



TC03435

Appeal number: TC/2013/02140

CAPITAL GAINS TAX – entrepreneurs’ relief – Chapter 3 part V TCGA 1992 – whether a material disposal of business assets within s 169I – whether an officer or employee of the company at the relevant time – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MRS SUSAN CORBETT

Appellant

- and -

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

**TRIBUNAL: JUDGE PETER KEMPSTER
MRS SHAMEEM AKHTAR**

Sitting in public at Priory Courts, Birmingham on 29 November 2013

Mr Nigel Turner (Brooks Mayfield) for the Appellant

Ms Joanna Bartup (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant (“Mrs Corbett”) appeals against a decision by the Respondents (“HMRC”) disallowing entrepreneurs’ relief in respect of a capital gain on a disposal of shares in the tax year 2009-10.

Background

2. Mrs Corbett’s self-assessment return for the tax year 2009-10 recorded a disposal of 1500 shares (“the Shares”) in Optivite International Limited (“the Company”) on 7 October 2009. The capital gain calculation included a claim for entrepreneurs’ relief (“ER”) on that disposal. By a closure notice issued on 6 December 2012 HMRC in effect disallowed the ER. That decision was upheld by a formal internal review issued on 22 February 2013, on the grounds that the statutory qualifications for ER had not been met in full. Mrs Corbett appeals to the Tribunal against those decisions.

Law

3. All statutory references are to TCGA 1992 and the legislation is cited as in force at the relevant time.

4. Section 169H provides (so far as relevant):

20 **“169H Introduction**

(1) This Chapter provides relief from capital gains tax in respect of qualifying business disposals (to be known as “entrepreneurs' relief”).

(2) The following are qualifying business disposals—

(a) a material disposal of business assets: see section 169I,

25 ...”

5. Section 169I provides (so far as relevant):

“169I Material disposal of business assets

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

30 (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—

35 ...

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

...

(5) A disposal within paragraph (c) of subsection (2) is a material disposal if condition A or B is met.

5 (6) Condition A is that, throughout the period of 1 year ending with the date of the disposal—

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

10 (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.

...”

6. Section 169S(3) provides:

“(3) For the purposes of this Chapter “personal company”, in relation to an individual, means a company—

15 (a) at least 5% of the ordinary share capital of which is held by the individual, and

(b) at least 5% of the voting rights in which are exercisable by the individual by virtue of that holding.”

20 **Evidence**

7. The Tribunal had a joint bundle of documents and took oral evidence from both Mrs Corbett and her husband Mr Michael Corbett.

25 8. In June 2008 negotiations began concerning a potential acquisition of the Company by Kiotech International PLC (“Kiotech”). Detailed (non-binding) heads of terms were contained in a letter from Kiotech dated 2 February 2009. The share sale completed on 7 October 2009.

30 9. Mrs Corbett’s evidence was as follows. She had been an employee of the Company. She was clerical assistant to her husband, who was a director of the Company. She worked from home, as mainly did her husband between trips abroad. Her duties comprised answering the telephone, faxing documents, filing, and general office work; she occasionally worked for other people in the Company as well as her husband. Her salary was £14,000 pa and was paid into a joint bank account. In February 2009 she was removed from the Company’s payroll. Her duties were exactly the same after February 2009 as before then; the job still had to be done. Her husband had explained to her that receiving a P45 was the best way of dealing with the changes necessary for the sale of the Company; it did not matter to her. After the sale her husband worked mainly at the Company’s office (where there were other staff) and her services were no longer required.

40 10. Mr Corbett’s evidence was as follows. He had been a director of the Company and had been closely involved in the negotiations with Kiotech. He knew well the

members of their negotiating team, who might be described as a prickly bunch. There had been discussions concerning employment of spouses of senior executives; Kiotech felt that could compromise leadership. As part of the general operation to clean up the Company before sale, he decided the best course of action was to remove his wife from the payroll in order not to jeopardise negotiations. After that was done at the end of February 2009 his wife carried on the same role as before. From March 2009 his salary was specifically increased by £1,200 per month – the amount of his wife’s salary. His salary had been further increased after that because before the takeover executive salaries had been below market rates and, when ownership moved to Kiotech, the new salaries were agreed by Kiotech. After the takeover he had stopped working from home; he had been given additional responsibilities and was mainly at head office. He was no longer employed by the Company.

11. In the trial bundle was a letter dated 8 April 2013 to Mrs Corbett’s accountants from Mr John Butlin, Group Financial Controller of the Company which stated:

15 “I worked for Optivite Limited and Optivite International Limited in the capacity of Financial Director for a number of years prior to the sale of both companies to Kiotech International plc. I am currently Group Financial Controller.

20 Mrs Corbett was employed to administer the office of the sales director of our company and is his wife. The nature of the work of a sales director of this international company required considerable travel and time away from his office. She therefore organised his diary, passed on messages and dealt with post.

25 By February 2009 the sale to Kiotech was agreed in principle and the board of Optivite considered the deal to be inevitable. The buyer made clear that their policy was to not employ spouses. 28 February was our year end and so we agreed to remove Mrs Corbett from the payroll. This would mean that there would be no spouses on the payroll during the new owners eventual involvement.

30 Mrs Corbett continued to carry out the same duties after 25 February 2009 until the share sale. Her salary was paid to her husband by an increase in his gross pay rate.

35 When the sale was concluded the new owners insisted that the Sales Director had an office on site and therefore Mrs Corbett’s role was superfluous and the office at home was closed down.

I trust this explains Mrs Corbett’s continued role in the company until the sale deal was completed.”

Respondents’ Case

12. Ms Bartup for HMRC submitted as follows.

40 13. HMRC accept that all the statutory conditions for ER were satisfied *except* for s 169I(6)(b), which requires that “throughout the period of 1 year ending with the date of the disposal ... the individual is an ... employee of the company ...”.

14. The date of disposal was 7 October 2009 and thus the one year period in s 169I(6)(b) is the period 8 October 2008 to 7 October 2009. HMRC contended that Mrs Corbett ceased to be an employee of the Company in February 2009. Thus the condition was not satisfied.

5 15. On Mrs Corbett's Form P14 for 2008-09 in the box labelled "Date of leaving if during tax year" the Company had entered "25/02/2009".

16. The resignation in February 2009 was acknowledged by Mrs Corbett's accountants in a letter to HMRC dated 1 July 2011:

"A deal was initiated and heads of terms issued in February 2009.

10 Kiotech is an AIM listed company and the company has a policy that they do not employ senior directors families. Mrs Corbett then resigned. Mrs Corbett was employed and continued to work for the company."

15 17. HMRC had not been shown any documentary evidence of Kiotech's purported policy.

18. Mrs Corbett's accountants in a letter to HMRC dated 5 September 2011 stated:

20 "Although Mrs Corbett was removed from the payroll, for the reasons set out in previous correspondence, she continued to carry out the same duties. You will accept, no doubt, that persons can be employed by businesses without being paid."

25 19. The first time that it was suggested that additional salary was paid to Mr Corbett was in a letter to HMRC from Mrs Corbett's accountants dated 1 July 2011. HMRC considered that the technical requirements for ER may have been unfortunately overlooked in the preparation for the sale of the Company, and on belatedly realising that mistake there had then been an attempt to rectify the position. HMRC did not accept that Mr Corbett had been remunerated for his wife's work. Although Mr Corbett's remuneration had increased after February 2009, there was no exact annual match to his wife's previous salary. Also, if there was more work for him in preparing for the sale then a pay rise may be attributable to that.

30 20. Even if (which was not accepted) there had been a transfer of salary between Mrs Corbett and her husband, that did not evidence a contract of employment between Mrs Corbett and the Company. There was still no consideration between Mrs Corbett and the Company. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions* [1968] 1 All ER 433 Mackenna J stated (at 439):

35 "I must now consider what is meant by a contract of service. A contract of service exists if the following three conditions are fulfilled:
40 (i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii)

The other provisions of the contract are consistent with its being a contract of service. I need say little about (i) and (ii). As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind.”

5 21. Thus without remuneration there could be no employment.

22. If (which was not accepted) Mrs Corbett had remained an employee then she was entitled by law to be paid the National Minimum Wage (“NMW”): s 1 National Minimum Wage Act 1998. The Company had clearly not considered her to be an employee, otherwise it would have been deliberately breaching the NMW legislation.

10 23. In the share sale agreement whereby Kiotech acquired the Company there was no reference to Mrs Corbett being an employee. There was provision for formal disclosure of details of all employees and, although HMRC had not been shown that disclosure, it was a reasonable assumption that Mrs Corbett would not have been so listed. Thus the Company had represented to Kiotech that Mrs Corbett was not an
15 employee of the Company at that time.

24. Mrs Corbett ceased to be an employee of the Company in February 2009. Thus the condition in s 169I(6)(b) was not satisfied and ER was not available to Mrs Corbett.

Appellant’s Case

20 25. Mr Turner for Mrs Corbett submitted as follows.

26. Mrs Corbett had remained an employee of the Company until it was acquired by Kiotech in October 2009.

27. At end-February 2009 (which was the end of the Company’s financial period) Mrs Corbett was removed from the payroll in order not to give cause for concern to
25 Kiotech, which was a listed company. The Company operates a computerised payroll system and the only way to remove Mrs Corbett from the payroll was to produce Forms P45 and P14. From March 2009 Mrs Corbett did exactly the same work in exactly the same way as previously.

28. There was an implied contract of employment up until the sale of the Company.
30 There was no need for strict legal formalities. HMRC relied on *Readymix* but that case was 45 years old and the practicalities of employment relationships had changed since then.

29. HMRC’s point concerning NMW was a bad one because HMRC’s own manuals confirm that remuneration is not required for eligibility for ER: “There are no specific
35 requirements regarding either working hours or the level of remuneration. The condition is simply that the individual should be an officer or employee.” (CG64110) Further, the requirement for NMW had been satisfied by the increase in Mr Corbett’s salary.

30. The fact that Mr Corbett had received his wife's salary from March 2009 was visible from his payslips. His salary was paid into a bank account that was in the joint names of himself and his wife; thus it could be said that Mrs Corbett did continue to receive consideration.

5 31. The letter from Mr Butlin confirmed what had happened. He had been finance director of the Company at the time and thus responsible for the payroll.

32. It was accepted that it was unlikely that the disclosure letter relating to the sale of the Company would have stated that Mrs Corbett was an employee of the Company.

10 **Consideration, Findings and Conclusions**

33. We must determine, on the balance of probabilities and using the evidence available to us, whether Mrs Corbett was an employee of the Company in the twelve months up to October 2009; in particular, whether her removal from the Company's payroll at the end of February 2009 was the end of her employment by the Company.

15 34. We have found helpful and persuasive the letter from the Company's former finance director (see [12] above). Mr Butlin was not called as a witness in person by the Appellant and thus HMRC did not have the opportunity to put questions to him (nor did the Tribunal) or challenge his evidence. We have borne that limitation in mind and have not adopted an uncritical attitude to Mr Butlin's explanation. But the fact that the availability or otherwise of ER to Mrs Corbett is of no financial concern to the Company does, we consider, make Mr Butlin an independent witness, and one whose explanation fully supports the evidence of Mrs Corbett and her husband.

25 35. We accept that the motivation for removing Mrs Corbett from the payroll at the end of February 2009 was to keep her out of sight of the potential purchaser because of Kiotech's sensitivity to the employment of spouses of senior executives. That was also the reason why she was not (apparently) disclosed on the list of employees scheduled to the share purchase agreement. That might be viewed as a less than transparent way of dealing with the potential problem, but we find that was what was done and why.

30 36. In relation to the adjustment to Mr Corbett's salary from March 2009, we do not accept HMRC's suggestion (Ms Bartup put it more diplomatically than this) that this was just a convenient explanation invented after the event to gloss over the absence of any remuneration for Mrs Corbett after February 2009. Mr Corbett's sworn oral evidence was that his wife's salary was directed to him from March 2009. Mr Butlin confirmed that "[Mrs Corbett's] salary was paid to her husband by an increase in his gross pay rate." It would have been helpful to the Tribunal to have sight of Mr Corbett's payslips before and after February 2009, to verify that point, but we feel we can determine this dispute on the basis of the evidence available to us. We do not need to go into the ramifications for the Company of a possible breach of the NMW legislation, nor whether the Company made the correct PAYE deductions from Mr Corbett's pay after February 2009. We are satisfied, on the balance of probabilities,

5 that the Company continued to remunerate Mrs Corbett after February 2009 by directing her salary to her husband (which was paid into a joint bank account), and that that taken together with her continued performance of her duties is sufficient for her to have continued to be an employee of the Company in the period from February 2009 to October 2009.

37. Accordingly the condition in s 169I(6)(b) is satisfied and Mrs Corbett is entitled to ER in respect of her disposal of the Shares.

Decision

38. The appeal is ALLOWED.

10 39. 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
15 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**PETER KEMPSTER
TRIBUNAL JUDGE**

RELEASE DATE: 25 March 2014

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