



17TAC2018

REDACTED

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This appeal is concerned with the denial by the Respondent of the Appellant's claim for relief from capital gains tax pursuant to Taxes Consolidation Act 1997 (TCA), section 604, on the disposal of **Address Redacted** (the Property). The Respondent was also of the view that the Appellant was engaged in dealing in land and raised assessments to income tax in accordance with TCA, section 640 for the years of assessment 2003 and 2004 amounting to €137,966 and €211,173 respectively.

Background

2. The Appellant purchased an apartment in **Address Redacted** in 1999 which he sold in 2002. He had initially claimed that the apartment constituted his principal private residence and claimed exemption from tax but later resiled from that position as he was living with his parents during a substantial period of that time. As a consequence, capital gains tax was paid on the profit arising from the sale.
3. During 2001, the Appellant rented and lived in a house in **Address Redacted** until he acquired the Property in March 2003. The Appellant asserted that he lived in the Property until its sale in December 2004. Thereafter he lived in Flat No. **Address Redacted** with 2 other friends for a year before acquiring another property **Address Redacted** in 2005. He lived in that premises until 2008 when he moved home to live with his parents at **Address Redacted**. He still resides at that property with his parents.
4. In 2007, the Appellant was the subject of a revenue audit where the issue of the disposal of the Property arose. Not satisfied that the Property was the Appellant's principal private residence, the Respondent raised assessments to income tax for the years 2003 and 2004 to which the Appellant appealed.



Legislation

Taxes Consolidation Act

5. The Appellant relies on the relief from capital gains tax on the disposal of a principal private residence as provided by TCA, section 604. Subsection 2 states:

“This section shall apply to a gain accruing to an individual on the disposal of or of an interest in-

- (a) a dwelling house or part of a dwelling house which is or has been occupied by the individual as his or her only or main residence, or*
- (b) land which the individual has for his or her own occupation and enjoyment with that residence as its garden or grounds up to an area (exclusive of the site of the dwelling house) not exceeding one acre;”*

6. The relief is set out in subsection 3 which states:

“The gain shall not be a chargeable gain if the dwelling house or the part of a dwelling house has been occupied by the individual as his or her only or main residence throughout the period of ownership or throughout the period of ownership except for all or any part of the last 12 months of that period.”

7. The Respondent did not accept that the Appellant is entitled to the relief from capital gains tax afforded by TCA, section 604 as there was insufficient evidence to support such a claim. On the contrary, the Respondent asserted that the Appellant was engaged in dealing and developing land, an activity that falls within the charge to tax under TCA, section 640 which provides, *inter alia*:

(1) For the purposes of subsection (2) –

- (a) a dealing in land shall be regarded as taking place where a person having an interest in any land disposes, as regards the whole or any part of the land, of that interest or of an interest which derives from that interest, and*
- (b) a person who secures the development of any land shall be regarded as developing that land.*

(2) (a) Where apart from this section all or some of the activities of a business of dealing in or developing land would not be regarded as activities carried on in the course of a trade within Schedule D but



would be so regarded if every disposal of an interest in land included among such activities (including a disposal of an interest in land which apart from this section is a disposal of the full interest in the land which the person carrying on the business had acquired) were treated as fulfilling the conditions specified in paragraph (b), the business shall be deemed to be wholly a trade within Schedule D or, as the case may be, part of such a trade, and the profits or gains of that business shall be charged to tax under Case I of Schedule D accordingly.

- (b) The conditions referred to in paragraph (a) are –
- (i) that the disposal was a disposal of the full interest in the land which the person carrying on the business had acquired, and
 - (ii) that the interest disposed of had been acquired by such person in the course of the business.”

8. Therefore, TCA section 640 does not apply to treat any person as carrying on a trade or to deem certain activities to be trading activities, unless the person in question disposes of the full interest in land where that interest had been acquired in the course of a business.

Submissions

Appellant

9. The Appellant submitted that he lived in the Property throughout the period of ownership as his only and main residence.

Respondent

10. The Respondent submitted that exemption from capital gains tax on the disposal of a principal private residence does not apply as there was insufficient evidence that the Property was the Appellant’s principal private residence.
11. Furthermore, during the period of ownership of the Property, the statements from **Financial Institution 1** and **Financial Institution 2** were addressed to the Appellant at his parent's home.
12. The Respondent thereafter asserted that the Appellant was engaged in dealing in land. Reliance was placed on the Warranties and Representation of the loan agreement between the Appellant and his father, (collectively referred to as the ‘Borrower’) and **Financial Institution 2** and in particular the reference to "*the Borrower is acting within*



a trade, profession or business of the borrower and is thereby not a consumer with the meaning of Section 2 of the Consumer Credit Act 1995."

13. In referring to the condition in the agreement requiring the full repayment of the principal sum within 2 years, the Respondent argued the Badges of Trade, specifically the short duration of the ownership of an asset was an indicator of trading. It was further argued that the Appellant had no financial means to discharge the mortgage at the end of the 2 year period, which suggested that the Property was acquired for speculative gain.
14. Further reliance was made to *Rutledge v Commissioner of Inland Revenue* (1929 SC 379), *Wisdom v Chamberlain* 45 TC 103, *Edwards v Bairstow and Harrison* and *Salt v Chamberlain* 1979 STC 750 in support of the submission that the Appellant was engaged in the business of dealing and developing land.
15. The Respondent was also of the view that the phone and utility bills were disproportionately low for a property that was claimed to be occupied as a principal private residence.
16. As such, the Respondent argued that TCA, section 640 applied to the gain on the disposal of the Property as a transaction that occurred in the course of a business of dealing in development land and the profits of that business should therefore be charged to tax under Case I of Schedule D.
17. Therefore, as the sale of the Property by the Appellant constituted a trade of property development, the profit element was calculated as follows:

Sale Proceeds		€1,560,000
<u>Less:</u>		
Purchase Price	€652,000	
Refurbishment	<u>€200,000</u>	<u>€ 852,000</u>
Profit		<u>€ 708,000</u>

18. The Respondent calculated that the trading period ran from 16th March 2003 to 1st December 2004 as 20 months and apportioned the profit as follows:

Trading Income 2003	€708,000 x 8/20 months	=	€283,200
Trading Income 2004	€708,000 x 12/20 months	=	€424,800



19. Income Tax Assessments were raised resulting in the following tax liabilities:

Tax Year 2003	€137,966
Tax Year 2004	€211,173

Evidence

20. The Appellant confirmed that he acquired the Property with funds provided by **Financial Institution 2**. The Appellant acknowledged that the loan facility letter dated 28th March 2003 confirmed that loan facilities of €826,307.50 had been approved in favour of the Appellant and his father. The term of the loan was interest only, for a term of 2 years and was to be repaid in full at the end of that term. The rate of interest was based on variable commercial property rates plus 0.5% giving rise to monthly repayments of €3,477. The stated purpose of the loan was to purchase and refurbish the Property. Finally, the agreement recorded that the Appellant and his father were acting within a trade, profession or business.
21. In a subsequent letter to the Appellant and his father dated 25th May 2003, **Financial Institution 2** confirmed that the loan had been increased to €901,500 on a variable commercial rate of 5.05% per annum and monthly loan repayments of €2,992.13.
22. The Appellant was not certain why he took out a commercial mortgage, when as he claimed, that he was acquiring the Property as his main residence. He was also unclear as to how he would continue to make the loan repayments after the loan term expired, a time when the principal sum had to be repaid in full. He said that he may have refinanced the Property at that stage. However even if the Property was refinanced, he was not able to confirm how such a debt could be financed specifically as his **Redacted** business was struggling financially. He said that he may have rented some of the rooms out to friends.
23. The Appellant was asked to comment on the publication of an article in **A Daily Newspaper** on **Date Redacted** in which it was reported that soon after the Appellant had acquired a **Redacted** sq ft, **Redacted** bedroom house, he realised that it was in excess of his requirements. The high-end finishing was also expressly noted and that the Property was expected to sell for **€Redacted** at auction. The Property ultimately sold for **€Redacted** on **Date Redacted**.
24. The Appellant confirmed that the Property was acquired “cheaply” in 2003 and required extensive refurbishment as it was in “very bad condition” as it had been unoccupied for years and little money had been spent on its maintenance.



25. When asked how he could live in a dilapidated house with no heating, the Appellant's response was that he was accustomed to living in period homes in various forms of decline. He said that when he was a child, his parents acquired a run-down property with no heating and that he had grown up occasionally living in challenging conditions. When his parents moved again to a house set in 4 flats, both he and his father converted the premises back into a sole residence. As such the idea of living in a dilapidated property did not faze him.
26. When asked how he could live in a building site with no adequate kitchen facilities, the Appellant's response was that he was not put out too much and that he lived on takeaway pizzas. He also said that he did part of the construction work himself.
27. The Appellant was taken through a review of electricity bills and asked to comment on the low level of electricity consumed during a specific 6 month period which amounted to €97. He said that he did not use much electricity and heated his living quarters with turf and briquettes as there were fire places in most rooms. He also said that he used his mobile phone during that period.
28. On a review of his bank statements, it was noted that the Appellant was paying utility bills and cable television subscriptions up until February 2003, a month before he acquired the Property. It was possible to discern from those statements that during a corresponding period in 2002, the Appellant's electricity usage amounted to €591 and payments to Bord Gais in that period amounted to €235. However, during the periods under appeal, there was no record of any payments made to cover such services.

Analysis

29. The entitlement to relief from capital gains tax applies to the profit arising from the sale of a dwelling house that has been owned and occupied by an individual as his or her only or main residence. In the absence of any specific Irish authority, it is possible to discern, based on the volume of jurisprudence emanating from the United Kingdom, that the interpretation of a similar statutory provision has caused difficulties specifically in context of the meaning of "occupied" and "only or main residence".
30. In this regard recourse can be made to a recent decision from the First-tier Tribunal in *Lam v Revenue and Customs Commissioners* [2018] UKFTT 310 (TC), where Judge Michael Connell at paragraph 54, made the following observations in relation to "occupation" of a principal private residence:

"the Court of Appeal judgment in Goodwin v Curtis and later cases have established that to determine whether a property qualifies as a principal private residence, the following factors must be considered.



- *Whether the property was actually occupied as a residence.*
- *The nature, quality, length and circumstances of a taxpayer's occupation of the property.*
- *Whether the occupation was intended to be permanent or merely temporary.*
- *Whether there was a degree of continuity or some expectation of continuity to turn mere occupation into residence. The need for permanence or continuity should not be overstated as it is only one of the factors to be taken into account in weighing up all of the evidence.”*

31. The Appellant confirmed that the Property, while habitable, was acquired in a rundown state. The extensive refurbishments undertaken during the Appellant's period of ownership together with the construction of a single storey extension would have made habitation of the Property significantly challenging specifically as his parent's home provided more comfortable accommodation. While the Appellant, during the period of his youth, had lived in houses in need of refurbishment, the extent of the refurbishment work undertaken on the Property together with the dust and debris would have made habitation of the Property intolerable.

32. The low level of expenditure on utility services also suggest that the Property was not inhabited and whatever expenditure was incurred was to facilitate the building and renovation work. Furthermore, it is not credible that the Appellant, due to the lack of cooking facilities, survived on take away pizzas from March 2003 to December 2004.

33. The **Daily Newspaper** article highlighted the extensive nature of the refurbishment to include underfloor heating, luxurious fittings, landscaped garden, **Redacted** and remote controlled gates giving access to two parking spaces all of which suggested that the Property was acquired and refurbished with a view to a subsequent sale to persons with significant financial resources. Therefore, such expenditure does not suggest that the accommodation was suitable for a young man whose only source of income was from a business in decline.

34. There was no evidence to suggest any degree of continuity of occupation of the Property. Furthermore, there was a failure to adduce any sustainable evidence to support the assertion that the Appellant occupied the Property as his only or main residence.

35. In light of the above, I have determined that the Appellant did not occupy the Property as his only or main residence during the years under appeal.



36. In addition to the above, the loan agreement with the **Financial Institution 2** clearly refers to the Appellant and his father as persons who are *“acting within a trade, profession or business of the borrower and is thereby not a consumer with the meaning of Section 2 of the Consumer Credit Act 1995.”* It is also significant that the rate of interest was that of a commercial loan and not a residential loan. Also, the period of the loan was for a 2 year term and there was no strategy at the time of purchase to demonstrate how the Appellant or indeed his father could continue to discharge the loan specifically in context of the winding down of the Appellant’s **Redacted** business. Furthermore, the Appellant, was unable to provide any evidence to demonstrate how he could sustain the mortgage payments at the end of the 2 year loan term. On the contrary, the evidence suggests that the Property was acquired for re-sale once the refurbishment and construction work had been completed.
37. The evidence supports the conclusion that the purchase of the Property was for a speculative purpose. The substantial renovation work, the high end finishes and the publicity around the sale are also indicative of making the Property highly marketable. On this basis, I have determined that the Property was acquired, renovated and subsequently sold in the course of a business carried on by the Appellant.

Conclusion

38. Therefore, based on a consideration of the evidence and submissions together with a review of the documentation, I have determined that the Appellant did not occupy the Property as his only or main residence during the years under appeal and as a consequence there is no entitlement to relief pursuant to TCA, section 604.
39. I have also determined that the Appellant was engaged in the business of dealing in or developing land pursuant to TCA, section 640. As a consequence, the income tax liabilities for the years assessment 2003 and 2004 of €137,966 and €211,173 respectively shall stand. This appeal is therefore determined in accordance with TCA, section 949AK.

Appeal Commissioner
28th August 2018

No request was made to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997 as amended.

