Neutral Citation: **[2023] UKUT 255 (TCC)**

Case Number: UT/2022/000094 and
UT/2022/000095

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

CAPITAL GAINS TAX – sale of shares – interpretation of share sale and purchase agreement – did FTT make an error of law in not considering working capital adjustment provisions of SPA – disguised attack on factual findings of FTT – appeal dismissed

Heard on: 20 September 2023
Judgment date: 19 October 2023

Before

JUDGE NICHOLAS ALEKSANDER
JUDGE PHYLLIS RAMSHAW

Between

MICHELLE McENROE (1)
MIRANDA NEWMAN (2)

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: David Whiscombe of David Whiscombe LLP

For the Respondents: Dilpreet Dhanoa, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The background facts, which are not disputed by the parties, were set out by the FTT as follows.

2. Ms McEnroe and Ms Newman were the sole shareholders in Kingly Care Partnership Limited ("the Company"), holding one ordinary share each ("the Shares"). On 25 October 2013 they entered into a share sale and purchase agreement ("the SPA") by which they agreed to sell the Shares to Active Assistance Finance Limited ("the Buyer"). The consideration, as defined in the SPA, was £8 million, subject to a working capital adjustment and an earn out. The SPA provided for simultaneous exchange and completion.

3. As at completion, the amount required to redeem a loan owed by the Company to Allied Irish Bank (GB) (a trading name used by AIB Group (UK) plc) ("AIB") was £1,080,990.68. On completion, this amount was paid by the Buyer's solicitors to AIB. A further £742.00 was paid in respect of property insurance. The Buyer's solicitors transferred £6,918,121.06 to the Appellants' solicitors on 28 October 2013 (25 October 2013 was a Friday, and we assume that completion must have taken place after the cut-off time for CHAPS payments). After the Appellants' solicitors had discharged professional fees incurred in respect of the sale, the Appellants each received £3,337,835.44. A further £145,045 was paid by the Buyer's solicitors to the Appellants' solicitors on 3 February 2014, after the Buyer and the Appellants reconciled the working capital adjustment.

4. For ease of reference, the amount of the AIB debt in this decision is rounded to £1.1m and the amount received by the Appellants' solicitors following Completion is rounded to £6.9m.

5. In their self-assessment tax returns, the Appellants each showed the consideration received for the disposal of the shares in the Company as one half of £6.9m (plus the working capital adjustment and the earn out received later[1]).

6. HMRC opened an enquiry into the Appellants' tax returns and in due course issued closure notices stating that the consideration should be one half of £8m, plus the earn out. The Appellants appealed to the First-tier Tribunal against the closure notices, the only point in dispute being whether the consideration for the Shares was £8m, or £8m less the AIB debt - the amounts of (a) the additional payment following the reconciliation of the working capital adjustment, and (b) the earn-out, were not in dispute before the FTT. The Appellants' grounds of appeal were that (in broad terms) the consideration of £8m was payment for the Shares and the discharge of the AIB debt, that £1.1m of the payment should be apportioned to the discharge of the debt, that the SPA, when properly construed, provides that the Buyer paid £6.9m for the Shares, and that the Appellants never received £8m as the £1.1m moved directly from the account of the Buyer's solicitors to AIB to discharge the debt.

7. The Appellants later sought to amend their grounds of appeal to the FTT, submitting that the SPA should be rectified in order to correctly reflect the intention of the parties. By a case management decision released on 7 April 2021, the FTT refused the application to amend because of the length of the Appellants' delay in bringing forward the rectification point, and that there were no good reasons given for the delay. No appeal was made against this decision.

[1] Neither the additional amount of £145,045 paid in February 2014 following the reconciliation of the working capital adjustment, nor amount of the earn out, is in dispute.

8. The FTT dismissed the substantive appeal "on the papers", holding in its decision released on 30 March 2022 that the Appellants had not discharged the burden of proof to show that the closure notice was incorrect.

9. The Appellants now appeal, with the consent of the FTT, against the decision of the FTT.

REPRESENTATION

10. Mr Whiscombe represented the Appellants and Ms Dhanoa represented HMRC. Neither Mr Whiscombe nor Ms Dhanoa represented the parties before the FTT.

11. The document bundles before us did not include the evidence and submissions made by the parties to the FTT. Mr Whiscombe told us that he did not have copies of the evidence or submissions made on behalf of the Appellants to the FTT.

THE SPA

12. It is helpful to start with such of the terms of the SPA as are relevant to this appeal.

13. A number of terms used in the SPA are defined in clause 1.1, the definitions relevant to this decision are as follows:

Completion Accounts	the balance sheet and profit and loss account of the Company for the period from the Last Accounts Date down to and including the Completion Date, prepared in accordance with the provisions of Schedule 7;
Completion Date	The date of this Agreement;
Consideration	The consideration for the purchase of the Shares as set out in clause 3.1 and subject to adjustment as set out in clauses 3.3 and 3.4;
Deed of Release	A deed of release from AIB Group (UK) plc in respect of the legal mortgage created on 12 January 2007, the mortgage debenture created on 12 January 2007 and the personal guarantee given by the Sellers on 11 December 2006;
Net Current Assets	In relation to the Company, its current assets less its liabilities as set out in the Completion Accounts;
Shares	The 2 ordinary shares of £1.00 each in the capital of the Company, all of which have been issued and are fully paid and which constitute the entire issued share capital of the Company;

Target Working Capital	The sum of £60,000

14. Clause 2 of the SPA provides that the Appellants shall sell, and the Buyer shall buy, the Shares free from all encumbrances.

15. The consideration payable for the Shares is the subject of clause 3, which provides as follows:

> **3 CONSIDERATION**
>
> **3.1 The Consideration**
>
> The consideration for the sale and purchase of the Shares shall, subject to adjustment as provided in clauses 3.3 and 3.4 be eight million pounds (£8,000,000) which shall be satisfied on Completion by the payment by the Buyer of eight million pounds (£8,000,000) by a telegraphic transfer to the client account of the Sellers' Solicitors at Bank of Scotland plc [bank account details redacted].
>
> **3.2 Receipt by Sellers' Solicitors**
>
> The Sellers' Solicitors are irrevocably authorised to receive the payments to be made pursuant to clause 3.1, paragraph 2.1 of Schedule 7 and paragraph 5.2 of Schedule 8 on behalf of the Sellers and payment or delivery thereof to the Sellers' Solicitors shall be good discharge to the Buyer.
>
> **3.3 Completion Accounts**
>
> The Completion Accounts shall be prepared and the Consideration adjusted as set out in Schedule 7 (Completion Accounts).
>
> **3.4 Earn Out**
>
> The Earn-Out Certificate shall be prepared and the Consideration shall be adjusted as set out in Schedule 8 (Earn-Out).

16. Paragraph 2.1 of schedule 7 deals with the payment of the working capital adjustment, and paragraph 5.2 of schedule 8 deals with payment of the earn-out.

17. Clause 4 deals with the obligations of the parties at Completion. Sub-clause 4.2.13 requires the Appellants to deliver a redemption statement for the AIB loan to the Buyer, and sub-clauses 4.2.15 and 4.2.17 requires the Appellants to deliver a deed releasing the Company and the Appellants from the security given to AIB and evidence of the discharge of any other security given to any other person by the Company.

18. Schedule 7 deals with the preparation of the Completion Accounts, and the calculation of the adjustment mentioned in clause 3.3 (what we have called the "working capital adjustment"). The principal provisions of schedule 7 are as follows:

> (a) Paragraph 1 sets out the requirement for the Appellants to prepare draft Completion Accounts, and the mechanism by which the draft is finalised either by agreement, or by expert determination.
>
> (b) Paragraph 2 addresses the amount of the working capital adjustment and its payment. Sub-paragraph 2.1 provides as follows:
>
> > 2.1 If the amount of the Net Current Assets as shown by the final and binding Completion Accounts:
> >
> > > 2.1.1 is less than the Target Working Capital, then the Consideration shall be reduced by £1 for every £1 by which the Net Current Assets fall short of the Target Working Capital; or

> 2.1.2 is greater than the Target Working Capital, then the Consideration shall be increased by £1 for every £1 by which the Net Current Assets exceed the Target Working Capital
>
> and the Sellers shall satisfy payment of the amount of any such reduction (if any) and the Buyer shall satisfy payment of the amount of such increase (if any) in accordance with paragraph 2.2 of this Schedule 7.

(c) Paragraph 2.2 provides that payment is made to the Buyer or the Appellants' Solicitors by telegraphic transfer within 14 days after the final Completion Accounts are determined. Paragraph 2.3 provides that none of the provisions of schedule 4 (which sets out the tax covenant) shall affect the amount of the working capital adjustment.

(d) Paragraph 3 addresses the basis on which the Completion Accounts are to be prepared. In summary, these are to be prepared in accordance with the requirements of paragraph 4, and otherwise in accordance with UK GAAP.

(e) Paragraph 4 sets out various policies which are to be applied in the preparation of the Completion Accounts, and which override UK GAAP. In particular, sub-paragraph 4.11 provides as follows:

> For the avoidance of doubt, the loan provided by AIB Group (UK) plc to the Company will be redeemed in full on Completion and shall not be included in any calculation of Net Current Assets.

FINDINGS OF THE FTT

19. The FTT made the following findings (references to paragraphs are to paragraphs of the FTT's decision):

(1) The Company owed £1,081,136.94 to AIB (paragraph [4])

(2) On the day of the sale, the Buyer transferred £8m to their solicitors (the decision states that the Buyer's solicitors transferred £8m to the Buyer's solicitors – the first reference to "Buyer's solicitors" must be a typographical error and should be a reference to the Buyer) (paragraph [5]);

(3) The Buyer's solicitors transferred funds to AIB to redeem the AIB debt (paragraph [5]). Included in the documents bundle before us (and we assume also produced to the FTT) was a copy of an undertaking given by the Buyer's solicitor to AIB stating that:

> Subject to Completion occurring and us being in receipt of funds from the Buyer and HSBC Bank plc, we irrevocable undertake to instruct our bankers, The Royal Bank of Scotland plc, on the day of Completion […] to transmit telegraphically the sum of [£1.1m] in clearance in full of the LIBOR loan owing by the Company to Allied Irish Bank (GB) to the account detailed below […];

(4) After further adjustments of a few hundred pounds, the remaining balance of the £8m was paid to the Appellants' solicitors (paragraph [5]);

(5) "Clause 3.3 refers to Completion Accounts and any adjustment in relation to them. Neither the Appellants nor HMRC argue that this clause did or should adjust the [consideration][2]" (paragraph [28])

[2] The FTT decision says "compensation", but this is clearly a typographical error, and the decision should read "consideration".

(6) The FTT found that what actually happened was that £6.9m was received by the Appellants and that £1.1m was paid by the Buyer to redeem the AIB debt (paragraph [31]);

(7) The FTT found that there was no ambiguity in the SPA and that no reference to the AIB debt is made in any clause relevant to the consideration for the purchase of the Shares (paragraph [32]);

(8) The SPA is not a contract for the sale of the Shares and the discharge of the AIB debt. Although SPA alludes to the fact that the AIB debt will be discharged, it does not say anything about how this is to be done and does not refer to the £8 million being anything other than consideration for the shares (paragraph [37]);

(9) The fact that the Appellants did not receive £8m does not mean that they are not entitled to it under the terms of the SPA. Although it is possible that they are entitled to it, and the parties intend that it will be paid at a later date, the more likely analysis is that the terms of the SPA do not reflect what the parties intended – but this leads to a rectification argument, and the FTT had previously refused permission for the Appellants to amend their grounds of appeal to include this as an argument (paragraph [40]); and

(10) The Appellants have failed to discharge the burden of proof to displace HMRC's closure notice (paragraph [43]).

GROUNDS OF APPEAL TO THE UPPER TRIBUNAL

20. The FTT granted permission to appeal to the Upper Tribunal on the following grounds as set out in the Appellants' application for permission:

> 7. Paragraph 28 of the Decision states that "Neither the Appellants nor HMRC argue that [clause 3.3] did or should adjust the compensation (sic)".
>
> 8. We submit that the Appellants made no concession in their case as to the non-application of clause 3.3. But we submit that whether the application of clause 3.3. was expressly argued or not, it was incumbent upon the FTT to consider whether and to what extent clause 3.3 operated to reduce the consideration due under the SPA below the "headline figure" of £8m.
>
> 9. We submit that if the FTT had considered the whole of the SPA including the application of clause 3.3 and Schedule 7 which it introduces, the FTT would inevitably have concluded that the consideration due under the SPA was £7,063,166.
>
> 10. Paragraph 40 of the decision recognises "the factual point that the sellers did not receive £8m" but that "it does not follow that they were/are not entitled to it under the contract."
>
> […]
>
> 15. The Decision does not address (whether in paragraph 40 or elsewhere) the third possibility – which is the factual and contractual reality – that the reason that the Appellants have not received £8m is that they are not contractually entitled to receive £8m, as we explain below. We consider this, as a mistake in the construction of the contract, to be an error of law.
>
> […]
>
> 18. The effect of the Buyer's paying off the debt was that [the Company] became indebted to the Buyer for the amount that the Buyer had paid to AIB on its behalf. The indebtedness to the Buyer is correctly shown in the accounts

> of [the Company] as a liability and is correctly shown as an asset in the accounts of the Buyer.
>
> […]
>
> 24. Thus Schedule 7 requires the Completion Accounts to exclude reference to the AIB loan (because it is anticipated that the AIB loan will no longer be a liability at the relevant time). However (and this is the crucial point), Schedule 7 does not require the Completion Accounts to exclude the debt due to the Buyer in respect of the repayment of the AIB debt. The computation of "Net Current Assets" was therefore required to take account of the debt due to the Buyer.

21. The skeleton argument filed by Mr Whiscombe raised additional grounds that were not raised in the Appellants' application for permission to appeal:

> 23. The assumption made by the FTT that no adjustment fell to be made to the consideration under clause 3.3. and Schedule 7 was plainly incorrect and inconsistent with the documents in evidence before it.
>
> 24. If the FTT had properly considered the evidence before it, it would inevitably have concluded that such an adjustment had been made and that the amount actually paid represented the full amount of consideration payable under the SPA, for the reasons which follow.

22. In essence, as Mr Whiscombe acknowledged before us, this raises an *Edwards v Bairstow* [1956] AC 14 argument, challenging the FTT's factual findings on the grounds that these were not ones that could be reasonably entertained on the basis of the evidence before it. At our suggestion, Mr Whiscombe applied at the start of the hearing to amend the grounds of appeal to include the *Edwards v Bairstow* issue raised in his skeleton argument. Mr Whiscombe submitted that the factual findings reached by the FTT were inconsistent with the abbreviated financial statements of the Company for the period ended 31 March 2014 (which included as comparable figures an unaudited balance sheet as at 25 October 2013). He submitted that it was incumbent on the FTT to have considered this balance sheet.

23. We refused his application for the following reasons.

(1) First, the evidence placed before the FTT was not produced to us. We therefore have no basis to determine whether the factual findings made by the FTT were ones that no reasonable tribunal could have made on the basis of the evidence before it.

(2) Secondly, the Appellants had neither pleaded nor argued before the FTT that the Consideration fell to be adjusted under the terms of clause 3.3 and schedule 7 of the SPA. To the contrary, the reason given by the FTT as to why it did not consider whether an adjustment was required under clause 3.3 was because "neither the Appellants nor HMRC argue that [clause 3.3] did or should adjust the consideration" (paragraph [28]). We note that the FTT found that: (a) the valuation of the Shares was not in dispute (paragraph [8]), and (b) the Buyer paid AIB to discharge its debt (paragraph [31]). We also note that at paragraph [28] the FTT expressly mentioned clause 3.3 of the SPA, which provided for the working capital adjustment. Mr Whiscombe submitted that the reason given by the FTT for not considering the working capital adjustment was because it was not raised by either party, rather than because both parties had submitted that no adjustment fell to be made. But in the absence of any positive submissions to the FTT by the Appellants that clause 3.3 was engaged, it is difficult to see how the FTT's decision (that clause 3.3 was irrelevant) could, in these circumstances, be one which no reasonable tribunal could have made.

(3) Finally, we note that if we were to allow the application, it would inevitably mean that the hearing would have to be adjourned (a) to allow for the preparation of new hearing bundles to include the evidence before the FTT and the submissions made by the parties, and (b) to give HMRC the opportunity to respond to this new ground of appeal. The fact that this new ground of appeal was only raised only a few days before the hearing in the Appellants' skeleton argument strongly mitigates against allowing the application, and the consequential need for an adjournment and the resulting delay.

In these circumstances, after taking account of the overriding objective, we refused the application.

24. Appended to the Appellants' application for permission to appeal was a table headed "Completion Accounts", which set out the basis on which the working capital adjustment was calculated. Ms Dhanoa objected to it being introduced as new evidence before us. On questioning Mr Whiscombe, it became clear that this table was not the "Completion Accounts" as defined in the SPA, but was prepared expressly for the purposes of the appeal to the Upper Tribunal based on "the recollections of the Appellants". Mr Whiscombe explained that he never intended to introduce the table as evidence, but rather that it was to form part of his submissions. However, he was not able to reconcile any of the amounts in the table with any of the accounting documents included in the bundles (such as the Company's abbreviated financial statements), nor with the accounting policies required to be adopted for the Completion Accounts under schedule 7. As there was no evidential basis for demonstrating the accuracy of the calculation in the table, we declined to consider it further.

APPELLANTS' SUBMISSIONS

25. Mr Whiscombe's core submission was that the FTT should have considered of its own motion whether an adjustment to the consideration was required under clause 3.3, notwithstanding that neither party raised this as an issue before the FTT. Mr Whiscombe submitted that the failure of the FTT to consider the application of clause 3.3 was a mistake of law, and if the FTT had considered clause 3.3, it would have appreciated that the only reason why £6.9m was paid to the Appellants' solicitors was because of the working capital adjustment made in accordance with the requirements of clause 3.3 and schedule 7. He argued that it was obvious that unless the target working capital was exactly £60,000, the £8m would need to be adjusted.

26. Mr Whiscombe submitted that the fact that the Buyer paid £1.1m to AIB, to discharge the Company's debt, automatically gave rise (by operation of double-entry bookkeeping) to indebtedness of £1.1m being owed by the Company to the Buyer. "Net Current Assets" was defined in the SPA as meaning current assets less liabilities (not current liabilities). Therefore, the indebtedness of the Company to the Buyer should be taken into account in the calculation of Net Current Assets, and thus into the working capital adjustment. Mr Whiscombe submitted that this was entirely consistent with the provisions of paragraph 4.11 of schedule 7, as there was no need for the amount of the AIB loan to be taken into account in the preparation of the Completion Accounts, as the AIB loan no longer existed. Instead, the corresponding amount of the indebtedness of the Company to the Buyer was a liability which was to be taken into account instead.

27. Mr Whiscombe referred us to the abbreviated financial statements of the Company to March 2014 included in the documents bundle, which included the unaudited balance sheet of the Company as at 25 October 2013. These show current assets of £748,616 and aggregate liabilities of £1,562,231. On the basis of these accounts, current assets less liabilities is a negative amount: £(813,615). Mr Whiscombe submitted that it should therefore have been

obvious to the FTT that it would need to consider whether an adjustment would be required in accordance with clause 3.3 and schedule 7 of the SPA.

DISCUSSION

28. We reject the submission that the FTT erred in law in failing to consider the application of clause 3.3 when construing the terms of the SPA. It is clear on the face of the FTT's decision at paragraph [28] that the tribunal was aware of the provisions of clause 3.3 and the potential for there to be a working capital adjustment. Other findings made by the FTT are consistent with it having considered the provisions of the SPA relating to the working capital adjustment. As neither party argued that clause 3.3 did or should adjust the consideration, we find that it was reasonable for the FTT not to have given further consideration to this point.

29. The submission made by the Appellants before the FTT that the SPA was for the purchase of the Shares and the discharge of the AIB debt, and that the £8m consideration needed to be apportioned between these two items was firmly rejected by the FTT. Neither the Appellants nor HMRC seek to disturb the FTT's finding in this respect. We agree with the FTT that whilst the SPA alludes to the discharge of the AIB debt on Completion (for example, at paragraph 4.11 of schedule 7), it makes no provision as to how this was to be done.

30. In relation to the arguments that the FTT erred in failing to consider of its own motion whether an adjustment to the consideration was required under clause 3.3 we conclude that there was no such obligation on the FTT on the facts of this case. In our view there was nothing obvious in the task set out by Mr Whiscombe (discussed below), which would have involved assumptions having to be made by the FTT and requires an involved analysis and extrapolation from evidence.

31. Mr Whiscombe was unable to provide any authority for his submission that indebtedness would arise automatically in favour of the Buyer, in consequence of the Buyer voluntarily discharging the liability of the Company to AIB. We reject Mr Whiscombe's submission that indebtedness automatically arose between the Company and the Buyer as a consequence of double entry bookkeeping. Double entry bookkeeping is a system of recording transactions – transactions and liabilities cannot arise as a consequence of double entry bookkeeping. Although we are aware that there may be grounds for arguing that the Buyer might have a claim in restitution against the Company as a consequence of the Buyer voluntarily discharging the Company's debt, this is a difficult area of law, and we find that it would be unreasonable to expect the FTT to make any findings that such a liability arises automatically in the absence of reasoned submissions and without being referred to the relevant authorities.

32. We note that the FTT made no reference to the Company's abbreviated financial statements in its decision. This is understandable - as neither party was arguing that an adjustment to the consideration was made under clause 3.3, neither party would have needed to have referred the FTT to the amounts in the Company's balance sheet for the purpose of calculating "Net Current Assets". In these circumstances, it was reasonable for the FTT not to review the amounts in the Company's balance sheet (and not to make reference to the balance sheet in its decision). In any event, even if it had considered the balance sheet, the amounts included in the "statutory" balance sheet would not be the same as the amounts included in the balance sheet prepared for the purposes of the Completion Accounts – as the Completion Accounts are prepared using different accounting policies. So, it would not necessarily be obvious from inspecting the abbreviated financial statements that an adjustment would be required to the Consideration under clause 3.3.

33. We agree with Ms Dhanoa that the Appellants' case amounts to a disguised attack on the FTT's findings of fact of the kind to which Evans LJ referred in the judgment of the Court of Appeal in *Georgiou v HMCE* [1996] STC 463 at 476:

> There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. That is well seen in arbitration cases and in many others. It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be misused in this way.

CONCLUSION

34. We find that the reason why the FTT did not consider whether the consideration payable to the Appellants had been adjusted under the terms of clause 3.3 of the SPA was because neither party had argued before the FTT that such an adjustment had been made. In the absence of any submissions to that effect, we find that it was reasonable for the FTT not to have considered the possibility of there having been any such adjustment.

35. We further find that there was no reason for the FTT to need to consider of its own motion the possibility of there having been an adjustment to the consideration under the terms of clause 3.3 of the SPA.

36. In these circumstances, we find that the FTT made no error of law in its decision that the Appellants had not discharged their burden of proof to displace HMRC's closure notice.

37. It follows that this appeal must be dismissed.

NICHOLAS ALEKSANDER
UPPER TRIBUNAL JUDGE

PHYLLIS RAMSHAW
UPPER TRIBUNAL JUDGE

Release date: 19 October 2023