[2015] UKFTT 0179 (TC)

TC04372

Appeal number: TC/2014/02707

CAPITAL GAINS TAX – Taper relief – Property let to unlisted trading company – Whether a "business asset" – Whether trading company a 51% subsidiary of listed company – Yes – Schedule A1 Taxation of Chargeable Gains Act 1992 – Whether enquiry commenced within time limit – No — Section 9A Taxes Management Act 1970 – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANDREW RICHARDSON **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
ELIZABETH BRIDGE

Sitting in public at the Royal Courts of Justice, London on 9 April 2015

Roy George, of Sackvilles Solicitors, for the Appellant

Linda McGuigan, of HM Revenue and Customs, for the Respondents

DECISION

1. On 10 March 2004 Mr Andrew Richardson together with a business associate purchased a property in Hornchurch, Essex (the "Property") for £180,000 which they then held as tenants in common in equal shares. It comprised of a shop on the ground floor and offices on the first and second floors. On 18 November 2004 the shop was let to Ladbrokes Limited for a term of 15 years and on 4 August 2006 the offices were let to Nestor Primecare Services Limited on a five year lease.

2. Following a transfer on 14 August 2006 the Property was held by Mr Richardson, his business associate and their respective wives as tenants in common in equal shares as a joint business venture between the four of them. However, having been advised by their accountants that they would be entitled to business asset taper relief, under s 2A Taxation of Chargeable Gains Act 1992 ("TCGA"), on its disposal, the Property was sold for £650,000 on 9 July 2007 with the respective tenants still in occupation.

3. On 5 August 2008 Mr Richardson's accountants electronically submitted his 2007-08 self-assessment tax return to HMRC. Included in the return were the details of his share of the net sale proceeds from the Property together with a computation of his liability to capital gains tax ("CGT").

4. By a letter dated 29 July 2009 HMRC notified Mr Richardson of an enquiry, under s 9A of the Taxes Management Act 1970 ("TMA"), into his 2007-08 self-assessment tax return. The letter requested a detailed CGT computation:

> … included (sic) documentary evidence of the cost of acquisition, enhancement and disposal [of the Property] and your reasons for claiming Business Asset Taper Relief.

In their reply, dated 9 September 2009, Mr Richardson's accountants explained that business asset taper relief was due because the Property was let to unlisted trading companies. However, having ascertained that Ladbrokes Limited and Nestor Primecare Service Limited were, for the purposes of the business asset taper relief provisions in schedule A1 TCGA, 51% subsidiaries of their respective parent companies, both of which were "listed", HMRC did not accept that Mr Richardson was entitled to taper relief.

5. In the circumstances, following an exchange of correspondence between the parties, on 17 May 2013 HMRC issued a closure notice under s 28A TMA. This amended Mr Richardson's 2007-08 self-assessment tax return by disallowing the business taper relief claimed and increased the tax Mr Richardson was required to pay by £19,684.20.

6. Similar closure notices were also issued on 17 May 2013 by HMRC to Mrs Richardson, Mr Richardson's business associate and his wife.

7. On 7 June 2013 Sackvilles solicitors, acting on behalf of Mr Richardson and the other three owners of the Property, wrote to HMRC referring to "the four closure notices dated 17 May 2013". The letter, which disputed HMRC's interpretation of the taper relief legislation, appealed against the closure notices and requested postponement of the tax. A statutory review was subsequently offered by HMRC and this was accepted on behalf of Mr Richardson and the other Property owners who were notified of its outcome by letters from HMRC dated 24 April 2014.

8. Although the review upheld the amendment to Mr Richardson's self-assessment tax return the amendments made in respect of the tax returns of other owners of the Property were withdrawn by HMRC. The reason for this is apparent from the letter, dated 24 April 2014 sent to Mrs Richardson by the review officer which explains:

> In carrying out my review I have to consider whether there is a sound statutory basis for HMRC's decision. In your case, I have found that this is not so.
>
> Your 2007/08 return was submitted online on 5 August 2008. The time limit for enquiring into the return was set by section 9A(2)(a) Taxes Management Act 1970 at 5 August 2009, ie 12 months after the return was delivered. To be effective, HMRC's notice of enquiry must have reached you on or before the deadline, the notice was dated 31 July 2009.
>
> In the absence of evidence to the contrary, the notice is deemed to have been effected at the time which it would have been delivered in the ordinary course of post. There is no evidence of the notice having been sent 1st Class and the courts assume – again in the absence of evidence to the contrary – that 2nd Class post takes four working days to be delivered. So a notice posted on 31 July 2009, which fell on a Friday, would ordinarily be considered to have been effected on 6 August, which is after the expiry of the enquiry deadline.
>
> There is, therefore, real doubt over whether HMRC's enquiry notice was issued in sufficient time for you to have received it by 5 August 2009. If it wasn't, there would have been no legal basis for the enquiry and consequential amendment to your self-assessment. In view of this doubt I have concluded that HMRC should not seek to litigate your appeal.

9. On receiving a copy of this letter, and letters advising of similar outcomes for Mr Richardson's business associate and his wife, Sackvilles wrote to HMRC's review officer, on 6 May 2014, stating that Mr Richardson had received his notice of enquiry after his wife had received hers and, in the circumstances, as the deemed date of his notice would also have been outside the 12 month period. However, in his reply of 12 May 2014 the officer explained that he was not able to reconsider the conclusions reached in his review.

10. Therefore, on 16 May 2014 Mr Richardson appealed to the Tribunal on the following grounds:

> (1) As the result of the application of s 170(7) TCGA Ladbrokes Limited and Nestor Primecare Services Limited are not 51% subsidiaries of their parent companies and he is accordingly entitled to business asset taper relief on his share of the disposal of the Property ; and

(2) HMRC failed to open an enquiry into his 2007-08 self-assessment tax return within the statutory time limit.

11. Before us Mr Richardson was represented by Mr Roy George of Sackvilles solicitors and HMRC by its presenting officer Ms Linda McGuigan.

Taper Relief

12. During 2007-08, the year in which the Property was sold, a taxpayer was eligible for taper relief on the disposal of asset in accordance with s 2A TCGA. There was a distinction in the application of taper relief between the disposal of business and non-business assets with a much lower percentage of any gain being liable to CGT on a disposal of business assets.

13. Schedule A1 TCGA had effect for the purposes of s 2A TCGA (see of s 2A(7) TCGA and all subsequent references to paragraphs are, unless otherwise stated, to the paragraphs of schedule A1 TCGA.

14. Paragraph 1 provided:

> (1) Section 2A shall be construed subject to and in accordance with this Schedule.
>
> (2) The different provisions of this Schedule have effect for construing the other provisions of this Schedule, as well as for construing section 2A.

15. Paragraph 5(1) applied:

> … in the case of the disposal of an asset, for determining (subject to the following provisions of this Schedule) whether the asset was a business asset at a time before its disposal when it was neither shares in a company nor an interest in shares in a company.

16. Under paragraph 5(2):

> Where the disposal is made by an individual, the asset was a business asset at that time if at the that time it was being used, wholly or partly, for purposes falling within one or more of the following paragraphs–
>
> (a) …
>
> (b) the purpose of any trade carried on by a company which at that time was a qualifying company by reference to that individual
>
> (c) the purpose of any trade carried on by a company which at that time was a member of a trading group the holding company of which was at that time a qualifying company by reference to that individual.

17. According to paragraph 6 a company "shall be taken to have been a qualifying company by reference to an individual at any time when–"

> (a) the company was a trading company or the holding company of a trading group, and
>
> (b) one or more of the following conditions was met–
>
> (i) the company was unlisted
>
> (ii) …

(iii) …

18. Paragraph 22(1) defines an "unlisted company" as:

> a company–
>
> (a) none of whose shares are listed in a recognised stock exchange, and
>
> (b) which is not a 51 per cent subsidiary of a company whose shares, or any class of whose shares, is so listed.

The definition of a "51 per cent subsidiary" is also contained in paragraph 22(1) which provides that a:

> 51 per cent subsidiary … has the meaning given to it by section 838 of the Taxes Acts.

19. The "Taxes Acts", according to s 288(1) TCGA, means "the Income and Corporation Taxes Act 1988 ("ICTA").

20. Under s 838 ICTA a body corporate shall be deemed to be a "51 per cent subsidiary" of another body corporate:

> … if and so long as more than 50 per cent of its ordinary share capital is owned directly or indirectly by that other body corporate.

The section continues setting out how if one body corporate owned a second body corporate through another company or companies or when the first owner in any series owns a fraction of the last ordinary share capital of the last owned body corporate in the series the first owner is deemed to own the sum of the fractions.

21. In the present case, although Mr George on behalf of Mr Richardson did question whether the operation of the deeming provisions of s 838 ICTA applied, there was no serious challenge to HMRC's position, as advanced by Ms McGuigan, that Ladbrokes Limited and Nestor Primecare Services Limited are 51% subsidiaries of their parent companies within the s 838 ICTA definition and that these parent companies are not "unlisted companies". Indeed the main thrust of Mr George's argument was that the definition of a "51 per cent subsidiary" contained in s 170(7) TCGA should be applied rather than that in s 838 ICTA.

22. Section 170(7) TCGA provides:

> For the purposes of this section **and** sections 171 to 181 a company ("the subsidiary") is an effective 51 per cent subsidiary of another company ("the parent") at any time if and only if –
>
> (a) the parent is beneficially entitled to more than 50 per cent of any profits available for distribution to equity holders of the subsidiary; and
>
> (b) the parent would be beneficially entitled to more than 50 per cent of any assets of the subsidiary available for distribution to its equity holders on a winding up.

23. Mr George relies on the word "and" (which we have emphasised above) in s 170(7) TCGA and submits that as a result the definition of a 51% subsidiary contained in that sub-section is not exclusive to s 170 and ss 171 to 181 TCGA. Moreover he submits that the definition in s 170(7) TCGA when looked at in the round provides clearer guidance in relation to defining a 51% subsidiary.

24. However, even if this is the case s 170(1) TCGA provides:

> This section has effect for the interpretation of sections 171 to 181 except in so far as the context otherwise requires.

Therefore, contrary to Mr George's submission, the definition of a 51% subsidiary in s 170(7) TCGA is only applicable for the purposes of that section, ie s 170 TCGA, and ss 171 to 181 TCGA and therefore cannot apply for the purposes of schedule A1 TCGA. Also, it is clear from paragraph 1(2) that it is the different provisions of schedule A1 which have effect for construing the other provisions of schedule A1 and nothing else.

25. One such provision, paragraph 22(1), provides that a "51% subsidiary" has the meaning given to it by section 838 ICTA. Accordingly the s 838 ICTA definition of a 51% subsidiary is the definition that must apply in the present case.

26. We accept that although Ladbrokes Limited and Nestor Primecare Services Limited are trading companies both are 51% subsidiaries of their parent companies as defined by s 838 ICTA. As these parent companies are listed, and therefore not "unlisted companies", it follows that the Property was not used by a "qualifying company" within paragraph 6 and cannot have been a "business asset" for the purposes of schedule A1.

27. Accordingly Mr Richardson cannot have been eligible for business property taper relief on his share of the disposal of the Property and, as such, his appeal on this ground cannot succeed.

Time limit

28. We now turn to Mr Richardson's second ground of appeal, namely that HMRC failed to open an enquiry into his 2007-08 self-assessment tax return within the statutory time limit.

29. Insofar as it applies s 9A TMA provides:

> (1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry")–
>
> (a) to the person whose return it is ("the taxpayer"),
>
> (b) within the time allowed.
>
> (2) The time allowed is–
>
> (a) of the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered.

30. In the present case Mr Richardson's 2007-08 self-assessment tax return was delivered electronically to HMRC on 5 August 2008 and the notice of enquiry was contained in a letter from HMRC to Mr Richardson dated 29 July 2009.

31. We heard from Mr Richardson and found him to be a credible and straightforward witness. He explained that he had received his notice of enquiry, the letter dated 29 July 2009 from HMRC, two days after his wife had received a similar

enquiry letter. He said that although he could not remember the date, he did recall returning home and his wife showing him her notice of enquiry letter which was dated 31 July 2009. He had then contacted his business associate who told him that he and his wife had also received enquiry letters from HMRC. However, Mr Richardson said that his enquiry letter did not arrive the next day but the day after that.

32. When asked by Ms McGuigan in cross-examination if he were sure of this he replied that he was "100% sure."

33. No evidence was adduced by HMRC in relation to when the letter had been posted to Mr Richardson or whether it had been sent by first or second class post, instead Ms McGuigan relied on the presumption contained in s 7 of the Interpretation Act 1978. This provides:

> Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

34. The time at which a letter would be delivered in the ordinary course of post was the subject matter of a Queen's Bench Division Practice Direction ([1985] 1 All ER 889) which, insofar as applicable to the present case, states:

> (1) Under s 7 of the Interpretation Act 1978 service by post is deemed to have been effected, unless the contrary has been proved, at the time when the letter would be delivered in the ordinary course of post.
>
> (2) To avoid uncertainty as to the date of service it will be taken (subject to proof to the contrary) that delivery in the ordinary course of post was effected (a) in the case of first class mail, on the second working day after posting, (b) in the case of second class mail, on the fourth working day after posting. 'Working days' are Monday to Friday, excluding any bank holiday.
>
> (3) Affidavits of service shall state whether the document was dispatched by first or second class mail. If this information is omitted it will be assumed that second class mail was used.

35. Having explained that any letter written after 10:00 by HMRC on one day is dated the next working day and that it is probable that Mr Richardson's enquiry letter had been sent by second class post, Ms McGuigan submits that, applying the deeming provision of s 7 of the Interpretation Act and the Practice Direction, the letter to Mr Richardson which was dated 29 July 2009, a Wednesday, would have reached him by the fourth working day after it had been posted. Assuming the letter was posted on Thursday 30 July 2009, Ms McGuigan contends it would have been received by Mr Richardson on Tuesday 4 August 2009, within 12 months of 5 August 2008, the date on which Mr Richardson's 2007-08 self-assessment tax return had been filed. Accordingly, she contends that the enquiry notice is valid and therefore Mr Richardson's appeal should be dismissed.

36. However, the deeming provision in s 7 of the Interpretation Act only applies "unless the contrary is proved". In this regard we were referred by Mr George to the

following observation of Morgan J who, after considering how s 7 of the Interpretation Act should itself be interpreted, said at [33] of *Calladine-Smith v Saveorder Ltd* [2011] EWHC 2501 (Ch):

> "…, my interpretation of Section 7 when it uses the phrase 'unless the contrary is proved' is that this requires a court to make findings of fact on the balance of probabilities on all of the evidence before it."

37. In the present case the only evidence before us in relation to the receipt of the enquiry notice was that of Mr Richardson who, as we have already noted, was a credible witness. We fully accept his evidence and find as a fact that he received his enquiry notice two days after his wife and the other joint owners of the Property had received theirs.

38. Given that HMRC withdrew amendments disallowing the business asset taper relief in relation to the disposal of the Property claimed in Mrs Richardson's self-assessment tax return (and the returns of the other joint owners of the Property) on the basis of a "real doubt" that the enquiry notice was issued in sufficient time for it to have been received within the statutory time limit, it must follow that a notice of enquiry received two days later cannot, on a balance of probabilities, have been received by Mr Richardson before the end of the period of twelve months after the day on which the return was delivered as required by s 9A TMA.

39. It was accepted by both parties that if the notice of enquiry had not been given in time Mr Richardson's appeal must succeed because, as HMRC recognised in the letter of 24 April 2014 to Mrs Richardson, there would have been no legal basis for the enquiry and consequential amendment to his self-assessment.

Conclusion

40. Although we reject the arguments advanced on behalf of Mr Richardson in regard to his eligibility for business asset taper relief, because he did not receive the notice of enquiry within the statutory time limit his appeal is allowed.

Right to Apply for Permission to Appeal

41. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 25 April 2015