



TC04252

Appeal number: TC/2014/00501

Income tax - Capital Gains - penalty - TCGA 1992 and TMA 1970 - inaccuracy in tax return - penalty assessment - whether error in income tax return was careless - yes - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PETER BROOKES

Appellant

- and -

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

**TRIBUNAL JUDGE MICHAEL S CONNELL
 MR MOHAMMED FAROOQ**

**Sitting in public at Ministry of Justice, Priory Courts, Bull Street, Birmingham
on 7 November 2014**

The Appellant did not attend and was not represented

Mr Simon Foxwell, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. This is an appeal by Mr Peter Brookes (“the Appellant”), against an HMRC
5 discovery assessment to Capital Gains tax of £4,599.24 for the tax year 2006-07 on
the sale of a property, and also against HMRC’s decision to impose a penalty of
£1,148.81 under (“Schedule 24”) in respect of an inaccuracy in the Appellant’s self-
assessment tax return.

2. The Appellant did not attend and was not represented. The Tribunal was
10 nonetheless satisfied that he had been notified of the date and venue of the appeal
hearing and that it was in the interests of justice to proceed.

3. The points at issue are:

(1) Whether or not a gain arises to the Appellant on the sale of his property at
15 Apartment 303 Platinum, 89 Branston Street, Birmingham (“the Property”) in
March 2007.

(2) Whether a penalty arises due to the negligent submission of an incorrect
tax return.

The factual background

4. The Appellant is a Director of Village Park Homes Ltd and Village Park
20 Developments Ltd, which are involved in building and property development.

5. HMRC commenced an investigation into the tax affairs of the Appellant in
November 2008, under HMRC Code of Practice 9. This entailed the preparation of a
disclosure report by his agent BTG Tax, which was signed by the Appellant and
submitted in December 2009. The report included the year ended 5 April 2008.

25 6. The report disclosed a number of tax irregularities, among which was a Capital
Gain arising in 2006-07. While all other matters were resolved or settled by way of
contract settlements, the gain was not accepted by the Appellant.

7. The Appellant acquired the Property on 26 September 2006 for £110,000 with
30 purchase expenses of £1,020. He bought the Property at auction with a mortgage of
£82,500, a loan of £11,000 and the balance from his own resources.

8. The Appellant sold the property to his then girlfriend, Natalie Wallace, on 22
March 2007 for £132,500, with sale expenses of £1,426. The increase in equity was
gifted to Ms Wallace by the Appellant as a deposit. He did not demand any payment
form his girlfriend.

35 9. The Property was never the Appellant’s principal private residence. During the
brief period of ownership, he lived at another address.

10. The disclosure report by BTG Tax acknowledged the gain arising in 2006-07 and calculated it at £20,298. HMRC did not challenge the information or figures for this transaction given in the disclosure report. The Appellant was UK resident and entitled to the annual Capital Gains exempt amount of £8,800 reducing the gain to £11,498. The gain was not disclosed in the Appellant's 2006-07 Tax Return.

11. The assessment was raised under s 29 (1)(a) and 36 (1A) Taxes Management Act [TMA] 1970 which permit an assessment to be made where a loss of tax has been found. The penalty determination was made under the provisions of s 95 (1)(a) TMA 1970 for fraudulently delivering to an officer of HMRC an incorrect return under s 8 TMA 1970.

12. The Appellant did not accept that a gain arose and therefore a formal discovery assessment including statutory interest and a penalty determination was raised on 8 May 2013.

13. The Appellant appealed the assessment and penalty on 27 June 2013.

15 **Relevant legislation**

Section 29(1)(a) TMA 1970 Discovery provisions

Section 36(1A) TMA 1970 Extended time limit provisions

Section 95(1)(a) TMA 1970 Incorrect returns penalty

Section 1 TCGA 1992 Charge to tax

20 Section 2 TCGA 1992 Person chargeable

Section 3 TCGA 1992 Annual exemption

Section 15 TCGA 1992 Computation of gain

Section 21 TCGA 1992 Assets and Disposals

The Appellant's submissions

25 14. In his Notice of appeal to the Tribunal the Appellant says:

30 'The decision by HMRC is incorrect because I was not the beneficiary of any gain arising from the sale of Apartment 303, 89 Branston Street Birmingham. In any event this sale/transfer between me and Natalie Wallace should have been free from Capital Gains Tax as we were Common Law Partners having co-habited together for numerous years and this was just a place for her/us to stay as and when and for her to stay during the week whilst working instead of her commuting each day to and from our house.'

35 15. Effectively the Appellant argues that his then girlfriend was his common law partner so no gain should be charged and that he received no "real" gain on sale of the property as he gifted the deposit to his girlfriend.

HMRC's submissions

16. The legislation only exempts property disposals to a spouse or civil partner where it is the taxpayer's principal private residence. There is no recognised legal concept of a common law partner.

5 17. A Capital Gain arose on the sale of the Property in the sum of £20,298.

18. It is irrelevant to the application of the tax law that the Appellant chose not to realise the increase in the Property's value for his own personal benefit. It was his choice to give the surplus to his girlfriend and not seek to recover it from her. The gain must be calculated according to the documented sale price.

10 19. There are no other reliefs or exemptions to reduce or extinguish tax because someone makes a private choice to forego payment.

20. Given the clear disclosure in the BTG Tax report and the fraudulent conduct of omission from the tax return, the penalty raised is correct. The maximum would be 100% of the tax lost. Under Code Of Practice enquiries the minimum charge is 25%,
15 which is the loading used here.

Conclusion

21. In brief terms, tax legislation imposes Capital Gains tax where a property is disposed of for a consideration greater than its cost.

20 22. The tax may not be charged if the property was the vendor's only or main residence throughout the period of ownership, or where the disposal is by way of a transfer of ownership of the property between a husband and wife or between civil partners. Neither of these circumstances applied.

25 23. It is not relevant to the application of the relevant tax law that the Appellant chose not to realise the increase in the Property's value between its acquisition on 26 September 2006 and its disposal on 22 March 2007 for his own personal benefit, but chose to 'give' the surplus achieved to his then girlfriend as her deposit when she purchased the Property.

30 24. The capital gain, as acknowledged in the Appellant's disclosure report, remains his personal capital gain. There are no reliefs or exemptions available to him to reduce the gain other than the annual exempt amount which for the year ended 5 April 2007 was £8,800 and which has been allowed for in the assessment of the capital gain.

25. The gain arose in the year ended 5 April 2007 and it should have been returned by 31 January 2008, when the tax was due and payable. Statutory interest was therefore charged from 31 January 2008, to the date the tax was or is paid.

35 26. Our conclusion is therefore that HMRC's assessment for the year ended 5 April 2007 correctly brought into charge the capital gain achieved on the disposal of

Apartment 303 Platinum, 89 Branston Street Birmingham, and the Capital Gains tax of £4,599.24 is payable with associated statutory interest.

27. The Appellant disclosed 'fraudulent conduct' in submitting his return, and therefore a penalty of up to 100% of the omitted tax may be imposed. A 75%
5 reduction in the penalty has been given, being the maximum abatement. We find that the penalty, determined at 25% of the culpable tax, that is, £1,148.81, is also correct.

28. The assessment and penalties are accordingly confirmed and the appeal is dismissed.

28. This document contains full findings of fact and reasons for the decision. Any
10 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
15 "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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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 27 January 2015

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