[2021] UKFTT 124 (TC)

TC08105

CAPITAL GAINS TAX – Entrepreneurs' relief – disposal of assets by partnership that had not commenced trading – whether disposal of a business for the purposes of relief – held that pre-trading activities are not "a business" – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/06727

BETWEEN

JOHN DOUGLAS WARDLE **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

The Tribunal determined the appeal on 16 to 18 February 2021 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of the ongoing restrictions resulting from the coronavirus pandemic. The documents to which I was referred are described in the decision notice.

DECISION

INTRODUCTION AND SUMMARY

1. Mr Wardle has appealed against a closure notice issued by HMRC on 5 December 2018 denying entrepreneurs' relief in respect of gains realised in the tax year 2015-2016 and increasing his capital gains tax liability for that year.

2. The relevant facts are agreed between the parties and are summarised below. There is no dispute as to quantum. The only issue before me is whether the disposal by a partnership of some or all of its business prior to that business having commenced trading nevertheless entitles the individual partners to claim entrepreneurs' relief on capital gains arising from such disposal under s169H(2)(a) Taxation of Chargeable Gains Act 1992 ("TCGA 1992"), assuming all other conditions are met. The dispute is whether there was "a business" as defined in s169S(1).

3. Mr Wardle gave Notice of Appeal to the Tribunal on 23 October 2019. That notice sought cancellation of the closure notice denying entrepreneurs' relief and confirmation that HMRC would be liable for costs in connection with the investigation. The appeal was allocated to the standard category and thus the costs-shifting regime under rule 10(1)(c) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") does not apply. Mr Wardle confirmed on 4 September 2020 that whilst he had significant concerns as to the way in which the HMRC had conducted the investigation, he would not pursue his costs claim before the Tribunal.

4. On 31 May 2020 Mr Wardle applied under rule 14 of the Tribunal Rules for certain information relating to the underlying transactions giving rise to the appeal not to be published. He stated that the facts of this case are not disputed, only a particular matter of law, and the underlying transactions include commercially sensitive and confidential matters which need not be in the public domain, given that they are not disputed. Those matters are essentially the disposal proceeds, the gain realised on that disposal and consequently the amount of the increase in his capital gains tax liability.

5. I have considered the confidentiality application below and concluded it should be dismissed. However, in this version of the decision notice I have not disclosed the matters sought to be kept confidential pending any appeal.

6. I have concluded that the disposal did not qualify for entrepreneurs' relief as the fact that the partnership had not commenced trading meant that there was no disposal of "a business" as defined in s169S(1) and required by s169I(2)(a). The appeal is dismissed.

FACTS

7. The relevant facts were common ground between the parties.

8. Mr Wardle was one of three partners who, in January 2014, established a general partnership under English law (the "Partnership") whose business was to develop, construct and operate renewable power plants at three locations in the UK.

9. The Partnership commenced pre-trading activities on 1 May 2014.

10. Once the projects reached the stage where construction could begin, the Partnership sold two plants to a third party, in August 2015 and November 2015. At that time, the Partnership had not commenced trading.

11. Mr Wardle's brought his share of the disposal proceeds into account in the tax year 2015-2016 and claimed entrepreneurs' relief.

EVIDENCE

12. I had an electronic hearing bundle (of 154 pages) which had been provided by HMRC on 7 August 2020. That bundle included the Notice of Appeal to the Tribunal given on 23 October 2019, Mr Wardle's detailed grounds of appeal, HMRC's statement of case dated 30 June 2020, correspondence between the parties, the Partnership agreement and the assignment agreements relating to the disposals.

13. I also had the Tribunal's file, which included Mr Wardle's written submissions dated 4 September 2020, an agreed Statement of Facts of that same date, the confidentiality application, HMRC's written submissions dated 18 September 2020 and Mr Wardle's response dated 25 September 2020.

14. HMRC also applied on 18 September 2020 to admit additional evidence, a policy notice published by HMRC on 24 January 2008 headed "Capital Gains Tax: Relief on disposal of a business (Entrepreneurs' Relief)" (the "2008 Policy Notice"). Mr Wardle consented to this and, having regard to the overriding objective in rule 2 of the Tribunal Rules, I decided to admit this evidence.

CONFIDENTIALITY APPLICATION

15. Mr Wardle has applied for an order under rule 14 of the Tribunal Rules prohibiting the disclosure or publication of certain information relating to the underlying transactions giving rise to the appeal. He stated that the facts of this case are not disputed and the underlying transactions include commercially sensitive and confidential matters which need not be in the public domain.

16. HMRC do not oppose the application. However, the decision as to whether or not to make the order is for the Tribunal, and in considering whether to exercise my discretion in such a way I am required to have regard to the overriding objective in rule 2 of the Tribunal Rules.

17. There have been various decisions addressing applications that a decision be anonymised, in relation to which Judge Bishopp said in *A v HMRC* [2012] UKFTT 541 at [6], when refusing an application for anonymity:

> "The usual practice in this tribunal is not only to hold its hearings in public, but also to make no attempt to conceal, either during the course of the hearing or in its published decisions, the details of a taxpayer's income and other financial circumstances relevant to the appeal. Redaction of such details … was exceptional."

18. In *HMRC v Banerjee (No 2)* [2009] STC 1930 Henderson J said that in his opinion:

> "34 … any taxpayer has a reasonable expectation of privacy in relation to his or her financial and fiscal affairs, and it is important that this basic principle should not be whittled away. However, the principle of public justice is a very potent one, for reasons which are too obvious to need recitation, and in my judgment it will only be in truly exceptional circumstances that a taxpayer's rights to privacy and confidentiality could properly prevail in the balancing exercise that the court has to perform.
>
> 35 It is relevant to bear in mind, I think, that taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane-seeming tax dispute. Nowhere is that more true, in my judgment, than in relation to the rules governing the deductibility of expenses for income tax. Those rules directly affect the vast majority of taxpayers, and any High Court judgment

> on the subject is likely to be of wide significance, quite possibly in ways which may not be immediately apparent when it is delivered. These considerations serve to reinforce the point that in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat."

19. In dismissing an application for anonymity in *Clunes v HMRC* [2017] UKFTT Judge Bishopp said:

> "10 … Any taxpayer who was not in the public eye but who, for example, would prefer his friends or neighbours not to know of his financial affairs, would find it impossible to persuade the tribunal to grant him anonymity; as Henderson J said, the public interest in the outcome of tax litigation, whether in the High Court or in this tribunal, outweighs the desire of the taxpayer for anonymity, and the inevitable resultant intrusion into matters which might otherwise remain confidential is the price which must be paid for open justice, however unpalatable the individual taxpayer might find it to be."

20. Whilst these applications sought anonymity for the appellant taxpayers, I consider that the same principles should apply here. This is particularly the case given that the information sought to be prohibited from disclosure includes the amount of tax which is the subject of this appeal. The principles of open justice require that such amount is disclosed.

21. I have therefore concluded that I should refuse Mr Wardle's confidentiality application. However, I have not included the figures in this decision notice in case of any application for permission to appeal by Mr Wardle, which would otherwise be rendered pointless if I included them at this stage.

RELEVANT LEGISLATION

22. Section 59 TCGA 1992 states:

> "59(1) Where 2 or more persons carry on a trade or business in partnership–
>
> (a)tax in respect of chargeable gains accruing to them on the disposal of any partnership assets shall, in Scotland as well as elsewhere in the United Kingdom, be assessed and charged on them separately, and
>
> (b)any partnership dealings shall be treated as dealings by the partners and not by the firm as such;"

23. The legislative provisions for entrepreneurs' relief are contained within Chapter 3 of Part V TCGA 1992, from s169H to s169SA. In addition, s169SA refers to Schedule 7ZA TCGA 1992 for the meaning of "trading company" and "trading group".

24. Section 169H states:

> "169H(1) This Chapter provides for a lower rate of capital gains tax in respect of qualifying business disposals (to be known as "entrepreneurs' relief").
>
> 169H(2) The following are qualifying business disposals–
>
> (a) a material disposal of business assets: see section 169I,
>
> (b) a disposal of trust business assets: see section 169J, and
>
> (c) a disposal associated with a relevant material disposal: see section 169K.

169H(3) But in the case of certain qualifying business disposals, entrepreneurs' relief is given only in respect of disposals of relevant business assets comprised in the qualifying business disposal: see sections 169L and 169LA.

169H(4) Section 169M makes provision requiring the making of a claim for entrepreneurs' relief.

169H(5) Sections 169N to 169P make provision as to the amount of entrepreneurs' relief.

169H(6) Section 169Q and 169R make provision about reorganisations.

169H(7) Sections 169S and 169SA contain interpretative provisions for the purposes of this Chapter."

25. The relevant parts of Section 169I state:

"169I(1) There is a material disposal of business assets where–

(a) an individual makes a disposal of business assets (see subsection (2)), and

(b) the disposal of business assets is a material disposal (see subsections (3) to (7)).

169I(2) For the purposes of this Chapter a disposal of business assets is–

(a) a disposal of the whole or part of a business,

(b) a disposal of (or of interests in) one or more assets in use, at the time at which a business ceases to be carried on, for the purposes of the business, or

(c) a disposal of one or more assets consisting of (or of interests in) shares in or securities of a company.

169I(3) A disposal within paragraph (a) of subsection (2) is a material disposal if the business is owned by the individual throughout the period of 1 year ending with the date of the disposal.

(4) A disposal within paragraph (b) of that subsection is a material disposal if–

(a) the business is owned by the individual throughout the period of 1 year ending with the date on which the business ceases to be carried on, and

(b) that date is within the period of 3 years ending with the date of the disposal.

(5) A disposal within paragraph (c) of subsection (2) is a material disposal if condition A , B, C or D is met.

(6) Condition A is that, throughout the period of 1 year ending with the date of the disposal–

(a) the company is the individual's personal company and is either a trading company or the holding company of a trading group, and

(b) the individual is an officer or employee of the company or (if the company is a member of a trading group) of one or more companies which are members of the trading group.

(7) Condition B is that the conditions in paragraphs (a) and (b) of subsection (6) are met throughout the period of 1 year ending with the date on which the company–

(a) ceases to be a trading company without continuing to be or becoming a member of a trading group, or

(b) ceases to be a member of a trading group without continuing to be or becoming a trading company,

and that date is within the period of 3 years ending with the date of the disposal.

…

(8) For the purposes of this section–

(a) an individual who disposes of (or of interests in) assets used for the purposes of a business carried on by the individual on entering into a partnership which is to carry on the business is to be treated as disposing of a part of the business,

(b) the disposal by an individual of the whole or part of the individual's interest in the assets of a partnership is to be treated as a disposal by the individual of the whole or part of the business carried on by the partnership, and

(c) at any time when a business is carried on by a partnership, the business is to be treated as owned by each individual who is at that time a member of the partnership."

26. Section 169S provides for the interpretation of these provisions. The key provision which is at the centre of this appeal is at s169S(1). It states:

"169S(1) For the purposes of this Chapter "a business" means anything which –

(a) is a trade, profession or vocation, and

(b) is conducted on a commercial basis and with a view to the realisation of profits."

27. Section 169SA states:

"169SA Schedule 7ZA gives the meaning in this Chapter of "trading company" and "trading group"."

28. Paragraph 1 of Schedule 7ZA states:

"1(1) This paragraph gives the meaning of "trading company" and "trading group" where used in the following provisions of Chapter 3 of Part 5 (entrepreneurs' relief) –

(a) in section 169I (material disposal of business assets)–

(i) paragraphs (a) and (b) of subsection (6) (which apply for the purposes of conditions A and B in that section), and

(ii)sub-paragraphs (i) and (ii) of subsection (7A)(c) (which apply for the purposes of conditions C and D in that section), and

(b)section 169J(4) (disposal of trust business assets).

1(2) "Trading company" and "trading group" have the same meaning as in section 165 (see section 165A), but as modified by Part 2 of this Schedule.

1(3) "Trading activities" (see section 165A(4) and (9)) is to be read in accordance with Part 3 of this Schedule."

29. Section 165(8)(aa) states:

""holding company", "trading company" and "trading group" have the meaning given by section 165A"

30. The relevant parts of Section 165A state:

> "165A(1) This section has effect for the interpretation of section 165 (and this section).
>
> 165A(2) "Holding company" means a company that has one or more 51% subsidiaries.
>
> 165A(3) "Trading company" means a company carrying on trading activities whose activities do not include to a substantial extent activities other than trading activities.
>
> 165A(4) For the purposes of subsection (3) above "trading activities" means activities carried on by the company–
>
> (a) in the course of, or for the purposes of, a trade being carried on by it,
>
> (b) for the purposes of a trade that it is preparing to carry on,
>
> (c) with a view to its acquiring or starting to carry on a trade, or
>
> (d) with a view to its acquiring a significant interest in the share capital of another company that–
>
> (i) is a trading company or the holding company of a trading group, and
>
> (ii) if the acquiring company is a member of a group of companies, is not a member of that group."

DISCUSSION

31. The burden of proof is on Mr Wardle to establish that he has been overcharged by the amendments made by the closure notice, otherwise the assessment shall stand good. In the context of this appeal this means that Mr Wardle must establish that the conditions for entrepreneurs' relief are met. The only point in issue between the parties is whether the activities of the Partnership met the definition in s169S(1) such that the disposals are eligible for entrepreneurs' relief.

32. Section 169H(1) provides entrepreneurs' relief in respect of qualifying business disposals. These include "a material disposal of business assets" (by virtue of s169H(2)(a)). This then includes a disposal of "the whole or part of a business" (s169I(2)(a)) where that disposal is a material disposal (which is the one-year ownership requirement). It is the application of these operative provisions which provide the context for the interpretation of the definition of "a business" set out in s169S(1):

> "169S(1) For the purposes of this Chapter "a business" means anything which–
>
> (a) is a trade, profession or vocation, and
>
> (b) is conducted on a commercial basis and with a view to the realisation of profits."

33. Mr Wardle's written submissions were careful and detailed. He acknowledged (in his submissions of 4 September 2020) that he needed to establish that both paragraphs (a) and (b) of s169S(1) needed to be satisfied.

34. In their statement of case dated 30 June 2020 HMRC emphasised that:

> (1) where a term is defined in legislation, the word carries that meaning as defined (rather than its ordinary legal meaning or a definition used elsewhere);

(2) both limbs of the definition in s169S(1) must be satisfied – the conjunction "and" is used, not "or";

(3) the parties are agreed that the Partnership did not commence training and that the activity amounted to activities in preparation of trading. Preparing to trade is not itself trading;

(4) s169S(1) requires that the trade is one that "is conducted" – a trade is not being conducted if it has not commenced; and

(5) Parliament has included some provisions within TCGA 1992 which included pre-commencement activity as "trading activities", eg s165A(4) which states that for the purposes of s165A(3), "trading activities" means "activities carried on by the company – (a) in the course of, or for the purposes of, a trade being carried on by it, (b) for the purposes of a trade that it is preparing to carry on, (c) with a view to its acquiring or starting to carry on a trade …". This only applies to companies and not to partnerships or individuals. By making such explicit provision for the disposals of shares in a company, Parliament intended those provisions to apply only to such disposals. A wider application would be contrary to the intentions of Parliament.

35. Mr Wardle submitted that a partnership's business disposed of prior to commencement of actual trading and while still in the setting-up phase comes within the definition of "a business" under s169S(1). His arguments as to the correct interpretation addressed:

(1) a review of the grammar and structure of s169S(1), supporting the view that (i) paragraphs (a) and (b) relate back to the thing which is being defined as a business and (ii) that no drafting has been included to restrict the eligible part of a business's existence to the phase after it has commenced trading;

(2) whether there is any indication that Parliament intended to exclude pre-trading business activities;

(3) why the default interpretation of partnership used in Chapter 3 includes the pre-trading set up phase of its business and how this is consistent with the definition of a business in s169S(1);

(4) how case law confirms that a partnership's business includes both the pre-trading set up phase as well as the trading phase;

(5) the interplay between s169S(1) and s165A(4)(b) and why this supports an interpretation of s169S(1) which includes pre-trading business activities for companies, partnerships and individuals alike;

(6) the use that Chapter 3 makes of the common definition of a business under s169S(1) for both companies and partnerships, side by side, and why this gives rise to a conflict if HMRC's interpretation is used; and

(7) how his interpretation is consistent with the objectives and motivations behind the introduction of entrepreneurs' relief.

36. HMRC's reply focused on the 2008 Policy Notice and the history of retirement relief and taper relief. Mr Wardle has then addressed each of the submissions made by HMRC in his response.

37. I have found it convenient to consider the detailed arguments raised in the order set out by Mr Wardle in his written submissions above. The 2008 Policy Notice is considered alongside other material relied upon in the context of the objectives and motivations behind the introduction of entrepreneurs' relief.

38. In *HMRC v The Quentin Skinner 2005 Settlement L and others* [2021] UKUT 0029 (TCC) the Upper Tribunal recently considered the interpretation of a different condition for entrepreneurs' relief, namely whether a qualifying beneficiary has to satisfy that definition throughout the same one-year period that the conditions in s169J(4) are met or whether it is sufficient for the qualifying beneficiary to have their interest in possession under the trust at the time of the disposal. In considering the submissions which were made the Upper Tribunal started as follows:

> "*Relevant principles of statutory interpretation*
>
> 38. We remind ourselves of the relevant principles of statutory interpretation.
>
> 39. The duty of the court is to "ascertain the intention of Parliament as expressed in the words it has chosen" (R (Quintavalle) v Secretary of State for Health [2003] UKHL 13, [2003] 2 AC 687, para 38, per Lord Millett).
>
> 40. In the same case, Lord Bingham held at [8]:
>
> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."
>
> 41. The reference to the need to read the controversial provisions in the context of the statute as a whole is a long-standing principle, and, as Lord Reid said in IRC v Hinchy [1960] AC 748 at 766, "one assumes that in drafting one clause of a Bill the draftsman had in mind the language and substance of the other clauses, and attributes to Parliament a comprehension of the whole Act".
>
> 42. The words chosen by Parliament are the primary source from which the intention of Parliament should be inferred. Lord Carnwath put that point in the following terms in Lambeth LBC v S of S for HCLG [2019] UKSC 33:
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> "…whatever the legal character of the document in question, the starting-point - and usually the end-point - is to find "the natural and ordinary meaning" of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense."
>
> 43. Ascertaining the statutory context involves the court in a legal determination of the purpose of the Act. It is the court's duty "to favour an interpretation of legislation which gives effect to its purpose rather than defeating it" (Test Claimants in the Franked Investment Income Group Litigation v Commissioners for Her Majesty's Revenue and Customs [2020] UKSC 47, para 155, per Lord Reed and Lord Hodge).
>
> 44. But that does not relegate the words of the statute to a supporting role. Lord Neuberger put matters as follows in Williams v Central Bank of Nigeria [2014] UKSC 10 at [72]:
>
> "When interpreting a statute, the court's function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretive role, the court can take a freewheeling view of the intention of Parliament looking at all admissible material, and treating the wording of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used."
>
> 45. It has been long established that the context includes a consideration of the law as it stood at the time of enactment of the relevant provisions concerned and how the law was intended to be changed. As is noted by Bennion, Bailey and Norbury on Statutory Interpretation (8th edition, October 2020) at [24.7],

> an Act will often replace or reproduce aspects of earlier legislation without amounting to a consolidation and, so far as the Act reproduces the old legislation, it may be interpreted in the same way as a consolidation, namely, that if a real doubt arises as to the legal meaning of the new legislation, recourse may be had to the earlier legislation in resolving that doubt.
>
> 46. In respect of the last point and as we explain below, we think that the meaning of s.169J(4) is clear when understood in the light of s.169O, a key part of the relevant statutory context. Nonetheless, we have considered whether the predecessor legislation casts doubt on that conclusion. In our view, it does the opposite: it confirms our analysis of the relevant provisions in question."

39. I have borne these principles in mind when considering all of the submissions on the correct interpretation of the definition of "a business" in s169S(1).

40. I have considered all of the written submissions which have been provided and taken them all into account in reaching my decision. Whilst I have outlined some of them in setting out my reasoning below, I have not found it necessary to refer to all of them. That does not mean that they were not taken into account.

Language used in s169S(1)

41. I must start with the language of s169S(1) itself, which is set out in full above.

42. Mr Wardle submits that:

(1) The definition in s169S(1) commences broadly with the use of the word "anything". This is followed by two independent conditions which do not cross-refer to each other. The independence of these conditions is reinforced by the repetition of the verb "is" – they should not therefore be conflated.

(2) Neither paragraph expressly requires the business to have commenced trading. The activities of "trade, profession or vocation" in paragraph (a) are trading-type activity, to be contrasted with investment-type activities. Paragraph (b) distinguishes business activities from those which do not have a profit seeking motive. Ordinary legal usage of the word "business" includes its setting up phase and there is no suggestion in s169S(1) that the business needs to have reached the point that trading has actually commenced, merely that the business existed at the time of the relevant disposal. This is neither ambiguous nor does it lead to an absurd result and this therefore supports the view that Parliament intended what is actually stated. Accordingly, there is no obvious justification for progressing to a purposive approach to interpretation.

(3) In terms of timing, "with a view to a profit" is wording used in many places in English law. It means that profits are sought to be achieved at a future date. It does not mean that the profits must already have been made at the date when such wording is being considered, as HMRC infer by claiming that trading must have commenced (notwithstanding that they appear to accept it requires only the presence of a profit seeking motive). The potential to make profits in the future from a commercial venture is fully consistent with any business which is still preparing to trade.

43. Within the body of Chapter 3, ie the chapter setting out the conditions for entitlement to entrepreneurs' relief, Parliament has set out the definition of "a business" for this purpose. As submitted by Mr Wardle, there is no reason to approach this particularly narrowly. However, I consider that a straightforward reading of this definition requires that the activity in question "is a trade" and "is conducted on a commercial basis". The use of present tense suggests that the activity should already satisfy those criteria. Preparing to carry on an activity is different

from carrying on the activity. This suggests strongly that an activity which is preparatory to trading does not satisfy these conditions.

44. When considering the arguments put and other material to which I was referred I have been seeking to assess whether any of this reveals that what I regard as the straightforward reading was not intended by Parliament.

Did Parliament intend to exclude pre-trading business activities?

45. The definition in s169S(1) does not include the words "which has commenced trading". Mr Wardle submits that HMRC's interpretation requires the implication of additional wording, with the result that the period of a business's existence prior to commencement of trading is excluded from the definition. Parliament had the tools available to make commencement of trading a pre-condition, by the express addition of these words, but chose not to do so.

46. HMRC submit that pre-trading activities are only taken into account for companies. They refer to the 2008 Policy Notice in support of this position.

47. The comparison with the definition of a trading company is addressed separately below. I consider that the difficulty with Mr Wardle's argument on the language of s169S(1) and the absence of express reference to pre-commencement of trading activities being excluded is that Parliament has used a definition which goes beyond an activity that is a trade – the language captures professions and vocations as well, and then sets out the basis on which that activity is to be conducted. I do not consider that this additional language requiring that a trade has been commenced needs to be implied; the express language used already gives rise to the interpretation that there is a trade which is conducted, ie that it has commenced trading.

Comparisons with the definition of a partnership's business

48. Mr Wardle drew attention to statutory definitions of a partnership's business and the case law interpretation thereof.

49. He submitted that his position that a partnership's business can exist and be conducted commercially with a view to a profit prior to commencement of trading is supported by the legislation governing partnerships:

> (1) A "partnership" is not specifically defined in TCGA 1992. Accordingly, the expression is given its ordinary legal meaning. Partnerships therefore include general partnerships (established under the Partnerships Act 1890 ("PA 1890")), limited partnerships (established under the Limited Partnerships Act 1907) and limited liability partnerships (established under the Limited Liability Partnerships Act 2000), with these statutes being the "Partnership Acts".
>
> (2) Taking by way of illustration the provisions of PA 1890, s1(1) provides that "Partnership is the relation which subsists between persons carrying on a business in common with a view of profit", it being noted that ""business" includes every trade, occupation, or profession" (s45).
>
> (3) There is no suggestion that the partnership does not exist prior to its business commencing trading; indeed, there are multiple provisions that apply equally to the pre-trading stage, for example the joint and several liability of partners under s12 PA 1890.
>
> (4) By statutory definition therefore, once a partnership exists, so too must its business in order to meet the test of establishment.
>
> (5) This being the established ordinary legal meaning of a partnership's business under applicable law, Parliament made no attempt in the definition of what constitutes a

partnership's business for the purposes of entrepreneurs' relief to deviate from this by expressly excluding the pre-trading conduct of that business.

50. Furthermore, Mr Wardle notes that in *Khan and another v Miah* [2001] 1 All ER 2 Lord Millet confirmed that the "conduct" of a business with a view to profit includes the stage when the business is still being set up and has yet to commence trading:

> "There is no rule of law that the parties to a joint venture do not become partners until actual trading commences. The rule is that persons who agree to carry on a business activity as a joint venture do not become partners until they actually embark on the activity in question. It is necessary to identify the venture in order to decide whether the parties have actually embarked upon it, but it is not necessary to attach any particular name to it. Any commercial activity which is capable of being carried on by an individual is capable of being carried on in partnership. Many businesses require a great deal of expenditure to be incurred before trading commences. Films, for example, are commonly (for tax reasons) produced by limited partnerships. The making of a film is a business activity, at least if it is genuinely conducted with a view of profit. But the film rights have to be bought, the script commissioned, locations found, the director, actors and cameramen engaged, and the studio hired, long before the cameras start to roll. The work of finding, acquiring and fitting out a shop or restaurant begins long before the premises are open for business and the first customers walk through the door. Such work is undertaken with a view of profit, and may be undertaken as well by partners as by a sole trader."

51. Mr Wardle submits that this decision pre-dated the introduction of entrepreneurs' relief and it directly addresses the matter under consideration, namely whether the conduct of a business on a commercial basis by a partnership with a view to a profit means that trading must have commenced. This is the "default meaning" when interpreting s169S(1), and if Parliament had not intended this meaning to apply they needed to include an express exception in the legislation.

52. This line of argument is, in short, that a partnership can only exist according to the Partnership Acts where persons are carrying on a business in common, HMRC accept that Mr Wardle was in partnership with others and therefore there is an inconsistency with HMRC then arguing that the Partnership did not dispose of part of a business for the purposes of entrepreneurs' relief.

53. The short answer is that the rules and definitions are different. PA 1890 addresses whether persons are carrying on a business in common with a view to profit, and for this purpose a business includes every trade and persons can become partners before actual trading commences. In Chapter 3, Parliament has chosen to use a different definition of a business, notably one which uses "means" rather than "includes" and which has conditions that require that it "is a trade" and "is conducted". To Mr Wardle's submission that if Parliament had not wanted the meaning from *Khan* to apply it needed to say so, there is good evidence that Parliament did say so.

Interplay between s169S(1) and s165A(4)(b)

54. Mr Wardle submits that entrepreneurs' relief is set up to incentivise entrepreneurial risk-taking rather than differentiating between the choice of business vehicle:

(1) There are structural differences between partnerships and companies - a partnership does not come into existence unless and until its business exists according to the Partnership Acts whereas a company can be incorporated and come into existence long before its business is ever established, eg a shelf-company or a dormant company.

(2) The mere existence of a company is insufficient for entrepreneurs' relief purposes. The definitions of "holding company", "trading company" and "trading group" set out which parts of a company's existence render it potentially eligible, this including the period once it is conducting "activities for the purposes of a trade that it is preparing to carry on" (pursuant to s165A(4)(b)). This brings the treatment for companies into line with that which Mr Wardle submits applies for a partnership (and indeed an individual entrepreneur).

(3) This shows that Parliament did intend common incentivisation and the existence of s165A(4)(b) shows this to be the case because without it the company's business would have a different starting point for the purposes of entrepreneurs' relief eligibility compared to partnerships or individuals.

55. HMRC emphasise that the definition of trading activities in s165A(4), which makes it clear that such activities include those for the purposes of a trade a company is preparing to carry on, apply only for the purposes of the definition of a "trading company" in s165A(3).

56. That is agreed between the parties – but Mr Wardle's argument is that there is no need to read the language across into s169S(1); such preparatory activities are already included and it is the nature of a company, which exists from incorporation but may be dormant for some time, that means it is necessary to set out the point from which it starts to become potentially eligible for relief.

57. Should every effort be made to read the provisions relating to individuals or partnerships making a disposal and those relating to a disposal of shares such that they apply in the same way? At the outset I note that the rules in Chapter 3 set out different routes for the relief to apply to disposals of assets (other than shares) by an individual or partnership and disposals of shares. The requirement that there is a "material disposal of business assets" requires both that an individual "makes a disposal of business assets" and that the disposal is a "material disposal". In defining a disposal of business assets, s169I(2) states that this is a disposal of the whole or part of a business (s169I(2)(a)) or a disposal of shares or securities in a company (s169I(2)(c)). This therefore brings in disposals of both incorporated and non-incorporated activities. Only the first type of disposal requires a reference to the definition of "a business".

58. However, the remaining provisions of s169I then set out the meaning of a "material disposal". Different conditions apply for each type of disposal of business assets:

(1) For a disposal within s169I(2)(a), s169I(3) requires that the business is owned by the individual throughout the period of one year ending with the date of the disposal.

(2) For a disposal within s169I(2)(c), one of four conditions must be met. They deal with different scenarios, and the comparison Mr Wardle seeks to draw is with Condition A in s169I(6), which is that throughout the period of one year ending with the date of the disposal, the company is the individual's personal company and is either a trading company or the holding company of a trading group, and the individual is an officer or employee of the company or (if the company is a member of a trading group) of one or more companies which are members of the trading group.

59. It is therefore only at this stage, namely whether there is a "material disposal", that consideration is given to the type or activities of the company. It is notable that not only must the company be a "trading company", the definition of which contemplates that the company may have non-trading activities (albeit with regard had to the extent of those activities) but also as to the level of ownership of the company – a personal company is one where the individual holds 5% of the ordinary share capital and possesses 5% of the voting rights. Shares are also eligible if they are in the holding company of a trading group – a holding company must have

one or more 51% subsidiaries, so again this leaves open the possibility that the shares are held in a company which owns, say, 40% shareholdings in various trading companies. A disposal would not then qualify for relief even though a non-incorporated structure could have done so.

60. This requirement for a certain level of ownership and level of voting influence is not present in the context of individuals who are in partnership together. Section 169I(8)(c) provides that at any time when a business is carried on by a partnership, the business is to be treated as owned by each individual who is at that time a member of the partnership. Parliament has thus expressly addressed the position of partnerships, and could have taken the opportunity to impose minimum participation thresholds, but has not done so.

61. The structure and content of Chapter 3 indicate that whilst Parliament intended that entrepreneurs' relief may be available for disposals of both incorporated and non-incorporated activities, there are differing conditions which bring in the use of different definitions. There is no necessary reason within Chapter 3 why an interpretation must be adopted to ensure absolute parity.

Application of s169S(1) throughout Chapter 3

62. Mr Wardle submits that HMRC's interpretation of s169S(1) gives rise to a conflict with the remainder of Chapter 3:

> (1) The word "anything" in the definition includes "trading activities" under s165A(4) which extends to pre-trading activities. For an eligible company still preparing to trade, the two relative clauses of paragraphs (a) and (b) in s169S(1) therefore qualify anything which is a pre-trading activity. Applying HMRC's interpretation, the definition of a business would first include preparation for trading for start-up companies (i.e. "anything") only to exclude it as a result of their interpretation of paragraphs (a) and (b).
>
> (2) This would clearly be a nonsense and could only be reconciled by the inclusion of implied wording, either to qualify the definition of "a business" under s169S(1) or to moderate the use of the definition within the substantive sections of the Chapter. Either way, under HMRC's approach to interpretation, s169S(1) is no longer a common definition but has two different meanings depending on the entity concerned.

63. I consider that this argument is flawed. It is important to look at how the definition in s169S(1) is used. Mr Wardle relies on the disposals by the Partnership being a "disposal of the whole or part of a business" within s169I(2)(a). However, a sale of shares would need to be within s169I(2)(c) as a "disposal of one or more assets consisting of (or of interests in) shares or securities of a company". At that stage there is no use of the definition of a business in assessing the eligibility for relief of a disposal of shares. A disposal of shares is a material disposal if one of four conditions is met; again, these conditions do not use the defined term, but instead are focus on whether the company is a trading company or the holding company of a trading group. Those terms have different definitions, and so to the extent that the outcome differs that is not because the meaning of "a business" is being interpreted differently; it is because a different term is used.

64. Mr Wardle then looks at the use to which the definition in s169S(1) is put in Chapter 3:

> (1) Taking, as an example, s169K(3) which relates to qualifying business disposals in the form of associated assets made by an individual, P, and reads as follows:
>
> > "(3) Condition B is that P makes the disposal as part of P's withdrawal from participation in the business carried on by the partnership or by the company or (if the company is a member of a trading group) a company which is a member of the trading group."

This places the focus on the individual's involvement in the business, defined under s169S(1), rather than the manner of his involvement (company or partnership).

(2) Similarly, in relation to s169L(3) which reads:

> "(3) This subsection applies to assets which—
>
> (a) in the case of a material disposal of business assets, are assets used for the purposes of a business carried on by the individual or a partnership of which the individual is a member,
>
> (b) in the case of a disposal of trust business assets, are assets used for the purposes of a business carried on by the qualifying beneficiary or a partnership of which the qualifying beneficiary is a member, or
>
> (c) in the case of a disposal associated with a relevant material disposal, are assets used for the purposes of a business carried on by the partnership or company."

It can be noted at (c) that the legislation applies the definition of "a business" equally to a partnership and to a company without distinction.

(3) The same can be seen in s169P(4):

> "(4) The conditions referred to in subsection (1) are—
>
> (a) that the assets which (or interests in which) are disposed of are in use for the purposes of the business for only part of the period in which they are in the ownership of the individual,
>
> (b) that only part of the assets which (or interests in which) are disposed of are in use for the purposes of the business for that period,
>
> (c) that the individual is concerned in the carrying on of the business (whether personally, as a member of a partnership or as an officer or employee of a company which is the individual's personal company) for only part of the period in which the assets which (or interests in which) are disposed of are in use for the purposes of the business, and
>
> (d) that, for the whole or any part of the period for which the assets which (or interests in which) are disposed of are in use for the purposes of the business, their availability is dependent on the payment of rent."

The wording "whether personally…" in s169P(4)(c) emphasises that the legislation is treating the various scenarios identically – whether it is a partnership or a company or an individual is unimportant. Yet HMRC are suggesting that (c) carries within it implied drafting in order to distinguish between the two.

(4) The significance of this, submits Mr Wardle, is that HMRC claim that the definition of "business" in s169S(1), used for companies and partnerships alike, requires trading to have actually commenced. However, they do not require trading to have commenced if the business is being carried on by a company. No wording is included to reconcile this conflict.

65. This fourth point suffers from the same problem identified above, in that the definition of "a business" is not used in the same way for companies.

66. I consider below each of the illustrations put forward by Mr Wardle.

(1) Section 169K applies for the purpose of qualifying business disposals that are "associated with a relevant material disposal" (s169H(2)(c)) (ie not a material disposal

of business assets within s169H(1)(a)). There is a disposal associated with a relevant material disposal if condition A1, A2 or A3 is met, and conditions B and C are met in s169K. Mr Wardle has cited condition B. However, it is worth noting that the three alternative A conditions each deal with different types of material disposals of business assets, ie the disposal of the whole or part of their interest in the assets of a partnership (in A1), the disposal of shares in a company (in A2) and the disposal of securities of a company (in A3). It is only when setting out condition B that the draftsman has started to deal in a single condition with all of these different types of disposal. This condition B in s169K(3) looks at the withdrawal from participation in the business carried on by the partnership or by the company (or, if the company is a member of a trading group, a company which is a member of the trading group). I agree with Mr Wardle that this conflation does not recognise that there may be a different threshold for the activities of the partnership or the company to qualify for relief. However, condition B is not itself seeking to set out the types of partnership or company the disposal of which are capable of qualifying for relief. It is setting out that the individual claiming relief on a disposal of associated assets must have made the disposal as part of their withdrawal from participation in the partnership or the company.

(2) For certain qualifying business disposals, namely those that do not consist of the disposal of shares or securities, relief is given only in respect of disposals of relevant business assets comprised in the qualifying business disposal (s169H(3)). Relevant business assets are those within s169L(3), other than excluded assets (and excluded assets include shares and securities). That definition sets out the assets to which it applies for the purposes of the different categories of qualifying business disposals. That to which Mr Wardle refers is s169L(3)(c), which applies where there is a disposal associated with a relevant material disposal, ie the same situation as addressed by s169K. I agree that there is some potential for confusion here; that limb refers to "assets used for the purposes of a business carried on by the partnership or company" and does not recognise that there are different routes to relief, or that a company be eligible for relief by virtue of being a holding company of a trading group and not conduct any activity itself.

(3) Section 169P contains provisions dealing with the amount of relief. It applies where, on a disposal associated with a relevant material disposal, any of the conditions in s169P(4) are met. Section 169P(4)(c) applies where the individual is involved in carrying on the business for only part of the period in which the assets which are disposed of are in use for the purposes of that business. As Mr Wardle notes, this provision does not distinguish between the different ways in which the individual might be concerned in the activity – it expressly refers to whether personally, as a member of a partnership or as an officer or employee of a company which is the individual's personal company.

67. All of these illustrations involve the situation where there is a disposal associated with a relevant material disposal within s169H(2)(c). I accept Mr Wardle's submission that the drafting of these provisions proceeds on the basis that there is no distinction between the types of activity which might qualify for relief. However, that is not to say that the provisions require that to be the case, or that HMRC's interpretation of s169S(1) gives rise to a conflict with these provisions. Instead, the reference to the activities of the individual, partnership or company is part of the background description before the relevant provision then goes on to specify the requirement, whether that be of the individual's withdrawal from participation, that the assets of the individual are used by the partnership or company or that the individual is involved for only part of the period in which the assets are used.

Objectives behind the introduction of entrepreneurs' relief – extra-statutory material

68. Both parties acknowledge that entrepreneurs' relief was introduced in 2008 as part of a wide-ranging reform of capital gains tax. I was referred to various non-statutory material in support of the parties' submissions, as set out further below.

69. I note at the outset that the circumstances in which Parliamentary material can be admitted on a question of construction are limited. It can usually only be admitted if it can be brought within the principle of *Pepper v Hart* [1993] AC 593. That case imposed narrow conditions for the admissibility of such material, which were summarized by Lord Bingham in *R v Secretary of State for the Environment, Transport and the Regions ex parte Spath Holme Limited* [2001] 2 AC 349 (at 391D-E) as follows:

> "In *Pepper v. Hart*, the House (Lord Mackay of Clashfern L.C. dissenting) relaxed the general rule which had been understood to preclude reference in the courts of this country to statements made in Parliament for the purpose of construing a statutory provision. In his leading speech, with which all in the majority concurred, Lord Browne-Wilkinson made plain that such reference was permissible only where (a) legislation was ambiguous or obscure, or led to an absurdity; (b) the material relied on consisted of one or more statements by a minister or other promoter of the Bill together, if necessary, with such other parliamentary material as might be necessary to understand such statements and their effect; and (c) the effect of such statements was clear (see pp. 640B, 631D, 634D)."

2008 Policy Notice

70. HMRC's 2008 Policy Notice includes:

> **"Background note and further details**
>
> 6. At the Pre-Budget Report the Chancellor announced a major reform of the CGT regime. From 6 April 2008 there will be a single rate of CGT of 18%. As part of this change the tax-free annual exempt amount (currently £9,200) will remain, but taper relief and indexation allowance will be withdrawn. Draft legislation relating to the changes proposed at PBR has been published on the HMRC website today.
>
> …
>
> 8. The conditions for the new relief will be based broadly on the CGT "retirement relief" (at sections 163 and 164 and Schedule 6 Taxation of Chargeable Gains Act 1992) that was phased out between 1998 and 2003, but the new rules will be simpler. But there will be no minimum age limit for entrepreneurs' relief. And in general entrepreneurs' relief will be available where the relevant conditions are met for a period of one year, instead of the retirement relief qualifying period of up to 10 years. Draft legislation will be published shortly.
>
> 9. The relief will apply to gains arising on disposals of the whole or part of a trading business (including professions and vocations, but not including a property letting business other than furnished holiday lettings) that is carried on by the individual, either alone or in partnership. Where a business is not disposed of as a going concern, but simply ceases, relief will be available on gains on assets formerly used in the business and disposed of within 3 years of the cessation of the business.
>
> 10. The relief will also apply to gains on disposals of shares (and securities) in a trading company (or the holding company of a trading group) provided that the individual making the disposal—

> • has been an officer or employee of the company, or of a company in the same group of companies, and
>
> • owns at least 5% of the ordinary share capital of the company and that holding enables the individual to exercise at least 5% of the voting rights in that company.
>
> The terms "trading company", "holding company" and "trading group" will have the same meaning as they currently do for the purposes of taper relief on business assets. Because of this, there will be no requirement to restrict the gains on shares by reference to any non trading assets held, as was the case for retirement relief."

71. HMRC's submissions based on this policy notice include:

(1) Referring to [6] and [8], entrepreneurs' relief was introduced at the same time as taper relief was withdrawn. In turn, taper relief had been introduced in 1998 at the same time as retirement relief was abolished. The history of these reforms gives context to the origin of Chapter 3.

(2) Entrepreneurs' relief was to be based on retirement relief, but simpler.

(3) The reforms in 2008 purposefully took the definition of "trading" and "trading activities" for companies from the taper relief provisions. The taper relief provisions for individuals and partners disposing of business assets did not permit relief unless the trade was being carried on.

(4) Parliament's decision to treat companies and individuals differently for the purposes of these reliefs has been a longstanding choice.

(5) Referring to [9] and [10], although a policy notice has no legal effect, it shows the policy intent that was placed before Parliament and that policy intent reflected the different treatment between individuals and companies established within taper relief.

72. Mr Wardle responds by noting that a policy notice of HMRC cannot be regarded as evidence of Parliament's intent. Moreover, it was not representative of the uniform view of HMRC on the subject in 2008, referring to evidence given by David Richardson at the committee stage (referred to below). Furthermore, material changes have been made to the reliefs throughout, demonstrating that Parliament's intent has changed.

73. I agree with Mr Wardle that a policy notice of HMRC cannot of itself assist with determining the intentions of Parliament, save to the extent that there is evidence that this notice was put before Parliament and somehow relied on, referred to or adopted by the ministerial statements in Parliamentary debates. I am not satisfied that this was the case with the 2008 Policy Notice.

74. HMRC use this 2008 Policy Notice as an umbrella under which to bring in the history of other reliefs, namely retirement relief and taper relief.

75. Prior to its repeal in 1998, paragraph 1 of Schedule 6 TCGA 1992 stated as follows in respect of retirement relief:

> ""trade", "profession", "vocation", "office" and "employment" have the same meaning as in the Income Tax Acts;
>
> "trading company" means a company whose business consists wholly or mainly of the carrying on of a trade or trades;"

76. I agree with HMRC that this definition made it clear that retirement relief was only available where the company was carrying on a trade (albeit with a "wholly or mainly" threshold), and was not available where the company was preparing to trade.

77. Upon the introduction of taper relief in 1998, paragraph 22 of Schedule A1 TCGA 1992 stated as follows

> ""trading company" means a company which is either—
>
> (a) a company existing wholly for the purpose of carrying on one or more trades; or…"

78. The definition of "trading company" was later amended by Finance Act 2002, and that definition is the same definition used in the present s165A TCGA 1992. That definition explicitly includes reference to activities taking place prior to the commencement of trade. In contrast, HMRC submit that no such provision was available within retirement relief or taper relief for an individual disposing of a business which had not yet commenced trading.

79. Paragraph 6 of Schedule 6 TCGA 1992, setting out the conditions for retirement relief, stated:

> "…the gains accruing to the individual or, in the case of a trustees' disposal, the trustees on the disposal of chargeable business assets comprised in the qualifying disposal shall be aggregated, and only so much of that aggregate as exceeds the amount available for relief shall be chargeable gains…"

80. Paragraph 12 then defined "chargeable business assets":

> ""chargeable business asset" means an asset (including goodwill but not including shares or securities or other assets held as investments) which is, or is an interest in, an asset used for the purposes of a trade, profession, vocation, office or employment carried on by—
>
> (a)the individual concerned; or
>
> (b)that individual's family company; or
>
> (c)a member of a trading group of which the holding company is that individual's family company; or
>
> (d)a partnership of which the individual concerned is a member."

81. When taper relief was introduced, paragraph 5 of Schedule A1 TCGA 1992 stated:

> "Where the disposal is made by an individual, the asset was a business asset at that time if at that time it was being used, wholly or partly, for purposes falling within one or more of the following paragraphs—
>
> (a)the purposes of a trade carried on at that time by that individual or by a partnership of which that individual was at that time a member;"

82. Thus, HMRC submit that taper relief was only available to individuals or members of a partnership where the business asset being disposed of was being used for the purpose of a trade being carried on at that time. It did not apply to activities prior to commencement of the trade.

83. Whilst I agree with HMRC's submissions as to the scope of retirement relief and taper relief, I consider that there are two matters of particular importance in the context of the present appeal:

(1) These reliefs demonstrate that different definitions and approaches have historically been used to determining the availability of relief according to whether an individual is disposing of shares in a company or other assets. That of itself is not the

same as acknowledging that the conditions were necessarily different – rather, it is that there was the possibility or scope for the provisions to operate differently. However, as regards how this may then assist with the interpretation of the definitions for entrepreneurs' relief, the 2008 Policy Notice simply says (at [8]) that entrepreneurs' relief will be "based broadly" on retirement relief, but "the new rules will be simpler". Such phrasing does not support an approach which involves a detailed analysis of the historic provisions.

(2) Furthermore, the approach within the 2008 Policy Notice, setting out the position for non-incorporated activities and companies separately (at [9] and [10]) and the description in [9] of a trading business being one that is carried on and the reference to it either being disposed of as a going concern or ceasing, do support HMRC's contention that there was no policy intent that relief be available in the same situations.

Explanatory Notes to the Finance Bill

84. The Explanatory Notes to the 2008 Finance Bill, prepared by HM Treasury and issued on 27 March 2008, are listed amongst the Bill documents which were before Parliament and they include:

> "SUMMARY
>
> 1. Clause 7 and Schedule 3 provide for a relief ("entrepreneurs' relief") so that the first £1 million of gains arising on or in connection with disposals of the whole or part of a business (including, in certain circumstances, disposals of shares or securities) are charged to capital gains tax at an effective rate of 10 per cent. The relief has effect for disposals on or after 6 April 2008.
>
> …
>
> DETAILS OF THE SCHEDULE
>
> Section 169H of TCGA - introduction
>
> 5. Subsection (1) of section 169H states that Chapter 3 of Part 5 of TCGA provides for a relief (entrepreneurs' relief) from capital gains tax (CGT). This relief is in respect of "qualifying business disposals". Section 169S(l) provides that for the purposes of Chapter 3 "a business" is a trade, profession or vocation that is carried on commercially. References to "business" in this explanatory note have the same meaning.
>
> …
>
> Section 169I of TCGA – material disposal of business assets by individual
>
> 9. Section 169I explains what is meant by a "material disposal of business assets".
>
> 10. Subsection (1) of section 169I provides that a material disposal of business assets takes place when an individual makes a disposal of business assets, which is a material disposal.
>
> 11. Subsection (2) explains what is meant by "a disposal of business assets". This can be one of three disposals:
>
> a disposal of the whole or part of a business (this is more than a disposal of assets used in a business; it requires the disposal of all or part of a business as a going concern);
>
> a disposal of assets which were used for the purposes of a business that has now ceased, provided they were in use for those purposes at the time of cessation, or of interests in such assets; or

> a disposal of shares in or securities of a company, or of an interest in such shares or securities."

85. Mr Wardle emphasises that the Treasury's explanation to Parliament framed entrepreneurs' relief as relating to gains arising on a disposal of "a business". The umbrella definition is therefore that of a business and the various types of disposal (including certain share sales) all sit within that definition. The Explanatory Note do not treat the sale of shares as being different from a sale of a business.

86. I do not find these Explanatory Notes to be helpful in the present context. They simply paraphrase the requirements of the legislation and, indeed, contrary to Mr Wardle's submission, I consider that they draw attention (at [11]) to the fact that a disposal of business assets can be one of three different types of disposals. They do not imply that the relief will operate in the same way irrespective of the legal form of the activity.

Committee stage of Finance Bill in the House of Commons

87. The clauses introducing entrepreneurs' relief were considered by the Public Bill Committee of the House of Commons in May 2008. They were led for the Government by the Financial Secretary to the Treasury, Jane Kennedy MP.

88. The minutes of the 3rd sitting include:

> "Jane Kennedy: The CGT regime that we are removing charged CGT at headline marginal rates of 10 per cent., 20 per cent. and 40 per cent, with a tax-free annual exempt amount of £9,200, as I said earlier. It had taper relief, which distinguished business assets from non-business assets. It also meant that, for those paying the highest rate of income tax, the effective rate on business assets came down from 40 per cent. to 10 per cent. after two years, the effective top rate on non-business assets for CGT. For those people in that highest-income bracket and paying the highest rate of income tax, the effective top rate after 10 years on non-business assets reduced from 40 per cent. to 24 per cent.
>
> I will return to this point in a few moments, but we believe that it is reasonable to ask those people who are benefiting from capital gains of this sort, particularly where the gain is not being reinvested in the way that was intended by the taper relief, to contribute more in taxes. The new regime will charge CGT at a new rate of 18 per cent. The tax-free annual exempt amount remains at £9,600. We are withdrawing the taper relief and indexation allowance because, as I have explained, it was effectively benefiting everybody irrespective of whether it was reinvested.
>
> There are other technical changes to simplify the rules. The entrepreneurs relief, which applies from 6 April onwards, targets business owners and material investors—in practice, anyone who has a 5 per cent. or greater shareholding—and will deliver a 10 per cent. tax rate for the first £1 million of lifetime capital gains. I believe that it remains a relatively generous regime, and bears comparison internationally."

89. Those from the 5th sitting include:

> "Jane Kennedy: I had hoped to have a very brief debate on schedule 3 stand part, if any. The hon. Gentleman has raised some new matters, but I do not accept that entrepreneurs relief is simply a rehash of retirement relief. It shares some of the same features, but it differs in a number of important respects. For example, there is a shorter and simpler qualifying period and there is no minimum age for qualification.

> In earlier debates on the schedule, we discussed why there were no transitional provisions. A period of notice of the changes was given when the announcement was made at the pre-Budget report, although I accept that entrepreneurs relief was not announced until January. There has been a period of consultation, and people had time to act if they wished to do so. The hon. Member for Runnymede and Weybridge asked why there was an officer or employee requirement, and said that that would unfairly influence behaviour in an unwelcome way. I reiterate that relief is targeted at people who have a full stake in the business. Partners have that stake. External investors in companies do not participate in the same way, and so are subject to an extra employee or officer test. It is not our intention to encourage the creation of artificial partnerships. As I have said, I will monitor the progress of entrepreneurs relief. The hon. Gentleman asked whether passive investors will simply become officers of the company. The officer or employee test is a pragmatic way to check active participation in a business. As I have said, passive investors have other tax advantage options open to them, such as the enterprise investment scheme.
>
> The hon. Gentleman asked why we should have personal company rules, and whether all new businesses will be set up as limited liability partnerships as a result. Businesses will continue to be set up in a variety of ways for a variety of commercial reasons. Tax, including the availability of entrepreneurs relief, will be just one factor that people can take into account in deciding on the business structure that is right for them. The differences between the capital gains tax rules for partnerships and companies reflect their different natures. As far as entrepreneurs relief in companies is concerned, the requirement to hold at least a 5 per cent. stake in the company strikes a fair balance.
>
> The hon. Gentleman asked why there is a test on the disposal of all or part of the business. That is part of the targeting of relief on people who withdraw from a business. Entrepreneurs relief is not intended to replicate the taper relief. As I have said repeatedly, entrepreneurs relief is aimed at entrepreneurs. If relief is to be extended to trustees who hold shares in the same company, it is right that the individual beneficiary should have a direct stake in the company, as well as being directly involved in the business as an officer or employee of the company.
>
> We have discussed the definition of "withdrawal from participation". I do not think that it is difficult to define. I am sure that the hon. Gentleman is right about lawyers seeking to argue the case, but the provisions in the schedule complement the simplified capital gains tax regime with focused tax relief for entrepreneurs. Taken together, that major reform of the capital gains tax regime will deliver a system that is more sustainable and straightforward for taxpayers, while remaining internationally competitive. Having answered as many of the hon. Gentleman's questions as I can, I hope that he will allow schedule 3 to go forward under a fair wind."

90. Based on these minutes, Mr Wardle submits that the emphasis of the discussion relates to encouraging entrepreneurs to develop businesses, rather than one treatment for partnerships and another treatment for companies depending on whether the business had commenced trading. The differences in treatment between partnerships and companies were those needed "to reflect their different natures". Whether a business has or has not commenced trading is a matter of fact rather than a feature of a partnership versus a company.

91. I consider that, given that Ms Kennedy has denied that entrepreneurs' relief is "simply a rehash of retirement relief" and said it "differs in a number of important respects" from that relief, it is difficult to avoid the conclusion that care must be taken when seeking to read across

from one relief into the other and that regard must be had to the provisions of Chapter 3 as they applied at the time of the disposal.

92. However, there is an acknowledgement that the provisions may apply to treat companies and partnerships differently, albeit that this is couched in terms of reflecting their different natures. The focus is on the level of participation required by an individual. The Financial Secretary did not address the definition of a business or the point at issue in this appeal.

House of Lords Select Committee on Economic Affairs

93. The provisions were also discussed by the House of Lords Select Committee on Economic Affairs during the committee stage for the Finance Bill 2008, the report of which included:

> "142. As for the different treatment of companies, partnerships including limited partnerships, and sole traders, David Richardson (HMRC) said "The basic principle behind the relief for all of those different situations is exactly the same, which is that the individual needs to be disposing of a share of their interest in the business … The fundamental point is the same but obviously [the relief] operates in a slightly different way, depending on the particular legal and organisational structure" (Q 338)."

94. Mr Wardle submits that the activities of setting up a business are not unique to a company or a partnership and are not particular to either their legal or organisational structures. This being the case, he submits that it was never intended that a different treatment would be introduced for partnerships and companies depending on whether or not their respective businesses had reached the point of commencing trading.

95. I consider that I should be wary of seeking to analyse this statement from Mr Richardson as though it were legislation; it is Mr Richardson's explanation of how he considers the relief operates. The difficulty illustrated by this appeal is that, where faced with the potential difference in how the rules operate between individuals and companies, any difference, no matter whether small or technical, is going to be perceived to be more than slight if it affects the outcome of whether or not relief is available. Furthermore, these statements do not address the meaning of the provision which is in issue.

Conclusions in relation to non-statutory statements

96. I am not convinced that the legislation is ambiguous or obscure, or that it leads to an absurdity. This means that the first condition which must be met before I may have regard to statements made in Parliament is not met. The 2008 Policy Notice is not, in any event, a statement made in Parliament.

97. Furthermore, given the issue which is before me, I am also strongly of the view that the effect of the statements made is not clear. They do not address specifically the question of whether activities prior to the commencement of a trade can be within the definition of "a business", and they leave open the prospect that the rules may operate differently between partnerships and companies.

Conclusions

98. I consider that the "natural and ordinary" meaning of the definition of "a business" in s169S(1) is that it requires that an individual or partnership making the disposal is disposing of something (or anything) that is, at that time, a trade and is conducted, at that time, on a commercial basis. The trade must exist at that time – it does not extend to activities which are capable of being conducted as a trade at a point in the future. I have tested this by reference to the various submissions before me, and borne in mind the relevant principles of statutory interpretation.

99. Looking at the statutory context of the definition and the language used therein:

(1) Section 169S(1) does not expressly state that pre-commencement activities are excluded. This is not determinative if the language actually used already gives rise to the interpretation that there is a trade which has commenced.

(2) I do not find the comparison with the Partnerships Acts to be helpful – s169S(1) defines "a business" for the purpose of Chapter 3 which sets out the conditions for the entitlement to entrepreneurs' relief. This must be deliberate and there is no good reason to look to definitions or use of the term in other statutes.

(3) More striking, however, is the difference which then results in the availability of entrepreneurs' relief for pre-trading activities of a partnership compared with those of company. There is no necessary reason within Chapter 3 why an interpretation must be adopted to ensure parity, and the different routes to obtaining relief indicate that it was contemplated that the outcome would not necessarily be the same dependant on legal form. The provisions dealing with a disposal associated with a relevant material disposal within s169H(2)(c) do not of themselves require such parity of treatment.

(4) I am also not satisfied that the provisions must be construed in a way which results in the relief operating differently (if that were not otherwise the natural reading of the legislation).

(5) I do not consider that the legislation is ambiguous or obscure, or leads to an absurdity. For this reason, no reference should be had to statements made in Parliament for the purpose of construing the legislation. Furthermore, whilst I have been referred to statements by the promoter of the relevant Bill, I do not consider that the effect of those statements is clear in the context of this appeal.

100. Having regard to all of the submissions, I have concluded that the words chosen by Parliament in s169S(1) require that a disposal by a partnership only constitutes a disposal of the whole or part of a business if the partnership has commenced trading. Therefore, the disposals by the Partnership were not a material disposal of business assets and do not qualify for entrepreneurs' relief.

DISPENSATION

101. For the reasons given above:

(1) Mr Wardle's confidentiality application is refused; and

(2) the appeal against the amendments made by HMRC to his self assessment for the tax year 2015-2016 is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

102. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 27 APRIL 2021