[2019] UKFTT 346 (TC)

TC07174

CAPITAL GAINS TAX-liability on sale of house-consideration received-penalties for late payment-penalties for late filing of personal tax returns-appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2014/04399

BETWEEN

JEREMY SAGE **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
NORAH CLARKE

Sitting in public at Cardiff on 14 May 2019

The Appellant in person

Mr Darren Bradley, Officer HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This case concerns the imposition of capital gains tax ("**CGT**") on the consideration received by the appellant for the sale of his share of the property at Clytha House, 10 Clytha Park Road, Newport (the "**Property**"). The amount of CGT is £5,528.16.

2. It also concerns a late payment penalty for failure to pay that CGT on time, and, separately, penalties for the late filing of personal tax returns (the "**penalties**")

SUMMARY OF THE LAW

3. The CGT law relevant to this appeal can be found in the Taxation of Chargeable Gains Act 1992 ("**TCGA**"). CGT is charged on chargeable gains accruing to a person who disposes of a capital asset. In calculating that gain, the starting point is to find the consideration for that disposal. The CGT legislation does not define consideration but case law shows that it is money or money's worth. Where the consideration is not wholly in money, then a monetary value of the non-monetary consideration must be found.

4. The gain is calculated by reference to the consideration received by the taxpayer. That is not expressly set out in the legislation but can be derived, for example, from references to receipt in sections 22 and 23 TCGA. There are also provisions in that Act (see section 48) which apply where a taxpayer has a right to receive consideration which is subject to postponement of that right. Finally, although reasonably clear from the principles set out above regarding the definition of consideration, section 26(3) TCGA expressly provide that where an asset is acquired subject to a secured liability, then any such liability which is assumed by the buyer is [additional] consideration received by the seller for the disposal of that asset.

5. For the reasons which will become apparent hereafter, the law relating to the penalties is largely irrelevant to the decision which we have to make today.

THE PENALTIES

6. The appellant's liability to a late payment penalty depends upon our decision, today, concerning his liability to CGT.

7. This appeal has been going on a long time, and the hearing was focused on the disposal of the Property. HMRC (and this is no criticism of them) had not come to the hearing prepared to deal with the late filing penalties. However, when it became apparent to Mr Bradley that for a number of the years for which late filing penalties had been visited on the appellant, the appellant had been in prison, he very fairly indicated that HMRC were prepared to accept that the appellant had a reasonable excuse for failing to file timely returns on which those penalties were based. The tax returns which Mr Bradley has now conceded that the appellant has a reasonable excuse for failing to submit on time, are those for the tax years 2010/2011, 2011/2012, and 2012/2013.

8. As regards the late filing penalties for the tax years 2013/2014, 2014/2015, and 2015/2016 we will give directions regarding Mr Sage's appeals against those penalties.

9. There is one procedural point with which we must deal concerning the penalties. It arises as a result of a direction given by Judge Cannan in which he directed the appellant to provide an outline of his case on or before 7 May 2019 or his appeal "would" be struck out. The appellant produced an outline of his case in relation to the CGT issue, but not in respect of the penalties.

10. However, at the hearing we were provided with a copy of the appellant's notice of appeal which clearly set out his grounds for opposing the penalties. And at the hearing, as mentioned above, Officer Bradley was content to allow the appellant to make submissions as to why he should not be liable for the late filing penalties. He had come to the hearing with the intention of parking the issues relating to the penalties, and dealing with them at a later date. Officer Bradley took no point as to whether or not we had jurisdiction in respect of the appellant's appeal against the late filing penalties. But of course it is not for Officer Bradley to confer jurisdiction upon us.

11. Notwithstanding Judge Cannan's direction that the appellant's appeal would be automatically struck out if he failed to provide an outline of his case on or before 7 May 2019, we do not believe that we are able to deal with this aspect of the case fairly and justly if we were to strike out the appellant's appeal relating to the penalties given the foregoing circumstances. And so, pursuant to the powers which we have by virtue of rule 5 of the First-tier Tribunal rules, we are able to (and we did) set aside Judge Cannan's direction, which allowed us and the parties to deal, to the extent described above, with the late filing penalties.

LATE APPEAL

12. Although the appellant had notified his appeal to the tribunal, he had never, in the first instance, appealed against the closure notice, or the penalties, to HMRC, something which he is obliged to do if he wishes to bring an appeal by virtue of section 31A Taxes Management Act 1970 ("**TMA**").

13. At the hearing, the appellant made an oral application to make an appeal to HMRC out of time. Mr Bradley agreed to this. It is our view that neither party is prejudiced by this late appeal and so we granted the appellant's application. Although, strictly speaking, the appellant should formally notify this appeal to the tribunal, we have a wide discretion and under the First-tier Tribunal rules and in particular rule 7, to deal with procedural irregularities. We have concluded that it is in the overriding interests of the parties and the tribunal, in order to enable us to deal with this case fairly and justly, to waive the strict requirement for the appellant to formally notify the tribunal of this late appeal. We therefore went on to hear the appeal relating to the appellant's liability to CGT on the disposal of his share in the Property.

EVIDENCE AND FINDINGS OF FACT

14. Mr Sage conducted the hearing on his own behalf. He is a bright and intelligent individual who, he would be the first to accept, has fallen on hard times. There are letters on the court file from his medical advisers indicating that he has, and has for some time had, significant ongoing mental health issues for which he takes medication. He was concerned at the start of the hearing that he might only last half an hour. But he managed to take a full part in the hearing throughout. He clearly found it a bit of an ordeal, but he followed it carefully. He gave oral evidence and did so with clarity and honesty. We have accepted much of what he said in his oral evidence.

15. His was not the only evidence given to us. There was also a bundle of documents provided by HMRC. In that bundle were a number of documents (the "**conveyancing**

documents") which related to the sale of the Property in April 2010. Mr Bradley explained that he could not divulge the source of these documents, and so, given their provenance, HMRC had not relied upon them save as regards the deductions shown on a completion statement which Mr Bradley had used to reduce the CGT which had originally been assessed on the appellant at £10,959.66 to the amount now in dispute of £5528.16. We have considered the conveyancing documents which do, in our view, have some probative value, as part of our fact-finding exercise.

16. From the evidence we find the following facts.

(1) In November 2001 Mr Sage bought the Property from an accountant for £215,000. He also paid that accountant an additional £16,000, but we cannot say for certain what this was paid for.

(2) He was planning to (and indeed did) run his business from the Property. This business was one of providing services to individuals and companies who wanted to borrow money from banks. He found that, at that time, banks were prepared to lend substantial sums and he found that he had talent for persuading them to lend to his clients.

(3) At some later stage he conducted this business in association with his domestic partner, Mrs Carol Peterson ("**Mrs Peterson**").

(4) In December 2005 he sold his half share in the Property to Mrs Peterson for £113,765.

(5) Mr Sage and Mrs Peterson fell out in the latter part of 2010 and separated in 2011. He moved out of the Property. Their separation was acrimonious and as part of that Mr Sage's business and personal records were destroyed or went missing.

(6) Mrs Peterson had an interest in a company called Lyndhurst Services Limited ("**LSL**"). On 30 April 2010 the Property was sold to LSL ostensibly for £300,000.

(7) The conveyancing documents record that the appellant owed LSL £45,000 and agreed to give his equity in the Property to LSL as repayment of that debt. We say more about this, and about the circumstances in which this document was signed by the appellant, below.

(8) The appellant did not return the details of the sale of his share of the Property in his tax return for 2010/2011.

(9) On 21 February 2014 HMRC opened an enquiry into that tax return. They closed that enquiry on 10 June 2014, the conclusion in the closure notice being that additional tax of £10,959.66 was due as a result of the sale of his share of the Property.

(10) Following a further review of the matter HMRC have now allowed additional estimated costs and expenses that the appellant had incurred in buying and selling the Property and, as a consequence, the amount of CGT for which the appellant is purportedly liable is £5528.16.

THE CONVEYANCING DOCUMENTS

17. We now need to consider the conveyancing documents in a little more detail.

18. They comprise:

(1) An SDLT record which is an HMRC print out relating to the sale of the Property in April 2010. The vendors are identified as Mr Sage and Mrs Peterson, and the purchaser as LSL. The consideration is £300,000 and the date of the transaction is 30 April 2010.

(2) A Valuation Office document relating to the sale of the Property which Mr Bradley thought might well have been based on the SDLT record mentioned above, in which the transferor is identified as Mr Sage and Mrs Peterson and the transferee as LSL.

(3) A completion statement which appears to relate to the sale of the Property in April 2010. It is drawn up by a firm of solicitors and the client is stated to be Mrs Peterson. The sale price is £300,000 from which there are a number of deductions including one which is described thus

> "LESS (allowance from Mr Sage) [£] 38220.36"

The statement also indicates that the amount required to redeem a mortgage is £232,340.96.

(4) A letter from the Monmouthshire Building Society to Mr Sage and Mrs Peterson dated 11 January 2010 stating that at that date the balance on their mortgage was £224,868.20.

(5) An executed but undated land registry form TR1 relating to the Property in which the transferor is expressed to be Mr Sage and Mrs Peterson as trustees for Mr Sage, and the transferee as Mrs Peterson. The consideration is £35,500 and "*the transfer is made in connection with the transferee assuming one half of the balance of the outstanding debt under the existing registered charge in the sum of £ "*. This document has been signed by both Mr Sage and Mrs Peterson the presence of witnesses who have also appended their signature and addresses on the form. The property is expressed to be the "property" i.e. the whole of it.

(6) A Law Society standard form contract which is undated save that the year (2010) is included in it. This has been signed by Mr Sage. The purchase price was typed in as £35,500 but then a line drawn through it in what we suspect was pen or biro, and replaced with £45,000. This amendment had been signed by the appellant and another person whose name we cannot identify. The seller in this contract was Mr Sage and Mrs Peterson as trustee for Mr Sage, the buyer was Mrs Peterson, and the property was described as 50% of the equity in the Property.

(7) An invoice raised by the solicitors for their fees and disbursements. This is dated 4 November 2005 and is addressed to Mr Sage and Mrs Peterson.

(8) An undated letter which Mr Sage accepts was signed by himself which relates to the Property and in which Mr Sage states that:

"I Jeremy Sage confirm that I am prepared to give my equity in Clytha house, 10 Clytha Park Rd, Newport NP20 4PB, to Lyndhurst Services UK Ltd in respect of monies owed by me to the said company in the sum of £45,000.00"

19. As mentioned above, Mr Bradley did not divulge the source of these documents other than the SDLT and the VOA records. He told us that HMRC had based their assessment on the figures in these two records. They had assumed that, perfectly reasonably in our view, that as Mr Sage was a 50% owner of the Property, he would have received £150,000 (i.e. 50% of the £300,000 which these documents show was the consideration for the sale of the Property by Mr Sage and Mrs Peterson to LSL on 30 April 2010). That £150,000 was then used as the basis of the CGT assessment.

20. Mr Bradley explained that HMRC had not used the figures or information in the other documents save to reduce the appellant's CGT liability by giving him credit for some of the expenses identified in the completion statement.

21. However Mr Sage's evidence was that whilst he had signed the documents which bear his signature, they were signed under duress, that duress being the threat of physical harm. In particular, he remembers signing the letter confirming that he had a debt to LSL of £45,000 one particular Saturday when some gentleman asked him to do so in circumstances in which he would have been beaten up had he not done so. His evidence was that he had never had any debt to LSL. His further evidence was that he never received any money from the sale, not £45,000, not the £35,500 set out in the contract and the TR1, and not the £38,220.36 set out in the completion statement.

22. This evidence was not challenged by Mr Bradley, and it is our view that Mr Sage was telling the truth and that his contention that he did not receive any such sums is correct. However he accepted that he was liable for the mortgage to the Monmouthshire Building Society before the sale to LSL and has not had any communication from them since that transaction suggesting that he is still liable under that mortgage.

23. From these documents and Mr Sage's evidence we make the following additional findings of fact in relation to the sale of the property in April 2010:

(1) Mr Sage never owed LSL £45,000.

(2) Mr Sage never received any of the sums mentioned at [21] above.

(3) His liability for the Monmouthshire Building Society mortgage was taken over or discharged at the time of the sale of the Property in April 2010.

24. Our interpretation of the conveyancing documents is that it had been originally intended that Mr Sage would transfer his half share in the equity of the Property to Mrs Peterson for which he would have been paid the value of that half share. This deal is broadly reflected in the conveyancing documents, but it was then scrapped and instead the deal was actually done between Mr Sage and Mrs Peterson on the one hand as seller, and LSL, on the other, as buyer, for £300,000.

THE BURDEN AND STANDARD OF PROOF

25. The burden of establishing that the appellant is prima facie liable to the CGT and for justifying the best of judgment assessment that has been visited on the appellant rests with

HMRC. They must establish, on the balance of probabilities, that the CGT is properly due from the appellant.

26. If and when they have established that, then the burden shifts to the appellant. The statutory basis of this is section 50(6) TMA.

27. If the appellant is to displace a best of judgment assessment, it is up to him to provide alternative figures which are more likely than not to be correct.

> "The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which 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 (*Bi-Flex Caribbean Ltd v Board of Inland Revenue* [1990] 63 TC 515, 522-3 PC, per Lord Lowry)".

DISCUSSION

28. HMRC's case is that the evidence shows that Mr Sage as owner of half of the Property would have received £150,000 from its sale to LSL on 30 April 2010. The SDLT and VOA records are an accurate depiction of that deal. Mr Sage has provided no satisfactory evidence of any alternative figures which should be used in the CGT assessment. And so that assessment should stand.

29. Mr Sage says that the SDLT and VOA records are wrong. In any case he never owed any money to LSL nor did he receive any benefit from the sale of the Property save that his mortgage was discharged. He signed the conveyancing documents under duress.

30. It was entirely reasonable for HMRC to base the CGT calculation and assessment on the information provided by the SDLT and VOA records. We consider that they are accurate records of the sale of the Property and reject the appellant's submission to the contrary.

31. We also think that they accurately reflect the transaction which took place on 30 April 2010. On that date the Property was transferred from the joint ownership of Mr Sage and Mrs Peterson to the single ownership of LSL. LSL provided consideration for the transfer of £300,000. But we do not think that £300,000 was paid in cash to Mr Sage and Mrs Peterson.

32. We have found as a fact that Mr Sage did not receive one half of that amount as his share of the transaction. The only benefit that he received was that his liability under the mortgage to the Monmouthshire Building Society was discharged or assumed by LSL.

33. The completion statement shows that the amount of mortgage discharged following the sale to LSL was £232,340.96, and so Mr Sage was liable for, and discharged from, one half of that liability, namely £116,170.48.

34. Given that a taxpayer can only be liable to CGT in respect of sale proceeds which he actually receives (along with any other benefit of monetary value which he actually receives), is our view of the CGT assessment should be based on this figure and not the £150,000 which HMRC have used in their best judgment assessment. That assessment, in the words of section 50(6) TMA, "overcharges" the appellant. There is sufficient positive evidence before us to enable us to say that the CGT computation should be corrected by using the figure of £116,170.48 instead of the £150,000 used by HMRC.

DECISION

35. Accordingly it is our decision that HMRC should remake the assessment using the figure of £116,170.48 instead of the £150,000, as the sale price (using all the other numbers which they have used in their view of the matter letter calculation) and that the appellant will be liable to CGT on the resulting amount. In our view this means that the assessable gain is reduced from £40,812 to £6,982.48 which is covered by the appellant's annual exemption and so no CGT is payable in respect of the sale of his share of the Property. But we defer to HMRC to provide a definitive figure.

36. The late payment penalty will, of course, depend on this figure. But if our figure is correct, then there will be no such penalty.

37. As regards the late filing penalties, our decision is that the appellant's appeal against the late filing penalties for the tax years 2010/2011, 2011/2012 and 2012/2013 is allowed. We are giving directions about the late filing penalties for the remaining years.

OFFICER BRADLEY

38. Finally we would like to finish by thanking Officer Bradley for the way that he conducted the case on behalf of HMRC. There is considerable history in this appeal and the fact that the hearing went as smoothly as it did is due, in no small part, to Officer Bradley's exemplary handling of it. We are very grateful to him for this.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

39. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 31 MAY 2019