Neutral Citation: [2024] UKFTT 00029 (TC)

Case Number: TC09022

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2022/12320

Entrepreneur's Relief (now business asset disposal relief) – single share held by first-named trustee of settlement who was also a director and life tenant – no shareholding in personal capacity as required by s169S(3)(a) CGTA 1992 – relief refused by HMRC – appeal dismissed

Heard on: 15 December 2023
Judgment date: 4 January 2024

Before

TRIBUNAL JUDGE ALASTAIR J RANKIN MBE
MS ANN CHRISTIAN

Between

TRUSTEES OF THE PETER BUCKLEY SETTLEMENT

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Kenneth A Rogers of Proud Goulbourn, Chartered Accountants

For the Respondents: Mr Paul Hunter, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The form of the hearing was by video with the consent of the parties using the Tribunal video hearing system. The documents to which we were referred are an electronic Hearing Bundle containing 443 pages (which included HMRC's Statement of Case dated 13 November 2022 and a copy of the Settlement Deed dated 31 March 1999), HMRC's Skeleton Argument dated 4 December 2023, and an electronic bundle of papers submitted by Mr Rogers.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

BACKGROUND

3. The 2015/16 Self-Assessment Tax Return for the Peter Buckley Settlement received by HMRC on 31 January 2017 contained a claim for Entrepreneur's Relief (ER) on the sale of the single share in Peter Buckley Clitheroe Ltd (PBCL) which company had been incorporated on 2 June 2009. The company's annual return showed that one ordinary voting share had been issued to Peter Buckley. A subsequent return to June 2013 showed that Mr Buckley transferred the share to the Peter Buckley Settlement on 9 September 2012. The annual return to June 2016 showed that the Settlement transferred the share to Progrezion (UK) Ltd on 8 November 2015.

4. The Peter Buckley Settlement was created on 31 March 1999 by Peter Buckley with Kenneth Rogers and Philip Jones as the Original Trustees. According to the Trust Deed Peter Buckley is the principal beneficiary, and the income is payable to him during his life. Clause 5.1 of the Settlement states:

> "Subject to all the trusts powers and provisions of this settlement and if and so far as (for any reason whatever) not wholly disposed of by it the Trust Fund and the income of it shall be held (as to both capital and income) upon trust for Rebecca Mott absolutely."

Rebecca Mott is the daughter of Peter Buckley. At some unspecified date Kenneth Rogers retired as a trustee and Peter Buckley was appointed as a trustee together with Philip Jones.

5. HMRC concluded that Peter Buckley was therefore the qualifying beneficiary. PBCL was a trading company and Peter Buckley was shown as a director from 2 June 2009 to 9 November 2015. There was only one ordinary voting share issued in the company which was issued to Mr Buckley on 2 June 2009 and then transferred to the Settlement on 9 September 2012. Mr Buckley did not hold any shares in PBCL as an individual.

6. HMRC wrote to Mr Buckley and his agent, Proud Goulbourn, on 17 January 2018 enclosing an enquiry under Section 9A TMA 1970 into the Settlement's 2015/16 Self Assessment Tax Return. This enquiry was opened to check the Settlement's ER claim, with a request for a copy of the Trust Deed along with details of any alterations made to it and why the trustees considered they met each of the requirements to qualify for ER.

7. Mr Rogers of Proud Goulbourn, the Settlement's agent, responded on 18 April 2018 enclosing a copy of the Trust deed and advising that other than a retirement and appointment of Mr Buckley as a trustee there had been no changes. Mr Rogers stated that the trustees believed that

"the disposal qualified for entrepreneurs relief in that the asset consisted of shares in a qualifying beneficiaries (sic) trading company" and further advised that Mr Buckley was "the only beneficiary in a pre 2006 interest in possession trust in which the beneficiary has the absolute interest".

8. On 12 June 2018 HMRC wrote to Mr Rogers setting out the position in Sections 169J (4) and 169S (3) of the Taxation of Capital Gains Act 1992 (TCGA 1992). HMRC advised that on the basis of the information available to them, the company only issued one share which had been held by the Settlement since 2012 and that as Mr Buckley had not held the requisite 5% shareholding for the period of 1 year within 3 years leading up to the date of disposal, the disposal did not meet the requirements to qualify for ER. Accordingly, HMRC disallowed the relief claimed.

9. Mr Rogers responded on 20 July 2018 advising that he believed that HMRC's position was not correct in this case as the one share issued represented 100% of the voting rights held by a pre-2006 interest in a possession trust, that Mr Buckley was the only beneficiary and had the voting rights via the trust of 100% of the issued share capital at the time of the sale. Accordingly, both the legal and equitable rights of the share was in Mr Buckley's hands.

10. HMRC responded on 10 August 2018, referring to their Internal Guidance from the Capital Gains Manual at 64050 and advised that they could not agree Mr Roger's analysis that the voting rights condition was met and sought agreement that ER was not due or if they could not agree, a detailed analysis of why HMRC's view was incorrect.

11. Between 10 August 2018 and 31 May 2019, there was correspondence between HMRC and Mr Rogers giving their respective interpretations of the legislation and their position on whether ER was due.

12. On 29 January 2020, HMRC wrote to Mr Roger's as follows:

"In response to your letter dated 19th December 2019, the point I am clarifying is that one of the conditions for the trustees to claim ER relief on a disposal of shares, is that the beneficiary must own 5% of the shares in their own right. You have previously mentioned aspects of the legislation added by FA2018, however FA2018 added two conditions to the existing conditions;

- Entitlement to 5% of distributable profits
- Entitlement to 5% of net assets

Alongside the requirements of 5% of share capital and 5% of voting rights. Please see further guidance at CG63985 and CG64050.

The guidance at CG4050 is quite clear to distinguish the conditions that were added from 29 October 2018 from the conditions that existed before.

The facts I see from reviewing the case is that;

- The trust disposed of 1 share it owned in Peter Buckley Clitheroe Ltd (PBCL) for £1,449,745.00 on 09/11/2015.
- There was only 1 share in PBCL at the point of sale, evidenced by companies house.
- The beneficiary of the Peter Buckley Settlement is the individual Peter Buckley.
- The trustees prior to the sale held 1 share. The beneficiary held none in his own right.

- Therefore the condition of the beneficiary holding 5% of the shareholding in PBCL is not met, as it is not possible. There was only 1 share which was owned by the trust.

Your argument as to why ER is due is that by removing the veil of incorporation Peter Buckley as the beneficiary owned the one share in PBCL. Had the share been appointed to the beneficiary and held for the required amount of time then hypothetically Peter Buckley as the beneficiary could have claimed ER on the share when he sold it. However, this was not the case.

The trust disposed of the share on 09/11/15, not to the beneficiary but to a third party. Therefore, the claim for ER by the trustees does not meet the condition and is not allowable."

13. On 18 May 2021 HMRC issued a closure notice which included the following in respect of the sale of Peter Buckley Limited:

> "Before this amendment your tax return showed tax due of: £140,463.20
>
> After this amendment your tax return shows tax due of: £391,742.96
>
> The difference between these amounts is: £251,279.76
>
> The difference of £251,279.76 is the result of the amendment to your Self Assessment tax"

14. Mr Rogers then informed HMRC that the closure notice should have referred to the sale of PBCL. HMRC acknowledged their error by letter dated 28 July 2021 though the figures remained the same.

15. Mr Rogers appealed the closure notice by letter dated 24 August 2021. Mr Brian Lawson, a Compliance Caseworker offered Mr Rogers a review and following further correspondence between HMRC and Mr Rogers, Mr Colin Vallance, a Direct Tax Review Officer with HMRC by letter dated 17 June 2022 upheld the additional tax assessed by the closure notice.

16. Mr Rogers, on behalf of the Trustees of the Peter Buckley Settlement appealed the closure notice to this Tribunal by Notice of appeal dated 17 July 2022..

THE LEGISLATION

17. Section 169H(1) of TCGA 1992 as amended provides for a lower rate of capital gains tax in respect of qualifying business disposals to be known as "Entrepreneurs Relief" which was renamed "business asset disposal relief" by the Finance Act 2020. Sub-paragraph (2) states that the following are qualifying business disposals—

> (a)a material disposal of business assets:
>
> (b)a disposal of trust business assets: and
>
> (c)a disposal associated with a relevant material disposal.

Sub-paragraph (3) goes on to provide that in the case of certain qualifying business disposals, business asset disposal relief is given only in respect of disposals of relevant business assets comprised in the qualifying business disposal.

18. Section 169I(1) states that there is a material disposal of assets where (a) an individual makes a disposal of business assets and (b) the disposal of business assets is a material disposal.

19. Sub-section (2) includes the provision that a disposal of business assets is -

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

(b) … or

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

Subsection (3) requires the business to have been owned throughout the period of two years ending with the date of disposal.

20. The legislation then continues by stating that a disposal within paragraph (c) of sub-section (2) is a material disposal if condition A, B, C or D is met. Condition A, contained in sub-paragraph (6) is that, throughout the period of 2 years ending with the date of disposal –

(a) the company is the individual's personal company and is either a trading 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.

21. Condition B, contained in sub-paragraph (7) is that the conditions in paragraph (a) and (b) of subsection (6) are met throughout the period of two years 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 three years ending with the date of disposal.

22. Section 169J provides that ER is also available to trustees of settlements who dispose of trust property that consists of either shares in, or securities of, a qualifying beneficiary's personal trading company or assets used in a qualifying beneficiary's business.

23. Subsection (3) is as follows:

(3) An individual is a qualifying beneficiary if the individual has, under the settlement, an interest in possession (otherwise than for a fixed term) in –

(a) the whole of the settled property, or

(b) a part of it which consists of or includes the settlement business assets disposed of.

24. Subsection (4) is as follows:

(4) In relation to a disposal of settlement business assets within paragraph (a) of subsection (2) the relevant condition is that, throughout a period of 2 years ending not earlier than 3 years before the date of the disposal—

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

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

25. Subsection (5) provides that:

(a) The settlement business assets are used for the purposes of the business carried on by the qualifying beneficiary throughout the period of two years ending not earlier than three years before the date of the disposal, and

(b) The qualifying beneficiary ceases to carry on the business on the date of disposal or within the period of three years before that date.

26. Section 169S (3) states:

(3) For the purposes of this Chapter a company is a "personal company" in relation to an individual if –

(a) the individual holds at least 5% of the ordinary share capital of the company,

(b) by virtue of that holding, at least 5% of the voting rights in the company are exercisable by the individual, and

(c) either or both of the following conditions are met –

(i) by virtue of that holding, the individual is beneficially entitled to at least 5% of the profits available for distribution to equity holders and, on a winding up, would be beneficially entitled to at least 5% of the assets so available, or

(ii) in the event of a disposal of the whole of the ordinary share capital of the company, the individual would be beneficially to at least 5% of the proceeds.

27. HMRC accepts that all the conditions in the legislation to qualify for ER have been met apart from the requirement for Mr Buckley to hold at least 5% of the ordinary share capital.

ARGUMENTS ON BEHALF OF THE TRUSTEES

28. Mr Rogers informed the Tribunal that the Peter Buckley Settlement dated 31 March 1999 is an interest in possession trust that in structure was common at that time. It normally consisted of two trustees but only one beneficiary apart from the ultimate beneficiary. In many areas it is very similar to a simple bare trust where the beneficiary is not only entitled to the interest but also to the capital.

29. While there is only one shareholder the share is held jointly by Mr Buckley and Mr Jones. Mr Rogers claimed that although Mr Jones is a joint holder with Mr Buckley as a trustee he does not have a vote but Mr Buckley as a trustee has a vote, thereby holding his share in two capacities, one as trustee and one having the same right as any other shareholder in a company. It is this voting right that results in Mr Buckley holding the share in his own right not the ownership of the share itself.

30. Mr Rogers referred the Tribunal to the First-tier Tribunal decision in *Guy Holland-Bosworth v HMRC* [2020] UKFTT331 (TC). He informed the Tribunal that following a reconstruction of the share capital Mr Holland-Bosworth held 50 B ordinary shares in his personal company, which represented 5% of the share capital in the company. He held those shares in his own right but the articles of association explicitly stated that B shareholders were not entitled to vote in the general meeting of the company. The First-tier Tribunal held that his disposal of shares in his personal company did not qualify for ER because the B shareholders did not carry votes exercisable in the general meetings of the company and therefore could not exercise at least 5% of the voting rights in the company. Mr Rogers claimed that this decision showed that the entitlement to the voting rights was one of the

definitive requirements to claim ER and in the present appeal Mr Buckley held the voting rights.

31. Mr Rogers maintained that the purpose of subsection (4) of section 169J is to show that Mr Buckley has a legal interest in the share that has been sold as well as the equitable interest he has under the Settlement. Mr Buckley does not hold the share in his sole name but in joint names with Mr Jones, but Mr Buckley has the voting rights.

32. If the Tribunal decides that the Settlement's claim for ER does not meet the strict requirements of TCGA 1992, Mr Rogers suggested the Tribunal should apply two dicta. In *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] A.C. 300 Lord Wilberforce on the interpretation of statutes said:

> "'What are clear words' is to be ascertained on normal principles: these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and the scheme of the relevant Act as a whole, and its purpose may, and indeed should, be regarded."

And in *IRC v Duke of Westminster* [1936] AC Tomlin J said that in Revenue cases there is a doctrine that the Court may ignore the legal position and regard what is the substance of the matter.

33. Where the result of applying the literal interpretation the resulting outcome would be unjustified, then the substance of the matter should be considered.

ARGUMENTS ON BEHALF OF HMRC

34. HMRC contended that the matters under appeal are purely a matter of fact. ER was renamed in Finance Act 2020 with effect from 6 April 2020. The new name is Business Assets Disposal relief. The Finance Act 2008 introduced ER for gains arising from a material disposal of business assets by individuals and the trustees of certain settlements and disposals of other business assets associated with a material disposal of business assets where certain conditions are met.

35. HMRC submitted that for disposals occurring on or after 23 June 2010 gains which qualify for ER are charged at a rate of 10%. The amount of ER is subject to a lifetime limit and the amount in respect of a gain arising in the 2015/16 tax year is £10,000,000. In respect of any qualifying disposal the amount of relief depends on: "the extent to which gains relate to disposals of business assets (as opposed to investments), and the total amount of relief given on any previous qualifying disposals."

36. For the purpose of ER 'business' is defined at TCGA92 section169S(1) as "a trade, profession, or vocation, that is conducted on a commercial basis and with a view to the realisation of profits." They further submitted that it is clear from the legislation and not under dispute that claims for relief must be made on or before the first anniversary of the 31 January following the tax year in which the qualifying business disposal is made. HMRC acknowledged that the claim was made within the time limits.

37. HMRC submitted that ER is available to trustees of settlements who dispose of trust property that consists of either shares in, or securities of, a qualifying beneficiary's personal trading company or assets used in a qualifying beneficiary's business but relief is only available where the individual has a life or absolute interest in possession under the trust, or under part of the trust which includes the property in question and the following conditions are satisfied:

> "the asset must have been used for the qualifying beneficiary's business for at least 2 years ending within the 3 years up to the date of the trustees' disposal of the asset, the

qualifying beneficiary must have ceased to carry on that business on the date of the disposal or within the period of 3 years before the date of disposal, the qualifying beneficiary must have had the interest in possession throughout the relevant 2-year period."

38. Section 169S states that a company is an individual's personal company if the individual: "holds at least 5% of the ordinary share capital of the company and that holding gives them at least 5% of the voting rights in the company".

39. HMRC accepted that Mr Buckley had been a director of the company from 2 June 2009 until 9 November 2015, but the one issued share was held by Mr Buckley in his capacity as a trustee of the Settlement from 9 September 2012 until 9 November 2015. As Mr Buckley did not own any shares in the company in his own right the requirements of section 169S were not met.

40. HMRC's position was according to Mr Hunter clear and is supported by the clear and unambiguous legislation: Mr Buckley was not a qualifying beneficiary as he did not hold any shares as an individual.

DISCUSSION AND DECISION

41. Both parties agreed that the only question to be decided by this Tribunal was whether the one share in PBCL held by the Settlement of which Mr Buckley was one of the trustees and the sole life tenant qualified Mr Buckley to claim that he owned at least 5% of the capital.

42. Mr Buckley held several positions each a separate legal entity. He was a director of PBCL, the only share issued by PBCL was registered in his name, he was a trustee of the Settlement and he was the only life tenant of the Settlement.

43. Mr Rogers accepted that Mr Buckley held the only share as a trustee of the settlement. This gave Mr Buckley a fiduciary duty to consult with his co-trustee before casting a vote at any meeting of PBCL. He also had a duty to consider the interests of Mrs Mott as the ultimate beneficiary.

44. As a matter of trust law, the registered owner of a trust asset (ie the trustee/s) do not own the asset personally. That is the very essence of a trust - the legal ownership and beneficial ownership are split. Mr Buckley was not the only beneficiary of the Settlement and therefore did not own the share personally at the date of the transfer.

45. The trustees did have the power to bring the trust to an end in favour of Mr Buckley, but they had not done so by 8 November 2015. At that date, the share belonged to the trust.

46. The Tribunal has considered the dicta of Lord Wilberforce in the *Ramsey* decision quoted in paragraph 32 above but considers the clear intention of Parliament was that to qualify for ER Mr Buckley must own at least 5% of the shares and voting rights in his personal capacity. At no time did Mr Buckley hold the shares in his personal capacity. Likewise, the words of Tomlin J in the *Duke of Westminster* decision also quoted in paragraph 32 above do not allow this Tribunal to disregard the clear intention of Parliament.

47. As Mr Buckley did not own the single share in his personal capacity as required by section 169S(3) TCGA 1992 HMRC were correct to disallow the claim for ER. Accordingly, the appeal is dismissed and the additional capital gains tax of £251,279.76 remains due for payment.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

ALASTAIR J RANKIN MBE
TRIBUNAL JUDGE

Release date: 04th JANUARY 2024