



TC05105

Appeal number: TC/2013/04426

INCOME TAX – Purchase of properties by Pension Scheme – Whether “residential property” – Yes – Whether “taxable property” – Yes – Appeal dismissed – Schedule 29A Finance Act 2004

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PENSIONER TRUSTEES (LONDON) LIMITED Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN BROOKS
 GILL HUNTER**

Sitting in public at the Royal Courts of Justice, London on 3 May 2016

Geoffrey Tack of DLA Piper (UK) LLP, for the Appellant

**Kate Balmer, counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. Pensioner Trustees (London) Limited (“PTL”), a professional trustee and administrator of the Ridgeway Executive Pension Scheme (the “Pension Scheme”), appeals against assessments to scheme sanction charges issued by HM Revenue and Customs (“HMRC”), on 25 March 2011 and 15 May 2012 in the sums of £209,736 and £87,076 respectively.

2. The assessments, which were upheld on 3 June 2013 following a review, were issued under s 255 of the Finance Act 2004 in respect of the Pension Scheme’s holding of taxable property as at 5 April 2006; the acquisition of taxable property in respect of the year ended 5 April 2007; and deemed income from taxable property in the years ended 5 April 2007, 2008, 2009, 2010 and 2011 and relate to the purchase by the Pension Scheme of two residential properties at Ashburton Grove, Narberth, Pembrokeshire, Plot 2 in August 2005 and Plot 3 in June 2006.

3. PTL was represented by Geoffrey Tack of DLA Piper (UK) LLP. Kate Balmer of counsel appeared for HMRC.

Evidence and Facts

4. We were provided with a bundle of documents. This included the witness statements of Mrs Linda Hawkins, who was the Deputy Matron of the Ridgeway Nursing Home between 2005 and 2010 and lived with her husband at Plot 3, Mrs C M Dunlop who, having recently married, moved from close care accommodation into Plot 2 with her husband, and Mrs Maureen Ruskin, who established the Ridgeway Nursing Home. It also included correspondence between the parties, copies of assured shorthold tenancies in respect of Plots 2 and 3 and a copy of Mrs Hawkins’s terms of employment with the Ridgeway Nursing Home.

5. Having also heard the oral evidence of Mrs Maureen Ruskin, who was cross-examined by Ms Balmer, we find the following facts.

6. In 1983 Mrs Ruskin opened the Ridgeway Nursing Home, a residential care home in Narberth, Pembrokeshire, which, until her retirement in 2008, she operated through a company, Mufulira Limited. Because of her experience of the provision of care in rural areas Mrs Ruskin was invited to sit on a panel in preparation for what became the Community Care Act 1993. She subsequently became an NVQ assessor and a qualified counsellor who, for two years, inspected care homes for the National Care Homes Association. She specialised in the rehabilitation of care home residents and was the first in Pembrokeshire to start a scheme to provide accommodation with an intermediate level of care between that available in a full nursing home and that provided by a Local Authority to individuals living in their own homes. She explained that without such a scheme it was very difficult for a patient to return home after recovering at a nursing home, describing the arrangements in place before establishing her scheme as a “total mishmash”.

7. On her retirement, in 2008, Mrs Ruskin was the recipient of the “Wales Gold Care Award” presented for “Outstanding Service” at a ceremony in Cardiff.

8. To implement an intermediate close care scheme for former patients of the Ridgeway Nursing Home by the same staff, the Pension Scheme, a small self-administered pension scheme, in an investment subsequently approved by the Inland Revenue, purchased eight, two bedroom, former Housing Association flats at Cawdor Court, Narberth, from the Local Authority over a period of six years between 1993 and 1999. The flats were leased by the Pension Scheme to Mufulira Limited which then made the appropriate arrangements with the resident of each flat regarding his or her occupation.

9. As it was unable to purchase further properties at Cawdor Court, the Pension Scheme purchased Plot 2 in August 2005 and Plot 3 in June 2006 with the intention of using these properties for former residents of the Ridgeway Nursing Home to continue their rehabilitation. Plots 2 and 3 are three bedroom houses with a garden and private car parking which have been adapted for elderly or disabled residents (eg with raised electric sockets and lowered light switches, extra hand and grab rails and a level floor throughout). They are approximately a mile from Cawdor Court and four miles from the Ridgeway Nursing Home and are regarded as “residential property” for Stamp Duty Land Tax and Council Tax purposes.

10. On 4 August 2005 the Pension Scheme granted an assured shorthold tenancy of Plot 2 to a Mr and Mrs Dunlop and on 1 August 2006 granted an assured shorthold tenancy of Plot 3 to a Mr and Mrs Hawkins. The rent stipulated under the terms of both tenancies was below the market value as it had been based on a Housing Association equivalent rather than that in the private sector.

Plot 2

11. Mrs Dunlop, who is registered as disabled, suffered a serious stroke in 2000 and subsequent transient ischemic attacks (small strokes). She also suffered from cardiac problems, arthritis and diverticulitis. She spent the earlier part of her recovery at one of the flats at Cawdor Court but, following her marriage and a need for more space, was offered Plot 2 by Mrs Ruskin. This allowed Mrs Dunlop to continue her rehabilitation and because of the location also allowed Mr Dunlop to continue in full time employment.

12. Although Mrs Ruskin was not able to provide us with a copy of a written care plan for Mrs Dunlop we are satisfied that such a plan did exist and that it, by its very nature, would have been flexible. However, it would have included:

- (1) a 24 hour helpline to the continuously staffed Ridgeway Nursing Home;
- (2) regular visits;
- (3) escort to GP services;
- (4) escort to Accident & Emergency department for emergency treatment or check-up following falls;

- (5) provision of physical and psychological support;
- (6) support through debilitating periods as a result of the diverticulitis; and
- (7) support in fulfilling holistic and everyday goals.

Plot 3

5 13. Mrs Linda Hawkins, who lived at Plot 3 with her then husband, was originally a member of the nursing staff at the Ridgeway Nursing Home. She applied for and obtained the post of Deputy Matron when it became vacant in 2006.

10 14. It was understood by Mrs Ruskin and Mrs Hawkins that it was a requirement of the Area Health Authority (and subsequently Care and Social Services Inspectorate Wales) for a Matron or Manager of a nursing home and their deputies to live within ten miles of the home. However, the 'Particulars of Terms of Employment' constituting the written statement provided to Mrs Hawkins (as required under s 1 of the Employment Rights Act 1996), despite having some 53 clauses did not include an express term requiring her to reside within ten miles of the Ridgeway Nursing Home.

15 Mrs Ruskin explained that this was because a 'standard form' employment contract had been used and as members of staff were already aware of the stipulated minimum distance requirement she did not consider it necessary to incur the additional legal fees required for an amendment to be drafted.

20 15. As she did not live within ten miles of the Ridgeway Nursing Home Mrs Hawkins was told by Mrs Ruskin that on her appointment as Deputy Matron she, Mrs Hawkins, would be required to relocate to the Narberth area. In evidence Mrs Ruskin confirmed that Mrs Hawkins was not required to reside in any particular property, such as Plot 3, only that she had to live within a ten mile radius of the Nursing Home in Narberth.

25 16. Narberth is a small town in Pembrokeshire approximately 11 miles from Haverfordwest (Pembrokeshire's county town), 30 miles from Carmarthen and 50 miles from Swansea. Pembrokeshire, which is a rural county in South-west Wales bordered by sea on three sides, is a popular holiday and tourist destination known for its countryside, coastline and beaches. Many properties there are bought as second homes or for use as holiday lets.

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17. Therefore, despite using the services of estate agents and making enquiries with Housing Associations, Mrs Hawkins was not able to find a suitable place to live as the properties she viewed within ten miles of the Ridgeway Nursing Home were beyond her budget. Had it not been for the offer, by Mrs Ruskin, of Plot 3 Mrs Hawkins would not have been able to take up her post as Deputy Matron.

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18. Although Mrs Ruskin told Mr and Mrs Hawkins that they would be required to vacate Plot 3 if Mrs Hawkins ceased employment at the Ridgeway Nursing Home such a term was not included in the tenancy agreement. It seemed to Mrs Ruskin to be "an unnecessary legal expense to amend the standard lease agreement to insert clauses" as they had "reached a clear understanding at the time that she would be required to occupy the property as a condition of her employment in the role of

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Deputy Matron.” However, in evidence Mrs Ruskin confirmed that had Mrs Hawkins left Plot 2 for alternative accommodation, provided it was within ten miles of the Nursing Home, it would not have had any effect on her employment.

Law

5 19. All subsequent statutory references are, unless otherwise stated, to the provisions of the Finance Act 2004 and all references to paragraphs, unless otherwise stated, to those paragraphs contained in schedule 29A to that Act.

20. We were referred to the following paragraphs which came into effect from 6 April 2006:

10 **2. Occupational pension schemes**

(1) For the purposes of the taxable property provisions a registered pension scheme which is an occupational pension scheme is an investment-regulated pension scheme if—

15 (a) there are 50 or fewer members of the pension scheme, and one or more of those members meets the condition in sub-paragraph (2), ...

(b) ...

(2) The condition is that either—

(a) the member, or

(b) a person related to the member,

20 is or has been able (directly or indirectly) to direct, influence or advise on the manner of investment of any of the sums and assets held for the purposes of the pension scheme.

...

6. Taxable property

25 For the purposes of the taxable property provisions property is taxable property if—

(a) it is residential property (see paragraphs 7 to 10), or

(b) ...

30 **Residential property**

7. —

(1) Subject as follows, for the purposes of the taxable property provisions “residential property” means—

(a) a building that is used or suitable for use as a dwelling,

35 (b) any land consisting of, or forming part of, the garden or grounds of such a building (including a building on any such land) which is used or intended for use for a purpose connected with the enjoyment of the building,

- (c) hotel or similar accommodation (but see paragraph 14(2)), or
- (d) a beach hut,

in the United Kingdom or elsewhere.

5 (2) For the purposes of the taxable property provisions “building” includes—

- (a) a structure, and
- (b) part of a building or structure.

8. —

10 (1) For the purposes of the taxable property provisions a building used for any of the following purposes is not residential property—

(a) a home or other institution providing residential accommodation for children;

(b) a hall of residence for students;

15 (c) a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of old age, disability, past or present dependence on alcohol or drugs or past or present mental disorder;

(d) a hospital or hospice;

20 (e) a prison or similar establishment.

(2) Where—

(a) a building is used for a purpose specified in sub-paragraph (1),

(b) a building which is not in use was, immediately before it ceased to be in use, used for such a purpose, or

25 (c) a building which has never been in use is more suitable for use for such a purpose than for use for any other purpose,

no account is to be taken for the purposes of the taxable property provisions of its suitability for use as a dwelling.

30 **9. — ...**

10. —

(1) Residential property is not taxable property in relation to a pension scheme if Condition A or B is met.

35 (2) Condition A is met if the property is (or, if unoccupied, is to be) occupied by an employee who—

(a) is neither a member of the pension scheme nor connected with such a member,

(b) is not connected with the employer, and

- (c) is required as a condition of employment to occupy the property.
- (3) Condition B is met if the property is (or, if unoccupied, is to be)—
 - (a) occupied by a person who is neither a member of the pension scheme nor connected with such a member, and
 - (b) used in connection with business premises held as an investment of the pension scheme.
- (4) Section 1122 of the Corporation Tax Act 2010 (connected persons) applies for the purposes of this paragraph.

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10 21. Condition A of paragraph 10 was considered in *J & A Young (Leicester) Limited v HMRC* [2015] UKFTT 638 (TC) in relation to a contract of employment. the Tribunal (Judge Brannan and Mrs Farquharson) observed, at [60]:

15 “Paragraph 10(2)(c) states that the employee must be "required as a condition of employment to occupy the property." Read in context, "the property" means the property which the employee is occupying.”

22. Paragraph 37C of schedule 36 provides:

- (1) This paragraph applies where—
 - (a) on 6th April 2006 an investment-regulated pension scheme holds an interest in taxable property which it acquired before that date, and
 - (b) immediately before that date the pension scheme was prohibited from holding the interest.
- (2) ...
- (3) The pension scheme is to be treated for the purposes of the taxable property provisions as acquiring the interest in the property on 6th April 2006.

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30 23. Under the Retirements Benefits Scheme (Restriction on Discretion to Approve)(Small Self-administered Schemes) Regulations 1991 and the Personal Pension Schemes (Restriction on Discretions to Approve)(Permitted Investments) Regulations 2001 the Inland Revenue was precluded from exercising its discretion to approve an investment in residential property other than that occupied by an employee not connected with his employer who was “required as a condition of his employment to occupy the property” (Reg 5 of the 1991 Regulations and Reg 7 of the 2001 Regulations) with “residential property” being defined (in Reg 2 of both the 1991 and 2001 Regulations) as:

35 “property normally used, or adapted for use, as one or more dwellings”

24. If an investment-regulated pension scheme holds “taxable property” the following charges to income tax arise:

- (1) under s 174A as it will be “treated as having made” an “unauthorised payment” to a member of the pension scheme (and therefore a “scheme chargeable payment” by virtue of s 241(1)(a));

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(2) under s 185A as it will be “treated as having made a scheme chargeable payment if the pension scheme holds an interest in taxable property in a tax year”; and

5 (3) under s 239, a “scheme sanction charge” on the scheme administrator where “in any tax year” there are “one or more scheme chargeable payments” made by a registered pension scheme.

Discussion

25. It is accepted that the Pension Scheme is “investment regulated pension scheme (within paragraph 2) and that Plot 2 and Plot 3 are “residential property” as defined by
10 paragraph 7. The issues between the parties concern whether Plot 2 is excluded from the definition of “residential property” in paragraph 7 by virtue of para 8(1)(c); and, whether, notwithstanding it is a “residential property” Plot 3 is nevertheless not “taxable property” as a result of the application of Condition A of paragraph 10(2).

Plot 2

15 26. Plot 2 which was purchased in August 2005 was held by the Pension Scheme on 6 April 2006. As it is accepted that it is “residential property” and therefore “taxable property” (as defined by paragraph 6), Plot 2 will be treated as if it were acquired by the Pension Scheme on 6 April 2006, and fall within schedule 29A, by virtue of
20 paragraph 37C of schedule 36 if the Pension Scheme was prohibited from holding the interest under the then prevailing provisions ie the Retirements Benefits Scheme (Restriction on Discretion to Approve)(Small Self-administered Schemes) Regulations 1991 and the Personal Pension Schemes (Restriction on Discretions to Approve)(Permitted Investments) Regulations 2001.

27. As Plot 2 is clearly “residential property” as defined by both the 1991 and 2001
25 Regulations and was not occupied by an employee, not connected with his employer, who was “required as a condition of his employment to occupy the property” it follows that the Pension Scheme would have been prohibited from holding Plot 2 as an investment by the Inland Revenue (and subsequently HMRC) and therefore be treated as having been acquired on 6 April 2006 and fall within schedule 29A.

30 28. As such, in relation to Plot 2, it is necessary to consider schedule 29A in particular paragraph 8(1)(c) which provides that:

35 “a home or other institution providing residential accommodation with personal care for persons in need of personal care by reason of old age, disability, past or present dependence on alcohol or drugs or past or present mental disorder”

is not residential property for the purposes of the taxable property provisions.

29. Mr Tack, for PTL, contends that the word “a home” in paragraph 8(1)(c), should be construed in accordance with its “ordinary meaning” ie a place where one lives. Plot 2 is clearly the place where Mrs Dunlop lived and where, as a person in
40 need, she was provided with personal care. Therefore, Mr Tack says, it falls within

paragraph 8(1)(c) and as such cannot be residential property for the purposes of the taxable property provisions.

5 30. However, for HMRC, Ms Balmer submits that such an interpretation is unsustainable as it fails to have regard to words “or other institution”. She contends that the use of the word “other” in the legislation defines “home” and that the construction advanced by Mr Tack separating “home” and “institution” would render the word “other” otiose.

10 31. We agree with Ms Balmer that the use of “other institution” in paragraph 8(1)(c) does indeed define “home” which should be construed as referring to an institution eg a care home or nursing home. We find support for such a construction having considered the similarly phrased paragraph 8(1)(a):

“a home or other institution providing residential accommodation for children”

15 If Mr Tack’s construction, with “home” and “other institution” treated as unconnected, were to prevail and applied to paragraph 8(1)(a), a home providing residential accommodation for children would not be treated as residential property for the purposes of the taxable property provisions. As this could include a family home where children live with their parents, given the purpose of the legislation is to restrict investment by pension schemes in residential property, we do not consider this
20 to have been intended by Parliament either in respect of paragraph 8(1)(a) or, by reason of the almost identical words used, 8(1)(c).

32. Therefore, as it does not fall within the exception contained in paragraph 8(1)(c) Plot 2 is a residential property and, as it does not meet the conditions of paragraph 10, is also a “taxable property”.

25 *Plot 3*

33. Mr Tack contends, that despite the absence of any express provision in her written terms of employment, the evidence establishes that Mrs Hawkins was required as a condition of her employment to occupy Plot 3, and as Condition A of paragraph 10(2) is met Plot 3 is not taxable property.

30 34. However, the evidence of Mrs Ruskin was that although Mrs Hawkins was required to live within ten miles of the Ridgeway Nursing Home as a condition of her employment as Deputy Matron she was not required to reside at any particular property, such as Plot 3. She also confirmed that had Mrs Hawkins left Plot 3 for alternative accommodation, provided it was within ten miles of the Nursing Home, it
35 would not have had any effect on her employment.

35. Clearly, therefore, Mrs Hawkins cannot have been required to live at Plot 3 as a condition of her employment. Accordingly Condition A in paragraph 10 has not been met and it therefore follows that Plot 3 is a “taxable property”.

Decision

36. In view of our conclusion that both Plot 2 and Plot 3 are taxable properties PTH's appeal cannot succeed. We therefore dismiss the appeal and confirm the assessments.

5 **Right to apply for permission to appeal.**

37. 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
10 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 BROOKS

TRIBUNAL JUDGE

RELEASE DATE: 18 MAY 2016

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