[2015] UKFTT 0223 (TC)

TC04416

Appeal number: TC/2014/2392

CAPITAL GAINS TAX – consideration – share sale – whether debt forgiveness constituted non-cash consideration forming part of disposal proceeds – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr STEVEN COOLING **Appellant**

- and -

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

TRIBUNAL: Judge Peter Kempster
Mr Leslie Howard

Sitting in public at Nottingham Justice Centre on 29 April 2015

Mr John Bramley (J.M. Bramley Accountants) for the Appellant

Mr Simon Bracegirdle (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant ("Mr Cooling") appeals against a decision by the Respondents ("HMRC") (upheld by a formal internal review dated 24 March 2014) that the consideration for a disposal of chargeable assets reported on his 2009-10 self-assessment return should be increased by £297,638.

Facts

2. Having considered the documents bundle and the explanations provided by Mr Cooling and Mr Bramley, we make the following findings of fact.

3. In October 2009 Mr Cooling owned 99.9% of the issued share capital of Shirebrook Care Limited ("Target"). He received an offer to buy his shares from the owners of Care Aspirations Developments Limited ("Buyer").

4. After negotiations terms were agreed and a share purchase agreement ("the Share Agreement") was executed on 18 December 2009, with completion on the same day (clause 4.1 of the Share Agreement).

5. The previous day (17 December 2009) Mr Cooling and Target executed an asset purchase agreement ("the Asset Agreement") whereby Mr Cooling purchased certain assets (mainly properties, plant, office equipment and vehicles) from Target for £297,638.95. The Asset Agreement:

(1) Recites that, "This Agreement is being entered into by each of the parties in preparation for the sale of the entire issued share capital of [Target] by [Mr Cooling] and another."

(2) Provides (Clause 4.4): "The Purchase Price will be left outstanding at Completion as a debt payable on demand by [Mr Cooling] to [Target]."

(3) Prohibits any assignment or transfer of benefits or obligations (clause 9.1).

(4) Requires any variation to be in writing and signed by the parties (clause 11.1).

6. The Share Agreement (clause 1.1) refers to the asset purchase as the "Permitted Disposal" and the £297,638.95 debt as follows: "*Assumed Liability* means the liability of Steven Cooling to the Target in the amount of £297,638.95 to be assumed by the Buyer pursuant to clause 5.2". Clause 5.2 states: "The Buyer undertakes that it shall not and undertakes to procure that the Target shall not seek to recover the Assumed Liability from any of the Sellers or their Associates." The assumption of the Assumed Liability is actually provided for by paragraph 5 of schedule 2: "Upon completion … the Buyer must … assume from Steven Cooling the Assumed Liability." That assumption was effected by a tripartite deed ("the Assumption Deed") dated 18 December 2009 between Mr Cooling, Buyer and Target, which provided:

> "Further to the obligation in the [Share Agreement] upon [Buyer] to assume certain liabilities (referred to in the Agreement as the *Assumed Liabilities*), [Buyer] hereby assumes on the terms of the Agreement [Mr Cooling's] liability to pay to [Target] the total sum of £297,638.96.
>
> [Target] hereby acknowledges and consents to the assumption of liability referred to above and the discharge of such liabilities by way of set off against the intra-group loan between [Target] and [Buyer]."

7. The Share Agreement (clause 3.1) states: "The consideration for the purchase of the shares … will be the amount of the Initial Consideration subject to any adjustment to be calculated and satisfied in accordance with the provisions of schedule 7." The "Initial Consideration" is defined (clause 1.1) as being £21 million (a) less liabilities to Barclays Bank, and (b) plus or minus the other net assets or liabilities of Target. The accounting treatments to be followed in ascertaining the other net assets are stipulated in schedule 7, which provides (paragraph 3.3.20): "the Assumed Liability shall be valued at nil". There was, inevitably, some further negotiation as to the computation of the adjustment of the other net liabilities but the final agreed completion statement showed:

	£
	21,000,000
Barclays liabilities	(10,384,654)
Other net liabilities	(608,167)
Professional fees	(28,582)
	9,978,597

8. It was consideration of £9,978,597 that Mr Cooling reported on his self-assessment tax return.

Law

9. All statutory references are to the Taxation of Chargeable Gains Act 1992.

10. Section 1(1) provides:

> "Tax shall be charged in accordance with this Act in respect of capital gains, that is to say chargeable gains computed in accordance with this Act and accruing to a person on the disposal of assets."

11. The Act is then (famously) silent as to how such computation should be performed, except that s 38 makes certain stipulations as to permitted deductions. However, the issue has been clarified by the courts over the years. In *Spectros International plc v Madden* [1997] STC 114 Lightman J stated (at 135):

> "In calculating the chargeable gain arising on the taxpayer's disposal of the shares, the starting point is to find the consideration for the disposal: that is implicit in [the predecessor legislation to s 38]. Where the consideration is not in money or not wholly in money, it is necessary, in order to calculate the gain, to value the consideration in monetary terms in pounds sterling.
>
> What is the relevant consideration may depend upon the terms and form of the transaction adopted by the parties. The parties to a

> proposed transaction frequently can achieve the same practical and economic result by different methods. Take for example the position of the owners of the entire issued capital of a company with gross assets of £2m and net assets (after discharging a debt of £1m owed to the owner or someone else) of £1m. The shares are worth £1m, but would be increased to £2m if the owner at his own cost and for the benefit of the company released or discharged the debt. In this situation, the owner may agree to sell his shares for £1m or, on condition that he first releases or discharges the debt, for £2m. The law respects the freedom of the parties to a transaction to frame and formulate their agreement as they wish and to suit their own legitimate interests (taxation and otherwise) and, so long as the form adopted is genuine, and not a sham, honest, and not a fraud on someone else, and does not contravene some established principle of public policy, the court will give effect to the method adopted. But as a corollary to this freedom, where the parties have chosen one method, it is not open to them to invite the court to treat as adopted some other method because it is more advantageous to them, because it leads to the same practical and economic result and because it is the more obvious and sensible method to have adopted. If the question is raised what method has been adopted and the transaction is in writing, the answer must be found in the true construction of the document or documents read in the light of all the relevant circumstances. If the terms of the documents are clear, that is the end of the question. If however there is any doubt or ambiguity upon the language used read in its proper context, it may be possible to resolve that doubt or ambiguity by reference to the inherent probabilities of businessmen entering into the transaction in one form rather than another."

Appellant's case

12. Mr Bramley for Mr Cooling submitted as follows.

13. HMRC claim that Mr Cooling, in addition to receiving cash of £9,978,597 for the sale of the shares also received "consideration" representing a waiver of his loan due to Target amounting to £297,639. This is not correct, because evidence exists that the loan was paid off and not waived. The Assumption Deed provides clear evidence that Buyer "discharged" that loan as part of its obligations under the Share Agreement. It is quite clear from the Share Agreement that Buyer had accepted that this debt was owed to Target and also that Buyer assumed liability for it. There is absolutely no evidence whatsoever within the Share Agreement that Target "waived" the loan.

14. £21 million represented the full market value of the shares. The Asset Agreement, entered into between Mr Cooling and Target before completion of the share sale, provides details of certain fixed assets which Mr Cooling agreed to purchase from Target. The Asset Agreement states quite clearly that the amount due from Mr Cooling was a "debt payable on demand". That amount therefore represented an asset of Target which formed part of the total assets of Target prior to the share sale. The Share Agreement states that, for the purposes of calculating the net cash consideration, the "Assumed Liability" was to be valued at £Nil. The agreed value of £21 million for all assets was inclusive of that debt, which was subsequently paid off by Buyer, as required by the Share Agreement, and further evidenced by the Assumption Deed. There was no statement within the Share Agreement that the

settlement of the "Assumed Liability" was in addition to the initial consideration of £21 million. Clause 5.2 of the Share Agreement defines matters after completion and provides further evidence that neither Buyer nor Target will pursue Mr Cooling for the "Assumed Liability". This clause confirms that Buyer acknowledges its liability for the debt which was discharged by it upon completion of the share sale, and as part of the initial consideration for £21 million. Furthermore, paragraph 3.3.20 of schedule 7 to the Share Agreement, which defines the net asset statement, clearly states that "the Assumed Liability shall be valued at Nil". This emphasises that Buyer, in making its offer, accepted the "Assumed Liability" as part of the initial consideration and would not pay any more than £21 million for the gross assets of Target. *Aberdeen Construction Group Limited v IRC* [1978] STC 127 was clear authority that the price allocated by the parties was decisive.

15. HMRC also contend that there were a series of transactions, when in fact there was only the Share Agreement which was a personal transaction between the shareholders and Buyer. The Asset Agreement was a personal arrangement made between Mr Cooling and Target.

16. It is therefore Mr Cooling's contention that the sale of the shares for £21million represented the full market value of the shares, and he disputes the claim made by HMRC that the proceeds of share sale should be increased by £ 297,638.

Respondents' case

17. Mr Bracegirdle for HMRC submitted as follows.

18. The correct position was that for the disposal of his shares Mr Cooling had received cash consideration of £9,978,597 plus non-cash consideration of £297,638.

19. It was clear that consideration can include the write-off of a loan between the parties to the transaction. In *Fielder (Inspector of Taxes) v Vedlynn Limited* [1992 STC 533] Harman J commented (at 566):

> "It was common ground before the Special Commissioner and before me that the definition in law of 'consideration' was as set out in the speech of Lord Lindley giving the advice of the Privy Council in *Fleming v Bank of New Zealand* [1900] AC 577 at 586, quoting from Lush J in 1875 (see *Currie v Misa* (1875) LR 10 Ex 153 at 162) (who himself was citing Comyns' Digest (at B.1–15) going back to the 17th century):
>
> > 'A valuable consideration in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other ...'
>
> As Lord Lindley observed, that definition had for hundreds of years been accepted as correct. The Privy Council approved it …"

20. The sale of Mr Cooling's shares in Target and the transfer of the loan owed by the Mr Cooling to Target were part of the same series of transactions. Clause 5.2 of the Share Agreement provided that Mr Cooling will not be pursued by Buyer or Target for his liability to Target. That is clear evidence that Mr Cooling was to

receive both cash consideration and consideration by way of the waiver of any monies owed by him to Target in exchange for his shares in Target. The transfer of Mr Cooling's debt from Target to Buyer is specifically mentioned within the Share Agreement and the form in which the assumption of the debt took place is set out in detail in the Assumption Deed. There is an inextricable link between Mr Cooling's sale of his shares in Target and the waiver of the debt owed by Mr Cooling to Target. The value of the debt waived is therefore consideration for the purposes of capital gains tax.

21. Whilst the value of the debt waived is the 'money's worth' received by Mr Cooling, it is important to consider the assets that Mr Cooling owned both before and after the series of transactions under discussion.

(1) On 16 December 2009 Mr Cooling held shares in Target.

(2) On 19 December 2009 Mr Cooling had cash of £9,978,597 plus assets valued at £297,638.96.

(3) Mr Cooling's creditor position with Target had not changed from 16 December 2009 to 19 December 2009.

(4) In simple terms, by being forgiven the debt Mr Cooling owed to Target, Mr Cooling ended up with cash and assets for his shares. The consideration that Mr Cooling received for his shares being the cash plus money's worth in the form of assets for which he was no longer required to make any payment.

Consideration and Conclusions

22. Mr Cooling explained to us (and we accept) that the original approach from Buyer had been on the basis of a value of £26 million but this had subsequently been reduced to £21 million. Mr Bramley repeatedly referred us back to Mr Cooling's statement that the price for the shares had been agreed by negotiation at £21 million. We consider that is not a sufficient explanation. Whatever the negotiated figure of £21 million was meant to represent, there was never any intention that a cheque for that amount would be presented to Mr Cooling at completion. Rather the deal was that the price for the shares was a figure to be calculated as £21 million less Target's liabilities to Barclays, plus/minus Target's other net assets/liabilities (see clause 3.1 of the Share Agreement). One of those other assets was the debt due from Mr Cooling but the parties to the Share Agreement specifically agreed (paragraph 3.3.20 of schedule 7) that Mr Cooling's debt would be valued at nil for the purposes of the net assets/liabilities calculation. That was perfectly acceptable as an assumption in the accounting methodology in schedule 7 to the Share Agreement; it is clear and the Tribunal "will give effect to the method adopted" (*per Spectros* – see [11] above).

23. That gives the calculation of the *cash consideration* for the shares. However, that is not the end of the matter. We agree with HMRC that the forgiveness of Mr Cooling's debt cannot be ignored. Mr Bracegirdle for HMRC conceded that HMRC's description of the debt as having been "waived" might be technically incorrect, but maintained that the same result had been achieved taking together the transfer of the debt, the promise not to pursue, and the discharge through inter-company loan accounts. We are clear that the effect of clause 5.2 of the Share Agreement (quoted at [6] above) was that Mr Cooling was released from the debt of £297,638.96; thus he was in the position of having received from Target assets to that value for which he

was not required to pay. That arrangement was clearly contemplated as being part and parcel of the share sale transaction - see recital (c) to the Asset Agreement ([5.1] above), the definition of Permitted Disposal in clause 1.1 of the Share Agreement, and clause 5.2 of the Share Agreement – and, we consider, only makes commercial sense in that context. For those reasons we consider Mr Cooling also received non-cash consideration of £297,638.96 for the disposal of his shares, and that forms part of his disposal consideration for the purposes of CGT.

24. Thus our conclusion is that, as contended by HMRC, the disposal proceeds for Mr Cooling's shares should be increased by £297,639.

Decision

25. The appeal is DISMISSED. We understand there are other (minor) adjustments to the CGT calculation agreed between the parties and therefore we give this decision as one in principle, with leave to the parties to approach the Tribunal for determination of exact figures if they are unable to agree the revised calculation.

26. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 19 May 2015