# TC03704

**Appeal number: TC/2011/08413**

***Capital gains tax – incorporation relief under section 162 TCGA – did this apply to transfer – was there a business – could it be transferred – was it transferred as going concern – yes – relief available – appeal allowed.***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**PAUL ROELICH** **Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** **Respondents**

**TRIBUNAL: JUDGE JUDITH POWELL**
**MR LESLIE HOWARD (IIT) Dip**

**Sitting in public at Bedford Square, London on 26 February 2014**

**Mr Hedgethorne, accountant for the Appellant**

**Mr Shea, officer with HM Revenue and Customs, for the Respondents**

## DECISION

1. This is an appeal against a discovery assessment made on 31 March 2011 in respect of the tax year ending 5 April 2007. The background to the assessment is that on March 26 2008 the Respondents started enquiries into the return of a company, Gloucester Holdings (Brighton) Ltd ("Gloucester") , for the accounting period ending 30 April 2007. They established that on 26 May 2006 the Appellant had made a transfer to Gloucester in exchange for shares. The assessment was raised in respect of capital gains tax that HMRC considers to be due in respect of the disposal made by the Appellant. HMRC contends that the disposal was of a right to future income which was a business asset but that there was no business transferred to Gloucester such as would qualify for incorporation relief. The Appellant contends that incorporation relief was available in respect of the chargeable gain that would otherwise arise. Incorporation relief is a form of roll over relief granted, subject to the satisfaction of conditions, by section 162 Taxation of Chargeable Gains Act 1992 ("the Act"). He says that relief is available on the basis that he satisfied the conditions for relief in that he transferred a business as a going concern to a company together with the whole assets of the business other than cash in exchange for shares in the company and appealed against the assessment on 21 April 2011. There was a statutory review of the decision not to give incorporation relief. The review was concluded on 20 September 2011 and upheld the decision and the Appellant notified his appeal to this Tribunal on 19 October 2011. There is no argument about the amount of capital gains tax due if the Appellant does not succeed and the only issue is whether incorporation relief is available and both parties agree that it is for the Appellant to show, on the ordinary civil standard of the balance of probabilities that he is overcharged as a result of the assessment. If relief is available no tax will be due.

2. Mr Hedgethorne, who is an accountant, represented the Appellant and the Appellant gave oral evidence. Mr Shea, who is an officer with HMRC, represented the Respondents. We found the Appellant to be a straightforward witness who had obvious expertise in relation to his subject.

*Agreed facts*

3. Certain facts were agreed. These are as follows:

4. The Appellant is a director of Gloucester, having been appointed on 11 February 2003. The shares in Gloucester were originally owned by Mr Jeffrey Blundell ("B") and his wife but in 2004 the Appellant became the owner of 49 shares in Gloucester with B owning the other 51 of the 100 issued shares.

5. On 24 May 2006 the Appellant made a transfer valued at £523,363, the nature of which is in dispute, to Gloucester in exchange for a further 49 shares and at the same time B transferred a business into Gloucester in exchange for a further 51 shares and there was a mutual agreement that B's business was valued similarly as adjusted for the relative size of their shareholdings. B's business was a property investment

business and therefore relatively easy to value. HMRC accept that, in the hands of the Appellant, the right to future income which was transferred to Gloucester in May 2006 and which was valued at £523,363 was a business asset. They do not accept that there was a transfer of a business.

6. The capital gain arising to the Appellant is £523,363, there being no available costs allowable as a deduction. The shares issued in 2006 were issued at a premium of £10,680 per share giving them a base cost for capital gains tax purposes of £523,369 which would be reduced to £6 if the claim for incorporation relief is successful.

7. Following the transfers in May 2006 the Appellant owned 98 of the 200 issued shares and B owned the remaining 102 shares. The base cost of B's new 51 shares was £10681 each which was reduced to £nil following a successful claim for relief. We were not concerned with B's claim for relief.

8. Gloucester shows in its balance sheet for the accounting period from 1 May 2006 to 30 April 2007 and subsequently the acquisition of an intangible asset described as "Patents and licenses". This acquisition results from the transfer by the Appellant in May 2006. Amortisation of £74,766 was charged in Gloucester's account for the year to 30 April 2007 and has now been written down to nil.

*Facts found*

9. We found the following facts from the evidence given by the Appellant:

10. The Appellant started his career in the building trade as a building contractor but when back injuries stopped him from doing physical work he ran a scrap yard from which his present activities have evolved. In 1995 his scrap business led to an involvement with the recycling and waste businesses. The recycling activities meant he had to deal with the Environment Agency which regulates recycling; indeed students used his yard for the purposes of study. He has no formal academic qualifications but had gained in depth knowledge of buildings as a building contractor as well as a detailed knowledge of the recycling and waste business. He was familiar with the Landfill Tax which was introduced in 1995.

11. The Appellant operated a trade of managing small scale business projects in the late 1990s through to 2006. He did this initially as a sole trader and then in partnership with his wife under the name of Paul Roelich Project Management. His wife is an interior designer and together they managed and organised small scale residential projects such as extensions and loft developments. That business ran down from 2005 and ceased altogether on 7 April 2006. During the running down of the partnership business the Appellant had time for other activities.

12. From some time in 2003 the Appellant used his gradually increasing available time to develop an alternative activity described shortly by him as a property development consultancy business. This involved him giving advice about possible projects introduced to him by his contacts - mainly people he met on the golf course. He set out to advise property owners how they could ally the development plans for

their land to the use of the land in question for infilling. Infilling would provide the owners with a source of income from infill contractors. He believed this was particularly attractive to landowners who wanted to develop golf courses where the level of the land had to be raised by land infilling prior to landscaping and would be particularly attractive to the contractors if an exemption from landfill tax could be secured. The land infilling would provide a parallel source of income for the landowner and, we shall see, for the Appellant. He also hoped to become involved in the property management once the activities got under way; waste disposal is heavily regulated and there are opportunities for a person with the necessary experience to liaise with the professionals and developers. He described the key to this as "knowing who you need" and having the contact base to recommend the right people to get the job done properly.

13. In the early stages of this activity he looked at a number of projects including ones involving the purchase of land in Blackburn and in Bray; companies had been formed for acquisition of land in these areas but on his advice the plans were abandoned either because terms could not be agreed with the vendors or because the likelihood of obtaining planning consent was too remote for the acquisitions to be commercially viable. He also looked at a scheme in Hastings which came to nothing. There is very little documentary evidence of his involvement with these projects. He earned no income from these projects but his expenses were minimal involving only his time and very limited correspondence and he made no loss claims for tax purposes. His initial plan was that once he felt a project had a reasonable chance of success he would approach various inert infill contractors, a business in which he had a number of contacts, and arrange a price per load for tipping on the sites. This would provide him with a source of income and he knew that in the early stages of any project the developers/landowners would not be likely to pay him thenselves.

14. He had an "on-off" involvement with a project on the Isle of Wight; this was a former landfill site and he was a director of the landowning company briefly in 1999. In 2005/06 the Environment Agency withdrew their licence and he was again asked to become involved which he did as a consultant for a short period – he cannot recall being paid for what he did. In 2008 he again became involved but on this occasion he insisted on consultancy fees being paid to Gloucester through which all his activities were then being conducted. By 2008 the Isle of Wight project had a new team of investors willing to pay for consultancy advice and he was able to take a view of what was needed and came up with recommendations for the site which now includes a nature reserve and high tech properties.

15. We accept what the Appellant told us that he knew he might look at five or six projects before one came to fruition but the potential rewards from a successful project were significant. This happened when he was asked to look at a scheme in Shoreham in 2005 which he knew would be attractive to inert infill contractors if planning consent was obtained since an exemption from landfill tax would be available. The company involved with this project (New Monks Farm Development Ltd ("NMF")) had no money of its own at this stage and encouraged him to generate his own income. He reached an agreement with three contractors, Penfold Verrall

(PV), Matthews and Wealden that if the contractor was successful in obtaining a contract to landfill on the site and if planning consent was obtained the contractor would pay him a fee of £5 per load of infill. The contract with PV was in writing since the Appellant knew the other two contractors well enough to reach a verbal agreement with them and although he knew Penfolds he was not familiar with Verralls which had merged recently with Penfolds.

16. In July 2005 the Appellant became a director of NMF which was responsible for developing the land at Shoreham. He was appointed so that he could liaise with the various authorities and constants on behalf of NMF. He co-ordinated the planning application for NMF and applied for the Environment Agency exemption from landfill tax. In November 2005 planning permission was granted and NMF awarded the land infill contract to PV subject to obtaining the landfill tax exemption from the Environment Agency which was obtained in June 2006. All the correspondence was addressed to the Appellant.

17. The Appellant expected that, in addition to the PV income, he would also receive further income from NMF for management services for management of the site. There was nothing in writing to record this.

18. The Appellant had built up a working relationship with B during the 1990s. B was some years older than the Appellant and the Appellant regarded him as a father figure and mentor who had great experience of the property business which was in many ways similar to that of the Appellant and he provided the Appellant with great support. Between 2003 and 2006 the Appellant looked after B's private property portfolio as a family friend and he was invited to join Gloucester to maximise the portfolio and "bring it up to spec". The company owned a large commercial unit and he made smaller starter units as well as mature full units out of this. During this time he did receive some dividends but he “could not have live on this income”, his other activities were not generating an income, his partnership with his wife was winding down and he remortgaged his house to provide cash to live on while he tried to develop business activities. Maybe with the benefit of hindsight he displayed to us a phlegmatic attitude to what must have been a financially difficult time.

19. In 2005/06 B had a stroke and was unable to look after his business. He has now made a full recovery but whilst he was ill the Appellant looked after B's private property portfolio, Gloucester and the Appellant's own activities. The Appellant found dealing with these activities separately quite challenging. Over an eighteen month period he and B discussed the possibility of them merging their respective interests into Gloucester. This would provide security for B’s future as well as easing the management burdens which fell on the Appellant during B’s period of ill health and which may do again in the future. The merger would also allow business growth and more efficient administration. It was agreed that this would only be done on a business like basis. The Appellant was clear that, if B transferred his private property portfolio into Gloucester, he could only maintain his 49% shareholding in Gloucester if he could make an equivalent contribution. At the time of the initial discussions the Appellant had nothing of quantifiable value to transfer to Gloucester. Once the Appellant's contract with PV was activated he felt he would have one asset of

quantifiable value which he could contribute to Gloucester (the agreement with PV) which would justify his continued 49% shareholding in the company after it acquired the property portfolio from B. .

20. The Appellant was quite frank that he disliked generating paperwork and seldom found it necessary to use formal agreements when doing business. He has a strong, confident personality and has not been disappointed by this way of doing business. He seems not to have suffered from this informal approach although we have little doubt he did not dwell on his failures (and there must have been occasions when people did not do as they had promised). Our impression was that in those circumstances he would move on to the next project but that he had not often been let down. He did insist on a written agreement with PV because he did not know the people in charge of Verralls but that agreement could scarcely have been any briefer. He had no formal agreement with NMF and in common with his other activities over the years he based his relationship with them on trust.

21. He did not have headed notepaper and his cards (which date from 2003) simply state his name "Paul J Roelich" followed by "Property, Land Recycling and Investments" and two telephone numbers – a mobile and office number. His landline was not dedicated to business. He had no specific cards for the partnership with his wife nor for the later property development consultancy activities nor for Gloucester but Gloucester had its own office number and business address since it operated from its own building. He has had three mobile phones. One, which still exists, is the number shown on his card, another was for the property management partnership business which was wound down by 2006 and the third is for a small company (Montague) which dealt with small scale building projects. When he bought his present house it already had an office which he used to run his businesses. He did no formal advertising of any of his business activities. He relied on his contacts built up over many years of diverse activity to generate business. He had no employees and it is only relatively recently that Gloucester employed a book keeper ("Phil").

22. The transfer to Gloucester was done as informally as his other activities. The PV contract was valued on the basis of likely loads and the property portfolio (which lent itself to being valued more precisely) had a similar value. We accept that the Appellant expected his and B's future activities would in future be conducted by Gloucester. He had discussed this with B and did not feel the agreement needed further record. They intended a merger of their activities under Gloucester. From August 2006 Gloucester undertook the management of the NMF site activities. The Appellant stated (and in view of their longstanding relationship and merger discussion it seems to us very likely to be the case) that B was aware of the Appellant's relationships with NMF and others. The Appellant also told us that B was unlikely to have placed any value on this because nothing was certain and the only asset with a certain value was the PV contract – the value of this matched B's property portfolio which had a readily measurable value.

23. Gloucester originally engaged people they needed on a self-employed basis but now have five employees (including the Appellant) as well as part time book keepers and consultants. We accepted what the Appellant told us that several people are

together able to do what the Appellant does and his succession planning includes a hope that his son who is a quantity surveyor will join the business. B is able to take over from the Appellant in an emergency but in view of his age and health this would only be a stop gap solution. The NMF site is approximately 187 acres of which the golf course will cover 126 and the remainder have potential for housing and/or commercial development through a planning promotion exercise with which the Appellant has been involved via a consultancy with Gloucester. NMF has now been formally adopted into the Local Plan with a strategic allocation for residential and commercial use; at the time of this appeal the Local Plan was in its public consultation stage. The Isle of Wight project, which initially was another golf course project, has changed its original concept and between 2008 and 2010 is being continued by Gloucester which has invoiced a six figure sum for planning promotion work.

24. The PV contract is shown as an asset of Gloucester for the first time in its accounts to 30 April 2007. The transfer was effected informally and following the transfer the invoices were issued by Gloucester. At the time of transfer the planning consent had been granted. The description in the accounts of the nature of Gloucester's business was not changed following the transfer; both before and after the transfer (i.e. in the 2006 and in the 2007 accounts) the business was described as property investment and there is no reference to any business being acquired. There are several references to a "purchase of a licence". Note 5 to those accounts record it as an "Intangible Fixed Asset" valued at £523,363 and the income is shown as licence income. We were shown a record of the income flows during the first six years of the contract. The acquisition and amortisation have been recorded on ordinary accounting principles. The consideration of £523,363 is attributed entirely to the flows of income from the PV contract rather than to that contract and other business activities. There is no evidence of a disposal (or acquisition) of goodwill.

25. *Section 162 of the Act ("section 162" or "incorporation relief")*

26. Before we move on to record the submissions made by the parties it is worth recording the relevant provisions of section 162 which offers a relief known as incorporation relief.

27. Section 162 (so far as relevant) provides as follows:

> *"(1) This section shall apply for the purposes of this Act where a person who is not a company transfers to a company a business as a going concern, together with the whole assets of the business, or together with the whole of those assets other than cash, and the business is so transferred wholly or partly in exchange for shares issued by the company to the person transferring the business*
>
> *Any shares so received by the transferor in exchange for the business are referred to below as "the new assets"*

*(2) The amount determined under subsection (4) below shall be deducted from the aggregate of the chargeable gains less allowable losses ("the amount of the gain on the old assets")*

*(3) For the purposes of computing any chargeable gain accruing on the disposal of any new asset –*

*(a) the amount determined under subsection (4) below shall be apportioned between the new assets as a whole, and*

*(b) the sums allowable as a deduction under section 38(1)(a) shall be reduced by the sum apportioned to the new asset under paragraph 9a) above;*

*…….*

*(4) The amount referred to in subsections (2) and (3)(a) above shall not exceed the cost of the new assets but, subject to that, it shall be the fraction A/B of the amount of the gain on the old assets where –*

*A is the cost of the new assets, and*

*B is the value of the whole of the consideration received by the transferor in exchange for the business*

*And for the purposes of this subsection "the cost of the new assets" means any sums which would be allowable as a deduction under section 38(1)(a) if the new assets were disposed of as a whole in circumstances giving rise to a chargeable gain"*

28. We understand there is no argument between the parties about how this section would operate if relief is available in relation to the May 2006 transfer by the Appellant to Gloucester; the dispute is whether the relief is available to the Appellant. If it is available to him the discovery assessment will be discharged and if not it will be confirmed. There is also no dispute that the Appellant is a person who is not a company for the purposes of section 162(1) nor that Gloucester is a company. The Appellant is in a position to benefit from incorporation relief in relation to transfers to Gloucester if the other section 162 conditions are satisfied. The dispute is whether or not this was the case.

*Submissions*

29. The Appellant says that he transferred a business as a going concern to Gloucester in May 2006 and this transfer was satisfied by the issue of shares to him. He says that the business which was transferred was his property development consultancy business. He notes that HMRC state on their web site (HMRC Capital Gains Manual at 65715) that "business" is not defined for the purposes of the Act so the word must be given its normal meaning. Moreover they accept that it should be treated as including a trade but that it also goes wider than that so the terms are not synonymous. The Appellant referred us to the definition of business posited by Lord

Diplock in *American Leaf Blending Co Sdn Bhd v Director-General of Inland Revenue* [1978] STC561 at 565

30. *"The carrying on of a business, no doubt, usually calls for some activity on the part of whoever carries it on, though, depending on the nature of the business the activity may be intermittent with long periods of quiescence in between"*

31. *Also to Lord Diplock's comments in Town Investments Ltd v Department of the Environment [1978] AC 359 at 383*

32. *"The word "business" is an etymological chameleon; it suits its meaning to the context in which it is found. It is not a term of legal art and its dictionary meanings […] embrace almost anything which is an occupation as distinguished from a pleasure – anything which is an occupation or duty which requires attention is a business"* and in the same case that Lord Kilbrandon ([1978] AC 359 at 402 considered that the term "business" denoted *"the carrying on of a serious occupation, not necessarily confined to commercial or profit-making undertakings"*.

33. On the matter of "going concern" the Appellant referred us *to IRC v Gordon* [1991] STC 174 at 186 citing *Reference under Electricity Commission (Balmain Electric Light Co Purchase) Act 1950* (1957) 57 (NSW) 100 at 131 where it was said

*"To describe and undertaking as a "going concern" imports no more than that, at the point of time to which the description applies, its doors are open for business; that it is then active and operating, and perhaps also that it has all the plant etc. which is necessary to keep it in operation as distinct from its being only an inert aggregation of plant"*

34. The Appellant says that the transferred property development consultancy business commenced by him in 2003 was distinct from the project management business which he conducted in partnership with his wife and which formally ceased trading in April 2006 but was winding down from April 2005. He says that following the transfer of his property development consultancy business to Gloucester in May 2006, Gloucester has charged management and consultancy fees to NMF and also consultancy fees to the Isle of Wight project. It has also received income from the PV contract. He says that although, immediately after the transfer, the income earned by Gloucester from the PV contract exceeded management and consultancy fees, this situation reversed in and after 2009. He says that in 2006 the property development consultancy business is a business as described in the *American Leaf* and *Town Investments* cases referred to above and that, despite earning no income in the period, he was actively involved in pursuing opportunities with a view to developing income streams which in due course were generated for Gloucester from two developments. He says there is no doubt the business was a going concern at the time of the transfer as described in the *Gordon* case. The Appellant has a reputation in a niche market particularly in allying infill with land development with the result that Gloucester is now heavily involved with NMF. The consultancy work on the Isle of Wight project has generated substantial consultancy income even though the project did not come to fruition as originally envisaged. This consultancy work is now conducted by

Gloucester; the Appellant remains in charge of this side of the operation but no longer offers his services on a personal level and although his involvement has undoubtedly assisted Gloucester in its exploitation of the market it is not correct to say it cannot be run independently of him. The Appellant says that incorporation relief is available and ask for the appeal to be allowed.

35. The Respondents disagree with the Appellant's description of what was transferred to Gloucester in 2006. They accept that, so far as the Appellant is concerned, the PV contract was a business asset. They say that all the Appellant transferred to Gloucester was this single asset consisting of a stream of income from infill rights. They say that, to claim incorporation or section 162 relief, there must be (a) a transfer of a business (b) as a going concern (c) together with the whole of the assets of the business apart from cash. They say that the test is not merely whether there was a business in the Appellant's hands but whether (a) it was capable of transfer and, if so, (b) whether the evidence shows it was transferred.

36. The Respondents accept that the Appellant undertook business activities in arranging the PV contract and this included exploiting the Appellant's professional knowledge, his experience in the industry and his contacts so that all the relevant permissions and so on were obtained to allow tipping to start. They say that these skills and contacts are personal to the Appellant and it is not possible for them to be separated from him and transferred as an identifiable business to be operated by another entity. Thus they do not accept that a business was transferred to Gloucester. He merely transferred a future income stream arising from a contract negotiated as a fee for his services. The fact that Gloucester may need to audit the contract from time to time does not constitute the continuation of a business activity. They say that Gloucester's subsequent activities do not demonstrate the transfer of a business. Gloucester already had engaged the Appellant's services as a director and as such he was free to exploit his personal skills to bring that contract to Gloucester and so there was nothing for Gloucester to acquire in May 2006 for this future activity which it did not already have. In relation to whether there was a going concern the Respondents say he did not have anything that could be identified as open for business; there were merely some isolated and speculative activities that he became involved in as he found them in the hope they would generate future income. They raised, without a great deal of conviction, a doubt on whose behalf he negotiated the PV contract. They accepted he did not act in his capacity as partner in the business which was wound up in April 2006 but even on the basis he did negotiate the contract as an individual the Respondents submit there is no documentary evidence to demonstrate this was anything other than an isolated transaction which had been concluded prior to the transfer to Gloucester. They say that as far as the Isle of Wight project is concerned there is no evidence of subsisting activity by the Appellant personally (rather than as director of Gloucester) before the May 2006 transfer and that even if the project was started by the Appellant personally it was no more than another isolated project rather than a part of an identifiable business or professional practice. They say he has provided no evidence that he was holding himself out as being "in business" offering services in a particular field of expertise. They note he had not registered his activities with HMRC nor make claims for tax purposes and submit this points to him seeing these activities as speculative and is a further pointer

to the activity not being "a business as a going concern" since activities which are speculative and isolated are such that there is no "going concern". Further, they say, the documentary evidence (particularly the accounts) demonstrates that Gloucester acquired a single asset from the Appellant in return for shares. They say that incorporation relief is not available, that the appeal should be dismissed and the assessment should be confirmed in the amount of £205,825.20.

*Our decision and our reasons for it*

37. We have to decide whether the Appellant has shown us on the balance of probabilities that he had been overcharged by the discovery assessment. This involved us considering whether the facts establish that the conditions for incorporation relief were satisfied.

38. The Respondents agreed that the benefit of the PV contract was a business asset in the hands of the Appellant, that the Appellant was a person and not a company and that Gloucester was a company.

39. The main questions for us to answer in relation to the Appellant are;

- Was there a business
- Was that business capable of being transferred
- If there was a business capable of being transferred does the evidence show it was transferred as a going concern to Gloucester with the whole of its assets
- If it was a business capable of being transferred as a going concern and was transferred to Gloucester was the business so transferred wholly or partly in exchange for shares issued by Gloucester to the Appellant

40. Was there a business? We found this relatively easy to answer. The Respondents accept that the Appellant undertook business activities and it seems to us that the Appellant was pursuing a plan to exploit his skills in waste management to attract landowners by allying land infill with development projects to maximise the income for landowners in the initial stages. We accept what he told us that he had create income for himself at the initial stages of the NMF project and he did this by negotiating the PV contract; this gave him an early and no doubt welcome income at a time when he had mortgaged his home to meet his living expenses because he had insufficient other income. We do not regard this as an isolated activity merely because only one or two was successful – the business required him to look at a number of projects and it was in the nature of the activity that only a small percentage would be successful.

41. We do not accept that this PV contract income was the only part of the business that the Appellant hoped to create. We also do not accept that once it was activated by planning permission and exemption from landfill tax it only required auditing. We heard that the ongoing management of the activities was important in maximising the infilling and thus the income. Looking at the scope of the Appellant's business we

find that he regarded the land infill idea not only as a source of initial income for his business and as an attractive idea for the developer but also as a method for becoming more widely involved with the project. He felt it was entirely reasonable for him to expect he would be asked to manage the project given the highly regulated nature of waste disposal and his particular knowledge and early involvement. The further project management work was a natural extension from that.

42. We conclude that a business might develop as opportunities present themselves but although it had not reached the consultancy stage in 2006 there was a business in place by 2006. We also conclude that the Appellant would have established a framework whereby he could reasonably hope for further work . The Appellant was clearly a person who would exploit as many opportunities as possible once a project was commenced and we accept that he may not have known at the outset just what these would be although he saw his natural starting point as finding an income stream for a landowner which would be attractive during the early stages of the development. We accept that the nature of this type of activity meant that he might have to pursue a number of opportunities before finding one that would be successful. None of these findings seem to us incompatible with the existence of a business.

43. One thing of which we had no doubt is that we were absolutely certain of is that this Appellant always had his doors open for business. We also believed that his expertise was known amongst his contacts; he did not advertise but we accept that advertising was not the way to grow this type of business. We conclude the business was a going concern from the outset. We do not draw any negative conclusions from the fact that only one project really took off in the period – we think that was to be expected given the nature of what he was trying to do and having the doors open for business does not imply that everyone who walks through those doors will provide the business with an income . In any case we find from the facts that the Appellant was originally involved in the Isle of Wight project as a part of his business of land development consultancy management – his 1995 directorship was quite clearly the start of his connection with the project, he returned to it briefly in 2005 and it is unsurprising that when new investors were found he would be approached again.

44. Was this business capable of being transferred? The Respondents say no and that it was dependent on the personal skills of the Appellant. We do not accept this. We can see that many businesses might be started by one individual whose skill and contacts are particularly important at the beginning but unless the nature of the business is such that no other person can learn those skills this does not prevent the business being transferrable. It might have been different if the Appellant had been a portrait painter or a singer but he was not. Most activities can be learned by others even if it takes time. For example, an accountant may start in business on his own and use his experience and contacts to create a successful business but there is no reason why he cannot transfer that business to another practice particularly if he works in the new business for a period after the merger so as to facilitate the success of the merged activity. The Appellant had a specialised knowledge of the waste business and its associated regulation and also knew who best might get the work done but nothing of this impressed us as being knowledge which was incapable of

being passed on to others. We accepted that B was able to do what the Appellant did, that there were others who, between them could also do what he did and that it was likely his son would prove to be a successor in due course.

45. If there was a business does the evidence show it was transferred to Gloucester as a going concern? Initially we found this to be more difficult to answer. There is very little documentary evidence of the transfer and such as exists suggest there was only a transfer of the PV contract. For example, the accounts point to a conclusion that the transfer was of the PV contract and nothing else. On the other hand there is evidence of Gloucester performing services for NMF after the transfer as well as giving consultancy advice to the Isle of Wight owners and so the question arises on what basis they did this.

46. The Respondents gave weight to the documentary evidence, such as accounts, and correspondence. They say that this evidence frequently states 'Purchase of Licence' rather than 'purchase of business, and that the subsequent income is described as 'Consultancy Fees.' We did not regard such wording as determinative of the transfer in question. We regard this as part, and a small part at that, of the evidence surrounding what was transferred.

47. In order to assist us to answer the question of what was transferred we considered the Appellant's position in 2006. He explained to us that he could not have lived on the income he received from Gloucester prior to the 2006 transfer. We have concluded that he had a business of land development consultancy at the time of the 2006 transfer. We also conclude he was in a position at that time to benefit from all the further opportunities that arose from the NMF project, from the Isle of Wight project and any other similar projects that he could find. After 2006 these opportunities were exploited by Gloucester.

48. We considered the fact that the Appellant was a director of Gloucester prior to the transfer because the Respondents have suggested that Gloucester was already in a position to offer the further services it performed for NMF and the Isle of Wight investors without any further transfer from the Appellant. We think it is most unlikely that, unless there was an agreement in 2006 for the future activities of his business to be performed under the Gloucester umbrella, he would have allowed the consultancy services to go to Gloucester rather than exploiting them himself. We have heard and believe that he was in discussion with B for the merger of their interests. We conclude that the PV contract was central to this going forward because it was the only asset owned by the Appellant which had a measurable value that equated with what B was going to transfer to Gloucester. That does not mean that it was the only transfer made by the Appellant. The clear understanding was for Gloucester to be the single entity for the future activities of the Appellant and B. This required the Appellant to transfer the rest of his business to Gloucester. We conclude that the performance by Gloucester of the ongoing work to NMF and to the Isle of Wight project is real evidence that the merger involved an agreement for the entire business of the Appellant to be transferred with all its assets consisting of the PV contract and any other opportunities that would otherwise have arisen to the

Appellants Land Development consultancy business. Having concluded that the business was transferred with all its assets we have no hesitation in saying it was a going concern and was transferred as such. The subsequent activities which followed on quickly after the May 2006 transfer are evidence of this.

49. Finally, we considered the question of the share issue. There was certainly an issue of shares to the Appellant and the issue was certainly for the PV contract but was that the only reason for the issue? In their letter of 10 June 2008 the accountants dealing with HMRC's enquiries into the Gloucester corporation tax return stated that *"the asset was acquired from Mr Paul Roelich in exchange for the issue of further shares in Gloucester Holdings. The asset was acquired on 24 May 2006"*. The asset to which the accountants referred is the PV contract. The Appellant says that the value of goodwill in his business was disregarded by the parties on the basis it was not measurable. But was the issue of shares intended to relate exclusively to the transfer of the PV contract? We accept that the way the Appellant did business was such that if he and B agreed to conduct all future activities under the Gloucester umbrella after the transfers by B and by the Appellant then he would regard it as binding on him and unnecessary to record anything further. And so, after some hesitation we accept that the issue of shares was primarily for the PV contract but was also in return for the transfer of the entire business which he believed at the time had no measurable value.

50. For the reasons set out above we find that the Appellant has shown to the required standard that he was overcharged by the assessment because incorporation relief is available to him. We allow his appeal.

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

**JUDITH POWELL**
**TRIBUNAL JUDGE**

**RELEASE DATE: 11 June 2014**