SQUIRE SANDERS

PRINCIPAL PRIVATE RESIDENCE

Recent conflicting tribunal decisions on the CGT private residence exemption has thrown the subject into confusion.

Everybody will be familiar with the CGT private residence exemption. An important condition for the relief is that the property must be a "residence" and while this sounds straightforward, it has caused all sorts of difficulties lately.

In *Susan Bradley v HMRC* [2013] TC02560, Mrs Bradley lived in a house owned jointly with her husband. She also owned another small house and a flat, both of which were normally let. She moved out of the matrimonial home in August 2007 and into the flat, with the intention of separating permanently from her husband pending a divorce. When the tenancy in the small house ended in April 2008, she moved into that house which was more convenient.

When she moved into the house, she repainted it, undertook some improvements and generally made it more of a home. She put the property on the market, but the market was very poor and she did not expect a sale; she expected to live permanently in the property. However, later in the year Mr and Mrs Bradley were reconciled and she moved back to the matrimonial home in November 2008; the small house was sold in January 2009.

So, between April 2008 and November 2008, the small house was her only residence (she did not live anywhere else) and one might have felt reasonably optimistic that this property would qualify not only as her residence, but as her main residence. No less an authority that Lord Widgery has described "a residence" as: "A place where a man is based or where he continues to live, the place where he sleeps and shelters and has his home. It is imperative to remember in this context that residence implies a degree of permanence. Consequently a person is not entitled to claim to be resident merely because he pays a short temporary visit. Some assumption of permanence, some degree of continuity, some expectation of continuity is a vital factor which turns simple occupation into residence."

However, the tribunal decided that she did not occupy the property as her residence. She had already placed it on the market and, if somebody had offered her the asking price, she would have sold it. The tribunal judge considered that she never intended to live permanently in the property; it was only ever going to be a temporary home and, therefore, it was never her residence.

The tribunal was heavily influenced by the Court of Appeal judgment in *Goodwin v Curtis* [1998] STC 475, which outlined the importance of continuity—observing that temporary accommodation at an address does not make someone resident there. However, in *Goodwin v Curtis*, the taxpayer only occupied the property for five weeks. The taxpayer had just separated from his wife and family and he stayed in the property as temporary accommodation. Indeed, two days after moving into the property, the taxpayer completed the purchase of another property which he intended to be his private residence.

It is a bit of a stretch to suggest that Goodwin occupied the property as his residence in these circumstances; it was the most temporary of accommodation. But this seems a long way from the situation of Bradley who moved into a perfectly suitable home, took steps to make it more of a home and lived there from April to November, without any intention of moving out unless the house were unexpectedly to be sold.

To apply this case to the circumstances of Bradley seems tough, but the combination of these cases seems to give HMRC a serious weapon to deny the exemption in many cases where previously there would have been little doubt that the relief was available. Any indication that the occupier had in mind moving out (at almost any time in the future) would demonstrate that the accommodation must be temporary and not qualify as a residence. Even if you have lived somewhere for ages, it might cease to be a residence once it is put on the market— or once you decide you might like to move. I cannot see many claims for private residence relief surviving this test.

Not so fast Mr Inspector. Reinforcements have arrived in the shape of *David Morgan v HMRC* [2013] TC 02596. Mr Morgan was purchasing a property where he intended to live when he and his fiancée were married. He had sold his own flat and moved in with his fiancée's family, but unfortunately, two weeks before the purchase, the relationship ended. He went to live with his parents. He carried on with the purchase of the property and he moved in for two weeks, specifically to prepare the house for renting and then moved back to live with his parents. The property was let and eventually sold.

Under the circumstances one might think that Morgan was doomed. However, after considering all the authorities, the tribunal decided that Morgan had lived in the property for two weeks before making serious enquiries about letting and this was enough for the property to qualify as a residence.

Apart from the fact that *Bradley* and *Morgan* are in hopeless conflict, it is difficult to avoid the conclusion that they were both wrongly decided. Bradley should obviously have been allowed her relief and Morgan equally should not. But what do I know?

What is clear is that unless there is an appeal on either or both of these cases, the whole subject will be in utter confusion—a situation which is bad for everybody.

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