[2017] UKFTT 860 (TC)

TC06255

Appeal number: TC/2015/02566
TC/2016/00625

CAPITAL GAINS TAX – Appeal against assessment and penalty – Whether expenditure incurred – Whether expenditure for enhancing the value of or defending title to or rights over the asset (s 38 TCGA)

FIRST-TIER TRIBUNAL
TAX CHAMBER

ZUNAIRA ASLAM **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR MOHAMMED FAROOQ

Sitting in public at Bradford on 9 August 2017

The Appellant in person

Miss J Bartup for the Respondents

DECISION

Introduction

1. The Appellant appeals against notices of assessment dated 19 November 2013 issued under s 29 of the Taxes Management Act 1970 ("TMA") in respect of tax years 2005-06 and 2006-07, and a penalty determination issued on 13 November 2013 under s 7(8) TMA.

2. The two assessments are for chargeable gains made by the Appellant on properties disposed of by her in the two tax years concerned. The penalty is for her failure to notify HMRC of her chargeability to tax as a result of those chargeable gains, and is calculated by reference to the amount of the tax to which she was assessed by the assessments.

Background facts

3. The following background facts have not been disputed, and in any event, on the basis of the material before it the Tribunal is satisfied that the following background facts have been established.

4. In tax year 2005-06, the Appellant sold six properties that were owned solely be her. These are referred to below respectively as Maud, Rhys, Argill, Fairfield Summerfield and Westminster 1.

5. In tax year 2006-07, the Appellant sold five properties that were owned solely be her. These are referred to below respectively as Westminster 2, Brookfield 1, Regent, Sandringham and Brookfield 2.

6. Prior to sale, each of these properties was let by the Appellant.

7. Following the receipt of information from the Land Registry, HMRC found that the Appellant was not in self-assessment and had not made tax returns to HMRC.

8. On 8 August 2012, HMRC wrote to the Appellant to advise her that they were carrying out a check of her tax position. That letter requested the Appellant to provide a schedule of all UK and overseas properties owned by her either solely or jointly from 6 April 2001 to 5 April 2011, together with other information including purchase date and price, and sale date and price.

9. On 26 November 2012, HMRC issued an information notice to the Appellant requesting this information. The Appellant's agent responded to this in a letter dated 14 January 2013, which provided certain information, and there followed further communications between the parties in which further information was provided to HMRC on behalf of the Appellant.

10. One of these further communications was a letter from the Appellant's accountants dated 27 February 2013, which stated that all original invoices had been

misplaced, but that scanned copies of the invoices were kept by the Appellant's husband who was managing all the properties.

11. On 3 June 2013, HMRC proposed a meeting with the Appellant, and suggested that it would be useful if her husband also attended. On 2 September 2013, Mr Aslam agreed to a meeting on 18 September 2013, but said that the Appellant might not be able to attend and that he was the person who looked after all the business records and looked after the rental properties. On 18 September 2013, this meeting went ahead. Mr Aslam and the Appellant's accountant attended, but the Appellant herself was not there.

12. On 24 September 2013, HMRC sent to the Appellant's accountant notes of the meeting which the accountant was invited to correct. The letter set out the HMRC position that there had been an understatement of capital gains tax for 2005-06 and 2006-07, and stated that HMRC intended to issue assessments to collect the unpaid capital gains tax as well as penalties for the deliberate failure to notify HMRC of the disposal of the properties. The letter invited the submission of any further information.

13. No response having been received to the 24 September 2013 letter, on 13 November 2013 HMRC sent letters to the Appellant's accountant and the Appellant, noting that no further information had been provided on behalf of the Appellant, and setting out details of the assessments they proposed to raise and the penalties they proposed to impose.

14. On 14 January 2013, DHC Accountants provided certain information to HMRC. There followed further communications between HMRC and DHC Accountants.

15. Under cover of letters dated 19 November 2013 to the Appellant and her agent, HMRC issued notices of assessment and the penalty determination. The notices of assessment were dated 19 November 2013, and the penalty assessment was dated 13 November 2013.

16. On 6 December 2013, HMRC were contacted by a new agent acting on behalf of the Appellant, Rehman Michael & Co, who wished to make representations on behalf of the Appellant in relation to the matter. This was treated as an appeal, and the closure was halted. An exchange of communications between the new agent and HMRC ensued.

17. On 26 February 2014, HMRC issued an additional information notice to the Appellant.

18. On 14 April 2014, HMRC issued the Appellant with a £300 penalty for failure to comply with the information notice.

19. In a letter to the Appellant dated 15 May 2014, HMRC noted that the parties appeared to have reached an impasse in the matter, and set out in detail the HMRC position. Issued with that letter were notices of assessment for the two tax years in question dated 15 May 2014, which were in identical amounts to the assessments

issued on 19 November 2013. HMRC have been unable to explain why these duplicate assessments were issued. There was also issued a further penalty determination dated 15 May 2014, which was in an amount identical to the earlier penalty determination dated 13 November 2013.

20. In a pre-action letter dated 15 January 2015, HMRC threatened the Appellant with County Court proceedings if she did not pay the overdue tax.

21. In a notice of appeal dated 30 March 2015, the Appellant purported to appeal against the 15 January 2015 letter (First-tier Tribunal appeal no TC/2015/02566).

22. In a letter to HMRC dated 31 July 2015, the Appellant's new agent (Goldsmiths) stated that the Appellant had "agreed to withdraw her appeal" and wished to "enter negotiations of a payment plan". The letter stated that Bradford County Court had also been advised of the decision.

23. In an application notice dated 31 July 2015, in proceedings brought by HMRC against the Appellant in the Bradford County Court, the Appellant stated that she "would now like to withdraw her appeal against HMRC because she would now like to make arrangements in to making payments against an agreed payment schedule".

24. A letter from HMCTS to HMRC dated 18 August 2015 advised HMRC that the Appellant had withdrawn appeal no TC/2015/02566.

25. On 5 January 2016, Bradford County Court gave judgment in favour of HMRC against the Appellant and one other defendant in the County Court proceedings referred to above. The judgment notes that the Appellant did not attend the hearing but that the Court had taken into account a letter from Goldsmiths Accountants dated 31 July 2015.

26. In an undated letter to HMRC, received by HMRC on 4 February 2016, the Appellant stated that she had withdrawn her appeal at the request of HMRC on the basis that they would negotiate a settlement, and that the Appellant felt tricked because HMRC would not negotiate.

27. In a notice of appeal dated 20 January 2016, the Appellant again purported to appeal against the 15 January 2015 letter (First-tier Tribunal appeal no TC/2016/00625).

28. In a decision released to the parties on 18 July 2016, the Tribunal gave the Appellant permission to reinstate appeal no TC/2015/02566

Applicable legislation

29. Section 38(1) of the Taxation of Chargeable Gains Act 1992 ("TCGA") provides:

> (1) Except as otherwise expressly provided, the sums allowable as a deduction from the consideration in the computation of the gain

accruing to a person on the disposal of an asset shall be restricted to—

(a) the amount or value of the consideration, in money or money's worth, given by him or on his behalf wholly and exclusively for the acquisition of the asset, together with the incidental costs to him of the acquisition or, if the asset was not acquired by him, any expenditure wholly and exclusively incurred by him in providing the asset,

(b) the amount of any expenditure wholly and exclusively incurred on the asset by him or on his behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset,

(c) the incidental costs to him of making the disposal.

30. Section 39(1) TCGA provided:

(1) There shall be excluded from the sums allowable under section 38 as a deduction in the computation of the gain any expenditure allowable as a deduction in computing the profits or losses of a trade, profession or vocation for the purposes of income tax or allowable as a deduction in computing any other income or profits or gains or losses for the purposes of the Income Tax Acts and any expenditure which, although not so allowable as a deduction in computing any losses, would be so allowable but for an insufficiency of income or profits or gains; and this subsection applies irrespective of whether effect is or would be given to the deduction in computing the amount of tax chargeable or by discharge or repayment of tax or in any other way.

31. Section 7(1) TMA relevantly provided:

(1) Every person who—

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

(b) has not received a notice under section 8 of this Act requiring a return for that year of his total income and chargeable gains,

shall, subject to subsection (3) below, within six months from the end of that year, give notice to an officer of the Board that he is so chargeable.

(2) In the case of [persons who are] chargeable as mentioned in subsection (1) above as [the relevant trustees] of a settlement, that subsection shall have effect as if the reference to a notice under section 8 of this Act were a reference to a notice under section 8A of this Act.

…

(8) If any person, for any year of assessment, fails to comply with subsection (1) above, he shall be liable to a penalty not exceeding the amount of the tax—

(a) in which he is assessed under section 9 or 29 of this Act in respect of that year, and

(b) which is not paid on or before the 31st January next following that year.

32. Section 36(1) TMA provided that an assessment for purposes of making good to the Crown a loss of capital gains tax attributable to his or her fraudulent or negligent conduct or the fraudulent or negligent conduct of a person acting on his or her behalf could be made at any time within 20 years after the 31st January next following the year of assessment to which it relates.

33. In appeals against best judgment assessments, the burden of proof is on the taxpayer to establish the correct amount of tax due. Such HMRC assessments "are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right": compare *Pegasus Birds Ltd v Customs and Excise* [2004] EWCA Civ 1015 at [14], quoting *Bi-Flex Caribbean Ltd v Board of Inland Revenue* (1990) 63 TC 515, 522-3 PC, per Lord Lowry.

The Appellant's witness evidence

34. In her witness statement, the Appellant said as follows.

35. Since 2008, she has been living in Pakistan. She never had a meeting with HMRC, or instructed anyone to deal on her behalf with HMRC. She has not supplied any invoices or paperwork to HMRC. No self-assessment was sent to her as agreed by HMRC. Purchases dates and prices, and sale dates and prices, were given for each of the properties. No capital enhancement has been allowed by HMRC for work done on the properties, despite the fact that a lot of work was done on them. £100,000 was spent on litigation in relation to Westminster 1, which should be allowed as a capital expense, as it is not a revenue expense as claimed by HMRC. The Appellant has not been able to locate any of the invoices, but as the work was undertaken over 6 years ago, she is not required to retain invoices. If HMRC allowed the amounts spent on capital enhancements and litigation, there would be zero tax due.

36. In her oral evidence in chief, the Appellant said as follows.

37. At the time that it was rented, the police raided Westminster 1 as a result of a complaint made by neighbours. It was discovered that cannabis was being grown there. The police arrested one person at the property. Two other tenants were away at the time. The Appellant then re-let the property. One of those other tenants subsequently demanded possession of the property, claiming to be an antique dealer and claiming that the Appellant had taken £400,000 of the tenant's antique furniture. The Appellant's accountant said that the matter was a capital expense, and that the Appellant should sell one of the properties to pay the amount being claimed. The

tenant sued the Appellant for £400,000, and the case went to court. She sat outside the courtroom, and was told afterwards that she had to pay £60,000. She tried to sue her solicitors for negligence, but they went bankrupt. He husband used to deal with all the properties and she has limited knowledge about them. She acted on the advice of her accountants. She never had meetings with HMRC or instructed anyone to deal on her behalf with HMRC. She did have a meeting with an accountant called Zaheed Khan and asked him to deal on her behalf with HMRC. The intention when buying the properties was to buy and sell them, to trade in properties. She was not sure if the intention was to hold them long term.

38. In cross-examination, the Appellant said as follows.

39. She accepted that she sold the properties to which this appeal relates, and that she personally signed the paperwork. When asked if she notified HMRC about the sale, she said that her husband dealt with everything and she was just asked to sign papers. She asked her husband to contact HMRC and he said that he was dealing with it. She never saw a self-assessment return, but was content that her husband was dealing with everything. Her husband managed the letting of the properties, and she did not see half of what was happening and did not see all the paperwork. She only went to accountants when HMRC commenced an enquiry. She was aware that work was being done on the properties. The work was paid for by cash in hand. The Appellant would personally withdraw the cash and then give it to her husband, who made the payments. The properties were not insured so no insurance payments were received. She saw a few of the original invoices, but she trusted her husband to deal with everything. When shown invoices in the hearing bundle, she was unable to positively identify them. She was unable to give further details of a County Court case brought against her and one other defendant, in which judgment was given in January 2016.

The Appellant's submissions

40. The Appellant's submissions are sufficiently set out above.

The HMRC submissions

41. HMRC submitted as follows.

42. In relation to the appeal against the assessments, the onus is on the Appellant to establish that the amount of the assessment is excessive, otherwise the HMRC figures stand good. For the penalties the onus is on HMRC to show that an offence has occurred. The standard of proof is the balance of probability.

43. HMRC acknowledge that the initial 13 November 2013 penalty determination was issued prior to the notices of assessment, but submit that even if this cast any doubt on the validity of that penalty determination, a further penalty determination was issued on 15 May 2014.

44. HMRC therefore request the Tribunal to dismiss the appeal, and to affirm the assessments and penalty determination in the amounts determined by HMRC.

The Tribunal's findings

45. HMRC submit that the Tribunal should not accept the invoices submitted from three contractors said to have undertaken work on various of the properties, on the ground that these invoices are not genuine. The three contractors are BW Property Maintenance & Building Ltd, Irvine Developments and Our Builder (or Our Builders).

46. As to the invoices from BW Property Maintenance & Building Ltd, HMRC argue as follows. The invoices bear dates in 2003 or 2005, and bear invoice numbers between BW359 and BW569. The invoices state the company's registration number. However, evidence has been submitted by HMRC showing that a company of this name and with this company registration number was incorporated only on 23 October 2009. Furthermore, the name of this company is stated three times on the invoices, and in two places the word "Maintenance" in its name is misspelled as "Maintainence". Additionally, these invoices give the company's bank account as a Santander account, yet it was only in 2010 that Santander was established as a bank in the UK. HMRC have further put into evidence an e-mail dated 12 March 2013 from a firm of accountants, who confirm that the company was a client of theirs. The e-mail confirms that the company was incorporated only on 23 October 2009, and states that the company's invoice numbers 300 to 415 were from the year to 31 October 2011, and did not bear the prefix "BW" in the invoice numbers. The e-mail adds that the company was not VAT registered. HMRC note that the invoices from this company from the period March to July 2005 alone would have taken the company over the threshold for VAT registration.

47. The Tribunal is satisfied on the evidence before it that the BW Property Maintenance & Building Ltd invoices are on a balance of probability not genuine. This is because the invoices, which are dated 2003 and 2005, bear a company registration number of a company that was incorporated only in 2009. Even if it is possible that the business traded for several years before it was incorporated as a company, and even if it wrongly used the "Ltd" suffix in its name even before it was incorporated, those responsible for the business could not possibly have known years in advance what the company registration number would be when the company came to be incorporated in 2009.

48. The Tribunal finds the reason given in the previous paragraph to be sufficient reason for the Tribunal's conclusion that these invoices are not genuine. It is therefore unnecessary to consider the other points raised by HMRC in relation to the invoices from this company. However, the Tribunal would add for completeness that the other points made by HMRC referred to in paragraph 46 above all strengthen the conclusion reached, whether or not any of those additional points individually would have been sufficient to sustain that conclusion independently. Based on the evidence cumulatively, the Tribunal is entirely satisfied that the invoices are not genuine.

49. As to the invoices from Irvine Developments, HMRC argue as follows. HMRC have produced what they say is a genuine invoice from this trader. The invoice has a very different layout to the invoice from this trader produced by the Appellant. The invoice said by HMRC to be genuine, and one of the invoices produced by the Appellant, both bear invoice no 26, so that they cannot both be genuine. The invoice said by HMRC to be genuine gives the address of the company with street number 19. The invoices produced by the Appellant bear the same address, except that the street number is given as 29. HMRC say that one of their inspectors contacted the business and was told that the business had never traded from no 29.

50. As to the invoices from Our Builder, HMRC argue as follows. An internet search shows that the logo appearing on the invoices (bearing the name "Our Builders") actually belongs to a company in Glasgow, while the invoices produced by the Appellant bear an address in Bradford. Furthermore, on the invoices produced by the Appellant, the name of the business is given at the top as "our builders" (in the plural) and at the bottom as "Our Builder" (in the singular).

51. The Tribunal considers that the points made in the previous two paragraphs might not of themselves be sufficient to conclude that the invoices from those two businesses are not genuine, if there was no other reason to doubt the genuineness of the invoices. As to paragraph 49 above, there is no witness statement or other evidence to establish that the invoice identified by HMRC as the genuine invoice is indeed genuine, or of the contact made by the HMRC inspector with the business, or of the business's address. As to paragraph 50 above, it is possible that a small business might use the same logo as another unrelated business (whether or not it is in fact entitled to do so), and that its invoices may include spelling mistakes.

52. However, there are other reasons for doubt. The Appellant has not produced originals of the invoices. The documents produced by the Appellant are said to be scanned copies made by the Appellant's husband. The Appellant indicated in her evidence that she herself did not see all of the originals. According to the HMRC minutes of the 18 September 2013 meeting, which the Appellant's accountants did not seek to correct despite having been given an opportunity to do so, the Appellant's husband said at that meeting that he did not scan the invoices himself, and was not sure who did. Furthermore, the invoices produced by the Appellant purportedly from BW Property Maintenance & Building Ltd are not genuine.

53. The burden is on the Appellant to establish that the expenses claimed by her as capital expenditure were indeed incurred. Having regard to all of the matters above, the Tribunal is not satisfied that she has established on a balance of probability that the invoices from Irvine Developments and Our Builders are genuine, and that the expenses indicated in these invoices were incurred in relation to the properties to which this appeal relates, or at all.

54. The Tribunal also accepts the HMRC argument that the documents from Scorpion Metal Fabrications Ltd are quotations and not invoices, and the Tribunal is not satisfied that this expenditure was incurred.

55. As to the Appellant's claim for legal fees and damages in relation to civil litigation, the Tribunal is also not persuaded that sufficient evidence of these has been provided to establish on a balance of probability that they were actually incurred. The Appellant has not for instance provided a copy of the County Court judgment in question, nor evidence of the actual payment of the legal fees and damages.

56. However, more importantly, insufficient evidence has been provided to establish that these legal fees and damages can qualify as capital expenditure on the property in question. According to the Appellant, this claimed expenditure related to a civil claim brought against the Appellant by a tenant or former tenant, which resulted in the County Court giving a judgment requiring the Appellant to pay damages to the tenant. The Appellant said that the claim was for loss of the tenant's personal property said to have been left in the premises. Even if these legal fees and damages could qualify as an expense in relation to the rental income (a matter that the Tribunal need not decide), the Tribunal is not persuaded that there is any legal basis for treating the legal fees and damages as an expense for capital gains tax purposes within the scope of s 38 TCGA.

57. The Tribunal has considered the points in dispute between HMRC and the Appellant. The Tribunal finds that the Appellant has not shown that the assessments are wrong, much less shown positively what corrections should be made in order to make the assessments right or more nearly right (see paragraph 33 above).

58. The Appellant's challenge to the penalty was based primarily on the challenge to the assessments given that the penalty is calculated as a percentage of the amount of the assessments. Had the assessments fallen away, so would have the penalties. However, as the appeal against the assessments has been rejected, the primary challenge to the penalty must also fail.

59. HMRC has given 70% abatement of the penalty (out of a maximum possible abatement of 100%), meaning that the penalty is only 30% of the tax assessed. The Tribunal is satisfied that the penalty is appropriate in all of the circumstances.

60. The Appellant claims that she left everything to her husband and acted on the advice of her accountant. This, even if true, is immaterial to her liability to capital gains tax, and would be relevant only to penalty. It is well established that leaving everything to be dealt with by another person, even a spouse, is not a reasonable excuse for non-payment of tax. Acting on the advice of an accountant is generally not a reasonable excuse. That latter claim would in any event relate only to the decision to claim the legal fees and damages in calculating capital gains tax liability. On the material before it, the Tribunal finds that the Appellant has not established that a reasonable taxpayer, acting diligently, would in all the circumstances have considered that the legal fees and damages could be so claimed. Furthermore, as has been noted, the Tribunal is also not persuaded on the basis of the material before it that it has been established that the legal fees and damages were in fact paid.

Conclusion

61. For the reasons above, this appeal is dismissed.

62. 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: 4 December 2017