



TC03273

Appeal number: TC/2012/09836

***CAPITAL GAINS TAX – disposal of property used in used car business-
entrepreneur’s relief – section 169I Taxation of Chargeable Gains Act 1992-
whether cessation of trade - whether disposal within three years of cessation
–yes – appeal allowed***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JEREMY RICE

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GUY BRANNAN
SONIA GABLE**

Sitting in public at Norwich on 21 January 2013

Hilary Gallup, AA Chartered Accountants, for the Appellant

Philip Osborne, HMRC Presenting Officer, for the Respondents

DECISION

Introduction

5 1. This is an appeal in relation to the tax year ended 5 April 2009. On the
appellant's tax return for that year, filed on 25 January 2010, he claimed what is
known as "Entrepreneur's Relief" under section 169I Taxation of Chargeable Gains
Act 1992 ("T CGA") in respect of the disposal of a property. The property consisted
of business premises at 151/161 Fletton Avenue, Peterborough ("Fletton Avenue").
10 The question in this appeal is whether the appellant was entitled to that relief.

The facts

2. The appellant, Mr Rice, traded as a sole trader at all material times selling used
cars. Whilst at Fletton Avenue he traded under the name Performance Cars, selling
cars from those premises. Fletton Avenue consisted of a small showroom and a
15 forecourt. Typically, Mr Rice would have about 40 cars in stock of which six would
be in the showroom and the remainder in the forecourt. There was a small office (non-
secure) on the premises together with a small workshop. Mr Rice carried out minor
work to cars such as servicing, paintwork and valeting.

3. Fletton Avenue was located on one of the four main roads into Peterborough.
20 Mr Rice depended on passing traffic for business. As the name Performance Cars
suggests, Mr Rice sold what he described as "sporty" cars which attracted the
attention of passers-by. Mr Rice did not advertise his cars on the Internet. He
described himself as not very computer-literate and relied on his wife in relation to IT
matters.

25 4. Because the office at Fletton Avenue was not secure, Mr Rice did all his
paperwork at home, including his VAT returns. His home address was his
correspondence address for Performance Cars. Until 1991 he had lived at a home
address near Fletton Avenue but in that year moved to a bungalow outside
Peterborough called Four Acres.

30 5. Fletton Avenue had originally been two separate sites. The first site was
acquired in the late 1980s. It had previously been used as a small garage which
serviced police cars. In 1998 Mr Rice also acquired an adjoining site which gave him
more space.

35 6. Mr Rice experienced problems with vandalism at Fletton Avenue. Eventually,
the problems became so bad that Mr Rice decided to sell Fletton Avenue. It was
common ground that Fletton Avenue was eventually sold on 29 April 2008, with
contract and completion taking place simultaneously. Mr Rice sold Fletton Avenue to
a property developer.

40 7. Mr Rice's evidence was that he ceased to trade at Fletton Avenue in May 2005.
He remembered this date because it was shortly before his wife went into hospital for

5 surgery in June 2005 and because of the vandalism. He then sold his stock of cars at auctions or by newspaper adverts. Fletton Avenue was empty by 1 September 2005. We know this because a Business Rates Bill for 2005/06 from Peterborough City Council shows that Fletton Avenue qualified for "Empty Property Rates Relief" from 1 September 2005.

8. The date on which Mr Rice ceased to trade at Fletton Avenue and, indeed, whether he ceased to trade at all) was in dispute and we shall return to this point shortly.

10 9. Mr Rice started to sell used cars from a site adjoining his home, Four Acres in a village outside Peterborough. He renamed the business "Four Acres Car Sales". Mr Rice had previously stored cars at Four Acres. At first he had intended to run the business at Four Acres in the same way as Performance Cars. However, he quickly ran into problems with the local council whose planning department would not allow him to trade at Four Acres and served an enforcement notice upon him.

15 10. Mr Rice was unable to trade at Four Acres until 29 September 2006 when planning permission was given for the site to be used for the sale of motor cars, with no display of those vehicles for sale to the general public being permitted. Permission was also given for the site to be used for preparatory works of cleaning and polishing the vehicles. On one part of the site the number of vehicles being kept at any one time
20 was restricted to 25 vehicles.

11. The restrictions imposed on him by the planning authorities meant that Mr Rice had to conduct his business by advertising on the Internet. Potential customers who were interested in a particular vehicle would then make an appointment to come and inspect it. Remarkably, Mr Rice estimated that about 20% of customers bought off the
25 Internet without inspection.

12. At Four Acres there was no forecourt displaying cars to the public. There was a small sign indicating that this was the premises of Four Acres Car Sales. Unlike Mr Rice's business at Fletton Avenue, there was no passing trade. Moreover, the type of cars sold by Mr Rice at Four Acres Car Sales was different from those sold by
30 Performance Cars. Whereas the former business concentrated on "sporty" cars, Four Acres Car Sales concentrated on four-wheel drive vehicles and family cars.

13. Mr Rice continued to use his home address for correspondence relating to the business. In respect of Performance Cars and Four Acres Car Sales Mr Rice maintained the same business bank account in his own name.

35 14. In his dealings with HMRC, Mr Rice had been represented for over 30 years by his accountant, Mr Ward. Mr Ward did not represent Mr Rice at the hearing because Mr Rice had instructed AA Accountants instead.

15. Mr Ward had prepared Mr Rice's tax return for 2008/2009. That return showed that Mr Rice had made a capital gain on the disposal of Fletton Avenue of £274,649.
40 The amount of the gain, prior to any relief, is not in dispute. In the return Entrepreneur's Relief of £21,203.92 was claimed, reducing the capital gains tax due

from £47,708.82 to £26,504.90. The return, as we have seen, was filed on 25 January 2010.

16. As the return was processed, HMRC reduced the amount of tax to £20,243.88. Mr Ward did not consider this lower figure to be correct and could not understand how it had been calculated by HMRC. Mr Rice says that Mr Ward told him that he had queried this twice with HMRC but HMRC had been insistent that their figure was correct.

17. On 21 October 2010 HMRC wrote to Mr Rice and Mr Ward stating that they intended to check Mr Rice's 2009 tax return, in particular the claim to Entrepreneur's Relief.

18. There followed a lengthy correspondence between HMRC and Mr Ward. The upshot of that correspondence was that HMRC denied Entrepreneur's Relief and increased the capital gains tax due to £47,708.82. We note that that correspondence, in large part, appeared to proceed on the basis that the disposal of Fletton Avenue was the disposal of part of an ongoing business (to which section 169I (2) (a) applies) whereas now the claim to relief is based on the sale of an asset within three years of the cessation of business (to which section 169I (2) (b) applies).

19. In particular, in a letter to HMRC dated 23 December 2010, Mr Ward stated that Mr Rice's business did continue after the disposal of the premises at Fletton Avenue. He further stated that there had been no change in the operation of the business "which is still the disposal of high-class second-hand cars."

20. In a letter dated 4 February 2011 to HMRC, Mr Ward stated that the sale of the business was forced upon Mr Rice because of vandalism and that the business was now carried on from his home. Mr Ward also stated that Mr Rice had sold his business and moved away from Fletton Avenue.

21. In a letter 7 October 2011 Mr Ward stated that there was a material disposal of the business (although we know that this conflicts with Mr Ward's previous assurance that the business continued without interruption).

22. In a letter dated 25 November 2011, Mr Ward again stated to HMRC that the Fletton Avenue "business was properly disposed of." Mr Ward also suggests that Mr Rice ceased to carry on business after leaving Fletton Avenue (contradicting statements in his letter dated 23 December 2010). As regards the business carried on at Four Acres, Mr Ward states that "working from home [Mr Rice] no longer has the business and when this comes to an end which is likely to be sooner rather than later, he will have nothing to sell on because there is no business as such."

23. In a letter dated 3 February 2012 to HMRC, Mr Ward states that the business moved out of Fletton Avenue in March 2004. He also states that Fletton Avenue was disposed of in May 2009. As we have seen, this date is incorrect and it is common ground that Fletton Avenue was disposed of on 29 April 2008. Mr Ward continued by stating that there was roughly a three-month gap between the cessation and sale of the old business (i.e. Performance Cars) and the new one (i.e. Four Acres) commencing.

24. Mr Rice's evidence was that it was his practice to hand over the relevant books and papers to Mr Ward in December then meet him again when he had prepared Mr Rice's return. Mr Rice estimated that he usually met Mr Ward two or three times a year. Mr Rice allowed Mr Ward to deal with HMRC as he thought fit and, although
5 Mr Ward copied his correspondence with HMRC to him, Mr Rice did not understand it and did not pay attention to it because he trusted Mr Ward to deal with it. Consequently, Mr Rice said that he did not spot what he regarded as factual errors in the letters sent by Mr Ward to HMRC. Mr Rice also said that Mr Ward did not consult
10 him or send him drafts before writing to HMRC. He had not discussed his decision to cease trading at Fletton Avenue with Mr Ward. Mr Rice had simply thought that this decision was best for his wife and children. Although he had used Mr Ward's services for many years, Mr Ward was not, according to Mr Rice, a close business adviser.

25. Once HMRC had challenged Mr Rice's entitlement to Entrepreneur's Relief, Mr Rice said that he did not discuss the subject with Mr Ward at any length. Instead, Mr
15 Ward assured Mr Rice that he would sort it out and that there was nothing to worry about.

26. As we have noted above, the date on which Mr Rice decided to cease the Performance Cars business at Fletton Avenue is disputed. Mr Rice, as we have indicated, recalls this as being May 2005 and that he spent the period between May
20 2005 and 1 September 2005 (the date on which the premises qualified for Empty Business Rates) clearing out the Fletton Avenue premises and selling off his stock of cars.

27. In examination in chief, Mr Rice stated that the period between his decision to close the business of Performance Cars at Fletton Avenue and the completion of
25 clearing the site was "about six months." Mr Osborne cross-examined him on this point. Obviously, six months would have meant that, if Mr Rice had ceased to trade at Fletton Avenue six months before 1 September 2006, he did so before May 2005 and, therefore, outside the three-year period provided for in section 169I TCGA. When pressed on this by Mr Osborne, Mr Rice said that it probably took four months to clear
30 the site.

28. Mr Rice, under cross-examination, accepted that he did not have a copy of any instructions sent to estate agents to market the Fletton Avenue site. He also accepted that no cessation date had been put on his self-assessment return for 2006 or 2007. He also accepted that no cessation accounts had been prepared. Mr Rice simply said that
35 he had trusted Mr Ward and that, in any event, he (Mr Rice) would not have understood the significance of these matters.

29. Finally, in a letter from HMRC to Mr Rice dated 15 August 2011, HMRC stated as follows:

40 "from the information provided, you carried on a sole trader car sales business from the premises at Fletton Avenue up until May 2005 when, due to vandalism, the premises were vacated and the business relocated to the grounds of your private residence from where trading continued more or less as before."

30. It will be noted that HMRC believe that the Performance Cars business was carried on until May 2005. Mr Osborne was unable to explain why HMRC had included this date in that letter.

Discussion

5 31. It was common ground that Mr Rice's disposal of Fletton Avenue qualified for Entrepreneur's Relief if it satisfied the requirements of section 169I TCGA. So far as is relevant for present purposes, section 169I TCGA provides:

- (1) There is a material disposal of business assets where—
 - 10 (a) an individual makes a disposal of business assets (see subsection (2)), and
 - (b) the disposal of business assets is a material disposal (see subsections (3) to (7)).
- (2) For the purposes of this Chapter a disposal of business assets is—
 - 15 (a) a disposal of the whole or part of a business,
 - (b) a disposal of (or of interests 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
 - 20 (c) a disposal of one or more assets consisting of (or of interests in) shares in or securities of a company.
- (3)...
- (4) A disposal within paragraph (b) of that subsection is a material disposal if—
 - 25 (a) the business is owned by the individual throughout the period of 1 year ending with the date on which the business ceases to be carried on, and
 - (b) that date is within the period of 3 years ending with the date of the disposal.

30 32. It was common ground that the disposal had to fall within subsection (2) (b) and subsection (4). The three-year period from the date of cessation of the business is contained in subsection (4) (b). The effect of Entrepreneur's Relief is, in short, to reduce the rate of tax charged on Mr Rice's gain in relation to Fletton Avenue to 10%.

35 33. Since it was also common ground that the disposal of Fletton Avenue occurred on 29 April 2005, Mrs Gallup submitted (and Mr Osborne did not demur) that the two relevant issues in this appeal were:

- (a) was there a cessation of the business carried on by Mr Rice; and
- (b) when did that cessation take place?

34. If there had been a cessation and that cessation took place after 29 April 2005 then Mr Rice would be entitled to Entrepreneur's Relief.

35. Mrs Gallup submitted that we should attach more weight to the evidence of Mr Rice than to the confused and inaccurate correspondence emanating from Mr Ward.

36. In our view, the letters written by Mr Ward should be approached with some caution. In the first place, the correspondence proceeded on the mistaken assumption
5 that in order to qualify for relief the disposal of Fletton Avenue had to be a disposal of the whole or part of the business. Secondly, there are a number of inaccuracies and inconsistencies in the correspondence which we have noted above (e.g. the date of the disposal of Fletton Avenue). Certainly, the letters written by Mr Ward did seem to us to be confused.

10 37. In addition, we accept Mr Rice's evidence that Mr Ward wrote these letters without reference to him. He trusted Mr Ward to carry matters forward with HMRC, having relied on his advice for many years.

38. Accordingly, we place very little weight on the information provided by Mr Ward in his correspondence with HMRC.

15 39. The first issue is whether there was a cessation of Mr Rice's business. Mrs Gallup referred to three authorities: *Fry v Burma Corporation Ltd* [1930] 1 KB 249, *J G Ingram & Son v Callaghan* (1968) 45 TC 151 and *Rolls-Royce Motor Ltd v Bamford* [1976] STC 162.

20 40. In Mrs Gallup's submission the *Burma Corporation* case established the principle that the relocation of a local business could give rise to a permanent discontinuance of one trade and the commencement of the different trade. She submitted that the changes in the appellant's mode of business were sufficient and substantial enough to fall within the principle established in that case.

25 41. The *Ingram* and *Rolls-Royce* cases both referred to the concept of "organic unity" and "organic growth". Mrs Gallup argued that there was a difference between a slow and gradual ("organic") change and a sudden and dramatic change. She submitted that the changes in the appellant's business fell into the latter category.

42. In the *Burma Corporation* case Lawrence LJ said (at 267):

30 "For instance, if the trade of the company had in the past been purely local, such as a shop, and in addition to removing the seat of control, the company had opened a branch establishment in London, or had closed down the Liverpool shop and opened a new shop in London, it might well be that a new trade had been set up and commenced...."

35 43. In this case, Mr Rice carried on the Performance Cars business on a busy main road leading into Peterborough. We accept his evidence that most of his business came from passing customers who would stop to look round his forecourt. We consider that the change to an Internet business, with no passing trade, with customers coming out to a country village because they had seen his website, constituted a very significant change in the business carried on by Mr Rice.

44. In addition, the concept of "organic growth" explained by Walton J in the *Rolls-Royce* case also seems to us to be relevant. Walton J said (at 183):

5 “[I]t appears to me that there is all the difference in the world between
an organic growth of a trade and a sudden and dramatic change
brought about by either the acquisition or the loss of activities on a
considerable scale. Let me illustrate what I mean by the case of a
company owning a single village grocer's shop. Over the years it
acquires, a few at a time, additional shops; it then organises a central
10 system of bulk buying for them; it may then possibly organise
manufacturing facilities in respect of various lines for its chain of
shops to sell; and it may well move into the realms of transport and run
its own fleet of vans. If it can do all this without ever having
discontinued one trade and commenced another—which is the
assumption which has to be made in the present case and which may
15 well be correct—well and good. The final trade of that company will,
however, as a matter of business activity, bear but little relationship to
its original beginnings. Then if, as a result of some crisis, that company
has to get rid of all its activities by selling them off, leaving it with
only the original village shop, I would myself be under no doubt
20 whatsoever but that there had been a violent change in the trade of that
company.”

45. In this appeal the move away from Fletton Avenue came about because of
vandalism to those premises. Although this vandalism may have occurred over a
period of time it was nonetheless an external factor and could not be regarded as an
25 organic development of the business of the type envisaged by Walton J. Moreover,
the type of cars sold by Four Acres Car Sales were different from those dealt in at
Fletton Avenue, the former tending to be four-wheel drive cars and family cars,
whereas the latter tended to be "sporty" or performance cars. In addition, the number
of cars kept by Mr Rice at Four Acres was considerably smaller than those kept on the
30 forecourt at Fletton Avenue.

46. These differences between the way in which and the location at which Mr Rice's
two successive were carried on lead us to the conclusion that there was a cessation of
the trade carried on by Mr Rice at Fletton Avenue.

47. The next question we need to consider is when the cessation took place.

35 48. We know that by 1 September 2005 Mr Rice had vacated Fletton Avenue. In his
evidence, Mr Rice said that he ceased trading at Fletton Avenue in May 2005.
However, he subsequently said that it took "about six months" to clear the Fletton
Avenue site. As Mr Osborne observed, this would put the date of the cessation back
into March 2005 i.e. outside the three year time limit required by section 169I TCGA.
40 Set against this, however, was Mr Rice's recollection that he decided to cease trading
at Fletton Avenue shortly before his wife went into hospital in June 2005 – his wife's
hospitalisation (together with the vandalism to his premises and stock) enabled him to
pinpoint the time at which he decided to give up business at Fletton Avenue.

49. When Mr Rice made the reference to "about six months" it did not seem to us that he was attempting to be precise. On balance, we think that his recollection of the cessation date triggered by the date of his wife's hospitalisation (i.e. May 2005) was more likely to be correct. For the reasons given earlier, we do not attach any weight to the dates given in correspondence by Mr Ward. We therefore accept that Mr Rice ceased to carry on his trade in May 2005.

50. It follows, therefore, that in our view Mr Rice was entitled to Entrepreneur's Relief on the disposal of Fletton Avenue.

51. It was agreed that we should give our decision in principle on the availability of Entrepreneur's Relief, leaving it to the parties to calculate the tax due in accordance with our decision. Having given our decision in principle, we now invite the parties to calculate the capital gains tax due.

52. Accordingly, this appeal is allowed.

53. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 29 January 2014