

Reversal of PPR relief decision (Lecture P1172 – 19.26 minutes)

The Court of Appeal's decision in *Higgins v HMRC* (2019) concerns the availability of principal private residence relief under Ss222 and 223 TCGA 1992. It is another in the long line of main residence tax cases which have come before the Tribunals and Courts in recent years and will be of particular interest to those practitioners advising clients about the sale of off-plan properties. The Court of Appeal has reversed the finding of the Upper Tribunal in 2018.

In 2004, the taxpayer (H) paid a reservation deposit of £5,000 for a two-bedroom apartment which was being created out of the former St Pancras Station Hotel but which, at that time, had yet to be built.

On 2 October 2006, when issues relating to the site's title had been resolved, H entered into a contract with the seller for the grant of a 125-year lease over the apartment (which had still not been started) for a total consideration of £575,000. This was to include two further deposits which, if not paid, would have allowed the seller to rescind the contract. A final payment was due on completion.

H sold his previous residence in July 2007 and, from then until he obtained possession of his new apartment, he stayed with his parents and also occupied a rental flat which he owned where the tenant had moved out. HMRC accepted that all these arrangements were temporary, i.e. there was no other dwelling which H regarded as his main residence.

Work finally began on the construction of H's apartment in November 2009 following delays over funding issues that affected the seller but, by mid-December 2009, H was informed that the property had been substantially completed.

H, although allowed access to the building to look round, had no right to occupy his property until 5 January 2010 when his purchase went through.

Exactly two years later, i.e. on 5 January 2012, H completed the sale of this apartment to a new owner. He had exchanged contracts with the buyer on 15 December 2011.

HMRC did not challenge the amount of H's gain on the disposal in 2011/12 and they accepted that principal private residence relief was available as a result of S223(1) TCGA 1992 which states that no part of a gain is chargeable to tax where the property has been the taxpayer's only or main residence throughout his period of ownership. Where the two sides differed was over the period of ownership for which relief was due. In other words, HMRC were arguing that there should be a restriction on the principal private residence relief which resulted in a CGT liability of more than £60,000 becoming payable, on the ground that there was a period of time during H's ownership when he had not occupied the apartment as a main residence. This, in turn, came down to a question of when H's occupation of the property was deemed to commence for CGT purposes.

HMRC's argument was that the qualifying period of ownership should not necessarily be confined to periods when H could first occupy the property. In their view, the period of ownership commenced on the date when the contract to acquire the lease was signed (2 October 2006), and not on 5 January 2010 when H actually took up residence. HMRC considered that relief from CGT should be limited to increases in value during the period of occupation as a residence.

Any increase in value before H occupied the apartment should not, they said, be covered by principal private residence relief. ESC D49, which is soon to become a statutory provision, allows a period of up to two years in exceptional circumstances to be treated as a period of occupation, but the delay in H's case comfortably exceeded this time limit and so ESC D49 was not in point – see Paras CG65003 and CG65009 of the Capital Gains Manual.

Newey LJ, who delivered the leading judgment, began by highlighting the fact that, under HMRC's interpretation (see above), very few people would qualify for full main residence relief, given that exchange and completion do not normally take place on the same day. HMRC had argued that S28 TCGA 1992, which identifies the acquisition and disposal of a chargeable asset by reference to contract dates, should determine the meaning of 'period of ownership' in the context of the availability of principal private residence relief. The judge did not accept HMRC's contention that any resulting anomaly which this caused was effectively remedied by the fact that only small liabilities would typically arise and that, in practice, short delays are ignored. There was a strong likelihood, he felt, that HMRC's interpretation was incorrect.

HMRC's understanding of the phrase 'period of ownership' ran counter, Newey LJ said, to the normal meaning of the words, since a purchaser would, as a matter of ordinary language, only be described as the owner of the property once completion had taken place. Moreover, he continued, it was hard to see how ownership could have commenced before completion of the building work as H's apartment did not exist in 2006 (and this could be distinguished from the purchase of a plot of land and the subsequent construction of a dwelling – catered for by ESC D49 – since, in that case, the land had existed throughout).

The Court of Appeal agreed with the First-Tier Tribunal that the period of ownership for main residence relief purposes did not begin until the completion of the contract for building the apartment and so the three judges allowed the appeal against the Upper Tribunal's decision.

There is likely to be considerable relief at this outcome, as the use of completion dates in this situation:

- (i) ensures that most taxpayers will obtain full relief; and
- (ii) avoids the need to rely on unpublished HMRC practice.

However, it remains to be seen whether there will be an appeal to the Supreme Court.

Contributed by Robert Jamieson