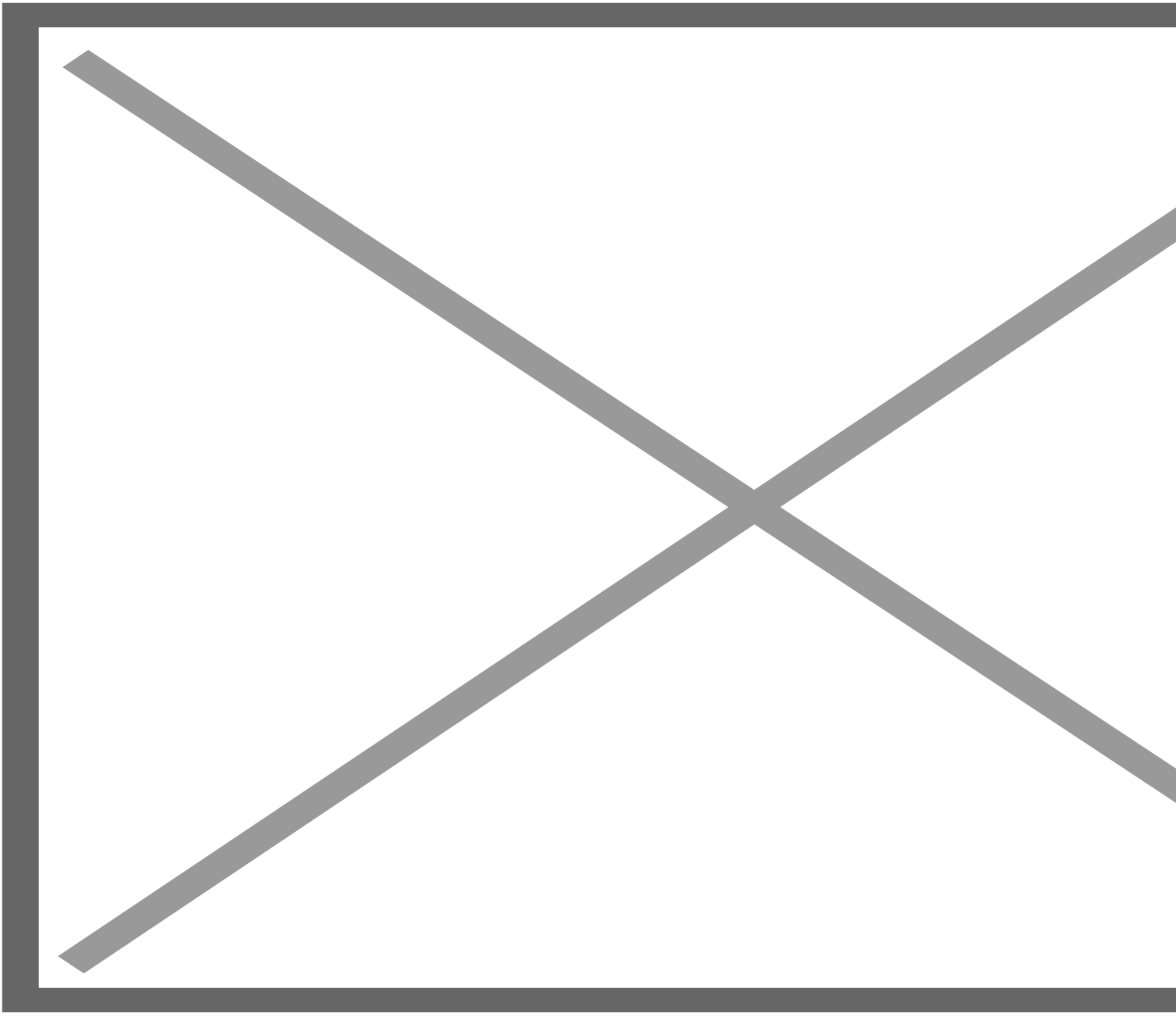
Six to eight weeks

Personal tax



08 January 2021

Keith Gordon looks at a case which concerns the application of the main residence exemption after only a few weeks of occupation

Key Points

What is the issue?

The usual absence of a capital gains tax charge on a taxpayer's only or main residence can mean that the possibility of tax being payable upon the disposal of one's home escapes most people's consciousness.

What does it mean for me?

The individual's occupation of the property must be of sufficient quality to represent a place of residence rather than a mere temporary presence.

What can I take away?

I would strongly advise that the taxpayer registers the new address with the local GP, the local authority, the bank, HMRC, etc. promptly on moving in – this being good evidence that the move is meant to be long term.

The exemption from capital gains tax in respect of a taxpayer's only or main residence is perhaps the widest known tax rule in the UK. The alternative view is that the usual absence of any tax charge on the disposal of one's home means that the possibility of tax being payable escapes most people's consciousness.

Either way, tax advisers will know that the true position is considerably more nuanced than most people realise. This article discusses the recent case of Core v HMRC [2020] UKFTT 440 (TC) which focuses on the meaning of 'residence'. At the heart of that statutory word is the requirement that the individual's occupation of the property must be of sufficient quality to represent a place of residence rather than a mere temporary presence.

The facts of the case

Mr and Mrs Core are married, with school age children. Mr Core is a builder by trade, and he operates his business through a limited company. Their family home was rented but, in March 2013, they purchased a property in 'Green Lane'. Before moving into the property, Mr Core carried out some refurbishment and extension work to the property. Initially, during these works, the family continued to live in the rented accommodation and in fact extended the lease by six months on two occasions (in December 2013 until June 2014, and in June 2014 until December).

Whilst working on the property in about February 2014, Mr Core was approached by an individual who asked if the property was for sale. Although told that it was not for sale, the individual returned about a month later and, a further time, a month after that. On those latter two occasions, actual offers to purchase were made, with a higher offer on that last occasion (May 2014) if exchange could take place immediately. Mr and Mrs Core accepted that last offer.

In the meantime, the Cores had moved into Green Lane (around March or April 2014). They therefore considered that Green Lane had represented their home which they would have stayed in for a longer period but for the unsolicited offer made six to eight weeks later.

HMRC considered that Green Lane did not amount to the couple's residence and that capital gains tax was due on the gain arising. They enquired into Mr Core's 2014/15 tax return and issued a closure notice charging the additional tax. In respect of Mrs Core, HMRC made a discovery assessment. Mr and Mrs Core appealed against both decisions and subsequently notified their appeals to the First-tier Tribunal.

The Tribunal's decision

The Tribunal (Judge Zachary Citron) dealt with the case on the papers, with the consent of both parties. He first set out the facts as he found them and as summarised above. In particular, he concluded that the agreement to sell Green Lane was reached in or after May 2014 and not, as contended for by HMRC, in or before December 2013.

The judge then addressed the law. He acknowledged the leading case on temporary occupation, being the Court of Appeal's decision in Goodwin v Curtis [1998] STC 475. However, he recognised that there is no minimum period of occupation that is required before the property can amount to a residence. Each case turns on its own facts. As the judge continued: 'to succeed, [taxpayers] must provide some evidence that their residence in the property showed some degree of permanence, some degree of continuity or some expectation of continuity'.

The judge considered that the fact that the whole family moved into Green Lane was 'strongly indicative that they expected to live at Green Lane indefinitely' and that it was only the unsolicited offer that caused that position to change. Accordingly, he allowed the taxpayers' appeals.

Commentary

This case strikes me as a classic illustration of a number of faults within the world of tax dispute resolution. HMRC's case theory appears to have been based on the undisputed fact that the Cores extended their rental agreement after accepting the offer on Green Lane. For some reason, HMRC interpreted this as an indication that the offer must have been made in or before the first extension in December 2013 (so that the Cores had moved into Green Lane when they already knew it was to be sold). However, the judge recognised that this made little sense and the relevant extension was that effected in June 2014.

In ideal world, this is the kind of factual misunderstanding that ought to have been capable of resolution at a face-to-face meeting. However, most advisers recognise that HMRC's approach to such meetings is typically too confrontational and, in any event, meeting notes subsequently prepared by HMRC are so skewed that it is standard advice not to allow such meetings between HMRC
and the client. Indeed, this case highlights the risk of HMRC picking up on one statement and then later basing its whole case on one interpretation of that statement, without recognising that that statement was capable of being interpreted (and was meant to be interpreted) in a different way.

It is for this reason I consider the Alternative Dispute Resolution (ADR) facility a helpful way forward, as information can often be clarified in a less confrontational forum. However, ADR works only when both sides are prepared to listen as well as to talk.
What also hindered HMRC's appreciation of the Cores' case was its insistence that there be contemporaneous documentary evidence that corroborated the Cores' account of what happened.

It is not clear, however, how HMRC could realistically expect such documentation to have existed in a case such as this. But if it was the absence of such documentation that prevented HMRC from agreeing to drop the case, then it seems that a case proceeded to the tribunal wholly unnecessarily. The approach adopted by HMRC seems to fly in the face of the HMRC Charter promise to 'assume you're telling the truth, unless we've good reason to think you're not'.

Another of the aspects of the case that concerned me was the fact that the appeal did not relate solely to the question as to whether a capital gains tax liability existed but also to penalty assessments made against Mr and Mrs Cole for 'carelessly' omitting to declare the capital gain on their tax returns. In the light of the judge's decision on the main issue, he did not proceed to address this issue. However, I shall.

The mere fact that penalties were issued in a case such as this is a cause for concern. There is a worrying tendency within HMRC to proceed from the assumption that ‘error on tax return’ implies either careless or deliberate conduct by the taxpayer (so as to justify the imposition of penalties). However, there is a safe zone, often (but not universally) referred to as ‘innocent error’; for example, a mistake caused because of a genuine difference in opinion. This was such a case: was the quality of occupation sufficiently high so as to make the property the Cores’ residence?

I would be interested to know whether the officer had a good reason to consider a penalty due, beyond the fact that the officer considered that capital gains tax due had not been accounted for. In many cases I am professionally involved with, I see similar threats of penalties in equally inappropriate cases. However, it is rare for penalties to follow and I assume that HMRC rows back because it knows that the taxpayer is professionally represented and that any penalty assessment would be vigorously challenged.

On this point, I note that the duty to treat all taxpayers equally has been dropped from the HMRC Charter.

What to do next

What can taxpayers do to help themselves if they find themselves in similar cases? The clincher in this case was the fact that the whole family moved to Green Lane; had there not been the intention for Green Lane to become their home, the likelihood is that the family would have continued to remain in their rented accommodation. However, how can a single taxpayer (or a couple without children) make it equally clear to HMRC (or the tribunal) that the move is not merely an exercise of window-dressing? In such situations, I would strongly advise that the taxpayer registers the new address with the local GP, the local authority, the bank, HMRC, etc. promptly on moving in – this being good evidence that the move is meant to be long term. Of course, there will be situations (the Cores’ case perhaps being an example) where there is no immediate urgency to effect this paperwork (because the rented accommodation was being retained for Mr Core’s work purposes, as he was working next door). However, failure to take such a precaution could cause difficulties with HMRC at a later stage.

As for HMRC, what can it do next? Perhaps read correspondence without the presumption that taxpayers have underpaid their tax. Similarly, HMRC should be more willing to believe the accuracy of what taxpayers tell it, even in the absence of corroborative documentation. It should be only when there is contradictory documentation or an intrinsically incredible account from a taxpayer that this should lead to HMRC disbelieving taxpayers.