TC02426

Appeal number: TC/2012/01118 & TC/2012/00412

CAPITAL GAINS TAX - Main residence. Election. Whether conclusive if there is more than one residence – yes. Can HMRC re-open the question and contend that a residence was not a main residence if an election to that effect has been made – no.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MRS P. A. ELLIS
THE ESTATE OF A. R. ELLIS, DECEASED Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS Respondents

TRIBUNAL: JUDGE GERAINT JONES Q. C.
DR C. HILL WILLIAMS D. L.

Sitting in public at 30 Friar Street, Reading on 30 October 2012.

Miss Fiona Ellis for the First Appellant

Mr R. McLeod for the Second Appellant

Mr A. Boal for HMRC the Respondents

DECISION

1. On 01 May 2008 the respondents began an enquiry into the self assessment tax return of the first appellant, Mrs P. A. Ellis, to check whether a gain made upon the sale of a property known as 1 Jessamine Cottages, Horton ("the property") had been made, declared and duly taxed.

2. The enquiry into the first appellant's self-assessment return began after a similar enquiry into the self-assessment tax return of the late Mr A. R. Ellis ("the deceased"), the first appellant's (late) husband. The disposal of the property had been declared by the deceased as if he was the sole owner of that property whereas, as a matter of property law, it was owned equally between himself and the first appellant. The self-assessment had proceeded on the basis that no tax was due upon the disposal of that property because it had been elected as the "main residence" for the purpose of section 222 of the Capital Gains Taxes Act 1992.

3. The relevant chronology is that the property was purchased on 31 March 1999 for £100,000 from the vendor, A R Ellis Limited. The property was later sold on 13 April 2005 for £187,500. The disposal was declared in the deceased's self assessment return for the fiscal year ended 5 April 2006 as if he was a sole owner. It was not mentioned in the first appellant's tax return for that fiscal year. It was agreed at the appeal hearing before us that nothing turns on that point.

4. After the property had been purchased in March 1999 it was continually let until 31 August 2004. The first appellant says that she and her late husband then decided to use the property as a residence from on 01 October 2004. On 29 October 2004 an election under section 222(5) CGTA 1992 was sent to the respondents and duly acknowledged by a letter dated 22 November 2004. At the appeal hearing before us, Mr Boal informed us that the acknowledgement is nothing more than an acknowledgement of the receipt of an election and does not amount to an admission that an identified property is a residence occupied or used by the taxpayer, within the meaning of section 222. He explained, and we accept, that that is an issue to be decided later if the respondents challenge the assertion that any given property was a residence occupied or used by a taxpayer.

5. The result of the enquiries commenced by the respondents was that additional assessments were raised, being £9478.80 against the first appellant and £9794.80 against the second appellant.

6. Each appellant has appealed against the assessment on the basis that the property was being used as a residence and that the election made and acknowledged, is conclusive as to which of more than one residence amounted to the taxpayers' main residence.

7. In the respondents' Statement of Case it is said that the point at issue is *"Whether the appellant's occupation of a property in the period October 2004 to March 2005 deems that property to be a "residence" for the purposes of a claim for principal private residence relief."* It thus seemed that there was to be a factual issue for the Tribunal to decide, that is, whether the property was or was not a property occupied and/or used as **a** residence by the taxpayers. Indeed, the bundle produced by the respondents contains several transcripts of decided cases, all of which deal with the issue of whether an appellant was or was not "resident" at a particular property within the meaning of the applicable legislation. We should emphasise that none of the

authorities contained in the bundle deals with the issue of whether a property can or cannot be described as a person's main residence except for the decision in *Frost v HMRC [1980] 55 TC 10*. The issue in that case was whether a publican who resided in Essex (in or over the public house) used a property that he owned in Wales as his only or main residence for the purpose of claiming mortgage interest relief thereon. The General Commissioners decided that he did and the Crown's appeal was dismissed by the High Court.

8. By the time that this appeal came on for hearing the issue seemed to have changed. In a document headed "Speaking Notes" produced by Mr Boal, it was said that the "Point in Dispute" was as follows *"Whether the occupation of 1 Jessamine Cottage by the appellant's in the 6 1/2 month period from October 2004 to 13 April 2005 was sufficient to deem the property as a "main residence" for the purpose of principal private residence relief."*

9. After evidence had been taken from Miss Ellis and the written material in the bundle had been considered, Mrs Hill Williams asked Mr Boal whether the respondents accepted that the property had been used as **a residence** by the taxpayers but that the case being advanced was that it could not properly be described as their "**main**" residence. Mr Boal stated that the respondents accepted that the property was **a residence** used by the taxpayers but that the nature and extent of the use made of the property did not permit of the conclusion that it was their **main residence.**

10. Thus it became clear that the respondents were not arguing that the property was not properly to be viewed as a residence used by the taxpayers; but simply that even though it was a residence it was not, as a matter of fact and degree, their main residence.

11. Mr Boal argued that whether a residence was or was not a person's main residence was a matter of fact and degree when comparing the various residences used by any given person against each other. The appellants had another residence, a detached four-bedroom house, near Slough. Mr Boal argued that we should look at the comparative amount of time spent at each of the two residences, the nature and quality of the use made of each residence and the fact that the house in Slough was also used by the taxpayers when two of their granddaughters resided with them, often for significant period of time, for family reasons that are not relevant to our decision.

12. We pointed out to Mr Boal that once the respondents conceded that the property was a residence and it was accepted or admitted that the taxpayers had two residences, the effect of section 222(5) CGTA was to allow the taxpayers to make an election which was determinative of the issue as to which of the two residences was, for capital gains tax purposes, his/her main residence.

13. Section 222 Capital Games Taxes Act 1992 so far as material, provides as follows :

> *(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.*

(2) In this section "the permitted area" means, subject to subsections (3) and (4) below, an area (inclusive of the site of the dwelling-house) of 0.5 of a hectare.

(3) .....

(4) .....

(5) So far as it is necessary for the purposes of this section to determine which of 2 or more residences is an individual's main residence for any period—

(a) the individual may conclude that question by notice to the inspector given within 2 years from the beginning of that period but subject to a right to vary that notice by a further notice to the inspector as respects any period beginning not earlier than 2 years before the giving of the further notice,

(b) subject to paragraph (a) above, the question shall be concluded by the determination of the inspector, which may be as respects the whole or specified parts of the period of ownership in question,

and notice of any determination of the inspector under paragraph (b) above shall be given to the individual who may appeal to the General Commissioners or the Special Commissioners against that determination within 30 days of service of the notice.

14. The important point to note about the construction of section 222 CGTA is that once it is established (or accepted) that a taxpayer has more than one property that can properly be called his residence, it is the taxpayer who can make an election as to which of two or more residences is to be his main residence. It is equally important to note that subsection 5 of section 222 specifically provides that *"the individual may conclude that question by notice to the inspector* ..... " and that this is a case in which such notice was given.

15. Thus the section envisages that a taxpayer *may* make an election; but does not have to do so. It then provides that if a taxpayer does decide to make an election the effect of that election is to conclude the issue as to which of two (or more) residences is his main residence, so far as capital gains tax matters are concerned. In other words, the respondents can challenge the assertion made by a taxpayer that a particular property is a residence used/occupied by him, but once it is proved or accepted that a particular property is a residence used/occupied by the taxpayer, the respondents cannot argue that as a matter of fact and degree that residence is not the taxpayer's main residence if an election has been made in favour of that property under section 222(5). That is because upon its true and proper construction the statute specifically provides that the question of which property is the main residence is conclusively dealt with by the election made under subsection 5.

16. It follows that, in our judgment, given that the respondents concede that the property was a residence used by the taxpayers, the appeals must succeed because an election was made. The respondents cannot go behind the election notwithstanding Mr Boal's contention that it was open to the respondents to challenge whether or not, as a matter of fact and degree, the property could properly be described as the taxpayers' main residence. If Mr Boal was correct in his submission, it would mean that an election made under section 222 would not be conclusive as provided by

section 222(5). In our judgment his submission was contrary to the plain meaning and effect of that statutory provision.

17. 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.

Decision.

Each appellant's appeal is allowed and each assessment is discharged.

GERAINT JONES Q. C.
TRIBUNAL JUDGE

RELEASE DATE: 3 December 2012