



**TC07987**

*CAPITAL GAINS TAX – entrepreneurs’ relief – section 169I TCGA 1992 – whether Condition A satisfied – whether throughout the period of one year ending with the disposals the appellant was an employee of the company – existence of an employment – whether the employment was terminated prior to disposal – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2018/07990**

**BETWEEN**

**PETER KENNEDY**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR HER MAJESTY’S  
REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE JONATHAN CANNAN  
MR MICHAEL BELL**

**The hearing took place in public on 10 September 2020 by way of remote video hearing on the Tribunal video platform. A face to face hearing was not held because of the Covid-19 pandemic.**

**Mr Michael Ripley instructed by Cowgills Chartered Accountants for the Appellant**

**Mr Alan Hall of HM Revenue and Customs for the Respondents**

## DECISION

### INTRODUCTION

1. This appeal concerns the appellant's entitlement to entrepreneurs' relief for capital gains tax. The appellant is Mr Peter Kennedy ("Mr Kennedy") who was until August 2013 a director of an AIM listed company called Bglobal plc ("Bglobal"). In 2014-15 he made a disposal of shares in Bglobal realising a taxable gain of £2,555,589. In 2015-16 he made a second disposal of shares in Bglobal realising a taxable gain of £449,397. Mr Kennedy claimed entrepreneurs' relief in relation to both disposals in his tax returns for the relevant years. HMRC opened enquiries into those returns in January 2017 and on 24 July 2018 closure notices were issued denying the relief claimed by Mr Kennedy.

2. Relief has been refused by HMRC on the basis that Mr Kennedy was not an officer or employee of Bglobal throughout the periods of one year ending with the date of each disposal. Mr Kennedy contends that he was an employee of Bglobal throughout the periods. That is the broad issue on the appeal. It is for Mr Kennedy to satisfy us in relation to each disposal that he was an employee of Bglobal throughout the period of one year ending with the date of disposal.

3. Mr Ripley, who appeared for Mr Kennedy, relied on three propositions in order to establish entitlement to the relief:

- (1) Mr Kennedy was employed by Bglobal pursuant to a written service agreement.
- (2) The service agreement was never properly terminated.
- (3) As a matter of fact and law, Mr Kennedy's employment by Bglobal subsisted at the date of each disposal.

4. Mr Kennedy gave evidence in support of his appeal. He made a witness statement dated 2 September 2019 and gave oral evidence. He was cross-examined on his evidence by Mr Hall who appeared on behalf of HMRC. Based on Mr Kennedy's evidence and the documentary evidence before us we make the findings of fact set out below. We firstly set out some background facts which are not in dispute and then make our findings of fact relevant to the issues concerning Mr Kennedy's employment status with Bglobal and the termination of his employment.

5. In the light of our primary findings of fact we consider the question of whether, as a matter of fact and law Mr Kennedy's employment with Bglobal was terminated prior to the two disposals of shares.

### RELEVANT STATUTORY PROVISIONS

6. We can set out the relevant statutory provisions quite briefly. Provision for entrepreneurs' relief (now known as "business asset disposal relief") is contained in *section 169H Taxation of Chargeable Gains Act 1992* ("TCGA 1992") which provided at all material times as follows:

- (1) This Chapter provides for a lower rate of capital gains tax in respect of qualifying business disposals (to be known as "entrepreneurs' relief").
- (2) The following are qualifying business disposals —
  - (a) a material disposal of business assets: see section 169I,

7. A material disposal of business assets is defined by section 169I(1) to include a disposal of shares in a company, subject to certain conditions set out in section 169I (6)-(7B). For present purposes Condition A is relevant which provides as follows:

- (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.

8. There is no issue in this appeal that Bglobal fell to be treated as Mr Kennedy's personal company and was a trading company. The issue is whether Mr Kennedy was an employee of Bglobal for the period of one year ending with the date of each disposal such that section 169(I)(6)(b) was satisfied.

## **BACKGROUND FACTS**

9. Mr Kennedy has considerable experience in various technology businesses. In 1997 he co-founded a small software company, later called Utilisoft Limited and part of Utiligroup Limited. It took advantage of electricity market deregulation in the UK and Australia, providing a range of business services including energy retail software solutions, energy trading infrastructure products and early stage smart metering services. The business grew to employ 230 people.

10. In 2004 Mr Kennedy set up Bglobal Metering Limited ("BML") with a view to creating a dedicated smart metering business. BML's smart metering product collected information about customers' energy usage which was sent wirelessly to BML and then passed to the energy suppliers, ensuring that the customer received accurate bills. Customers at this stage were commercial businesses, local authorities and other public bodies and the technology enabled customers to reduce energy usage and lower bills.

11. In March 2007, Bglobal was created as a corporate vehicle through which BML would be listed on the Alternative Investment Market ("AIM") in April 2007. It was intended that the listing would provide capital to roll out BML's smart metering technology across residential markets. When Bglobal listed on AIM it had a market capitalisation of £30 million. At this stage Mr Kennedy was a director and chief executive of BML and Bglobal. He was also the largest single shareholder with some 23.66% of the shares. Bglobal strengthened its management team at the time of the listing and appointed new executive directors.

12. Mr Kennedy remained as chief executive of Bglobal until 1 May 2009 at which point he became non-executive chairman, providing support in an advisory capacity and with responsibility for strategic development. He subsequently became executive chairman.

13. In May 2010, Bglobal acquired Utiligroup Limited thereby diversifying the range of energy services accessible to customers.

14. We shall deal with Mr Kennedy's status as a director and employee of BLM and Bglobal in the next section of this decision. For present purposes, it is common ground that Mr Kennedy ceased to be a director of Bglobal following a resolution of shareholders on 15 August 2013. Mr Kennedy's son, Nicholas Kennedy was the finance director at that time and he ceased to be a director in October 2013.

15. Mr Kennedy made the following disposals of his shares in Bglobal:

- (1) On 12 September 2014 Mr Kennedy disposed of shares for £2,766,589 realising a chargeable gain of £2,566,589. After deducting the annual exempt amount, he had a taxable gain for 2014-15 of £2,555,589.

(2) On 16 September 2015 Mr Kennedy disposed of shares for £460,497 realising a chargeable gain in the same amount because he had no base cost. After deducting the annual exempt amount, he had a taxable gain for 2015-16 of £449,397.

16. Both these disposals arose in the context of distributions of capital by Bglobal following sales of various parts of its business. In September 2014 Bglobal de-listed from AIM following the sale of two business units and made a capital distribution to shareholders. Bglobal then entered members' voluntary liquidation on 17 August 2015. The disposal of shares on 16 September 2015 arose on the final distribution to members. Bglobal was then dissolved on 17 January 2018.

17. Mr Kennedy made claims to entrepreneurs' relief in respect of each disposal of shares in his tax returns for 2014-15 and 2015-16. On 23 January 2017 HMRC opened enquiries into those returns. Closure notices were issued on 24 July 2018 in which HMRC disallowed Mr Kennedy's claims for relief on the basis that he was not an officer or employee of Bglobal throughout the period of one year ending with each disposal.

18. Mr Kennedy lodged notices of appeal against the closure notices on 21 August 2018. The conclusions in the closure notices were confirmed in HMRC's review letter dated 14 November 2018 and the appeals were notified to this Tribunal on 10 December 2018.

#### **EVIDENCE AND FINDINGS OF FACT**

19. In this section we describe the evidence and some of our findings of fact relevant to contentious matters. In particular, the contractual arrangements which Mr Kennedy had with Bglobal and the circumstances in which Mr Kennedy ceased to be a director of Bglobal in August 2013. Our findings of fact in relation to the principal issues, which to a large extent depend on the inferences we draw from findings of primary fact, are contained in the discussion section which follows.

20. It is common ground that Mr Kennedy had the following roles with Bglobal and with BLM prior to the incorporation of Bglobal in the period 2004 to 2013:

Period to April 2007	Director and chief executive
April 2007 – May 2009	Managing director
May 2009 – Nov 2010	Non-executive chairman
Nov 2010 – August 2013	Executive chairman

21. Mr Kennedy was described as chief executive for certain periods and as managing director for certain periods. Those terms were effectively used inter-changeably and did not signify any different role being undertaken.

22. The evidence did not include any contractual documentation for the period prior to March 2007 and it is not clear whether Mr Kennedy had a written contract of employment before that date. The first evidence of a written contract was an unsigned service agreement between Mr Kennedy and Bglobal dated 22 March 2007 ("the 2007 Agreement"). The date was inserted in handwriting. Pursuant to the 2007 Agreement Mr Kennedy was to be employed and to serve as managing director of Bglobal. He was required to devote the whole of his time and attention to the affairs of the company. His salary was expressed to be £150,000 pa which was to include director's fees. The following provisions were relevant to termination of the agreement:

#### **Appointment, duration and notice**

3.2 The appointment will continue subject as follows unless and until terminated by either party giving to the other not less than [6] months' written notice.

3.3 Without prejudice to clauses 17.1 and 17.2 at its absolute discretion the Company may terminate this Agreement and the Executive's employment with immediate effect at any time by making a payment of basic salary and benefits at the rate applicable at the Termination Date (less PAYE deductions) in lieu of the notice period referred to in clause 3.2, or remainder of the notice period if at the Company's request the Executive has worked or been excluded pursuant to clause 17.2 during part of the notice period.

### **Termination**

17.1 The Company may terminate the Executive's employment immediately by summary notice in writing without compensation (notwithstanding that the Company may have allowed any time to elapse or on a former occasion may have waived its rights under this clause) if [the agreement then sets out various circumstances in which the company can terminate by summary notice, including for example a serious breach of the agreement]

### **Resignation as director**

20.1 The Executive will on termination of his employment for any reason at the request of the Board give notice resigning immediately (but without prejudice to any claim he may have arising out of the termination of the Executive's employment):

20.1.1 as a director of the Company and all such Group Companies of which he is a director...

20.2 If notice pursuant to clause 20.1 is not received by the relevant company within seven days of a request by the Company, the Company is irrevocably authorised to appoint a person to execute any documents and to do everything necessary to effect such resignation or resignations on the Executive's behalf.

23. Mr Kennedy's evidence was that service agreements were put in place in relation to all executive directors as part of the listing requirements when Bglobal was floated on AIM. We accept that evidence. The date of the 2007 Agreement was consistent with it being drafted at the time of the flotation. However, we do not know whether the service agreement was executed in these terms.

24. Mr Kennedy's role altered in May 2009 when he ceased to be managing director and became non-executive Chairman. Mr Anthony Barnes took over as chief executive officer.

25. Mr Kennedy described his contractual arrangements with Bglobal from May 2009 onwards when he became non-executive chairman. In particular, he described entering into a contract for services using a personal services company, PBK Consulting Limited. We got the impression from Mr Kennedy's evidence generally, that when it came to his employment status and his status as a consultant he was not a person with an eye for detail. In 2009 he probably saw this as administrative detail which was not a matter of great concern to him. For example, Mr Kennedy's witness statement contained the following, rather vague description of his contractual arrangements in 2009:

"In addition to the contract for services, I continued to receive remuneration of £5,000 pa (paid from BML). As a founder of a small business I had never put in place a formal contract of employment. I understood that I was subject to the same terms and conditions of employment as all other Executors (*sic*) of Bglobal PLC and that the service contract I had was on identical terms to that of other Board Executives. Between 2009 and 2012 Bglobal PLC sought to implement standard service contracts with all of its executives, including me. I believe these were referred to as "Master Exec Contracts" within the company. I have been unable to find a

copy of my service agreement with Bglobal PLC. Within my bundle of documents ... I have provided a copy of the service agreement of my son, Nicholas Kennedy, who was Finance Director of the company at the same time. The service agreement with Nicholas Kennedy was entered into in October 2009.”

26. The evidence included what was expressed to be a draft consultancy agreement (“the Consultancy Agreement”). The date on the cover page appears as “xx May 2009” and the draft is unsigned. There was no copy of a final signed agreement but it seems likely from the DLA letter which we reference below that a consultancy agreement became effective on 12 June 2009. The parties in the draft agreement were expressed to be Bglobal and Mr Kennedy “trading as PBK Consultancy” and it provided for the supply of Mr Kennedy’s consultancy services relating to the development of the Bglobal group and its strategy. The Consultancy Agreement was deemed to have commenced on 1 May 2009. The following clauses are relevant for present purposes:

## **2 Appointment and term**

2.1 On and subject to the terms of this Agreement, the Company hereby appoints the Consultant, and the Consultant hereby agrees to provide consultancy services to the Company on matters relating to the development of the Group and its strategy, as requested by the Company from time to time...

2.2 The Appointment under this Agreement shall be deemed to have commenced on 1st May 2009 and shall continue thereafter until properly terminated in accordance with clause 6.

## **3 Scope of the Appointment**

3.1 During the continuance of the Appointment the Consultant shall:

...

(c) comply where relevant with every rule of law, every regulation of the FSA and/or the London Stock Exchange and every regulation or code of the Company adopted in relation to dealings by directors ... in shares, debentures or other securities of the Company and the use to which unpublished price sensitive information affecting the shares, debentures or other securities of the Company and any other company may be put;

## **5 Fees**

5.1 In consideration of the provision of the Services hereunder, the Company shall pay to the Consultant from 1st May 2009 a monthly fee of £6,000.00.

## **6 Termination**

6.1 Notwithstanding any other provision of this Agreement, either party may terminate this Agreement by not less than six months notice in writing

6.2 This Agreement shall be subject to termination by the Company by summary notice in writing to the Consultant if the Consultant

6.2.1 commits any breach of clause 3.1(c) or any serious breach ... of this Agreement ...

## **7 Resignation as director**

7.1 The Consultant’s Representative will, on termination of this agreement for any reason at the request of the Board give notice resigning immediately without claim for compensation (but without prejudice to any claim he may have for damages for breach of this agreement):

7.1.1 as a director of the Company ...

7.2 If notice pursuant to clause 7.1 is not received by the relevant Company within seven days of a request by the Company, the Company is irrevocably authorised to appoint a person to execute any documents and to do everything necessary to effect such resignations on the Consultant's Representative's behalf.

## **8 General**

8.1 This Agreement constitutes a contract for services and not a contract of employment...

27. In practice the agreement for the provision of consultancy services by Mr Kennedy was treated as being between Bglobal and PBK Consulting Limited and payments were made by Bglobal to that company. Mr Kennedy was employed and paid a salary by PBK Consulting Limited, in addition to his director's fees paid by BML

28. Whilst there is no signed version of the Consultancy Agreement, the precise terms of the agreement are not significant. We are satisfied from the evidence that the intention of the parties was that when Mr Kennedy became non-executive chairman he should provide services to Bglobal through PBK Consulting Limited.

29. Mr Kennedy said that he was advised that a separate consultancy agreement would be more efficient for tax purposes and that he would pay less tax if he provided his services in that way. He understood that several of the directors adopted the same structure. He described the structure as involving one role, but dividing his remuneration between his directorship and his consultancy. He said that from May 2009 onwards he did not distinguish his role as non-executive chairman from his role as a consultant.

30. Mr Kennedy's evidence was that he also entered into a new service agreement with Bglobal in 2009. There was no copy of any such agreement in evidence but Mr Kennedy relies upon certain "draft master executive agreements" from 2009 and 2010.

31. The evidence included an unsigned service agreement dated 1 November 2009 on the cover page. The cover page and signature page identified this as a service agreement between Mr Kennedy and Bglobal. However, the body of the agreement identified Nicholas Kennedy as the employee being appointed to serve as chief financial officer.

32. Mr Ripley explained on instructions that during HMRC's enquiry, the November 2009 document had been produced to HMRC. It had been edited by Mr Kennedy to show his name on the cover page and signature page prior to being provided to HMRC. Apparently, this was done to show the form of Mr Kennedy's service agreement with Bglobal. Whatever the circumstances, this was an extremely unwise course of conduct. We were provided with a copy of the unedited version.

33. The evidence also included service agreements in similar form for other directors of Bglobal as follows:

(1) An unsigned agreement dated 1 May 2009 appointing Mr Anthony Barnes as chief executive officer.

(2) An unsigned agreement dated 1 February 2010 appointing Mr Tim Jackson-Smith as commercial director and general counsel.

34. All three unsigned service agreements ("the Unsigned Agreements") were obtained by Mr Kennedy from an old computer drive he had kept. He had access to the documents because he was on the remuneration committee. They were kept in a file with the name "Master Exec Service Agreements". We were told that original signed documents would have been kept by Bglobal, and Mr Kennedy thought they would have been destroyed following

the liquidation of Bglobal. Mr Kennedy did not retain a signed copy of his own service agreements or his consultancy agreement.

35. The Unsigned Agreements contained similar termination provisions to those contained in the 2007 Agreement, although the notice period was increased from 6 months to 12 months.

36. There was unchallenged evidence which we accept that Mr Kennedy's remuneration as an employee and/or director of Bglobal was as follows:

<b>Tax Year</b>	<b>Earnings £</b>
2008-09	166,500
2009-10	19,375
2010-11	6,000
2011-12	6,000
2012-13	n/k
2013-14	2,253

37. It appears from the evidence, and we find that when Mr Kennedy became non-executive chairman, his remuneration as a director from May 2009 onwards was £6,000 pa, rather than the £5,000 mentioned by Mr Kennedy in his witness statement. Clause 5.1 of the Consultancy Agreement made provision for fees of £6,000 per month which equates to £72,000 pa. Mr Kennedy could not explain the difference between that sum and a sum of £120,000 he referred to in oral evidence.

38. Mr Kennedy told us that his consultancy fees through PBK Consulting Limited were £120,000 pa. He said he was advised that his remuneration should be the split in this way. In seeking to justify the small amount paid for his position as a director he suggested that he did not want to take more out of the company "because this would affect the bottom line" and could therefore have implications on a sale of the business. Payments to a consultancy would not have the same effect because on a sale the company could simply terminate the consultancy.

39. The accounts of Bglobal for the year ended 31 March 2014 were in evidence. They show that Mr John Grant replaced Mr Kennedy as chairman on 15 August 2013. They also include the remuneration of directors. Mr Grant's remuneration was £97,106 and a note indicates that £90,625 was invoiced by Hawkwood Capital LLP of which Mr Grant was a member. Similarly, the remuneration of Mr Fawkes and Mr Newman, who were non-executive directors, was £46,000 and £35,833 respectively of which £45,000 and £30,833 were invoiced by Energypro Limited and West Wood on Derwent Limited.

40. It was not immediately clear whether Mr Grant was an executive or non-executive chairman. However, Note 8(ii) of the 2014 Accounts refers to the removal of Mr Kennedy as a director of Bglobal and describes him as the "Executive Chairman". In the same note, it is recorded that Mr John Grant was appointed as a director and "Chairman". We infer from this that Mr Grant was a non-executive chairman. The chief executive at this time was Mr Tim Jackson-Smith.

41. It is clear from the 2014 accounts that non-executive directors were paid most if not all of their remuneration through other corporate entities, and we infer that their services were



provided under consultancy agreements between Bglobal and those corporate entities. We infer that executive directors did not have consultancy agreements with Bglobal.

42. Mr Kennedy told us that remuneration for several directors was split between a service agreement and a consultancy agreement. He gave this evidence based on his understanding as to what he had been told by his son Nicholas. Mr Kennedy did not volunteer in his evidence that it was only non-executive directors who used consultancy agreements. We do not consider that Mr Kennedy was seeking to mislead in any way, but it is another example of Mr Kennedy's lack of knowledge in relation to administrative detail. In the course of closing submissions following the evidence Mr Ripley told us on instructions that the use of consultancy agreements was adopted by non-executive directors but not by executive directors. We accept that is the case. It is the finding we have made by reference to the evidence generally.

43. It seems likely to us that the £72,000 pa identified in the Consultancy Agreement was the consultancy fee paid when Mr Kennedy was first appointed as non-executive chairman in May 2009. When he became executive chairman in November 2010 the same structure was maintained. If Mr Kennedy is right that his consultancy fees were at the level of £120,000 pa, it is possible that is because they were increased to reflect the fact that he was fulfilling the role of executive chairman rather than non-executive chairman. However, the evidence before us included the accounts of PBK Consulting Limited for the year ended 31 March 2014, although we were not taken to those accounts. They include comparative figures for the year ended 31 March 2013. The turnover shown in those accounts was as follows:

y/e 31 March 2013	£ 85,329
y/e 31 March 2014	£ 64,833

44. It is common ground that no payments were made to Mr Kennedy or PBK Consulting Limited after 21 August 2013. It seems therefore and we find that the consultancy fees paid by Bglobal were at the rate of approximately £85,000 pa in 2012/13 when Mr Kennedy was the executive chairman.

45. When Mr Barnes the chief executive officer left Bglobal, Mr Kennedy stepped in as executive chairman again. We were not provided with the date that Mr Barnes left Bglobal. However, the documentation in the electronic hearing bundle included a hyperlink to a page on the Companies House website from which we can identify that Mr Barnes resigned as a director in November 2010. Mr Kennedy said that he did not require or receive any extra remuneration at this stage because he was more concerned with adding value to the business from which he would benefit as the largest single shareholder. He did however retain the benefit of the Consultancy Agreement.

46. The evidence included an email to Mr Kennedy discussing the drafting of "Master Executive Agreements". It was not clear who this email was from or when it was sent. Mr Kennedy suggested that it was from "Tony", which we take to be Anthony Barnes the chief executive officer, and that it dated from 2012 or 2013. In fact, it must have been sometime prior to November 2010. The email does nothing more than confirm that there was some discussion about the terms of executive contracts which does not take matters further for the purposes of this appeal.

47. In 2013 there was a divergence of opinion between the directors as to the future strategy of Bglobal. A majority of the board and the shareholders proposed to sell the company's businesses but Mr Kennedy disagreed with that proposal. The upshot was that Mr

Kennedy was removed as a director of Bglobal at an extraordinary general meeting of shareholders on 15 August 2013.

48. On 21 August 2013, DLA Piper solicitors acting on behalf of Bglobal wrote to PBK Consulting and Mr Kennedy. The heading of that letter referred to a consultancy agreement between (1) Bglobal, (2) PBK Consulting and (3) Mr Kennedy, said to be dated 12 June 2009. The letter reads as follows:

“...We are instructed to write to you concerning the Consultancy Agreement under the terms of which PBK Consulting has been providing to our client the services of Mr Kennedy - which are in addition to the duties that Mr Kennedy also performed as a director of the Company.

On 15 August 2013 at a general meeting of our client various resolutions were passed which included the removal of Mr Kennedy as a director of the Company. Both PBK Consulting and Mr Kennedy should treat this letter as notice given on behalf of the Company to terminate the Consultancy Agreement with immediate effect.

As a consequence, our client will, in due course, make payments due to you in respect of any fees earned by you but unpaid for the period up to and including 15 August 2013.

Our client considers that it is entitled to lawfully terminate the Consultancy Agreement in accordance with clause 6.2 on the basis our client considers that during the period immediately before the shareholders' meeting referred to above Mr Kennedy may have committed an act or acts placing him in breach of clause 6.2.1 of the Consultancy Agreement. Specifically, Mr Kennedy may have breached clause 3.1(c) of the Consultancy Agreement and/or otherwise committed a serious breach of the Consultancy Agreement.

Clause 3.1(c) of the Consultancy Agreement compels Mr Kennedy to comply with every rule of law, every regulation of the FSA and/or the London Stock Exchange and every regulation or code of our client adopted in relation to dealings by directors in shares, debentures or other securities of our client and the use to which unpublished price sensitive information affecting the shares, debentures or other securities of our client may be put.

Our client is currently investigating these issues and we anticipate being instructed to write to you again shortly on these matters.”

49. Bglobal lodged a form with Companies House on 22 August 2013 headed “Termination of Appointment of Director”. This referred to Mr Kennedy “resigning” as a director, but we are satisfied that he did not do so and that he was in fact removed as a director by the shareholders at the general meeting.

50. BML issued a P45 to Mr Kennedy on 28 August 2013, identifying his leaving date as 15 August 2013 with total pay to date of £2,253. This was the relevant portion of Mr Kennedy’s director’s fees at the rate of £6,000 pa. BML issued the P45 because it was treated as the employer for tax and PAYE purposes. We understand it would make inter-company charges to Bglobal for sums paid out.

51. Mr Kennedy said that he took advice from his sister at this time. She had some experience of employment matters in her role as an advisor to the National Union of Journalists. Mr Kennedy told us that he was advised by his sister that sending a P45 did not have the effect of terminating his employment and that Bglobal had not gone through the necessary processes to validly terminate his employment. There was no evidence before us from Mr Kennedy’s sister as to the advice she gave at this time.

52. We accept that Mr Kennedy did take advice from his sister and her advice was that his employment had not validly been terminated. However, we do not know what documentation or other material Mr Kennedy's sister had before her when she provided this advice.

53. Bglobal's accounts for the year ended 31 March 2014 show Mr Kennedy ceasing to be a director on 15 August 2013. A note to the accounts shows costs of £131,550 incurred in relation to the removal of Mr Kennedy as a director and refers to subsequent challenges by Mr Kennedy. Mr Kennedy did not recall making any challenge to his removal as a director. He was asked in cross-examination whether he had tried to call an EGM to try and have himself reinstated as a director. Initially, Mr Kennedy said he had no recollection of so doing. Later in his evidence, after he had taken an opportunity to check the Reuters News Service, Mr Kennedy acknowledged that he did call an EGM on 15 October 2013, but with a view to removing two of the directors.

54. Mr Kennedy's evidence was that following the letter from DLA he heard nothing more from Bglobal about any investigation. We accept that evidence. He ceased to be paid any further amounts whether by way of director's fees, consultancy fees or otherwise. He received no payment in lieu of notice. At that stage, the directors were moving to sell the business.

55. Similar allegations to those made against Mr Kennedy were made against Nicholas Kennedy and Nicholas was removed as a director on 22 October 2013. Nicholas, advised by Mr Kennedy's sister, commenced a claim against Bglobal in the employment tribunal. The claim was settled although we do not know the basis of the claim or the terms on which it was settled.

56. Mr Kennedy appeared quite sanguine about the allegations that had been made against him in the DLA letter, despite the seriousness of those allegations. He said that the shareholders were entitled to remove him as a director in any event, but that they had never particularised the allegations against him. He said that he did not commence a claim in the employment tribunal because the Bglobal businesses were being sold and he would get value for his shares from those sales. Nicholas, in contrast was not a shareholder. It seems clear and we find that for whatever reason Mr Kennedy never seriously considered making a claim against Bglobal.

57. Mr Kennedy maintained that after August 2013 he continued to work on behalf of Bglobal. He continued talking to his son and other people in the company, he continued looking at strategy and had dealings with suppliers. He maintained that he did this pursuant to his employment contract and stressed that he had been advised by his sister that his contract had not been terminated. He said he was not concerned that he would not be paid for this work because he owned 23% of the company. However, he acknowledged that he did not report to anyone at Bglobal in relation to these activities.

58. We are not satisfied that Mr Kennedy was working pursuant to what he considered was an ongoing employment contract. In our view it is unlikely he would do so without making that clear to Bglobal. More likely is that he knew that what he was doing was in the best interests of the company and would help him to realise full value for his shares.

59. Cowgill Holloway were Mr Kennedy's accountants and they submitted Mr Kennedy's tax return for 2013-14 on 10 June 2014. It showed a gross salary from employment with Bglobal of £6,000 and no income from PBK Consulting Limited. An amended return for 2013-14 was submitted on 20 January 2015. This showed gross income from employment with Bglobal of £2,253 and also the following narrative in the "white space" on the form:

“Bglobal PLC employment – additional information My employment was terminated on 15 August 2013”

60. Mr Kennedy’s tax return for 2014-15 was submitted on 30 January 2016 and showed employment income of £5,745 received from PBK Consulting Limited. His tax return for 2015-16 was submitted on 2 January 2017. These returns included the relevant disposals of shares in Bglobal and claims to entrepreneurs’ relief. Mr Kennedy identified in the white space that he was a director of various companies but that he did not receive payments or benefits from those companies. He did not identify any employment with Bglobal from which he did not receive any payments or benefits.

61. Sometime, probably in early 2016, Mr Kennedy took advice from Eversheds solicitors. Eversheds had originally been Bglobal’s solicitors but by the time Mr Kennedy was removed as a director they had been replaced by DLA Piper. We were not told what prompted Mr Kennedy to seek this advice.

62. Mr Kennedy wrote to HMRC on 18 March 2016. This letter was sent on the basis of advice from Cowgills and Eversheds. Mr Kennedy referred to the claim for entrepreneurs’ relief made in his tax return for 2014-15 in order to “disclose further details regarding the basis on which [the claim] has been made”. He went on to set out the case which he is putting forward in this appeal. Namely, that he had two separate contracts with Bglobal. A consultancy agreement and a service agreement and that the service agreement had never been properly terminated. He asserted that Bglobal was in repudiatory breach of the service agreement and he had not accepted that repudiatory breach. In the circumstances he continued to be an employee of Bglobal. Mr Kennedy said that the reason this letter was sent to HMRC at this time was because he had been advised that the situation ought to be brought to the attention of HMRC.

## DISCUSSION

63. In light of the evidence and our findings of fact we must consider whether Mr Kennedy’s employment with Bglobal subsisted until the date of each disposal, namely 12 September 2014 and 16 September 2015. We shall consider that question by reference to the three propositions relied on by Mr Ripley to establish Mr Kennedy’s entitlement to entrepreneurs’ relief which may be framed as follows:

- (1) Was Mr Kennedy employed by Bglobal pursuant to a written service agreement?
- (2) If so, was the service agreement properly terminated?
- (3) As a matter of fact and law, did Mr Kennedy’s employment with Bglobal subsist at and until the date of each disposal.

64. The first issue is whether Mr Kennedy was employed by Bglobal on 15 August 2013, the date he was removed as a director and on 21 August 2013 when his consultancy agreement was terminated. It is only if Mr Kennedy was employed by Bglobal on those dates and his employment continued after those dates that Mr Kennedy could satisfy Condition A for entrepreneurs’ relief.

65. The term “employment” is defined in *section 169S(5) TCGA 1992* as having the meaning given by *section 4 Income Tax (Earnings and Pensions) Act 2003* which provides as follows:

- 4(1) In the employment income Parts “employment” includes in particular—
  - (a) any employment under a contract of service,
  - (b) any employment under a contract of apprenticeship, and

(c) any employment in the service of the Crown.

(2) In those Parts “employed”, “employee” and “employer” have corresponding meanings.

66. It was common ground that what amounts to employment under a contract of service involves applying common law principles including the well-established distinction between a contract of service and a contract for services (see for example *Weight Watchers (UK) Limited v HM Revenue & Customs* [2011] UKUT 433 (TCC)). In the present appeal, however the issue does not involve distinguishing between a contract of service and a contract for services. Essentially, the question is whether there was a contract at all, and if so what were its terms. The question of whether any contract was validly terminated or subsisted until the disposals also involves the application of common law principles.

67. We are satisfied that Mr Kennedy had a written service agreement with Bglobal from April 2007 until May 2009. We do not know what the terms of that service agreement were, but we consider it likely that it contained the same or similar terms as the 2007 Agreement, including the termination provisions. We reach that conclusion based on the fact that the draft agreement was dated in manuscript, suggesting that it was likely to be in a final form ready for signature, and the termination provisions were in similar form to the termination provisions in the Unsigned Agreements for Mr Nicholas Kennedy, Mr Barnes and Mr Jackson-Smith.

68. Mr Ripley submitted that the terms of Mr Kennedy’s employment after May 2009 are a question of fact. He relied upon the terms of the 2007 Agreement and the Unsigned Agreements and submitted that whatever the contractual arrangements were, they would have required written notice of termination which was clearly not given.

69. Mr Hall accepted that there was a contract of services in 2009 onwards, but submitted that it was not reduced to writing and that it “did not go beyond Mr Kennedy’s entitlement to director’s fees”.

70. We have found that non-executive directors were paid director’s fees together with consultancy fees pursuant to separate consultancy agreements, using personal service companies. We are satisfied that in May 2009, when Mr Kennedy became non-executive chairman his contractual arrangements altered significantly. He adopted the arrangement of being paid directors fees together with consultancy fees paid to PBK Consulting Limited. From May 2009 onwards, Mr Kennedy received director’s fees at the rate of £6,000 pa. That payment was paid in respect of his duties for holding the office of director. The larger part of his income from Bglobal came from the Consultancy Agreement with PBK Consulting Limited. It was pursuant to the Consultancy Agreement that Mr Kennedy provided services in connection with the development of Bglobal and its strategy.

71. Clearly, Mr Kennedy’s 2007 Agreement did not fit into that structure. It provided for him to serve as managing director and to devote the whole of his time and attention to the affairs of Bglobal. He was no longer serving as managing director and the vast majority of his time with the business was being remunerated through the consultancy agreement. Looking at the circumstances as a whole, we find that in May 2009 there must have been a common intention or mutual understanding between Mr Kennedy and Bglobal that the 2007 Agreement would no longer govern the relationship between the two parties.

72. We are not satisfied that Mr Kennedy entered into any other written agreement in May 2009 governing his position as a director of Bglobal or the work he was doing for Bglobal. There is no reason to suppose that non-executive directors would have service agreements in the same form as executive directors. In our view, from May 2009 Mr Kennedy simply served in the office of director with an entitlement to director’s fees. His position as a director

was terminable according to company law and the articles of association of Bglobal. It was not suggested that anything other than a vote of shareholders was required to remove Mr Kennedy from his office as a director.

73. We must now consider the position in November 2010 when Mr Kennedy became executive chairman. We know that Mr Kennedy's remuneration from Bglobal remained the same at £6,000 pa for the director's fees to which he was entitled. However, the Consultancy Agreement continued and Bglobal continued to pay PBK Consulting Limited for Mr Kennedy's services. By March 2013 he was being paid at the rate of £85,000 pa. The fact that the Consultancy Agreement continued and the only remuneration Mr Kennedy received by virtue of being a director remained at £6,000 pa suggests and we find that no other service agreement was entered into by Mr Kennedy and Bglobal. That position was anomalous because we have found that executive directors did not use consultancy agreements. The anomaly arose because Mr Kennedy was a non-executive chairman who then became an executive chairman and the Consultancy Agreement simply continued.

74. On 20 January 2015 when Mr Kennedy's amended tax return was submitted it seems clear that Mr Kennedy considered that his employment with Bglobal had terminated on 15 August 2013. In our view that was a correct interpretation of events. His position as a director had ceased on that date when he was removed by the shareholders. There was no other employment at that time. In so far as Mr Kennedy's position as a director might be considered an employment for the purposes of section 169I TCGA 1992, we find that it was terminated when he ceased to be a director. No other formalities were required.

75. Based on the evidence as a whole, we are not satisfied that there was any employment contract between Mr Kennedy and Bglobal in the period between November 2010 and 15 August 2013. It was not suggested that Bglobal failed to comply with any formality necessary to remove Mr Kennedy as a director.

76. In the circumstances, it is not necessary for us to consider whether Mr Kennedy's employment contract was validly terminated on or after 15 August 2013.

77. Mr Ripley had submitted that if there was a contract of employment incorporating similar termination provisions to the draft agreements referred to above then that contract was never properly terminated by Bglobal. He relied heavily on the judgment of the Supreme Court in *Société General v Geys* [2012] UKSC 63, and a High Court judgment in *Sunrise Brokers LLP v Rodgers* [2014] EWHC 2633 (QB) in which *Geys* was applied.

78. One issue in *Geys* ("the repudiation issue") which is relevant for present purposes was whether, in the context of employment law, the dismissal of an employee in repudiatory breach of contract would itself terminate the contract even if the repudiation was not accepted by the employee.

79. In relation to the repudiation issue in *Geys*, Lord Wilson with whom the majority of Justices agreed, distinguished what were described as "the automatic theory" and "the elective theory" of terminating a contract of employment:

63. In the absence of any direct authority of real weight at this level, the court is required to make a difficult and important choice between a conclusion that a party's repudiation (albeit perhaps only an immediate and express repudiation) of a contract of employment automatically terminates the contract ("the automatic theory") and a conclusion that his repudiation terminates the contract of employment only if and when the other party elects to accept the repudiation ("the elective theory"). It is common ground that, whichever theory be chosen, it should apply equally to wrongful repudiations by employers (i.e. wrongful dismissals) and wrongful repudiations by employees (i.e. wrongful resignations)...

80. Lord Wilson carried out an extensive review of the authorities and concluded that the elective theory which applied to contracts generally, also applied to contracts of employment.

81. In relation to the termination issue Lady Hale, with whom the majority of Justices agreed described that issue as follows:

50. Paragraph 8.3 deals with termination by the Bank and payment in lieu of notice. Such PILON clauses are very common in contracts of employment and no doubt this clause is in a form which is also common. Its object is to dispense with the period of notice. The employer “reserves the right to terminate your employment with immediate effect by making a payment to you in lieu of notice”. It says nothing about whether and how the employee is to be notified that his employment is at an end. Is it enough that the payment in lieu is actually made? Or is something more than that required? And if so, what? The resolution of these questions is of great importance to the large numbers of employees and employers who are party to PILON clauses in this form.

...

54. ...The question therefore becomes, to what notification was the employee entitled under the express or implied terms of his contract of employment?

82. Lady Hale summarised her views on the termination issue in these terms:

57. Whatever the test to be applied, it seems to me to be an obviously necessary incident of the employment relationship that the other party is notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate. These are the general requirements applicable to notices of all kinds, and there is every reason why they should also be applicable to employment contracts. Both employer and employee need to know where they stand. They both need to know the exact date upon which the employee ceases to be an employee.

83. Mr Ripley submitted that Mr Kennedy’s contract of employment subsisted until at least 16 September 2015 when the second disposal of shares was made. There was a repudiatory breach of contract by Bglobal but Mr Kennedy never accepted that breach. The fact he did not work for Bglobal and was not paid by Bglobal after 21 August 2013 was irrelevant. It did not amount to acceptance of the repudiation. He further submitted that no written notice was given to Mr Kennedy and nothing approaching the sort of notice described by Lady Hale in *Geys* had been given. There was not even any payment in lieu of notice which was present in *Geys*, but held to be insufficient to terminate the written contract in that case.

84. We have recorded these submissions for the sake of completeness, but as we have said they are not relevant on the facts as we have found them. We might add that it is not clear to us that the principles described in *Geys* can apply in circumstances where both parties to a contract of employment proceed for a long period of time on the basis that it has been terminated, in this case from 15 August 2013 to 12 September 2014 and thereafter to 16 September 2015. During that period neither party asserted the existence of the contract to the other or performed any obligations required by the contract. Mr Ripley made forceful submissions to the contrary but it is not necessary for us to deal with the issue and we prefer not to do so.

## **CONCLUSION**

85. For the reasons given above we are satisfied that Mr Kennedy was not an employee of Bglobal at the time he disposed of his shares and was not entitled to entrepreneurs' relief in relation to those disposals. In the circumstances we dismiss the appeal.

## **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

86. 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: 5 JANUARY 2021**