[2019]UKFTT 0666(TC)

TC07441

Appeal number: TC/2018/04280
TC/2018/03823

CAPITAL GAINS TAX – entrepreneurs' relief under Chapter 3 TCGA 1992 – whether or not business carried on in partnership – held yes – whether or not activities amounted to trade – held not – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

STEPHEN RENEAUX **Appellants**
LYNNE RENEAUX-SMITH

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT
CAROLINE DE ALBUQUERQUE

Sitting in public at Taylor House, London on 1 November 2019

Stephen Dicker, Abbotswood Taxation & Accountancy Services Limited, for the Appellants

Christopher Vallis, officer of HMRC, for the Respondents

DECISION

1. These are appeals against HMRC's conclusions, set out in closure notices dated 23 November 2017, that the appellants are not entitled to entrepreneurs' relief under Chapter 3 Taxation of Chargeable Gains Act 1992 ("TCGA") in respect of a gain on the sale of commercial premises at 65 Alexandra Road, Chalvey, Slough ("The Premises").

THE FACTS

2. We received a witness statement and heard evidence from Stephen Reneaux, whom we found to be a reliable and credible witness. We also received a bundle of documents and, based on Mr Reneaux's evidence and the documents presented to us, we make the following findings of fact.

3. Mr Reneaux worked as a self-employed freelance MOT tester and vehicle mechanic and Mrs Reneaux-Smith worked (both as an employee and on a freelance basis) as a hairdresser. Mrs Reneaux-Smith was also employed in Mr Reneaux's business dealing with the administration and accounts.

4. In 1993 the appellants each acquired a 50% share in Unit 2 at the Premises, and in 1998 the appellants each acquired a 50% interest in Unit 1 at the Premises. The total cost for both units was £397,404.

5. Between 1993 and 2003, Mr Reneaux traded at the Premises under the name Trucktest as an MOT tester and HGV vehicle mechanic.

6. In 2003, the Trucktest business was sold to a Mr Robertson, who also leased the Premises from the appellants from that date. This arrangement lasted until June 2011, when Mr Robertson's business failed.

7. This left the appellants, who by this time were divorced, in some difficulty, since they were still paying all the overheads and mortgage on the Premises. They agreed that they would try to sell or let the Premises but, in the absence of any firm agreement to sell or let the Premises, they then agreed to work together to obtain income from the property.

8. The Premises were unoccupied between June 2011 and January 2012. On 1 February 2012 a business was set up under the name was Junction Six Storage and Workspace Hire. This business offered secure storage, in Unit 2, and the opportunity for third parties to hire workshop facilities, in Unit 1.

9. On 30 May 2012, Mr Reneaux (in his individual capacity) wrote to the Vehicle and Operator Services Agency ("VOSA") to apply for appointment as an Authorised Examiner, which would be required in order for him to carry out any MOT testing, with a view to re-establishing an MOT licence for the Premises. With this in mind he had

already met with VOSA officials in April 2012 and went on a managers' course in July 2012. In September 2012 corrections were made to the floor levels within the Premises to meet VOSA requirements. On 3 October 2012 Mr Reneaux met again with VOSA officials. On 23 October 2012 VOSA indicated that the equipment at the Premises would need recalibration and on 30 October 2012, following this work, VOSA wrote to Mr Reneaux indicating their approval in principle to the MOT business being operated from the Premises, subject to a few minor issues.

10. There was nothing in the correspondence with VOSA which indicated that Mr Reneaux intended to carry on this business in partnership with Mrs Reneaux-Smith. She had not signed any application to VOSA nor been mentioned in any correspondence with VOSA.

11. Mr Reneaux did not however pursue this any further because he was approached by Chalvey Car Service, a dealer in classic cars, with a view to hiring out Unit 2 to provide secure storage for their stock of cars. Chalvey Car Service paid him £10,000 to store their cars at the Premises from 1 November 2012 until 31 March 2013.

12. At the same time the workspace hire business was producing income and Mr Reneaux also used Unit 1 for the storage of some of his tools.

13. Mr Reneaux continued to work as a freelance MOT tester, working at customer locations, frequently in the Brockenhurst and Cadnam areas, in Hampshire. The invoices in respect of this business were issued from Mr Reneaux's home address at the time, Fox Cottage, North Weirs, Brockenhurst, Hampshire. He occasionally made use of the workshops in Unit 1 to carry out vehicle maintenance work, as well as for the storage of some of his heavier tools, but he acknowledged that this was at most "a couple of times a month". Most of the tools of his trade were kept in a garage at his home address.

14. All the income from his work as a freelance MOT tester and vehicle mechanic was returned on Mr Reneaux's income tax returns for the period. None of this income was returned on the tax returns of Mrs Reneaux-Smith.

15. All the income from the letting of the storage facility in Unit 2 and the workspace hire facility in Unit 1 was however reported in the respective tax returns of the appellants for 2011-12 and 2012-23, split 50/50 between them, less the related overheads, also split on a 50/50 basis. Mr Reneaux explained that the rationale for this was that the appellants owned the Premises 50/50 and now that they were divorced any net income from the Premises should also be split between them 50/50.

16. Mr Reneaux did not say that he spent significant amounts of his own time supervising the storage and workshop hire business. The storage facility business consisted of one customer who leased the whole space and therefore did not command any significant attention from the appellants. Mr Reneaux said that Mrs Reneaux-Smith did visit the Premises and supervised the use of the workspace, but only a few times a week. This was not therefore a business requiring a high level of activity on the part of the appellants.

17. All this income was reported to HMRC on the appellants' individual tax returns as rental income, and not as the profits of a trade or business. Neither was it reported as the profits of a partnership. However, during this period, Mr Reneaux was not using the services of a professional accountant and was preparing his own tax returns and he may not therefore have understood the subtleties or implications of this. We accept this and have not therefore placed any weight on this presentation of this income in their tax returns when evaluating whether or not they were carrying on a business in partnership.

18. Mr Reneaux's income tax return from 2011-12 showed that a "storage and workspace for hire" business had been set up, for which a turnover of £100 was recorded. That tax return also included a figure of £11,875 as being rental income. Mrs Reneaux-Smith's tax return for 2011-12 also included a figure of £11,875 as rental income.

19. For the following tax year, 2012-13, both returns showed rental income of £11,750.

20. On 9 May 2013 the appellants disposed of the Premises for £600,000 to the owner of Chalvey Car Service. This disposal was reported in the appellants' tax returns for 2013-14. They both claimed entrepreneurs' relief under Chapter 3 TCGA.

THE LAW

21. Chapter 3 TCGA provides for a lower rate of capital gains tax to be applied in respect of qualifying business disposals. Section 169H(2) TCGA provides that a material disposal of business assets is a qualifying business disposal.

22. Section 169I TCGA then provides the conditions for a material disposal of business assets, as below:

> "**Material disposal of business assets**
>
> (1) There is a material disposal of business assets where—
>
> (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—
>
> (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
>
> (c) a disposal of one or more assets consisting of (or of interests in) shares in or securities of a company.

(3) A disposal within paragraph (a) of subsection (2) is a 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—

(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.

(5) …"

23. Section 169S(1) TCGA then provides:

"For the purposes of this Chapter "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."

DISCUSSION

24. Mr Vallis helpfully summarised the questions for the tribunal arising from ss169I and 169S as follows:

(1) whether a trading business was carried on by the appellants, which ceased at some point between 10 May 2010 and 9 May 2013,

(2) if so, was that business owned throughout a period of 1 year (ending with date the business ceased),

(3) if so, were the Premises in use for the purposes of the business at the time the business ceased to be carried on, and

(4) if it can be established that s169I(2) and (4) are met, whether the appellants were in a partnership.

25. We agree that these are the questions which should be asked and we will address these questions in order.

Was there a trade?

26. There are two possible trades which we need to consider:

(1) Mr Reneaux's trade as a freelance MOT tester and vehicle mechanic, and

(2) The provision of storage facilities and workshop hire at the Premises.

27. It is clear from the facts which we have found that Mr Reneaux carried on a trade as an MOT tester and vehicle mechanic as a sole trader throughout the period. It is also clear that Mrs Reneaux-Smith was not a partner in this trade. She did provide

administration and accountancy services as an employee of the business in the period before the appellants divorced but she was not a partner in this business.

28. We have also found that Mr Reneaux used some part of the Premises to store some of his heavy equipment during the last year of ownership of the Premises and used the workshop "a couple of times a month".

29. We must therefore ask if this limited use constituted the Premises being used for the purposes of the business, "**at the time at which a business ceases to be carried on"** as required by s169I(2)(b). In our view we do not regard this limited use of the Premises as being sufficient to fall within this wording.

30. More importantly however, Mr Reneaux's trade as a freelance MOT tester and vehicle mechanic did not cease when the premises were sold. He continued to carry on this trade after the Premises were sold. This trade does not therefore, in our view, fall within the provisions of s169I.

31. We then need to consider the second business, which Mr Dicker described as being the provision of a service of providing storage facilities and workshop hire.

32. Mr Vallis referred us to *Salisbury House Estate Ltd v Fry* 15 TC 266 in which consideration was given as to whether or not the simple act of leasing property could be regarded as constituting a trade. In that case Lawrence LJ said, at p 297 to 298:

> "Now what are the facts in the present case? The Company owns a large building known as Salisbury House. According to the finding of the Commissioners it lets out offices in that building. Some of these offices are let on lease for terms of years varying from three to twenty-one years. In addition to that, there are eighty-nine tenancy agreements for shorter periods, and twenty-six tenancies by letter, but in each case the Company parts with some estate in the property itself and is playing the true part of a landowner by constituting the legal relationship of landlord and tenant. In these circumstances I think it is erroneous to say merely because there are such a number of leases and lettings that therefore the character of the undertaking of the Company changes from one of a landowner deriving his profit from letting his land to one of a trader making a trade profit consisting of the excess of the rents over the annual value of the property as ascertained under Schedule A. Then does it make any difference because besides owning and letting the land the Company does that which under the Income Tax Acts is considered as the carrying on of a trade or an adventure in the nature of a trade, or something *ejusdem generis* with a trade or such an adventure so as to come under Case VI if it failed to come under Case I? In the present case the activities of the Company consist of providing cleaning facilities and fuel for firing, and rendering other services to the tenants who occupy the various offices which are let to them. The services so rendered result in a profit of over £4000 a year; but these services are separate from the land-owning part of the Company's business, in which, as I have already stated, the relationship of landlord and tenant is created. It cannot be denied that under the leases which the Company has granted, and although I have not seen the tenancy agreements and the terms of the

tenancies created by letters, I take it that the same applies to them, the Company would be committing a trespass by entering upon the property of their tenants except under the provisions of the leases or agreements. In certain events the Company has reserved to itself the right to enter upon the tenants' property; but, apart from that, the Company has parted with an estate or interest in the land and has vested the exclusive ownership during the term in the tenant."

33. Mr Vallis submitted that this made it clear that the mere act of letting property, even if this was, as in the case of *Salisbury House*, a number of offices, did not constitute a trade. However, *Salisbury House* considered what one might term conventional leases, where the owner of the land or property was creating a separate interest in the property, such that the owner of the land could not enter into the property without committing trespass unless the lease specifically permitted him to enter into the property. This is not therefore totally analogous to the facts of this case.

34. In this case, the appellants were not creating conventional leases over the workshop space or indeed the car storage area. They were permitting third parties to use the Premises, but not under a formal lease which precluded the appellants from entering on the property. This distinguishes it from *Salisbury House* and we must therefore consider further whether or not the activities in question amounted to a trade.

35. The definition of what constitutes a trade is notoriously vague. Perhaps a good starting point is the report of the Royal Commission on the Taxation of Profits and Income (Cmd 9474) at para 116 which sets out five "badges of trade". In considering these "badges of trade" we do so accepting that none of the badges of trade is on its own evidence of trading and that it is important to look at the overall picture. In addition this report very much considered trading from the perspective of the buying and selling of assets or goods, which may not be totally appropriate to the current case.

36. These badges can be summarised as:

(1) The length of the period of ownership of the assets or goods being sold,

(2) The frequency of transactions,

(3) The circumstances responsible for realisation of the assets or goods,

(4) The motives of the taxpayer, and

(5) The question of enhancement expenditure or supplementary work on the assets or goods in question.

37. In the current appeal, the only "badge" which might be relevant is that of frequency of transactions.

38. The leasing of the storage space for cars was a single transaction and we do not believe therefore that this can constitute a trading transaction. It is far more akin to the simple lease of property considered in *Salisbury House*.

39. The hiring out of the workshop space might perhaps have the necessary frequency but we did not hear any evidence that this was a substantial activity, and indeed, Mr

Dicker focussed on the car storage aspect of the business. Mrs Reneaux-Smith was required to supervise the workspace hiring activity a few times a week but this was not presented as a substantial activity.

40. We can certainly envisage that businesses which provide large scale storage facilities, such as those letting hundreds of individual storage units of varying sizes, within a single secure storage facility, which are commonplace these days, might well be carrying on a trade, but what we are considering here is a far cry from that level of business.

41. Overall the question of whether or not a business amounts to trading is one of fact and degree, and in our opinion, the activities in question in this case do not constitute trading.

42. Having decided that the activities in question did not constitute trading it is not strictly necessary for us to consider any of the other conditions imposed by ss169I and 169S but, in case we are wrong on that point, we should also consider whether or not Mr Reneaux and Mrs Reneaux-Smith were acting in partnership.

Was there a Partnership?

43. As we have found, the main driver for the activities undertaken by the appellants was that they found themselves in possession of buildings they no longer required and which they could not sell or let. They therefore decided jointly to exploit the Premises to produce income in whatever way they could.

44. They split the income and expenses of the Premises equally between them because they were by this time divorced but still owned the Premises jointly.

45. Mr Reneaux did contact VOSA with a view to resurrecting the licence to carry out MOT testing at the Premises and carried out changes and additional work on the Premises to ensure that they were suitable for MOT testing. He did not follow this through because eventually an opportunity to sell the Premises presented itself, thus resolving their problem. This activity was however solely carried on by Mr Reneaux not by the appellants in partnership.

46. However, the appellants, even though they were divorced by that time, did agree on a joint course of action, which was designed to realise income from the Premises.

47. Section 1(1) Partnership Act 1890 defines a partnership in the following terms:

> "Partnership is the relation which subsists between persons carrying on a business in common with a view of profit."

48. Mr Reneaux and Mrs Reneaux-Smith did not enter into any formal partnership agreement, and neither did they report their income from their joint business to HMRC as partnership income or register their business as a partnership with HMRC, because they were simply unaware of the need to do so. As explained above, therefore, we have not placed any weight on how the income was included in the appellants' tax returns

when considering whether or not the appellants were carrying on the business in partnership.

49. However, on the basis of the facts we have found, it is hard to disagree with the proposition that the appellants were carrying on a business in common with a view to profit.

50. We therefore find that the appellants were indeed in a partnership from June 2011, when the Premises reverted to them, until they sold the Premises, in May 2013.

Letting of surplus property

51. The appellants' skeleton argument refers to the possibility that, in accordance with s21 Income Tax (Trading and Other Income) Act 2005, a taxpayer who is carrying on a trade may treat rental income arising from the letting of property which is surplus to the requirements of his trade as trading income for the purposes of calculating the profits and losses of his trade.

52. This does not however in our view have any relevance to the provisions of ss169I and 169S TCGA.

DECISION

53. For the reasons set out above therefore we decided that this appeal should be DISMISSED.

54. 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.

PHILIP GILLETT

TRIBUNAL JUDGE
RELEASE DATE: 05 NOVEMBER 2019