[2020] UKFTT 327 (TC)

TC07681

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/02425
TC/2018/02427

BETWEEN

NEIL PICKLES
SHARON PICKLES **Appellants**

-and-

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

SUPPLEMENTARY DECISION

1. On 22 April 2020, the Tribunal issued the decision in this appeal ('the Original Decision'). On 17 June 2020 the Respondents made an in-time application to appeal the Original Decision.

2. We considered in accordance with Rule 40 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Rules") whether to review the Original Decision and concluded that we should. This is because we were satisfied that there was an error of law in the Original Decision and it was appropriate for us to carry out a review in line with the overriding objective set out in rule 2 of the Rules. We were further satisfied that it was appropriate to exercise this Tribunal's power under TCEA 2007, s 9(4)(b) to amend the reasons given for the Decision.

3. On 1 July 2020 Judge Malek gave directions in which he set out that the Tribunal proposed to provide a supplementary decision amending its reasoning so as to deal with the error of law identified. The directions further invited submissions on this proposed course of action within 7 days of the receipt of these directions. The Respondents responded on 8 July 2020 with further representation in which they sought to, essentially, argue that the Tribunal should not only amend the reasons given in its Original Decision, but should set aside the Original Decision in its entirety and re-decide the matter so as to dismiss the appeal.

4. We have given careful consideration to those submissions. The error of law, as identified in the Respondents grounds of appeal, is that the Tribunal failed to take into account section 1020 (1) (b) of the Corporation Act 2010: a transfer of assets to a company

by its members. This error pervaded the reasoning contained in paragraphs 44-46 (inclusive) of the Original Decision. Those paragraphs of the Original Decision should be, and are, set aside. However, we are not satisfied that this error of law is such that the entirety of the Original Decision should be set aside or that it would be in furtherance of the overriding objective (as set out in Rule 2) for us to do so. The Original Decision, in our judgment, remains otherwise sound and, for the reasons given below, the outcome remains unaffected.

AMENDED REASONS

5. The present case calls for the analysis of the following matters:

(1) What is the transfer of assets or liabilities to which section 1020 applies and from whom and to whom are the assets transferred?

(2) What was the amount or value of those assets?

(3) What was the amount or market value of the benefit received by a member?

(4) What was the market value of any new consideration given by the member?

(5) By what amount or value does the amount or market value of the benefit received by a member exceed the market value or amount of new consideration?

6. The first question should, in theory, be easy to answer. However, for reasons we set out later, it is not. Notwithstanding any such difficulties the Respondents position is clear. It identifies the transfer of assets as the transfer of goodwill and other business assets by the Appellants to HFPL [paragraph 82 of the Respondents skeleton argument].

7. In relation to the second question we have determined the market value of the relevant asset (i.e. goodwill) to be £270,200.

8. The third question requires careful thought. HFPL agreed to pay the sum of £1,199,043 to the Appellant in consideration of the transfer of goodwill and other assets to it. As of 1 May 2011the Appellants became entitled to receive this sum on demand and it was credited to the Appellant's directors' loan account. In actual fact the Appellants received cash in the sum of £771,863 over a prolonged period of time with the balance of their directors' loan accounts being adjusted accordingly. The first point to consider under this head is this: what, precisely, is the benefit that resulted to the Appellants from this transaction? According to the Oxford English Dictionary "benefit" in the ordinary sense means "advantage, profit, good". In our view, the resultant benefit to the Appellants came in two forms. Firstly, the Appellants received the benefit of cash in the sum of £771,863. Secondly, the Appellants had the benefit of a debt owing to them by HFPL.

9. The next question under this head is whether, to what extent and when the benefit was actually <u>received</u>. In the case of the benefit in cash there can be no issue or doubt. In the case of the benefit relating to the debt the issue is far from clear. It is right to say that the Appellants had contractually enforceable rights to the sum of £1,199,043 and that this bundle of rights represent a benefit; but it does not follow that the benefit attached to those rights was received by the Appellants. In this case the fruit (or advantage or profit) of those rights is the sum of £1,199,043 or the ability to call for that sum at any time limited only by the ability of HFPL to make payment. Put another way whilst a promise to pay may confer a benefit the benefit is not received until payment is made. In this case only a partial payment was ever made.

10. If we are wrong about that, and the benefit in relation to the debt was received by the Appellants as soon as they had a right to demand payment (in this case immediately on 1 May 2011), then we need to move to the third consideration under this head and ascertain the

amount or value of the benefit. The amount or value of the benefit is the market value [see s.1020(3)].

11. The market value of corporate debt will be affected by very many factors including the strength of the balance of sheet, cash flow, industry, size of the business, company structure, the coupon rate, treasury interest rates, market demand and so on. This is an issue upon which this Tribunal would have been assisted by the opinion(s) of one or more suitably qualified expert(s). As it happens no such expert evidence was advanced by either side. In the circumstances the only evidence available to this Tribunal was the actual sums paid in relation to the debt. There are many things wrong with using the sums actually paid as an approximation for the value of the debt. However, such an approximation is preferable to the proposition that the value of the debt is the face value. The latter, in our judgment, is almost certainly the wrong approach- not least because any purchaser on the open market would look carefully at the ability of the company to pay the debt and discount for any uncertainty- paying particular attention to the factors that we have set out above.

12. For the avoidance of doubt, we consider the market value of cash to be the face value.

13. Accordingly, the answer to the third question is £771,863 representing the sum of money actually received by the Appellants. Either there was no benefit actually received by the Appellants by virtue of the debt which remained outstanding or, based upon the evidence available to us, the value of such debt was approximate to the sums actually received.

14. On the above analysis there was no new consideration given by the members. They only ever transferred the assets.

15. On a literal reading of s. 1020(1) the answer to the fifth question is £771,863. The test in s. 1020(1) does not take into account the value of the assets transferred to the company (under s. 1020(1)(b)) by the members or indeed require this to be a market value. This would produce an absurd result and was not a point taken before us by either party. We are satisfied that, taking a purposive approach, s.1020 does not intend to leave out of account the market value of the assets transferred by members to the company under s 1020(1) (b). Accordingly, the answer to question 5 is £501,663. The alternative analysis is to go back to question 1 posed above and consider whether the asset(s) that have been transferred are actually cash and debt under s 1020(1)(a). This analysis would mean that the consideration provided was £270,200 in answer to question 4. Accordingly, the answer to question 5 would be £501,663. However, this alternative analysis is not without its own conceptual difficulties. That is why we say that the first question is not one entirely easy to answer.

16. On balance we are satisfied that the relevant transfer of assets took place under s.1020(1)(b) and consisted of goodwill and other assets transferred by the Appellants to HFPL on or around 1 May 2011. Accordingly, the above analysis is to be preferred to that set out in the Original Decision.

17. The outcome of the Original Decision remains unaffected.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

18. This document contains supplementary reasons for the Original Decision. Any party dissatisfied with the Original Decision and this Supplementary Decision has a right to apply for permission to appeal against either or both 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 Supplementary 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.

ASIF MALEK
TRIBUNAL JUDGE
RELEASE DATE: 12 AUGUST 2020