[2016] UKFTT 0671 (TC)

TC05382

Appeal number: TC/2016/03114

CORPORATION TAX – Application for postponement of tax – Whether reasonable grounds for believing appellant overcharged to tax – Yes – Application allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SPRING CAPITAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at the Royal Courts of Justice, London on 15 September 2016

Mr Michael Upton, advocate, instructed by Russel & Aitkin solicitors, for the Appellant

Ms Harry Jones of HM Revenue and Customs, for the Respondents

DECISION

1. This is the application of Spring Capital Limited (the "Company"), under s 55 of the Taxes Management Act 1970 ("TMA"), for the postponement of corporation tax in the sum of £516,721.32. The disputed amount of tax arises as a result of a consequential amendment, made by HM Revenue and Customs ("HMRC") on 21 December 2015 (under paragraph 34(2A) of schedule 18 to the Finance Act 1998), for the period ending 30 April 2012. This amendment disallowed a claim for intangibles relief in the sum of £2m. Although Mr Michael Upton, who appears for the Company, explained that the actual figure of the relief sought was £1.917m it was agreed that, as this figure was sufficiently close to £2m, for the purposes of this application any adjustment to the original amount was unnecessary

2. Under s 55 TMA a taxpayer who has appealed to the Tribunal and has grounds for believing he has been overcharged to tax by an amendment or assessment can make an application for payment of that tax to be postponed first to HMRC and, if agreement cannot be reached between them, subsequently to the Tribunal. Unless either HMRC or the Tribunal agrees to the postponement the tax due under the assessment or amendment shall be due and payable as if there had been no appeal.

3. Section 55(6) TMA provides:

> The amount of tax the payment of which shall be postponed pending the determination of the appeal shall be the amount (if any) in which it appears, that there are reasonable grounds for believing that the appellant is overcharged to tax

4. Park J observed in *Pumahaven v Williams (Inspector of Taxes)* [2002] STC 1423:

> "10. … that the phrase 'reasonable grounds for believing that the appellant is overcharged to tax' taken as a whole does not require the [General or Special] commissioners [now the Tribunal] to conduct a mini trial of what will be the main appeal.
>
> 11. Mr McKay [counsel for HMRC] did not dissent from the proposition that the word 'is' in s 55(6) should be read in the sense of 'may be'. It is always dangerous to paraphrase statutory words, but I think that the sense of the subsection is that the commissioners do not have to decide, or form a view on the balance of probabilities, whether the taxpayer has been overcharged. They have to form a view on whether the taxpayer has reasonable grounds for arguing that he (or it) has been overcharged. If they think that the taxpayer's 'grounds' (which I equate, at least in the context of this case, to its arguments) are not reasonable ones, they will reject the application for a postponement, but if and to the extent that their view is that the taxpayer's arguments are reasonable, then, even if the commissioners can see the possibility that on a full hearing of the appeal the arguments may not succeed, the commissioners should make an order for postponement."

He went to say, at [17]:

> "… that the [special] commissioner's role was not to consider whether she believed that the appeal was likely to succeed, but rather to consider whether there were real and not fanciful grounds for appeal. That formulation does not reproduce the words of the statute, but I would broadly agree that it adequately indicates the effect. It appears from Dr Brice's written decision that she agreed also."

5. I should also note that under s 55(6A) TMA the decision of the Tribunal on this matter is "final and conclusive", ie there is no right of appeal.

6. The disallowed claim for intangibles relief in the present case was made in relation to the amortisation of goodwill acquired by the Company on the transfer of a business, between September 2004 and January 2005, that had originally been operated by Spring Salmon & Seafood Limited ("SSS"). The circumstances surrounding this transfer were described by Judge Brannan in *Spring Capital Limited v HMRC* [2015] UKFTT 66 (TC) as follows:

> "21. … the manner in which the seafood trade moved from SSS to the appellant [the Company] is disputed. In a nutshell, the appellant argues that on 22 September 2004 SSS transferred its seafood business to Messrs Thomas. Then, on the same day, Messrs Thomas are said by the appellant to have transferred the seafood business to the appellant for consideration equal to market value – the agreement being evidenced, according to the appellant's evidence, by a minute of agreement dated 22 September 2004 ("**the Minute**"). In this decision I have referred these transactions as the "**tripartite transaction**".
>
> 22. HMRC, on the other hand, say that there is no evidence that the tripartite transaction described in the preceding paragraph took place. HMRC say that there was no written agreement evidencing the transfer by SSS to Messrs Thomas and there was no sale agreement evidencing the transfer from Messrs Thomas to the appellant. The accounts of the appellant for 2005 and 2006 make no mention of the appellant having acquired the goodwill attaching to the seafood trade. Furthermore, HMRC say that there was extensive correspondence between the parties in which, if the tripartite transaction had taken place as described, it would naturally have been mentioned. Instead, it was not until a letter from Mr Thomas on 8 April 2011 that the nature of these transactions was first mentioned. HMRC does not dispute that the seafood trade originally carried on by SSS started to be carried on by the appellant at some stage in 2005, but do not accept that the appellant purchased the goodwill attached to the business for market value nor that the appellant bought the business from Messrs Thomas (nor, for that matter, that SSS sold its trade to Messrs Thomas)."

7. Having considered documents and correspondence to which he had referred Judge Brannan said, at [126]:

> "It seemed to me that these documents indicated that the seafood trade carried on by SSS ceased at some stage between September 2004 and February 2005 and during that period came to be carried on by the appellant. The impression created by the documents was, however, that there was a gradual migration of the trade rather than an outright transfer of the trade at a specific date. I was, however, satisfied that the trade which the appellant began to carry on was the same trade as that previously carried on by SSS."

8. It became apparent during the hearing that, in essence, the Company's application is founded on two grounds. First in relation to whether what Judge Brannan described as a "gradual migration" was a transfer between a company and a related party for the purposes of paragraph 92 of schedule 29 to the Finance Act 2002 (now s 845 of the Corporation Taxes Act 2009 ("CTA")); and secondly, whether the consequential assessment was valid.

9. I shall consider each in turn

Migration/Transfer

10. Paragraph 92 of schedule 29 to the Finance Act 2002 provides that a transfer of an intangible asset to a company from a related party, and vice versa, are to be treated "for all purposes of the Taxes Acts" as being at market value. The commencement date for the provision was 1 April 2002 (see paragraph 117) and under paragraph 118 it applies to only to intangible fixed assets acquired after commencement. It is common ground that SSS is a "related party" to the Company for these purposes.

11. For the Company, Mr Upton says that although Judge Brannan was satisfied that the Company was operating the same trade as that previously carried on by SSS it is clear from his decision that he did not go on to consider the application of paragraphs 92 and 118. He contends that "a general migration" is synonymous with a "transfer" of the trade and that there is evidence, that was not before Judge Brannan that although SSS had been involved with selling fish products before 2002 from July of that year the production of fish became a major part if its business. Therefore, by analogy with *Gordon & Blair Limited v Inland Revenue Commissioners* 40 TC SSS in which a company that had brewed and sold beer was held to have commenced a new trade on the cessation of brewing but continuation of its beer sales, Mr Upton contends that when it took up the production of fish SSS commenced a new, post 1 April 2002, trade within paragraph 118 of schedule 29.

12. Ms Harry Jones, for HMRC, contends that Judge Brannan who had concluded, at [232] and [295], that the Company was not entitled to any deduction in respect of the amortised goodwill, had considered the effect of the provisions of schedule 29. Not only had he done so during the hearing of the appeal but in written submissions made in accordance with his subsequent directions as well as in an application for permission to appeal made by the Company on 3 May 2016. To re-open the issue, she says, would be an abuse of process.

13. However, Ms Jones accepted that Judge Brannan had not addressed this issue in his decision. This is confirmed by a letter sent from the Tribunal to HMRC on 24 May 2016 which states:

> "Judge Brannan's preliminary (but <u>not decided</u>) view is as follows. Paragraph 92 of Schedule 29 Finance Act is relied on by the appellant in its application for PTA [permission to appeal] dated 3 May 2016. This was considered at the hearing and in the written submissions directed by the judge after closing in October 2014. While the judge did not record this in the written decision, he was of the view that paragraph 92 could not apply to deem a market value cost to the acquisition of goodwill by [the Company] because of paragraph 118: it could not apply whether or not SSS and Spring Capital were related parties."

14. Because paragraphs 92 and 118 of schedule 29 to the 2002 Finance Act were not specifically addressed in the decision there is, in my judgment, given Judge Brannan's conclusion that there had been a migration of the same trade from SSS to the Company, a reasonable, as opposed to fanciful, argument that these paragraphs could apply in relation to the appeal against the consequential assessment.

Consequential amendment

15. HMRC, under paragraph 34(2A) of schedule 18 to the Finance Act 1998, as amended by the Finance Act 2008:

> … may by further notice to the company make any amendments of other company tax returns delivered by the company that are required to give effect to the conclusions stated in the closure notice.

16. Guidance produced by HMRC, in their Enquiry Manual (EM3878), states that such a consequential amendment should only be made if it is a "direct result" of the conclusions stated in a closure notice. Indeed, the guidance provides that there should not be reliance on paragraph 34(2A) "to make Revenue amendments which are not a direct result of the conclusions stated in the closure notice."

17. Mr Upton contends that consequential assessment in this case was not a direct result of the closure notice for the previous year and is therefore not valid.

18. Ms Jones, who contends that it is difficult to see how the assessment is not consequential, says that not only did Judge Brannan, at [261] of his decision, conclude that the 2008 consequential amendment was valid but that the Company had an opportunity for this matter to be determined by the Upper Tribunal in the appeal from Judge Brannan (reported at [2016] UKUT 0264 (TCC) where one of the grounds of appeal before the Upper Tribunal (Judges Sinfield and Greenbank) was (as stated at [23]):

> "… that the First-tier Tribunal had erred in law in determining that a valid consequential amendment had been made in the return to the 2008 period because the closure notice for the 2007 period did not include any consequential amendment to the return for the 2008 period and, in any event, the disallowance of a deduction for the amortisation of goodwill in the 2008 period did not arise as a consequence of a decision in respect of return for the 2007 period."

19. However, the Company abandoned this argument before the hearing in the Upper Tribunal and Ms Jones contends it would be an abuse of process for it be allowed another bite of the cherry especially as that the Upper Tribunal upheld the 2008 consequential assessment, albeit on other grounds.

20. While I appreciate the force of Ms Jones's argument it is clear that I am not required to conduct a "mini trial" to determine the issues between the parties or decide whether the argument advanced by the Company would succeed at the substantive hearing but whether it is reasonable. In my judgment it is as the Company has, at the very least, raised an arguable issue for the determination of the Tribunal.

Decision

21. For the above reasons I consider that the arguments advanced by Mr Upton on behalf of the Company are reasonable. It therefore follows that the tax in dispute should be postponed and I direct accordingly.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 22 SEPTEMBER 2016