



Neutral Citation: [2023] UKFTT 861 (TC)

Case Number: TC08962

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[By remote video hearing]

Appeal reference: TC/2019/04336

INCOME TAX – Claim for relief on gift of shares to charity under section 587B of the Income and Corporation Taxes Act 1988 – shares listed on the Alternative Investment Market (AIM) of the London Stock Exchange – market value of shares on gifting date – appeal dismissed

Heard on: 21 to 23 March 2022
Judgment date: 12 October 2023

Before

**TRIBUNAL JUDGE KIM SUKUL
CELINE CORRIGAN**

Between

CRAIG KAY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Craig Kay

For the Respondents: Glynis Millward, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. The Appellant, Mr Kay, appeals to the First-tier Tribunal ('the Tribunal') against the closure notice issued by the Respondents ('HMRC') on 22 October 2018 following an enquiry into Mr Kay's 2003-04 self-assessment tax return, which reduced the amount of relief due on a gift of shares from the amount claimed of £80,750 to £17,936.
2. The hearing lasted 2 days. With the consent of the parties, the form of the hearing was video using the Tribunal's Video Hearing Service platform. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.
3. The documents to which we were referred were contained within the 653-page hearing bundle. We were also provided with an authorities bundle (395 pages) and skeleton arguments from both parties.
4. Having carefully considered the evidence and the submissions made by both parties, we dismiss this appeal. Our conclusions regarding the key arguments are set out below.

POINT IN ISSUE

5. Mr Kay made gifts of shares in a company called Access Intelligence plc ('Access Intelligence') to the Lord's Taverners (a charity) and claimed relief under section 587B of the Income and Corporation Taxes Act 1988 ('ICTA 1988') on the basis that the gifted shares were worth £80,750. The effect of the closure notice issued by HMRC was to amend the relief claimed in relation to the shares based on a valuation of £17,936.
6. The only point in issue for the Tribunal to determine is the market value of the shares at the time of the relevant gift. HMRC's position is that this was considerably lower than the amount claimed by Mr Kay. HMRC valued the shares at 9.44p per share, differing from Mr Kay's claim of 42.5p per share.

THE BURDEN OF PROOF

7. The burden of proof rests with Mr Kay to show that the closure notice and consequential amendment made by HMRC are wrong. The standard of proof is the civil standard, namely on the balance of probabilities.

BACKGROUND

8. The company was incorporated in June 2003 (under the name Readymarket Limited) and became a public company in July 2003. The company changed its name to Access Intelligence plc in November 2003 and acquired Access Intelligence Limited in December

2003. Some trading of Access Intelligence shares occurred on the Alternative Investment Market ('AIM') of the London Stock Exchange. Mr Kay received 190,000 shares as a gift on 1 April 2004 and donated 190,000 shares to the Lord's Taverners on 2 April 2004. Mr Kay claimed relief based on a share value of £80,750, derived from AIM trading prices.

PROCEDURAL HISTORY

9. The key points regarding the procedural history of this case are as follows:

- (1) HMRC opened an enquiry into Mr Kay's 2003-04 self-assessment tax return on 4 July 2005.
- (2) On 22 October 2018, HMRC issued a closure notice in respect of that enquiry and reduced the claimed relief under section 587B of ICTA 1988.
- (3) Mr Kay appealed against the closure notice on 17 November 2018.
- (4) A statutory review was offered by HMRC on 21 March 2019 and accepted on 17 April 2019.
- (5) HMRC conducted a review and upheld the closure notice on 22 May 2019.
- (6) Mr Kay appealed to the Tribunal on 21 June 2019.

LEGISLATION

10. During the period in question, section 587B of ICTA 1988 provided tax relief in respect of gifts of qualifying investments to charities. That section provided as follows:

“(1) Subsections (2) and (3) below apply where, otherwise than by way of a bargain made at arm's length, an individual... disposes of the whole of the beneficial interest in a qualifying investment to a charity.

(2) On a claim made in that behalf to an officer of the Board –

(a) the relevant amount shall be allowed –

(i) in the case of a disposal by an individual, as a deduction in calculating his total income for the purposes of income tax for the year of assessment in which the disposal is made;

...

(4) Subject to subsections (5) to (7) below, the relevant amount is an amount equal to –

(a) where the disposal is a gift, the market value of the qualifying investment at the time when the disposal is made;

...

(6) Where the disposal is a gift, the relevant amount shall be increased by the amount of the incidental costs of making the disposal to the person making it.

...

(9) ... ‘qualifying investment’ means any of the following –

(a) shares or securities which are listed or dealt in on a recognised stock exchange;

...

(10) ... the market value of any qualifying investment shall be determined for the purposes of this section as for the purposes of the 1992 Act.”

11. There is no dispute between the parties that the shares in Access Intelligence were a “qualifying investment” for the purposes of this section.

12. Section 831(3) of ICTA 1988, defined the term “1992 Act” to mean the Taxation of Chargeable Gains Act 1992 (‘TCGA 1992’). Section 272 TCGA 1992 provided:

“(1) In this Act “market value” in relation to any assets means the price which those assets might reasonably be expected to fetch on a sale in the open market.

(2) In estimating the market value of any assets no reduction shall be made in the estimate on account of the estimate being made on the assumption that the whole of the assets is to be placed on the market at one and the same time.

(3) Subject to subsection (4) below, the market value of shares or securities quoted in The Stock Exchange Daily Official List shall, except where in consequence of special circumstances prices quoted in that List are by themselves not a proper measure of market value, be as follows –

(a) the lower of the two prices shown in the quotations for the shares or securities in The Stock Exchange Daily Official List on the relevant date plus one-quarter of the difference between those two figures; or

(b) halfway between the highest and lowest prices at which bargains, other than bargains done at special prices, were recorded in the shares or securities for the relevant date,

choosing the amount under paragraph (a), if less than that under paragraph (b), or if no such bargains were recorded for the relevant date and choosing the amount under paragraph (b) if less than that under paragraph (a).

(4) Subsection (3) shall not apply to shares or securities for which The Stock Exchange provides a more active market elsewhere than on the London trading floor; and, if the London trading floor is closed on the relevant date, the market value shall be ascertained by reference to the latest previous date or earliest subsequent date on which it is open, whichever affords the lower market value.

...”

13. Section 273 TCGA 1992 provided:

“(1) The provisions of subsection (3) below shall have effect in any case where, in relation to an asset to which this section applies, there falls to be determined by virtue of section 272(1) the price which the asset might reasonably be expected to fetch on a sale in the open market.

(2) The assets to which this section applies are shares and securities which are not quoted on a recognised stock exchange at the time as at which their market value for the purposes of tax on chargeable gains falls to be determined.

(3) For the purposes of a determination falling within subsection (1) above, it shall be assumed that, in the open market which is postulated for the purposes of that determination, there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if he were proposing to purchase it from a willing vendor by private treaty and at arm’s length.”

14. Section 50 of the Taxes Management Act 1970 (‘TMA 1970’) provides that if the Tribunal concludes that an appellant has been either overcharged or undercharged to tax by an assessment, it is required to reduce or increase the amount assessed accordingly.

LEGAL PRINCIPLES

15. As set out in *Netley v. HMRC [2017] UKFTT 442 (TC)* (‘*Netley*’) at [203], the following principles to be adopted in the valuation of shares, for the purposes of section 272 TCGA 1992, are not controversial:

“(1) The sale is hypothetical. It is assumed that the relevant property is sold on the relevant day (see *Duke of Buccleuch v IRC [1967] AC 506* at 543 per Lord Guest).

(2) The hypothetical vendor is anonymous and a willing vendor, in other words prepared to sell provided a fair price is obtained (see *IRC v Clay [1914] 3 KB 466* at 473, 478).

(3) It is assumed that the relevant property has been exposed for sale with such marketing as would have been reasonable (*Duke of Buccleuch v IRC* at 525B per Lord Reid).

(4) All potential purchasers have an equal opportunity to make an offer (*re Lynall [1972] AC 680* at 699B per Lord Morris).

(5) The hypothetical purchaser is a reasonably prudent purchaser who has informed himself as to all relevant facts such as the history of the business, its present position and its future prospects (see *Findlay's Trustees v CIR (1938) ATC 437* at 440)."

16. The Tribunal in *Netley* considered that AIM shares are unlisted shares not in the Official List and that section 272(3) TCGA 1992 does not apply in calculating the market value (at [183-184]). The Tribunal also commented, regarding AIM as the basis for valuation, as follows:

"196. It is accepted that the market for AIM shares may be illiquid, and FTG is clearly a case in point. The price at which the small volumes of shares were traded on 28 July 2004 cannot, without more, be viewed as a reliable proxy for the open market value of those shares."

THE APPELLANT'S CASE

17. Mr Kay's submissions are that he received shares in Access Intelligence as a gift from a friend after that friend sold their interest in another company. The shares were gifted to a charity which supports underprivileged children through sports. Mr Kay had no involvement in advising or assisting his friend in the sale and he believes HMRC have misunderstood the situation. He used publicly available information to value the shares for tax purposes, relying on the quoted AIM share price on the date of the gift. Mr Kay argues that the share price was supported by a Nominated Advisor ('NOMAD') and that there is no evidence of share price manipulation. Access Intelligence is still trading on the AIM market and Mr Kay believes it has done well given the evolution of the cloud computing industry. Mr Kay has concerns about HMRC's expert valuation report, which he challenges. He contends that he used what was available to him at the time to arrive at the correct valuation and therefore asks the Tribunal to uphold the appeal.

HMRC'S CASE

18. HMRC argues that, regarding the key question of what a prudent buyer, possessing relevant information, would pay for the shares on the gifting dates, a prudent investor would follow similar valuation methods to those undertaken by HMRC's expert, namely considering business value, benchmarks, and cross-checks to determine a realistic share valuation. The expert report considers the information available to a hypothetical buyer under TCGA 1992 and concludes that publicly available data, such as the offer for subscription and prospectus,

would be accessible but non-public information would not be available to a small Access Intelligence shareholder. HMRC contend that their expert's valuation approach is sound and, in the absence of any other expert evidence on share value, asks the Tribunal to adopt that suggested valuation.

CLOSURE NOTICE VALUATION

19. The value placed on the shares for the purposes of HMRC's closure notice was based on the reports (which were shared with Mr Kay on 5 July 2018) from Daniel Ryan of Berkeley Research Group and Richard Lamb of HMRC's Shares and Assets Valuation department. They both formed the view that the prices at which shares in Access Intelligence were admitted to trading on AIM and (to a very limited extent) dealt in on it did not constitute reliable indicators of their market value. Rather, they both concluded that the shares in Access Intelligence were worth at most 9.44p each, and they may have been worth less.

EXPERT EVIDENCE

20. No expert evidence was adduced on Mr Kay's behalf.

21. Expert evidence was given during the hearing by Clare Rooney, HMRC Senior Officer and a qualified Associate Member of the Royal Institution of Chartered Surveyors. Ms Rooney stated that she has 16 years' cumulative work experience in HMRC's Shares and Assets Valuation department and set out her opinion in a 64-page report. The report refers to her detailed consideration of the following matters in arriving at her opinion of market value.

- (1) The company background from the date of incorporation to the valuation date.
- (2) The meaning of sections 271(1) and 273 of TCGA 1992.
- (3) The information that a prudent purchaser of the gifted shares, making the appropriate enquiries would have access to (based on the applicable provisions of the TCGA 1992).
- (4) The AIM.
- (5) The meaning of a well-informed market, liquidity and free float of shares and arm's length transactions.
- (6) Transactions in the company shares on AIM between 1 December 2003 and 2 April 2004.
- (7) Alternative valuation methods and reasons for preferring the methods adopted.
- (8) The trading activity and financial performance of the company from the date of incorporation to the valuation date.

(9) A valuation by reference to the arm's length acquisition of Readymarket Limited on 1 December 2003.

(10) A valuation based on the net assets of Access Intelligence using the interim results announced by the company on 27 February 2004.

(11) A valuation based on the application of a revenue multiple by reference to forecast information.

22. Ms Rooney set out her valuation summary and conclusion as follows:

“11.1. I have been asked to provide my expert opinion of the valuation of 190,000 Access Intelligence Plc ordinary shares as at 02 April 2004.

11.2. In providing my opinion I have considered the information that would have been available to an uninfluential minority purchaser as at the valuation date and have taken the view that this would be restricted to published information only.

11.3. For completeness, I have also considered forecast information that was prepared prior to the acquisition of Readymarket Limited and admission to AIM on 01 December 2003, namely the Competitive Advantage Report, Long Form Report and Review of Working Capital Requirements. However, I am of the view that this information would have been confidential to the Board of Directors and would not have been available to the purchaser.

11.4. Access Intelligence Plc was incorporated on 13 June 2003 as a cash shell to attract companies and businesses which were seeking admission to AIM. On 01 December 2003, the company acquired the entire issued share capital of Readymarket Limited and its 3 operating subsidiaries, The Marketing Guild, Wired Gov Limited and Backup and Running Plc for a Consideration Price of £1,680,000. This was satisfied through the issue of 15,800,000 Ordinary Shares and 191,177 Redeemable Preference Shares in Access Intelligence Plc. Deducting par value for the Redeemable Preference Shares, this indicates a value of 9.42p per share for the ordinary shares. As far as I am aware this transaction was carried out between unrelated parties on an arm's length basis. Arm's length transactions are generally considered to be a reliable measure of market value.

11.5. On 01 December 2003, Access Intelligence Plc was also admitted to AIM, and 528,378 ordinary shares were placed at a value of 37p per share. The Placement Shares were issued to existing shareholders, by virtue of the specific terms these shareholders had agreed to under the Offer for Subscription and Private Placing in September and October 2003. Under the terms for acquiring their original shares, the Shareholders who had acquired

shares in the Offer for Subscription and the Private Placing committed to providing a further 23% of their initial investment. Therefore, as these were existing shareholders, the placing price is not indicative of an arm's length transaction; the price of the shares was determined by the number of new shares the Directors opted to issue. I am unable to reconcile why the placing price reflected an uplift of 3.9 times the value that was paid for the acquisition of Readymarket Limited given that the acquisition and placing occurred on the same day and were for the same class of share.

11.6. I have considered the transactions in the Company's share that took place on AIM between 01 December 2003 and 02 April 2004. Trading took place on only 5 out of a possible 123 days, involving a total of 19,716 Ordinary Shares at a total investment cost of £8,536.90. Owing to the small volume of trades and infrequent trading over this period, I am of the view that there was limited liquidity and free float of the shares. Therefore, in my opinion the prices paid in the transactions on AIM are not a reliable measure of market value.

11.7. I have undertaken a review of the Group trading activity and financial performance of the Company from the date of incorporation to the valuation date. Access Intelligence Plc did not trade prior to 01 December 2003. The aggregated profit and loss account provided in the November 2003 Placing Document for the period 30 November 2000 to 30 June 2003, demonstrates that the Group was lossmaking at the time of acquisition. The Marketing Guild was the most established company; Wired Gov Limited and Backup and Running Plc having only commenced trading during 2001. Therefore, the aggregated results are largely attributable to The Marketing Guild. The prospectus cited a business strategy to introduce various initiatives across the Group to increase its subscriber base and revenue stream. The interim results announced on 27 February 2004 confirmed that some of these initiatives had commenced, however, no financial figures were reported, and it is perhaps too early at the date of valuation to measure their impact. Based on the information available and the short timespan between the acquisition of Readymarket Limited on 01 December 2003 and the date of the valuation on 02 April 2004, I am of the view that little of the Group's trading performance is likely to have changed.

I have valued the Access Intelligence Plc shares by reference to the methods described below and arrived at the following values:

A valuation by reference to the arm's length acquisition of the entire issued share capital of Readymarket Limited on 01 December 2003 - 9.42p

A valuation based on the net assets of Access Intelligence Plc using the interim results announced on 27 February 2004 - 8.77p

A valuation based on the application of a revenue multiple by reference to forecast turnover information - 10.6p

11.8. These valuation methods produce a valuation range of 8.77p per share to 10.6p per share; the median average of this range of values is 9.42p per share, the mean average is 9.6p per share. However, in my view a prudent purchaser of the gifted shares would not have access to forecast information, therefore the value of 10.6p which is based on this information should be excluded from consideration. The revised range of valuations is 8.77p per share to 9.42p per share, the mean average of which is 9.10p per share.

11.9. An arm's length acquisition is generally seen as a reliable measure of market value. I am of the view that the overall performance and position of the group was unlikely to have significantly changed between 01 December 2003 and 02 April 2004. Therefore, it is my opinion that the Appellant's 190,000 ordinary shares in Access Intelligence Plc had a market value of 9.42p as at 02 April 2004."

23. In cross-examination, Ms Rooney stated that she would expect the prudent purchaser to have considered publicly available information like Company House data, prospectus details, internet searches and AIM listings. In arriving at her valuation, she sourced information from the public domain. Accounts were not available at the time of the gift, but she relied on the comprehensive overview in the prospectus. She accepted that the prospectus showed the share price at 37p, and there were some transactions. She was also aware of hope value and that the share price could reflect it. She commented that Access Intelligence's acquisition of Readymarket Limited was conditional, and the trading performance of subsidiaries varied. She could not access NOMAD information, and her understanding of AIM admission was that this was focused on director checks. She did not ask the NOMAD about the differing values because she lacked the position to do so, and this was not done by HMRC.

24. Ms Rooney said that when she did an internet check she found limited information and repeated that thinly traded shares were unreliable for market value. She said that her valuation at 9.42p considered transaction data, but the placement of shares by existing shareholders was not arm's length. She had examined the transactions on AIM from December to transfer but that only equates to about 19,000 shares out of 28 million, so they were thinly traded and could not be relied upon for market value. She considered the 37p price was influenced by the number of shares placed, and the shareholders were committed to more shares. She could not determine if the external investors were approached at arm's length and viewed the value as potentially variable depending on directors' decisions. She accepted that loss-making companies can still have value and her assessment was based on acquisition value and hope value. She did not see the documentation for private placements,

other than what was in the prospectus, and lacked information about whether the initial transaction was at arm's length.

25. Ms Rooney was asked why she disagreed with Mr Kay's valuation when the shareholders had agreed 37p, the NOMAD said 37p and the real transaction was at 37p. She replied that was because she considered the 37p per share price could not be reconciled with same-day transactions. The 37p price gave a company value of £10m for a company sold on the same day for £2m, so that price could not be reconciled and relied upon. Therefore, in her view, a prudent purchaser would look at other benchmarks.

26. Ms Rooney's report referred to the role of the NOMAD being to advise and guide a company through the admission process and to act as a regulator whilst the company is on AIM. She also referred to the Market Maker, who provides active quotes for buying and selling the company's shares and will move the price of the share up or down according to either market demand or their view of the value of the company. She accepted that she was not a NOMAD expert or a Market Maker expert but maintained that the valuation needed to take into account all transactions and not just the small number of AIM trades.

DISCUSSION

27. Having considered the relevant statutory provisions and the comments made by the Tribunal in *Netley*, which we agree with, we accept HMRC's submission that it is necessary to ascertain what price the shares could reasonably have been expected to fetch on a sale in the open market as at the date of the gift.

28. Mr Kay submits that the decision in *Netley* supports the view that AIM valuations may be relevant. He argues the 37p per share transaction was on the open market at arm's length and that this is strong evidence to support that value. He contends that it would be prudent to assume the NOMAD would have considered the valuation and been comfortable with it. He also contends that HMRC's valuation is not an open market valuation because they used the benefit of hindsight and real trading was not considered. Mr Kay thought AIM was a recognised stock exchange and he had used what was available to him at the time to arrive at the correct value.

29. Whilst we accept the point made by Mr Kay that AIM trades may be relevant to a valuation, there were a limited number of trades in this case. Ms Rooney's evidence that trading took place on only 5 out of a possible 123 days was not disputed and we agree with the comment made in *Netley* (at [196]) that the price at which small volumes of shares were traded cannot, without more, be viewed as a reliable proxy for the open market value of those shares.

30. We accept Mr Kay's submission that the information available to a prudent purchaser can vary and depends on the size of the holding, which in his case was a small holding of

0.67 percent. However, Mr Kay contends that the AIM information was the only information available to him as a small shareholder. The statutory accounts were not yet filed and the agreement between the shareholders for the placement was not available, nor was the workings of the NOMAD. The prospectus was available but the underlying information concerning the agreement for placement was not. On this point, we accept Ms Rooney's evidence the prudent purchaser would have considered publicly available information such as Company House data, prospectus details, internet searches and AIM listings.

31. We understand that Mr Kay thought AIM was a recognised stock exchange and that this was the basis upon which he arrived at his valuation. We must, however, consider the hypothetical purchaser to be a reasonably prudent purchaser who has informed himself as to all relevant facts (see *Findlay's Trustees v CIR (1938) ATC 437* at 440).

32. We must also take into consideration that expert evidence has been permitted in this case to inform and assist the Tribunal in determining the correct valuation. We are satisfied that Ms Rooney is qualified to give such evidence and has prepared her report in accordance with her duties as an expert witness. Having considered the detailed analysis performed and the explanations provided for her reasoning, we accept the conclusions as set out in Ms Rooney's report.

CONCLUSION

33. We therefore find, on a balance of probabilities, that as at 02 April 2004 the value of shares in Access Intelligence was 9.42p per share, in accordance with the expert evidence given by Ms Rooney, and not the amount claimed by Mr Kay of 42.5p per share.

34. For the reasons set out above, we dismiss the appeal.

35. Mr Kay has been undercharged to tax as a result of the amount stated on the closure notice being £17,936 (190,000 shares at 9.44p per share). We find the amount to be claimed is £17,898 (being 190,000 shares at 9.42p per share), and, by virtue of section 50 TMA 1970, the amounts assessed shall be increased accordingly.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

36. 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.

**KIM SUKUL
TRIBUNAL JUDGE**

Release date: 12th October 2023