

PPR On An Off-Plan Property

(Lecture P1104 – 11.52 minutes)

Following on from Robert Jamieson's article and seminar this month (P1103), we take a look at the recent Upper Tribunal decision in the case *HMRC v Desmond Higgins* [2018] UKUT 0280 (TCC)

The Facts

Mr Higgins wished to purchase an apartment in a development of the former St Pancras Station Hotel.

In 2004 he paid a reservation deposit of £5,000 to secure a 2-bedroom apartment.

On 2 October 2006 Mr Higgins entered into a contract with Manhattan Loft St Pancras Apartments Ltd. At that time the development works had not yet commenced. The apartment was "off-plan" – ie, identified on the development plans but not then in existence. The agreed purchase price for the apartment was £575,000.

Further deposits of the purchase consideration were paid in October 2006 and March 2007.

Mr Higgins had no right to access the building while the apartment was under construction.

After delays to the development due to funding issues, the apartment was finally finished in December 2009. The contract was legally completed on 5 January 2010 after which point Mr Higgins had a legal right of occupation.

Mr Higgins occupied the apartment from 5 January 2010 to 5 January 2012. In December 2011 he entered into a contract for sale which was completed on 5 January 2012 at which point he vacated the property. The sale price was £1,215,000 giving Mr Higgins a substantial capital gain.

Mr Higgins claimed that private residence relief was due, and in his case full relief was available as the apartment had been his only or main residence throughout his period of ownership.

Mr Higgins contended that his period of ownership started on 5 January 2010 when he was first able to occupy the apartment and finished on 5 January 2012 when he completed the disposal and vacated the property. As the period of ownership is coterminous with the period when the apartment was his main residence, private residence relief was due on the whole of the capital gain.

HMRC rejected this premise and instead argued that private residence relief should only be granted in respect of part of Mr Higgins' capital gain because the apartment was not his main residence during the whole of his period of ownership.

Under Section 28 TCGA 1992, the “period of ownership” is the period between the date of acquisition and the date of disposal.

“.....where an asset is disposed of and acquired under a contract, the time at which disposal and acquisition is made is the time the contract is made....”.

The period of ownership commenced on 2 October 2006 when Mr Higgins contracted to purchase the apartment and ended on 15 December 2011 when he contracted to sell the apartment. In the period between 2 October 2006 and 5 January 2010, the apartment was not occupied by Mr Higgins as his only or main residence as required by Section 223. As a consequence, private residence relief should be restricted leaving part of the gain on the property chargeable to CGT.

An assessment to tax was raised by HMRC against which Mr Higgins appealed.

The FTT Decision

Both parties agreed that there was no other dwelling that Mr Higgins regarded as his main residence throughout the period July 2007 to January 2010. [In this period he had been living with his parents and travelling.]

The FTT considered that the term “period of ownership” in Sections 222 and 223 should be given its ordinary meaning and should reflect a “realistic view of the facts”. The FTT accepted the taxpayer’s argument that a period of ownership of a dwelling house will ordinarily begin on the date the purchase of the dwelling house has been physically and legally completed and the purchaser has the right to occupy.

Only at that time does the purchaser become the full beneficial owner of the property. In the case of an off-plan purchase the case was even stronger because when contracts are exchanged for the purchase, the dwelling does not actually exist. It was not possible for it to have been anyone’s main residence in this period.

The FTT accordingly found that the period of ownership for the purpose of the private residence relief rules began when Mr Higgins acquired the legal right to occupy the property (that being the legal completion date which was 5 January 2010). This subsequently meant that the period of ownership and occupation fully coincided and Mr Higgins’ gain was wholly covered by private residence relief.

The taxpayer’s appeal was allowed.

HMRC appealed to the UTT.

The UTT Decision

The FTT has concluded that a period of ownership cannot begin before the taxpayer has a right of occupation. The UTT found that there was nothing in the words or context of the provisions of TCGA 1992 to justify such a narrow construction and that the FTT had failed to have due regard to Section 28.

Mr Higgins’ chargeable gain is the difference between his acquisition cost and his disposal proceeds. Those figures are determined when unconditional contracts for the purchase and sale are exchanged.

The acquisition cost was fixed on 2 October 2006 when unconditional contracts were signed with the developer. This is also the date of acquisition for CGT purposes by virtue of Section 28. The gain therefore accrued between October 2006 and December 2011 (being the date the purchase price was fixed and the sale price was agreed). However, the property was not Mr Higgins' main residence prior to 5 January 2010 and as such private residence relief should be restricted.

The UTT pointed out that, in the majority of house purchases, there is a delay of a few weeks between exchange of contracts and completion, with the purchaser only taking up residence at the later date. Yet HMRC does not shave a few weeks off the main residence relief under Section 223 to account for the few weeks at the start when the property was not occupied by the taxpayer.

This practical problem is dealt with by HMRC's concession ESC D49 whereby short periods of non-occupation between exchange of contracts and completion are overlooked. ESC D49 would be superfluous if the period of ownership actually started on completion of the purchase. The fact that the practice exists is acceptance that ownership starts on exchange of contracts and gains accrue from that point. [No similar practice is needed on disposal because a dwelling-house is treated as a main residence for the last 18 months of ownership.]

It should be noted here that ESC D49 allows a period up to two years to be treated as a period of occupation, but the delay in this case was well in excess of two years so the concession was not relied upon.

The UTT also rejected the FTT finding that Mr Higgins had no equitable interest in the apartment until construction was substantially completed in December 2009 because the apartment did not exist as such until that time. It was put to the UTT that the period of ownership of the apartment could not begin before an equitable interest was established. From March 2007 when the second deposit was paid, Mr Higgins had an asset which he could legally dispose of by way of sub-sale. If Mr Higgins had disposed of his interest by way of sub-sale at any time prior to completion on 5 January 2010, he would have realised a chargeable gain with no possibility of private residence relief.

HMRC's appeal was allowed.

Conclusions

The pragmatic view of the FTT has been set-aside by the UTT taking a much stricter interpretation of the law. It is hard to see what grounds the taxpayer will have to appeal this judgement, so this now looks to be set in stone.

This decision will be somewhat worrying to those who have entered into – or are interested in pursuing – an off-plan property purchase as delays between the buyer signing the initial contract with the developer and taking-up residence are very common and are largely out of buyer's control.

Whether this will lead to buyers seeking some sort of contractual indemnity for any additional CGT costs they incur as a result of developmental delays remains to be seen. In Mr Higgins' case and through no fault of his own, there was a 3-year delay between him signing the contract and the apartment being built and this has ultimately cost him

around £60,000 in capital gains tax. This is certainly something buyers might consider raising with a developer if an off-plan purchase of a home is to be considered.

Caveat emptor.

Contributed by Steve Sanders