



TC004362

Appeal number TC/2014/00517

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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Capital gains tax entrepreneur's relief – disposal of syndicate capacity by Name at Lloyd's – whether capacity an asset or part of a business – whether business ceased on disposal – ss 169H-S TCGA 1992 – s171 FA1993 – appeal dismissed

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JOHN HUMPHREY ROBERTON CARVER

Appellant

- and -

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**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

25

**TRIBUNAL: Judge Malachy Cornwell-Kelly
Mr Leslie Howard**

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Sitting in public at 115 Queen's Road, Norwich, on 9 March 2015

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**The taxpayer in person, assisted by Mr Christopher Richardson of
Larking Gowen, Norwich**

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Ms Sadiya Choudhury for the Crown

DECISION

1 Mr John Carver appeals against the amendment to his self-
assessment tax return for the year 2009 to 2010, made by means of a
5 closure notice dated 21 October 2013. Mr Carver had claimed
entrepreneurs' relief ("ER") in respect of the disposal of syndicate
capacity in a Lloyd's syndicate. Following an enquiry into Mr
Carver's 2009-10 tax return, the commissioners rejected the claim
for this relief, resulting in an additional capital gains tax ("CGT")
10 liability for Mr Carver of £19,623.30.

Facts

2 The following facts are drawn from an agreed statement of facts,
supplemented by oral evidence given by Mr Carver at the hearing.
15 There is no dispute about them, and we accept them as proved on
the balance of probabilities.

3 Mr Carver is recognised as carrying on a trade as a Name at
Lloyd's. Individuals (known as "Names"), partnerships and
20 corporate entities can all be members of Lloyd's and are required to
conduct business severally and on their own account. They cannot
do business jointly, but underwrite risks through syndicates.
Syndicates may consist of a single corporate member, or a number
of members. They are managed by Managing Agents, and not by
25 the members themselves; a syndicate has no legal personality and its
members are taxed on their profits.

4 Syndicates are thus the means by which insurance is written at
Lloyd's. Each syndicate has an insurance portfolio and, while it is
30 possible for a syndicate to underwrite only a single category of
insurance, most syndicates spread their risk over several categories
of insurance.

5 In order to join a syndicate, members must purchase "syndicate
capacity". Syndicate capacity is the extent to which a syndicate
may underwrite insurance business, i.e. the maximum amount of
premium income that it may accept. This is equal to the total of the
premium limits of all the syndicate's members. A member's
35 premium limit is directly related to the capital they put at risk.

6 This capital is not actually used in the syndicate's business, but is
held by Lloyd's in a trust from which Lloyd's will pay insurance
claims if the syndicate makes a loss and a member does not pay his
or her share of the liabilities. This is referred to as "Funds at
45 Lloyd's ("FAL")", and includes a deposit and other reserve funds.

7 Thus the capacity of a syndicate is directly related to the amount
of the capital backing provided by its members as the overall
premium limit of the syndicate determines the amount of FAL
required from its members. When members acquire syndicate
5 capacity, they have the right to underwrite on the syndicate in the
following year, and the right to remain on that syndicate in each
successive year for as long as that syndicate remains in existence, or
until the member sells the capacity.

10 8 A member also has the right to the same notional capacity in each
successor syndicate, and the right to a pre-emption offer from the
managing agent if the successor syndicate is to be expanded in the
following year. The direct ownership of capacity in a syndicate by a
member is referred to as “bespoke capacity”.

15 9 A member could also enter into a Members’ Agent Pooling
Arrangement (a “MAPA”). A MAPA allows a group of perhaps
several hundred Names to spread their underwriting risk. Names
will bring their existing capacity into and/or pay to join the MAPA.
20 All capacity in a MAPA is pooled and the Name is treated as
owning a small amount of capacity in a large number of syndicates.
The operator of the MAPA adjusts the MAPA’s portfolio of
syndicate capacity through the capacity auction process in the same
way as individual Names do, and re-balances the portfolio between
25 the members to spread each Name’s underwriting risk.

30 10 Prior to 1995, Names were placed in syndicates by members’
agents, and moved between syndicates by mutual consent. There
was rarely any cash involved, but in 1995 syndicate capacity
became a tradable asset. If a syndicate has been newly set up,
capacity is acquired from the managing agent of the syndicate,
usually at no cost to the Name. In the case of ongoing syndicates,
capacity acquired for the first time, or increased capacity must be
purchased from other members or obtained through pre-emption.

35 11 (A pre-emption offer is an invitation by a syndicate to members
to increase their nominal capacity in line with the increase in a
syndicate’s increase in capacity, so that the member has
proportionately the same share of the syndicate’s capacity in that
40 subsequent year.)

45 12 Lloyd’s control transactions of capacity between members by
means of a series of auctions held by Lloyd’s in the autumn of each
year. Members who wish to sell can “tender” capacity, and
members who wish to buy can make “bids” and Lloyd’s then
matches tenders with bids. Members can also enter into bilateral
arrangements to transfer capacity at any time throughout the year.

13 The capacity acquired during the year, whether privately or by auction, cannot be exploited (i.e. the member would not actually join the syndicate and begin to trade) until 1 January of the following year.

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14 Mr Carver has in previous years disposed of syndicate capacity, and claimed taper relief and roll-over relief in respect of some of these disposals; in the year ending 31 December 2009, he was a member of 17 syndicates including syndicate 958. In 2009, Omega Insurance Holdings Ltd made a cash offer to the members of that syndicate to purchase their capacity in the syndicate. Mr Carver accepted that offer and sold all his capacity in syndicate 958 on 31 July 2009. As the sale was for the right to participate in syndicate 958 for the underwriting year starting on 1 January 2010, Mr Carver continued his trading in syndicate 958 to 31 December 2009 and returned income and expenses from that year to that date.

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15 Mr Carver was also a member of a MAPA at Lloyd's which ended in 2009. When it did so, the syndicate capacity that was applicable to the underwriting year beginning on 1 January 2010 was distributed proportionately to its members, and in Mr Carver's case some of this returned capacity was in syndicate 958. Mr Carver was therefore able to participate in syndicate 958 for the underwriting year starting on 1 January 2010, despite having sold existing bespoke capacity in that syndicate. The MAPA reallocation of capacity to syndicate 958 was instructed by Mr Carver's agent on 28 August 2009.

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16 In his tax return for the year 2009 to 2010, Mr Carver declared a disposal of bespoke capacity in syndicate 958 for proceeds of £355,200, realising a gain of £340,647. Business asset roll-over relief was claimed in respect of part of this gain, and ER was claimed in respect of £109,015 of this gain. On 24 June 2011, the Revenue opened an enquiry into this return in order to ascertain the circumstances under which the relief had been claimed.

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17 The Revenue concluded that the ER claim should be disallowed and a closure notice to that effect was issued on 24 October 2013. The decision to deny the claim for relief was upheld on review on 23 December 2013. Mr Carver appealed this decision to the tribunal on 20 January 2014.

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18 Oral evidence from Mr Carver provided further detail to this statement. In relation to capacity: as we have seen, after the reforms in 1995 it became a tradable asset except in syndicates being established for the first time.

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19 There is apparently no definition of capacity, but we are satisfied that its valuation when a Name joins an existing syndicate is a reflection of the profitability of that syndicate and the desirability therefore of joining it, as determined by the market. In the Omega offer to purchase capacity in syndicate 958, for example, the very good track record of the syndicate since its inception was cited as a reason for Names not selling. In the annual auctions of capacity, or private sales, the syndicate manager might also feature as a purchaser.

20 Secondly, the Member's Agent: his or her task is to advise the Name, to lobby the Council of Lloyd's and to keep a close eye on the Managing Agent's conduct of the syndicate's business, and he or she will report to the Name fortnightly on these matters and on what is happening in the market generally. Names are usually 'non-working Names', meaning that they rely on their agents between them to determine and conduct the business of the syndicate; but some Names take a more active interest in what is going on than others do, Mr Carver describing his own as "passive participation". A Member's Agent will normally act for several Names together.

21 Thirdly, the Managing Agent: he or she is essentially the person who conducts the business of the syndicate, and each year Names with capacity in a syndicate sign a document relating to that syndicate, governing the conduct of business for the year following. This document is an important means of regulating the conduct of the syndicate by its Managing Agent, and is signed after advice to the Name by his or her Member's Agent. It will be the Managing Agent who deals directly with brokers, and who decides what risks the syndicate will or will not underwrite and at what premiums.

22 Normally, a Name will have little or no contact with a Managing Agent, relying on the Member's Agent to make sure that the Name's interests are looked after. The Member's Agent therefore gives advice on the document to be signed for each year; it will be based on a template common to such documents, but is likely to be altered to fit the circumstances and objectives of each syndicate. Syndicate 958 wrote general business, as do most of the syndicates at Lloyd's now, but there are some syndicates which specialise in certain types of risk such as marine business, catastrophes or re-insurance. Both types of agent are remunerated by a mixture of fixed fees and a share of profits.

23 Finally, Mr Carver confirmed that the accounts of a syndicate are audited both by accountants and by the Revenue.

Legislation

24 The provisions regarding entrepreneur's relief are set out in
Chapter 3, Part V of the Taxation of Chargeable Gains Act
5 ("TCGA") 1992.

25 Section 169H provides:

(1) This Chapter provides for a lower rate of capital gains tax
in respect of qualifying business disposals (to be known as
10 "entrepreneurs' relief").

(2) The following are qualifying business disposals—

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

...

(3) But in the case of certain qualifying business disposals,
15 entrepreneurs' relief is given only in respect of disposals of
relevant business assets comprised in the qualifying
business disposal: see section 169L...

26 Section 169I defines "material disposal of business assets". The
relevant parts of this section are as follows:

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

(a) an individual makes a disposal of business assets
(see subsection (2)), and

25 (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—

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

30 (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,...

(3) A disposal within paragraph (a) of subsection (2) is a
35 material disposal if the business is owned by the
individual throughout the period of 1 year ending with the
date of the disposal.

(4) A disposal within paragraph (b) of that subsection is a
material disposal if—

40 (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...

45 27 Section 169L defines "relevant business assets" as follows:

(1) If a qualifying business disposal is one which does not
consist of the disposal of (or of interests in) shares in or
securities of a company, entrepreneurs' relief is given only

in respect of the disposal of relevant business assets comprised in the qualifying business disposal.

(2) In this Chapter “relevant business assets” means assets (including goodwill) which are, or are interests in, assets to which subsection (3) applies, other than excluded assets (see subsection (4) below).

(3) This subsection applies to assets which—

(a) in the case of a material disposal of business assets, are assets used for the purposes of a business carried on by the individual or a partnership of which the individual is a member,...

(4) The following are excluded assets—

(a) shares and securities, and

(b) assets, other than shares or securities, which are held as investments.”

28 Section 169S(1) defines “business” for the purposes of ER as follows:

‘a business’ means anything which—

(a) is a trade, profession or vocation, and

(b) is conducted on a commercial basis and with a view to the realisation of profits.

29 Section 169S(5) states that “trade” has the same meaning as in the Income Tax Acts. “The Income Tax Acts” include all enactments relating to income tax (Schedule 1, Interpretation Act 1978). Section 171 Finance Act 1993 in Chapter III provides that the profits arising to a member from his underwriting business are chargeable to tax as the profits of a trade.

30 Taxation of Lloyds income is provided for in the Finance Act 1993, and section 171 provides:

1(1) Income tax for any year of assessment on the profits arising from a member's underwriting business shall be computed on the profits of that year of assessment.

(2) As respects the profits arising to a member from his underwriting business for any year of assessment—

(a) the aggregate of those profits shall be chargeable to tax under Chapter 2 of Part 2 of the Income Tax (Trading and Other Income) Act 2005 as the profits of a trade carried on in the United Kingdom; and

(b) accordingly, no part of those profits shall be treated as relevant foreign income, or be charged to tax under any other Part of that Act or any Part of the Income Tax (Earnings and Pensions) Act 2003;

but nothing in this subsection shall affect the manner in which the amount of any profits arising from assets forming part of an ancillary trust fund is to be computed.

(2A) . . .

(2B) Sections 397(1) and 397A(1) of the Income Tax (Trading and Other Income) Act 2005 (entitlement to tax credit) shall not apply

where the distribution there mentioned is a distribution in respect of any asset of a member's premium trust fund.

(3) . . .

5 (4) Subsection (2) above does not apply in relation to any profits arising before 6th April 1993 from assets forming part of an ancillary trust fund.

Submissions for the taxpayer

10 31 The grounds declared on appeal to the tribunal, as alternatives, may be summarised as follows.

15 32 Firstly, that Mr Carver's disposal to Omega of his capacity in syndicate 958 was a disposal of "part of a business" within section 169I(2)(a) of TCGA. It was a separately identifiable part of Mr Carver's underwriting business at Lloyds; he participated in 18 different syndicates and the sale of his capacity in one of them constituted the sale of part of his business.

20 33 Secondly, as it is put, Mr Carver's activity in each syndicate in which he participates is a separate business as far as his position is concerned, so that the sale of his capacity in syndicate 958 represented the sale of a business.

25 34 Thirdly, since sales of capacity are effective as of the start of the year following that in which the sale takes place, Mr Carver's sale to Omega was not that of an asset "used" in the business at the time of its sale; it would only be used in the syndicate from the beginning of 2010.

30 35 Fourthly, on the sale of capacity before the end of the year in which it is used the business in question does not cease, because it continues to the end of the year of sale and it only ceases then. Since the Revenue accept that the final sale of part a Name's capacity at Lloyds qualifies for ER, it must follow that the sale of any part before then also qualifies.

35 36 In section 169I, subsections (1) and (2) are mutually exclusive. The Revenue accept that subsection (2)(b) is not in point and that it is subsection (2)(a) which is applicable and on this basis the sale was of an independent business. Before the sale, Mr Carver was an underwriter trading through 18 businesses, and after it he was trading through 17.

40 37 Mr Richardson and Mr Carver then amplified these submissions further.

38 Firstly, the argument was emphasised that since the Revenue accept that ER is due when all capacity in every syndicate is finally sold, and therefore the difference between that and a sale of part of a Name's capacity earlier is no more than one of degree: the same circumstances surround a final sale as an earlier sale, namely that it does not take effect until the next trading year, there is the same liability for run-off from the years in which capacity was held, and the use of the Member's Agent to deal with these matters.

39 The argument holds good whether the Name is considered to have a different business in each syndicate, or whether he is seen as being in single business of underwriting via all the syndicates he belongs to.

40 Turning to the effect of the reallocation of MAPA capacity, Mr Richardson said that it had reduced Mr Carver's continuing capacity in 958, so that in 2010 he was participating at a lower level than he had done in 2009; he had disposed of one asset in the business of syndicate 958 in 2009 and acquired another in it for 2010. This could be seen in the MAPA reallocation in which Mr Carver's indirect capacity in syndicate 958 (among others) through the MAPA became a new bespoke capacity of his in 2010 – the other options on the ending of the MAPA would have involved selling capacity for cash.

41 Reference was then made to the first instance decision in *Gilbert v RCC* [2011] UKFTT 705 (TC), in which ER was allowed on the sale of a business as a going concern; what was sold was found by the tribunal to be a viable section of the business from which it was carved out and "recognisable as a business even when separated from the whole" [44]. In the present case, submitted Mr Richardson, the situation was analogous, the capacity sold by Mr Carver in syndicate 958 being either the disposal of a part of the business he carried on in that syndicate, or of a part of his overall business of underwriting at Lloyds.

42 That part became then a trade or business carried on by the transferee, Omega Holdings, and it was unnecessary to show that everything relevant to the carrying on of the business was included in the sale. Thus, in *Gilbert* the premises from which the businesses were carried on before and after the sale were not included in it, so the fact that the holder of capacity in addition needed to have Funds at Lloyds in order to trade did not mean that they also had to be included in the sale.

43 Mr Carver urged that section 169I(2)(a) should be read purposively, and that on a literal reading of subsection (2)(b) even a disposal of 100% of a Name's capacity would not qualify for ER. It had to be understood that capacity for a particular year was already "in use" for the preceding year (the year in which it had been acquired) and, by contrast, it ceased to be "in use" for a particular year once a sale of it had taken place.

44 Although his case did not depend on business in one syndicate being seen as distinct from business in other syndicates, Mr Carver submitted that section 171, relating as it does to income tax and deeming all income of a person from Lloyds to be from a single source, is not relevant to the analysis of the facts for capital gains purposes.

45 Further points urged by Mr Carver appear from the submissions made by the Revenue in reply.

Submissions for the Crown

46 In order for ER to be available, there must be a material disposal of business assets, which in the present context means there must either be a disposal of all or part of a business within the meaning of section 169I(2)(a) TCGA 1992; or a disposal of an asset in use, at the time at which the business ceased to be carried on for the purposes of the business within the meaning of section 169I(2)(b) TCGA 1992. The disposal of the syndicate capacity at issue in this appeal does not fall within either category, so that the relief is not available.

47 The commissioners do not accept, however, that the disposal of capacity constitutes the disposal of either all or part of "a business". The House of Lords considered the meaning of "part of a trade" in the context of the capital allowances legislation in *Maco Door and Window Hardware (UK) Ltd v HMRC* [2008] STC 2594. "Trade" is included in the definition of business for the purposes of ER in section 169S(1)(a). Lord Walker said, at [25]:

...a part of a trade" must be, not simply one of the activities carried out in the course of a trade, but a viable section of a composite trade which would still be recognisable as a trade if separated from the composite whole....

48 This test was applied by the tribunal in the ER case of *Gilbert* where the business of the taxpayer consisted of providing sales representation to manufacturers and suppliers on a commission basis. One of the suppliers, entered into an agreement to purchase that part of the business consisting of the sale of its products to its customers, including the customer database, the goodwill, the trade marks registered for certain brands and business information, and the benefit and burden of unperformed contracts. After the sale the taxpayer's gross commissions were reduced by 55% and his customer base was reduced to 35 from 120. It was held that the appellant had disposed of part of his business within the meaning of the *Maco Door* test and that ER was therefore available.

49 At [44] the tribunal said:

One way of testing whether there is a viable section in Lord Walker's terms is to consider what would be the case if the transferee was an empty shell until the transfer. Would the activities of the transferee using only the assets and liabilities transferred be capable of constituting a trade or business? In this case we think they would. The transferee would be able to use the customer database and the existing contracts and to exploit the goodwill to make sales and profits....

50 In the present appeal, as the taxpayer continued trading as a Name, he did not dispose of all his business: in order to have disposed of part of his business, it would be necessary for him to show that he had disposed of "a viable section" of his trade, but he merely disposed of an asset used in his trade. This is because the holding of capacity does not in itself constitute the underwriting trade: it is an asset that puts a member in a position to be able to carry on this trade.

51 It is therefore not sufficient to simply hold capacity in order to carry on the trade. The member would, for example, also need to have Funds at Lloyd's and a Member's Agent to act on his behalf. Unlike the situation in *Gilbert*, the activities of the transferee using only the assets and liabilities transferred would not be capable of constituting a trade or business, as the transferee would still need funds at Lloyd's and a Member's Agent. A transferee cannot simply buy the transferor's funds, which are returned to the transferor if he leaves underwriting, and therefore must acquire his own funds.

52 In *Atkinson v Dancer* [1988] STC 758, Peter Gibson J held that the taxpayer farmer was not entitled to retirement relief on the disposal of nine out of 89 acres of farmland. Referring to the decision of the general commissioners under appeal, he stated:

I do not see how they could have reached the conclusion that the mere sale of nine out of 89 acres, with no livestock or equipment or other stock or goodwill or anything else included in the sale, amounted to a sale of part of the business...It was a sale not of part of a business but of a chargeable asset ...

53 The commissioners submit that the sale of syndicate capacity by a Name is similar to the sale of farmland without the sale of livestock, equipment or other stock by a farmer as the sale of an asset.

54 The taxpayer argues that the only way an underwriter can underwrite is by owning capacity and that the only way he can sell the whole or part of his business and achieve ER is by selling his capacity. The commissioners do not accept that this means that syndicate capacity is the business, as opposed to a business asset: the actual economic activity is the underwriting itself and this is the trade; the income from syndicates at Lloyd's is from a single trade of underwriting.

55 This is supported by section 171 et seq. of the Finance Act 1993. Thus, a disposal of some of the capacity in one syndicate, or the disposal of capacity in a number of syndicates while capacity is retained in others, does not constitute disposal of all or part of a business but merely a reduction in its scale.

56 The taxpayer argues that the provisions of the 1993 Act only have effect for income tax and are deeming provisions, in the absence of which profits from individual syndicates could be taxed severally and not on an aggregate basis. This is not disputed by the commissioners, but they submit that these provisions are nevertheless relevant as they show how Lloyd's syndicates are treated for tax purposes: it is necessary to look at the provisions in the Income Tax Acts to determine whether Lloyd's underwriting is a trade, and therefore a business for the purposes of ER, as there are no specific provisions in the TCGA which define it as such.

57 In the context of the present appeal, it is worth noting that the taxpayer continued to trade as an underwriter in syndicate 958, even after disposing of his previous capacity.

5 58 The third ground of appeal is that the commissioners are wrong to argue that syndicate capacity is an asset used in the business. It is submitted, however, that syndicate capacity is an asset used in the trade of Lloyd's underwriting, as a capital business asset similar to other intangible assets such as copyright or goodwill, providing the holder of the capacity the right to participate in the syndicate.

10 59 ER is available in respect of the disposal of syndicate capacity under section 169I(2)(b) where this disposal takes place when the business ceases to be carried on; as the latter condition is not satisfied in the present appeal, the relief is not available under this paragraph either.

15 60 The taxpayer has sought to argue that subsection (2)(b) does not apply to a disposal of syndicate capacity because it is not an asset that is "used" in the business: but we say that in addition to providing the member with the opportunity to participate in the syndicate in the following and subsequent years, it also allows a member to share in the profits of the syndicate in the current year, and therefore it is "used" within the meaning of the statute.

20 61 The taxpayer maintains that capacity is differs from copyright and goodwill and, unlike those assets, disappears the moment a one year business starts. That raises the question of how this asset can be "the business", as argued by the taxpayer, if it stops existing in the current year but the business continues to exist.

25 62 If syndicate capacity was not an asset used in the member's underwriting business, ER would not be available in respect of it at all, even on the cessation of the business. This is because the condition in section 169L(3) would not be satisfied: in order to be a "relevant business asset" in respect of which the relief is available, it must be "used for the purposes of the business".

30 63 Furthermore, other capital gains tax reliefs available in respect of business assets such as roll-over relief (and formerly taper relief) would not be available in respect of disposals of syndicate capacity.

64 The taxpayer does not seek to argue that syndicate capacity is not a business asset for the purposes of any other capital gains tax relief. According to the taxpayer's arguments, syndicate capacity is a business asset for the purposes of hold-over relief and roll-over relief (and formerly taper relief), but would be regarded as the business itself as opposed to an asset for the purposes of ER.

65 Mr Carver contends that syndicate capacity is a business asset for the purposes of the other reliefs as they use a "wide definition" of a business asset as an asset used for the purposes of a trade. On the other hand, the ER definition of a business asset as an asset used in the business is a narrow definition.

66 The commissioners say that it is not possible to argue that syndicate capacity is a business for the purposes of one CGT relief, and not a business but only an asset for another relief, where similar definitions of business asset are used for both reliefs. Nor do they accept that the definitions are sufficiently different to justify such a difference in treatment. If anything, the definitions of business asset for the other reliefs are narrower than the ER definition, as they require the asset to be used in a trade as opposed to a business, which is a wider concept than trade.

67 The final ground of appeal is concerned with the provision under which ER would be granted on a cessation of business. The taxpayer contends that the commissioners cannot justify allowing ER on the final sale of an underwriter's capacity under section 169I(2)(b) as a disposal of an asset used in the business "at the time the business ceased to be carried on" because, whenever capacity is sold, the business does not "cease" but continues for the rest of the year. If the sale of the last part of the business qualifies for ER, it must follow that the sale of any other part must also qualify.

68 This is not a valid ground of appeal, because the facts in the present appeal are entirely different to those postulated; in particular, the taxpayer has not ceased his underwriting business. It therefore does not provide any legal basis for allowing the appeal. The taxpayer accepts that his business has not ceased, but contends that the question of how the commissioners would have treated an ER claim in those circumstances is relevant as it shows the "inconsistency" in their position.

69 The sale of syndicate capacity prior to the final cessation of the Name's underwriting business, does not preclude ER being available under section 169I(2)(b) provided there was a genuine cessation of trade. In the context of section 169I(2) and (4) the phrase "business ceases to be carried on" must refer to the cessation of underwriting activity, i.e. when the capacity is disposed of and the intention not to participate in any syndicates in the following year is clear.

70 This is not affected by the fact that the member would still be participating in the syndicate until 31 December, so that the sale of syndicate capacity may precede the cessation of the business by a few months, as this is simply an incidence of how the particular trade of Lloyd's underwriting is structured. While Lloyd's rules dictate that the Name remains a member until the end of the year, there is a change in status from an active member to a non-active member.

71 It is submitted that, for the reasons given above, ER is not available in respect of the capacity in syndicate 958 disposed of by the taxpayer and that his appeal should therefore be dismissed.

Conclusions

72 The first question to be addressed is whether a Name's capacity in a syndicate is an asset of his business, or whether it is the business itself. Connected with that issue, is the question whether, where a Name participates in more than one syndicate, there is a separate business carried on in each syndicate, or whether there is a single business of underwriting at Lloyd's carried on through the various syndicates.

73 We were at first struck by the distinct nature of a syndicate, with its own Managing Agent, its own portfolio of risks, and its own legal document governing its conduct to which the Names on the syndicate subscribe. No two syndicates are exactly the same, especially if they specialise in particular types of risk, and the value of capacity in one may differ from that in another for various reasons, not least the track record of a syndicate in achieving profits from skilful underwriting.

74 We asked indeed whether the statutes governing business at Lloyds would be relevant to this issue, by we were assured by Ms Choudhury that they were not of relevance.

5 75 We have found the arguments advanced by Ms Choudhury to be persuasive. Although it deals with a separate tax, section 171 of the 1993 Act is in our understanding of it more than a deeming provision, and is declaratory for tax purposes of how the concept of trade must be approached in the context of Lloyds' business.

10 76 While it certainly provides convenience in respect of the taxation of income earned from the Lloyd's market, treating it as deriving from a single source, it goes further than that and establishes the extent and character of the trade in question for taxation purposes. It is difficult to accept that the capital gains tax treatment of Lloyd's business is intended by parliament to diverge conceptually from its treatment for income tax in so far as the characterisation of the trade at issue is concerned, and that capital and revenue considerations should start from differing bases.

20 77 We are reinforced in that conclusion by there being a single membership of Lloyd's, subject to a single set of by-laws governing the whole of the market, in which the trade of insuring risks of various kinds is carried on, and that capacity to trade in that market can be bought and sold across the syndicates which comprise it; this is subject to the availability of FAL, which are relevant to whatever part of the market a Name chooses to do business in. Thus, in our judgment, a Name at Lloyd's carries on there a single trade, however many or few syndicates are involved.

30 78 To carry on that trade in any given year, the evidence shows that a Name requires to have (a) Funds at Lloyd's, (b) capacity in a syndicate, and (c) a contract with the Managing Agent of that syndicate; it may in addition be a virtual necessity to retain the services of a Member's Agent. That was certainly the case for Mr Carver.

40 79 The trade carried on is that of underwriting the risks assumed by the syndicate's Managing Agent, so that capacity to participate in the syndicate's business is not itself the trade, but a means by which the Name is enabled to carry it on in conjunction with the other members of the syndicate. It is partly analogous to buying into the goodwill of a business. Capacity is, in the terms of the statute, an asset of the business and is not the trade or business itself.

80 As such, capacity cannot therefore by itself amount, in
Lord Walker's formulation, to a viable section of a composite
trade which would still be recognisable as a trade if separated
from the composite whole. Capacity at Lloyd's is in our
5 view more nearly identifiable with the acreage of land sold
by the farmer in *Atkinson v Dancer* than with the self-
standing part of the commission seller's business described in
Gilbert.

10 81 There is no dispute about the mechanism required by
Lloyd's for the disposal and acquisition of capacity. A sale or
purchase, at whatever point in the year it takes place, is for
the year following; while the contract is immediately binding
on the buyer and seller, the implementation of it is deferred
15 until the start of the year following. It is the present selling
of a right which is exercisable in the future.

20 82 The capacity sold accordingly remains in use till the end
of the current year, so that Name who has sold it has exactly
the same benefits and burdens arising from the conduct of the
syndicate's business for the rest of that year as if he had not
sold; he remains entitled to the profits made and is liable for
the losses incurred until the end of the year, and the buyer has
no exposure to either until the next year begins.

25 83 In the present case, Mr Carver continued to trade in
syndicate 958 in 2010 in the same way as he had done in
2009. If there could be any argument, based on the notion
that trading through syndicate 958 was a separate business,
30 that the sale to Omega in 2009 led to Mr Carver's business of
underwriting through that syndicate ceasing at the end of
2009, it is answered by the continuation of business in that
syndicate in 2010. That the extent of Mr Carver's capacity
may have been less or more in the second year than in the
35 first is neither here nor there: it was the same business,
carried on in the same syndicate, in successive years.

40 84 The argument in the fourth ground of appeal hypothesises
facts which are removed from those in this appeal, and seeks
to call in the question the policy of the legislation. What
parliament has intended is clear enough from the wording of
the statute and, if the taxpayer's argument has any force at
all, it concerns a matter not within our remit, namely whether
the legislation produces in all cases and all circumstances
45 what may be perceived as a fair result. We therefore do not
address the argument of the fourth ground any further.

5 85 As will have been seen, arguments were exchanged bearing on the consistency of the criteria for capital gains tax reliefs, and whether the construction contended for by the Revenue is out of line with that applicable to what are said to be comparable reliefs. We do not find it necessary to express a view on those arguments: the other reliefs cited are not the subject of this appeal, and we have not been shown any authority to indicate that there should be consistency across what are different reliefs originating at different times and for different purposes.

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15 86 We therefore find that the sale of capacity the subject of this appeal does not fall within either paragraph of subsection (2) of section 169I of the 1992 Act and that the appeal must accordingly fail.

Further appeal rights

20 87 This document contains the full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply in writing 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 the tribunal no 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.

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MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE

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RELEASE DATE: 22 April 2015