TC01308

Appeal number TC/2010/06538

Capital Gains Tax – Whether property was only or main residence of Appellant – Whether Appellant had separated from his wife – Section 222 Taxation of Chargeable Gains Act 1992 – Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

MARTIN BENFORD **Appellant**

- and -

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

TRIBUNAL: JOHN BROOKS (TRIBUNAL JUDGE)
NORAH CLARKE (TRIBUNAL MEMBER)

Sitting in public at Eastgate House, Newport Road, Cardiff CF24 on 29 June 2011.

Martyn Arthur of Martyn F Arthur Forensic Accountant Limited for the Appellant

Peter Massey of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mr Martin Benford against an assessment to capital gains tax ("CGT") for 2005-06 made under s 29 of the Taxes Management Act 1970 ("TMA") in the sum of £18,764.96. It arises as a result of the sale of a three bedroom property at 60 Naseby, Bracknell, Berkshire (the "Property"). The CGT liability was reduced to £16,525.32 following a statutory review by HM Revenue and Customs ("HMRC") to take account of the expenses (which, in the absence of any documentary evidence, has been estimated) that would have necessarily been incurred in respect of the sale of the Property.

2. It is not disputed that Mr Benford purchased the Property in his sole name on 24 March 2005 for £124,500 or that it was sold on 30 September 2005 for £175,000 realising a capital gain. It is also common ground that Mrs Benford never occupied the Property. However, Mr Benford contends that he is not liable to CGT on the disposal as the Property was his principal private residence during a period of separation from his wife. This can be contrasted with another property bought jointly by Mr and Mrs Benford in October 2003 for £125,000 which was let until its sale for £168,000 in February 2006. Mr Benford fully accepts that a liability to CGT arises as a result of the gain on the sale of that property.

3. Section 222 of the Taxation of Chargeable Gains Act 1992 ("TCGA") applies to a gain accruing to an individual that is attributable to the disposal of a dwelling house which "*is or has at any time in his ownership been his only or main residence*" and no part of a gain to which s 222 applies shall be chargeable to CGT if the dwelling house has been the individual's only or main residence throughout the period of ownership (see s. 223 TCGA). Under s 222(6) TCGA there can only be one residence in the case of a husband living with his wife. A husband shall be treated for CGT purposes as living with his wife unless they are separated under a court order or they are "*in fact separated in such circumstances that the separation is likely to be permanent*" (see s 288(3) TCGA and s 282 Income and Corporation Taxes Act 1988).

4. Section 50(6) TMA provides that if, on an appeal, it appears to the Tribunal that an appellant is overcharged by an assessment the assessment shall be reduced accordingly but "*otherwise the assessment … shall stand good.*" It is accepted by Mr Arthur, who appears for Mr Benford, that this places the onus of proof on his client to establish, on a balance of probabilities, that not only did he occupy the Property but that he did so as his residence during the period he owned it and that during this time he was separated from Mrs Benford in such circumstances that the separation was likely to be permanent.

5. We first consider whether Mr Benford occupied the Property and if so whether he occupied it as his residence.

6. Mr Benford, who gave oral evidence under oath, told us that he bought the Property "as seen" after separating from his wife and that at that time it was "unliveable". He had to board up broken windows and clean out the Property and he was not able to move in for "a couple of weeks".

7. He explained that although he worked during the day as a tiler in the construction industry he continued to carry out improvements to the Property whilst living there. This included re-glazing all of the windows and installing central heating in the house. However, Mr Benford was unable to give any approximate date of when this work was undertaken other than to say it was during the period that he lived at the Property. He also described his living conditions at that time. There were no carpets or rugs just plain wooden floor boards, no heating, no cooking or food storage facilities, no furniture to speak of and nowhere to hang his clothes which he stored on the floor. Mr Benford told us that he slept on an inflatable bed and that he had a kettle and bought takeaway food. He said that he also had meals and showers at both the matrimonial home where Mrs Benford still lived and at his mother's house which was "10 minutes away" which was also where he took his washing.

8. Despite the separation from his wife all correspondence addressed to Mr Benford, including his bank statements, continued to be sent to the matrimonial home. Mr Benford explained that he did not notify his change of address to any official body (eg his bank, utilities etc) as he was concerned about someone breaking into the Property and described how on occasions youths had thrown bottles through the windows.

9. The only documentary evidence provided to us in support of Mr Benford's occupation of the Property were copies of two bills from Southern Electric and one from South East Water. These are addressed to Mr Benford at his current address and show that electricity and water were provided to the Property. However, as the Property did not have a water meter the water charge would have applied whether or not it was occupied. Of the two electricity bills, the first is dated 21 July 2005 and is for the period from 28 April 2005 to 15 July 2005; the second, dated 5 October 2005, covers the period from 16 July 2005 to 30 September 2005, when the Property was sold. Although Mr Benford did explain that other than his kettle and the lights, he owned no other electrical appliances and as that he lived in the Property during the summer and went to bed early he would not need much lighting, we were somewhat surprised at how little electricity was used and note that the major item on each of the bills was the service charge. With VAT, this accounted for the entirety of the 21 July 2005 bill which was for £9.48. The 5 October 2005 bill shows that 31 units of electricity were used at a cost of £2.27 and that the service charge was £9.44 with VAT making up the balance of the total bill which was £11.86.

10. We were also provided with two Council Tax Enquiry Forms from Bracknell Forest Council dated 18 April and 3 October 2005. The first shows that Mr Benford contacted the Council shortly after he bought the Property and at that time had "not moved in yet". His address was recorded as c/o the matrimonial home. The second of the forms records notification of the Property having been sold. A letter to HMRC, dated 15 June 2010, from the Revenue Services Department of the Council states that:

> Mr Benford owned [the Property] between 24 March 2005 and 29 September 2005. He did not live in it so was in receipt of an exemption [from Council Tax] for six months of that time and a 50% discount for the remaining period.
>
> He lived at [the matrimonial home].

11. Before us Mr Benford said that this was not the case as he had lived at the Property. He admitted that he had not told the Council the truth as he wanted to reduce the Council Tax on the Property.

12. Clearly whether or not Mr Benford occupied the Property is a question of fact and, having considered the evidence, we find that Mr Benford did stay overnight at the Property during, but not throughout his period of ownership, and was therefore in occupation. Having found that Mr Benford did occupy the Property it is necessary to consider whether that occupation was sufficient to make the Property his residence.

13. In *Moore v HMRC* [2010] UKFTT 445 (TC) at [38] Judge John Walters QC conveniently summarised the authorities in relation to the issue of 'residence' as follows:

> "A residence for these purposes must be a person's 'home' (*Sansom v Peay*, *ibid.* at 6G), 'a place where somebody lives' (*Frost v Feltham*, *ibid*. at 13I). However, 'even occasional and short residence in a place can make that [place] a residence' (*Moore v Thompson*, *ibid.* at 24E). *Goodwin v Curtis* is more helpful in assisting a resolution of the problem on the facts of this appeal. The Court of Appeal in that case was unanimous in the view that 'there must be some assumption of permanence, some degree of continuity, some expectation of continuity to turn mere occupation into residence' (*ibid.* at 508I, 510H)."

Millet LJ said *Goodwin v Curtis* [1998] STC 475 said, at 480:

> "the question whether occupation is sufficient to make him resident is one of fact and degree of the commissioners to decide"

14. Having regard to all of the circumstances, in particular the absence of any convincing documentary evidence to show that Mr Benford lived at the Property, the lack of furniture and appliances there and the very small amount of electricity used, leads us to conclude that there was not sufficient assumption of permanence or degree or expectation of continuity to turn such occupation into residence.

15. Although our finding that there was not sufficient expectation of continuity to establish residence would be enough in itself to dispose of this appeal we have also considered whether the circumstances of the separation of Mr and Mrs Benford were such that the separation was likely to be permanent.

16. Mr Benford said that during 2004 although their relationship was "amicable" he and Mrs Benford "drifted apart". Although they spent Christmas 2004 together for the sake of the children (their daughter and Mr Benford's children from a previous marriage) it was felt that the marriage had come to end and that it was time to move on. He told us that he continued to live in the matrimonial home but started looking for somewhere else to live until he found and subsequently purchased the Property moving in shortly after its acquisition. However, as we have already noted, he continued to have his correspondence sent to the matrimonial home which he visited for meals and to take a shower.

17. Despite their continued amicable relationship Mr Benford maintains that the separation was intended to be permanent until Mrs Benford told him sometime in the

summer of 2005 that she was expecting a baby. Because of this they decided to "give their marriage another go" and Mr Benford moved back into the matrimonial home to live with his wife. Their son, Harry, was born on 13 November 2005.

18. We did not find Mr Benford to be an altogether convincing witness, especially in regard to this issue, as he was somewhat vague as to when he separated from his wife and when the reconciliation took place and was unable to provide us with even approximate dates of these events which occurred about six years ago although he was able to tell us with some certainty that a buyer was found for the Property within a couple of weeks of it being placed on the market.

19. Mrs Benford did not give evidence. If we had heard from her she may have been able to corroborate her husband's account of the separation and whether it was likely to be permanent. However, in the absence of such evidence and given that Mr Benford continued to use the matrimonial home as his postage address, had meals and showered there, we have come to the conclusion that Mr Benford has not discharged the burden of proof required to demonstrate that he was separated from his wife in such circumstances that the separation was likely to be permanent.

20. Therefore, in accordance with s 288(3) TCGA and s 282 of the Income and Corporation Taxes Act 1988, Mr Benford is to be treated as living with his wife for CGT purposes. In such circumstances, as s 222(6) TCGA provides that there can only be one residence or main residence for a husband and wife living together and as Mrs Benford has never lived at the Property, it is the matrimonial home and not the Property that is her and Mr Benford's main residence.

21. As such, even if we had found it to be Mr Benford's residence, s 222 TCGA cannot apply to the Property and it must inevitably follow that the gain on its disposal is properly subject to CGT. We therefore dismiss the appeal and confirm the assessment to CGT in the sum of £16,525.32.

22. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 8 JULY 2011

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 30 July 2011.