[2020] UKFTT 0072 (TC)

TC07567

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/06521

Capital gains tax – whether goodwill existed and was sold to company – no – appeal dismissed

BETWEEN

NEILL DYER **Appellant**

-and-

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

TRIBUNAL: JUDGE GREG SINFIELD
MRS CATHERINE FARQUHARSON

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 26 and 27 November 2019

Nichola Ross Martin of Ross Martin Tax Consultancy Limited for the Appellant

Karen Powell, litigator of HM Revenue and Customs' Solicitor's Office, and David Lewis, HMRC Officer, for the Respondents

DECISION

INTRODUCTION

1. The Appellant, Mr Neill Dyer, appeals against HMRC's decision to amend his 2014-15 self-assessment tax return and include £1,200,000 as employment income, resulting in extra tax due of £431,400.

2. Mr Dyer claims that, on 4 September 2014, he sold goodwill which he owned personally to Dyer & Co Services Limited ('Services'), a company of which he was a director and the majority shareholder, for £1,200,000. In his self-assessment tax return for 2014-15, dated 31 January 2016, Mr Dyer showed employment income of £12,000 and a capital gain of £1,086,000. He claimed capital gains tax (CGT) entrepreneurs' relief on the disposal producing an amount of tax due of £143,001.42.

3. HMRC did not agree that Mr Dyer owned any goodwill personally at the time of the purported sale. In a letter dated 1 December 2017, HMRC stated that they were of the opinion that no asset existed in 2014 to be transferred. After a further exchange of correspondence, when neither party changed their views, HMRC amended Mr Dyer's 2014-15 self-assessment tax return to remove the gain. The amended assessment, dated 13 March 2018, showed employment income of £1,212,000 with no capital gain producing an amount of tax due of £574,401.42, ie additional tax of £431,400.

4. Mr Dyer appealed to HMRC by letter dated 6 April 2018. In a response dated 1 May 2018, HMRC maintained their view that there was no disposal of goodwill by Mr Dyer in 2014. This view was confirmed in a statutory review conclusion letter, dated 20 September 2018, which stated:

> "I conclude that in 2014 you had no such asset of goodwill that could be used as an asset to subsequently transfer to [Services]."

5. Mr Dyer maintains that, at all times up to 4 September 2014, he owned the goodwill of the Dyer & Co business which, on that date, he assigned to Services for £1,200,000.

6. HMRC have never accepted the valuation of the goodwill at £1,200,000 because they have never accepted that such goodwill existed. In her skeleton argument, Ms Powell, who represented HMRC, asked that if we were to find that the goodwill existed then we should not make any findings in relation to the valuation issue but should allow the parties to see if agreement can be reached as to the amount of the gain. If the parties cannot agree then the matter must return to us for determination of the value of the goodwill. At the hearing, we stated that we considered that this was an appropriate way to deal with the appeal for two reasons. First, neither party had submitted any evidence on valuation apart from Services' own business valuation (and we would usually expect to see some independent expert evidence, especially from HMRC if they were challenging the appellant's own valuation). Accordingly, there was insufficient evidence to enable us to determine the issue with confidence. Secondly, the appeal had only been listed for two days (both parties had estimated that the hearing would take no longer than that) which was plainly not enough time to deal with all the issues if they included the question of valuation.

7. Accordingly, this decision is only concerned with whether, in September 2014, Mr Dyer owned any goodwill that was capable of being assigned to Services.

BURDEN AND STANDARD OF PROOF

8. It has been settled law for almost 90 years that the burden is on the appellant to show that the sums charged to tax by an assessment are excessive. In *T Haythornthwaite & Sons Limited v Kelly (Inspector of Taxes)* (1927) 11 TC 657, Lord Hanworth MR said at 667:

> "Now it is to be remembered that under the law as it stands the duty of the Commissioners who hear the appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to the majority of the Commissioners by examination of the Appellant on oath or affirmation, or by other lawful evidence, that the Appellant is over-charged by any assessment, the Commissioners shall abate or reduce the assessment accordingly; but otherwise every such assessment or surcharge shall stand good. Hence it is quite plain that the Commissioners are to hold the assessment standing good unless the subject - the Appellant - establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside."

9. In *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635, Mustill LJ stated at 642:

> "The starting point is an ordinary appeal before the [Tribunal]. Here, however unacceptable the idea may be to the ordinary member of the public, it has been clear law binding on this court for sixty years that an inspector of taxes has only to raise an assessment to impose on the taxpayer the burden of proving that it is wrong: *Haythornthwaite & Sons Ltd v Kelly* (*Inspector of Taxes*) (1927) 11 TC 657."

10. More recently still, the position was confirmed by the Inner House of the Court of Session in *Rouf v HMRC* [2009] CSIH 6, [2009] STC 1307 at [29] where, having quoted the passage above from *Haythornthwaite*, the Court stated that the general onus to show an overcharge lay upon the appellant.

11. The cases cited above are binding on us and show that the burden is on Mr Dyer to satisfy us, on the balance of probabilities, that the amount of tax charged by the closure notice amending Mr Dyer's self-assessment tax return is excessive. In this appeal, that means that Mr Dyer must satisfy us that it is more likely than not that, in September 2014, he owned the goodwill of the Dyer & Co business which he asserted was sold to Services. The standard of proof to be applied in this case is the ordinary civil standard of proof, namely whether it is more likely than not that Mr Dyer owned the goodwill in September 2014.

EVIDENCE

12. For the hearing, we were provided with two bundles of documents produced by Mr Dyer containing correspondence and other documents. In addition, on the second day, Ms Ross Martin, who appeared for Mr Dyer, applied to introduce some accounts relating to another of Mr Dyer's companies, Dyer & Co Accountants Limited ('Accountants'). Although Ms Powell objected to the documents being produced so late in the day, she recognised that they might be helpful in establishing some facts and we admitted them on that basis.

13. Mr Dyer provided a short witness statement. HMRC did not produce any witness statements.

14. At the hearing, we heard oral evidence from Mr Dyer. He was not was asked any questions in chief by Ms Ross Martin so his witness statement stood as his evidence in chief. Ms Powell cross-examined Mr Dyer and, in re-examination, Ms Ross Martin clarified some points made in response to questions from Ms Powell. When giving evidence, Mr Dyer

appeared to be trying to be helpful. He frankly admitted that some things stated as fact in his witness statement could not be right in the light of documents that were put to him. He straightforwardly admitted that he could not recollect the details of events that occurred many years ago. It is, of course, understandable that Mr Dyer would have difficulty in recalling distant events in detail but that inevitably casts doubt on his evidence about matters which occurred at the same time about which he purported to have a clear recollection. For that reason, we felt unable to accept Mr Dyer's evidence in relation to certain key points in our findings of fact below without some documentary or other evidence to corroborate it.

15. It is clear from paragraph 161 of *Balloon Promotions Ltd v Wilson (HMIT)* (2006) (SpC 524) ('*Balloon Promotions*'), as well as other cases mentioned in that decision, that whether goodwill exists is a question of fact. In any case, the facts may be established in one of two ways: by a statement of facts agreed by the parties for the purposes of the appeal or by evidence adduced by the parties from which the tribunal or court may find the facts. There was no agreed statement of facts in this case. Unfortunately, the evidence presented in this case was unsatisfactory and inadequate in many respects.

16. Mr Dyer's witness statement, which was less than a page of actual narrative, failed to deal with certain material matters, lacked detail about those matters which it did deal with and contained some factual errors. The documents bundle omitted several documents that would have been useful in addition to the accounts of Accountants that Ms Ross Martin produced on the second day. Ms Ross Martin did not seem to appreciate that it is necessary to establish the facts before considering how the decided cases might apply to the appeal. Her skeleton argument contained a little over two pages (double spaced) summarising the background facts without any references to the documents or other evidence that supported that summary and 23 pages of "technical analysis" almost entirely based on case law. References to and quotes from decided cases may be useful guidance as to the law but are of no assistance in determining the facts in another appeal. Each case must be decided on its own facts. At the hearing, neither party took us through the documents in a methodical way. We were left to make our findings of fact on the basis of the scant pickings of the brief testimony of Mr Dyer and our own review of documents in the bundles both before and after the hearing. On the basis of the evidence made available to us, we find the material facts are as set out below.

FINDINGS OF FACT

17. Mr Dyer is a chartered accountant. He established his own accountancy practice, which traded as Dyer & Co, in 1988. Between 1988 and April 1996, Mr Dyer carried on the accountancy business as a self-employed sole trader. Between May 1996 and 21 August 2003, Mr Dyer was in a partnership ('the Partnership') with, first, Mr Bob Stiddard and then, after he had left, with a Mr Coles. The Partnership traded as Dyer & Co.

18. In August 2003, Mr Dyer formed a new company, Accountants. Mr Dyer was the sole shareholder and director of Accountants. On 21 August 2003, the Partnership transferred its accountancy practice to Accountants. Accountants started trading, as Dyer & Co, on 1 September 2003. Mr Dyer said that, at that time, there was no agreement between the Partnership and Accountants that set out the terms of the transfer or anything about goodwill. Mr Dyer said in evidence that it was his intention to retain the goodwill and that is shown by the fact that the accounts of Accountants never showed any goodwill under intangibles.

19. On 1 December 2003, Joanna Morley, with whom Mr Dyer was then in a relationship, was appointed as a director of Accountants and a further 99 shares were issued: 89 to Mr Dyer and 10 to Ms Morley. However, accounts prepared by Accountants showed Mr Dyer as the

sole director and shareholder, with 100 shares, for the years ended 31 August 2004, 2005 and 2006.

20. On 11 June 2004, Services was incorporated. Services had two directors: Mr Dyer, who had 89 shares and his then partner, Joanna Morley, who had 10 shares. One share was allocated to Instant Companies Limited.

21. The accounts of Accountants for the year ended 31 August 2004 showed the company's turnover to be £1,005,023 and a net profit of £160,400.

22. During November 2004, Mr Dyer suffered some heart problems which later required admission to hospital. As a result of his ill health, Mr Dyer was unable to work from November 2004 until June 2005. Mr Dyer said that Accountants lost many clients while he was in hospital because he was not available. During that period, there was a dispute with his former business colleague, Mr Coles, and, as a result, Accountants' turnover for the year ended 31 August 2005 fell to £925,153 which produced a net profit of £74,852. Also, during this period, Ms Morley took on a number of finance agreements and purchased three vehicles.

23. On 31 December 2005, Ms Morley resigned as a director of Accountants.

24. Services submitted dormant company accounts for the year ended 30 June 2005 to Companies House on 18 January 2006.

25. On 13 May 2006, Ms Morley ceased to be a director of Services.

26. On 8 June 2006, Services notified Companies House that Ms Morley had resigned as a director of Services.

27. On 12 June 2006, during an enquiry into the tax affairs of Accountants and Mr Dyer personally, HMRC wrote to Mr Dyer and stated:

> "Limited company
>
> Thank you for the further background information regarding the transfer of business to company [ie Accountants]. I note: -
>
> - Practice of Dyer & Co trades through limited company as from 1 September 2003.
> - You retained the goodwill and the freehold property in your own name.
> - …"

28. Mr Dyer contended that, in the letter of 12 June 2006, HMRC confirmed that he was the owner of the goodwill of the business of Dyer & Co which was used by Accountants. We do not accept this. We were not provided with a copy of the letter dated 4 April 2006 to which HMRC's letter was a response but we consider that it is clear from the words preceding the bullet points that the writer was merely acknowledging what Mr Dyer had stated in his letter by way of further background information. The letter of 12 June was not an acceptance by HMRC that Mr Dyer owned any goodwill in his own name in June 2006.

29. On 24 November 2006, Services notified Companies House of the appointment of a new director, Nicola Jane Wood. Services also submitted a Return of Allotment of Shares showing that, on 22 November 2006, Mr Dyer had been allotted 89 ordinary shares and Nicola Jane Wood had been allotted 10 ordinary shares.

30. Mr Dyer instructed Mr Gordon Beat of Tenon Recovery to advise him about Accountants' financial position. Tenon's advice was that, as Accountants was not able to meet its liabilities as and when they fell due, there was no alternative but to liquidate the company.

31. On 21 December 2006, an agreement was signed by special resolution changing the name of Services from Dyer & Co Secretarial Services to Dyer & Co Services Limited but nothing turns on that and, in this decision, we simply refer to 'Services'.

32. Accountants' tangible business assets were acquired by Services in January 2007. Accountants ceased trading on 31 January 2007 and Services commenced trading on 1 February 2007. We were told that there was no agreement relating to the transfer but we were shown a letter to Duncan Beat, a liquidator with Tenon Recovery, enclosing a cheque for £6,462.50, both dated 23 February 2007, by which Services paid for the purchase of the fixed assets of Accountants.

33. In her skeleton argument, Ms Ross Martin said that when Mr Dyer transferred the business of Dyer & Co to Services in 2007, he did not transfer the goodwill to either Accountants or to Services but retained ownership of it personally and allowed each company to exploit the goodwill. In his witness statement, however, Mr Dyer said that he had acquired the goodwill from the liquidator of Accountants for £100,000 in 2007 (that must be a typographical error for 2009 - see [58] below).

34. In evidence, Mr Dyer said that he had never been paid or received any other consideration for the introduction of clients to Accountants. He contended that Accountants did not have any goodwill and the accounts of Accountants had never shown any goodwill. Having seen those accounts, which were produced on the second day, we accept that they did not show goodwill as an intangible asset but it does not necessarily follow that Accountants did not have any goodwill built up over its years of trading.

35. On 1 May 2007, Services submitted dormant company accounts for the year ended 30 June 2006 to Companies House.

36. On 11 July 2007, Mr Beat of Tenon Recovery, sent a letter to Mr Dyer's solicitors saying:

> "No consideration was paid by Dyer & Co Services Ltd for Dyer & Co Accountants Ltd as the goodwill vests in Neill Dyer personally."

37. Accountants went into liquidation on 20 July 2007 and Mr T J Bramston of Kingston Smith was appointed as the liquidator. It was eventually wound up in 2009 and was dissolved on 3 February 2012.

38. On 27 October 2007, Services submitted Abbreviated Financial Statements for the year ended 30 June 2007 to Companies House. These showed additions of tangible fixed assets, described as office equipment, to the value of £9,539. Mr Dyer said, and we accept, that these were assets purchased by Services from Accountants.

39. On 17 July 2008, the solicitor acting for the liquidator of Accountants sent a letter before action to Mr Dyer regarding a number of claims against him in his capacity as director of Accountants. Sections 3, 4, 5, 6 and 7 of the letter set out multiple allegations of misfeasance. At section 7, the solicitors stated:

> "7.8 Furthermore, it is apparent that no payment was made by [Services] to [Accountants] when it took over the business and assets of [Accountants] in January 2008 [sic]. [Accountants] had assets of £381,265 according to the accounts for [Accountants] for the period ending 31 August 2006.

> 7.9 In particular, no payment was made in respect of the goodwill. We understand that you are of the view that the goodwill was vested in you personally rather than in [Accountants].
>
> 7.10 However, the previous share sale agreement between Mr Coles and you confirms it was your intention to bring your personal goodwill into [Accountants] by incorporation.
>
> 7.11 During the interview with Ms Morley, she stated that she believed that the goodwill was owned by [Accountants] and in part herself.
>
> 7.12 Accordingly, the acquisition of the business of [Accountants] (including some book debts) without payment being made by [Services] to [Accountants] constitutes a transaction at an undervalue contrary to s238 Insolvency Act 1986. It also amounts to a misfeasance on your part of [sic] Mr Dyer. You and your new company [ie Services] benefited from the transfer at the expense of the creditors of [Accountants]."

The share sale agreement with Mr Coles and evidence given by Ms Morley in interview referred to in sections 7.10 and 7.11 of the letter were not in evidence before us. In Section 8 of the letter, the liquidator's solicitors made a Part 36 offer of £550,000 in full and final settlement of the liquidator's claims against both Mr Dyer and Services.

40. On 22 July 2008, Mr Dyer's solicitor wrote to him and stated:

> "The claim concerning the assumption on goodwill by [Services] is more complex, as you maintain the goodwill was never transferred into the company. Whilst we may be able to establish this, the difficulty is that goodwill could thereafter have been engendered by the company itself through continued trading."

41. On 14 August 2008, Mr Dyer wrote to the Professional Conduct Department of the Institute of Chartered Accountants in England and Wales ('ICAEW') in response to a letter from the ICAEW of 1 August. We were not provided with a copy of the ICAEW's letter but it is clear that it raised concerns about the practices of Accountants and Services around the time of the former's liquidation. In his letter, Mr Dyer stated that the client base of Accountants and Services vested in him. In relation to Services, he also wrote:

> "The goodwill of the practice is owned by myself. Before [Accountants] was incorporated I traded as a sole trader and the goodwill was never transferred to the Limited company. This can be evidence [sic] by no such credit within the accounts of [Accountants] as previously supplied.
>
> [Services] purchased the other fixed assets from [Accountants] via a valuation placed on them as valued by Cuthbert and Kingsley, a third party valuation [sic]."

42. On 16 September 2008, Mr Dyer's solicitor wrote to him in relation to the various claims made against Mr Dyer by the liquidator of Accountants. In relation to the claim for the transfer of Accountants' business to Services, the letter stated:

> "Transaction at an undervalue – transfer of business
>
> The liquidator maintains that the business transferred [sic] to [Services] was effected at an undervalue. The liquidator relies on a [sic] historic share sale agreement with Mr Coles, and evidence given by Ms Morley, to suggest that the transfer of the business was effected at an undervalue as not [sic] value was allocated to goodwill. You maintain that the goodwill was never an asset of the company [ie Accountants], and indeed on file … you do have

> communication with the Crown Department suggesting that goodwill had never been incorporated into the business of the company. Although a complex forensic accounting exercise would be required, my slight concern is that the company was trading for a period of time. Although no goodwill might have been injected into the company at the outset, during the period of its trading you were engaged as a director of the company and were working for the company as opposed to you as an individual. Therefore, over the period of trading when you were dealing with clients, or generating new clients, the company may have engendered its own goodwill as a result. If I am right in this, theoretically there is a valid transaction at an undervalue claim to the extent of the value of the goodwill transferred (ie the value of the business received by [Services])."

43. On 10 December 2008, the solicitor acting for Accountants' liquidator wrote to Mr Dyer's solicitor stating:

> "7 Goodwill
>
> To suggest that there can be no goodwill vested in the company is a nonsense. The dispute between us in [sic] one of quantum."

44. On 24 December 2008, Mr Dyer's solicitor responded to the solicitor for Accountants' liquidator:

> "7. Goodwill
>
> Goodwill was expressly excluded, and this was accepted by the Crown Department. You suggested our contentions in this regard are 'nonsense' and that the dispute between us is one of quantum. With respect, the dispute is clearly one of merits."

45. On 24 December 2008, Mr Dyer's solicitors also wrote to Mr Dyer:

> "6. Insofar as concerns goodwill, they continue to maintain that goodwill is an asset of the company [ie Accountants] notwithstanding the letter from the Crown Department, and the points previously made. As you are aware in my view it is likely that the company [ie Accountants] would have engendered its own goodwill through trading following incorporation, notwithstanding that any goodwill previously vested in you as an individual might have been excluded notwithstanding the wording in the agreement relied upon by the Liquidator."

We conclude that the agreement referred to in Mr Dyer' solicitor's letter as being relied on by Accountants' liquidator must be the share sale agreement with Mr Coles referred to above. It is obviously an important document and, therefore, regrettable that it was not produced in evidence before us. That is especially surprising as we conclude from the correspondence that both Mr Dyer and Mr Dyer's solicitor must have seen the agreement. In the absence of the document and any evidence to the contrary, we accept the interpretation of Accountants' liquidator that the previous share sale agreement between Mr Dyer and Mr Coles showed that Mr Dyer intended to bring any personal goodwill into Accountants on incorporation of the Dyer & Co business carried on by the Partnership. We note, however, that there is no evidence about what happened to the agreement with Mr Coles or that any goodwill was actually transferred.

46. On 20 January 2009, there was a without prejudice meeting between the solicitors for Accountants' liquidator and Mr Dyer's solicitor. On 29 January, Mr Dyer's solicitor wrote to him:

> "Without prejudice meeting
>
> … We were advised the Liquidator would only accept offers of in the region of £325,000 …
>
> As you are aware, I believe that were the matter to be progressed to court[,] judgment of in the region of £100,000 … is likely to be made against you based upon the merits."

The letter went on to discuss the formalisation of a without prejudice offer to be made to Accountants' liquidator.

47. On 9 February 2009, the solicitor for Accountants' liquidator wrote two letters to Mr Dyer's solicitor. The first was an open letter asking if Mr Dyer's solicitor would accept service. The second was a without prejudice letter stating that the without prejudice offer made by Mr Dyer's solicitor was derisory and unlikely to be accepted by the liquidator. On 10 February, Mr Dyer's solicitor responded to the without prejudice letter from the liquidator's solicitor stating:

> "Selling the business is not an option, since the goodwill is effectively our client. Were your client to obtain judgment, and were our client ultimately to be adjudged bankrupt, the value of this business would be reduced to £nil."

48. On the same day, Mr Dyer's solicitor wrote to him to ask for information to enable the preparation of an affidavit of means.

49. On 19 February 2009, the solicitor for Accountants' liquidator wrote to Mr Dyer's solicitor formally rejecting the offer of £30,000 in full and final settlement which Mr Dyer's solicitor had made at the without prejudice meeting on 20 January.

50. On 17 April 2009, Dawn McCambley, counsel, of 11 Stone Buildings, provided written advice to Mr Dyer in relation to the proposed proceedings against him. Ms McCambley's advice was that overall the liquidator would have good prospects of succeeding in most of the claims made. In relation to the transfer of the business of Accountants to Services, Ms McCambley advised:

> "The Liquidator has asserted that the transfer of the business to [Services] was effected at an undervalue, as insufficient value was attributed to goodwill. Mr Dyer has argued that as the goodwill vested in him personally, and he was going to be involved in [Services], no payment reflecting goodwill was necessary. Although it may be possible to argue that there was no goodwill associated with [Accountants] at the date of incorporation, [Accountants] then traded for approximately 4 years before Liquidation. As such, the Liquidator will claim that a certain amount of goodwill had built up within [Accountants] over that period, which was not directly associated with Mr Dyer. Particularly as, on Mr Dyer's own evidence, he was absent from [Accountants] for a significant time, namely around 9 months, from January/February 2005 until June 2005 (when he only returned on a part time basis).
>
> However, the main difficulty is that from the information available at present, it is not possible to put a value on any potential claim. Rather, a detailed accounting exercise would be necessary to accurately determine the value of the goodwill. Nonetheless, it would appear that at least some value would have been attributable to the goodwill which had built up; for the sale of which no consideration was received by [Accountants]. On balance I would advise there is a likelihood the Liquidator would be able to successfully argue there was a transfer at an undervalue."

51. Ms McCambley's view that Accountants had built up some value independent of Mr Dyer was confirmed by an independent valuation of Services. On 18 May 2009, Mr Dyer's solicitor wrote to him:

> "(ii) the valuation from Duncan of your 90% shareholding in [Services].
>
> I have spoken to Duncan and discussed the initial valuation with him. I understand that the valuation of your shares amounts to £140,000 on the basis you are no longer involved in the business going forward, or £200,000 if you are involved. I must confess that bearing in mind the goodwill appears to vest in you as an individual I am somewhat surprised by this valuation, and have asked Duncan to liaise with the valuer urgently in this regard."

52. The significance of the valuation is that it suggests that, contrary to the position maintained by Mr Dyer in correspondence with the liquidator for Accountants and before us, the business of Dyer & Co, whether carried on by Accountants or by Services, would have significant value without Mr Dyer. On the basis of the valuation prepared for him, Mr Dyer's presence only constituted one third of the value of the business of Services. That is consistent with the fact that the business of Accountants did not fail completely when Mr Dyer was absent from November 2004 until June 2005 due to ill health. Turnover for the relevant year fell when compared with the previous year but by less than 10% (and some of that may be attributable to the mismanagement by Ms Morley alleged by Mr Dyer in the liquidation proceedings). We conclude from this that the business of Dyer & Co carried on by Accountants was not solely dependent on the continued involvement of Mr Dyer and we infer that his contribution to Services when it took over the business of Accountants would not have been any greater. We also find, although we do not purport to make a valuation in the absence of expert evidence, that the valuation of Mr Dyer's contribution at a third of the value of the business of Services was generous in the light of the effect of his absence in 2004-05 which had a much smaller effect on the turnover of Accountants.

53. On 26 May 2009, Mr Dyer's solicitor responded to the solicitor for Accountants' liquidator enclosing Mr Dyer's affidavit of means. The affidavit showed that Mr Dyer had a personal liability to T R Stebbings of £30,000. The solicitor's letter stated:

> "We have previously canvassed the issue of the goodwill, and produced copy correspondence from the Crown Department in which they agree that in their opinion the goodwill did not vest in the company. By way of analogy we refer to the recent acquisition by Mr Dyer of the goodwill of T R Stebbings. Monies owing to T R Stebbings are shown as a liability in our client's affidavit of means. This liability relates to the goodwill acquired by Mr Dyer personally, which does not belong to [Services]."

54. As Mr Dyer readily acknowledged when giving evidence on oath, the reference in the affidavit of means sworn by him and in his solicitor's letter to the liability to pay T R Stebbings in respect of goodwill acquired by Mr Dyer personally was wrong. Mr Stebbings sold some of the goodwill associated with his accountancy practice (he retained some private clients) to Services in 2009 or 2010 but Mr Dyer could not remember the exact date. He said that he never personally owned any of T R Stebbings' goodwill and was not liable to pay for it. Services' accounts showed that Services made payments to Mr Stebbings. Mr Dyer said that his solicitor was mistaken. It is clear that Mr Dyer would have been aware of the true position when his solicitor sent the letter in May 2009 but we were not shown any correspondence from him to his solicitor or to the liquidator's solicitor correcting the error.

55. On 3 June 2009, the liquidator's solicitor responded to Mr Dyer's solicitor:

> "10 Goodwill
>
> 10.1 Your client has argued consistently that he owns the goodwill of [Services] personally. That being the case we are somewhat surprised to note that he does not list this as a personal asset.
>
> 10.2 From a review of the Tenon report the goodwill could be worth £150,000. Furthermore the goodwill acquired from Mr Stebbings was worth £90,000 in December 2008."

56. As we have already noted at [54] above, Mr Dyer said that he had never owned T R Stebbings' goodwill and its inclusion in his affidavit of means was an error by his solicitor. In relation to the omission of the goodwill that he owned personally from the affidavit, Mr Dyer said that his solicitor had made the list of assets. Mr Dyer said that he could not recall if his solicitor had checked the list with him. We did not find Mr Dyer's answer on this point to be credible as his solicitor had sent him several drafts of the affidavit and Mr Dyer had had to swear on oath or affirm that the contents of the affidavit were true and accurate before another solicitor. It follows that Mr Dyer had several opportunities to check the affidavit and realise that it overstated his liabilities and understated his assets but he did not do so. It seems to us that there are three possible explanations for this. The first is that Mr Dyer had forgotten who was the true owner of T R Stebbings' goodwill and that he owned the other goodwill associated with the Dyer & Co business. We do not consider that is very likely given the fact that Services had acquired some goodwill from T R Stebbings in May 2009 and, in June, Mr Dyer would be unlikely to have forgotten something that had occurred so recently. He would also be unlikely to have forgotten that he owned the other goodwill personally if, as he maintained before us, he had always owned it and it was the basis of the whole business and thus very valuable. The second possible explanation is that Mr Dyer was seeking to mislead Accountants' liquidator about his net worth. The third possibility which is that Mr Dyer did not distinguish between Services and himself in relation to who owned goodwill. In our assessment, the second and third possibilities are not mutually exclusive. We consider that Mr Dyer regarded the Dyer & Co business as his business whether it was carried on by him as a sole trader or by the Partnership or Accountants or Services. That is not to say that we agree that Mr Dyer was the business and vice versa: as we have found at [52] above, Mr Dyer's contribution to the value of Services was probably significantly less than a third in May 2009. We also consider that Mr Dyer was trying to mislead the liquidator (or was content to allow a misleading mistake by his solicitor to go uncorrected) by saying he had a personal liability to T R Stebbings of £30,000.

57. On 9 June 2009, Mr Dyer's solicitor responded to the liquidator's solicitor:

> "10. Our client does maintain that the goodwill belongs to him personally, and does not belong to [Services]. Having said that, and your client ought not to seek to read anything into this, the valuation prepared by Tenon Recovery expressly included goodwill. The fact remains that the goodwill is Mr Dyer personally. The valuation speaks for itself. The valuation of £150,000 to which you refer is on the assumption that Mr Dyer will continue either as a director or employee of the company. The reality is that if judgment is obtained against him he cannot do so
>
> Without prejudice, save as to costs
>
> … we note your client would be prepared to accept the sum of £100,000 in full and final settlement inclusive of interest and costs."

58. In July 2009, Accountants' liquidator, Mr Dyer and Services entered into a settlement agreement by way of deed ('the Deed'). Under the Deed, the parties agreed to settle all claims which the liquidator might have had against Mr Dyer and Services in connection with the

liquidation in return for a payment of £100,000. It is clear from the terms of the Deed that it settled all potential claims and not just the liquidator's claim in relation to the transfer of goodwill from Accountants to Services. In his witness statement, Mr Dyer said that he had personally acquired the goodwill of Accountants from the liquidator for £100,000 which was financed by personal loan. In cross-examination, Mr Dyer said that he entered into the settlement and paid £100,000 to avoid personal bankruptcy as that would mean that he was no longer able to practice as a chartered accountant. He readily agreed that the settlement covered everything, ie all and every claim, and that it did not refer to goodwill specifically. He also accepted, as was clear from the Deed, that the settlement related not just to potential claims against him but also against Services.

59. On 5 April 2011, Services submitted Abbreviated Financial Statements for the year ended 30 June 2010, signed by Mr Dyer, to Companies House, showing an intangible fixed asset addition of £111,240 for goodwill. It is clear from the accounts that any goodwill acquired from the liquidator of Accountants was regarded as an asset of Services. Mr Dyer accepted that the amount of the addition included the sum of £100,000 paid to the liquidator. Of course, that was not correct. As Mr Dyer accepted, the payment to the liquidator was not just for Accountants' goodwill but to settle all claims against Mr Dyer and Services.

60. In his witness statement, Mr Dyer said that, in November 2011, he disposed of 8% of his shares in Services. He said that in bringing in a new shareholder it was agreed that it would be unfair to other shareholders if he were to profit from the potential increase in his personally owned goodwill which was due to their efforts. Mr Dyer's evidence, in his statement, was that it was for that reason that he agreed to assign his "interest in the goodwill of [Services] to [Services]". However, the goodwill was not transferred until September 2014.

61. As the annual return at [63] below shows, Mr Dyer transferred eight of his original allocation of 89 shares in Services to its practice manager, Ms Donna Benton. We were told that the award of shares was designed to motivate and retain Ms Benton in the practice. Mr Dyer's evidence was that it was as a result of the change and to add value to Services from the perspective of a shareholder that he agreed to assign his goodwill to the Company which he did by a deed of assignment made on 4 September 2014 which we discuss below.

62. On 30 March 2012, Services submitted Unaudited Abbreviated Accounts for the period ended 30 June 2011 to Companies House, showing an intangible fixed asset addition of £2,950. Mr Dyer told us that this was a payment to Mr Stebbings for a client that he had introduced to Accountants. The notes to the accounts stated that Services' accounting policy was to write off the cost of goodwill over five years.

63. On 18 June 2012, Services submitted an annual return to Companies House which showed that, as at 11 June 2012, the shareholders in Services were Mr Dyer with 82 ordinary shares, Ms Wood with 10 ordinary shares and Ms Benton with 8 ordinary shares. Mr Dyer said that Services was run by the three shareholders who operated more like partners.

64. On 28 March 2013, Services submitted Abbreviated Accounts for the period ended 30 June 2012 to Companies House, showing an intangible fixed asset addition of £3,375.

65. On 24 March 2014, Services submitted Abbreviated Accounts for the period ended 30 June 2013 to Companies House, showing an intangible fixed asset addition of £4,300.

66. Services was valued for the purposes of the assignment of the goodwill referred to at [60] and [61] above. The valuation was not carried out by an independent valuer but by Services itself. Mr Dyer told us that Ms Wood calculated the value of Services. We were shown a document titled "Dyer & Co Services Business Valuation" which was undated but was

described in the minutes of the meeting of the board of directors referred to below as dated 31 August 2014. The executive summary stated that Services had valued the business of Dyer & Co to ascertain the value of goodwill owned by Mr Dyer. The "Back Ground [sic] Information" stated that Dyer & Co had been formed by Mr Dyer in 1988 and had continued to trade successfully since that date. It made no reference to the insolvency of Accountants. It also stated that Dyer & Co had approximately 1000 listed company clients and 500 sole trader clients. The information included statements that Dyer & Co had 29 members of staff and described the services provided by Dyer & Co. It also stated, simply, that Services had been incorporated in 2004 and the first year of trading was for the year to 30 June 2007. It will immediately be seen that the Business Valuation failed to make any distinction between the business of Dyer & Co as carried on by Mr Dyer as a sole trader, by the Partnership, by Accountants and finally by Services. Further, the Business Valuation failed to recognise that the employees were employed by Services and that Services supplied the services to clients who were contractually, as Mr Dyer acknowledged in cross-examination, clients of Services. The valuation produced a value for the goodwill of £1,200,000 by using the gross recurring fees of Services and applying a multiple of one.

67. On 4 September 2014, there was a meeting of the board of directors, chaired by Mr Dyer and with Ms Wood the only other director present, to approve the purchase of the goodwill from Mr Dyer. The Minutes of the Board of Directors of Services dated 4 September 2014 stated amongst other things:

> "4. BUSINESS OF THE MEETING
>
> The Chairman reported that the purpose of the meeting was to consider and, if deemed fit, approve:
>
> (a) the purchase by the Company of the goodwill and business name Dyer & Co which he had purchased and retained since 01st January 2008 and
>
> (b) to approve the execution of the Deed of Assignment of the said goodwill and business name from the chairman to [Services]."

68. When asked by the Tribunal who he had purchased the goodwill from on 1 January 2008, Mr Dyer said that he did not know what that referred to as he had not purchased any goodwill in 2008. He could not explain why the minutes referred to 1 January 2008. In our view, this obvious yet unexplained error casts doubt on the credibility of the Minutes and of the purported purchase of goodwill from Mr Dyer by Services. Mr Dyer must have been aware that the Minutes contained an error and yet he did not correct them. We consider that there can only be two explanation for this. The first is that Mr Dyer intended the Minutes to create a false impression that he had acquired the goodwill as a personal asset in 2008. The second explanation is that, in September 2014, Mr Dyer did not care that the Minutes contained a false and misleading statement. In either case, the misleading statement in paragraph 4(a) of the Minutes shows that the Minutes cannot be relied on as evidence of facts stated in them. We do not accept that the Minutes are evidence that Mr Dyer personally owned any goodwill which he could sell to Services.

69. The shareholders passed a resolution on the same day, 4 September 2014, approving the purchase by Services of the goodwill from Mr Dyer. Mr Dyer and Services entered into a deed, dated 4 September 2014, under which Mr Dyer purported to sell the goodwill and business name of Dyer & Co to Services for a consideration of £1.2m. The deed included the following provisions:

> 1. Interpretation
>
> 1.1 … Goodwill: the goodwill, custom and connection in relation to the Business
>
> …
>
> 3. Payment of the consideration
>
> The Assignee shall promptly make payment of the Consideration, allowing for all payments made on account, in such amounts, including the whole amount of the balance outstanding at any time, as the Assignor shall from time to time request.
>
> 4. Price adjustment
>
> 4.1 Should the parties become aware that a fair market price is different from the Consideration, the Consideration shall be adjusted accordingly."

70. Notwithstanding paragraph 3 of the deed, there was no actual payment in the year ended 30 June 2015, as can be seen from Services' accounts, but we were told that an adjustment in Mr Dyer's favour was made to the director's loan account.

71. On 3 December 2014, the Chancellor of the Exchequer announced in his autumn statement that, with immediate effect, entrepreneurs' relief would be denied in relation to goodwill and related assets on the transfer of a business to a close company, where the individual transferring the goodwill is a related party.. The withdrawal of entrepreneurs' relief for such transactions did not affect transactions entered into before 3 December 2014.

72. In his self-assessment for 2014-15, dated 31 January 2016, Mr Dyer reported a capital gain of £1,086,000. He claimed CGT entrepreneurs' relief under section 169K TCGA 1992. HMRC have not contended that section 169k would not apply in the event that the disposal is capital in nature. In the calculations attached to the return, Mr Dyer showed the disposal proceeds of £1,200,000 but claimed a cost of £100,000 with incidental costs of acquisition of £1,000. When giving evidence, Mr Dyer acknowledged that the amount of £100,000 referred to the amount paid to the liquidator of Accountants but, as we have already discussed at [58] above, that amount did not relate only to goodwill nor was it incurred solely for the benefit of Mr Dyer. This claim was inconsistent with the treatment of that amount in Services' accounts for the year ended 30 June 2010 which Mr Dyer had signed (see [59] above).

73. On 26 March 2015, Services submitted Abbreviated Accounts for the period ended 30 June 2014 to Companies House, showing an intangible fixed asset addition of £1,700.

74. On 23 March 2016, Services submitted Abbreviated Accounts for the period ended 30 June 2015 to Companies House, showing an intangible fixed asset addition of £1.2 million.

75. On 10 January 2017, HMRC opened an enquiry into Mr Dyer's self-assessment tax return for 2014-15. HMRC concluded that no asset had been transferred by Mr Dyer to Services in September 2014. On 13 March 2018, HMRC issued a closure notice under section 28A(1B) and (2) Taxes Management Act 1970. The sum of £1.2 million was treated as employment income and an amended calculation was issued removing the chargeable gain.

76. On 6 April 2018, Services responded disagreeing with HMRC's decision. That was treated by HMRC as an appeal. On 1 May 2018, HMRC responded with their view of the matter and offered a Statutory Review. On 18 May 2018, Services requested a Statutory Review. On 20 September 2018, HMRC completed the Statutory Review, upholding HMRC's decision. On 18 October 2018, Mr Dyer notified his appeal to the First-tier Tribunal.

77. On 12 March 2019, HMRC also issued Services with notice of a determination under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 for 2014-15 for the same amount, ie £1,200,000. The effect of the regulation 80 determination is to make Services liable for unpaid PAYE tax. HMRC has not sought to enforce the regulation 80 determination but has put it 'on hold'. Ms Ross Martin submitted on behalf of Mr Dyer that if Services has liability for PAYE tax then it is not Mr Dyer's liability and the assessment cannot stand. Mr Lewis, for HMRC, explained that this was a precautionary determination by HMRC. Mr Dyer had not claimed credit under regulation 185 of the 2003 Regulations and, until he makes such a claim, he remains primarily responsible for the tax. If he makes such a claim then HMRC may consider whether primary liability shifts to Services. Accordingly, we do not consider this point further in this decision.

DISCUSSION

78. In *Balloon Promotions*, the Special Commissioner provided a useful summary of points in relation to goodwill that were derived from a number of leading cases on the meaning 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 …"

79. The only issue for us to decide is whether Mr Dyer owned any goodwill in September 2014 when he purported to sell the goodwill and business name of Dyer & Co to Services for a consideration of £1.2m. As the Special Commissioner in *Balloon Promotions* observed, that is a question of fact.

80. HMRC's position is that there was no goodwill for Mr Dyer to sell to Services in September 2014 and that the £1.2 million payment should be charged to income tax under section 62 Income Tax (Earnings and Pensions) Act 2003 ('ITEPA 2003'). HMRC contend that the goodwill was incapable of existing separate of the business. In addition, when Services commenced trade the goodwill was incapable of existing separate of the business. Therefore,

Mr Dyer could not retain the business goodwill personally. In summary, HMRC contend that the goodwill was not owned by Mr Dyer, and therefore could not be sold by him in 2014. The payment of £1.2 million did not relate to the purchase of goodwill. The payment did not represent a distribution by Services. HMRC submit that the payment of £1.2 million should be treated as earnings under section 62 ITEPA 2003.

81. Mr Dyer's case was that the goodwill was owned by him personally at all times until he transferred it to Services in September 2014. As can be seen from our findings of fact above, there was contradictory evidence about how and when Mr Dyer acquired the goodwill. There were four different and inconsistent versions, namely that:

> (1) Mr Dyer had always retained the goodwill because he did not transfer it to Accountants when he transferred the other business assets of Dyer & Co (the partnership) in August 2003;
>
> (2) that he had retained the goodwill of Accountants when it transferred its business to Services in early 2007;
>
> (3) that he had purchased the goodwill on 1 January 2008; or
>
> (4) that he purchased the goodwill from the liquidator of Accountants in July 2009 for £100,000.

82. As to (1) above, the only evidence that Mr Dyer intended to retain the goodwill was Mr Dyer's testimony. We were not shown any agreement between the Partnership and Accountants or other evidence that corroborated that testimony. The most that Ms Ross Martin could point to was that the accounts of Accountants did not show any goodwill under intangibles but that does not establish that Mr Dyer retained the goodwill. We do not accept that, on the balance of probabilities, Mr Dyer retained any goodwill when he transferred the business of the partnership to Accountants. In any event, we agree with HMRC's submission and find that, even if Mr Dyer had retained any personal goodwill in 2003, it would not have existed or had any value in 2014 because, by then, Services would have established its own goodwill independently of any goodwill that he had formerly enjoyed as a sole practitioner or partner.

83. In relation to (2), the position is very similar to (1). There was no evidence, other than Mr Dyer's testimony, that established that Mr Dyer retained any goodwill when Accountants transferred its business to Services. For the same reasons as in relation to (1), we do not accept Mr Dyer's evidence had retained any personal goodwill in 2007 but, even if we had, we would have found that it had ceased to exist or have any value in 2014.

84. Mr Dyer admitted that (3) above, which was taken from minutes of the board meeting which he chaired on 4 September 2014, was wrong (see [68] above). He also acknowledged that the statement in (4) that he had paid the liquidator of Accountants £100,000 for goodwill in 2009 was incorrect (see [58] and [59]). The payment was made to settle all claims that the liquidator had or might have against Mr Dyer personally and against Services. Further, Services' accounts for the year ended 30 June 2010 showed an acquisition of goodwill in relation to which the company had incurred expenditure in excess of £100,000, which Mr Dyer said included the payment to Accountants' liquidator (see [59] above). The Deed makes no specific reference to goodwill and, in our view, does not support the assertion that Mr Dyer purchased Accountants' goodwill from the liquidator in 2009.

85. Our findings of fact and the inconsistencies in Mr Dyer's evidence described above lead us to conclude that Mr Dyer has not established, on the balance of probabilities, that he owned any goodwill that was capable of being assigned to Services in September 2014.

86. We record that, at an earlier stage in the proceedings, Mr Dyer had put forward an alternative submission. This was that, if the payment by Services was not for goodwill, it should be treated as a cash distribution under section 1020(1)(a) and section 1000(1)B Corporation Tax Act 2010 ('CTA 2010'). The effect of section 1020(1)(a) is that a company is treated for the purposes of the Corporation Tax Acts as making a distribution to a member where the company transfers assets to the member which are worth more than the consideration given by the member. The value of the distribution is the amount by which the market value of the asset exceeds the market value of the consideration. That does not apply where the distribution would be a distribution out of assets of the company in respect of shares in the company under section 1000(1)B CTA 2010 (except one that represents a repayment of capital on the shares or is made for an equal amount or value of consideration). This submission was not presented to us either in Ms Ross Martin's skeleton or in her oral submissions. We consider that it would not have assisted Mr Dyer. First, as there was no goodwill, there was no consideration provided by the member, Mr Dyer, to engage section 1020(1)(a). Further, Services did not hold sufficient retained profits to pay a distribution of £1.2 million at the time so the payment could not be treated as a distribution.

87. HMRC contended that the payment of £1.2 million should be treated as earnings under section 62 ITEPA 2003. We agree. We have found that the payment was not consideration for goodwill and was not a distribution but, we find, represents earnings derived from Mr Dyer's employment with Services.

DISPOSITION

88. For the reasons set out above, Mr Dyer's appeal is dismissed and the amended assessment, dated 13 March 2018, is confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

89. 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.

JUDGE GREG SINFIELD
CHAMBER PRESIDENT

RELEASE DATE: 10 FEBRUARY 2020