[2019] UKFTT 0659 (TC)

TC07434

Appeal number: TC/2017/06140
TC/2017/06141

CAPITAL GAINS TAX – principle private residence relief – HMRC decision that extra-statutory concession D49 should not apply – whether or not FTT has jurisdiction to consider application of ESC D49 – held not – appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANDREW WHITE **Appellants**
MELANIE WHITE

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT

Sitting in public at Taylor House, London on 22 October 2019

Ximena Montes Manzano, counsel, instructed by Smith and Williamson LLP, for the Appellant

Elizabeth Edley, officer of HMRC, for the Respondents

DECISION

INTRODUCTION

1. This was an appeal against HMRC's decision not to apply Extra-Statutory Concession D49 to the gain made on the disposal of a property owned by Mr and Mrs White.

2. In addition HMRC made an application that the appeal should be struck out in accordance with Rule 8(2)(a) of The Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2003 on the grounds that this tribunal does not have the jurisdiction to consider this appeal.

THE FACTS

3. The key facts in this case are not, for the most part, in dispute between the parties. They are not however directly relevant to my decision because I decided that the question of the application of an Extra-Statutory Concession was not one within the jurisdiction of this tribunal. I will however set out the main facts for the sake of completeness.

4. Mr and Mrs White purchased four interests in land in 2001 and 2002 which they converted into a single dwelling. These acquisitions occurred on the following dates:

	Deposit Paid	**Completion**
31 Queen's Gate Mews	11 June 2001	12 July 2001
32 Queen's Gate Mews	11 June 2001	12 July 2001
24 Hyde Park Gate	11 June 2001	21 September 2001
32b Queen's Gate Mews	28 March 2002	17 April 2002

5. There is some dispute as to when Mr and Mrs White took up residence in the property, but it was some time between September 2003 and November 2003.

6. HMRC argue that the date of acquisition of a property which was acquired in stages, as in this case, commences from the time of entering into an unconditional contract for the first part of the property which was acquired, which they state was on 11 June 2001. Commencement of occupation in September or November 2003 was therefore outside the maximum two year time limit which is permitted by ESC D49 for that period to be considered to be a period of occupation for the purposes of principle private residence relief.

7. The statutory provisions do not permit any delay in the commencement of occupation if full principle private residence relief is to be granted. It is common ground between the parties that the facts of this case take it outside the strict

provisions of the legislation regarding principal private residence relief as regards the period of ownership prior to occupation of the property.

JURISDICTION

8. Before considering the question of whether or not the provisions of ESC D49 should be applied to the facts of this case I must first consider the question of whether or not I have the jurisdiction to consider the application of an Extra-Statutory Concession and whether or not I should therefore strike out the appeal as requested by HMRC.

9. I was referred to a number of cases as below:

JH Corbitt v HMRC [1981] AC 531

Prince v HMRC [2012] UKFTT 157 (TC)

The Trustees of the BT Pension Scheme v HMRC [2015] EWCA Civ 713

Birkett v HMRC [2017] UKUT 0089 (TC)

McHugh v HMRC [2018] UKFTT 0403 (TC)

10. *Prince* and *McHugh* are of course decisions of the FTT and are not therefore binding on me. In addition, they do, unfortunately, come to essentially different conclusions on the issue of jurisdiction but they are nevertheless instructive.

11. The principles covering the jurisdiction of the FTT are set out at some length in the judgement of Patten LJ in *BT Trustees*, at [142] and [143]:

> "142. The statutory jurisdiction conferred upon the FtT by s.3 TCEA 2007 is in our view to be read as exclusive and the closure notice appeals under Schedule 1A TMA do not extend to what are essentially parallel common law challenges to the fairness of the treatment afforded to the taxpayer. The extra-statutory concession is, by definition, a statement as to how HMRC will operate in the circumstances there specified and its failure to do so denies the legitimate expectation of taxpayers who had been led to expect that they would be treated in accordance with it. We are not concerned as in these statutory appeals with the direct application of the taxing instrument modified, or otherwise, by any relevant principles of EU law. The sole issue in relation to ESC B41 is whether it was fairly operated in accordance with its terms.
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> 143. We therefore consider that the reasoning of Sales J in *Oxfam v HMRC* has no application to the statutory jurisdiction under s.3 TCEA 2007 in the sense of giving to the FtT and the Upper Tribunal jurisdiction to decide the common law question of whether HMRC has properly operated the extra-statutory concession. The appeals are concerned with whether the Trustees are entitled under s.231 to claim the benefit of the credits on FIDs and foreign dividends. Not with what is their entitlement under ESC B41. This reading of TCEA 2007

is strengthened by s.15 TCEA 2007 which gives the Upper Tribunal jurisdiction to decide applications for judicial review when transferred from the Administrative Court. It indicates that when one of the tax tribunals was intended to be able to determine public law claims Parliament made that expressly clear. There are no similar provisions in the case of the FtT."

12. This issue was discussed further by the Upper Tribunal (Nugee J and Judge Greenbank) in *Birkett* at [30] to [32], which most helpfully summarised the principles to be applied:

> "30. The principles that we understand to be derived from these authorities are as follows:
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> (1) The FTT is a creature of statute. It was created by s. 3 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory: *Hok* at [36], *Noor* at [25], *BT Trustees* at [133].
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> (2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at [143].
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> (3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In *Oxfam* at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In *Hok* at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (*Wandsworth LBC v Winder* [1985] AC 461), or whether a compulsory purchase order had been vitiated (*Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In *Noor* at [73] the UT, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.
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> (4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is

sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.

(5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction.

31. Some cases are relatively straightforward. *Hok* is a good example. The appeal to the FTT was against fixed penalties of £100 per month. The FTT's jurisdiction was given by s. 100B TMA (set out above at paragraph [27]). That only entitled it to determine if the penalties had been incurred and if the amounts were correct. The issue which was sought to be raised (was it unfair of HMRC to levy the penalties because of delay?) did not go to either issue. Hence the FTT had no jurisdiction to consider it.

32. In other cases the Court may have to construe the statutory provision conferring jurisdiction on the FTT to decide the scope of it. An example is *BT Trustees*. Here the appeals were against closure notices. The FTT's jurisdiction was given by para 9(7) of sch 1A TMA (set out above at paragraph [29]). That entitled the FTT to determine if the claims for tax credits "should have been allowed". The Court of Appeal held that that was **limited to the question whether the claims should have been allowed as a matter of tax law, and as not extending to the question whether the taxpayers should have been allowed the benefit of the extra statutory concession**. That must on analysis have been because that was the true construction of para 9(7). Similar decisions have been made in relation to other cases where taxpayers have sought to argue that they should have had the benefit of an extra statutory concession: examples to which we were referred included *Prince v HMRC* [2012] UKFTT 157, *Shanklin Conservative & Unionist Club v HMRC* [2016] UKFTT 0135 (TC)."

13. The Upper Tribunal went on further to say, at [38] to [40]:

"Under s. 49D(3) TMA, the FTT's jurisdiction is to decide "the matter in question", and under para 48(3) of Sch 36, the FTT is limited to confirming or cancelling the decision. The matter in question on an appeal under para 47(a) is whether "a penalty is payable by that person [that is, the appellant] under 20 paragraph 40". That seems to us to be the same question as whether "the person is liable to a further penalty" under para 40(2), which in turn depends on whether the requirements of para 40(1) are met. In other words, **the FTT's jurisdiction on an appeal under para 47(a) is in our view confined to asking whether the statutory requirements under para 40(1) are met.**

39. That means that the FTT cannot on an appeal under para 47(a) review the decision of the HMRC officer on any other grounds. In the present case the appellant partnerships wished the FTT to review the decision on the grounds that it was unfair to issue the penalties because they had a legitimate expectation of deferring any further penalties. That does not seem to us to be an issue which goes to the matter in question on an appeal under para 47(a).

40. We have reached this conclusion simply as a matter of construction of the relevant statutory provisions. Mr Hackett referred to what he called the "tension" between the decisions in *Oxfam* and *Noor*, and invited us to resolve that tension in favour of preferring the reasoning in *Oxfam*. He also submitted that it would be unfortunate if a taxpayer who wished to argue that HMRC had acted unfairly and in breach of a legitimate expectation had to take proceedings in the Administrative Court rather than availing himself of the comparatively simple and low-cost jurisdiction available in the FTT. We have not found it necessary to consider these points: **the resolution of this appeal turns in our view on what the statutory provisions say, not on some broader principle**."

14. These authorities clearly require me to consider the legislation to determine if this is one of those (rare) cases where the FTT must consider matters of public law in order to arrive at its decision on a matter which is properly appealable to the tribunal.

15. The legislation to which I was referred by Miss Manzano is set out in s28A, s31, s49D and s49I Taxes Management Act 1970. I do not consider it necessary to set out these provisions in full but in essence, as is well known, they provide quite clearly that an appeal against a closure notice, as in this case, is properly an appeal which this tribunal can consider. This distinguishes it from *Prince*, in which there was no appealable decisions.

16. Miss Manzano also referred me to *McHugh*, in which the First Tier Tribunal (Judge Geraint Jones QC and Simon Bird) did consider the application of ESC D49 in very similar circumstances to this appeal, and found in favour of the appellant. This decision was not appealed to the Upper Tribunal by HMRC but Mrs Edley stated that this did not imply any approval or acceptance of the decision by HMRC.

17. In their decision in *McHugh* the FTT did not include any analysis of the question as to whether or not they had the jurisdiction to consider the application of D49, but their jurisdiction was not challenged by HMRC in that case and perhaps the tribunal therefore considered that they were not required to consider it. The tribunal did address the differences between an ESC and statute law at [17] as follows:

"17. We remind ourselves that extra statutory material of this nature is not to be read as if it is primary or secondary legislation. The essence of the enquiry is to discover the purport and intent of the concession and to construe and apply it so as to give effect to its true purport and intent. We can understand that the use of the words "provided that" in the middle paragraph of the Concession could be read as introducing a proviso to the effect that the concession can and will only apply if the building or refurbishment works are completed within one year. The words "provided that" are equally capable of being read as expressing the intention that the period for building and/or refurbishment works should not be open ended and should, for capital gains tax purposes, be limited to 12 months or, if there are good reasons beyond the control of the taxpayer, to a maximum of 24 months."

18. In other words, the tribunal recognised that the ESC was not on a par with primary or secondary legislation but in all other respects it treated it as statute law. It did not therefore address the question as to whether or not it had any jurisdiction to hear an appeal on the way in which HMRC had chosen to apply ESC D49.

19. The question for me therefore is whether or not a proper legal construction of the legislation setting out the requirements for principal private residence relief, together with the legislation setting out the appellants' right to make an appeal to this tribunal, requires me, or permits me, to consider how HMRC have exercised their discretion as to whether or not they should grant relief to the appellants under ESC D49.

20. Regrettably, whatever my sympathies with the appellants, I can see nothing in this legislation which requires or permits me to consider ESC D49. I can determine the appeal simply by considering the legislation regarding the availability of principal private residence relief, and it is common ground between the parties that the circumstances of this case do not fall within the strict wording of the legislation in question. I do not need to go any further than that.

DECISION

21. Therefore, for the reasons set out above, I have decided that this appeal should be struck out in accordance with Rule 8(2)(a) of The Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2003 on the grounds that this tribunal does not have the jurisdiction to consider this appeal.

22. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 30 OCTOBER 2019