



TC02779

Appeal number: TC/2012/07246

CAPITAL GAINS TAX – whether property disposed of by the appellant was held by him as an investment or as trading stock – held that the evidence supported the conclusion that it had been held as an investment – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANTHONY HEADLEY

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JOHN WALTERS QC

Sitting in public in London on 4 March 2013

Roy Sokhal, for the Appellant

John Corbett, for the Respondents

DECISION

- 5 1. This is an appeal against an assessment to capital gains tax (“CGT”) made on the appellant, Anthony Headley (“Mr Headley”) in relation to the sale by him of a property, referred to in the appeal as 180 Grange Road, in December 2005. The gain assessed to CGT was £126,500 and the tax charged by the assessment was £45,381.
- 10 2. There is no dispute about the figures. Mr Sokhal contends, in support of the appeal, that the disposal of 180 Grange Road was not a disposal giving rise to any CGT consequences because it was a disposal of trading stock, Mr Headley having carried on a property dealing trade. He relies, in effect, on section 37(1) of the Taxation of Chargeable Gains Act 1992 (“TCGA”) by which consideration taken
15 into account as a receipt in computing income or profits or gains or losses for income tax purposes is excluded from the consideration for a disposal of assets for CGT purposes.
- 20 3. Unusually, Mr Headley was not present at the hearing of the appeal. Mr Sokhal explained that he had acted for him (providing accountancy services) from a date after his acquisition of 180 Grange Road, but for various reasons he had ceased to do so and that Mr Headley had gone abroad and contact with him had been lost.
- 25 4. In 2009 Mr Sokhal had received instructions from Mr Headley’s estranged wife (Mrs Headley). Mrs Headley was present at the hearing and gave evidence. She explained that she was interested in the result of the dispute between Mr Headley and the Respondent Commissioners (“HMRC”) on behalf of her two sons (the sons of her marriage to Mr Headley) and also that Mr Headley owed her some money.
- 30 5. Mr Corbett, for HMRC, raised no objection to the hearing of the appeal proceeding on this basis.
- 35 6. Although Mr Sokhal did not formally give evidence (and was not cross-examined by Mr Corbett), he did provide information to the Tribunal as follows. He said that he understood that Mr Headley’s aim had been to buy, develop and sell property and had engaged subcontractors for the purpose. However his
40 business had foundered due in large part to cash flow difficulties. He had become estranged from Mrs Headley and had gone to live with another lady, had had health issues (deep vein thrombosis) and eventually had gone abroad. He had taken out mortgages on the properties acquired and had also borrowed money from Mrs Headley.
- 40 7. Mr Sokhal told the Tribunal that 180 Grange Road had been let and explained that Mr Headley’s reason for letting the property out had been to obtain a source of funds to help finance his other trading activities. Although Mr Sokhal

described the letting as a temporary measure, it had continued ‘for a number of years’ and, in December 2005, Mr Headley had been forced to sell 180 Grange Road. Mr Sokhal submitted to the Tribunal that 180 Grange Road had never been held by Mr Headley as an investment.

5 8. As has been said, Mrs Headley did give evidence. However she said that she did not know about Mr Headley’s business affairs until she took out a power of attorney on 10 March 2011. The power of attorney, however, related to Mr Headley’s ownership of another property, 2 Ash Road, and it appeared that Mrs Headley’s personal knowledge of Mr Headley’s affairs was limited to 2 Ash Road, and, in particular, that she could not give evidence as to Mr Headley’s intentions in relation to his acquisition and holding of 180 Grange Road.

10 9. Mr Sokhal told the Tribunal that 180 Grange Road had been bought by Mr Headley in September 2001. No copy of the lease pursuant to which Mr Headley let out 180 Grange Road was produced, nor were any details of the letting given to the Tribunal.

15 10. Mr Corbett was able to produce relevant information from HMRC’s records.

20 11. It appears that Mr Headley returned rental income of £5,570 for the year 2001/02 and that in that year the only property held by Mr Headley was 180 Grange Road. Mr Corbett submitted that it was reasonable to assume that Mr Headley had let 180 Grange Road as soon as possible after purchasing it. The rental income returned by Mr Headley in 2002/03 was £6,340, in 2003/04 it was £7,410, in 2004/05 it was again £7,410 and in 2005/06 (the year in which 180 Grange Road was sold) it was £3,870. Mr Corbett’s submission was that 180 Grange Road was rented out throughout Mr Headley’s period of ownership of it and that no evidence had been produced to contradict this. I accept this submission and find accordingly.

25 12. Mr Corbett also told the Tribunal that the rents had been returned in all years as property income rather than as trading income. Mr Sokhal explained that this had been done with regard to his (Mr Sokhal’s) professional obligation ‘to protect the Chancellor of the Exchequer’s interest’.

30 13. Mr Corbett also told the Tribunal that information given in Mr Headley’s tax return had indicated that he had commenced a property development business on 16 October 2002 (over a year after the purchase of 180 Grange Road). Mr Sokhal explained that Mr Headley had come to him after he had bought 180 Grange Road and had said that he wanted it included in his trading assets. The date in October 2002 had been given on the tax return because that was when Mr Headley had identified personnel to do the development work.

35 14. The Tribunal was shown a schedule of the properties owned by Mr Headley – called a Schedule of Stock. It showed:

40 180 Grange Road (Cost: £118,758)

81 Bowes Road Acquired November 2002 (Cost £222,725)

88 Broad Street Acquired December 2002 (Cost £128,201)

5 15. The property 88 Broad Street had been sold in August 2004 and HMRC had accepted that the sale had been a trading transaction. There had been no evidence of any rental income associated with 88 Broad Street.

16. (For completeness I add that 2 Ash Road, referred to above, was used by Mr Headley as his home, and that the former marital home of Mr and Mrs Headley was another property, 1 Chichester Gardens.)

10 17. Mr Corbett submitted that Mr Headley's holding of each property must be considered separately, to determine whether it was held as an investment or as trading stock. HMRC accepted that 88 Broad Street was held as trading stock. Mr Corbett submitted that the evidence showed that 180 Grange Road had been held as an investment. The remaining property, 21 Bowes Road, had been sold in 2010 and HMRC had yet to make enquiries to determine whether it was held as an investment, or as trading stock.

15 18. Mr Corbett submitted that 180 Grange Road was let out before any cash flow problems can have arisen, because if there had been cash flow problems Mr Headley would not have proceeded with the purchase of 21 Bowes Road in November 2002 and 88 Broad Street in December 2002.

20 19. Mr Corbett referred to *Granville Building Co. Ltd v Oxby* 35 TC 244 and *Harvey v Caulcott* 33 TC 159.

25 20. As Lord Wilberforce observed in *Simmons (as liquidator of Lionel Simmons Properties Ltd.) v Inland Revenue Commissioners* [1980] STC 350, trading requires an intention to trade and normally the question to be asked is whether this intention existed at the time of the acquisition of the asset (*ibid.* p.352f/g). He also observed that intentions may be changed and that what was first an investment may be put into trading stock and vice versa. But he said that if findings of this kind are to be made precision is required (*ibid.* p.352g/h). He concluded that what is not possible is for an asset to be both trading stock and permanent investment at the same time, nor for it to possess an indeterminate status, neither trading stock nor permanent asset. It must be one or the other (*ibid.* p.353h/j).

30 21. In *Simmons*, the special commissioners had found that the group concerned had aimed to build up a suitable portfolio of investments but to allow the final decision whether to retain to await on events. There was, ultimately, a decision to liquidate and the commissioners had commented that 'the decision to liquidate was in our view, not inconsistent with the original aim'.

35 22. Lord Wilberforce analysed their finding that the group's initial intention (original aim) had been 'primarily for the purposes of creating and retaining investments' and 'not primarily for the purposes of immediate sales after

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development' as a clear finding of an investment purpose (*ibid.* p.354f/g). He commented that a decision to liquidate would not be a decision to intend to trade but a decision to put an end to the investment plan.

5 23. In this case there is no reliable evidence that Mr Headley acquired 180 Grange Road with an intention to put it into trading stock. The evidence is that he let it either immediately, or as soon as possible, at any rate well before the end of the tax year, 5 April 2002, having acquired it in September 2001. This evidence is sufficient to support a finding that 180 Grange Road had been acquired as an investment and I so find.

10 24. Mr Sokhal told me that Mr Headley had told him that he wished 180 Grange Road to be included in his trading assets when the date of the commencement of the trade, 16 October 2002, had been decided on. Even accepting that Mr Sokhal's statement was evidence of Mr Headley's intention on which I can rely, I do not accept that it can found a conclusion of fact that Mr Headley had decided at
15 that point to put 180 Grange Road, which had previously been an investment, into trading stock. As Lord Wilberforce said in *Simmons*, for such a finding precision is required.

20 25. There is provision in section 161 TCGA for a deemed disposal at market value to take place for CGT purposes if an asset acquired otherwise than as trading stock is appropriated to trading stock. A chargeable gain can of course arise on such a deemed disposal. That result can be avoided by an election under section 161(3) TCGA, but such an election must be made within a stated (quite short) time limit after the appropriation and there is no evidence that any such election was made or contemplated in this case.

25 26. A finding that Mr Headley had appropriated 180 Grange Road to trading stock in October 2002 might well, therefore, involve a CGT liability. However I consider that the evidence does not support such a finding in any event. The weightiest evidence on this point is that Mr Headley continued to let out 180
30 Grange Road throughout his ownership of it. I do not accept that he did this as a temporary measure for cash flow reasons because, as Mr Corbett said, Mr Headley's purchase of 21 Bowes Road in November 2002 and 88 Broad Street in December 2002 indicates that he did not encounter such serious cash flow problems before November 2002.

35 27. My conclusion is that Mr Headley's acquisition and subsequent ownership of 180 Grange Road was motivated to a significant extent by the prospect of the rental income to be derived from it (an investment motive) and that Mr Headley continued to hold 180 Grange Road as an investment until he sold it in December 2005 and I must dismiss the appeal.

Right to apply for permission to appeal

40 27. This document contains full findings of fact and reasons for our decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Rules. 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.

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JOHN WALTERS QC

TRIBUNAL JUDGE

RELEASE DATE: 8 April 2013

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