraph 1 of Schedule 36 of the Finance Act 2008 on the 28 March 2011 specifically seeking further information on the enhancement expenses claimed.

13. Following that a Penalty Warning was issued on the 6 June 2011 with the Penalty Notice itself in the sum of £300 issuing on the 4 July 2011.

14. A subsequent conversation took place between DML Turgot and HMRC by telephone on the 6 July 2011 where again the requests for information in relation to the enhancement expenses, legal and selling fees arising on the disposals, were discussed.

15. From an attendance note on HMRC's file there was, on that occasion, a reference to the parties' discussions the tax liability arising on the "CGT computation under Schedule D".

16. A further conversation took place on the 22 July 2011 between HMRC and Dr. Maurice Laverty of DMC Turgot.

17. The Tribunal was furnished with a copy of the telephone attendance note and was provided with copies of a follow up email exchange between Mr. McAreavy and Dr. Laverty.

18. Mr. McAreavy's email asked if he (Dr. Laverty) "*could also confirm [his] agreement for [HMRC] to disallow the enhancement expenses and selling fees of £8,400 (8 Douglas Terrace) and £14,700 (78 Dunclug Gardens) in their entirety.*"

19. Dr. Laverty replied to that email by way of email on the 25 July 2011 in the following terms:

> *"Yes, please accept this email as confirmation that I agree with you to disallow the enhancement expenses and selling fees of £8,400 (8 Douglas Terrace) and £14,700 (78 Dunclug Gardens) in their entirety."*

20. By this stage Mr. McAreavy had sought additional internal advice on the case (from a Mr. Uel Magee) who had pointed out that rather than treating the taxable gains arising as Schedule D income, that they should properly be treated as capital gains and taxed accordingly.

21. I mention this confusion as to the correct nature of the tax treatment of the gain because it was referred to in the Appellants' evidence and their agent's submissions before the Tribunal by way of mitigation.

22. In a follow up internal conversation between Mr. McAreavy and Mr. Magee on the 22 September 2011, HMRC came to the view that Business Asset Taper Relief had been incorrectly claimed on the basis that paragraph 5 of Schedule 1A TCGA 1992 provides that a Schedule A business does not count as a "qualifying activity" for the purposes of Business Asset Taper Relief.

23. On the 23 September 2011 HMRC wrote to DML Turgot. That letter dealt with income tax issues arising (which I do not comment on as they do not form part of this Appeal) but in addition pointed out that in the 2007/08 return for the Appellants:

> (1) the capital gains tax had been understated because Business Asset Taper Relief had been wrongly claimed – by reference to paragraph 5 of Schedule 1A TCGA 1992;
>
> (2) by setting out a revised capital gains computation for the disposal of both Properties; and
>
> (3) finally, indicating HMRC's intention to amend the 2007/08 tax return and issue a closure notice.

24. On the 6 October 2011 HMRC wrote to each of the taxpayers identifying the shortfall in tax which, as result of the restatement of the 2007/08 tax returns, then fell due. In each case that shortfall was £21,189.83.

25. The Appellants' representatives complained and, as a result, a review was carried out under Section 28A TMA 1970.

26. That review upheld the earlier conclusions of HMRC.

27. The Appellants' new advisers, CR Accountancy (in which Dr. Laverty continued to be employed as a consultant) wrote to HMRC on the 19 January 2011.

28. In summary, the focus of that letter was to make representation against HMRC's decision on the basis that:

> (1) as part of a VAT inspection on a previous occasion an Officer of HMRC, Audrey Nesbitt, had suggested that the Appellants could claim VAT back on expenses relating to the property portfolio, and that CR Accountancy took the view that as VAT could be claimed back on business expenses, that the Properties in question must therefore by extension be "business assets"; and/or
>
> (2) as the Properties were purchased from profits generated from the car sales business, and that the Properties themselves were used to make profit, that they therefore must constitute a business activity.

29. A rejection of that line of correspondence and specifically those contentions has led to this appeal.

Evidence

30. The Appellants were represented at the appeal by Dr. Maurice Laverty who had advised them throughout, initially as a principal in DML Turgot and, latterly, as a consultant in CR Accountancy.

31. Dr. Laverty called the Appellants to give evidence.

32. Both witnesses gave evidence as to the circumstances in which they both bought, improved and then sold the Properties.

33. Both gave evidence to the Tribunal that the Properties had been acquired with a long term view but, in one case, because they had had previous experience of "bad tenants" that they had done up the property and then sold it, and that in the other, as the sitting tenants wanted to buy it, the Appellants had agreed to sell.

34. That led to the disposals which triggered the tax liability in dispute.

35. In cross examination, and focusing on Dunclug Park, Mrs. McCaughern gave evidence that the property had been bought on the 21 December 2004 and improvements carried out in January / February 2005 prior to it then being sold.

36. HMRC pointed out that the date of the invoice which had been submitted as a part of the expenses which were claimed against any gain arising on that Property was dated 20 May 2004 (ie. some eight months before the property itself was acquired).

37. Whilst no satisfactory explanation was provided, both witnesses gave evidence to the effect that a vehicle had been provided to the builder who had undertaken the works by way of a counter set off for the expenses incurred.

38. Both witnesses were questioned both through examination in chief and in cross examination as to the discussions which they had had with Audrey Nesbitt and, more latterly, with Mark McAreavy in relation to the treatment of expenses arising in relation to the Properties and/or the consideration of the Properties themselves as "business assets".

39. The purpose of that line of questioning appeared to seek to advance the argument as previously (see Para 28) that because:

(1) there was some degree of VAT recovery; and/or

(2) that business profits (from the car business) had been used to buy the Properties

40. they were de facto "business assets" and that Business Asset Taper Relief ought to apply.

41. It is suffice to say that no clear picture arose from that line of examination.

Decision

42. There is no doubt that there was some initial confusion – may I say on both the Appellants and HMRC's sides – as to the taxable nature of the transactions which arose on the disposal of the Properties.

43. From the Tribunal's perspective, we fail to see why such confusion arose.

44. Both Mr. McCaughern and Mrs. McCaughern were very clear in the evidence which they gave to the Tribunal.

45. Both indicated that the Properties had been acquired with a view to them being held as long term assets – indeed Mr. McCaughern referred to their purchase as part of their ultimate "pension" provision.

46. In both cases, they were residential properties which were acquired as such, refurbished and let out as private rented accommodation.

47. On the evidence before us it was quite clear that the Properties were bought as investments and not as business assets.

48. It is equally clear from the evidence before us that the income arising had been treated as Schedule A income – again, there may have been some confusion in both the minds of the Appellants' advisers and, indeed, HMRC, as to the treatment of that income, but nonetheless it was Schedule A income and (eventually) treated as such.

49. It logically follows that Business Asset Taper Relief could never have applied on the facts of this case.

50. For Business Asset Taper Relief to apply (per paragraph 5(2) of Schedule A1 of TGCA 1992) "*the asset [must be] a business asset ….. being used wholly or partly for the purposes falling within one of more of the following paragraphs:*

> (a) *the purposes of a trade carried on at that time by that individual or by a partnership of which that individual was at that time a member ….*"

51. At the time of the disposal of the Properties we find that there was no trade being carried on in respect of these Properties, they were simply investment properties which the Appellants had rented out.

52. Dr. Laverty's suggestion – which he attempted to advance both in correspondence and before the Tribunal – that the use of profits from the car sales business was sufficient to render those Properties as assets of a business or trade – had neither a firm basis in law or, indeed, in logic. In questioning by the Tribunal it tended to suggest a lack of understanding between trading or revenue receipts and capital receipts.

53. On the facts, it is clear to us that the disposals made in the tax year in question were disposals which properly fell to be attributed to capital gains and for the reasons

given based on Schedule A TGCA we find that Business Asset Taper Relief did not apply in the circumstances.

54. We have some sympathy with the Appellants in that clearly, on the evidence before us, there were some substantial alterations carried out, at least to one of the Properties. We accept that oral evidence and find that alterations were carried out.

55. The real issue, however, is that the Appellants' agents put forward very scant information as to the nature of those expenses and/or to explain the discrepancies that HMRC had raised over the invoices that were furnished.

56. Those which related to legal expenses were allowed by HMRC as, indeed, were some agent's fees insofar as they related to the acquisition and/or disposal of the Properties.

57. Where the dispute arose in the main was in relation to the enhancement expenses.

58. I have already commented above that some of the invoices which were advanced actually predated the works, which would automatically have raised enquiries with HMRC. No satisfactory explanation was provided as to why that might have been the case either through correspondence or as part of the Appeal hearing.

59. In relation to the two material lots of expenditure, ie. the £8,400 and the £14,700, the email of the 25 July 2011 is evidence of clear acceptance on the part of the Appellants' agents that HMRC could disallow those expenses.

60. They were, unsurprisingly, subsequently disallowed which resulted in the tax computation which is now in dispute.

61. We cannot comment on the exact rationale behind Dr. Laverty's email concession on the point, but nor have we seen any documentary evidence for the enhancement expenses which were initially claimed.

62. It will be evident from what we have said above that we have concluded that this appeal should be dismissed.

63. The Appellants' claim for Business Asset Taper Relief was not well founded.

64. We were not addressed on the issue of those costs, and make no finding in relation to them.

65. 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.

IAN HUDDLESTON
TRIBUNAL JUDGE

RELEASE DATE: 10 May 2013