Neutral Citation: [2023] UKFTT 00893 (TC)

Case Number: TC08968

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal references: TC/2022/12049
TC/2022/13579

Capital gains tax – deductibility of costs in computing gain – disposal of residential property – profit share paid for introduction of opportunity and assistance with management of project – whether deductible as incidental cost of acquisition or disposal – s.38 TCGA 1992

Heard on: 3 October 2023
Judgment date: 20 October 2023

Before

TRIBUNAL JUDGE KEVIN POOLE
JANE SHILLAKER

Between

WAYNE BOTTOMER
BEVERLEY BOTTOMER

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Claire Jarvis of CJB Accountancy

For the Respondents: Ellis Davies, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

Administrative matters

1. With the consent of the parties, the form of the hearing was V (video), using the Tribunal's video hearing system. In addition to the parties' representatives, the hearing was attended by the first Appellant, officer Greg Crookston (HMRC's witness) and further representatives of HMRC, namely officers Max Simpson (assisting officer Davies) and Neil Drinkwater (technical adviser). A face to face hearing was not held because it was considered that the matter was capable of being heard more efficiently by video. The documents to which we were referred comprised mainly a bundle in pdf format of 460 pages; in addition, HMRC submitted a copy of officer Davies' speaking notes and a further authority in the form of a copy of section 83 Income Tax Act 2007 ("ITA").

2. 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.

Summary of the appeals

3. These appeals chiefly concern the deductibility, for capital gains tax purposes, of certain sums paid by the Appellants in relation to the purchase, renovation and later disposal of a residential property in Walsall.

4. The sums in question, totalling £31,906.50 (representing one half of the gain made on the disposal, after deducting the renovation costs), were paid by the Appellants to an unconnected third party who had initially introduced them to the opportunity and had subsequently performed some oversight functions in relation to the renovation.

5. In their subsequent CGT computations, the Appellants had included deductions in respect of these sums. HMRC had disallowed the deductions, arguing that they did not fall within any of the categories of sums which were allowable as a deduction under section 38 Taxation of Chargeable Gains Act 1992 ("TCGA"). The Appellants appealed against assessments raised by HMRC to recover the resulting underpayment of capital gains tax.

6. In addition, the second Appellant had claimed to relieve some trading losses arising from her share in a partnership against any gain arising from the property disposal, pursuant to section 261B TCGA. At the hearing, it was confirmed that this aspect of the appeal was no longer being pursued (as it was accepted that the trading loss had arisen in a prior year and was therefore not available to be set against the gain in question) and the Tribunal was therefore invited to dismiss that aspect of the appeals by consent.

7. Various other matters had been in issue between the parties as to other aspects of the assessments, but these had all been resolved and we were not asked to consider them.

8. The parties therefore confirmed that the Tribunal was simply being asked to decide in principle whether the £31,906.50 was an allowable deduction in the Appellants' CGT computations, following which they anticipated no difficulty in agreeing the final figures.

THE FACTS

9. We received a witness statement and heard evidence from officer Crookston. We also heard oral evidence from the first Appellant. We find the following facts.

10. The first Appellant had known Mr Stuart Bottomer ("SB") for some time prior to the events the subject of this appeal. Though they are distantly related, they only became

acquainted through an introduction by the first Appellant's son, who played football at a semi-professional club at which SB was a regular visitor.

11. SB was an accountant with his own practice, but was also involved in various other business activities, including in the property sector. He knew the first Appellant was interested in property investment and had introduced him to another individual in the sector who had a number of properties for sale.

12. In late spring/early summer of 2014, SB told the first Appellant of a property he was interested in at the time, but was unable to buy himself because of "cash flow issues". He offered to give the details to the first Appellant in exchange for a fee if he went ahead with the purchase. Nothing firm was agreed, but fees in the range of £10,000 to £15,000 were discussed.

13. The Appellants decided to proceed, and went ahead with the purchase (which completed in early August 2014). The first Appellant was in the early stages of cancer treatment at the time and was in and out of hospital. He would normally have expected to manage the process of renovation himself (he is a carpenter/joiner by trade) but because of his illness he was not sure he would be able to do so fully. As he required more hospital treatment and became unable to manage the project directly himself, he reached an agreement with SB that the Appellants would simply pay to SB half the eventual profit on the transaction and SB would help as necessary with the oversight of the property during the first Appellant's illness. No written agreement was ever entered into. The renovation was commenced and carried through, though only after some delay (it seems there were some attempts to obtain planning permission for a bigger development, which were not successful). The first Appellant required fairly extensive surgery for his cancer in early 2015, and had quite minimal involvement in the project for the first 9 to 12 months after the property was bought.

14. It is not clear when the renovation work (as opposed to the initial clearance of the property) started, or how long it took. In any event, the renovation proceeded and the renovated property was sold by the Appellants in September 2017 at a gain. HMRC have accepted that the disposal should be treated as giving rise to a chargeable gain rather than a revenue profit.

15. On 4 October 2017, SB sent a letter to the first Appellant (which he described at the hearing as an "invoice") asking for £15,000 to be sent to each of him and his wife (into their joint account) in respect of "the monies due" to them "in relation to the sale of the above property"; this was followed up by an email dated 1 November 2017, in which SB calculated the final net profit as £63,813 after having reviewed a spreadsheet of the various costs of the project and therefore asked for a further payment of £1,906.50, also saying that "if you need another invoice from me for the £1,906.50 just let me know." The first Appellant appears to have requested an invoice, so on 8 December 2017 SB sent a further letter, in similar format to his letter dated 4 October 2017, asking for £953.25 to be sent to each of his and his wife.

16. In consequence, one half of the final agreed net profit of £63,813, i.e. £31,906.50, was paid out by the Appellants to the joint account of SB and his wife (notionally allocated equally between SB and his wife).

17. The Appellants included the disposal on their respective self-assessment tax returns for 2017-18, claiming a deduction of £32,000 (£16,000 each) in respect of the payments made to SB's joint account with his wife.

18. HMRC wrote to the first Appellant on 19 November 2020, seeking information about the transaction, having been alerted to discrepancies between the SDLT return made by the

Appellants by reason of SB having also included reference to the property in his self-assessment return. Their enquiries proceeded, in relation to this and a number of issues, until they were concluded by the issuing of assessments addressed to the Appellants on 24 March 2022. Those assessments were duly appealed and, following a statutory review which upheld them, the appeals were notified to the Tribunal.

19. The Appellants do not contest the validity of the assessments, only their amount. We are satisfied that the assessments were validly made.

THE ISSUE

20. There is only one issue outstanding for determination by the Tribunal, namely whether the Appellants are entitled to deduct the payments totalling £31,906.50 made to SB and his wife, as set out above ("the Payments"), in computing their respective chargeable gains arising on the disposal of the property in September 2017.

THE LEGISLATION

21. The relevant provision is section 38 TCGA which reads, so far as relevant, as follows:

> **38 Acquisition and disposal costs etc**
>
> (1) Except as otherwise expressly provided, the sums allowable as a deduction from the consideration in the computation of the gain accruing to a person on the disposal of an asset shall be restricted to –
>
> (a) the amount or value of the consideration, in money or money's worth, given by him or on his behalf wholly and exclusively for the acquisition of the asset, together with the incidental costs to him of the acquisition or, if the asset was not acquired by him, any expenditure wholly and exclusively incurred by him in providing the asset,
>
> (b) the amount of any expenditure wholly and exclusively incurred on the asset by him or on his behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset,
>
> (c) the incidental costs to him of making the disposal.
>
> (2) For the purposes of this section and for the purposes of all other provisions of this Act, the incidental costs to the person making the disposal of the acquisition of the asset or of its disposal shall consist of expenditure wholly and exclusively incurred by him for the purposes of the acquisition or, as the case may be, the disposal, being fees, commission or remuneration paid for the professional services of any surveyor or valuer, or auctioneer, or accountant, or agent or legal adviser and costs of transfer or conveyance (including stamp duty or stamp duty land tax) together –
>
> (a) in the case of the acquisition of an asset, with costs of advertising to find a seller, and
>
> (b) in the case of a disposal, with costs of advertising to find a buyer and costs reasonably incurred in making any valuation or apportionment required for the purposes of the computation of the gain, including in particular expenses reasonably incurred in ascertaining market value where required by this Act.

22. By way of background to the interpretation of section 38, Mr Davies referred to *Blackwell v HMRC* [2017] EWCA Civ 232. Whilst that case was largely concerned with an examination of the meaning and significance of the phrase "being expenditure reflected in the

state or nature of the asset at the time of the disposal" in section 38(1)(b) TCGA, he pointed out the comment of Briggs LJ at [27]: "… s 38 is couched in cautiously restrictive terms, plainly designed to ensure that not all forms of expenditure which a businessman might think should be taken into account in identifying his chargeable gain are in fact permitted deductions".

THE ARGUMENTS

For HMRC

23. Mr Davies confirmed that HMRC accepted the Payments had been made. The only issue was whether they were allowable as deductions under s.38 TCGA.

24. He submitted that the Payments quite clearly fell outside section 38(1)(a) TCGA as they were not being claimed as having been given "wholly and exclusively for the acquisition of" the property. Furthermore, to the extent they might be regarded as "incidental costs" of that acquisition, he submitted they would not qualify because of the restrictive definition of "incidental costs" referred to below.

25. So far as section 38(1)(b) was concerned, he submitted that the Payments represented a simple profit-sharing arrangement. As such, it could not fairly be argued that the expenditure had been incurred "for the purpose of enhancing the value of" the property, still less could it be argued that the expenditure was "reflected in the state or nature of the [property] at the time of the disposal", or that it had been "wholly and exclusively incurred … in establishing, preserving or defending [the Appellants'] title to, or to a right over, the" property.

26. The only possible basis for a valid claim, in Mr Davies' submission, arose as "incidental costs" of making the acquisition or disposal under section 38(1)(a) or (c) TCGA.

27. In his submission, however, this possibility was ruled out by virtue of section 38(2) TCGA. This provision severely restricted the allowable "incidental costs". The only potentially allowable costs were "fees, commission or remuneration paid for the professional services of any surveyor or valuer, or auctioneer, or accountant, or agent or legal adviser", together with certain ancillary items which were not relevant in this case.

28. In Mr Davies' submission, an arrangement in the nature of a profit share could not be regarded as "fees, commission or remuneration" of any kind. In addition, SB was not a surveyor, valuer, auctioneer or legal adviser. It so happened he was an accountant, but his involvement in this project was not part of his professional activities as such; and nor was he acting in any kind of professional capacity as an agent – while he had introduced the Appellants to the property owner and had subsequently provided some small assistance with the renovation project, this was insufficient to make him a professional agent for the purposes of section 38 TCGA. All he had done was make an introduction and carry out some minimal oversight activities, none of which could be regarded as "professional services" for the purposes of section 38 TCGA.

29. Mr Davies also argued that the second Appellant should not be entitled to a deduction in any event, for the additional reason that she had no involvement in the arrangement that had been agreed between SB and the first Appellant.

For the Appellants

30. Ms Jarvis accepted it was difficult to describe SB's role with great precision. He introduced the property to the Appellants and carried out some supervisory role in the renovation project. As the nature of his involvement evolved with changing circumstances, his role also evolved and the original "finder's fee" proposal turned into an agreement for a fee equal to half the profit on the project. If he had not become more fully involved, the project would not have been successfully completed. He added significant value and it was

appropriate for that to be reflected by a deduction for the payments to him and (on his instruction) to his wife. His role therefore ought to be regarded as that of a professional agent, helping to set up the purchase and subsequently partially run the renovation project.

DISCUSSION

31. The sole issue before us is whether the Payments made by the Appellants to SB and his wife fall within any of the categories of allowable expenditure in section 38 TCGA.

32. First, we reject HMRC's suggestion that the second Appellant's lack of involvement in the discussions between SB and her husband meant that she could not qualify for a deduction in any event. In a situation where the two Appellants were joint owners of the property, the fact that the first Appellant took on the role of negotiator with SB simply implies that he was doing so with the authority of his wife.

33. The only substantive point of dispute is whether the Payments qualified as "incidental costs" of the acquisition or disposal (under section 38(1)(a) or (c) TCGA), or as "expenditure wholly and exclusively incurred on the asset" by the Appellants "for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal" (under section 38(1)(b) TCGA).

34. Dealing with the second point first, we do not consider the Payments could fairly be said to represent expenditure "on" the property, nor could it fairly be said that their expenditure was "represented in the state or nature" of the property at the time of its disposal. The wording of section 38(1)(b) is clearly directed at allowing relief for expenditure where the result of that expenditure is clearly discernible in the "state or nature" of the asset when it is disposed of. Whether the Payments are regarded as a "finder's fee", as payment for some involvement in the oversight of the early stages of the renovation project or as a profit sharing arrangement, they do not in our view represent expenditure "on" the property, nor were they in any way "represented in the state or nature" of the property when it was sold.

35. We turn now to what was effectively the main point of contention between the parties, namely whether the Payments could be regarded as "incidental costs" of either the acquisition or disposal of the property.

36. To conform to this description, the Payments would have to satisfy two basic requirements under section 38(2) TCGA:

> (1) they would have to consist of expenditure wholly and exclusively incurred for the purposes of either the acquisition or the disposal;
>
> (2) they would have to represent fees, commission or remuneration paid for the professional services of a surveyor or valuer, or auctioneer, or accountant, or agent or legal adviser.

37. In a situation where the Payments had not even been agreed at the time of the acquisition in August 2014, we struggle to see how it could fairly be said that they were incurred "wholly and exclusively for the purposes of the acquisition". And conversely, where the disposal would have taken place independently of any obligation to make the Payments, it is difficult to see how they were incurred "wholly and exclusively for the purposes of the disposal".

38. Additionally (and in our view, most crucially), since SB was neither a surveyor, valuer, auctioneer or legal adviser, the Payments would have to represent "fees, commission or remuneration paid for the professional services of an accountant or agent". As it is clear SB was not providing professional services as an accountant in exchange for the Payments, the

only question is whether they might represent "fees, commission or remuneration paid for the professional services of an agent".

39. On the evidence before us, the only capacities in which SB acted in relation to the whole project was as introducer of the seller of the property to the Appellants, and as overseer of the early stages of the renovation while WB was too ill to do so.

40. We accept that the Payments can be regarded as "fees, commission or remuneration" – it is clear that SB rendered some service to the Appellants, for which they agreed to make the Payments. The fact that the Payments took the form of a 50% share of the profits does not in our view affect this – many payments which quite clearly fall within section 38 TCGA as allowable costs are variable in their nature and linked to the consideration paid, most obviously an estate agent's commission on a property sale.

41. But we do not consider that the Payments were for SB's "professional services" as an agent. He introduced the seller to the Appellants, as an estate agent might (though in a very much less formal way), but there was no evidence before us that he carried on any profession of that type; indeed, the evidence was to the contrary – this was a friendly introduction of a business opportunity from one businessman (who was not himself in a position to take advantage of it) to another (who was) on the basis of a general understanding that there would be "something in it" for SB as introducer.

42. Once SB's role evolved into something rather more participatory and a clear agreement on a profit-sharing arrangement was reached as a result, that in our view demonstrates a change in the nature of the relationship from a simple informal introduction to something more in the nature of a shared business project. Whether viewed as the former, the latter, a progression from one to the other, or a combination of the two, we would not consider it correct to regard the Payments made to SB (and to his wife at his direction) as being for his "professional services" as an agent, but rather as arising from a profit-sharing arrangement that had been agreed between the parties on what had become a shared project.

43. On this basis, we consider HMRC are correct to disallow any deduction by the Appellants in their respective CGT computations for the Payments made to SB (and, at his direction, to his wife).

DISPOSITION

44. The appeal as to the deductibility of the Payments made by the Appellants is therefore **DISMISSED** in principle.

45. As requested by the parties (see [6.] above), we also **DISMISS** the appeal of the second Appellant against HMRC's refusal to permit her to offset her brought forward trading loss against her capital gains for 2017-18.

DIRECTIONS

46. The parties stated that they expected to be able to settle the final figures in the light of a decision in principle of this nature, but they are at liberty to apply to the Tribunal for a further determination if it proves impossible to reach agreement.

47. In any event, the parties are also **DIRECTED** to notify the Tribunal if and when final settlement is reached (or update the Tribunal at intervals of not less than three months as to the progress of negotiations).

RIGHT TO APPLY FOR PERMISSION TO APPEAL

48. This document contains full findings of fact and reasons for the decision in principle set out above. 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.

KEVIN POOLE
TRIBUNAL JUDGE

Release date: 20th OCTOBER 2023