Neutral Citation: [2022] UKFTT 227 (TC)

Case Number: TC08548

FIRST-TIER TRIBUNAL
TAX CHAMBER

City Centre Tower
Birmingham

Appeal reference: TC/2020/03709
TC/2020/03710

CAPITAL GAINS TAX – section 38 TCGA 1992 – deductible expenditure – expenditure not wholly and exclusively incurred in preserving or defending title to the asset – appeal dismissed

Heard on: 5 July 2022
Judgment date: 26 July 2022

Before

TRIBUNAL JUDGE JONATHAN CANNAN
MR DEREK ROBERTSON

Between

JONATHAN MARK SLADE
JONATHAN JAMES SLADE

Appellants

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Jonathan Mark Slade appeared in person and also represented his father, Jonathan James Slade who did not appear

For the Respondents: Harry Robison of HM Revenue and Customs represented the Respondents

DECISION

INTRODUCTION

1. These appeals both concern assessments to capital gains tax ("CGT") on the disposal of land in tax year 2015-16. At the time of disposal, the land was held by the appellants in joint names. The first appellant ("JMS") is the son of the second appellant ("JJS"). The land in question was part of the estate of JJS's mother. Following the disposal, a dispute arose in relation to the land and the proceeds of sale between JJS and JMS on one side and various other family members on the other side. The dispute led to proceedings in the High Court which were subsequently compromised by way of a consent order. We describe the nature of the dispute in more detail below. The issue in these appeals is what sums can be deducted in calculating the chargeable gains on disposal of the land. In particular, whether JJS and JMS are entitled to deduct from the proceeds of sale, the payments which they made to the other family members pursuant to the consent order and the costs of the High Court proceedings.

2. A chargeable gain for CGT purposes is calculated by deducting various sums from the proceeds of sale. Section 38 Taxation of Chargeable Gains Act 1992 ("TCGA 1992") sets out what sums may be deducted. In so far as relevant, s 38 provides as follows:

> 38(1) Except as otherwise expressly provided, the sums allowable as a deduction from the consideration in the computation of the gain accruing to a person on the disposal of an asset shall be restricted to –
>
> > (a) the amount or value of the consideration, in money or money's worth, given by him … for the acquisition of the asset …
> >
> > (b) the amount of any expenditure wholly and exclusively incurred on the asset by him or on his behalf for the purpose of enhancing the value of the asset … and any expenditure wholly and exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset,
> >
> > (c) the incidental costs to him of making the disposal.

3. These appeals are concerned with s 38(1)(b). In particular, whether the sums paid by JJS and JMS pursuant to the consent order amounted to "*expenditure wholly and exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset*". HMRC say that the sums are not deductible because they were incurred in preserving or defending the appellants' entitlement to the proceeds of sale of the land, and not the land itself. In the alternative, even if the expenditure was in part incurred in preserving or defending title to the land, it was not wholly and exclusively incurred for that purpose. It is said that the expenditure was partly incurred in preserving or defending the appellants' entitlement to the proceeds of sale and partly in defending title to other land held by JMS and JJS.

4. There is no real factual dispute between the parties. We heard evidence from JMS which was not seriously challenged by Mr Robison, who appeared for HMRC. We set out our findings of fact in the next section, and then consider whether, on the basis of those findings of fact, JJS and JMS are entitled to the deductions claimed.

FINDINGS OF FACT

5. JJS's parents, Jim and Dora, owned St Peter's Farm in Didcot, Oxfordshire. The farm comprised a farmhouse, garden, grounds and farmland. Jim and Dora made mutual wills the effect of which was that on the death in 1987 of Dora, who was the survivor, JJS inherited the farmland. Dora's residuary estate comprised the farmhouse, garden and grounds which she left to her executors and trustees on trust for various family members including JJS. The executors

and trustees included JJS. The executors and the trustees did not all get on together, but it is not necessary to explore the nature of the family dispute in this decision.

6. In 1987, the farmhouse, garden and grounds were split into three separately registered titles known as the Northern Parcel, the Farmhouse and the Southern Parcel. This was done because it was intended to sell the Farmhouse, and services for electricity and water serving the farmland and access to the farmland passed over the Northern and Southern Parcels. JJS operated a commercial nursery on the farmland.

7. An application for planning permission for the Southern Parcel was made in 1987 but refused.

8. In 1988, the Farmhouse was sold to a third party and we assume that the proceeds of sale were distributed to the beneficiaries of Dora's residuary estate. At some stage there was a boundary dispute with the new owner in relation to the boundaries of the Farmhouse with the Northern Parcel and the Southern Parcel. Again, it is not necessary to explore that dispute.

9. By June 2009, JJS was the sole executor and trustee under Dora's will, the other executors and trustees having died.

10. The possibility of obtaining planning permission for the Southern Parcel was raised again in 2010. At that stage, solicitors for JJS asked the other family members who were beneficiaries of Dora's residuary estate whether they would be prepared to contribute to the costs of a planning application. Certain family members wanted nothing to do with the proposal, principally because JJS was organising it.

11. Sometime after 2010, JJS received legal advice in connection with the boundaries of the Northern Parcel and the Southern Parcel. We were told that he was advised that the two parcels of land had in fact remained part of the farmland and that JJS was therefore beneficially entitled to that land and it did not fall within the residuary trust. Subsequently, JJS was able to obtain planning permission for the Southern Parcel.

12. In 2012, JJS assented to the Northern Parcel and the Southern Parcel being transferred to himself and JMS as tenants in common. They were registered with title in joint names on what must have been a trust for sale. The evidence of JMS was that JJS was entitled to 13/20ths of the proceeds of sale and JMS was entitled to 7/20ths of the proceeds of sale. When Jim and Dora were alive, they had gifted various parcels of land to JJS and JMS in those shares. Titles to the Northern Parcel and the Southern Parcel were separately registered in the joint names of JJS and JMS.

13. JJS and JMS sold the Southern Parcel with the benefit of planning permission on 15 August 2015 for £250,000. It is that disposal which gives rise to the CGT issue on this appeal.

14. In August 2016, some of the other family members wrote to JJS asking him to account for the proceeds of sale of the Southern Parcel. Formal letters before action were sent to JJS in November 2016 and to JMS in September 2017.

15. On 12 March 2018, those other family members commenced a claim in the High Court in their capacity as beneficiaries of the residuary trust under Dora's will ("the High Court Claim"). JJS and JMS were both named as defendants, together with some of the other family members who were also beneficiaries. No relief was sought against those other family members. They were joined as defendants so that they would be bound by any judgment.

16. We can summarise the particulars of claim as follows:

(1) The claim was said to relate to breaches of trust and/or fiduciary duty by JJS as executor and trustee of Dora's estate. JMS was sued as the alleged recipient of trust assets and/or trust funds and/or as constructive trustee of trust property.

(2) The assent of the Northern Parcel and the Southern Parcel to JJS and JMS was alleged to be a breach of trust by JJS.

(3) It was alleged that JMS held the Northern Parcel and the Southern Parcel as a constructive trustee.

(4) It was alleged that the sale by JJS and JMS of the Southern Parcel and their retention of the proceeds of sale was a breach of trust by them.

17. The claimants sought the following remedies for these alleged breaches of trust and/or fiduciary duty:

(1) A declaration that JJS and JMS held the Northern Parcel and the Southern Parcel on the residuary trusts of Dora's will.

(2) An order that JJS and JMS account to the beneficiaries for the proceeds of sale of the Southern Parcel and any profits obtained from those parcels of land.

(3) In the alternative, damages for breach of trust and/or breach of fiduciary duty in a sum equal to the value of the Northern Parcel and the Southern Parcel.

18. JJS and JMS served a defence to the claim in which it was alleged that Jim and Dora had intended that the Northern Parcel and the Southern Parcel should pass to JJS together with the farmland. Jim and Dora had instructed solicitors to that effect, and did not intend those parcels of land to pass together with the Farmhouse as part of Dora's residuary estate. It was averred that as a matter of law, more particularly as a result of the rule in *Strong v Bird*, the beneficial interest in the Northern Parcel and the Southern Parcel had passed to JJS when he obtained legal title to that land. In the circumstances there was no breach of trust or breach of fiduciary duty.

19. The High Court Claim was settled shortly before the hearing by way of a consent order dated 8 August 2019 ("the Consent Order"). We were told that at least part of the reason for the settlement was because JJS was in poor health and he would not have been able to withstand the strain of a 4-day hearing, giving evidence and being cross-examined on that evidence.

20. In the Consent Order, the parties recited their agreement that the net proceeds of sale of the Southern Parcel was £221,404, subject to capital gains tax which it was agreed would be paid in full by JJS and JMS. The value of the Northern Parcel was agreed to be £86,256. JJS and JMS agreed to pay the other family members various sums "in damages". The total amount agreed to be paid was £184,596.

21. JJS and JMS also agreed to pay the claimants their costs of the High Court Claim, assessed at £55,404. Their own costs of the High Court Claim amounted to £40,981.

22. We are satisfied from the evidence before us that when the Southern Parcel was sold, JJS and JMS believed that they were the beneficial owners of the land. However, JJS must have been aware that there was a real prospect that the other family members would claim an interest in the land or the proceeds of sale and would have considered that JJS held the land as trustee of Dora's residuary estate. It seems to have been the sale of the Southern Parcel which caused the other family members to assert their rights as beneficiaries.

23. We now turn to the circumstances in which HMRC came to make the assessments under appeal.

24. On 15 January 2018 the Appellants' accountant, Mark Kirkbride & Co ("Kirkbrides") wrote to HMRC to say that JJS had omitted to disclose a CGT liability for 2015-16 arising from the disposal of the Southern Parcel. The letter included a CGT computation in connection with the disposal for both JJS and JMS on the basis that they were each entitled to 50% of the disposal proceeds. The letter was written shortly before the High Court Claim commenced. It is not clear how the calculations based on JJS and JMS each having a 50% interest in the Southern Parcel reconcile to JMS's evidence that their interests were 13/20ths and 7/20ths respectively. However, nothing turns on the extent of their interests for present purposes.

25. HMRC enquired into the matter, and on 2 October 2019 sent revised CGT calculations to Kirkbrides. Kirkbrides responded by telephone on 15 October 2019 and by letter dated 29 October 2019. In that letter, they set out details of the High Court Claim and the Consent Order. It was argued that the damages and costs paid pursuant to the Consent Order and the appellants' own costs of the High Court Claim should be allowed as a deduction in the CGT computation.

26. HMRC did not accept that the deductions claimed by Kirkbrides were properly allowable in the CGT computation. On 5 November 2019, Mr Roger Dillon of HMRC issued assessments to both JJS and JMS without any deduction in relation to the High Court Claim. The assessments to tax, which are the assessments now under appeal, were as follows:

JJS	-	£18,273
JMS	-	£ 8,448

27. The appellants both appealed against the assessments by letter from Kirkbrides dated 25 November 2019. HMRC's view of the matter remained the same, and the appellants both requested a statutory review. The assessments were upheld in review conclusion letters dated 26 August 2020. The appellants then both appealed to this tribunal by notices of appeal dated 22 October 2020.

DISCUSSION

28. The issue raised on this appeal is whether the sums paid by JJS and JMS pursuant to the Consent Order, including the claimant's costs and their own costs of the High Court Claim, amounted to expenditure wholly and exclusively incurred by them in establishing, preserving or defending their title to or rights over the Southern Parcel.

29. By the time the appellants came to lodge their notices of appeal with the Tribunal they were no longer represented by Kirkbrides. JMS told us and we accept that this was because he and his father did not consider it cost effective to retain professional advisers to pursue the appeal. The grounds of appeal state as follows:

> I believe that we should be entitled to deduct the damages and professional fees I had to pay as a result of the challenge to our legal ownership of the land sold. We made no profit from the sale of the land and it is unfair that we should be taxed on a non-existent gain.

30. In considering the grounds of appeal we shall consider the grounds relied upon by Kirkbrides when they were representing the appellants, as well as the grounds set out in the appellants' notices of appeal to this tribunal.

31. We must first consider the formal validity of the assessments. The assessments under appeal are discovery assessments pursuant to section 29 Taxes Management Act 1970 ("TMA 1970"). We are satisfied that Mr Dillon discovered that JJS and JMS had chargeable gains for 2015-16 which ought to have been assessed to CGT but which had not been assessed. Having made that discovery, we are satisfied that Mr Dillon was entitled to make the assessments pursuant to section 29 TMA 1970. The assessments were made within the time limit set out in

section 34 TMA 1970, that is within 4 years of the end of the year of asssessment. We are satisfied therefore that the assessments under appeal are formally valid.

32. We must now consider whether JJS and JMS are entitled to a deduction for the sums paid by them in relation to the High Court Claim. They have put their case by reference to the following propositions:

(1) It is not necessary for deductible expenditure to be incurred prior to the date of disposal.

(2) The High Court Claim related specifically to the disposal of the Southern Parcel and title to the Northern Parcel, and not to the administration of Dora's estate and the residuary trust as such.

(3) The other family members who received payments pursuant to the Consent Order would be taxed pursuant to extra-statutory concession D33 on the basis that they had made a part disposal of an asset. The corollary of this must be that the payments were deductible by the appellants as they related to the same underlying asset.

(4) The appellants made no gain when they disposed of the Southern Parcel. Virtually all the proceeds were paid to the other family members by way of damages and costs. It is unfair that they should be taxed on a non-existent gain.

33. Mr Robison submitted that the High Court Claim did not involve the appellants defending their title to the Southern Parcel. They had no title to lose by that stage because the land had been sold. The claim involved the appellants defending their entitlement to the proceeds of sale. Further, the claim was about how they had acted as trustees and allegations of breach of trust, not title to the land. The only issues of title in the High Court Claim concerned title to the Northern Parcel. Even if it could be said that the appellants were defending their title to the Southern Parcel, the expenditure was not wholly and exclusively incurred in that regard, but also involved preserving their entitlement to the proceeds of sale of the Southern Parcel and defending title to the Northern Parcel.

34. We consider that there is a short answer to these appeals. The sums paid pursuant to the Consent Order and the High Court Claim concerned not only the Southern Parcel but also the Northern Parcel. On any view, it cannot be said that the sums paid by JJS and JMS were wholly and exclusively incurred by them in establishing, preserving or defending their title to the Southern Parcel. They were partly paid in relation to the Northern Parcel. There is no provision for apportionment of sums paid which are not wholly and exclusively incurred for that purpose. On that basis, the appellants are not entitled to a deduction pursuant to section 38(1)(b) TCGA 1992 in computing chargeable gain.

35. The more difficult question, which does not now arise, is whether the appellants incurred expenditure in preserving or defending title to the land, or whether they were preserving or defending their entitlement to the proceeds of sale. Having heard HMRC's submission we will make some observations on that argument. However, we do so with some diffidence because we are conscious that the appellants have not been professionally represented and understandably, the submissions of JMS did not really address the issues of law raised by HMRC.

36. Putting to one side the claim in relation to the Northern Parcel, it seems to us that the High Court Claim was a claim to the proceeds of sale of the Southern Parcel. The claimants were asserting an interest in the proceeds of sale, which derived from their case that JJS had held the Southern Parcel on the residuary will trust. In order to defend that claim, JJS and JMS asserted that they had title to the Southern Parcel prior to the disposal. In substance the High Court Claim was a claim to the proceeds of sale.

37. The difficulty arises because the High Court Claim followed the disposal of the land. If it had preceded the disposal, the claim would no doubt have sought declaratory relief to the effect that JJS and JMS held the Southern Parcel on the residuary will trust, with a counterclaim by JJS and JMS for declaratory relief that they held the Southern Parcel as beneficial owners. In those circumstances, the expenditure incurred would have been deductible on a subsequent disposal of the Southern Parcel. The question which arises, is whether the fact that the claim post-dates the disposal affects the appellants' entitlement to deduct the expenditure.

38. In their statement of case, HMRC accept that expenditure paid after a disposal may still be the subject of deduction pursuant to s 38. However, they do not address the appellants' general proposition that there is no requirement for expenditure to be incurred before the disposal if it is to be deductible pursuant to s 38(1)(b). It is not immediately clear to us that the appellants are right in their general proposition that expenditure incurred after the date of disposal can be the subject of a deduction pursuant to s 38(1)(b). However, in the absence of full argument we prefer not to address that issue.

39. We should also mention the other propositions made by or on behalf of the appellants.

40. The appellants say that the High Court Claim was not about the administration of Dora's estate and the residuary will trust as such. It specifically related to the disposal of and title to the Southern Parcel. It seems to us that these matters were inextricably intertwined in the High Court Claim. That is not to say that the expenditure should therefore be treated as not being wholly and exclusively incurred on preserving or defending title to the land. A similar issue arose in *CIR v Richards Executors* 46 TC 626 which concerned a solicitor's costs of valuing stocks and shares for the purpose of paying estate duty and obtaining a confirmation in Scotland for probate purposes. The House of Lords held that the expenditure was incurred wholly and exclusively by the executors in establishing their title to the stocks and shares. We were not referred to this case, and again we prefer not to make any observation on whether, even though the administration of the residuary will trust and title to the Southern Parcel were intertwined, the expenditure would still be deductible.

41. The appellants also say that the other family members would be subject to CGT on the sums received by them pursuant to the Consent Order on the basis of extra-statutory concession D33. That concession would apply on the basis that the other family members had made a part disposal of an asset. The corollary of this must be that the payments were deductible by the appellants as they related to the same underlying asset.

42. The right to take court action for compensation or damages is an asset for CGT purposes. Consequently, where a person receives compensation there is a disposal of an asset for CGT purposes and strictly there may be no acquisition cost. ESC D33 provides a concessionary treatment where the right of action arises in relation to damage to an underlying asset. The gain may be treated as if the receipt of compensation or damages was a part disposal of the underlying asset. Where there is no underlying asset, any gain on disposal of the cause of action may be exempt up to a limit of £500,000.

43. It is not clear to us that the other family members would be liable to CGT on receipt of the damages provided for in the Consent Order. In particular, they were seeking to enforce their rights as beneficiaries under Dora's residuary will trust. They were not seeking to obtain title to the land themselves. As such, it is not clear that there was any underlying asset. It may be that their disposal of the right of action would not be taxed as a matter of concession. In any event, as Mr Robison correctly submitted, the tax treatment of damages in the hands of the other family members is irrelevant to the tax treatment of the appellants' disposal of the Southern Parcel.

44. The appellants also say that they made no gain when they disposed of the Southern Parcel. Virtually all the proceeds were paid to the other family members by way of damages and costs. It is unfair that they should be taxed on a non-existent gain.

45. The existence of a gain for CGT purposes on disposal of the Southern Parcel is to be determined by reference to the provisions of the TCGA 1992. It is generally irrelevant how the proceeds of sale are utilised. In *Burca v Parkinson (HMIT) [2001] 74 TC 125* Park J said as follows:

> If the beneficial owner of an asset sells it to a purchaser, and directs the purchaser to pay the price to a third party, the price does not thereby become excluded from the computation of the chargeable gain on the disposal by the former owner. Exactly the same is true if the purchaser pays the price to the vendor but, because of some relationship between the vendor and the third party, the vendor, upon receiving the price from the purchaser, holds it, or part of it, on trust for the third party.

46. In *Blackwell v HM Revenue & Customs* [2017] EWCA 232, the Court of Appeal considered whether, on a disposal of shares, the taxpayer could deduct expenditure incurred by him in buying his release from a personal contractual obligation to a third party restricting his ability to vote or sell those shares. The Court of Appeal held he could not. The taxpayer submitted that concepts, phrases and words used in TCGA 1992 should be given a broad commercial interpretation, and that commercial common sense should prevail if a narrow or technical interpretation would conflict with it. Briggs LJ, as he then was, said as follows:

> 22. While I accept that the capital gains tax legislation, and words, phrases and concepts used in it, including those in s.38, are generally to be interpreted on a basis consistent with business common sense, it by no means follows that there will in any particular instance be a conflict between business common sense and a careful juristic analysis of particular provisions. Even if there is, the clear language of statutory provisions by which gains are to be computed, and deductions allowed, may nonetheless prevail, even where the outcome might appear to be one which a businessman might find surprising.
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> 27. … [Section 38 TCGA 1992] is couched in cautiously restrictive terms, plainly designed to ensure that not all forms of expenditure which a businessman might think should be taken into account in identifying his chargeable gain are in fact permitted deductions.

47. These principles have been applied recently by the FTT in *Tedesco v HM Revenue & Customs* [2022] UKFTT 171 (TC) where it was held that repayment of debt prior to a disposal of company shares was not deductible pursuant to section 38 TCGA 1992.

48. The appellants are wrong to say that they are being taxed on a non-existent gain. They are being taxed because they made a disposal of a chargeable asset for CGT purposes which gave rise to a chargeable gain. The fact they made payments to the other family members pursuant to the Consent Order does not affect the calculation of that chargeable gain.

CONCLUSION

49. For the reasons given above, we must dismiss these appeals.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

50. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

Release date: 26 JULY 2022