



Neutral Citation: [2023] UKFTT 90 (TC)

Case Number: TC08718

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By video hearing

Appeal reference: TC/2021/01106

Income Tax – closure notice - stamp duty land tax – whether the enquiry was opened within time – yes – whether the relevant property was a replacement for the appellant’s only or main residence – no - appeal dismissed

Heard on: 22 June 2022

Judgment date: 30 January 2023

(summary decision released on 29 September 2022)

Before

**TRIBUNAL JUDGE RICHARD CHAPMAN KC
MRS SONIA GABLE**

Between

BENJAMIN COHEN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr David Cohen on behalf of the Appellant.

For the Respondents: Ms Elizabeth Edley, litigator, of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This is an appeal by Mr Benjamin Cohen (“Mr Cohen”) against a closure notice dated 9 December 2021 in respect of the higher rate of Stamp Duty Land Tax in the sum of £15,045 applied by HMRC to the purchase of 20 Luna Court, Newmans Lane, Loughton, IG10 1ES (“Luna Court”).

2. The purchase of Luna Court was a single dwelling transaction. Single dwelling transactions are treated as chargeable to the higher rate if Conditions A to D are met within paragraph 3 of Schedule 4ZA to the Finance Act 2003, which provides as follows:

“(1) A chargeable transaction falls within this paragraph if -

(a) the purchaser is an individual,

(b) the main subject-matter of the transaction consists of a major interest in a single dwelling (‘the purchased dwelling’), and

(c) Conditions A to D are met.

(1A) But sub-paragraph (1) is subject to paragraph 7A.

(2) Condition A is that the chargeable consideration for the transaction is £40,000 or more.

(3) Condition B is that on the effective date of the transaction the purchased dwelling -

(a) is not subject to a lease upon which the main subject-matter of the transaction is reversionary, or

(b) is subject to such a lease but the lease has an unexpired term of no more than 21 years.

(4) Condition C is that at the end of the day that is the effective date of the transaction -

(a) the purchaser has a major interest in a dwelling other than the purchased dwelling,

(b) that interest has a market value of £40,000 or more, and

(c) that interest is not reversionary on a lease which has an unexpired term of more than 21 years.

(5) Condition D is that the purchased dwelling is not a replacement for the purchaser's only or main residence.

(6) For the purposes of sub-paragraph (5) the purchased dwelling is a replacement for the purchaser's only or main residence if -

(a) on the effective date of the transaction (‘the transaction concerned’) the purchaser intends the purchased dwelling to be the purchaser's only or main residence,

(b) in another land transaction (‘the previous transaction’) whose effective date was during the period of three years ending with the effective date of the transaction concerned, the purchaser or the purchaser's spouse or civil partner at the time disposed of a major interest in another dwelling (‘the sold dwelling’),

(ba) immediately after the effective date of the previous transaction, neither the purchaser nor the purchaser's spouse or civil partner had a major interest in the sold dwelling,

(c) at any time during the period of three years referred to in paragraph (b) the sold dwelling was the purchaser's only or main residence, and

(d) at no time during the period beginning with the effective date of the previous transaction and ending with the effective date of the transaction concerned has the purchaser or the purchaser's spouse or civil partner acquired a major interest in any other dwelling with the intention of it being the purchaser's only or main residence.

(6A) Sub-paragraph (6)(ba) does not apply in relation to a spouse or civil partner of the purchaser if the two of them were not living together (see paragraph 9(3)) on the effective date of the transaction concerned.

(7) For the purposes of sub-paragraph (5) the purchased dwelling is also a replacement for the purchaser's only or main residence if -

(a) on the effective date of the transaction ('the transaction concerned') the purchaser intended the purchased dwelling to be the purchaser's only or main residence,

(b) in another land transaction whose effective date is during a permitted period, the purchaser or the purchaser's spouse or civil partner disposes of a major interest in another dwelling ('the sold dwelling'),

(ba) immediately after the effective date of that other land transaction, neither the purchaser nor the purchaser's spouse or civil partner has a major interest in the sold dwelling, and

(c) at any time during the period of three years ending with the effective date of the transaction concerned the sold dwelling was the purchaser's only or main residence.

(7A) for the purposes of sub-paragraph (7)(b), the permitted periods are -

(a) the period of three years beginning with the day after the effective date of the transaction concerned, or

(b) if HMRC are satisfied that the purchaser or the purchaser's spouse or civil partner would have disposed of the major interest in the sold dwelling within that three year period but was prevented from doing so by exceptional circumstances that could not reasonably have been foreseen, such longer period as HMRC may allow in response to an application made in accordance with sub-paragraph (7B).

(7B) An application for the purposes of sub-paragraph (7A)(b) must -

(a) be made within the period of 12 months beginning with the effective date of the transaction disposing of the major interest in the sold dwelling, and

(b) be made in such form and manner, and contain such information, as may be specified by HMRC.

(7C) Schedule 11A (claims not included in returns) does not apply in relation to an application made in accordance with sub-paragraph (7B).

(8) Sub-paragraph (7)(ba) does not apply in relation to a spouse or civil partner of the purchaser if the two of them are not living together (see paragraph 9(3)) on the effective date of that other land transaction.”

3. The parties helpfully agreed that there were only two issues: first, whether the enquiry was opened within time; and, secondly, whether Luna Court was a replacement for Mr Cohen's only or main residence. It follows from the second of these issues that only Condition D of the four conditions is in dispute.

FINDINGS OF FACT

4. We make the following findings of fact. In doing so, we note that we heard evidence from Mr Cohen, who adopted the witness statement of his father, Mr David Cohen. We also take into account the documents contained in the hearing bundle.

5. Mr Cohen is a full-time osteopath. He has also invested in a number of properties with the assistance of Mr David Cohen.

6. On 23 July 2018, Mr Cohen purchased a property at 337 Sherrard Road, London, E12 6UH ("Sherrard Road"). Sherrard Road was in need of renovation. Works took place between 23 July 2018 and 28 August 2018.

7. Mr Cohen moved into Sherrard Road on 29 August 2018. His oral evidence (which we accept) was that this was for ten days. During that period, he slept at Sherrard Road, moved his clothes in, and entertained friends there.

8. Mr Cohen decided that he would prefer to live in a different area. Mr David Cohen says in his witness statement that this was after he had moved into Sherrard Road and that he had seen a new build flat (which we take to mean Luna Court). However, we find that this decision to sell Sherrard Road and to purchase Luna Court took place before Mr Cohen moved into Sherrard Road. We reach this finding because Mr Cohen stated in a letter dated 19 February 2020 that he had, "put down a holding deposit for plot 21 Luna Court in Mid August 2018", and that, "I had made the decision to purchase a new build property in August 2018." Further, in a letter dated 23 February 2021, Mr Cohen states that he decided on 9 August 2018 (while works were still being done) that he, "had made a mistake and no longer wished to live there having found a new-build property in a better location." On 16 August 2018, Mr Cohen entered into a reservation agreement in respect of Luna Court and paid a reservation fee of £1,000.

9. Mr Cohen sold Sherrard Road to his parents on 25 October 2018 (which date we take from the explanation in Mr Cohen's letter dated 19 August 2019) for the sum of £172,500. Mr Cohen's address on the undated contract within the hearing bundle is stated to be 40 Alderton Hill, Loughton, Essex, IG10 3JB ("Alderton Hill"). Alderton Hill is the home of Mr Cohen's parents and was where he lived prior to moving into Sherrard Road.

10. Statements of account of council tax for the period of Mr Cohen's ownership of Sherrard Road show a 100% discount for empty property from 23 July 2018 to 22 August 2018, and an entry for "0% long term empty" from 23 August 2018 to 21 November 2018. The statements provide Alderton Hill as Mr Cohen's correspondence address. However, it is Mr Cohen's evidence (which we accept) that Mr David Cohen had informed the Council that Mr Cohen would be moving into Sherrard Road and that Mr Cohen's company paid (on Mr Cohen's behalf) the sum of £82.80 for council tax from 23 August 2018 to 22 September 2018 and £85 from 23 September 2018 to 25 October 2018.

11. An electricity bill for the period from 8 August 2018 to 7 September 2018 was paid by Mr Cohen and addressed to "The Owner/Occupier from 2 July 2018" at Sherrard Road. An electricity bill for the period from 22 September 2018 to 19 October 2018 was paid by Mr Cohen and addressed to him at Sherrard Road (albeit that a previous version had been addressed to "The Owner/Occupier from 02/07/2018 to 19/10/2018" at Sherrard Road. A water bill addressed to "The Occupier" at Sherrard Road was paid by Mr Cohen.

12. Mr Cohen completed his purchase of the long leasehold of Luna Court on 30 October 2018 for the sum of (according to the draft completion statement) £501,500.

13. On 27 November 2018, Mr Cohen submitted Stamp Duty Land Tax return which did not include any charge to higher rate tax, upon the basis that he was treating Luna Court as a replacement of a previous property (being Sherrard Road) as his only or main residence.

14. On 14 August 2019, HMRC wrote to Mr Cohen at Alderton Hill opening an enquiry.

15. On 19 August 2019, Mr Cohen wrote to HMRC acknowledging the letter sent on 14 August 2019 and noting that it had been sent to his parents' address and that, "I have not resided there since purchasing my new home on the 30th October 2018". HMRC responded to Mr Cohen at Luna Court on 16 September 2019.

16. Further correspondence followed. Mr Cohen submitted an appeal to HMRC on 23 February 2021, which ultimately resulted in a review conclusion upholding the decision on 24 May 2021. Mr Cohen appealed to this Tribunal on 4 April 2021.

WHETHER THE ENQUIRY WAS OPENED IN TIME

Submissions

17. Mr David Cohen submitted on Mr Cohen's behalf that a valid notice of enquiry had not been served within time as HMRC wrote to Mr Cohen at the wrong address.

18. Ms Edley submitted that Alderton Hill was the last known address for Mr Cohen and that in any event he received it within the required period.

Discussion

19. We find that the enquiry was opened within time. It was common ground that the effective date of the transaction was 30 October 2018, being the date of completion of the purchase of Luna Court. Section 76 of the Finance Act 2003 (in the form it was in at the time) provided that a Stamp Duty Land Tax return be filed within 30 days of the effective date of the transaction, the last day of which constitutes the "filing date" for the purposes of the Finance Act 2003, schedule 10, paragraph 2. As such, the filing date was 29 November 2018. The Finance Act 2003, schedule 10, paragraph 12(2)(a) provides for an enquiry to be opened within nine months of the filing date. As such, an enquiry could be opened until 29 August 2019. The letter dated 14 August 2019 ("the August Letter") was a notice that the enquiry had been opened and so was sent within the required time period.

20. Section 84 of the Finance Act 2003 provides for how documents may be delivered and served for these purposes:

"84. Delivery and service of documents

(1) A notice or other document to be served under this Part on a person may be delivered to him or left at his usual or last known place of abode.

(2) A notice or other document to be given, served or delivered under this Part may be served by post.

(3) For the purposes of section 7 of the Interpretation Act 1978 (c30) (general provisions as to service by post) any such notice or other document to be given or delivered to, or served on, any person by the Inland Revenue is properly addressed if it is addressed to that person –

(a) in the case of an individual, at his usual or last known place of residence or his place of business;

..."

21. Section 7 of the Interpretation Act 1978 provides as follows:

“7. References to service by post.

Where an Act authorises or requires any document to be served by post (whether the expression ‘serve’ or the expression ‘give’ or ‘send’ or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

22. It was Mr Cohen’s responsibility to ensure that he updated HMRC as to his address. Alderton Hill was Mr Cohen’s last known place of residence as that was the last address Mr Cohen had notified to HMRC as at the date of the August Letter. There is no dispute that HMRC posted the August Letter to Alderton Hill and no dispute that it was delivered there. As such, we find that the August Letter was properly served in accordance with section 84 of the Finance Act 2003 and section 7 of the Interpretation Act 1978.

23. In any event, Mr Cohen did in fact receive notice within time as he had received it by the time he wrote to HMRC referring to the August letter in his own letter dated 19 August 2019. We note that the obligation in paragraph 12(1) of schedule 10 to the Finance Act 2003 is to “give notice” and that section 84 of the Finance Act 2003 permits delivery and service of documents in the manner set out in that section rather than providing that documents can only be delivered and served in the manner set out. Given that Mr Cohen in fact received that notice within time, we find that HMRC’s obligation to give notice of their intention to enquire into a land transaction was fulfilled within time. Even if we were wrong to treat the August Letter as having been properly served pursuant to section 84 of the Finance Act 2003 and section 7 of the Interpretation Act 1978, we find that notice was properly given within time by virtue of Mr Cohen in fact receiving it within time.

WHETHER SHERRARD ROAD WAS MR COHEN’S ONLY OR MAIN RESIDENCE

24. As set out above, only Condition D within paragraph 3 of Schedule 4ZA to the Finance Act 2003 is in dispute. It is common ground that Luna Court was a replacement for Sherrard Road. However, the key issue is whether Sherrard Road was Mr Cohen’s only or main residence (Condition D being fulfilled if Luna Court was not a replacement for Mr Cohen’s only or main residence).

Submissions

25. Mr David Cohen submitted on Mr Cohen’s behalf that Sherrard Road was Mr Cohen’s only or main residence. He noted that Mr Cohen lived there, council tax was paid on the basis of him living there, and the absence of other indicators of residence is simply because of the very short period of time that he owned Sherrard Road.

26. Ms Edley submitted that the evidence did not justify a finding that Sherrard Road was Mr Cohen’s only or main residence.

Discussion

27. We were referred to and take into account *Frost (HM Inspector of Taxes) v Feltham* 55 TC 10 and *Oliver v HMRC* [2016] UKFTT 0796 (TC) (“*Oliver*”) (although we note that *Oliver* is a First-tier Tribunal decision and so we are not bound by it). One of the cases referred to in *Oliver* was *Goodwin v Curtis (Inspector of Taxes)* [1998] STC 475 (“*Goodwin*”). In *Goodwin*, Millett LJ provided the following explanation of the meaning of “residence”:

“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 as temporary accommodation. They used the expression ‘temporary

residence’ when narrating the facts. It was suggested that this was a contradiction. But, of course, they were not using the word ‘residence’ in the sense in which it is used in the 1979 Act, but as a synonym for occupation. The farmhouse was where he lived; it was the only place where he lived. For the first two or three days he had nowhere else to live. He was undoubtedly in occupation. But they came to the conclusion that he was in temporary occupation and not in residence.

...

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 for the commissioners to decide.”

28. We find that Sherrard Road was not Mr Cohen’s only or main residence. We do so for the following reasons.

29. First, whilst we accept that Mr Cohen was in occupation of Sherrard Road (albeit only for ten days) this is not the same as saying it was his only or main residence. The features relied upon by Mr David Cohen are consistent with occupation but do not lead to the conclusion that Sherrard Road was Mr Cohen’s only or main residence. We note that Mr David Cohen (as had Mr Cohen in correspondence with HMRC) emphasised Mr Cohen’s intentions when he purchased Sherrard Road that it would be his only or main residence. However, we find that those intentions had changed before he moved in, as he had already decided to sell Sherrard Road and to purchase Luna Court during the works to Sherrard Road (and so before he moved in).

30. Secondly, the very short period of time that Mr Cohen lived at Sherrard Road is, in all the circumstances, indicative that his occupation was temporary.

31. Thirdly, Mr Cohen did not intend to live at Sherrard Road permanently. Before he moved into Sherrard Road he knew that such occupation would be temporary and very short term as he had already decided that his purchase of Sherrard Road was a mistake, had already decided to sell Sherrard Road, and had already decided to purchase Luna Court.

32. Fourthly, Mr Cohen did not even continue to live at Sherrard Road for the entirety of the period between completion of the works and the completion of the purchase of Luna Court; Mr Cohen said he only lived at Sherrard Road for ten days from 29 August 2018, whereas the purchase of Luna Court was completed on 30 October 2018.

DISPOSITION

33. For the reasons set out above, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. 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.

**JUDGE RICHARD CHAPMAN KC
TRIBUNAL JUDGE**

Release date: 30th JANUARY 2023