CURTILAGE: AN ANALYSIS AS TO THE CORRECT LEGAL DEFINITION FOCUSING ON CAPITAL GAINS TAX

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The definition of curtilage: General Principles

Although the use of the word is fairly widespread in the legal context in particular in statutes, there is no specific statutory definition for the word curtilage in land law, property law, housing law, planning law or indeed tax law. As a direct result of this lack of a set definition the courts were left to hear extensive argument as to what it should comprise and to try to devise a suitable and fair definition of the word as applied to the facts of actual cases.

Have the courts got it right or is the practice of determining what is the curtilage of a building an exercise of judgment rather than an application of law?

The Oxford English Dictionary defines the word as:

> *A small court, yard, garth, or piece of ground attached to a dwelling-house, and forming one enclosure with it, or so regarded by the law; the area to and containing a dwelling house and its outbuildings.*

Interestingly enough, the New Oxford Dictionary of English (Clarendon, Oxford, 1988) defines it simply as:

> *An area of land attached to a house and forming one enclosure with it.*

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Stroud's Judicial Dictionary describes a curtilage as:

> *A garden, yard, field, or peece of voide ground. Laying neare and belonging to the messuage (Termes de la Ley)*

The obvious common factors in all these definitions are smallness, close proximity and some degree of physical attachment as specific requirements. It will be therefore interesting to note what the Courts have identified and accepted as the most suitable definition.

The Definition of curtilage: cases decided under various statutory regimes

The leading case on the meaning of curtilage is *Dyer v Dorset County Council* [1989] 1 QB 346, CA.[2] a case that arose under the Housing Act 1980, in which the Court of Appeal held that in the absence of any definition, 'curtilage' bore its restricted and established meaning connoting a small area forming part and parcel of the house or building which it contained or to which it was attached. It was further held that it was ultimately a matter of fact and degree in each case. In that case, the Court found it impossible to accept that the house occupied by the applicant and within but on the edge of the grounds of a college and separated by a significant amount of green land was within the curtilage of the main college building. Nourse LJ endorsed as adequate the definition contained in the Oxford English Dictionary as explained above.

Moreover, in the case of *Sinclair Lockhart's Trustees v Central Land Board* (1950) 1 P&CR 195, the Court of Session held that the word *Curtilage* could be described as:

> *The ground which is used for the comfortable enjoyment of a house or other building may be regarded in law as being within the curtilage of that house or building and thereby as an integral part of the same although it has not been marked off or enclosed in any way. It is enough that it serves the purpose of the house or building in some necessary or reasonably useful way*

It is submitted that this definition is far from satisfactory or accurate as it could potentially include a neighbouring garden or drive which serves a house in a very useful way by providing an attractive view or an alternative access but which is clearly not part of the main dwelling. It is also worth to note that in the nineteenth century case of *Caledonian Railway Co v Turcan* [1898] AC 256, the House of

2 Leave to appeal to the House of Lords was refused: [1988] 1 WLR 1284.

Lords held that an accessway leading to a yard could, in appropriate circumstances, be part of the curtilage of the building adjoining the yard. It naturally followed that this land could not be severed from the rest of the property being compulsorily acquired without having a material detriment on the rest of the land.

The following points may be made looking at the case law that has developed on this area:

Firstly, the curtilage of a building need not always be a small area *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions* [2000] 3 WLR 511, CA. This fairly recent case concerned the Grade II listed Grimsdyke Hotel, in Harrow; the owners of the hotel, had installed double glazing in a stable block situated some 200 metres from the hotel. As no listed building consent had been obtained for the operation, the local authority began enforcement proceedings, on the basis that the stable block lay within the curtilage of the hotel and therefore consent should have been obtained. Skerritts maintained that, based upon the decision in *Dyer,* no listed building consent was needed since the curtilage of a building had to be inherently small. The Court of appeal held that;

> *Whilst the decision in* Dyer *was plainly correct…[the] court went further than it was necessary in expressing the view that the curtilage of a building must always be small, or that the notion of smallness is inherent in the expression.*[3]

That is to say that contrary to the ordinary dictionary meaning, the starting position in identifying a curtilage should not necessarily be that it is limited in size. Secondly, what a building's curtilage encompasses and amounts to is essentially a question of fact and degree. The Court in *Skerritts* did not venture into giving any further guidance on the approach to be taken when determining what exactly is within the curtilage of a building and it limited itself to reiterating the position established in *Dyer* that it is always a question of fact and degree. This case reinforced the position previously held by the courts in *James v Secretary of State* [1991] 1 PLR 58 and *McAlpine v Secretary of State* [1995] 1 PLR 16. In *James*, the court upheld an Inspector's finding that a tennis court built at the end of a field some 100 metres away from the dwellinghouse was not within its curtilage. It was found that the field was separate and distinct from the cultivated garden attached to

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3 As per Robert Walker LJ at p 519. It was decided that the Inspector and Secretary of State had not erred in law in not making a particular reference to smallness and concluding that building consent was indeed needed because in the context of substantial listed buildings the curtilage was likely to extend to what were or had been, in terms of ownership and function, ancillary buildings.

the house and that the house and the tennis court did not have the appearance of being within this same enclosure. The Court maintained it was *quintessentially a matter of fact*. In *McAlpine*, the court upheld an enforcement notice requiring the removal of a swimming pool which had been constructed without planning permission in the grounds of a substantial listed building. There was a garden at the rear of the main house, and beyond that an extensive open grassed area which had been used for generations for recreation as part of the garden. The Court held that whether the pool was in the curtilage of the listed house was *essentially a matter of fact and degree* for the Inspector. The deputy judge also held that it was open to inspectors, in appropriate cases, to consider historical evidence where it assisted the determination of the current curtilage boundary.

Thirdly, the curtilage of a building or dwelling should not necessarily be equated to land in the same ownership: *Lowe v First Secretary of State* [2003] 1 PLR 81. Notwithstanding this established principle, in ecclesiastical law, for unconsecrated land to be in the 'curtilage' of a church within section 7 of the Faculty Jurisdiction Measure 1964 (No. 5), both must be occupied together and belong together in a physical sense, their titles not being such as to conflict with their belonging together (*Re St. George's Church, Oakdale* [1976] Fam 210).

Finally, the curtilage should serve the purpose of the main dwelling or building in some necessary or useful manner (*Sinclair-Lockhart's Trustees* and *Collins v Secretary of State* [1989] EGCS 15).

The Definition of curtilage: Capital Gains Tax

The practical difficulties of determining what is within or outside the curtilage of a building or dwellinghouse have also translated into tax law and in particular under the Taxation of Chargeable Gains Act 1992. According to section 222 (1) *Relief on disposal of private residence*, the exemption applies to a gain accruing to an individual so far as attributable to the disposal of, or of an interest in –

> *(a) a dwelling-house or part of a dwelling-house which is, or has at any time in his period of ownership been, his only or main residence, or*
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> *(b) land which he has for his own occupation and enjoyment with that residence as its garden or grounds up to the permitted area.*

According to subsection (2) "the permitted area" means, subject to (3) and (4) an area (inclusive of the site of the dwelling-house) of 0.5 of a hectare.

Subsection (3) provides:

> *Where the area required for the reasonable enjoyment of the dwelling-house (or of the part in question) as a residence, having regard to the size and character of the dwelling-house, is larger than 0.5 of a hectare, that larger area shall be the permitted area.*

The disposal of a staff house or other similar outbuilding has been held to be a part disposal of the taxpayer's dwelling house as above, however, such building must be within the curtilage of, and appurtenant to, the main house.

In determining whether the outbuilding or separate building is within the curtilage, both the courts and Her Majesty's Revenue and Customs ("HMRC") seem have adopted the Oxford English Dictionary's definition and HMRC have stated as its position:

> *Buildings standing around a courtyard together with the main house will be within the curtilage of the main house. More dispersed groups of buildings will fall within a single curtilage if they constitute an integral whole. A wall or fence separating two buildings will normally indicate they are not within the same curtilage, and a public road or stretch of tidal water will set the limit to the curtilage of the building. There is a distinction between the curtilage of a building and the curtilage of an estate as a whole.*[4]

Can this position expressed by the HMRC be considered as right and accurate or have they deliberately made it more restrictive in order to discourage taxpayers claiming relief for the sale of various outbuildings linked to their properties?
The case law on this point developed over a bit longer that a decade and it had been fairly sympathetic to taxpayers until the final determination by the Court of Appeal in 1992:

Within the curtilage of, or appurtenant to, the main house: the case law

Batey (HM Inspector of Taxes) v Wakefield [1981] 55 TC 550

In this case, the taxpayer constructed a four-bedroom house set in 1.1 acres of land. The taxpayer's employment required him to live in London in a flat firstly as a tenant and then as an owner and the house was as a result left unattended

4 HMRC Capital Gains Manual - Private Residence Relief : More than one building: curtilage. CG64245–CG64251.

whilst he was in London. As a consequence of the house and others in the neighbouring area being burgled, the taxpayer decided to employ a caretaker/ gardener and housekeeper (husband and wife) to look after the house and proceeded to build a bungalow for their accommodation. This bungalow had its own access to a separate road and was separated from the main house by an already established yew hedge and by the width of a tennis court. A number of years later the flat was sold, the main house was occupied permanently and there was no longer a need for a caretaker. The bungalow was sold with 0.15 acres of land and the taxpayer contended that the gain on the disposal was exempt pursuant to section 29 (2) of the Finance Act 1965 because it was part of his residence. The Revenue contended that the bungalow did not form part of the taxpayer's dwellinghouse because they were not only physically separated by a hedge but also separately rated. Furthermore, there was a separate access to it and the bungalow had been disposed of separately. It was argued that the separate disposal of the bungalow was an indication that such land was not required for the reasonable enjoyment of the main house as a residence. The Commissioners found that a dwellinghouse could indeed consist of more than one building on the same site not being contiguous buildings. The bungalow was occupied in conjunction with the main house having been built specifically for staff purposes and to increase the taxpayer's reasonable enjoyment of the house. The Chancery Division agreed with this decision adding that the taxpayer's house and residence consisted of all those buildings which were part and parcel of the whole, each part being appurtenant to and occupied for the purposes of the residence.

The Court of Appeal held:

(i) that a taxpayer's dwellinghouse could include another person's dwellinghouse if the user of the later was for the purpose of serving the former as a residence;

(ii) that it was a question of fact and degree for the Commissioners to determine.

The above reasoning was followed in the case of *Green v Inland Revenue Commissioners* [1982] BTC 378 by the First Division of the Inner House of the Court of Session in Scotland to dismiss a taxpayer's appeal against the decision of the Commissioners that the two wings of a mansion although closely adjacent and occupied for the purposes of the main house, were not to be taken as part of it for Capital Gains Tax Act purposes. The Court decided (reluctantly) that the question to be asked was not what the court would have decided on the facts but whether the General Commissioners were entitled based on those facts to reach that particular decision on the matter. These principles were also followed in the case of *Williams (HM Inspector of Taxes) v Merrylees* [1987] BTC 393, where the test

was expressed as determining whether there was an *entity* which could sensibly be described as dwellinghouse although split into separated building(s) performing different functions.

In *Markey (HM Inspector of Taxes) v Sanders* [1987] BTC 176, Walton J considered *Batey* and held that although the Court of Appeal had used the words 'curtilage' and 'appurtenance' exhaustively they were used as mere descriptions and they were not given a strict legal meaning. He further added that the 'very closely adjacent' test was rather imprecise and that the preferred question should be: *looking at the group of buildings in question as a whole, is it fairly possible to regard them as a single dwelling-house used as the taxpayer's main residence?*[5] He further added that looking at the facts of that case, a bungalow with the same number of rooms of roughly the same size as the ones in the main house, which was 130 metres away and separated by a large paddock and situated on the other side of a ha-ha as well as screened by a belt of trees, should not have not been considered as part of the main dwellinghouse. The learned judge held that the Commissioners had applied the wrong test and therefore allowed the Crown's appeal.

The principle of *entity* was later used and reiterated in the case of *Honour (HM Inspector of Taxes) v Norris* [1992] BTC 153 where it was held that one of four flats in different buildings in a London square, all occupied by the taxpayer and his family, could not be regarded as part of a single entity which could sensibly be described as a dwellinghouse split into different buildings and performing different but related functions.

All of these cases led on to the determination of the leading case on the most pragmatic approach to the definition of curtilage for CGT purposes: *Lewis (HM Inspector of Taxes) v Lady Rook* [1992] BTC 102. In this case, the HMRC appealed against a decision by Mervyn Davies J affirming the decision of the General Commissioners that a gardener's cottage some 175 metres away from the main house situated in 10.5 acres of land could be regarded as part of the entity which constituted the elderly taxpayer's residence for the purposes of the private residence exemption.

The facts of the case were not overly complex and were essentially concerned with a property known as *Newlands* which included a main house[6] and two cottages (one of which was formerly an oasthouse). The first cottage, and the one subject to the dispute, comprised a dining room, a lounge, a kitchen, two bedrooms and a

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5 At p 184.

6 Comprised of a large hall, a landing, a drawing room, a playroom, a further reception room, eight bedrooms, a kitchen, a pantry, a scullery and a silver room.

bathroom. It had been occupied even before the purchase by the taxpayer by the Gardener and his wife who in turn sometimes assisted as housekeeper in the main house. After the Gardener's death, his wife remained in the cottage but never worked again for the taxpayer; she did however pay some weekly rent. The taxpayer then sold the first cottage in order to finance the conversion of the old coach house (which was immediately adjacent to the main house) as residential accommodation for a new gardener and moved the gardener's wife into the second cottage. During the taxpayer's ownership of the first cottage, it had never been screened from the house and in fact it was deliberately fully visible so that the taxpayer could get assistance in times of need.

The Commissioners found that on the evidence presented to them, the first cottage formed part of the entity which comprised *Newlands*. On appeal to that decision, the High Court held that the entity constituting the taxpayer's residence included the first cottage because the taxpayer's way of living embraced use not only of the main house itself with its gardens but also of the gardener's cottage who cared for those gardens. He further added that the distance between the house and the cottage was not determinative but that the set-up described above was.

The Court of Appeal discussed the findings in all of the aforementioned cases and held that simply identifying the taxpayer's 'residence' would be a circular and confusing approach because in cases where the dwellinghouse forms part of a small estate, it would be easy to consider the estate as the residence and to therefore conclude that all the buildings within the estate are part of his residence. It was consequently decided that the right formula to be used was a combination of what the appeal Court had held in *Batey* and what was decided in *Dyer*. Their Lordships expressed approval for the notion of smallness of the area to be comprised in the curtilage (*Dyer*) and the 'very closely' adjacent test (*Batey*) when determining what is within the curtilage of a dwellinghouse or building. Balcombe LJ, delivering the judgment of the Court, confirmed that the right test to be applied should have been: *was the cottage within the curtilage of, and appurtenant to, Newlands, so as to be a part of the entity which, together with Newlands, constituted the dwelling-house occupied by the taxpayer as her residence?*[7]

The Court went onto conclude that by reason of the distance, degree of separation and size of the estate and through using the right test, the Commissioners and the Court below should have found that the cottage was not within the curtilage of, and appurtenant to, *Newlands*, and thus was not part of the entity which together with the main house constituted the taxpayer's dwellinghouse.

7 At p 109.

The Courts have been and continue to be reluctant to intervene in matters of merit, judgment and fact finding when confronted with the question of what exactly constitutes a curtilage and have restricted themselves to reverse only decisions that have been taken as a result of a misdirection as to the correct legal test or that has been taken unreasonably/ irrationally by the Commissioners as fact finders. It could be argued that this is not the most precise and satisfactory approach to such an important question (especially when large amounts of tax liability are concerned) but in my submission it could be said to be most prudent way to consider every case based upon its factual matrix by applying the well established and much debated about test. It is without doubt that the HMRC will continue to take a stern view as to what land should and should not be exempted from CGT but this should certainly not discourage practitioners and clients to challenge refusals of Private Residence Relief.