



TC02299

Appeal number: TC/2012/01073

Capital Gains Tax – Entrepreneurs’ Relief – disposal of land – material disposal of part of a business – no appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WILLIAM S G RUSSELL

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP
KAREN BRUCE LOCKHART, WS**

**Sitting in public at George House, 126 George Street, Edinburgh on Wednesday
22 August 2012**

Mr J Roberts for the Appellant

**Ms R Shields, instructed by the General Counsel and Solicitor to HM Revenue
and Customs, for the Respondents**

DECISION

1. Background

2. This appeal concerns a Closure Notice issued under section 28A(1) and (2) of the Taxes Management Act 1970 (“TMA”) for the year ended 5 April 2009 in respect of the amended self-assessment return received by HMRC on 23 November 2009. In that return Mr Russell had claimed Entrepreneurs’ Relief in regard to a disposal of land at South Logiebrae Farm.

3. Mr Russell’s one-third share of the sale proceeds was £430,000 after allowable costs and he claimed Entrepreneurs’ Relief in his 2008-2009 self-assessment (SA) return. An enquiry was opened by HMRC under section 9A TMA on 12 November 2010. That enquiry concluded that Entrepreneurs’ Relief was not due and the enquiry was concluded with the issue of a Closure Notice on 7 November 2011.

4. The Agreed Facts

5. The facts in this case are not in dispute, although the papers presented to the Tribunal referred to widely differing figures and percentages for the land that was sold and retained. However, in the course of the Hearing, the parties agreed that the disposal of the land was a disposal of 35% of the land that was “fit for purpose”.

6. Mr Russell and his two brothers each owned an equal share of farmland that had been bequeathed to them by their mother in 1993. In 2008-2009 it was being farmed in partnership by Mr Russell, his brother Mr John Russell and his sister-in-law Mrs Ros Russell, his other brother having died.

7. In his SA return for 2008-09, Mr Russell claimed Entrepreneurs’ Relief under Section 169M TCGA 1992 in respect of the disposal of his “PERSONAL SHARE 1/3 of 6.72 ha land at South Logiebrae Farm which I have farmed and owned since 1993.” In that return he stated that the land under cultivation prior to the sale comprised an area of 21.65 hectares and that on 14 January 2009, the 6.72 hectares were sold for a total consideration of £1,290,000. Following the disposal of the land the partnership continued to farm the retained land.

8. The partnership profits in the five years to 05/04/11 are as follows:

9.	Year to 5/04/07	£2,796
10.	Year to 5/04/08	£2,895
11.	Year to 5/04/09	£2,175
12.	Year to 5/04/10	£1,902
13.	Year to 5/04/11	£1,740

14. The retained land is farmed in the sense that an agricultural contractor, Mr Morrison Dick works the land on behalf of the partnership. He owns all the equipment and because of his greater buying and selling power he attends to day to day matters. The crop is barley and that yields the profits indicated above. The fact that the partnership was farming the land both before and after the sale was not in dispute.

15. The only asset of the farming partnership was the land itself since there was no farmhouse, steading, livestock or plant or machinery. As indicated above, it was also not in dispute that the land that was sold represented approximately 35% of the land which was suitable for cropping.

16. Mr Russell's evidence

17. 8. Mr Russell gave very clear and credible evidence and it was not challenged by HMRC. The Tribunal therefore adopts that evidence and finds it as facts. The primary reason he and his brothers had retained the land was because of its potential for development. He had been trying for years to get various planning permissions. His neighbour had succeeded in getting planning permission. The land that had been sold had been sold for development. Mr Russell had originally farmed the land himself but it had not been profitable for him. Accordingly for some ten years he had had an arrangement with Mr Dick. He discussed with Mr Dick what should be done each year, he would discuss the financial arrangements with him and in particular he would ensure that Mr Dick got five per cent above the baseline fee, the details of which he could not recall. He visited the farm and there was work to be done dealing with issues with dead trees. Currently it was his brother who was undertaking the role that he described that he had undertaken in 2009.

18. 9. Mr Russell was explicitly asked whether what he, or his brother, did in connection with the farm business had changed at all after the sale of the land. He said that it carried on now as it had then. The only difference was that they had lost a field and as there was less barley the profits went down.

19. Mr Russell's arguments

20. The primary argument for Mr Russell was that the land that was sold represented a material disposal of a business asset particularly because the fall in profit correlated with the percentage of land sold. The land was the only asset of the business that generated income so therefore the sale had a material impact on the profit earning capacity of the business. In the paper tabled at the hearing the Tribunal was invited to find that the disposal of the land constituted a material disposal of business assets.

21. **HMRC's arguments**

22. HMRC denied Entrepreneurs' Relief on the basis that the disposal was a part disposal of an asset used for the purposes of the Appellant's business: it was not a disposal of part of the business.

23. **The Legislation**

24. Section 169H Taxation of Capital Gains Tax at 1992 ("TCGA")

25. "(1) This chapter provides [for a lower rate of capital gains tax] in respect of qualifying business disposals (to be known as 'Entrepreneurs' Relief').

26. (2) The following are qualifying business disposals—

27. (a) a material disposal of business assets: see section 169(1) ...".

28. 13. Section 169(1) TCGA

29. "(1) There is a material disposal of business assets where—

30. (a) an individual makes a disposal of business assets (see sub-section (2)), and

31. (b) the disposal of business assets is a material disposal (see sub-sections (3) to (7)).

32. (2) For the purposes of this chapter a disposal of business assets is—

33. (a) a disposal of the whole or part of a business,

34. (b) a disposal of (or of interest in) one or more assets in use, at the time at which a business ceases to be carried on, for the purposes of the business, or

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

36. (3) A disposal within paragraph (a) of sub-section (2) is a material disposal if the business is owned by the individual throughout the period of one year ending with the date of the disposal ...".

37. **Case Authorities**

38. 14. The parties referred to:

39. *McGregor (HM Inspector of Taxes) v Adcock* 1977 STC 206

40. *Barrett (HM Inspector of Taxes) v Powell* 1998 STC 283

41. *Atkinson v Dancer and Mannion v Johnston* 61 TC 598

42. **Reasons for Decision**

43. 15. Both parties agreed that the sale of the land had been a disposal of an asset. Clearly, it was not a disposal of the whole of the business. The business continued. The business had been owned throughout the year ending with the date of the disposal. Although, as indicated at paragraph 10 above, Mr Roberts invited the Tribunal to find that the disposal of the land constituted a material disposal of business assets, it can only be that in terms of the legislation set out above if it had been the disposal of whole or part of the business.

44. 16. Accordingly the only matter for the Tribunal to consider is whether or not it was a disposal of a part of the business as opposed to an asset. If it was simply an asset of the business then it cannot qualify for Entrepreneurs' Relief.

45. 17. Mr Roberts, for Mr Russell, relied on the excerpt from the judgement of Fox J in *McGregor v Adcock* and that reads as follows:

46. "In my view, there is a clear distinction between the business and the individual assets used in the business. *Prima facie*, therefore, it seems to me wrong to assert that the mere sale of the farmland is a disposal of part of a farm business. The true position, I think, is that the sale is merely a factor which the court has to consider in deciding whether there has been such a disposal. There are cases in which it may be the determining factor. Thus if a man is farming 200 acres and sells off 190 acres, it may very well be that the nature and extent of the man's activities after the sale would be so wholly different from what they were before the sale that the inevitable conclusion would be that there had been a disposal of part or even the whole of the business".

47. HMRC also referred to, and relied on, that excerpt. The Tribunal entirely agrees with the reasoning in that paragraph. The sale of the land is a factor but what is also important is to consider the extent to which, if any, the business was changed or different after the sale. The only argument advanced for Mr Russell was that because the fall in profits equated to the percentage that the land sold bore to the overall land that was suitable for cropping, that therefore there was a disposal that was so material that it constituted a disposal of part of the business. In that context it was suggested that the land was still being farmed, the profits presumably taxed and therefore it constituted a business. That is speculation and is discounted. It was agreed that it was sold for development purposes and the price reflected that: what may have happened thereafter is not a matter for this Tribunal.

48. As indicated above, the Tribunal explored with Mr Russell exactly how the business had been run both before and after the date of disposal. His oral evidence was that there was no difference. Everything was done in the same way. The only change had been in the amount of the profit received. The only consequence of the sale of part of the land was that the share of profit was commensurately reduced.

49. The key point is that there is a difference between a business and a mere asset used in the business. Immediately before the excerpt relied upon by Mr Roberts, Fox J also said the following:-

50. “In the ordinary use of language land is not the same thing as a business. A business connotes an activity; land is merely an asset of a business ... A business connotes a distinct entity which is separate from its parts.”

51. HMRC referred the Tribunal to *Barrett v Powell* where Lightman J quoted with approval from the judgement of Peter Gibson J in *Aitkinson v Dancer, Mannion v Johnston* to the following effect:-

52. “... the fact that a farmer sells some land alone which he has been using for a farming business *prima facie* will not amount to the sale of his farming business or any part thereof because it is only the sale of a chargeable business asset and not in itself the sale of the business or any part of it, this notwithstanding that it will be virtually inevitable that the sale of land on which the business has been conducted will reduce the activity of the farmer and probably his profits.”

53. Lightman J went on to say that:

54. “The fact that the future of the business so far as it was carried on that the tenanted land became precarious did not mean that Mr Powell ceased to carry on the same business activity afterwards as before or that he had made any disposal of any part of his business. There was no change in the character of his business and no obligation of a separate part of his business”.

55. That is entirely analogous with the situation in this case. After the sale of the land, Mr Russell and his brothers continued doing exactly what they were previously doing, only for less money.

56. Accordingly, for all these reasons, the Appeal is dismissed, as there was simply a sale of a business asset and not a sale of part of a business.

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.

**ANNE SCOTT, LLB, NP
TRIBUNAL JUDGE**

RELEASE DATE: 4 October 2012