ICAEW

FARMING AND RURAL BUSINESS GROUP NEWS

NOVEMBER 2012

Home is where the Harte is

This article looks at a recent case to demonstrate the importance of evidence of occupation and for taxpayers not to take the PPR claim for any property too lightly.

A recent case before the First-tier Tribunal (FTT) has questioned quality of occupation and whether this amounts to residence within the meaning of s222(5), Taxation of Chargeable Gains Act 1992 (TCGA 1992).

The case was 'M J and Mrs B A Harte' (TC 1951). The longest period that Mr and Mrs Harte had lived in the property was three weeks, which was considered not long enough. The key point arising from the case was, however, the importance of evidence of occupation.

What were the facts?

Mr and Mrs Harte lived in a property as their main residence which they had bought in 1969. In 1992, Mr Harte inherited a house, Alder Grove, from his father, which his stepmother occupied as her residence until she died in May 2007. Mr Harte transferred to his wife a joint interest in the property after his stepmother's death.

In August 2008, the Hartes elected for the inherited property to be their main residence for the week ending 19 October 2007. Although their first home was only six miles away, they claimed to stay in the inherited property regularly and treat both properties as homes simultaneously. Mr and Mrs Harte kept no records of the periods they stayed in the inherited house, and they did not ensure the bills were in their own names.

In October 2007, Mr and Mrs Harte sold Alder Grove and claimed only or main residence relief under TCGA 1992 s222. HMRC disallowed the claim and assessed the couple to capital gains tax (CGT) as they did not consider the occupation was permanent enough to satisfy this section.

The taxpayers stated they had intended to make Alder Grove their home, and lived there briefly. Mr and Mrs Harte received an offer from a neighbour to buy the property, and they decided to accept that offer.

The longest time that the couple lived in Alder Grove was three weeks. The taxpayers did not move any of their own possessions into Alder Grove nor did they carry out any work on the property. They had spent short periods in the house to test what it would be like to live there, but it was decided that this was not occupation.

The Tribunal rejected the election under s222(5) TCGA 1992. This rejection was not on the basis of the short period it applied to, but because there was no evidence of Mr and Mrs Harte ever occupying the property with any degree of permanence or continuity. It could be argued that there was an attempt to "flip" the houses by Mr and Mrs Harte in order to gain CGT advantages.

What is "flipping"?

"Flipping" is the tax planning advantage by which a taxpayer elects for a second home to be his or her main residence for CGT purposes (s222(5)), then changes that election in favour of the first home a short time later. The "short" should ideally not be "ridiculous" and there should be a degree of permanence.

By this procedure, the first home loses the main residence exemption for a few weeks, and the second home achieves at least three years' worth of exempt gain. However, to be effective, both properties must be factually occupied as the taxpayer's home, and the deadlines for making and

changing the election must be achieved. As this case shows, it is essential that there is evidence of actual occupation.

It is possible to claim principal private residence relief (PPR) – the only or main residence relief in a situation like that faced by Mr and Mrs Harte – but there must be evidence of occupation.

It can be argued that this case does not provide any new guidance but simply reinforces the established principles of the need for fact, evidence and permanence. It is essential for taxpayers not to take the PPR claim (and the planning and advice in respect thereof) for any property too lightly.

Julie Butler FCA, Butler & Co

Julie Butler is the author of Tax Planning for Farm and Land Diversification (Bloomsbury Professional), Equine Tax Planning, and Stanley: Taxation of Farmers and Landowners (LexisNexis)

Farming and Rural Business Group, September 2012