[2016] UKFTT 365 (TC)

TC05120

Appeal number: TC/2015/02178

CAPITAL GAINS TAX – appeal against assessment under s 29 TMA 1970 and related penalty – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

AYSEL YAZAR **Appellant**

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER: MR TOBY SIMON

Sitting in public at the Royal Courts of Justice, Strand, London 23 February 2016

The Appellant did not appear and was not represented at the hearing

Miss Joanna Bartup, an officer of the Respondents, for the Respondents ("HMRC")

DECISION

1. The appellant appealed against an assessment made by HMRC on 26 November 2013 under s 29 of the Taxes Management Act 1970 ("**TMA**") for £25,380.40 of capital gains tax asserted to be due on the disposal of a property at 20 Sharon Gardens, London E9 7XR (the "**Property**") in the tax year 2007/08 and a related penalty of £3,807 also issued on that date.

2. The appellant did not attend and was not represented at the hearing. The appellant did not give any prior notification or reason for not attending. We were satisfied that the appellant had been notified of the hearing and given the full opportunity to attend. Having regard to the rules governing the tribunal and, in particular, the overriding objective of dealing with matters fairly and justly we decided that, as the appellant had been given the opportunity to attend and had not requested a postponement and as HMRC were present and prepared, we should proceed with the hearing.

Facts

Background – property acquisition and sale

3. The appellant and her sister, Mrs Ayfer Aykac, purchased the Property on 10 March 2006. Mrs Aykac later divorced and is now known as Ms Cebi and is referred to by that name in the remainder of this decision.

4. The sale agreement of 10 March 2006 was made in the names of the appellant and Ms Cebi as the buyers of the Property for £310,000. The register of title kept by HM Land Registry showed the appellant and Ms Cebi as the owners of the title absolute to the Property at that date. The purchase was in large part funded through a mortgage of £250,000 which was taken out in the names of the appellant and Ms Cebi. A letter from a firm of solicitors, Ismail & Co, addressed to the appellant and Ms Cebi and setting out the terms of engagement and an estimate of fees for the legal work on the purchase of the Property, indicates they appointed that firm jointly to do the legal work. Ismail & Co prepared a completion statement regarding the purchase again addressed to the appellant and Ms Cebi.

5. The appellant and Ms Cebi sold the Property on 4 May 2007 for £499,950. The appellant did not declare any capital gain in respect of the sale of the Property in a self assessment tax return for 2007/08 or otherwise.

6. HMRC later became aware of the sale of the Property and concluded that the appellant had disposed of a 50% interest in the Property for capital gains purposes and raised an assessment for capital gains tax accordingly. The appellant subsequently argued that she had a lesser share in the Property of only one fifth (as explained below) and that the capital gain and penalty should be recomputed on that basis.

HMRC enquiry

7. On 4 December 2012 HMRC notified the appellant they were checking her tax position as regards property transactions which HMRC understood the appellant had carried out. On that date HMRC issued a notice under para 1 of schedule 36 to the Finance Act 2008 essentially requiring details of all UK and overseas properties owned solely or jointly by the appellant during the period from 6 April 2005 to 5 April 2012.

8. The appellant's advisers, Zek & Co, provided some of the requested information in a letter of 8 April 2013. This included details of the purchase and subsequent sale of the Property as set out above. In the correspondence HMRC reached agreement with Zek & Co on the computation of the chargeable gain arising to the appellant on the disposal of the Property. The gain was computed on the basis that the appellant owned a 50% share of the Property and accordingly was entitled to a 50% share of the sales proceeds.

9. In a note of a telephone call with Zek & Co on 14 May 2013 HMRC record the following:

> "He [the adviser at Zek & Co] said that Mrs Yazar is not happy that no enhancement expenditure [which had been claimed of £10,000] has been allowed but realises that she cannot support any claim. They will therefore accept the CG comps attached to my letter.....He said the position is exactly the same with Ms Cebi as this was a joint venture".

10. In a note of a telephone call with Zek & Co of 30 September 2013 HMRC record the following:

> "The accountant said they wanted to explain what happened. The property was bought by Ms Cebi's mother and given to her and her sister. When the property was sold the proceeds were divided between them and their two brothers - split equally between them.
>
> SH [the HMRC officer dealing with this] explained that the documents she has seen show the property was acquired by Ms Cebi and Ms Yazar and sold by them. They were the legal owners and any CGT liability is split between them. She said she is not disputing what she is told but can only calculate the CGT liability in line with the legal position."

Correspondence following issue of assessment

11. HMRC then raised the assessment and issued the penalty on 26 November 2013.

12. The appellant sent an email to HMRC on 9 December 2013 which stated the following as regards the ownership of the Property and its sale:

"The house was bought by our mother as a gift for her five children but named under two of her children, Ayfer Cebi (former name Ayfer Aykac) and myself Aysel Yazar. The house was never rented but on few occasions it was occupied by Ms Ayfer Cebi due to her going through divorce. Shortly after the purchase of 20 Sharon Gardens our mother was diagnosed with terminal secondary cancer and doctors gave her three months. Upon her request we took her back to Turkey where she wanted to pass away. Our mother passed away on 22 February 2007 and we decided to sell the house dividing it between the five children.

13. On 2 February 2014 the appellant wrote to HMRC stating that she was sending documentation which showed that the proceeds from the Property was shared equally by all her siblings as it was gifted as part of the inheritance from their mother being sworn declarations from the relevant sibling made in the presence of a solicitor. The declarations referred to are two letters apparently signed by 3 of the appellant's siblings (in the presence it seems of a solicitor) stating that on the sale of the Property the money was split between all siblings:

(1) The first letter is dated 28 January 2014 addressed "To whom it may concern" and signed by Mrs Ayten Muti and Mr Murat Cebi. It stated that the Property was "gifted to us by our mother Mrs Kiymet Cebi before her death in 2007. On the sale of the property of 20 Sharon Gardens Hackney E9 7RX the money was split between all siblings that me Mrs Ayten Muti and Mr Murat Cebi being one of them".

(2) The second is less easy to read and the name of the signatory is not clear. It is again addressed to "To whom it may concern" and states "I would like to confirm that Mr Dursun Cebi had one equal share of 20 Sharon Gardens Hackney E9".

14. On 28 February 2014 the appellant wrote to HMRC and enclosed bank statements which she said showed the distribution of the proceeds between the siblings. The appellant's bank statement for the period from 5 April 2007 to 13 June 2007 has an entry for 8 May 2007 showing the receipt of £241,066.22. The appellant's bank statements also show substantial amounts being paid out of the account at that time but there is no reference to whom the payments were made.

15. In a letter of 12 February 2014 HMRC wrote to the appellant stating that if the appellant was contending that the Property was owned by her mother and distributed as part of her estate, HMRC would be happy to consider any documents which could be provided to support this such as her will and probate papers, an inheritance tax return and completion statement from the solicitors acting on the sale. HMRC went on to state that if the appellant was trying to demonstrate that the property was gifted equally to the appellant and her siblings prior to their mother's death, HMRC would need to see independent evidence such as copies of deeds or other legal documents, the inheritance tax return or the name and address of her executors.

Appeal to the tribunal

16. The appellant submitted an appeal to the tribunal on 14 January 2015 which stated the following grounds of appeal:

> "The initial figure from HMRC of £25,380.40 does not account for the individual tax allowances for all who benefitted from the sale of the property. This then had a penalty of £3,807. I then started to appeal against the decision. The appeal process was vast and complicated with so many different departments to deal with. The whole process has taken years, dealing with several departments in HMRC. They have all given me different information, however, no one has been able to direct me clearly within all these correspondence. I was told the case was put on hold which led me to believe that there were no charges incurred as the case was being dealt with. However, to my dismay the surcharges and interest have been accumulating while the correspondence and appeal was taking place. This has meant that I have been mislead and misinformed. In my view the individual calculations were wrong. However at this point in time I would like the surcharges and interest to be removed."

17. The appellant also stated in the notice of appeal that the desired result was for an individual tax allowance for each beneficiary on the sale of the property. Interest and surcharges have accumulated as a result of being dealt with insufficiently by HMRC. Therefore I would like the surcharges and the interests to be made void.

18. At the hearing HMRC explained that the surcharges the appellant referred to in the notice of appeal had been removed as the appellant was being charged a penalty.

Law

19. A person who has not received notice to submit a tax return for a year of assessment but who is chargeable to income tax or capital gains for that year, must notify HMRC that he is so chargeable. This is provided for under s 7 TMA as follows:

> "(1) Every person who –
>
> (a) is chargeable to income tax or capital gains tax for any year of assessment, and
>
> (b) has not received a notice under section 8 of this Act requiring a return for that year of his total income and chargeable gains,
>
> shall, subject to subsection (3) below, within six months from the end of that year, give notice to an officer of the Board that he is so chargeable."

20. A person who fails to comply with an obligation under s 7 TMA is liable to a penalty under s 7(8) TMA which provides:

> "(8) If any person, for any year of assessment, fails to comply with subsection (1) above, he shall be liable to a penalty not exceeding the amount of the tax-
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> (a) in which he is assessed under s 9 or 29 of this Act in respect of that year, and
>
> (b) which is not paid on or before the 31st January next following that year."

21. The provisions enabling HMRC to make a discovery assessment are set out in s 29 TMA. Section 29(1) provides that:

> "If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment:
>
> (a) that any…….. chargeable gains which ought to have been assessed to capital gains tax have not been assessed,
>
> …..the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

22. The time limits for the making of an assessment in these circumstances is 20 years as set out in s 36 TMA:

> "(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax -
>
> (a) brought about deliberately by the person,
>
> (b) attributable to a failure by the person to comply with an obligation under section 7, or….
>
> may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period.)"

23. Under s 118 (2) TMA a person may appeal against such an assessment on the grounds of reasonable excuse:

> "(2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the Commissioners or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not

to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased."

24. Under s 1 of the Taxation of Capital Gains Act 1992 ("**TCGA**"), tax is charged in respect of capital gains, that is to say chargeable gains computed in accordance with that Act and accruing to a person on the disposal of assets.

Submissions

25. We have considered the appellant's submissions as set out in the correspondence and notice of appeal set out above.

26. HMRC's submissions are as set out below:

(1) The appellant failed to give notice that she was liable to capital gains tax for the tax year 2006/07 under s 7 TMA. HMRC subsequently made a discovery, within the meaning of s 29(1) TMA, that the appellant was liable to capital gains tax on the disposal of the Property when they were informed of that transaction in July 2013. HMRC note that the onus is on them to prove, on the balance of probabilities, that a discovery was made. HMRC consider this to be evident from the materials produced to the tribunal. The assessment was made within the applicable time limit of 20 years (under s 36A TMA).

(2) Under s 7(8) TMA a penalty is due in an amount not exceeding the tax on which the person is assessed. HMRC have given the maximum permitted reduction in the penalty for disclosure as the appellant revealed the transaction once the information was sought, 35% out of the possible maximum reduction of 40% for cooperation (as there were some delays in providing information) and 20% out of a maximum possible reduction of 40% for seriousness as the amount of the gain is significant. The appellant had no reasonable excuse under s 118 (2) TMA.

(3) The person making a disposal of a chargeable asset for capital gains purposes is the beneficial owner of the asset. The documents all point to the appellant and Ms Cebi each being the legal and beneficial owners of a 50% share of the Property when it was sold. HMRC noted, in particular, the office copies of the Land Registry title when the Property was acquired, that the mortgage for funding the purchase of the Property was taken out in the names of the appellant and Ms Cebi, that the sale agreement was in their names as purchasers and that the related correspondence with the solicitor was addressed to them both.

(4) The onus is on the appellant to demonstrate that the beneficial ownership was different to legal ownership. In the case of *Stack v Dowden* [2007] 2 All ER 929 it was held at [56] that the onus is:

> "upon the person seeking to show that beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show he has any interest at all. In joint

ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest."

(5) There is no document which evidences that anyone other than the appellant and Ms Cebi were the beneficial owners of the Property at the relevant time.

(6) HMRC noted that under s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 a contract for the sale or other disposition of an interest in land can only be made in writing. If the 3 other siblings were the beneficial owners of the Property, as the appellant argues, they should have joined in the contract for the purchase and sale of the Property.

(7) HMRC also referred to s 53 of the Law of Property Act 1925 which provides that (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by the operation of law, (b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will. The section specifies it does not affect the creation or operation of resulting, implied or constructive trusts.

(8) There is no written evidence of an express trust and no evidence supporting a constructive trust. It was only after the tax computations were agreed that the appellant raised that the Property was owned by all of the 5 siblings. The appellant's advisers, Zek & Co, had not mentioned this and did not seem to be aware of it. This suggests that this was something suggested purely as a way of reducing the potential tax charge after the event, which was not reflected in the reality of the situation. There is simply no evidence which supports the appellant's assertions.

(9) If, contrary to HMRC's view, the tribunal were to find that the other three siblings had an interest in the Property, HMRC's view is that any such interest could only relate to the part of the Property purchased with the balance of £60,000 which was not funded by the mortgage. It is clear that the mortgage of £250,000 was taken out only by the appellant and Ms Cebi.

(10) An assessment for capital gains tax on the disposal of the property has also been raised on Ms Cebi and that she has not appealed against this.

Discussion

27. The issue is the validity of a discovery assessment issued by HMRC for £25,380.40 of capital gains tax asserted to be due from the appellant on the disposal of the Property in the tax year 2007/08 and a related penalty of £3,807.

28. It is clear that the appellant made a disposal of her interest in the Property on 4 May 2007 giving rise to a taxable chargeable gain. The appellant did not notify HMRC that she was liable to capital gains tax on the disposal. HMRC later issued an assessment for the capital gain under s 29(1) TMA on the basis that they had discovered that capital gains tax, which ought to have been assessed for the tax year 2007/08, had not been assessed when they received information from the appellant's adviser in July 2013.

29. As regards when there is a "discovery" in the case of *Revenue and Customs Commissioners v Charlton* [2013] STC 866 at [37] the Upper Tribunal held that:

> "All that is required is that it has "newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that an assessment should be issued, but for some reason the assessment is not made within a reasonable period after the conclusion is reached, it might depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment".

30. According to the above, whilst the threshold for a discovery is relatively low, there must be a new conclusion reached by HMRC within a reasonable time period prior to the issuing of the assessment. In our view, it is clear from the documents produced to the tribunal that the relevant HMRC officer discovered, acting reasonably and honestly, that capital gains tax was due for the tax year 2007/08 when the appellant's advisers, Zek & Co, provided information on the purchase and sale of the Property in July 2013. The subsequent issue of the assessment on 26 November 2013 was sufficiently close in time to the making of that discovery that there is no issue that the discovery in any way lost its newness. We conclude, therefore, that HMRC were entitled to make a discovery assessment. It appears that the appellant does not dispute this.

31. The issue is the amount assessed to capital gains tax. HMRC made the assessment on the basis that the appellant owned a 50% share in the Property and accordingly was entitled to 50% of the sale proceeds. The appellant contends that in fact she owned only one fifth of the Property with a correspondingly reduced share of the proceeds. This is on the basis that the Property was purchased for her mother who gifted the Property or the proceeds to the appellant, Ms Cebi and their 3 other siblings in equal shares. The appellant argues the capital gain arising to her should be recomputed on that basis which would mean it would be substantially reduced (thereby also reducing the penalty).

32. The provisions of the TCGA impose a liability to capital gains tax on the person who makes a disposal of the relevant asset, in this case, the Property. Whilst not specifically stated in the Act as such, it is implicit that a person can make a disposal of

an asset only if they have an interest in that asset which can be disposed of. There are special rules where an asset is held in trust.

33. As HMRC have satisfied us that they were entitled to issue an assessment the onus passes to the appellant to demonstrate that, on the balance of probabilities, the amount of the assessment is not correctly computed for the reasons the appellant asserts. The appellant would need to establish that the 3 siblings had at the relevant time a beneficial interest in the Property for her argument to succeed. We note that such an interest could arise in a number of ways such as by direct purchase of an interest, through a gift from the original owner, the declaration of an express trust by the owner (which would have to be made in writing) or the creation of a constructive or resulting trust.

34. The available evidence shows that the appellant and Ms Cebi beneficially owned the Property in equal shares and it appears the appellant does not dispute the validity of these documents:

(1) The Land Registry show only the appellant and Ms Cebi as the owners of the absolute title to the Property on 10 March 2006.

(2) The sale and purchase agreement for the acquisition of the Property was made in the names of the appellant and Ms Cebi.

(3) The appellant and Ms Cebi took out a mortgage of £250,000 to fund the purchase of the Property.

35. The difficulty is that there is no evidence which suggests that the above position, as evidenced by the legal documents relating to the purchase, is not correct. There is no documentary evidence and, the appellant did not attend to give oral evidence, that the Property was acquired by the appellant's mother or held by the appellant and Ms Cebi on trust for the appellant's mother. There is no evidence that if the appellant's mother did own an interest in the Property, she made a gift of it or of the proceeds of sale to her 5 children. There is no satisfactory evidence that the other siblings of the appellant and Ms Cebi otherwise had an interest in the Property.

36. The only evidence submitted are 2 letters from the appellant's siblings stating that they were entitled to a share of the proceeds and the appellant's bank statements showing large payments out of her account in the 2007/08 tax year in which the disposal was made. This is not of itself sufficient to show that the siblings had an interest in the Property. The fact that the appellant may have shared the proceeds with the siblings does not lead necessarily to the conclusion they had an interest in it prior to its sale. It is not clear, in any event, that the siblings did receive a share of the proceeds as the bank statements in question do not show to whom funds shown as debited from the account were paid. One of the letters notes that the two signatories had a share of the proceeds as the Property was gifted to them (and the other siblings) by their mother. However, as noted, there is no evidence to substantiate that the appellant's mother had an interest in the Property which she could have made such a gift of.

37. Overall we have concluded that, on the evidence presented, the appellant has no basis for challenging the assessment.

38. As regards the penalty, our view is that this was validly issued and there is no reason for giving any further reduction in the amount charged.

Conclusion

39. For all the reasons set out above, the appeal is dismissed.

40. 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 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.

HARRIET MORGAN
TRIBUNAL JUDGE

RELEASE DATE: 24 MAY 2016