



[2019] UKFTT 0568 (TC)

TC07362

Capital Gains Tax. Transfer of Headingley Cricket Stadium and whether attached “business” or “income streams”. Whether goodwill existed, was capable of transfer and was in fact transferred. Held: transfer of business with attached goodwill and not merely income streams. Importance of evidence and the value of opinions when looking at facts. IRC v Muller & Co’s Margarine Ltd [1901] AC 217, Ramsay v HMRC [2013] UKUT 226 (TCC), Kenmir v Frizzell and Others - [1968] 1 All ER 414 considered and applied. Balloon Promotions Ltd and others v Wilson (Inspector of Taxes) and another SpC 524 (2006) considered and approved.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/04486

BETWEEN

**THE LEEDS CRICKET FOOTBALL & ATHLETIC
COMPANY LIMITED**

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE MALEK
ANN CHRISTIAN**

**Sitting in public at Leeds Magistrates’ Court & Family Court Hearing Centre, Westgate,
Leeds LS1 3BY on 6-7 August 2019**

Mr. Firth, of counsel, for the Appellant

**Mr. Bruce-Girdle, litigator of HM Revenue and Customs’ Solicitor’s Office, for the
Respondents**

DECISION

INTRODUCTION

1. Until the sale, described below, the Appellant owned the free-hold to the cricket ground known as Headingley (the “Property”) which it leased to Yorkshire County Cricket Club (“YCCC”) for the purposes of the latter playing cricket thereon.
2. On 30 December 2005 the Appellant entered into a contract with YCCC for the sale and purchase of freehold property at Headingley Cricket Stadium (the “Contract”).
3. It is the subject matter of that sale that forms the dispute before us. The issue can be simply stated: Did the sale involve a disposal of a business with attached goodwill or was there only a disposal of land with attached income streams?

THE LAW

4. We do not need to rehearse, or set out in detail, the applicable parts of the Taxation of Chargeable Gains Act 1992 (i.e. sections 1, 15, 17, 21, 152 & 153) because to do so would unnecessarily lengthen this decision and because their applicability is not in issue. Suffice to say that the end result of these provisions would be that the Appellant would be chargeable to a large capital gain if we concluded that the transaction involved the disposal of land with attached income streams. No such gain would arise if we concluded that the transaction was for the disposal of a business or businesses with attached goodwill.
5. The concept of business should be afforded a broad meaning and a business will exist where the activities of the business are a serious undertaking earnestly pursued with reasonable or recognisable continuity giving rise to a turnover and being conducted in accordance with recognised business principles [*Ramsay v HMRC [2013] UKUT 226 (TCC) par 64*].
6. Lord MacNaghten in *IRC v Muller & Co's Margarine Ltd [1901] AC 217* described goodwill as follows:

“... It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there. To analyze goodwill and split it up into its component parts, to pare it down as the Commissioners desire to do until nothing is left but a dry residuum ingrained in the actual place where the business is carried on while everything else is in the air, seems to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one whole, and in a case like this it must be dealt with as such.

For my part, I think that if there is one attribute common to all cases of good will it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again.”

7. Although only a first instance decision (and therefore not binding on us), in *Balloon Promotions Ltd and others v Wilson (Inspector of Taxes) and another SpC 524* (2006) Special

Commissioner Michael Tildesley provided a useful summary for the construction of goodwill for the purposes of the TCGA 1992:

“159. TCGA 1992 does not define the term goodwill.

160. Goodwill in the context of TCGA 1992 must be construed in accordance with the principles established by the legal authorities on goodwill.

161. Whether goodwill exists is a question of fact.

162. Goodwill is a type of property.

163. Goodwill should be looked at as a whole and includes whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers and absence from competition. The precise composition of goodwill will vary in different trades and in different businesses in the same trade.

164. Goodwill realises profits for the business.

165. Goodwill cannot subsist by itself but must be attached to a business.

166. Goodwill distinguishes an established business from a new business and is built up by years of honest work and investment in the business. Goodwill is created by trading activities.

167. The value of goodwill will be enhanced if the business and the premises in which the business is carried on are sold together as a going concern.

168. Goodwill can be sold separately from the premises in which the business is carried on.

169. The authorities caution against an over analytical approach to goodwill (see *IRC v Muller & Co's Margarine Ltd* and *Whiteman Smith Motor Co*).”

FINDINGS OF FACT

8. The Appellant called Mr. Robin Smith (Chairman of YCCC), Mr. Peter Hirst (the Appellant’s Financial Director) and Mr. Rob Oates (the Appellant’s Commercial Director) to give evidence. We found Mr. Smith and Mr. Hirst to be both candid and honest witnesses, but able to add little factual detail (by which we mean to imply no criticism of either). However, we found the evidence of Mr. Oates to be of significant assistance. He presented as a straight forward, credible and knowledgeable witness.

9. The Respondents called Mr. McLaren and Ms. Sirsena (both Revenue Officers), both of whom had been involved with the case, but had inherited it from others. Parts of their statements (paragraphs 1-13) appear to be near identical. The explanation offered for this during cross examination was that these parts of their statements came from the same notes of the case file and merely represented background information. The probative value of third hand information must be limited and it seems to us, in any event, that the repetition of background information (which is not disputed) adds little. The remainder of their evidence concerned the reason(s) why each had concluded that there was “no goodwill”. Whether or not goodwill exists is, with respect, a question for this tribunal to determine on the facts. Whilst it can sometimes be necessary for the Respondents to show their “thought processes” (where for example the Appellant is seeking the closure of an enquiry and this is resisted by the Respondents) this was not one of those cases. Whilst, of course, the Respondent is entitled to make submissions on the facts and advocate a particular conclusion arising from those facts; submissions should not be put in the mouth of witnesses as opinion evidence (for which no permission was given or sought and which opinion evidence was not required in any event).

10. Therefore, whilst we have no doubt that both witnesses called on behalf of the Respondents are honest and did their best to assist on the day, we found their evidence to be of limited assistance.

11. We accept Mr. Oates' evidence in these key regards that:

- (1) prior to the sale the Property was leased to YCCC whilst the Appellant maintained the right to carry on hospitality, catering and advertising and did so.
- (2) the hospitality consisted of selling corporate hospitality packages to business customers and that throughout the day representatives of the Appellant's would look after hospitality guests.
- (3) the hospitality operation required the Appellant to find clients and organise /attend meetings, generating significant revenue.
- (4) the advertising operation involved selling advertising packages for boards at the ground and there was a significant overlap with the hospitality operation.
- (5) the catering operation employed 19 full-time staff to provide meals and refreshments to visitors to the stadium on cricket days.
- (6) After the sale the Appellant provided significant assistance to YCCC to ensure a smooth handover – which included the transfer of client details and the benefit of agreements of third parties.
- (7) the catering business was licensed back by YCCC to the Appellant for an annual fee.

DISCUSSION

Was there a business being carried on prior to transfer?

12. The starting point is for us to determine what was happening prior to the sale on 30 December 2005. It seems to be common ground that the Property was being leased to YCCC. Mr. Oates' evidence (which we accepted) was that, during this period, the Appellant also carried out three distinct (but cross reliant) operations at the Property: hospitality, catering and advertising.

13. The first question for us is whether or not these operations, either by themselves or together as a whole, constituted a business carried on by the Appellant prior to the sale. When one applies the definition set out in *Ramsay* there can be little doubt that these operations each (and together) amounted to business(es) being carried on by the Appellant. For ease of reference we will refer to these operations as the "Cricket Business".

14. The Respondents' argument that these were income streams ancillary to the land and not capable of existence without the land is devoid of merit. Firstly, the argument is not supported by the facts: it was established during cross examination that cricket was in fact played at grounds other than the Property and the "income streams" continued.

15. Secondly, the implication in the Respondent's argument is that there was a passive stream of income arising from the Property which did not require anything to be done. This is contrary to the evidence that we have accepted. In our judgment the Appellant had to do (and did) significantly more in the case of each activity which was well demonstrated by Mr. Oates.

16. Lastly, this argument addresses, in our judgment, the wrong test. For the present purposes we are required to determine whether the operations that the Appellant was engaged in constituted a business as set out *Ramsay*. This test was not explicitly addressed by the

Respondents, but it seems to us that there can be little doubt that these were serious undertaking earnestly pursued with reasonable or recognisable continuity giving rise to a turnover and being conducted in accordance with recognised business principles.

17. It bears setting out that, in our judgment, just because an “income stream” is ancillary to the ownership of an interest in the land and would not exist without the land does not necessarily mean that a business was not being conducted from which the “income stream” was derived. Take for example that of the hotelier. He cannot derive any income without an interest in the land and his income is “ancillary” to that interest, but he is clearly engaged in a business (provided that the criteria as set out in *Ramsay* are met).

Did that business have attached goodwill?

18. Having established that, prior to the sale, the Appellant was engaged in the Cricket Business we next need to consider whether this business had goodwill attached to it.

19. It is not clear from HMRC’s submissions whether they argue that, even if we accepted that the Appellant was engaged in the Cricket Business prior to sale, it remains the case that no goodwill attaches to that business. We work on the assumption that this is the view taken by HMRC.

20. Based upon the evidence before us we are satisfied that the Cricket Business had goodwill attached to it which had been generated over the years by hard work and effort. In particular the business had an established client base and reputation garnered over the years through a professional sales, marketing and delivery operation which would distinguish it from a similar, but newly established operation.

21. Based upon the summary in *Balloon Promotions* (with which we agree) it is not necessary for us to distinguish between inherent (or site) goodwill and adherent (or free) goodwill and indeed we find it unhelpful to do so. Either goodwill exists or it does not. The further splitting of hairs would lead only to more torturous submissions and practical difficulties in apportioning relative values.

22. To the extent that it was argued by the Respondents that the adherent goodwill should be subsumed into the value of the property we reject such a submission for two reasons. Firstly, for the reason given above – namely that the splitting of goodwill into inherent and adherent goodwill is an artificial exercise lacking useful purpose. Secondly, the unchallenged evidence before us demonstrated that the Cricket Business could be purchased by another (possibly a competitor) and carried on at another location. We accept that the connection that the Cricket Business had was not with the land, *per se*, but with the staging of major cricketing spectacles there.

What was transferred and did this include goodwill?

23. Clause 2 of the Contract provides:

“LCFA shall sell and YCCC shall buy on the Completion Date the Property and the Goodwill in consideration of the Price in accordance with the terms of this contract...”

24. Goodwill is defined in the Contract as goodwill of the business which is defined as:

“‘Business’ means the business carried on at the Property by LCFA up to and including the date of this Agreement including (without limitation) the letting of advertising boards at ground level around the perimeter of the playing area within the Property and the provision of hospitality and catering services for Cricket Events within the Property, but excluding (for the avoidance of doubt) as reserved in the Transfer, the hotel business carried out in the premises demised by the Hotel lease and the LCFA’s rugby activities.”

25. Further to the Contract a deed of assignment of the goodwill was entered into on 30 December 2005 which provided by clause 1:

“In consideration of the payments provided for in the Contract now paid by the Assignee to the Assignor (receipt whereof the Assignor hereby acknowledges) the Assignor as beneficial owner hereby assigns to the Assignee all the property, right, title and interest throughout the world in and to the Goodwill including all common law rights connected therewith.”

26. HMRC make a number of arguments. Firstly, they contend that there was no business capable of transfer. We have dealt with this aspect above and concluded that there was a business capable of transfer.

27. Secondly, the Respondents contend that “before and after the sale of the freehold property the Appellant was conducting the catering activities” and therefore no catering business was transferred. This, of course, ignores the catering and pouring rights agreement entered into by the Appellant with YCCC [page 422 of the bundle] (the “Catering Agreement”). The effect of the Contract and the Catering Agreement together is that the business is sold by the Appellant to YCCC and at the same time a license is provided by YCCC to the Appellant to allow it to continue to operate the business for an annual fee. In order to get to the position that they argue for, the Respondents would have to establish that the Catering Agreement and / or the Contract was a “sham”. This has not, for obvious reasons, been advanced by HMRC as a fruitful line of argument. Further, and to the extent that it was argued before us that the granting of a license cannot amount to a business we reject such an assertion. Such a proposition would be a wide spreading generalisation lacking any authority in support.

28. Thirdly, HMRC appear to suggest that because Headingley Hospitality Limited (“HHL”) was engaged by the Appellant to sell hospitality packages then it was HHL, and not the Appellant, that was engaged in the hospitality businesses. Although to some extent we have already dealt with this above by concluding that the Appellant was engaged in the business of hospitality we revisit it under this head to make explicit our finding that the decision to sub-contract parts of the hospitality operation (which the evidence shows was eventually brought back in house) does not mean that the Appellant was not engaged in that business. If anything it shows a proper business-like approach to outsourcing to bring about efficiencies.

29. Lastly, and although we did not understand HMRC to be explicitly making this argument, we take the point that a business cannot be transferred unless all of the assets of the business are transferred. If that is a point taken against the Appellant then it falls to be rejected. *Widgery J in Kenmir v Frizzell and Others - [1968] 1 All ER 414* held:

“In deciding whether a transaction amounted to the transfer of a business, regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he could carry on without interruption....”

30. In the present case the evidence (primarily of Mr. Oates) points to significant steps being undertaken by the Appellant to ensure that YCCC could carry on the Cricket Business without interruption. Indeed sub-contracting parts of the business back to the Appellant tends to support the continuity of the business without interruption rather than hinder it. That analysis also holds true where YCCC continued to use a sub-contractor already in situ.

31. It is clear from the Contract and supporting documents that the parties intended to, and did, transfer the Property and the Cricketing Business on 30 December 2005. The evidence

provided by the Appellant's witnesses provided further support for this contention. Further, the Cricketing Business had goodwill associated with it and this was also transferred at the same time. None of the arguments deployed by the Respondents were sufficient for us to come to a different conclusion.

CONCLUSION AND NEXT STEPS

32. For the reasons set out above we accept that the Cricket Business, with attached goodwill, was transferred by the Appellant on 30 December 2005 together with the Property. The transfer did not consist merely of a transfer of land with attached income streams. It, therefore follows, that we allow this appeal.

33. The parties are agreed that on the conclusion of this appeal the matter should be transferred to the Lands Tribunal for it to decide on the value of the Property as at 31 March 1982. We concur and direct it so.

34. For the avoidance of doubt we are not remitting to the Lands Tribunal the issue of the value of goodwill (either at the date of transfer or 31 March 1982). That is an issue, which if in dispute, was one for this Tribunal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

35. 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.

**ASIF MALEK
TRIBUNAL JUDGE**

RELEASE DATE: 06 SEPTEMBER 2019