TC01667

Capital Gains Tax - Relationship between Enterprise Investment Scheme relief and taper relief in relation to properties that had been part used for business purposes and part for non-business purposes and properties used for part of the period of ownership for business purposes and part for non-business purposes - Appeal allowed

FIRST-TIER TRIBUNAL **Reference no: TC/2010/08529**

TAX

MR. MARK STOLKIN

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: HOWARD M. NOWLAN (Tribunal Judge)
SHEILA CHEESMAN

Sitting in public at 45 Bedford Square, London on 24 November 2011

Michael Sherry, counsel, on behalf of the Appellant

John Davies, Inspector of Taxes of HMRC's Appeals and Reviews Unit on behalf of the Respondents

DECISION

Introduction

1. This case was one where there was no dispute about the facts, but one where everything revolved around the legal issue of how to calculate capital gains taper relief when Enterprise Investment Scheme relief ("EIS relief") had been claimed, and was to be off-set, on one basis or another, against the gains on properties part used for business purposes and part for non-business purposes.

2. The contentious issue was whether, when, for taper relief purposes, a disposal of such a mixed use property was deemed to involve separate disposals of a business asset and a non-business asset, the taxpayer could claim to set his EIS relief claim entirely, or at least first, against the gain on the non-business property. In the alternative, if the deemed separate disposals were to be treated as having no effect on the fact that in claiming EIS relief there was at that stage only one single disposal against which to set the relief, then it would follow that the residual gain, after claiming EIS relief, would be allocated between the deemed gain on the business and non-business assets, and taper relief would be given at the different applicable rates on each of the deemed gains.

3. The facts of the case provided, most conveniently, examples of all combinations of situations because the Appellant had disposed of, and made chargeable gains in respect of, various real properties, some of which had been used entirely for business purposes, some of which had been used entirely for non-business purposes, and some where there had been mixed use. Even more conveniently one property, the property referred to as Observatory Gardens, was an example of a property that had been used wholly as a business asset for part of the period of ownership and as a non-business asset for the balance of the period. By contrast another property, known as Lanterns Court, had been used at all times during the period of ownership both for business and non-business purposes.

4. It is easier to explain what was in dispute by referring first to the areas of common ground, of which there were two.

5. Firstly it was accepted that EIS relief had to be claimed first, before calculating taper relief. Assume a gain of £100,000 on a non-business asset, and assume that taper relief would reduce that gain to £60,000. If indexation relief could have been taken first, then an EIS relief claim of £60,000 would eliminate the gain. The decision of the Special Commissioner, Michael Johnson, in *Daniels v. HMRC* [2005] STC (SCD) 684 had decided that EIS relief had to be claimed first. Thus if the EIS relief was again claimed and set off against the gain in the amount of £60,000, the unrelieved gain would be £40,000, and the same rate of taper relief would reduce the gain only to £24,000. The Appellant's counsel suggested that if the Appellant lost the appeal before us and chose to appeal, the Appellant might re-open the issue of whether the *Daniels* decision was correct, but that was not in issue before us.

6. The other area of common ground, again very much in point on the actual facts of this case, was that HMRC accepted that if the taxpayer phrased his claim for EIS relief on the basis that that relief would be set against a gain on non-business properties, and not against other gains on business properties, then that claim was perfectly effective. This was of course beneficial to the taxpayer because if there

were gains of £100,000 on both types of property, and the periods of ownership had been sufficient to reduce the gain on the non-business property to £60,000, and the gain on the business property to £25,000, an EIS claim for relief of £100,000 would initially save the taxpayer the tax on a gain of £60,000 if set against the gain on the non-business asset, and would only save the taxpayer tax on a gain of £25,000 if set against the gain on the business asset. With the potential for clawback of the relief when an EIS claim is made, and the risk of the relevant acquired shares falling in value, many taxpayers might have thought it reasonably sensible to claim EIS relief to defer gains on non-business assets, but not worth claiming the relief in relation to the more modest amount of gain left in charge in relation to business assets.

7. The Appellant duly made a claim for EIS relief in the amount of £3.5 million, and certainly elected to set that relief first against the gains on properties that had been wholly used for non-business purposes.

8. In making his tax return, the Appellant then presented his claim for taper relief on the premise that when in the case of both "mixed use assets", there were deemed to be separate disposals of a business and a non-business asset, he could allocate his EIS relief claim preferentially, not only against properties whose sole use qualified for business treatment (which was not contentious), but also against the gain on the deemed non-business use assets, in the case of both categories of mixed-use assets, i.e. Observatory Gardens and Lanterns Court.

9. It will be noted that where there was, as here, a substantial chargeable gain in respect of both properties (Observatory Gardens and Lanterns Court), and the EIS claim only eliminated some fraction of the gains on those properties, the point in issue here is of great significance, particularly where, as in both examples here, the business use element of the two total gains was by far the larger proportion. The reason for this, of course, is that if the taxpayer can allocate his EIS claims against the relatively modest elements of gain that will be treated for taper relief purposes as the gains on non-business properties (where taper relief would be less beneficial), he can largely eliminate or defer those gains. The far more beneficial rates of taper relief can then be set against the undiminished gains on the business assets. If, by contrast, the EIS gain has to reduce the single gain on the mixed-use properties in just one calculation for each actual property, then there is a residual gain to be dealt with for taper relief purposes on both deemed assets for taper relief purposes. The taxpayer might very well view this as a case of wasting EIS relief, and incurring the future risks inherent in claiming EIS relief, when he would have been entirely content to pay the 10% tax that would have anyway been applicable, after full business asset taper relief, in relation to the deemed business asset.

10. We were asked in this case just to reach a decision on the point of principle, and the figures were not in dispute. The significance of the point can be seen, however, when we record that the difference in tax chargeable, depending on which view is correct, was roughly £0.5 million in this case.

11. We consider that this dispute was very finely balanced. Indeed, purely in interpreting the wording, we incline to the view that the Respondents have the marginally stronger case, and that there is a tenable view that EIS relief has to be set, in one singe calculation against the single gain on an asset, treated as a mixed use asset for taper relief purposes. The point of interpretation is not unambiguous, however, and we allow this appeal because of situations where we consider that the results of the Respondents' contention would lead to significant anomalies.

The law

12. We have already said that it was common ground between the parties that if a taxpayer disposed of two assets, one of which had been at all times a business asset for taper relief purposes, and the other of which had been a non-business asset, an EIS claim could be made in respect of the amount of the gain on the non-business asset if the taxpayer so chose, and then that gain would be eliminated, or reduced (according to the amount of the qualifying expenditure for EIS purposes) if the taxpayer chose to allocate the EIS relief to that asset. The ability to allocate did not relate in any way to categories of assets for taper relief purposes (not least because taper relief had not been enacted when EIS relief was first granted). This ability to off-set EIS relief against the gain on one asset rather than another (which would seem to have been of little or no significance apart from for taper relief purposes) did not even result from any specific wording in the EIS legislation, relating to how claims were made. It resulted simply from the wording that happened to refer to the relief being set against "the original gain", which defined expression clearly referred to a gain on a particular asset.

13. Thus paragraph 1(1) of Schedule 5B to the Taxation of Chargeable Gains Act 1992 ("TCGAct 1992") provided that:

> *"This Schedule applies where –*
>
> *(a) there would (apart from paragraph 2(2)(a) below) be a chargeable gain ("the original gain") accruing to an individual ("the investor") at any time("the accrual time" on or after 29th November 1994;*
> *(b) the gain is one accruing either on the disposal by the investor of any asset or ……*

Paragraph 2 (1) then refers back, in dealing with the making of a claim for EIS relief, to the feature that paragraph 1(1) has made it clear that "the original gain" is a gain on the disposal of a particular asset. It provided that:

> *"2 (1). On the making of a claim by the investor for the purposes of this Schedule, so much of the investor's unused qualifying expenditure on [the relevant shares] as-*
>
> *(a) is specified in the claim, and*
> *(b) does not exceed so much of the original gain as is unmatched,*
>
> *shall be set against a corresponding amount of the original gain".*

14. Turning now to the taper relief provisions, paragraph 3 of Schedule A1 to TCGAct 1992 contained the rules relating to the disposal of business assets and, for present purposes, sub-paragraphs (2) to (5) are of significance in relation to assets that have been used at different times within the period of ownership for business and non-business purposes. In full, paragraph 3 used to provide as follows:

> *"3 (1) Subject to the following provisions of this Schedule, a chargeable gain accruing to any person on the disposal of any asset is a gain on the disposal of a business asset if that asset was a business asset throughout its relevant period of ownership.*
>
> *(2) Where:*

(a) a chargeable gain accrues to any person on the disposal of any asset;
(b) that gain does not accrue on the disposal of an asset that was a business asset throughout its relevant period of ownership, and
(c) that asset has been a business asset throughout one or more periods comprising part of its relevant period of ownership,

a part of that gain shall be taken to be a gain on the disposal of a business asset and, in accordance with sub-paragraph (4) below, the remainder shall be taken to be a gain on the disposal of a non-business asset.

(3) Subject to the following provisions of this Schedule, where sub-paragraph (2) above applies, the part of the chargeable gain accruing on the disposal of the asset that shall be taken to be a gain on the disposal of a business asset is the part of it that bears the same proportion to the whole of the gain as is borne to the whole of its relevant period of ownership by the aggregate of the periods which -

(a) are comprised in its relevant period of ownership, and
(b) are periods throughout which the asset is to be taken (after applying paragraphs 8 and 9 below) to have been a business asset.

(4) So much of any chargeable gain accruing to any person on the disposal of any asset as is not a gain on the disposal of a business asset shall be taken to be a gain on the disposal of a non-business asset.

(5) Where, by virtue of sub-paragraphs (2) to (4) above, a gain on the disposal of a business asset accrues on the same disposal as a gain on the disposal of a non-business asset -

(a) the two gains shall be treated for the purposes of taper relief as separate gains accruing on separate disposals of separate assets; but
(b) the periods after 5th April 1998 for which each of the assets shall be taken to have been held at the time of their disposal shall be the same and shall be determined without reference to the length of the periods mentioned in sub-paragraph (3) (a) and (b) above."

15. Paragraph 9 of the same Schedule dealt with mixed-use assets where simultaneously an asset had been used both for business and non-business purposes in the following manner:

9 (1) This paragraph applies in the case of a disposal by any person of an asset where the asset's relevant period of ownership is or includes a period ("a mixed-use period") throughout which the asset -

(a) was a business asset by reference to its use for purposes mentioned in [any provision of paragraph 5] above; but
(b) was, at the same time, being put to a non-qualifying use.

(2) The period throughout which the asset disposed of is to be taken to have been a business asset shall be determined as if the relevant fraction of every mixed-use period were a period throughout which the asset was not a business asset.

(3) In sub-paragraph (2) above "the relevant fraction", in relation to any mixed-use period, means the fraction which represents the proportion of the use of the asset during that period that was a non-qualifying use.

(4) ……

(5) ……

(6) Where a mixed-use period is a period in which –

(a) the proportion mentioned in sub-paragraph (3) above has been different at different times, or

(b) different attributions have to be made for the purposes of sub-paragraphs (4) and (5) above for different parts of the period,

this paragraph shall require a separate relevant fraction to be determined for, and applied to, each part of the period for which there is a different proportion or attribution."

16. The final paragraph of the taper relief provisions that we need to quote is paragraph 21. This provided as follows:-

"21. Where any apportionment falls to be made for the purposes of this Schedule it shall be made-

(a) on a just and reasonable basis; and
(b) on the assumption that an amount falling to be apportioned by reference to any period arose or accrued at the same rate throughout the period over which it falls to be treated as having arisen or accrued."

17. Prior to summarising the parties' contentions it is just worth making one observation on the relationship between paragraphs 3 and 9 of the taper relief provisions. Paragraph 9 itself contains no provision deeming there to be two separate assets and two separate gains in the situation where an asset has been used at times for both purposes. This is nevertheless the effect because paragraph 9 divided the mixed concurrent use situation into use of one category for a fractional part of the total period, and use of the other category for the balance of the period, and that of course then took this mixed-use example (i.e. concurrent mixed use) back into the provisions of paragraph 3. Accordingly, in this slightly roundabout way, both categories of mixed use lead to the drafting fiction of their being deemed disposals of separate assets, and two deemed gains for taper relief purposes.

The contentions on behalf of the Respondents

18. It is convenient to summarise the Respondents' contentions first, because to some extent the Appellant's contentions involved disputing those advanced by the Respondents.

19. It was contended on behalf of the Respondents that:

- the taper relief provision that deemed the gain on mixed-use assets to be two separate gains on two separate assets was expressed to be "for taper relief purposes", and it was contended from this that it was only for taper relief purposes that the assets and the gains were split. Thus, whilst it was accepted that EIS relief was to be set against gains on particular assets, and the taxpayer could choose against which disposals to allocate EIS relief, when EIS relief was claimed in respect of a mixed-use asset, for EIS relief purposes there was only one asset, and the deeming provision in the taper relief rules did not change this position;
- the focus of the EIS relief rules and the focus of the taper relief rules was different in that EIS relief deems gains not to have accrued in the year and taper relief applies only to gains that accrue, after taking account of any deeming provisions.

The contentions on behalf of the Appellant

20 It was contended on behalf of the Appellant that:

- The Respondents, by allocating the EIS deferral relief between the business use gain and the non-business use gain on a *pro rata* basis, were ignoring the Appellant's claim to set the EIS relief just against the non-business gain and failed to point to any statutory provision providing for a *pro rata* allocation. Nor did the respondents point to any good policy reason for their approach.
- Although paragraph 3(5), which provided for the divided gains to be treated as separate gains on separate disposals, referred to this treatment being "for taper relief purposes", it was only for that purpose that there was any significance in the allocation of the Appellant's EIS relief claim against the non-business gain. Accordingly, in one sense, the Appellant's claim was entirely directed to the calculation of taper relief and if there were to be two disposals for taper relief purposes, it made sense to accept that the Appellant's method of claiming EIS relief was also "for taper relief purposes".
- The Respondents were wrong to seek to treat the effect of EIS relief and the effect of taper relief as being different. Both reduced the chargeable gains in a particular period. It was accepted, subject to the point mentioned in paragraph 5 above, that the EIS claim had to be made first, but subject to that both reliefs simply reduced chargeable gains in the same way.
- Finally the claim made by the Appellant was consistent with the decision of the Tribunal in *Jeffries v. HMRC* [2009] UKFTT 291 (TC).

21. We should mention that we were taken to various authorities in relation to the familiar question of how to determine the extent of the application of statutory deeming rules. We will not refer in detail to that topic, though we will seek to apply the judicial tests, which fundamentally require attention principally to be given to the statutory language, subject also to the issue of whether an over-literal interpretation leads to absurd results.

Our decision

22. We might mention first that we have found this case to be very finely balanced, and that we consider that a presentable case could be made for a decision in favour of either of the parties.

23. We consider that the Appellant makes a bad point when he suggests that there is no statutory basis for the Respondents' suggested *pro rata* allocation between the

business and the non-business gains. The Respondents' contention is simply that the EIS relief has to be claimed first. This seems not to be contentious. If, as is implicit in the Respondents' contention, the EIS claim can be allocated to particular gains on particular assets, but at this stage one gain cannot be split into two for allocation purposes, it then obviously emerges that if the EIS claim is for less than the one total gain, a residue of the single gain remains chargeable. Once that conclusion is reached, and taper relief has to be calculated, it is obvious that taper relief will be divided between the business and the non-business gains in the appropriate manner, and there is nothing non-statutory about the manner in which this will happen. The Appellant's error is in asserting that the Respondents seek to allocate the EIS relief for taper relief purposes on a *pro rata* basis. They do not; they treat the EIS relief as diminishing the one single gain, and the residual gain is then divided in the manner the taper relief provisions of paragraph 3 Schedule A1 provided.

24. The next point that the Respondents make that appears to be reasonably compelling is the point that the two deemed gains (in respect of a business asset and a non-business asset, where a mixed-use asset has been disposed of) are said by sub-paragraph 3(5) of the taper relief Schedule to "be treated for taper relief as separate gains accruing on separate disposals of separate assets". The reference to this treatment being "for taper relief" is obviously of some significance. When, as here, the Appellant seeks to allocate EIS relief to the gain on the deemed non-business asset, there is clearly force in the argument that if the deemed separation of the asset into two deemed assets applies only for taper relief purposes, then the Appellant cannot allocate a claim to one part of a single indivisible gain, when making the earlier EIS claim.

25. There are two qualifications to the significance of this point, however, the first of which the Appellant advanced, and the second of which occurs to us.

26. The Appellant's point was that since it is only in the context of taper relief that any significance attaches to whether the EIS claim can be allocated to the deemed separate assets, the allocation of the EIS claim to the deemed non-business asset is in a sense still made "for taper relief purposes". There may indeed be other significance even to the point accepted by the Respondents, namely that as regards quite different assets, the taxpayer can elect against which gain EIS relief should be set, but it appears to us that in the days of taper relief, the prime significance of that liberty to allocate EIS relief to particular assets was largely in relation to taper relief.

27. The other point that occurs to us in relation to the drafting of paragraph 3 of the taper relief schedule is that it is actually paragraph 3(2) that deems the gain on the mixed-use asset "to be a gain on the disposal of a business asset and, in accordance with sub-paragraph (4) below, the remainder shall be taken to be a gain on the disposal of a non-business asset." Paragraph 3(2) contains no wording to the effect that this deemed treatment is, or is only, "for taper relief purposes". Sub-paragraphs 3(3) and 3(4) then proceed on the basis that it is already clear that there are two deemed disposals. It is only when we get to paragraph 3(5) that there is reference to "the two gains [being] treated **for the purposes of taper relief** as separate gains accruing on separate disposals of separate assets" and then, very significantly, sub-paragraph (5)(b) goes on to provide some language that is plainly of relevance only to the taper relief calculations. The interesting thing, therefore, is that the actual deemed creation of two separate gains has been achieved by paragraph 3(2), where no reference is made to that deemed treatment being confined to taper relief purposes, and consistently paragraph 3(5) commences by adopting just that premise. Thus it

starts by saying "the two gains shall be treated"…… . In other words, paragraph 3(2) to 3(4) make it perfectly clear that the deemed separate asset notion arises prior to applying sub-paragraph 3(5), and those opening words of sub-paragraph 3(5) re-confirm this point.

28. We are not entirely clear what sub-paragraph 3(5)(a) achieves, or what its effect used to be, or whether indeed it was superfluous. It is quite clear that paragraph 3(5)(b) is a matter of calculation that is indeed inherently relevant only to the taper relief calculation. For present purposes, the conclusion that we reach, that we find to be of considerable significance, is that the deemed separate asset notion is occasioned by paragraph 3(2), not by paragraph 3(5), and it is only paragraph 3(5) that is expressed to be for taper relief purposes. That certainly makes entire sense when applying sub-paragraph 3(5)(b), and quite what sub-paragraph 3(5)(a) achieved that had not already been achieved by the earlier sub-paragraphs appears to us to be a bit of a mystery. We certainly say that paragraph 3(5) cannot be read to qualify paragraph 3(2), and to deem the deeming notion of paragraph 3(2) to have been narrower than it initially seemed. That could and should have been achieved by inserting the four simple words, "for taper relief purposes" in paragraph 3(2), had that been intended to be how the deeming notion of paragraph 3(2) should operate.

29. Having now reached the point of concluding that the statutory wording is not entirely clear, we now turn to look at some of the implications of the two contended interpretations.

30. In this context, the first obvious observation is that it would be somewhat odd for it to be the agreed position (as it is) that the taxpayer can allocate his EIS claim against a gain on a non-business asset, leaving a gain on a quite separate business asset to be greatly reduced by the more beneficial business asset calculations, and then for this same treatment to be denied when a single asset has been a mixed-use asset, occasioning deemed separate gains on deemed separate assets at least for some purpose. It seems curious that there might be one rule for the one situation, and a different one for the mixed-use asset.

31. The above point is illustrated by the following simple example. Taxpayer A owns No 1 Any Street, and No 2 Any Street. No 1 was let to tenants and was not a business asset. No 2 was a business asset. Taxpayer B owns the single title including Nos 3 and 4, Any Street, and used part by letting it to tenants and the balance for business purposes. Both taxpayers dispose of their assets, and both make EIS claims, sufficient to eliminate the gain on No 1 (in the case of taxpayer A), and the deemed non-business element of the gain on the disposal of Nos 3 and 4 (in the case of taxpayer B). On HMRC's contention, the taper results of these two substantially identical examples would have been different, and this seems very curious.

32. An even more curious point is that if HMRC was right to suggest that taper relief had to be spread between the two deemed gains in the case of taxpayer B, taxpayer B would appear to have been able to achieve a different result in this example by effecting a part disposal of the single asset, initially transferring the part of the asset that had at all times been the non-business asset first, then subsequently (possibly one day later) disposing of the residue of the asset. This trick would be of no use in the type of situation in the *Jeffries* case where there had at all times been simultaneous use of the asset (the hotel) for business and non-business purposes, but

in the case where half the asset had always been let, and half had always been used for business purposes, separate disposals (a part disposal followed by a disposal of the residue – and either order would do) would seem to avoid the trap into which HMRC suggest that the present Appellant has fallen.

33. The Appellant's counsel referred us to the facts in the *Jeffries* case, and suggested that the Tribunal in that case could have decided the case by adopting the Appellant's counsel's contention that the separate asset notion was wider than just its application in relation to taper relief. We should deal with that point, because it was advanced as a supporting reason to confirm the argument in relation to the wide effect of the deeming wording in paragraph 3(2).

34. In the *Jeffries* case a hotel had at all times been part used as a private residence, and part used for business purposes as a hotel. Part of the gain was obviously exempt under the private residence exemption, and the balance of the gain, entirely therefore in respect of the business use as a hotel, was chargeable. HMRC had contended, however, that because a single asset had been disposed of, taper relief still had to be apportioned, such that part of the chargeable gain would attract taper relief at the business asset rate and part at the non-business rate. This was a manifest nonsense in common sense terms, since the entire gain that remained in charge was entirely referable to the business use of the hotel portion of the gain.

35. The Tribunal in the *Jeffries* case observed, however, that there was some difficulty in treating the entire residual gain as a gain on a business asset for taper relief purposes. For, referring to the wording of first paragraph 9, the asset was treated as having been used for business purposes for part of the period of ownership, and for non-business purposes for the residue of the period. Accordingly, paragraph 3(1) could not apply because the asset had not been used for business purposes **throughout** the period of ownership. Equally, and more significantly, paragraph 3(2) and 3(3) did not operate coherently either, because they merely sub-divided **"chargeable gain".** Had they divided exempt gain and chargeable gain, and allocated the exempt gain to the private residence deemed asset, and the chargeable gain (thus the entire chargeable gain) to the deemed business asset for taper relief purposes, such that that gain was diminished entirely at the business rate, common sense would have prevailed. The two sub-paragraphs regrettably omitted to note that part of the total gain might be exempt, and therefore, the residual chargeable gain appeared to have to be split between the two deemed assets created by paragraphs 9 and 3, such that the business gain was to attract taper relief in part at the business rate and in part at the non-business rate. The Tribunal, faced with the task of doubtless needing to decide whether to say that there was just a manifest drafting error in paragraph 3(3) or to rely on a rather novel application of paragraph 21, to attribute the whole of the gain to the hotel portion of the asset, chose the latter approach. So common sense prevailed, albeit the application of paragraph 21 was odd. Should it be impossible for the courts to rectify a plain drafting error, however, it is clear why the Tribunal adopted the reasoning that it chose.

36. We actually find this case of little assistance to the Appellant. The critical point of interpretation in this present case is whether the deemed separate asset notion is to be confined just to the taper relief calculations, or whether it can enable, still essentially for taper relief purposes, some other relief to be allocated entirely to the non-business asset. This point is of obvious relevance in relation to EIS relief, but it would appear that it could also have been relevant in relation to losses on other assets. Could an allowable loss be allocated, for taper relief purposes (seemingly the only significance of the point) to the non-business asset portion of a total gain, or did

the loss (and the EIS relief) just have to be set against the single gain? Whatever the answer to this question, we consider that the *Jeffries* case had little bearing on this question of the ambit of the deeming notion contained in the taper relief rules. Equally we disagree with the Appellant's counsel when he said that the *Jeffries* case could have been decided by applying his "paragraph 3 argument". For the reasons that we gave in paragraph 35, we agree that the Tribunal in the *Jeffries* case rightly apprehended that technically HMRC's argument in relation to the technical rule appeared to be right, albeit incoherent.

37. We conclude therefore that the Appellant's contention, based on *Jeffries*, is not correct.

38. The last point that we consider is whether, purely in the context of taper relief, there was any obvious significance to the feature that the draftsman chose to go out of his way to deem there to be two distinct assets and two distinct gains in the two mixed-asset situations. The draftsman could equally have said simply that the proportion of the total gain, attributable to the fraction of the period of ownership for which the asset has been used (or deemed by paragraph 9 to be used) for business purposes should be treated as attracting taper relief at the business rate, and the residue of the gain at the non-business rate. We note in particular that the drafting does essentially split the gain by reference to the separate periods or deemed periods of use, and it refrains from actually calculating the gains in the more complex manner, for instance, of considering whether enhancement expenditure might have been referable to one asset or the other. Accordingly we see no obvious significance, purely in the context of taper relief, to why the draftsman went out of his way to create the deemed separate asset notion if that was to apply just for taper relief purposes. This certainly does not prove that the draftsman intended the wider application of the deemed separate asset fiction to apply, but it does at least indicate that there was no obvious factor in relation to taper relief itself that required this fiction to be adopted.

39. We repeat that we find this case to be very finely balanced. We decide the case in favour of the Appellant, principally because:-

- it seems very odd for the legislation to permit EIS relief to be set against gains on chosen assets, and thus most obviously against gains on non-business assets, if then it is contended that a different rule applies where an asset is sub-divided for taper relief purposes;
- we are far from clear that the deemed separate asset notion is said to be relevant for, or only for, taper relief purposes, because the deemed separate asset and separate gain fictions are created by earlier sub-paragraphs of paragraph 3, than sub-paragraph 3(5),and it is only sub-paragraph 3(5) that is said to apply "for taper relief purposes". Furthermore sub-paragraph 3(5), or certainly sub-paragraph 3(5)(b), is certainly of relevance only to taper relief;
- the claim that the Appellant has made to allocate EIS relief to the non-business portion of the mixed-use assets may relate to EIS relief, but it is still only of relevance to the calculation of taper relief; and
- in practical terms, it appears that HMRC's contention would lead to some fairly odd and impractical distinctions, as we sought to illustrate in paragraphs 30 to 32 above.

Right of Appeal

40. This document contains full findings of fact and the reasons for our 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.

HOWARD M. NOWLAN (Tribunal Judge)

Released: 15 December 2011