[2012] UKFTT 86 (TC)

TC01782

Appeal number: TC/2010/6391

CAPITAL GAINS TAX – application for permission to amend grounds of appeal to challenge valuation previously agreed – application allowed

FIRST-TIER TRIBUNAL

TAX

GRAHAM MICHAEL WILDIN **Appellant**

- and -

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

TRIBUNAL: Mrs B Mosedale (TRIBUNAL JUDGE)

Sitting in public at 45 Bedford Square London on 12 December 2011

Mr Wilden in person

Miss H McCarthy, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. In the course of a preliminary hearing in front of me the Appellant asked for leave to amend his grounds of appeal. This decision notice sets out my reasons for allowing that application.

2. On 3 August 2010, Mr Wilden lodged an appeal with this Tribunal against a decision on review dated 9 July 2010 which upheld an amendment to his self-assessment tax return for the year to April 2003 by closure notice. The amendment was to increase his liability to capital gains tax by £83,701.60. The capital disposal at issue was the disposal by him of the goodwill of his accountancy business, Wilden & Co, on 1 April 2003 to a connected company Wilden & Co Ltd. (It was not explained to me why Mr Wilden did not claim roll-over relief on the disposal of the goodwill). The closure notice was dated 26 April 2010 and followed an enquiry which was opened on 10 January 2005.

3. Mr Wilden's business had commenced in 1981, with no goodwill. However, due to the indexation revaluation rules in s 35(2) Taxation of Capital Gains Tax, the base cost of the goodwill on disposal has to be taken as the market value of it as at 31 March 1982. Mr Wilden claimed this was £516,940. HMRC considered it to be £75,000 and issued the closure notice on that basis.

4. The closure notice recorded the value of Mr Wilden's share of the business on 1 April 2003 as £1,400,000. Actual market value was relevant because the disposal was between connected parties. The value of £1.4million was taken from Mr Wilden's self assessment return as HMRC did not dispute Mr Wilden's estimation of the goodwill's market value in 2003. Mr Wilden was to use his £1.4million valuation as the base cost of the shares in 3 of his subsequent self assessment returns as he made partial disposals of his shareholding in Wilden & Co Limited in 2004 and 2008 and a final disposal in 2009.

5. The review letter of 9 July 2010 from HMRC states that:

> "The issue on which agreement cannot be reached is the actual value of the goodwill to be used in the computation at A and C above".

A and C above referred to the £516,940 value of the goodwill as at 31 March 1982. The letter goes on to set out the disagreement: HMRC thought the figure should have been £75,000.

6. Mr Wilden's grounds of his appeal were stated to be that:

> "The valuation given by me as at March 1982 was correct. The valuation put forward by HMRC was wholly incorrect."

He also stated:

> "the value of goodwill as at March 1982 should be £516,940" in the box for the result that the appellant is seeking from the Tribunal.

7. No where in Mr Wilden's letter of appeal to HMRC or to the Tribunal is there mention of any dispute as to the value of the goodwill at the date of *disposal*. The gist of Mr Wilden's evidence at the preliminary hearing before me was that at the point the review was carried out and the appeal lodged there was no dispute about this figure. All parties accepted that the £1.4million was correct.

8. The appeal progressed towards hearing. Directions were given that both parties would have leave to adduce evidence "as to the valuation of the goodwill of accountancy practices". On 7 October 2011, HMRC served on Mr Wilden an expert report by a Ms A Hennessey setting out her opinion on the market value of the goodwill in Wilden & Co as at 31 March 1982. Mr Wilden did not serve an expert witness report.

9. However, his response to HMRC's witness report was that he wished to introduce new evidence and he wished HMRC's expert witness to give a view of the valuation of the goodwill of the practice as at the date of its sale in 2003. His reasons were stated to be "all the negotiations between myself and HMR&C had been on the basis of valuation on a multiple of recurring fees, but as they are now changing that to a completely different method then they must also get their 'expert' to advise on the transfer value as at 31 March 2003."

Is leave of the Tribunal required?

10. At the hearing, I gave Mr Wilden further leave to adduce expert witness reports as to how accountancy practices should be valued. However, it appeared to me that, by asking HMRC's expert to give an opinion about the 2003 value Mr Wilden was really seeking to raise a new ground of appeal: his original ground was that his 1982 valuation was correct and HMRC's was wrong. His new claim was that if HMRC's 1982 valuation was correct then the 2003 valuation was too high. If he was right on either of these points it would lead to a reduction in the CGT assessment which was at the root of his appeal. The question on which I reserved my opinion was whether he should be given such leave.

11. I am satisfied that, up until his email of 19 October 2011 to HMRC, although Mr Wilden's appeal was against the CGT assessment, the ground of his appeal was solely that HMRC's valuation as at 31 March 1982 of the goodwill of Wilden & Co was too low. An appellant must state his grounds of appeal so that HMRC knows the case that it has to meet in its Statement of Case and at the hearing. So to raise the question of the valuation as at April 2003 Mr Wilden needs the leave of this Tribunal to amend his grounds of appeal. Unless I give him such leave he will not be able to challenge the 2003 value at the hearing.

HMRC's objections

12. HMRC objected to Mr Wilden being given leave to amend his grounds of appeal. Their grounds for objecting were:

- They disagreed with his contention that Ms Hennessey had used a different method of valuation to the one which HMRC had used from the start of the dispute.

- The £1,400,000 valuation as at 5 April 2003 was given by Mr Wilden and HMRC have agreed it and the tribunal has no jurisdiction to re-open this;

- Later tax liability of Mr Wilden has been agreed by HMRC on the basis of the £1,400,000 valuation.

13. I consider whether any of these grounds should lead to leave being refused. I proceed on the assumption that, in general, apart from these objections, leave should be given unless the delay and increased costs in the proceedings resulting from a new ground of appeal is outweighed by the potential unfairness if it is excluded; and that Mr Wilden's new ground of appeal must have at least some prospect of success, for it should not be admitted if it does not.

(1) Delay to and increased cost in the proceedings

14. I take into account that allowing Mr Wilden to introduce into the appeal the question of the 2003 value at this late stage of proceedings will inevitably set back the hearing date and involve HMRC in a great deal more work. They would, at the very least, need to obtain Ms Hennessey's opinion on the 2003 value, something which was not previously in dispute. My view is that the extra costs are not of great significance to the decision I have to make, in that they are costs that HMRC would have had to meet if Mr Wilden had raised the 2003 valuation as one of his original grounds of appeal: HMRC do not suggest that Mr Wilden could not have raised the 2003 valuation as a ground of appeal in 2010.

15. An objective of the tribunal is to ensure that a tax assessment is in accordance with the law. Where one party seeks to introduce a new, arguable, ground of appeal it must normally be right to allow the grounds of appeal to be amended, even though it will delay proceedings, if there is sufficient time for the other party to address the new ground. This case has not yet been set down for hearing and so there will be time for HMRC to address the 2003 valuation, and therefore in this case neither the delay nor extra costs are grounds on which leave to amend the grounds of appeal should be refused.

(2) Is it an arguable point?

16. Mr Wilden's case in his email of 19 October was that Ms Hennessey had valued the goodwill in 1982 as a multiple of net profits. However Mr Wilden stated in his email that HMRC had always agreed with him that the proper valuation was a multiple of net fees. The issue between them, by implication, was merely the multiple to be used. HMRC thought the multiple should be 1 and Mr Wilden thought it should be 3.5.

17. HMRC's case was that, on the contrary, it was both their position and Ms Hennessey's that the goodwill should be net fees multiplied by one and minus net assets. The only difference (in their view) between the HMRC's officer's opinion and their expert's opinion a small difference in how net assets should be calculated.

18. It was also their opinion that the question of whether net assets should be deducted from the figure arrived at by net fees times a multiple was in issue from the start. Mr Wilden's view is that net assets should not be deducted and that if he had deducted them from the 2003 valuation it would have been £1,000,000 rather than £1,400,000 and this would make a substantial difference to his CGT liability on the disposal of the goodwill.

19. I take the view that by itself there is nothing to suggest that the value of the goodwill of Mr Wilden's business in 1982 would bear any resemblance to its value on disposal in 2003. Ignoring the changing value of money, which indexation and taper relief are intended to compensate, it is clear that in 21 years a great many changes may have occurred and there is no intrinsic reason why a tribunal, deciding that Mr Wilden had overvalued it in 1982 would of necessity find it was also overvalued by him in 2003.

20. Mr Wilden's point, however, is that it would not be fair if the valuations were calculated by a different methods. Although all methods of valuation are intended (or should be) to arrive at an accurate valuation and therefore it does not necessarily follow that a one method of valuation will necessarily lead to a different valuation to another method, nevertheless the reality is that this might very well happen.

21. So I agree that the Tribunal hearing the substantive appeal may consider that the capital gains tax liability should be calculated using same method of valuation of the goodwill in both 1982 and 2003. (Of course, were that method to include multiples, that does not mean that the same multiples would necessarily be used for both valuations as, for instance, the valuation of the goodwill in 2003, after some 22 years' operation might, for instance, justify a higher multiple than the valuation of the business in 1982 when the business had been in existence for less than one year.)

22. Furhter, so far as HMRC contend that Ms Hennessey had not used a different method of valuation in her expert report to the one which HMRC had used from the start of the dispute, I conclude that this is not relevant to the question of whether Mr Wilden should be allowed to raise a new ground of appeal. HMRC do not dispute that the question of whether the net assets should be deducted from a valuation based on a multiple is an issue in respect of the 1982 valuation and has been so from the start: if HMRC are right on deduction of net assets I find this means that there is at least an arguable case that the valuation in 2003 was too high. I conclude that the correctness of the 2003 valuation is at least an arguable point in that (at least) there is an argument whether net assets should have been deducted from the figure.

(3) Is it one this Tribunal has jurisdiction to hear?

23. But is it a point that this Tribunal has jurisdiction to hear? The 2003 valuation which Mr Wilden now wishes to challenge is one which he himself put forward (in his self assessment return for 2003 and in the three later self assessment returns already mentioned) and there must be an issue whether the Tribunal has any jurisdiction to consider the matter.

S 31 TMA

24. The scheme of the Taxes Management Act that there is no right of appeal against a self assessment. The only method of correcting an incorrect self assessment is to file a new self assessment. The appeal rights are contained in s 31 TMA which (in so far as relevant) only gives Mr Wilden a right of appeal against

> "(b) any conclusion stated or amendment made by closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return)"

Or

> "(d) any assessment to tax which is not a self-assessment."

25. The closure notice issued to Mr Wilden on 22 April 2010 amended his tax return by increasing the taxable capital gain to £230,759 from £21,505. This increase in liability to CGT is something which Mr Wilden has the right to appeal: therefore the fact that the 2003 valuation was proposed by him in his self assessment return and accepted by HMRC does not in my view by itself means that he may now not challenge it in his appeal against the CGT assessment issued by HMRC. In other words his appeal is against the increase in tax liability: his new ground of appeal is that the 2003 valuation used by HMRC in arriving at their conclusion was wrong. I do not think there is anything in s 31 to deprive this Tribunal of jurisdiction to hear that ground of appeal.

Section 49F TMA

26. HMRC were of the opinion that s 49F TMA deprived the tribunal of jurisdiction. This section provided:

> "(1) This section applies if HMRC give notice of the conclusions of a review…
>
> (2) The conclusions are to be treated as if they were an agreement in writing under s 54(1) for the settlement of the matter in question.
>
> (3) The appellant my not give notice under s 54(2) (desire to repudiate or resile from agreement) in a case where subsection (2) applies.
>
> (4) Subsection (2) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under s 49G."

27. Section 54 provided that the consequences of an agreement under s 54 was that:

> "the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner of had discharged or cancelled it, as the case may be."

28. This Tribunal would have no jurisdiction to determine a matter already determined by this tribunal: therefore it has no jurisdiction to determine a matter settled by a s54 agreement. This means that this tribunal has no jurisdiction over the "matter in question" if the review letter of 9 July 2010 is to be treated as a s54 agreement by virtue of s 49F TMA. But s 49F (4) provides that this does not apply "to the extent that" the appellant notifies an appeal.

29. The "matter in question" is defined in s 49I as "the matter to which an appeal relates". It is HMRC's view that the matter in question was the 1982 valuation. In their view, the review letter acted as a s54 agreement save only to the extent that it related to the 1982 valuation, and that therefore the 2003 value (as it was included in the review letter) was to be treated as already determined by tribunal.

30. I find that the conclusion of the review was that "the decision should be upheld". That decision was the decision in the closure notice which increased Mr Wilden's CGT liability to £83,701.60. The reviewing officer refers to the computations supplied with the closure notice and states she is in full agreement with them.

31. I think a distinction must be drawn over the matter under appeal and the grounds of the appeal. The matter under appeal is Mr Wilden's tax liability and in particular the increase of £83,701.60 in liability to CGT, which was stated in the closure notice and in his notice of appeal. His *ground* of appeal was that HMRC's 1982 valuation was wrong.

32. In my view, s 49F applies to a matter under appeal and not the grounds of the appeal. In my opinion, there is nothing in s 49F which would fetter the Tribunal's discretion in allowing Mr Wilden to raise a new ground of appeal in challenge to a closure notice against which he has already appealed. His appeal has, in accordance with s 49F, meant that the closure notice and in particular its increase in his tax liability by the stated amount is under appeal and not to be treated as a matter settled by a s 54 agreement.

33. To reach any other conclusion would be anomalous as HMRC are free to seek to amend their statement of case and sometimes are given leave to do so: for Appellants to be prevented from amending their grounds of appeal in appropriate cases would be unfair and cannot have been the result intended by s 49F.

34. In conclusion, I consider that I have the jurisdiction to allow Mr Wilden to amend his grounds of appeal.

(4) Overriding objective of fairness and justice

35. The remaining issue is whether it is fair to allow Mr Wilden to amend his grounds of appeal. Tribunal's overriding objective is to deal with cases fairly and justly. HMRC's case is that it is not fair or just to allow Mr Wilden to challenge at this late stage the 2003 valuation because he has used this valuation elsewhere in his tax affairs and HMRC have accepted this because they consider it right and thought that it was informally at least agreed between HMRC and Mr Wilden.

36. Although HMRC did not adduce evidence of this, Mr Wilden did not dispute HMRC's assertion of it, and I find that in December 2004 Mr Wilden redeemed for £150,000 150,000 shares in the Wilden & Co Ltd; in June 2008 he redeemed a further £450,000 shares in cash and on 5 April 2010 he disposed of his remaining shareholding claiming a loss of some £800,000.

37. Because the contribution of the goodwill to the new company was consideration for his shares in it, the value of the goodwill as at 1 April 2003 is the base cost for the value of the shares that Mr Wilden later disposed of.

38. In brief, if the Tribunal in this appeal were to agree that the £1,400,000 2003 valuation of the goodwill was too high, Mr Wilden would not pay the right amount of tax overall. He would pay the right amount of CGT on the 2003 transfer at issue in the appeal but the CGT gains/losses claimed on the year end 2004, 2008 and 2010 disposals would be wrong as he would benefit from a higher base cost than that to which he would be entitled. So he would pay less tax than he ought to have paid.

39. I note that this can only be an approximation as CGT losses can not be carried back: but they can be carried forward and the evidence was that at least some of Mr Wilden's CGT losses were eligible to be set off against income and were so used.

40. Whereas even if the £1,400,000 base cost is too high, if Mr Wilden is unable to challenge it, he would ultimately pay (approximately at least) the right amount of tax. This is because, although the valuation on disposal in 2003 would be too high, it would be compensated for by the too high base cost in 2004, 2008 and 2010 on the disposal of the shares.

41. There seem to be a number of issues to consider. Firstly, is Mr Wilden's wider tax position even relevant to the question of whether it is fair within this particular appeal against the closure notice for 2003 to allow a new ground of appeal? Secondly, if Mr Wilden's entire tax liability ought to be considered, surely it is also relevant to consider whether for the other years HMRC would be able to rectify the position through their powers of assessment? I deal with the last issue first.

Is it too late for HMRC to rectify the three later tax years?

42. There is an overall time limit of four years from the end of the year of assessment contained in s34 TMA for HMRC to raise an assessment. The old six year time limit does not apply to Mr Wilden as he rendered tax returns – see The Finance Act 2008, Schedule 39 (Appointed Day, Transitional Provision and Savings) Order 2009 Article

10). The December 2004 disposal is therefore beyond assessment: it would have been returned for the tax year ended April 2005 and is now out of time for assessment.

43. The four year time limit does not rule out an assessment for the later two disposals. The final disposal of the shares took place on 30 April 2009 and was returned in Mr Wilden's tax return for the year to 5 April 2010. It used a base cost of £1,400,000. I was not informed when Mr Wilden submitted this return, so I am unable to determine whether HMRC is still within the 12 month enquiry window of S 9A TMA bearing in mind the 12 months runs from when the return is delivered (assuming it was not late). If, for instance, it was a paper return delivered on the last due date, the enquiry window would have closed on 31 October 2011.

44. For the 2008 disposal it is likely the enquiry window is closed as there is no suggestion Mr Wilden delivered late returns for these years. So the question for both the 2008 disposal and (if the window was closed) the later assessment, is whether HMRC could raise a discovery assessment?

45. Discover assessments are in s 29 TMA. This provides:

> "If an officer of the Board or the Board discover, as regards any person….(c) that any relief which has been given is or has become excessive, the officer….may, subject to subsections (2) and (3) below, make an assessment in the amount …which ought in his or their opinion to be charged in order to make goods to the Crown the loss of tax."

46. What is a discovery? It has a very wide meaning and I think it would encompass a situation where an HMRC officer "discovers" that the agreed valuation of £1,400,000 was held by a Tribunal to be excessive: I think it would also encompass the situation (as now) that Mr Wilden is putting the case that the valuation is wrong and no longer standing by the figure he put in his various tax returns.

47. The valuation of £1,400,000 was agreed between Mr Wilden and HMRC. As it was only agreed informally there is no question of a s54 agreement and the implication of *Scorer v Olin Energy Systems* [1985] STC 218 is that HMRC would as a matter of law be entitled to raise a discovery despite it. It would only be different if the matter had been determined by a court or tribunal, or as with a s 54 agreement, deemed to be so determined. Nevertheless, in Statement of Practice 8/91 HMRC state that they would not use discovery to go back on a matter which had been even only informally agreed.

48. Statements of Practice are not binding on HMRC but HMRC could be judicially reviewed for failing to apply it. Nevertheless, my view is that were Mr Wilden to use judicial review to seek to hold HMRC to their agreement on the £1,400,000 value for the 2008 and 2009 disposals of shares and prevent a discovery assessment, he would be unsuccessful if he himself first chosen to challenge that value in Tribunal over the 2003 disposal of the goodwill. He would have been the first to renege on the agreement.

49. My conclusion is therefore that HMRC could make a discovery assessment in relation to the last of the two share disposals. The four year time limit runs so HMRC might consider it wise to make such an assessment now. No assessment can be raised in respect of the December 2004 assessment.

Is Mr Wilden's wider tax position relevant?

50. The appeal before me should be dealt with in a procedurally fair manner: but does that mean it is relevant to take into account Mr Wilden's overall tax liability which is not in issue in this appeal?

51. Perhaps in most cases the taxpayer's wider tax position would not be relevant. But I think, where the question is whether a new ground of appeal should be permitted, it is relevant to overall fairness to ask the question whether the failure to raise the ground of appeal at the right time (in other words, in the Notice of Appeal) has led the other party (HMRC) to act to their detriment.

52. In other words, I would be inclined to refuse to allow Mr Wilden to amend his grounds of appeal to challenge the 2003 valuation if, had he raised it in his Notice of Appeal in 2010, HMRC would have been able at that point to raise an assessment on the basis that the valuation used in the 2004 disposal was excessive, but that, because Mr Wilden only now in late 2011 seeks to make the amendment, HMRC are out of time to so do.

53. However, on the facts of this particular case, by the time of the review in July 2010, even by the time of the closure notice in late April 2010 (the four year rule having come into force on 1 April 2010), it was already too late for HMRC to make an assessment in relation to the 2004 disposal as the four years would have ended in April 2009.

54. In other words if Mr Wilden had raised it has a ground of appeal in August 2010, at a time when leave of this Tribunal was not required to include any matter as a ground of appeal, HMRC were already out of time to make a discovery in relation to his 2005 self assessment return. So I conclude therefore that this is not a reason to refuse to allow the new ground to be added now.

55. This result may not seem fair as (if Mr Wilden successfully challenges the 2003 valuation in this appeal) he will, so far as his tax years to April 2004 and 2005 have got the best of both worlds, but this necessarily seems to follow from the legislation and in particular the four year time limit which does not admit of an exception even where a taxpayer seeks to go back on an agreed valuation which he both proposed and used to calculate other tax liability. There is perhaps the possibility of a challenge in the High Court for breach of contract or estoppel where a taxpayer on appeal seeks to go back on an agreed valuation but HMRC is out of time to assess. But in my opinion *this* Tribunal, which only has jurisdiction where given it by Parliament, would have had no jurisdiction to prevent Mr Wilden raising the 2003 valuation as a ground of appeal in his notice of Appeal lodged on 3 August 2010. Therefore, in my view there is no reason to refuse to allow him to add it as a new ground of appeal now.

Summary

56. I allow Mr Wilden's application to amend his grounds of appeal against the CGT assessment to include a new ground that the 2003 valuation of his share of the goodwill was excessive. Directions are issued separately.

57. 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.

Barbara Mosedale

TRIBUNAL JUDGE
RELEASE DATE: 24 January 2012