13TACD2022

****

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This appeal is concerned with the denial by the Respondent of the Appellant's claim for additional relief from capital gains tax pursuant to Taxes Consolidation Act 1997 (TCA), section 604(7), on the disposal of a residential property in ******* (the Property) in 2019 for €350,000.

2. Prior to moving to ****** in 2011, the Appellant occupied the Property as his principal private residence and thereafter rented the Property until 2019 when it was sold. The Respondent allowed relief for the 175 months that the Appellant occupied the Property together with the statutory entitlement of the last 12 months. After applying the relief, a gain of €42,425 arose on which the Respondent assessed the Appellant to capital gains tax in the sum of €13,999. However the Appellant appealed the assessment and is arguing that that the gain should be reduced to €25,000 on the grounds that the value of the Property at the time it ceased to be his principal private residence in 2011 was €350,000. As a consequence, the Appellant submitted that the revised capital gains tax liability should be €1,654.

3. After raising the assessment but prior to the hearing, the Respondent was furnished with additional documentation relating to the disposal of the Property and is satisfied that further deductions should be allowed. As such, it was agreed between the parties that the disputed capital gains tax liability should be reduced to €13,124.

Material findings of fact

4. The Appellant purchased the Property as his and his family's main residence on ******** for the £130,000 or €165,000.

5. In 2008 the market value of the Property, while it was still the Appellant's main residence was valued at €600,000 approx.

6. The Appellant retired in ****** and soon after placed the house on the market to facilitate the transfer of his residence to ****** in order to be close to his ** children and **** grandchildren all of whom lived in *****. Despite being willing to accept an offer in the region of €375,000, a reduction of €225,000 on the 2008 value, no offers were received and the market was perceived to be deteriorating.

7. In 2011, the Appellant rented the Property and purchased a home in ***** as his principal private residence. At the hearing a valuation was produced valuing the Property in 2011 at €325,000.

8. The Property was sold in 2019 for €350,000.

Legislation

Taxes Consolidation Act

Principal Private Residence Relief (PPR)

9. Relief from capital gains tax on the disposal of a principal private residence as provided by TCA, section 604 and provides *inter alia*:

"(2) *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; …*

(3) *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.*

(4) *Where subsection (3) does not apply, such portion of the gain shall not be a chargeable gain as represents the same proportion of the gain as the length of the part or parts of the period of ownership during which the dwelling*

house or the part of a dwelling house was occupied by the individual as his or her only or main residence, but inclusive of the last 12 months of the period of ownership in any event, bears to the length of the period of ownership.

(5) (a) In this subsection, "period of absence" means a period during which the dwelling house or part of a dwelling house was not the individual's only or main residence and throughout which he or she had no residence or main residence eligible for relief under this section.

(b) For the purposes of subsections (3) and (4) –

(i) any period of absence throughout which the individual worked in an employment or office all the duties of which were performed outside the State, and

(ii) in addition, any period of absence not exceeding 4 years (or periods of absence which together did not exceed 4 years) throughout which the individual was prevented from residing in the dwelling house or the part of a dwelling house in consequence of the situation of the individual's place of work or in consequence of any condition imposed by the individual's employer requiring the individual to reside elsewhere, being a condition reasonably imposed to secure the effective performance by the employee of the employee's duties,

shall be treated as if in that period of absence the dwelling house or the part of a dwelling house was occupied by the individual as his or her only or main residence if both before and after the period the dwelling house (or the part in question) was occupied by the individual as his or her only or main residence.

(6) Where the gain accrues from the disposal of a dwelling house or part of a dwelling house part of which is used exclusively for the purposes of a trade, business or profession, the gain shall be apportioned and subsections (2) to (5) shall apply in relation to the part of the gain apportioned to the part which is not exclusively used for those purposes.

(7) Where at any time in the period of ownership there is a change in the dwelling house or the part of it which is occupied as the individual's residence, whether on account of a reconstruction or conversion of a building or for any other reason, or there have been changes as regards the use of part of the dwelling house for the purpose of a trade, business or profession or for any other purpose, the relief given by this section may be adjusted in such manner as the inspector and the individual may agree, or as the Appeal Commissioners may on an appeal consider to be just and reasonable.

Acquisition and Enhancement Expenditure

10. The entitlement to deduct acquisition and enhancement expenditure is set out at TCA, section 552(1) and provides:

> *"Subject to the Capital Gains Tax Acts, the sums allowable as a deduction from the consideration in the computation under this Chapter of the gain accruing to a person on the disposal of an asset shall be restricted to –*
>
> *(a) the amount or value of the consideration in money or money's worth given by the person or on the person's behalf wholly and exclusively for the acquisition of the asset, together with the incidental costs to the person of the acquisition or, if the asset was not acquired by the person, any expenditure wholly and exclusively incurred by the person in providing the asset,*
>
> *(b) the amount of any expenditure wholly and exclusively incurred on the asset by the person or on the person's behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and exclusively incurred by the person in establishing, preserving or defending the person's title to, or to a right over, the asset, and*
>
> *(c) the incidental costs to the person of making the disposal."*

Submissions - Appellant

11. The appeal depends on TCA, section 604(4) being subject to the application of subsection (7) where the inspector and the individual may so agree, or where the Appeal Commissioners may on an appeal consider such application to be just and reasonable.

12. Therefore for the Appellant to succeed, it is necessary that the Tax Appeals Commission agree that the application of TCA, section 604(7) results in an outcome that is both just and reasonable. The Appellant asserts that the application of that provision results in an outcome that is neither just nor reasonable.

13. The collapse of the housing market starting in 2008 and continuing for years thereafter represented the most exceptional movement in the value of property since the inception of the State. It is evident beyond logical argument that in these circumstances the application of time apportionment in this case represents an

oppressive and penal distortion of the market realities. This is illustrated by the following comparison: -

<u>*Case A*</u>

Taxpayer A purchases a house in 2011 as an investment property for the market value at that time, €325,000. He immediately lets the house and continues to do so until he sells the house in 2019 for the then market value, €350,000 – realising a gain of €25,000 on which he is liable to CGT (subject to regulatory deductions).

<u>*Case B*</u>

Taxpayer B purchases a house in 1996 for a sum equivalent to €165,000. He uses the house as his residence until 2011 when he changes his use of the house. He ceases to use the asset as his residence and begins to use it as an investment property. The market value of the house at the time of this change of use is €325,000. He sells the house in 2011 for €350,000. The Respondent insists on applying a time-based apportionment that results in the capital gain being calculated at €45,000 (also subject to regulatory deductions).

14. The Appellant asked rhetorically how can it be just or reasonable to assess Taxpayer B as having made a capital gain of €45,000 while taxpayer A is assessed to have made a capital gain of €25,000 (45% less) in entirely comparable circumstances?

15. The Appellant accepts that in normal market conditions, the application of TCA, section 604(4) is appropriate. However in this appeal, normal circumstances do not apply.

16. It is essential that TCA, section 604(7) is interpreted in accordance with what it states and not by what it is presumed to mean. As such, that subsection applies where the calculation of gain is unjust and unreasonable. It is for this reason the subsection is very wide in its application.

17. As such in circumstances where the application of normal rules is unjust and unreasonable, TCA, section 604(7) allows methods of calculation alternative to the methods set down in other subsections where so agreed between the inspector and the individual or, where no such agreement exists, as determined by the Appeal Commissioners to be just and reasonable.

18. The Respondent argued that TCA, section 604(7) "*did not apply as there was no 'change of use' of the property in 2011. It ceased to be the PPR of the taxpayer, however, it remained a private residence*". In so stating, the Respondent concurs that if change of use from being a private residence to being an investment property is, in

fact, a change of use under section 604(7), then Tax Appeals Commissions can apply its discretion to ameliorate the exposure to tax.

19. In this regard, TCA, section 604(7) allows for this discretion to be exercised in 2 circumstances: -

    (a) A change in the structure in the property, or

    (b) A change in the use in the property.

20. The Appellant relies on the change of use circumstance.

21. The Appellant fundamentally disagreed with the Respondent's narrow interpretation of TCA, section 604(7) as the insertion of the clause "*or for any other purpose*", applies the widest possible interpretation of change of use. While referring to "*for the purpose of a trade, business or profession*" it pointedly does not qualify the application of the term '*or for any other purpose*' by the use of such qualifications as: -

    (a) or for any other such purpose,
    (b) or for any other similar purpose,
    (c) or for any other like purpose.

22. It just states '*or for any other purpose'*. No qualification but just simply and starkly '*for any other purpose'*. One is bound to interpret what this clause states by what it actually states and not what we think the legislators meant to state. Therefore, any change of use of the asset is covered by this subsection.

23. Even if one was inclined to apply the principle of *ejusdem generis* to this subsection then surely the letting of property was a business in that it was an activity of individuals to produce a housing service for profit?

24. The Respondent cannot have his cake and eat it. The Respondent cannot claim on the one hand:

    (a) that the Appellant is liable to Capital Gains Tax on the disposal of the asset because he ceased to use it as his principal private residence in 2011 and, on the other hand,
    (b) that there has been no change in the use of asset during the period of ownership from 1997 to 2019

25. The fact is that the Appellant did change the use of the house in 2011 – this is indisputable. It changed most fundamentally in that the taxable use of the asset

changed. It changed from being a principle private residence to being a business – the business of property rental. Had the taxable use not so changed, the house would have remained as the taxpayer's residence and would not be subject to capital gains tax on disposal.

26. The Respondent's reference to TCA, section 552(1) is misplaced. That subsection provides that the acquisition cost of the Property in *** was the base cost for this disposal. While the Appellant does not dispute the calculation of the base price, it is not an issue in this case and therefore cannot accept that it can be used to prevent the operation of TCA, section 604(7). In summary the Appellant depends on the second part of TCA, section 604(7), change of use condition and not on the first part which requires spending money on structural change.

27. On this basis, TCA, section 604(7) applies and the Appeals Commissioner should exercise it discretion to reduce the taxable gain from €45,000 to €25,000 from which the appropriate reliefs and exemptions should be applied to give rise to a final liability to capital gains tax of €1,654.

Submissions - Respondent

28. The Appellant's agent submitted correspondence to the Respondent on 10th April 2019 outlining the basis of a capital gains tax payment and computation relating to the sale of a property in ***** in ***. This property was purchased in 199* and was used as a principal private residence until 2011. At this time, the property was rented out as a private residence. In 2019, the property was sold.

29. The Respondent's position is thus:

    (a) TCA, section 604 relates to the conditions pertaining to tax relief on the sale of a principal private residence.
    (b) TCA, section 604(4) specifically covers partial relief. The Respondent is satisfied that this condition is met and, consequently, there is an apportionment applicable to the period of time in which the residence was the Appellant's principal private residence.

30. TCA, section 552(1) covers the acquisition cost of the asset. Allowable expenditure includes cost of acquisition of an asset, enhancement expenditure incurred during the period of ownership of the asset and costs incurred in disposing of the asset. The acquisition cost in 199* was the cost of acquisition and no capital transaction took place in 2011 which would have impacted the base cost of this asset.

31. As such the Respondent applied a base cost of €165,066 to the property as at the date of acquisition (199*) and apportioned the principal private residence relief based on the dates of residence plus the final 12 months, i.e. 272 months of ownership, with 187 months relating to principal private residence relief and 85 months considered taxable.

32. The Appellant's claim was to apply a base cost of €325,000. This figure related to a valuation prepared in 2011 when the residence ceased being the principal private residence of the Appellant. There was no purchase/acquisition/transfer of the asset in 2011.

33. The Appellant's basis of claim was to apply the provisions of both Section 552 and Section 604 of the TCA, 1997, as follows:

> *"The sub section (S.552, TCA 1997) mentions "the value of the consideration in money OR MONEY'S WORTH given. Valuations are allowable on chargeable assets when they are acquired. How otherwise would Revenue propose to tax assets acquired by gift or inheritance? The original cost of the Principal Private Residence is in money as contained in the computation submitted. It has been valued by a professional firm as at 2011, the time of change from P.P.R. to rented premises dealt with under Case Five of schedule D.*
>
> *Sec. 604 Sub. Sec 4, allows apportionment between the period of P.P.R. and a chargeable period.*
>
> *Section 604 Sub. Sec 7, deals in detail with the method of apportionment: "Where at any time in the period of ownership there is a change in the dwelling house or the part of it which is occupied as the individuals residence whether on account of a reconstruction or conversion of a building or for any other reason, OR there have been changes as regards the use of the part of the dwelling house for the purpose of a trade, business or for any other purpose, the relief given by this section may be adjusted in such manner as the inspector and the individual may agree, or as the appeal Commissioners may on appeal may consider to be just and reasonable."*
> *The act clearly allows for an agreed method of apportionment other than a time apportionment'.'*

34. The Respondent's response relating to the above was to state:

    (a) TCA, section 552(1) provides the acquisition cost in 1997 was the base cost for this disposal.
    (b) TCA, section 604(7) did not apply as there was no '*change of use*' of the property in 2011. It ceased to be the principal private residence of the taxpayer, however, it remained a private residence.

35. In light of the foregoing, it is clear that the claim made by the Appellant is unfounded and was correctly rejected by the Respondent. The Respondent submitted that the Tax Appeals Commission should, therefore dismiss this appeal.

Determination

36. In the recent judgment in *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552, McDonald J., from his review of the most up to date jurisprudence, summarised the fundamental principles of statutory interpretation at paragraph 74:

"The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd v. The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:

(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;

(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";

(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;

(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.

(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;

(f) *Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.*

(g) *Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:*

"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible".

37. In light of such principles, the entitlement of the Appellant to discretionary relief in accordance with TCA, sections 604(7) can now be considered.

38. Relief from capital gains tax on the disposal of a principal private residence in accordance with TCA, section 604(3) applies to the gain from the sale of a dwelling house which 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." [Emphasis added]

39. TCA, section 604(4) apportions the relief with reference to the individual's period of occupation, including the last 12 months of ownership over the total period of ownership. Furthermore, TCA, section 604(5) preserves the entitlement to the relief by providing deemed periods of occupation in the following prescribed situations:

> *(i) throughout which the individual worked in an employment or office all the duties of which were performed outside the State, and*
>
> *(ii) any period of absence not exceeding 4 years (or periods of absence which together did not exceed 4 years) throughout which the individual was prevented from residing in the dwelling house … in consequence of the situation of the individual's place of work or in consequence of any condition imposed by the individual's employer requiring the individual to reside elsewhere, being a condition reasonably imposed to secure the effective performance by the employee of the employee's duties"*

40. It is therefore clear that the only prescribed periods of absence in which the individual is deemed to occupy the residence relate to conditions necessitated by employment. As such, the period of time during which the Appellant rented the Property while in occupation of his principal private residence in ***** does not fall within the deemed period of occupation required by subsection 5.

41. Notwithstanding the above, the essence of the Appellant's argument is that the base cost of the Property should be adjusted to the €325,000, the value in 2011 when the Appellant ceased to occupy the Property. As such the Appellant sought to rely on TCA, section 604(7) which permits an adjustment to the relief where "*the inspector and the individual may agree, or as the Appeal Commissioners may on an appeal consider to be just and reasonable"* in circumstances where "*there have been changes as regards the use of <u>part</u> of the dwelling house for the purpose of a trade, business or profession or for any other purpose."* (Emphasis added)

42. While there is no doubt that there was a change in the use by the Appellant of the Property from a principal private residence to a rented property, any consideration of adjusting the relief can only apply where "*there have been changes as regards the use <u>of part</u> of the dwelling house*". As such, my discretionary authority to adjust "*the relief given by this section"* cannot be invoked where there has been a complete change in the use of the property.

43. Furthermore as subsection (7) envisages a change in use of only "*part of the dwelling house",* I am of the view that an individual is required to remain in occupation or deemed occupation of the property in situations where the dwelling is used for "*the purpose of a trade, business or profession or for any other purpose".*

44. It is also relevant that the changes to the use of a dwelling are normally associated with commercial activities such as an office or crèche or indeed with medical, dental, physiotherapy and veterinary practices whereby a room or rooms in a dwelling are used exclusively for such purposes. I am not aware of any jurisprudence or indeed

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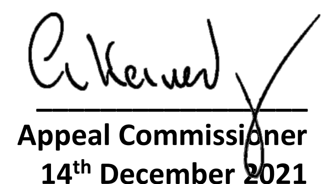
academic commentary that supports the Appellant's argument that the relief should be adjusted where a property has been rented out for part of the period of ownership.

45. The Appellant also highlighted the difference in the gains on the sale of a property with reference to the time when the property was acquired. In the Appellant's example, the sale of a house in 2019 for €350,000 acquired by an individual in 1996 for €165,000 made significantly more in profit than the individual who acquired the same house in 2011 for €325,000. As such the Appellant asserted that there was an inequity in the difference in the amount of tax payable by the person who acquired the house in 1996.

46. However I am unable to accept the Appellant's argument that the application of TCA, section 604 was unjust or unreasonable specifically as he had made a profit of €185,000 on the disposal, a sum of €160,000 more than he would have received if he acquired the property in 2011. Therefore contrary to the Appellant's assertion, the calculation of the capital gains tax in accordance with the prescribed statutory rules set out in TCA, section 604 do not prejudice or impose any hardship on the Appellant but recognise the economic reality of the disposal.

47. Finally and as identified by the Appellant, there is an inherent ambiguity in the meaning of subsection (7), a fact also acknowledged by several of the leading tax commentators. However as confirmed by McDonald J. in *Perrigo* at paragraph 74 "*If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms*". Therefore in light of such judicial clarification, the Appellant's claim to increase the relief cannot succeed.

48. Therefore pursuant to TCA, section 949AK, the assessment to capital gains tax for the year 2019 raised on the Appellant is to be reduced to €13,124, the amount agreed between the parties to be in dispute.



Appeal Commissioner
14th December 2021