TC03021

Appeal number: TC/2010/07521

CAPITAL GAINS TAX – Relief on disposal of private residence (TCGA s 222) – Sale of residential property owned by Appellant – Demolition of existing house and construction of new house in its place – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAUL GIBSON **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MRS CAROLINE DE ALBUQUERQUE

Sitting in public in London on 9 and 10 April and 13 September 2013

Mr D Cheema for the Appellant

Mr J Hillier for the Respondents

DECISION

Introduction

1. The Appellant originally appealed against a number of matters. By the time of the substantive hearing, it was common ground between the parties that the only remaining issues in dispute were the following:

(1) whether the disposal by the Appellant of a property known as Moles House on 24 January 2006 is prevented from giving rise to a chargeable gain by virtue of ss 222 and 223 of the Taxation of Chargeable Gains Act 1992 ("TCGA");

(2) whether the Appellant is liable to a penalty under s 95 TMA in respect of his 2005-06 tax return for the omission of the chargeable gain arising from the disposal of Moles House;

(3) if the Appellant is so liable to a penalty, the amount of the penalty.

2. The following basic facts were not in dispute. The Appellant purchased Moles House in February 2003. In 2004, he completely demolished the existing house that stood on that property, and constructed a new house on the same site. The new house was completed and put on the market and sold in early 2006. The Appellant's 2005-06 self-assessment tax return did not include any chargeable gain arising from that sale.

3. On 19 November 2007, HMRC opened an enquiry into that return. On 16 April 2010, Mr Wood of HMRC issued a closure notice bringing into charge the capital gain in respect of that sale. Mr Wood concluded that some time around the end of April 2004 the Appellant made a decision to obtain further finance, and apply for planning permission to demolish the existing property and rebuild a new property that would then be sold on completion to realise a gain. Mr Wood concluded that principal private residence relief should be denied under s 224(3) TCGA as the expenditure subsequent to the planning application was incurred for the purpose of realising a gain from the disposal.

4. On the same date, HMRC issued a penalty determination under s 100 of the Taxes Management Act 1970 ("TMA") in the amount of 60% of the tax charged in respect of the capital gains tax due. This has since been reduced by HMRC to 50%.

5. The Appellant appealed against the closure notice and penalty determination on 13 May 2010. On 20 August 2010, the HMRC review officer issued an opinion upholding the charge to tax of the capital gain, but for different reasons. The review decision concluded that the house that was constructed by the Appellant was not the same house as the house that stood on the property at the time that the Appellant purchased it. HMRC refer to the original house as Moles House One, and to the house constructed following its demolition as Moles House Two. The review decision concluded that Moles House Two was never the Appellant's main residence for purposes of private residence relief. The review decision also endorsed the penalty that was imposed.

Applicable law

6. Section 222 of the TCGA relevantly provides:

> **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
>
> (b) land which he has for his own occupation and enjoyment with that residence as its garden or grounds up to the permitted area.

7. Section 223(1) of the TCGA provides:

> **223.— Amount of relief**
>
> (1) 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.

8. Section 224(3) of the TCGA provides:

> **224.— Amount of relief: further provisions**
>
> (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 ownership and was incurred wholly or partly for the purpose of realising a gain from the disposal.

The witness evidence

9. At the hearing on 9 April 2013, the Appellant gave evidence in person, and called Mr Mark Reid as a witness. HMRC called Kenneth Wood, HMRC Inspector of Taxes, as a witness.

10. The witness statement of the Appellant stated amongst other matters as follows.

11. The Appellant purchased Moles House in June 2003 for £715,000. His intention had been to make it a family home for himself and his then girlfriend Caroline. They felt that they could afford the house if they accepted some help from Caroline's parents. The Appellant obtained a mortgage for £536,000. Additional funding was provided to the Appellant by his friend Mark Reid, which Mr Reid obtained by taking out a bank loan against his property. Some of the sum provided by Mr Reid was repayment of a loan that the Appellant had made to Mr Reid, and some

of it was a bridging loan from Mr Reid until Caroline was able to sell her house. At the time of purchase, the Appellant and Caroline intended to fit a new kitchen and bathroom and extend the property.

12. The Appellant moved into the house about a month after it was purchased. Due to problems with roof timbers and given plans to undertake a further extension in the longer term, an architect who was consulted about the extension advised that it would be cheaper in the long run to demolish the house and start again from scratch, and that this would also have the advantage of enabling the Appellant to design the property to his exact needs. The Appellant calculated that this would be affordable if Caroline sold her house and if Caroline's parents provided financial assistance. The Appellant received planning permission for the new house in the middle of 2004. The Appellant then approached Mr Reid about extending the loan, and Mr Reid agreed to borrow the money for the Appellant, using the freehold of Mr Reid's shop as guarantee.

13. The existing house was demolished, and work commenced on the construction of the new house. By the beginning of 2005, the Appellant realised that the cost of the build was going to be more than he thought. It became apparent that he would not be able to afford to complete the house as well as pay the ever increasing interest. The Appellant's relationship with Caroline became very strained due to the stress. Mr Reid became concerned that the Appellant and Caroline might split up, which would have been catastrophic for him as the Appellant would not be able to repay the loan to Mr Reid if the sale of Caroline's house was cancelled and the expected help from Caroline's parents was no longer forthcoming.

14. The Appellant and Caroline discussed the option of finishing the property and then selling it to release them from the huge financial commitment it was becoming. They completed the house and put it on the market at the beginning of 2006, and it was sold at the end of February 2006. The money received from the sale paid the entire bank loan as well as a fee to Mr Reid for helping the Appellant. The Appellant's overall gain on completion was drastically reduced by interest charges leaving very little surplus.

15. After the house was sold, the Appellant and Caroline became engaged and subsequently married. The Appellant had previously bought two residential properties, in 1986 and 1988 respectively, which he sold in 1988 and 2001 respectively. There were two further properties that he helped Mr Reid acquire under a bare trust, and as far as the Appellant is aware, Mr Reid included these in his tax returns.

16. In his oral evidence, the Appellant said amongst other matters as follows. Originally the plan had been to do only a small extension to the house. The plans then grew, and then it became the case that it would be cheaper to demolish the house and start again. Caroline's mother was prepared to give financial assistance because Caroline's father was elderly and the intention was that Caroline's mother would live with them on her father's passing. The building project was consuming a lot of the Appellant's time and this also put a strain on his relationship with Caroline. The Appellant would have liked to stay on in Moles House, but Caroline pushed him to

sell it. Their relationship became so strained that when they were close to finishing the house, there was no choice but to sell it, as they could no longer afford the interest on the finance.

17. In cross-examination, the Appellant said amongst other matters as follows. The newly constructed house had 5 bedrooms, 4 bathrooms, 3 floors, a garage attached to the house, a family room and a study, in addition to the kitchen, dining room and drawing room. The original house had 4 bedrooms, one bathroom and a WC, 2 floors, a detached garage, kitchen, living room and dining room, but no family room or study. The two were different in size and layout. The old house was completely demolished, and the bricks were taken away and not used in the new house. The Appellant lived in the new house for 4-5 months, after the plumbing was put in, prior to it being sold. He would have moved into the new house about summer 2005. When it was put to the Appellant that he had decided to sell the house in the summer of 2005, he said that he got a valuation of the new house in the summer of 2005 but that at the time he hoped he would still be able to live in the house.

18. In response to questions from the Tribunal, the Appellant said amongst other matters as follows. Caroline never sold her house. The funding from Caroline's mother would only have been provided after the Appellant and Caroline married. They originally envisaged marrying much sooner. About 4 months prior to completion of the project, Caroline refused to move in or get married. The construction was financed by the substantial loan from Mr Reid, which ultimately was about £920,000, although Mr Reid did not provide this all at once. Some £50,000 of this sum provided by Mr Reid was repayment of a loan from the Appellant to Mr Reid. The Appellant and Mr Reid had a deed of trust, but it is not in the hearing bundle. The Appellant was still working at the time of the construction of the new house. He was living at Caroline's house during the interim period of construction before he moved into the new house.

19. The witness statement of Mr Reid stated amongst other matters as follows.

20. Mr Reid has been a close friend of the Appellant since both were in their 20s. The Appellant consulted him when thinking of purchasing Moles House. In early 2003, the Appellant approached Mr Reid to ask him if he could borrow some money to buy Moles House. Mr Reid and the Appellant have often helped each other in a financial way. The Appellant lent Mr Reid some money to aid him in setting up a jewellery business. Mr Reid was only too happy to help the Appellant and Caroline and arranged a bank loan with his bank, using the freehold of his jewellery shop as collateral. The Appellant had explained that the money would only be used as a bridging loan until Caroline sold her house. Mr Reid's lawyer advised that it would be prudent for the Appellant and Mr Reid to sign a contract in case they fell out or one of them died.

21. The Appellant subsequently asked Mr Reid to extend the loan to enable him to rebuild the house completely. The plan was still to pay Mr Reid back once Caroline's house was sold and they had received a financial gift from her parents. Mr Reid arranged this.

22. In 2005 it was apparent that the build was getting on top of the Appellant and causing rifts in his relationship with Caroline. Mr Reid's accountant was becoming concerned that the loan would not be repaid if the Appellant and Caroline split up. Mr Reid voiced his concerns to the Appellant about the mounting debt and his floundering relationship. In order to complete the property as quickly as possible and keep on top of expenditures, the Appellant asked Mr Reid to assist, which included using Mr Reid's secretary for the administrative side of the project. It became the plan to sell the property to recoup some of the Appellant's losses and pay back the loan. Mr Reid was paid a small fee by the Appellant to cover some of the overheads he had incurred. Upon the sale of Moles House, Mr Reid's bank loan was repaid in full and he was given a fee for his additional work.

23. In his oral evidence, Mr Reid said amongst other matters as follows. Mr Reid initially provided the Appellant with £300,000, of which £50,000 was repayment of a loan from the Appellant. This was to cover costs of refurbishment as well as the deposit. He had a deed of trust with the Appellant, in case they fell out or one of them died. The Appellant was ultimately to pay all the interest on the loan that Mr Reid took out. The Appellant did not start the building work until he had had the property for a while. Mr Reid had an account on which the Appellant was a joint signatory. Mr Reid had no interest in the property other than that the Appellant ultimately paid him a £50,000 fee that was agreed at the very end because Mr Reid's accountant advised that this was only fair. Mr Reid was very aware of the problems that the Appellant was having.

24. The witness statement of Mr Wood described the evidence that he received and considered during the enquiry into the Appellant's tax return, and the conclusion that he reached. He now agreed with the HMRC review decision. He considered that the Appellant was negligent in the completion of his tax return. In oral evidence, Mr Wood again gave further details of these matters.

25. Paragraphs 18 and 19 of the witness statement of Mr Wood mentioned two other properties that had been purchased and sold by the Appellant, which are referred to below as "Inglethorp Street" and "West Lodge" respectively. Mr Wood's witness statement said that the Appellant and Mr Reid had informed him that these two properties were both beneficially owned by Mr Reid under a bare trust.

26. In cross examination, Mr Wood was asked whether he would expect someone to keep receipts of building costs in respect of building their own private residence. Mr Wood responded that he did not consider this to be such a case and that the Appellant should have consulted someone or have kept records of his own volition.

The submissions of the parties

27. The submissions on behalf of the Appellant at the 9 April 2013 hearing were as follows.

28. The Appellant purchased Moles House as his residence, with a view to living there long term with his girlfriend, and in the expectation of her mother subsequently

moving in. He was neither a property dealer nor a developer. It is accepted by HMRC that it was initially his residence. In anticipation of his marriage, the Appellant decided to improve the property and make it his dream house. When the building work started, costs escalated, and it was not possible to fund these and live in the house so that the property had to be sold. The Appellant did not own more than one property, so this is not a case where it is necessary to decide which of multiple properties was the main residence. If the Appellant only said for the first time at the hearing that he lived in the newly constructed house for a period, this was only because he had never been asked before. It was accepted that in this period, the Appellant would have been "camping" in the property, with only basic furniture. The property was developed to live in and not with a view to making a commercial profit. Section 224(3) TCGA therefore does not apply. There is no legal requirement to keep records of private bank or credit card accounts. It is accepted that the Appellant did not keep records. HMRC was able to obtain most of the relevant material from the banks on enquiry. There were some small items for which there was no evidence, however these were private items and not taxable. The Appellant sincerely believed that as the house was his private residence, he was not required to include its sale in his tax return.

29. The submissions on behalf of the HMRC at the 9 April 2013 hearing were as follows.

30. It is accepted by HMRC that Moles House One was the Appellant's only or main residence for a relevant period. However, Moles House Two was a different dwelling house, and the Appellant did not live in that at any time. The old house was completely demolished, and no materials from the original house were used in the construction of the new house. The new house had a very different size and layout to the original house.

31. In his oral evidence at the hearing, the Appellant now claims that he moved into Moles House Two in the period between the plumbing being put in and the sale. This claim was made by the Appellant for the first time at the hearing. No documentary evidence has been provided of this. Even if the Tribunal were to accept this claim, any occupation in this period was not of a quality to make it the Appellant's sole or main residence, or any residence at all. The Appellant's witness statement indicates that the Appellant realised in the summer of 2005 that it would not be possible to keep Moles House.

32. A dwelling house must be physically occupied by the individual at some time during their period of ownership in order for it to be their only or main residence and for the relief to apply. The intention to occupy a dwelling house as a home but having to sell it for reasons outside of their control and never doing so does not qualify the individual for relief. If the position were otherwise, ss 222(8) and 223(3) TCGA would be unnecessary. Reliance was placed on *Levene v Inland Revenue Commissioners* [1928] AC 217, 13 TC 486; *Fox v Stirk* [1970] 2 QB 463 and *Goodwin v Curtis* [1998] STC 475, 70 TC 478. The Appellant did not provide a capital gain computation when asked by Mr Wood to do so, so that Mr Wood had to compute the chargeable gain based on the evidence before him. The quantum of the

gain has not been disputed, and must be accepted in the absence of a computation from the Appellant.

33. As regards the penalty, the Appellant has been negligent. He either did not read the guidance notes or did not follow them. The guidance makes clear that it is necessary to live in a dwelling house for it to qualify. The maximum penalty that could be imposed under the legislation is the difference between the amount due under the incorrect tax return and the amount due under a correct tax return. A penalty of 50% of this amount has been imposed in accordance with HMRC policy.

Post-hearing directions and submissions

34. Following the main hearing on 9 April 2013, the Tribunal issued further directions in this case following a further brief hearing on 10 April 2013. These directions provided for the parties to file further written submissions on the following questions:

(1) whether the Appellant only stated for the first time at the hearing on 9 April 2013 that he had lived in Moles House for several months immediately prior to its sale in January 2006, and if so, the reasons why this was not stated earlier;

(2) the history of the evolution of the Appellant's intentions with respect to Moles House from the time of its initial purchase to the time of its disposal; and the arrangements between the Appellant and Mr Reid in respect of Moles House and in respect of the other properties ("Inglethorp Street" and "West Lodge") referred to in paragraphs 18 and 19 of the witness statement of Mr Wood; and

(3) the interpretation and application of s 222(1) TCGA in circumstances where a dwelling-house is demolished in order for a new dwelling house to be immediately erected in the same place, and any difference between this situation and the situation where an existing dwelling-house is fundamentally remodelled and renovated.

35. After the further written submissions of the parties were filed, a supplementary hearing was held on 13 September 2013 at which final oral submissions were presented.

36. The supplementary submissions of the Appellant were as follows.

37. The Appellant has always stated that he lived at Moles House. He was never previously asked the question "Did you live at Moles House Two". It is HMRC who has referred to Moles House as two different properties.

38. The Appellant purchased Moles House with the intention of living there. Mr Reid acted as financial and building adviser and had no beneficial interest in the property.

39. Inglethorp Street and West Lodge were beneficially owned by Mr Reid and were bought with a view to develop for profit. The Appellant obtained a mortgage for these properties, since it was easier and cheaper for the Appellant to do so since he, unlike Mr Reid, did not have any existing mortgages at the time. West Lodge lost a considerable amount of money. Neither the Appellant nor Mr Reid intended to live in either of these properties and they were declared in Mr Reid's tax return without any claim for private residence relief.

40. The Appellant provided a letter from the estate agent who sold Moles House for the Appellant, who said that he did attend the property during the marketing period and that "I do recollect that there was a bed, a television and an occasional chair in one of the bedrooms, as well as toiletries in the bathroom", and that "I also seem to remember that you mentioned that as you were living at the property it would be easy to arrange viewings".

41. The supplementary submissions of HMRC were as follows.

42. HMRC agree that they never asked the Appellant specifically whether or not he ever lived in the newly constructed Moles House. On 18 March 2013, the Appellant's representative Mr Cheema stated, in response to a direct question from HMRC, that the Appellant did not live in the newly built property. The Appellant provided a witness statement in which he referred to staying with Caroline and Mr Reid during the construction of the new house, but in which he never referred to living in the new house. The letter from the estate agent (see paragraph 40 above) would indicate that the Appellant occupied Moles House Two at some stage before its disposal in January 2006.

43. The evidence indicates that prior to any occupation by the Appellant of Moles House Two, he realised that residing in the property was not going to become possible. There could therefore be no degree of permanence or expectation of continuity of occupation of Moles House Two that would amount to residence. While the letter from the estate agent indicates some level of occupation of Moles House Two after the decision to sell had been taken, it does not show occupation of the property as a residence prior to the decision to sell: occupation does not amount to residence unless a property is occupied in such a manner that it becomes a person's home. Reference was made to *Springthorpe v Revenue & Customs* [2010] UKFTT 582 (TC) and *Metcalfe v Revenue & Customs* [2010] UKFTT 495 (TC). Even if the Appellant could be said to have ever resided in Moles House Two, on the evidence, it was never his sole or primary residence.

44. The arrangements between the Appellant and Mr Reid are unusual. The unusual facts of this case support the HMRC contention that at no time did the newly built dwelling-house become the Appellant's residence and point towards the build and sale becoming an endeavour intended to realise a gain. HMRC can provide no further observations on Inglethorp Street and West Lodge, but note that the deed of trust has not been provided by the Appellant.

45. The difference between the present case and one where an existing house is fundamentally remodelled and renovated is that in the present case there were two houses, and in the latter type of case there would be only one house. Had Moles House One been renovated and remodelled, then the tax consequences may well have been different and private residence relief may have applied. However, the tax consequences must follow what the Appellant has done and not what he could have done. Reliance was placed on *Sansom v Peay* [1976] 1 WLR 1073, 52 TC 1.

The Tribunal's findings

46. The Tribunal has given careful consideration to the evidence. It finds that the facts of this case, as presented by the Appellant, are highly unusual.

47. The Appellant's case is that he bought Moles House in June 2003 for £715,000, and financed the purchase by taking out a mortgage of £536,000, with the balance of the purchase price plus additional funding for renovations being provided by Mr Reid by way of a loan to the Appellant. Overall, by the time that Moles House was sold, Mr Reid is said to have lent the Appellant about £920,000. Mr Reid is said to have obtained this amount to lend to the Appellant by taking out a loan himself, using his shop as security. It is said that Mr Reid was willing to do this as a favour to help out the Appellant, whom he had known for a very long time. However, it seems quite extraordinary that anyone would put their own shop (and thereby their livelihood) up as security for a loan of such magnitude for which they would be personally liable, merely in order to lend the money to a friend as a favour. Furthermore, Mr Reid is said to have been willing to lend this amount to the Appellant in circumstances where the Appellant's ability to repay the loan depended on his girlfriend selling her house and using the proceeds to pay Mr Reid, and depended also on the Appellant's girlfriend's parents making a gift to the Appellant and his girlfriend of some £300,000. On one view, there must have been at least some possibility in Mr Reid's mind that either or both of these events might not transpire.

48. Further unusual circumstances of this case include the fact that Mr Reid's name is on the planning documents submitted to the Council for the building of Moles House Two, the fact that Mr Reid was paid a £50,000 fee by the Appellant following the sale of Moles House Two in return for Mr Reid's administrative assistance in relation to the building project, and the fact that there were two other properties that had been bought in the Appellant's name but of which Mr Reid is said to have been the beneficial owner under a bare trust.

49. Nevertheless, the HMRC letter of 26 May 2010, giving reasons for the closure notice against which the Appellant now appeals, concluded that "some time around the end of April 2004 you made a decision to obtain further finance, apply for planning permission to demolish the existing property and rebuild a new property that would then be sold on completion to realise a gain", and that private residence relief therefore fell to be denied in respect of expenditure subsequent to the planning application, under s 224(3) TCGA. This decision therefore accepted that although the Appellant had acquired Moles House in June 2003, he only formed the intention to redevelop and sell it in April 2004.

50. The 20 August 2010 HMRC review letter did not expressly take any view on whether or not Moles House One was ever the Appellant's only or main residence. However, it concluded that Moles House One and Moles House Two were two separate houses, and that Moles House Two had never been the Appellant's only or main residence.

51. Nevertheless, paragraph 4(d) of the HMRC skeleton argument states expressly that it is accepted by HMRC that Moles House One *was* the Appellant's only or main residence. The HMRC review decision, and the HMRC case in this appeal, no longer relied on s 224(3) TCGA. In the hearing of this appeal, HMRC did not seek to dispute that the Appellant would succeed in this appeal if Moles House One and Moles House Two were the same dwelling house for purposes of s 222(1) TCGA. The HMRC case, as ultimately presented in this appeal, is the position taken in the 20 August 2010 HMRC review letter.

52. The Tribunal therefore proceeds to determine this appeal on the basis that Moles House One was for a period the Appellant's only or main residence, and that his intention to sell it was formed only some time after it had been his residence.

53. The first question that the Tribunal is called upon to determine is therefore whether Moles House One and Moles House Two were or were not the same "dwelling house" for purposes of s 222(1) TCGA.

54. HMRC advance a number of arguments as to why they should be considered two different houses.

55. First, HMRC argue that they were very different in size and layout (see paragraph 17 above), and substantially different in appearance and value. The Tribunal is not persuaded by that argument, for the simple reason that HMRC accepted that if an existing dwelling house was fundamentally remodelled and renovated, it could still be the same dwelling house. Following fundamental remodelling and renovation, a dwelling house may well have a very different size and layout to what it had before, as well as a very difference appearance and value. This cannot therefore be determinative.

56. Secondly, HMRC argue that Moles House was completely demolished, and none of the materials from Moles House One were used in the construction in Moles House Two.

57. In its post-hearing directions, the Tribunal requested the parties to refer the Tribunal to any case law dealing with the application of s 222(1) TCGA in circumstances where a dwelling house is demolished in order for a new dwelling house to be immediately erected in the same place. Neither party was able to refer to any. The Tribunal notes that the decision of the Court of Appeal in *Ellis & Sons Amalgamated Properties, Limited v Sisman* [1948] 1 KB 653 might be said to have some similarities. However, this was not a tax case and is not directly on point, and given that neither of the parties has addressed this case in argument, the Tribunal does not take it into account.

58. The Tribunal accepts that, as a matter of ordinary language, it would be said that in such circumstances, the existing house had ceased to exist, and that an entirely new house had been erected in its place. Thus, HMRC point to the fact that even the Appellant himself in his own witness statement refers to "the new house".

59. There are, however, a number of arguments that might be made contrary to the relevant provisions of the TCGA being given this interpretation.

60. The Appellant's evidence, which the Tribunal does find to be plausible on this point, was that in order to create a house of a certain size and layout, it was cheaper to demolish the existing house and to rebuild it from scratch than to achieve the same end result by remodelling and renovating the existing house. It is arguable that there is no reason for ascribing different tax consequences to the end result, merely because different means were employed to achieve that same end result.

61. It is also arguable that there may be difficulties in distinguishing between the two cases in practice. For instance, it may be difficult to determine whether a house has been remodelled and renovated, or whether one house has been demolished and a new one constructed in its place, if a house is razed to its foundations but the existing foundations are used in the reconstruction, or if some of the materials from the existing house are used in the reconstruction.

62. Furthermore, it might arguably be unjust to apply a different tax treatment in cases where the demolition of the original house is not due to the owner's choice, such as where the original house is completely destroyed by fire.

63. Thirdly, HMRC rely on the case of *Sansom v Peay* [1976] 1 WLR 1073; 52 TC 1, in which it was said:

> I am permitted to take into consideration one factor which must have been present to the mind of Parliament when enacting section 29. The general scheme of section 29 is to exempt from liability to capital gains tax the proceeds of sale of a person's home. That was the broad conception. The justification for the exemption is that when a person sells his home he frequently needs to acquire a new home elsewhere. The evil of inflation was evident even in 1965. It must have occurred to the legislature that when a person sells his home to buy another one, he may well make a profit on the sale of one home and lose that profit, in effect, when he buys his new home at the new, inflated price. It would not therefore be surprising if Parliament formed the conclusion that, in such circumstances, it would be right to exempt the profit on the sale of the first home from the incidence of capital gains tax so that there is enough money to buy the new home.

64. Relying on this quote, HMRC argue that the Appellant has not disposed of his home in order to fund the purchase of a new home. However, the Tribunal finds that, regardless of what might have been said in *Sansom v Peay* about the justification for private residence relief, it is not a requirement of the legislation that the proceeds of sale be used to fund the purchase of a new home.

65. Relying on this quote, HMRC also argue that the increase in the value of the property in this case was due to the construction works rather than the effect of inflation. The difficulty with this argument is that the same could be said in circumstances where an existing dwelling house is fundamentally remodelled and renovated, yet HMRC accept that there could be a single dwelling house in such circumstances.

66. Ultimately, the Tribunal is split on its opinion in relation to this question.

67. The Tribunal Judge is of the view that despite the considerations above, the words of the relevant provisions of the TCGA, read in the context of the statute as a whole, must be given their plain meaning unless this would lead to "an inconsistency, or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification, and to justify the court in putting on them some other signification, which, though less proper, is one which the court thinks the words will bear" (*River Wear Comrs v Adamson* (1877) 2 App Cas 743, 764–765 Lord Blackburn, quoted for instance in *Yarl's Wood Immigration Ltd v Bedfordshire Police Authority* [2009] EWCA Civ 1110 at [68]). The Tribunal Judge considers that the ordinary meaning of the words "dwelling house" refer to the building itself (and may include, as a secondary matter, the land upon which it is situated), rather than refer to the land (and, as a secondary matter, any building that may be situated upon it). If one house is completely demolished and a new house erected in the same location, then the new house is not the same "dwelling house" as the one that previously stood on that site. The considerations referred to above are not sufficient to justify a conclusion that the intention could not have been to use the words in their ordinary meaning. The Tribunal Judge therefore concludes that Moles House Two was not the same house as Moles House One.

68. On the other hand, the Tribunal Member is of the view that that the considerations above, especially those at paragraphs 59-62 above, lead to the conclusion that where a house is demolished and then reconstructed in order to achieve the same end as extending and remodelling the existing house, only by more cost effective means, the new construction should be regarded as the same dwelling house as that which originally existed.

69. As the Tribunal is not unanimous, the Tribunal Judge has the casting vote pursuant to article 8 of the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008. The Tribunal accordingly finds, by majority, that Moles House Two was not the same dwelling house as Moles House One.

70. It follows that the second question that the Tribunal must determine in this appeal is whether the Appellant occupied Moles House Two as his main or principal residence prior to its sale. The Tribunal's decision on this second question is unanimous.

71. The burden of proof is on the Appellant to establish on a balance of probabilities that he did occupy Moles House Two as his main or principal residence.

72. The Appellant's witness statement stated as follows:

> We started work on the interior of the house in the beginning of 2005. It was at this stage that I started to realise that the cost of the build was going to be more than I thought. ... Although we still had the money to continue with the build it was becoming apparent that we would not be able to afford to complete the house as well as pay the ever increasing interest. ... Caroline and I discussed the option of finishing the property and then selling it to release us from the huge financial commitment it was becoming. During the summer of 2005 I instructed an Estate Agent ... to value the property as if it was finished. They estimated between £1,450,000 and £1,500,000. At that figure it would enable us to cover the initial purchase price and all the rebuild costs.

73. The Appellant sought to clarify in his oral evidence that when the agent was asked to value the property, a decision had not yet been taken to sell it. The Tribunal on its consideration of the evidence as a whole does not accept this. The HMRC case was that by the time of any occupation of Moles House Two by the Appellant, he had already decided to sell it, and the Appellant was cross-examined about this. It seems clear to the Tribunal from the wording of the witness statement that even before the agent was called to value the property, the Appellant realised that he would not be able to keep it and live in it himself. The Appellant has not given precise indications of the time of the valuation and the time that he said that he occupied Moles House Two. He says that the valuation occurred in the summer of 2005. In his oral evidence, the Appellant first said that he commenced occupation of Moles House Two 4-5 months before it was sold (which would have been late summer or autumn of 2005), and then later he said that it was in the summer of 2005. The Tribunal finds that the Appellant has not established on a balance of probability that he occupied Moles House Two at any time prior to his decision to sell it.

74. Furthermore, in oral argument, Mr Cheema accepted on behalf of the Appellant that the Appellant would have been "camping" in Moles House Two, with only basic furniture.

75. HMRC rely on *Levene v Inland Revenue Commissioners* [1928] AC 217 for the proposition that "residence" implies a degree of permanence, and is concerned with something that will go on for a considerable time. HMRC also rely on *Goodwin v Curtis* [1998] STC 475 as an example of a case where it was found that a property was not used as a residence but as "mere temporary accommodation for a period that the taxpayer hoped would be brief and which in fact lasted some 32 days between completion of the sale to him and the completion of the sale by him".

76. The Tribunal finds that the Appellant has not discharged the burden of proving on a balance of probabilities that Moles House Two was ever his "residence". The Tribunal considers that "camping" at Moles House Two for an unspecified period in the months before its sale, at a time before building works had been completed, in the knowledge that the property was to be sold upon completion, is not enough to amount to "residence" for purposes of the applicable provisions of the TCGA.

77. The Tribunal therefore finds that the Appellant has not established that he is entitled to private residence relief in relation to the sale of Moles House Two.

78. The Appellant has not specifically sought to challenge the amount of capital gains tax to which he is liable, in the event that he is not entitled to private residence relief. The Tribunal accepts the HMRC argument in this case that HMRC's computation of the quantum of the gain must be accepted in the absence of an alternative computation from the Appellant.

79. As to the appeal against the penalty, the Appellant's main argument is that he genuinely did not consider that he was required to return the capital gain in the circumstances. However, even if this were accepted to be the case, the Tribunal is not persuaded that ignorance of his obligations as a taxpayer is of itself a reason for reducing the penalty. The Tribunal is not persuaded by the Appellant that he has established any ground for reducing the penalty imposed.

Conclusion

80. For the reasons above, this appeal is dismissed in its entirety.

81. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 30 October 2013