Neutral Citation: **[2024] UKUT 00110 (TCC)**

Case Number: UT/2021/000157

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

CAPTAL GAINS TAX – whether FTT erred in concluding taxpayer's transfer of the beneficial interest in distribution rights in company (where the company's articles did not provide for transfer of those rights) was a disposal – no – appeal dismissed

Heard on: 27 February 2024
Judgment date: 01 May 2024

Before

JUDGE SWAMI RAGHAVAN
JUDGE VIMAL TILAKAPALA

Between

JOHN TENCONI

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant

For the Respondents: Stephen Donnelly, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The appellant, Mr Tenconi, appeals against a decision of the First-tier Tribunal (Tax Chamber) ("FTT") published as *John Tenconi v HMRC* [2021] UKFTT 107 (TC). Dismissing his appeal, the FTT upheld the closure notice HMRC had issued in the amount of £175,158.59 in respect of Mr Tenconi's liability to capital gains tax ("CGT"). The FTT held that, when Mr Tenconi transferred his beneficial interest in certain distribution rights in a company (which it considered were assets under s21 Taxation of Capital Gains Act 1992 ("TCGA")) in return for £1m, the transfer amounted to a disposal for CGT purposes.

2. In granting permission to appeal, the Upper Tribunal restricted Mr Tenconi's ground of appeal to the following narrow issue. Was the FTT wrong to conclude that there was a disposal of the beneficial interest in the rights for CGT purposes despite the fact that the legal title to those rights was incapable of being transferred (there being no provision for their transfer under the company's articles of association)?

LAW

3. Under s1(1) TCGA "Capital gains tax is charged for tax year on chargeable gains accruing in the year to a person on the disposal of assets".

4. Section 21 TCGA headed "Assets and disposals" provides as follows:

> "(1) All forms of property shall be assets for the purposes of this Act, whether situated in the United Kingdom or not, including—
>
> (a) options, debts and incorporeal property generally
>
> b) currency, with the exception (subject to express provision to the contrary) of sterling,
>
> (c) any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired.
>
> (2) For the purposes of this Act—
>
> (a) references to a disposal of an asset include, except where the context otherwise requires, references to a part disposal of an asset, and
>
> (b) there is a part disposal of an asset where an interest or right in or over the asset is created by the disposal, as well as where it subsists before the disposal, and generally, there is a part disposal of an asset where, on a person making a disposal, any description of property derived from the asset remains undisposed of."

FTT DECISION

5. There is no dispute over the FTT's findings in relation to the background to the transaction at issue. These can be shortly summarised as follows.

6. In 2008, Mr Tenconi became an investor member in Monarch Assurance Holdings Ltd ("MAH"), a company limited, as was allowed at the time of its incorporation in 1979, both by share capital and guarantee rights. Investor members were required to pay for one or more "distribution rights" at a cost of £100. Mr Tenconi bought four such rights (FTT [4][6] and [11]).

7. As well as voting rights for the investor member, the distribution rights gave the investor member a right to income (a share in the profits available for distribution in excess of £2000 apportioned according to the number of distribution rights) and to capital (a share in the surplus assets of MAH after repayment of share capital to the shareholders) together with, in the event

of winding up, repayment of the amounts paid for the distribution rights. There was no provision for the transfer of distribution rights in the articles of association. They could however be surrendered to the company for a cash payment, or in consideration of any security in the company, or any other consideration approved by the directors (FTT [8]-[10]).

8. In 2015 another company, Soogen Holdings Limited ("SHL") wished to buy the shares of a subsidiary of MAH. At this time Mr Tenconi's holding of distribution rights meant he held 50% of the voting right in MAH. To undertake the intended purchase SHL needed the majority of the investor members' approval or else to obtain the distribution rights itself so SHL could provide approval (FTT [12]).

9. Mr Tenconi entered into a contract with SHL and a guarantor of SHL set out in an agreement of 3 September 2015. In that agreement he agreed that, in exchange for £1m, he would sell, and SHL would buy, the entire beneficial interest in Mr Tenconi's four distribution rights in MAH. Mr Tenconi warranted that he was the sole legal and beneficial owner of the rights and that he was entitled to transfer the beneficial title to the rights. Following completion, he would hold the rights as nominee and on trust for SHL and would have no beneficial interest in the rights. Around October 2015 the investor members of MAH voted in a general meeting to transfer the shares of the subsidiary to SHL (FTT [14][15]).

10. Mr Tenconi included a CGT gain of £984,204 (after deduction of cost and losses) in his 2015/16 tax return in respect of the disposal of "4 shares from s. 104 holding" claiming entrepreneur's relief on the gain. HMRC denied the relief and issued a closure notice in the amount of £175,158.59 (FTT [16][17]).

11. The FTT dealt first with the question of whether Mr Tenconi had made a disposal for CGT purposes. It rejected Mr Tenconi's argument that the distribution rights were incapable of being owned (because they could not be transferred) holding that it was clear from the case-law that the lack of transferability did not prevent rights from being assets for capital gains tax purposes (FTT [30]-[40]).

12. The FTT also noted that s21 TCGA expressly included, as a form of property which is a CGT asset, incorporeal property generally (FTT [30]) and that there was nothing in the case law to prevent the distribution rights from coming within that definition (FTT [36]). The FTT also rejected Mr Tenconi's argument that the fact the distribution rights could not be transferred meant they could not be held on trust noting that there was no provision in the governing documents prohibiting the rights from being held on trust for a third party (FTT [38]).

13. The FTT went on to dismiss HMRC's alternative case that there was a part disposal of rights under s21(2) TCGA. It did not consider there was, noting the sale agreement stated that Mr Tenconi transferred all of his beneficial interest and that Mr Tenconi undertook to account to SHL for any amounts paid to Mr Tenconi in respect of the rights (FTT [39]). (In the proceedings before us HMRC maintain this alternative argument, as identified in their Rule 24 response.)

14. The FTT accordingly concluded that the beneficial interest in the distribution rights was capable of being disposed of and that it was disposed of by Mr Tenconi to SHL for the consideration set out in the agreement (FTT [40]). The FTT also agreed with HMRC's case in the alternative that the transaction was chargeable to CGT as a deemed disposal pursuant to s22 TCGA. (It then proceeded to reject Mr Tenconi's arguments that relevant statutory provisions for entrepreneur's relief were met finding that the distribution did not fall within the definition of "ordinary share capital" in s989 Income Tax Act 2007, although as no specific challenge was sought against that part of the FTT's decision that issue is outside the scope of this appeal.)

GROUND OF APPEAL AND PROCEDURAL BACKGROUND

15. The sole ground of appeal upon which permission was granted by the Upper Tribunal (Judge Rupert Jones) was stated as follows:

> "The FTT erred in concluding at [30]–[40] of its decision that the £1m paid by SHL to Mr Tenconi for transfer of his beneficial interest in the distribution rights in MAH was a disposal of incorporeal property for the purposes of section 21(1)(a) TCGA 1992."

16. Earlier in his permission decision Judge Jones explained the arguable error of law as follows:

> "…that while the beneficial interest was transferred and disposed of to SHL, the legal interest in the distribution rights was not capable of being transferred (under the memorandum and articles of association) and was neither disposed of nor transferred to SHL. The distribution rights were only ever capable of being surrendered to MAH, under the terms of the articles of association and were never disposed of but subsequently surrendered by Mr Tenconi after the transfer of his beneficial interest."

17. It is relevant to note that Mr Tenconi had sought permission to appeal on a number of other grounds including that the distribution rights were incapable of being property in the first place because of their lack of transferability He was however turned down on those grounds, it being considered that the FTT did not arguably err in deciding that the distribution rights were assets or incorporeal property for the purposes of s21(1)(a) TCGA. Judge Jones similarly considered that the FTT had not arguably erred in its analysis that a beneficial interest in such rights was likewise incorporeal property or an asset.

18. Mr Tenconi subsequently sought permission before the Administrative Court to judicially review Judge Jones' refusal of permission. That application was out of time and the Administrative Court declined to extend the time limit. Mr Tenconi's subsequent application to the Court of Appeal for permission to appeal the Administrative Court's refusal decision was also unsuccessful. As we set out below, Mr Tenconi refers to what was said in the permission refusal decision in advancing his case before us.

THE APPELLANT'S SUBMISSIONS

19. Mr Tenconi based his substantive case on why the FTT erred in holding there was a disposal under s21 TCGA on the following central propositions.

20. First, he argues that the way s21 TCGA is drafted has the result that the term "assets" means "property". (In his submission that is because the words in subsections 1(a) to (c) describe exhaustively what "all forms of property" in sub section (1) means "for the purposes of this Act").

21. Second, he submits "property" has the common law meaning of property. Mr Tenconi referred to *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch) where the issue concerned the nature of carbon emission allowances as property and where the High Court referenced Lord Wilberforce's definition in *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1965] AC 1175 as setting out the common law definition:

> "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."

22. Third, applying that definition, Mr Tenconi submits that neither the distribution rights, nor the beneficial interest in them constitute property; neither can be transferred. There being no property there can accordingly be no disposal. A disposal, Mr Tenconi says, requires an actual disposal and thereby a transfer of the property so that someone comes to own it in the fullest sense.

DISCUSSION

23. An important issue to note at the outset is the narrow terms on which permission to appeal was granted. In view of that limited scope of permission, and also the grounds of appeal the Upper Tribunal refused, we do not consider that it would be right to address the entirety of Mr Tenconi's case in the same terms as he has put it above. As already mentioned, Mr Tenconi was specifically refused permission on his proposed ground of appeal that argued the distribution rights could not constitute property because of their lack of transferability. By raising that same issue, but under the guise of an argument on disposal, Mr Tenconi is effectively seeking to resurrect a ground on which he was specifically refused permission to appeal.

24. We consider we must deal with Mr Tenconi's arguments above through the lens of the limited scope of permission that has been granted. That is also the approach the respondents to the appeal, HMRC, have rightly restricted themselves to in formulating their response to Mr Tenconi's appeal.

25. With that in mind, the core issue of law advanced by Mr Tenconi, that falls within the scope of permission is the following. Does the fact that the legal title to the distribution rights was not capable of transfer (because there was no provision for this in the articles) mean the beneficial interest in those rights could not be disposed of for CGT purposes?

26. It is also important to be clear, as Mr Donnelly, for HMRC pointed out, exactly what the subject matter is whose disposal is in contention. The grant of permission takes as its starting point that there is an asset clearly in the frame for being disposed of or not. That asset is the beneficial ownership in the distribution rights. It is not therefore necessary to address Mr Tenconi's arguments above that "asset" means "property", that "property" has the common law meaning of property nor the number of authorities Mr Tenconi took us to as to what counts as property. It is also unnecessary to consider the wider discussion surrounding such issues in the Law Commission report on Digital assets of 27 June 2023 that Mr Tenconi also sought to take us to.

27. Similarly, Mr Tenconi's reliance on *Hardy v HMRC* [2016] UKUT 0332 (TCC) does not advance his appeal. The Upper Tribunal held there that just because something was a valuable right (the property buyer's contractual right to seek specific performance of the seller's obligation to convey legal title) it did not necessarily follow that meant the thing was an asset for CGT purposes. The circumstances of the grant of permission mean that it is not open to Mr Tenconi to now contend that the beneficial interest in the distribution rights was not an asset for CGT purposes.

28. In support of his case regarding the importance of the legal interest being transferred, or being capable of transfer, to the person on the other end of the putative disposal, Mr Tenconi also took us to an excerpt from Nicholls LJ's judgment in *Kirby v Thorn* 1987 STC 621 at pg 627 concerning the predecessor provision to s21 (in s22 Finance Act 1965) where Nicholls LJ said:

> "I can see no reason to doubt that in sec. 22 'property' bears the meaning of that which is capable of being owned, in the normal, legal sense"."

29. Mr Tenconi places particular significance on the fact Nicholls LJ referred to "in the legal sense" as opposed to say the "legal or equitable sense". We do not agree that the reference to "legal sense" here can be read as precluding beneficial interests from constituting property or as requiring a focus on where the legal interest lies as opposed to the equitable interest. The issue in that case was whether the Revenue were right in their submission that a liberty to trade constituted property. The contrast being drawn was between "that which was capable of being owned, in the normal legal sense" with a "right" in the wide sense of "a person's "rights" in a free society" and the question of whether a "liberty or freedom to trade enjoyed by everyone" could constitute "property" within s22. Nicholls LJ was simply explaining that a right (in this wider societal sense) was not such property. He was not drawing a contrast between legal and equitable rights.

30. Returning then to the question of whether there can be a disposal of a beneficial interest in an asset for CGT purposes in circumstances where the legal title to that asset is not transferable, Mr Tenconi highlighted the limitations of contractual assignment as a means of transfer and also took us to various passages in *Tolhurst (The Assignment of Contractual Rights 2nd Edition)* in particular he submits that these distinguish "between a beneficiary entitled to an equitable interest corresponding to the full legal interest who may require the trustee to transfer to it the legal interest and one who cannot require the transfer". He points to an excerpt (at [3.11]) said to confirm that "where…the party taking the interest may not be considered the "owner" of it or may not be able to enforce it in his own name…then no transfer is involved."

31. However, those extracted words in 3.11 must be read in full and in the wider context of the preceding passages. The full extract appears in a general legal discussion of assignment and the concept of transfer and the extent to which disposals of interest (generally not with any particular reference to CGT), taking account of the "bundle of rights" theory of ownership, constitute transfers. Earlier passages in the text emphasise that whether there is a transfer cannot be determined by the movement of rights alone but require analysis of the intention that informs that movement.

32. The full passage from which the words Mr Tenconi relies on above reads as follows:

> "Where, however, the transaction is not informed by an intention to transfer such that the interest disposed of does not equate to the interest vested, for example, the party taking the interest may not be considered the "owner" of it or may not be able to enforce it in its own name, and hence its value to that party is less than its value was to the party disposing of it, then no transfer is involved."

33. From that it can be seen that the situation of the party taking the interest not being considered an owner is mentioned by way of example of a transaction where no intent to transfer is present. The passage does not suggest a free-standing proposition that a transfer cannot take place without the recipient being able to enforce in their own name still less that there cannot be a disposal in such circumstances. (Earlier in the section it is acknowledged in any case that not all dispositions of right involve transfers and that "…the concepts of "transfer" and "disposition" are capable of wide meaning and their meaning in any particular instance depends on the circumstances"). Even as regards the question of whether there was a transfer, the passage would not apply to the facts of this case. Here there was no mismatch between the interest disposed of and that vested. Mr Tenconi disposed of the beneficial interest. That same beneficial interest was vested in SHL.

34. There appeared to us, in any case, to be no real dispute between the parties as to the legal limitations surrounding contractual assignment as a means of transfer. HMRC's analysis, in support of the FTT's decision, is, in essence, that a disposal of the beneficial interest in the rights was effected not by contractual assignment but by a declaration of trust. The rights in

question were the subject matter of a declaration of trust which thereby effected a disposal for CGT purposes. That remained the case even though the rights were not assignable legally because of the lack of transfer provisions in the articles.

35. In support of the proposition that there can be a transfer of the beneficial interest even if the legal title cannot, HMRC rely on the Court of Appeal's decision in *Don King Productions Inc. v Warren and others* [2000] Ch 291. The issue there, which arose in the context of various boxing promotion agreements, was whether a purported assignment of personal contract and the benefit of rights that were prohibited from being assigned could create a trust not just over the receipts in the hands of the assignor but of the rights under the contract. The Court of Appeal endorsed Lightman J's reasoning in the High Court that no objection could be seen to a party to a contract containing non-assignment provisions from becoming trustee of the benefit of being the contracting party (as well as the benefit of rights conferred).

36. Mr Tenconi, sensibly, did not in any case appear to take issue with the proposition that contractual rights could be held on trust even if legally the rights were non-assignable. HMRC also referred us to a passage in *Underhill and Hayton: Law of Trusts and Trustees* (20th edn. 2022) at paragraph 1.30 explaining that:

> "…contractual rights which are not assignable at law, because the contract is for provision of personal services or because of an express contractual restriction, may be the subject matter of a declaration of trust by the person having the benefit of the contract."

37. However, in reply, Mr Tenconi argued *Don King Productions* did not help on whether the rights were capable of disposal. He reiterated his arguments that rights, such as those in point here, that were not property in the first place could not be capable of disposal. That line of argument again however reintroduces an issue which it is not open to Mr Tenconi to appeal given the limited scope of the appeal he has been given permission on.

38. We agree with HMRC's analysis. None of Mr Tenconi's arguments lying within the scope of his appeal give any basis to suggest that the FTT erred in law in concluding there was a disposal for CGT purposes. The relevant asset was the beneficial interest in the rights. That asset was disposed of for CGT purposes through the agreement he entered into. Pursuant to that agreement a trust was declared with the result the beneficial interest was transferred from Mr Tenconi to SHL in exchange for Mr Tenconi receiving £1m. The fact the legal title to the distribution rights could not be transferred because there was no provision in the articles for assignment of the rights did not stand in the way of there being a disposal of the beneficial interest in the rights.

Scope to raise the argument that rights did not constitute property

39. As regards the limited basis on which permission had been granted, Mr Tenconi sought to persuade us that we should address the question of whether the rights were property. That issue, he emphasised, was inextricably entwined with the question of disposal. In doing so he also relied on the following statement from the Court of Appeal's refusal of his application to appeal the Administrative Court's refusal to allow Mr Tenconi's out of time judicial review application against Judge Jones' permission refusal. There Warby LJ said:

> "If there is a debatable issue of law in this case is the one which was at the forefront of Mr Tenconi's case throughout, and on which the UT gave permission to appeal, namely whether the rights which Mr Tenconi transferred are assets or incorporeal property for the purposes of s 21 TCGA."

40. We recognise that there is some ambiguity over what exactly was regarded as the debateable issue. The issue said to be debateable actually corresponded to a ground which had specifically been rejected by the Upper Tribunal (whether what was transferred was property) rather than the ground that had been granted (whether there had been a disposal).

41. However, irrespective of whether the statement refers to the view on a ground on which permission was refused or seen as an interpretation of the breadth of the scope of the permission that was granted, we agree with Mr Donnelly the statement cannot be read as altering, and could not have altered, the scope of the appeal in relation to which permission had been granted. The statement was not part of the reasoning for the Court of Appeal's refusal of the application before it for two reasons. First, the permission to appeal to the Court of Appeal was against the Administrative Court's decision to refuse to extend time; that was refused because Mr Tenconi had not identified any ground of appeal against that decision, and being a discretionary decision the Court of Appeal did not consider it a case where there was some error of principle outside the bounds of reasonableness. Second, as described in the permission decision, the underlying ground in issue was one Mr Tenconi pursued in the alternative regarding whether the transfer was a deemed disposal under s22 TCGA. The permission refusal decision was not addressing, nor seeking to address, the merits of either Mr Tenconi's other grounds on which he had been refused, nor indeed the scope or interpretation of the ground on which permission had been granted. Coming as it did at the end of a decision in which permission to appeal had effectively already been refused, we consider the statement was simply a consolatory postscript reminding Mr Tenconi that he still had the benefit of a ground of appeal on which the Upper Tribunal had granted him permission to appeal.

42. Mr Tenconi argues that the tribunal does nevertheless have the discretion to take account, in reaching its decision, any matters which might lead to, what he termed, a miscarriage of justice despite the fact the UT had not given permission. That was consistent with the tribunal's overriding objective and with the proper administration of justice. (Mr Tenconi made this point primarily in the context of his arguments in the alternative on why he should be able to resurrect his ground of appeal that there was no s22 deemed disposal, but the point would, if correct, apply equally to his arguments about why this tribunal ought to re-examine his arguments on whether the distribution rights in question were capable of being incorporeal property in the first place.) He referred by way of support the Upper Tribunal's decisions in *Kevan Denley v HMRC* [2017] UKUT 0340 (TC) at [29]-[34] and *Lloyds Bank v HMRC* [2023] UKUT 00013 at [100] onwards.

43. Mr Tenconi is right that these were both cases where the tribunal acknowledged that it had jurisdiction to consider points in relation to which permission had not been granted previously. However, the difference here is that the argument Mr Tenconi seeks to raise had been specifically considered by the Upper Tribunal but then duly refused with reasons at the permission stage. Finality in decision making is also an important concept in fairness and in the administration of justice. Allowing a party to reopen a ground that had already been raised but specifically rejected at the permission stage, and moreover in circumstances where any possibility of a judicial review of that decision had been exhausted (there being no statutory right of appeal against such permission refusals) would undermine the purpose of the permission stages and the finality of such decisions. We therefore reject any argument that Mr Tenconi can run the arguments he sought to that the rights in question were incapable of constituting property. For similar reasons, we reject Mr Tenconi's attempt to re-open the ground, previously refused by the Upper Tribunal, that the FTT had erred in its alternative analysis that there was a deemed disposal under s22 TCGA.

HMRC's Respondents' notice: part disposal?

44. Our conclusion, that we agree with HMRC's analysis that the FTT made no error of law in holding there was a disposal of the beneficial interest in the distribution rights, means we need not address HMRC's Rule 24 response which argued that there was, in any case, a part disposal under s21(2)(b) TCGA.

45. If it were necessary to consider the point then we could see some attraction in the analysis that if Mr Tenconi's distribution rights were considered as the relevant asset (as opposed to simply his beneficial interest those rights) that the transaction with SHL gave rise to a part disposal under s21(2)(b). That would arise for the straightforward reason that Mr Tenconi's retention of the legal title would satisfy the words "any description of property derived from the asset remains undisposed of" under s21(2)(b).

46. Mr Tenconi had argued that HMRC required permission to rely on its part disposal ground and that such permission should not be granted (arguing also that each side should bear its own costs arising out of dealing with HMRC's Rule 24 response). If it had been necessary to decide this point, we would not have been persuaded that HMRC needed permission to raise it. It was a clear example of HMRC asking for the FTT decision, which had upheld the closure notice, and in relation to which HMRC had been the successful party, to be maintained but on a different basis; HMRC were not seeking to do better on a decision in relation to which they had been unsuccessful. HMRC were also not seeking to raise a new point. This was clear from Mr Tenconi's reply in the proceedings before us to HMRC's Rule 24 Response which referred to HMRC's s21(2)(b) argument in its FTT Statement of Case and from the FTT's recognition of HMRC's submissions on the point at [29] of its decision.

CONCLUSION

47. For the reasons set out above, we reject Mr Tenconi's ground of appeal. He has not shown the FTT erred in law in concluding he had made a disposal for CGT purposes of the beneficial interest in the distribution rights in MAH. (We ought also to mention that, following the circulation of the draft of this decision to both parties for typographical corrections, Mr Tenconi made a number of substantive submissions. While we have considered those, they, in essence, in our view, simply reiterate the points Mr Tenconi had already made before us and which we have rejected for all the reasons set out above. In particular, the points assumed, contrary to what we have held above regarding the scope of permission to appeal in the light of the finality of the Upper Tribunal's refusal of permission on certain grounds, that it was permissible for him to argue that incorporeal rights could not be assets subject to CGT and therefore could not be disposed of.)

48. The appeal is accordingly dismissed.

JUDGE SWAMI RAGHAVAN
JUDGE VIMAL TILAKAPALA

Release date: 01 May 2024