

Taxpayer denied main residence relief

(Lecture P1189 – 17.24 minutes)

This article deals with the recent CGT case of *Simpson v HMRC* (2019) which was decided by the First-Tier Tribunal.

The taxpayer (S) bought a one-bedroom flat in Earl's Court Square, London SW5 for £630,000 in June 2013. She sold the property towards the end of November 2013 for £900,000, having undertaken significant work in refitting and improving the flat's kitchen and reception room.

During this period, S also owned a nearby (and larger) apartment in Coleherne Court, Old Brompton Road, London SW5 that she had purchased in December 2001 following her divorce. A few years later, S's widowed sister (Mrs O'Donnell) had moved in with her. There was then the possibility of S's daughter (Victoria) and her new husband, who were living in France, returning to London and joining Victoria's mother in Coleherne Court. Realising that it might be a little awkward for them all to be living together, S looked around for a smaller flat for herself and her boyfriend – hence the purchase of the Earl's Court Square property referred to above.

Following the flat's sale in 2013/14, S did not notify HMRC of the disposal in her next tax return on the ground that she had lived in the property as her main residence and so was exempt from CGT. She argued that, after buying the flat, she had furnished it, moved in and occupied it throughout the refurbishment work. As a result, there was no tax to pay, despite the fact that she already owned another residential property.

It is well known that, where a taxpayer has two or more residences, it is open to the individual to make a nomination to HMRC that one or other of the properties is to be regarded as their main residence, but there is no statutory requirement in S222(5) TCGA 1992 that this has to be done. If a timely nomination for main residence status is not made, the ball falls into HMRC's court and they will come to a decision based on the underlying facts. This was to be the position here.

HMRC's primary contention was that S was not entitled to claim any main residence relief because she had never occupied Earl's Court Square as a residence. In the alternative, HMRC maintained that, if she did occupy it as a residence, the property was not her main residence.

In the non-tax case of *Fox v Stirk* (1970) heard by the Court of Appeal, Lord Denning cited with approval the following passage from the judgment of the House of Lords in *Levene v CIR* (1928):

'... the word "reside" is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place".'

Lord Denning went on to say:

'I derive three principles. The first is that a man can have two residences. He can have a flat in London and a house in the country. He is resident in both. The second principle is that temporary presence at an address does not make a man resident there. A guest who comes for the weekend is not resident. The third principle is that temporary absence does not deprive a person of his residence. If he happens to be away for a holiday or away for the weekend or in hospital, he does not lose his residence on that account.'

One of the other Court of Appeal judges in the 1970 case commented:

'This conception of residence is of a place where a man is based or where he continues to live, the place where he sleeps and shelters and has his home. It is imperative to remember in this context that "residence" implies a degree of permanence. In the words of the Oxford English Dictionary, it is concerned with something which will go for a considerable time. Consequently, a person is not entitled to claim to be a resident at a given town merely because he pays a short temporary visit. Some assumption of permanence, some degree of continuity, some expectation of continuity is a vital factor which turns simple occupation into residence.'

These comments are regarded as equally applicable to main residence relief under Ss222 and 223 TCGA 1992 and were of course relied on by the Court of Appeal in the leading case of *Goodwin v Curtis* (1998).

The First-Tier Tribunal judges pointed out that there were inconsistencies in S's witness statement and in her evidence before them. For example, she was very vague about the nature of the refurbishment work carried out at Earl's Court Square and when it was done. And there were no invoices, even though the cost had apparently been between £10,000 and £12,000 that she stated that she had paid in cash.

HMRC argued that it was extremely unlikely that S and her boyfriend would have lived in the small flat while extensive work was being carried out in the kitchen, given that they had a fully functioning kitchen in another apartment just a few minutes' walk away. In addition, Mrs O'Donnell had by now moved out of Coleherne Court and Victoria and her husband had decided to remain in France. This indicated that S probably did not move to Earl's Court Square or that, even if she had done so, she had not occupied the flat as a residence.

For the period of S's ownership of Earl's Court Square, utility bills for the flat were addressed to 'The Occupier'. Clearly, S had never informed the utility companies that she was the new occupant of the flat. Interestingly, shortly after completion of her purchase in June 2013, the estate agents handling the transaction wrote to her saying that it was vitally important to contact the suppliers of gas, electricity and telephone services as well as the local authority to ensure that the accounts for the relevant services and council tax were transferred into her name. The council tax bill from the Royal Borough of Kensington and Chelsea (RBKC) was sent to S at Coleherne Court. For the purpose of this charge, RBKC considered Earl's Court Square to be a secondary residence.

Another relevant pointer was that Earl's Court Square was sparsely furnished with what S stated was 'excess' furniture from her other properties and no contents insurance for the flat was ever taken out.

At one stage, S was considering the transfer of Coleherne Court to Victoria and her husband as part gift and part sale – this would be when they were thinking about returning to the UK. There was no reference to this arrangement in S's witness statement. When asked during the hearing if she had taken advice about how to effect the transfer and what the tax consequences of the gift element would be, S stated that she had but that she could not recall the detail of the advice. No documents relating to the proposed transfer were provided to HMRC (or to the First-Tier Tribunal).

In the light of all this, it is unsurprising that the First-Tier Tribunal found that Earl's Court Square was never occupied by S as a residence and so could not of course be her main residence. A CGT liability of nearly £53,000 was therefore payable, along with a penalty of more than £14,000 which was imposed under Sch 41 FA 2008 because of S's failure to notify HMRC of her chargeability to CGT in 2013/14. This case is a very good illustration of how not to go about a main residence planning exercise!

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