

[2019] UKFTT 488 (TC)



*CAPITAL GAINS TAX – principal private residence relief – whether appellant's sequential stay at two properties qualified as residence or only a temporary stay for the purposes of section 222 Taxation of Chargeable Gains Act 1992 – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**TC07291**

**Appeal number: TC/2018/01552**

**BETWEEN**

**MARTIN FITZJOHN**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE GUY BRANNAN  
MR MOHAMMED FAROOQ**

**Sitting in public at Cambridge Magistrates Court, Cambridge on 24 June 2019**

**Phil Beard, Thomas Quinn, Chartered Accountants, for the Appellant**

**Pallavika Patel, Presenting Officer, for the Respondents**

## DECISION

### INTRODUCTION

1. The main issue in this appeal is whether in the tax year ended 5 April 2007 (“the year 2006/2007”) the appellant, Mr Fitzjohn, is entitled to relief from capital gains tax in respect of the disposal of two properties under the principal private residence exemption contained in section 222 Taxation of Chargeable Gains Act 1992 (“TCGA”). Essentially, the dispute in this appeal is whether Mr Fitzjohn’s stay at the two properties, amidst matrimonial difficulties, was sufficiently settled to constitute residence or whether it was simply temporary stay not constituting residence.

2. Secondly HMRC seek to charge a penalty on the appellant under section 95 Taxes Management Act 1970 (“TMA”) on the basis that Mr Fitzjohn has negligently delivered an incorrect tax return for the year 2006/2007.

3. In addition, HMRC’s assessment is a “discovery assessment” under s 29 TMA and, in addition, the question arises whether the extended time limits on an assessment contained in section 36 TMA have been satisfied.

4. Although the appellant’s appeal was strictly out of time, HMRC raised no objection in this regard. Accordingly, we exercise our discretion to allow this appeal out of time and we, ourselves, see no reason to prevent this appeal being heard.

### EVIDENCE

5. Mr Fitzjohn gave evidence and was cross-examined.

### THE LEGISLATION

6. Section 222 TCGA provides as follows:

“222 Relief on disposal of private residence

(1) This section applies to a gain accruing to an individual so far as attributable to the disposal of, or of an interest in—

(a) a dwelling-house or part of a dwelling-house which is, or has at any time in his period of ownership been, his only or main residence, or

(b) land which he has for his own occupation and enjoyment with that residence as its garden or grounds up to the permitted area.

(2) In this section “the permitted area” means, subject to subsections (3) and (4) below, an area (inclusive of the site of the dwelling-house) of 0.5 of a hectare.

(3) Where the area required for the reasonable enjoyment of the dwelling-house (or of the part in question) as a residence, having regard to the size and character of the dwelling-house, is larger than 0.5 of a hectare, that larger area shall be the permitted area.

(4) Where part of the land occupied with a residence is and part is not within subsection (1) above, then (up to the permitted area) that part shall be taken to be within subsection (1) above which, if the remainder were separately occupied, would be the most suitable for occupation and enjoyment with the residence.

(5) So far as it is necessary for the purposes of this section to determine which of 2 or more residences is an individual’s main residence for any period—

(a) the individual may conclude that question by notice to [an officer of the Board] given within 2 years from the beginning of that period but subject to a

right to vary that notice by a further notice to [an officer of the Board] as respects any period beginning not earlier than 2 years before the giving of the further notice,

(b) . . .

. . .

(6) In the case of [an individual living with his spouse or civil partner]—

(a) there can only be one residence or main residence for both, so long as living together and, where a notice under subsection (5)(a) above affects both [the individual and his spouse or civil partner], it must be given by both, . . .

(b) . . .”

7. Section 1011 of the Income Tax Act 2007 provides:

“Individuals who are married to, or are civil partners of, each other are treated for the purposes of the Income Tax Acts as living together unless—

(a) they are separated under an order of a court of competent jurisdiction,

(b) they are separated by deed of separation, or

(c) they are in fact separated in circumstances in which the separation is likely to be permanent.”

8. The “discovery” provisions of section 29 Taxes Management Act 1970 are as follows:

“(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment-

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or that any relief which has been given is or has become excessive,

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.

(2) [not applicable]

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above-

(a) in respect of the year of assessment mentioned in that subsection; and

(b) ... in the same capacity as that in which he made and delivered the return, unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board-

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.”

9. Section 36 TMA places a time limit on the length of time by which an assessment must be made section 36 provides as follows:

“ 36 Loss of tax brought about carelessly or deliberately etc.

(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

(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,

.....

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).

10. The relevant penalty provisions of section 95 TMA are as follows:

**“95 Incorrect return or accounts for income tax or capital gains tax**

(1) Where a person fraudulently or negligently—

(a) delivers any incorrect return of a kind mentioned in [section 8 or 8A of this Act (or either of those sections)] as extended by section 12 of this Act . . .), or

(b) makes any incorrect return, statement or declaration in connection with any claim for any allowance, deduction or relief in respect of income tax or capital gains tax, or

(c) submits to an inspector or the Board or any Commissioners any incorrect accounts in connection with the ascertainment of his liability to income tax or capital gains tax,

he shall be liable to a penalty not exceeding [the amount of the difference specified in subsection (2) below].

(2) The difference is that between—

(a) the amount of income tax and capital gains tax payable for the relevant years of assessment by the said person (including any amount of income tax deducted at source and not repayable), and

(b) the amount which would have been the amount so payable if the return, statement, declaration or accounts as made or submitted by him had been correct.”

11. Finally, section 118 TMA provides, in relation to deliberate inaccuracy, as follows:

“(7) In this Act references to a loss of tax or a situation brought about deliberately by a person include a loss of tax or a situation that arises as a result of a deliberate inaccuracy in a document given to Her Majesty's Revenue and Customs by or on behalf of that person.”

## THE FACTS

12. Mr Fitzjohn is an estate agent and has been engaged in this business since 1993.
13. Mr Fitzjohn had been residing at a house in Peterborough with his wife and two children – this property was Mr Fitzjohn’s matrimonial home (“the matrimonial home”).
14. In 2005, Mr Fitzjohn moved out of the matrimonial home. In a letter to HMRC dated 14 November 2014, Mr Fitzjohn stated:

“Due to my deteriorating matrimonial situation we decided that my wife and I should have some time living apart to see if this would result in us resolving our matrimonial difficulties.

Unfortunately this ultimately resulted in a permanent separation in 2008 and resulted in a stressful and difficult divorce soon after that.”

15. When Mr Fitzjohn moved out of the matrimonial home he moved to an address in Peterborough (“Regents Court”) which he purchased on 31 December 2005 for £82,500. He sold Regents Court on 29 March 2006 for £93,000 making a gain of £10,500. Mr Fitzjohn’s evidence was that he found Regents Court unsuitable – it was a one-bedroom flat – because he wanted to have his children to come and stay with him.

16. Mr Fitzjohn returned a capital gain on Regents Court of £10,500 on his self-assessment tax return for the year 2005/2006. He did not seek to claim that Regents Court was his principal private residence, on the basis that it was only a temporary place to stay. On 21 April 2006, Mr Fitzjohn purchased another property in Peterborough (“Silver Street”) for £88,000. He then sold Silver Street on 24 August 2006 for £124,995, making a gain of £36,995.

17. Next, on 2 May 2006, Mr Fitzjohn purchased another property in Peterborough (“Bringhurst”) for £81,000. On 31 October 2006, Mr Fitzjohn sold Bringhurst for £97,000, making a gain of £16,000.

18. The dates in respect of the above transactions were, we were informed, the completion dates.

19. Mr Fitzjohn did not return the gains in respect of Silver Street and Bringhurst on his self-assessment tax return for the year 2006/2007. Instead, he claims that each property constituted his only or main residence for the purposes of section 222 TCGA.

20. In his letter of 14 November 2014 to HMRC Mr Fitzjohn explained that

“The reason that I changed homes in a short period was that Regents Court turned out to be far from ideal living space when I had my three young sons come to stay with me. Bringhurst turned out to be a total [sic] unsuitable location for life as the boys became more dependent on staying with me and Silver Street was sold in a last gasp attempt to move back into the matrimonial home and make a go of it with my now ex-wife.”

21. Mr Fitzjohn instructed Messrs. Thomas Quinn, Chartered Accountants, (“the accountants”) to represent him. The accountants wrote to HMRC on 12 May 2015 stating as follows:

“The facts are that at the time Mr Fitzjohn was estranged from his wife but at the time was hopeful of reconciliation, within this process he moved out of the matrimonial home initially into an apartment [Regents Court]. He realised quite quickly that the apartment was not suitable for the situation where he still wanted access to his children and therefore moved to [Silver Street], the only motivation being a larger property where there were additional bedrooms enabling his children to stay. However, he quickly found he did not care for

the area in which the property was and therefore moved to [Bringhurst] which had sufficient space but was considered to be in a preferred location.”

22. HMRC requested information from Peterborough City Council. In a letter dated 26 February 2015, the Council responded to an HMRC request to advise whom the council had registered as living at the matrimonial home and paying council tax for the period November 2005 to November 2006. The council was also asked to advise if exemption for an empty or unfurnished property had been claimed. The council replied:

“A check of our council tax system, shows a Mrs Karen and a Mr Martin Fitzjohn were registered as living at the above mentioned property during the period as stated above.

There was no exemption for empty or unfurnished property.”

23. In a letter dated 13 April 2015, Anglian Water (the letter was informatively signed – the actual signature was illegible – by “Customer Services”) wrote to Mr Fitzjohn as follows:

“Thank you for your recent letter.

Our records don’t show that you were not liable for charges at the below listed properties.

[The letter listed Regents Court, Bringhurst and Silver Street]”

24. We were informed by Mr Beard that Mr Fitzjohn’s enquiries of the electricity and gas utilities elicited no information.

25. On 25 February 2016, the accountants wrote to HMRC with the following information:

“Mr Fitzjohn had expected the sale of Regents Court may take some time to sell and therefore when an offer was received soon after putting the property up for sale he immediately took the opportunity despite not having a property to move into. He relied upon friends for short-term accommodation.

[Silver Street] was put up for sale as soon as [Bringhurst] was purchased the property at Silver Street was probably purchased as a bit of a knee-jerk reaction due to the fact that Regents Court had sold quicker than expected and at the time Mr Fitzjohn did not have a home of his own.

The property at Bringhurst came onto the market and an offer was made shortly after occupying Silver Street, the property market in 2005 was quite fluid in the mortgage was fairly easy to obtain in comparison to the current situation.

Mr Fitzjohn moved out of Silver Street on completion on or around 24 August.

Notifying HMRC of the change of address was not high on the list of priorities at the time as he considered he would deal with that on completion of a Tax Return. Similarly with other authorities although he is uncertain as to whether he did or did not notify any particular authority. He was obviously unsettled at the time and was not sure where he would be living on a permanent basis.”

26. Mr Fitzjohn’s evidence was that he had married in 1986 and, during 20 years of married life, had frequently moved home. He estimated that he and his wife moved home every 12 to 15 months before their children were born. In 1992 the first of their children arrived but they continued to move home. In 1996, following matrimonial issues, Mr Fitzjohn and his wife separated for the first time with a view to divorce, sold their then matrimonial home and his wife and the children moved into a smaller property. He said that his mental health had suffered. He had sought reconciliation and moved back in with his wife about 2 to 3 years later.

27. Mr Fitzjohn said that he had realised quickly that Silver Street, the property he bought on 21 April 2006, was too small. Although Bringhurst, the property he bought after Silver Street, was a larger property, there were difficulties taking the children to school. He accepted that Regents Court was only a temporary residence but considered Silver Street and Bringhurst to be his only or main residences – he had to live somewhere. Following his divorce, over a period of five years (from January 2009 to February 2013) he had lived in four different properties.

28. Mr Fitzjohn referred to a letter from his ex-wife dated 2 September 2015 address to HMRC which stated as follows:

“... I can confirm that we did in fact separate on or around the early part of 2006 which resulted in [Mr Fitzjohn] leaving the matrimonial home and setting up home for himself with a view to having the capacity to accommodate and provide for our three young children during weekends and other family visits.

I can confirm that to my knowledge he did own and move into three properties in the Peterborough area in Princes Street, Orton Goldhay and Woodston, between early 2006 and late 2007 and I regularly dropped off the children to stay with him.

None of the properties he moved to were eventually suitable for him with a mind to provide for the short-term welfare of his children in my opinion.

I confirm that it was my understanding that the homes were bought over the period by my ex-husband with the intention of establishing a permanent home in residence for him to accommodate his children given the difficult and stressful matrimonial situation.”

29. When cross-examined by Ms Patel, Mr Fitzjohn said that he had not obtained bank statements for the period. It transpired that he had not asked for bank statements because he did not think that he would be able to obtain them. We did not find this explanation entirely convincing.

30. Mr Fitzjohn confirmed that Silver Street was a three bedroomed terraced house, although the third bedroom was off one of the other bedrooms. Bringhurst was a larger house with three bedrooms.

31. Mr Fitzjohn separated from his wife for the second time in 2005 and filed for divorce in September 2008, with the divorce becoming absolute in 2011. Throughout that time his ex-wife remained in the matrimonial home. During this period, Mr Fitzjohn’s belongings were respectively in Silver Street and Bringhurst.

32. In cross-examination, Mr Fitzjohn was asked about his intention to stay at Silver Street and Bringhurst. He said that he intended to stay at Silver Street when he bought the property but decided to move when Bringhurst became available. He referred to his matrimonial difficulties and said that the intention behind the purchase of Silver Street and, later, Bringhurst was to live a separate life away from his ex-wife and look after his children. Mr Fitzjohn said that too much weight should not be placed on his letter of 14 November 2014 – he had received no advice before writing the letter and he did not expect to have to justify his failed marriage in the present circumstances.

33. Mr Fitzjohn confirmed that between 2006 (after he had separated from his wife) to 2008 when he filed for divorce he did not live at the matrimonial home. He did not move back to the matrimonial home once he had sold Silver Street.

34. The Tribunal asked Mr Fitzjohn why he had moved to Silver Street when, as an estate agent, he must have known it was an unsuitable area. He described it as a “funny area”. He was constrained by his finances and commented that it was not possible to know an area fully “until one lived there.”

35. HMRC commenced their checks into Mr Fitzjohn’s self-assessment tax returns for the years 2005/2006 and 2006/2007 on 6 November 2014. The assessments were triggered by HMRC appreciating that the appellant had purchased and sold properties during the year 2005/2006 and 2006/2007 which had not been declared on his self-assessment tax returns. It is curious that when HMRC commenced their enquiries into Mr Fitzjohn’s tax returns in November 2014, Mr Fitzjohn did not mention to HMRC that the capital gain in respect of Regents Court had in fact been returned on his 2005/2006 return. Nonetheless, HMRC subsequently accepted that the Regents Court capital gain had been duly returned and charged to tax.

36. Assessments capital gains tax were raised and issued on 19 August 2016 for the year 2006/2007.

#### **SUBMISSIONS**

##### **HMRC’s submissions in outline**

37. Ms Patel accepted that the onus of proof lay upon HMRC to demonstrate that the extended time limits for a discovery assessment under section 36 TMA were satisfied. Furthermore Ms Patel accepted that the onus lay on HMRC to show that there was a “discovery” for the purposes of section 29 TMA. Otherwise, the burden of proof rested with the appellant to displace the assessment: section 50(6) TMA.

38. The standard of proof was the ordinary civil standard of the balance of probabilities.

39. Ms Patel submitted that, on the basis of Mr Fitzjohn’s letter of 14 November 2014, that Silver Street and Brighthurst constituted temporary accommodation purchased with a view to a reconciliation with his wife at a later date. Mr Fitzjohn was an experienced and reputable estate agent and, Ms Patel submitted, would be aware of what accommodation was required for his children. Each property had been sold within a few months of being purchased. Ms Patel argued that the two properties (Silver Street and Brighthurst) were never intended by Mr Fitzjohn to be a permanent residence. He had provided no evidence of his intention to reside permanently at those properties.

40. Ms Patel noted that Mr Fitzjohn remained liable for council tax in relation to the matrimonial home.

41. In relation to the discovery assessment under section 29 TMA, Ms Patel referred to the decision of the Upper Tribunal in *Jerome Anderson v HMRC* [2018] UKUT 0159 (TCC) at [28] where the Tribunal said:

“Having reviewed the authorities, we consider that it is helpful to elaborate the test as to the required subjective element for a discovery assessment as follows:

“The officer must believe that the information available to him points in the direction of there being an insufficiency of tax.”

That formulation, in our judgment, acknowledges both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not.”

42. The Upper Tribunal continued at [30] as follows:



“The officer’s decision to make a discovery assessment is an administrative decision. We consider that the objective controls on the decision making of the officer should be expressed by reference to public law concepts. Accordingly, as regards the requirement for the action to be “reasonable”, this should be expressed as a requirement that the officer’s belief is one which a reasonable officer could form. It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer’s belief was not reasonable.”

43. Ms Patel submitted that HMRC had made a “discovery” for the purposes of section 29 TMA when HMRC became aware of the purchase and sales of property and the non-declaration of capital gains on Mr Fitzjohn’s self-assessment tax returns. When Mr Fitzjohn’s claim to relief under section 222 TCGA was considered by an officer of HMRC in the light of Mr Fitzjohn’s letter of 14 November 2014, it was apparent that capital gains which ought to have been assessed had not been returned and assessed and therefore HMRC had made a “discovery”.

44. Ms Patel submitted that the inaccuracy was brought about carelessly or deliberately by Mr Fitzjohn (section 29(4) TMA). As regards requirement in section 29(5) TMA (viz that the officer could not reasonably have been expected to be aware of the insufficiency of tax), Ms Patel argued that no officer of HMRC could reasonably have been expected to be aware of the insufficiency of tax from the information provided by Mr Fitzjohn’s self-assessment tax return for the year 2006/2007.

45. In relation to the time limits for assessments, section 34 TMA provides that an assessment may only be issued within six years of the end of the year of assessment to which it relates. However, this “normal” time limit is extended, under section 36 TMA, to 20 years if the loss of tax has either been brought about deliberately by the taxpayer or was attributable to a failure to comply with an obligation under section 7 TMA.<sup>1</sup>

46. Ms Patel submitted that Mr Fitzjohn’s failure to include the disposals of Silver Street and Bringhurst on his tax return for 2006/2007 was a deliberate inaccuracy and that, therefore, the 20 year limit in section 36 TMA applied.

47. Ms Patel referred to the decision of the Court of Appeal in *Goodwin v Curtis* [1998] STC. In that case the taxpayer had moved out of the family home, on separating with his wife, and moved into a nine bedroom farmhouse which he also owned. The taxpayer had previously put the farmhouse on the market for sale. The taxpayer lived in the farmhouse for approximately five weeks, before moving into another house that he owned, when the farmhouse was sold. The taxpayer claimed that the farmhouse had been his only or main residence. The Court of Appeal upheld the decisions of the General Commissioners and the High Court in dismissing the taxpayer's appeal. Millett LJ said at 480:

“It was submitted to us that the test which the commissioners applied, namely that residence denotes some degree of permanence, some degree of continuity or some expectation of continuity, was in the wrong test....

The question was whether, during the five weeks or so when the taxpayer occupied the farmhouse, he occupied it as temporary accommodation or as his settled abode, as his "residence". The commissioners found that he occupied it

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<sup>1</sup> As a result of the Finance Act 2009, Schedule 39 (Appointed Day, Traditional Provision and Savings) Order 2009, article 7 provides that section 36 (1A) (b) TMA shall not apply where the year of assessment is 2008/2009 or earlier, except where the assessment on the person is for the purposes of making good to the Crown a loss of tax attributable to the person's negligent conduct or the negligent conduct of a person acting on his behalf.

as temporary accommodation.... [T]hey came to the conclusion that he was in temporary occupation and not in residence.

In my judgment, there was ample evidence to support this conclusion. The taxpayer had just separated from his wife and family. He had nowhere else to live. The farmhouse had nine bedrooms and was hardly a suitable home for a single man. It had already been placed on the market. The taxpayer's occupation was manifestly a stop-gap measure pending the completion of his purchase of somewhere else to live....

Temporary occupation at an address does not make a man resident there. The question whether the occupation is sufficient to make him resident is one of fact and degree of the commissioners to decide.

The substance of the commissioners' finding taken as a whole, in my judgment, is that the nature, quality, length and circumstances of the taxpayer's occupation of the farmhouse did not make his occupation qualify as residence. This conclusion was, in my judgment, clearly open to them."

48. Millett LJ referred to Viscount Cave LC's explanation in an income tax context of the meaning of the word "reside" (a familiar English word) as "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place" – see *Levene v Commissioners of Inland Revenue* 13 TC 486 at 505.

38. Schiemann LJ said at 481;

"I accepted, as did the commissioners, the Crown's contention that in order to qualify for the relief a taxpayer must provide some evidence that his residence in the property showed some degree of permanence, some degree of continuity or some expectation of continuity."

49. Ms Patel submitted that on the evidence of Mr Fitzjohn's letter of 14 November 2014 and the letters from the accountants dated 12 May 2015 and 25 February 2016 it was clear that Mr Fitzjohn's evidence was to live temporarily at Silver Street and Bringhurst whilst he sought reconciliation with his wife. That intention changed in 2018 when he filed for divorce. Until that time Mr Fitzjohn's residence in the two properties in question was temporary with no expectation of continuity.

50. Therefore, when Mr Fitzjohn failed to return the disposal of Silver Street and Bringhurst on his self-assessment tax return for the year 2006/2007 this was a deliberate inaccuracy. Accordingly, the assessment raised on Mr Fitzjohn was within time (section 36(1 A) (a)). It followed that the condition in section 28(4) TMA was satisfied (viz that the fact that capital gains which should have been assessed had not been assessed) because been brought about carelessly or deliberately by the taxpayer.

51. In relation to the penalty under section 95 TMA, Ms Patel said that HMRC were arguing that the incorrect return was negligently delivered and that no allegation of fraud was being made against Mr Fitzjohn. Mr Fitzjohn was aware that Silver Street and Bringhurst were not his permanent residences. Furthermore, Ms Patel submitted that a 30% abatement was proportionate in all the circumstances and was correctly determined in accordance with section 102 TMA.

### **Submissions for Mr Fitzjohn in outline**

52. Mr Beard submitted that Silver Street and Bringhurst were principal private residences of Mr Fitzjohn for the purposes of section 222 TCGA.

53. Mr Fitzjohn had left the matrimonial home in 2005. Regents Court was clearly a “stopgap” property. It was a one-bedroom apartment which was unsuitable for Mr Fitzjohn to have his children stay with him.

54. Mr Beard noted that Mr Fitzjohn’s letter of 14 November 2014, upon which HMRC relied, was written when Mr Fitzjohn was divorced about a matrimonial separation that led to a divorce. He submitted that Mr Fitzjohn was in a state of flux and not operating rationally. He was just looking for somewhere to live.

55. Mr Beard submitted that *Goodwin v Curtis* was a very different case from the present appeal. It was obvious that a nine bedroom farmhouse was unsuitable for a single man to live in and it was equally obvious that it was only a temporary “stopgap”.

56. Furthermore, Mr Beard argued that the appellant’s actions in failing to mention the disposal of Silver Street and Bringhurst on his 2006/2007 tax return did not constitute a deliberate action. Mr Fitzjohn had acted honestly throughout. He thought he was entitled to rely on the principal private residence exemption in relation to Silver Street and Bringhurst.

#### **DISCUSSION**

57. In our view, having carefully reviewed the evidence, we do not consider that Mr Fitzjohn was entitled to the principal private residence exemption contained in section 222 TCGA in respect of his disposal of Silver Street and Bringhurst. Accordingly, the capital gains made on those properties should have been returned on his 2006/2007 self-assessment tax return.

58. We have reached this conclusion for the following reasons.

59. Mr Fitzjohn’s disposal of Regents Court was not in dispute in this appeal. It was clear that that property was simply a temporary stopgap in order to tide Mr Fitzjohn over at the beginning of his separation. The fact that Mr Fitzjohn returned that disposal on his 2005/2006 self-assessment tax return does, however, indicate that Mr Fitzjohn was aware of the need for his occupation of a property to have some degree of permanence or intention of permanence.

60. However, from Mr Fitzjohn’s letter of 14 November 2014 and the letters from the accountants dated 12 May 2015 and 25 February 2016 it was clear that Mr Fitzjohn acquired both Silver Street and Bringhurst at a time when he was hopeful of a reconciliation with his wife. It seems to us, therefore, that Mr Fitzjohn did not occupy those properties with the necessary expectation of permanence or semi-permanence required for the purposes of the principal private residence exemption.

61. Moreover, we found Mr Fitzjohn’s explanation for the rapid purchase and sale of Silver Street (he bought Bringhurst before he had actually completed the sale of Silver Street) unconvincing. He was an experienced local estate agent and must have known about the suitability of the property and its location. It seems to us more likely that Mr Fitzjohn saw an opportunity to deal in properties, using his expertise to spot attractive deals. Similarly with the purchase and sale of Bringhurst, although Mr Fitzjohn said that its location was inconvenient in terms of taking his children to school that must surely have been apparent to an experienced local estate agent. Again, we consider that it is more likely that Mr Fitzjohn saw the opportunity to make a quick profit, even after conveyancing costs and SDLT. He owned Silver Street for approximately only four months and Bringhurst for approximately only six months.

62. The burden of proof, subject to the comments below, lies upon Mr Fitzjohn to displace the assessment. In our view, he has not discharged that burden of proof.

63. That is not, however, an end to the matter.

64. It was common ground that HMRC must show that the assessments made against Mr Fitzjohn were in time under section 36 TMA and, secondly, that a valid “discovery assessment” was made under section 29 TMA.

65. In our view, taking section 36 TMA first, HMRC must show that the loss of capital gains tax was brought about deliberately by Mr Fitzjohn. We are satisfied that Mr Fitzjohn deliberately submitted an inaccurate self-assessment tax return for the year 2006/2007 so that the extended 20 year limit applies. As the Court of Appeal noted in *HMRC v Tooth* [2019] EWCA Civ 826 at [90] that section 36(1A) (a) TMA, when read with section 118(7) TMA does not require conduct which overall was blameworthy (1A) (a). Moreover, as a result of the deeming provision in section 118 (7) TMA there is no need for HMRC to prove that there was an intention to bring about a loss of tax. Floyd LJ, with whom Males LJ agreed, explained the point as follows:

“86. The deliberateness requirements of section 29(4) and 36(1A)(a) require HMRC to prove that the taxpayer intended to bring about a particular fiscal result. In the case of section 29(4) it is an intention to bring about a situation in which an assessment to tax is insufficient, and in the case of section 36(1A)(a) it is an intention to bring about a loss of tax. I agree with HMRC's contention, however, that section 118(7) is a deeming provision which means that HMRC can establish the relevant intention by showing that there was a deliberate inaccuracy in a document given to HMRC by or on behalf of the taxpayer, and that the loss of tax followed "as a result of" the deliberate inaccuracy. That is no more than what the language of the statute conveys. It follows that the enquiry about the taxpayer's intention stops once it is established there is a deliberate inaccuracy in a document. Thereafter one enquires into whether the loss of tax or other situation occurred as a result of the inaccuracy. That is simply a question of factual causation.

87. I did not find the Explanatory Notes to the relevant Finance Bill on which Mr Ghosh relied to be of assistance in reaching any other conclusion. The first sentence of the Notes confirms, as Ms McCarthy pointed out, that the section is a deeming provision, because it uses the language "*is to be treated as ...*".

88. The requirement for deliberateness occurs in the different contexts of section 29 and section 36. In section 29(4) it operates as a pre-condition (along with carelessness) for HMRC to be able to raise a discovery assessment. Its obvious purpose is to restrict the availability of a discovery assessment (as opposed to the other mechanisms for enquiring into a taxpayer's return) to cases where there is some blameworthy conduct on the part of the taxpayer. Section 29(5) extends the availability of a discovery assessment to certain cases where HMRC could not be expected to be aware of the situation (e.g. the insufficiency of tax) on the basis of the information available to them within the time period for launching an enquiry. These are cases, therefore, where HMRC is blameless in not raising the assessment earlier, but do not depend on proving any blameworthy conduct by the taxpayer.

89. The triggers for the 20 year time limit identified in section 36(1A)(a) to (d) also do not include a consistent requirement of blameworthy conduct by the taxpayer. Sub-paragraph (b) includes a failure by a person who is chargeable to income tax for any year of assessment and who has not delivered a return of his profits, gains or income for that year to give notice that he is so chargeable. The failure is not required to be negligent or deliberate. Such a failure could occur, for example, as a result of incorrect advice.

90. In the light of these considerations, I do not regard it as surprising that, as a result of the expanded meaning given to the sub-sections by section 118(7), conduct which is overall not blameworthy is brought within the definition.”

66. It follows, therefore, in relation to the discovery assessment that the first condition in section 29(4) TMA is also satisfied and that a valid “discovery assessment” was made. There was no doubt, in our mind, that HMRC (or the relevant officer) made a “discovery” when the assessment was issued in 2016, because Mr Fitzjohn had not returned the capital gains in respect of Silver Street and Bringhurst in his return for the year 2006/2007. Secondly, and in any event, the HMRC officer concerned could not reasonably have been expected to be aware of the insufficiency of tax charged i.e. the fact that Mr Fitzjohn had failed to make a return of the capital gains made on Silver Street and Bringhurst (section 29(5) TMA).

67. As regards the penalty charged under section 95 TMA, section 95(2) allows a penalty to be charged of up to 100% of the missing tax where the return has been delivered either fraudulently or negligently. Section 102 TMA allows for mitigation of the penalty by HMRC. HMRC’s practice relating to the year ended 5 April 2007 involved consideration of the disclosure (maximum abatement available being 20%), cooperation (maximum abatement being 40%) and seriousness (maximum abatement being 40%).

68. HMRC allowed the following as regards the penalties:

- (1) disclosure – Mr Fitzjohn was given full 20% for acknowledging the transaction;
- (2) cooperation – under 40% Mr Fitzjohn was given a 30% abatement due to the delays in replying and the need for HMRC to issue a formal Schedule 36 information notice; and
- (3) seriousness – out of 40% Mr Fitzjohn was given a 20% abatement due to the fact that the appellant was aware of the need to declare capital gains tax as he had done so in the previous year.

69. This resulted in an overall penalty of 30% i.e.  $£17,678 \times 30\% = £5,303.40$ .

70. We see no reason to interfere with the penalty or HMRC’s calculation of the abatement percentages.

#### **CONCLUSION**

71. For the reasons given above, we dismiss this appeal.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

72. 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.

**GUY BRANNAN  
TRIBUNAL JUDGE**

**Release date: 27 July 2019**